

Nos. A10-1802 and A11-567

6

State of Minnesota  
In Supreme Court

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

*Appellants,*

v.

James R. Williams,

*Respondent.*

APPELLANTS' BRIEF AND ADDENDUM

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## LEGAL ISSUES

1. **Is a person negotiating a contract with a government entity conclusively presumed to know the extent of authority of the government representative?**

The lower courts abandoned long-established law by creating a “proprietary” exception to the conclusive presumption of knowledge of the extent of authority of a government representative.

**Most apposite cases:**

*Jewell Belting Co. v. Village of Bertha*, 97 N.W. 424 (Minn. 1903).

*City of Geneseo v. Utils. Plus*, 533 F.3d 608 (8th Cir. 2008).

*Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845 (Minn. 1995).

2. **Does a duty of care exist during arm’s length negotiations between an employer and a prospective employee?**

The lower courts created a new duty of care in negotiations between employers and prospective employees.

**Most apposite authority:**

Restatement (Second) of Torts, Section 552.

*Bonhiver v. Graff*, 248 N.W.2d 291 (Minn. 1976).

*Safeco Ins. Co. of Am. v. Dain Bosworth Inc.*, 531 N.W.2d 867 (Minn. Ct. App. 1995), *rev. denied* (Minn. July 20, 1995).

*Fry v. Mount*, 554 N.W.2d 263 (Iowa 1996).

3. **Is the University entitled to a new trial because Williams commenced his case with and relied upon inadmissible, and highly prejudicial, character evidence?**

The Court of Appeals concluded that the District Court erred in admitting the inadmissible evidence, but held the error harmless notwithstanding the evidence being a linchpin of Williams’s case.

**Most apposite authority:**

Minn. R. Evid. 608(a).

4. **Did the District Court err by denying remittitur when Williams failed to produce evidence supporting the jury's damage award?**

The Court of Appeals affirmed the verdict.

**Most apposite case:**

*Zinnel v. Berghuis Const. Co.*, 274 N.W.2d 495 (Minn. 1979).

## STATEMENT OF THE CASE

In 2007 James Williams brought an action against Regents of the University of Minnesota (“University”) and its Athletic Director, Joel Maturi (“Maturi”), alleging that the University men’s basketball coach, Orlando “Tubby” Smith (“Smith”), offered him a position as an assistant coach, that he accepted the offer, that an employment contract was formed, and that the next day the contract was breached when Maturi decided that the University should not employ Williams. Based on these allegations, Williams asserted claims against the University and Maturi for breach of contract, promissory and equitable estoppel, interference with contract, negligent misrepresentation, negligence, and defamation. He also asserted constitutional claims and sought injunctive relief.<sup>1</sup>

In March 2008 Hennepin County District Court Judge Regina M. Chu granted Defendants’ motion to dismiss all claims.<sup>2</sup> Williams only appealed the dismissal of his estoppel, negligent misrepresentation, and constitutional claims.

In *Williams v. Board of Regents of the University of Minnesota*, 763 N.W.2d 646 (Minn. Ct. App. 2009), the Court of Appeals affirmed the district court’s dismissal of the estoppel and constitutional claims, but reversed as to the negligent misrepresentation claim, finding that the trial court could have jurisdiction over this single claim.

Upon remand to the district court, Williams commenced a separate action against Smith, asserting claims for fraud, negligent misrepresentation, interference with contract,

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<sup>1</sup> App. 1-21.

<sup>2</sup> App. 112-23.

and promissory estoppel.<sup>3</sup> The District Court informally consolidated the two cases, and upon motion dismissed all claims except fraud and negligent misrepresentation.<sup>4</sup> Williams later voluntarily dismissed Maturi from the litigation,<sup>5</sup> and at trial just prior to closing arguments, voluntarily dismissed his fraud claim.

On the sole remaining claim, negligent misrepresentation, the jury returned a verdict in favor of Williams, awarding \$1,247,293 in damages.<sup>6</sup> Judge Chu denied Defendants' motions for judgment as a matter of law or for a new trial.<sup>7</sup> The District Court granted in part Defendants' motion for remittitur based on the Minnesota Tort Claims Act, reducing the award to \$1 million.<sup>8</sup>

The Court of Appeals affirmed the District Court's rulings in all respects.<sup>9</sup>

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<sup>3</sup> App. 22-36.

<sup>4</sup> App. 124-36. (12/15/09 Order)

<sup>5</sup> App. 138. (Order and Memorandum, dated March 8, 2010).

<sup>6</sup> Appellant's Addendum [hereinafter Add.] 13-15 (Special Verdict Form).

<sup>7</sup> Add. 16-23 (Order and Memorandum, dated September 21, 2010).

<sup>8</sup> *Id.*

<sup>9</sup> *Williams v. Smith*, Nos. A10-1802, A11-567 (Minn. Ct. App. Oct. 17, 2011) (Add. 1).

## STATEMENT OF FACTS

### I. BACKGROUND

In March 2007 Tubby Smith became the head coach of the University men's basketball team.<sup>10</sup> Smith brought to the University nearly thirty years of college coaching experience, having worked at a number of different institutions as an assistant coach and head coach.<sup>11</sup>

The University's Athletic Director, Joel Maturi, had exclusive authority to hire assistant coaches for each of the University's twenty-five intercollegiate athletic programs, including men's basketball.<sup>12</sup> Maturi's authority was commonly known within the University's athletic department.<sup>13</sup>

Shortly after he was hired, Smith considered several individuals to serve as assistant basketball coaches, including James Williams.<sup>14</sup> Williams has extensive coaching experience at a number of different institutions, including as an assistant coach at the University from 1971 until 1986.<sup>15</sup> When considering Williams, Smith did not know that the National Collegiate Athletic Association (NCAA) had conducted two separate investigations of the University men's basketball program relating to that time period.<sup>16</sup>

Each investigation by the NCAA Committee on Infractions concluded (among other

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<sup>10</sup> Tr. 1025 (Smith).

<sup>11</sup> Tr. 1000-03 (Smith).

<sup>12</sup> Tr. 636, 639-40 (Maturi).

<sup>13</sup> Tr. 640 (Maturi).

<sup>14</sup> Tr. 1030-31, 1041 (Smith).

<sup>15</sup> App. 73-78 (Tr. 511-16 (Williams)).

<sup>16</sup> Tr. Exs. 103, 128.

things) that Williams personally committed multiple violations of NCAA rules.<sup>17</sup> As a result of these major rules violations, the NCAA Committee on Infractions imposed severe sanctions upon the University in both 1976 and 1988.<sup>18</sup>

At the time he attempted to return to the University, Williams was at the end of the second year of his three year assistant coaching contract with Oklahoma State University (OSU), earning an annual salary of \$158,000.<sup>19</sup> He reported to the head men's basketball coach at OSU, Sean Sutton.<sup>20</sup> Williams's contract with OSU required written notice of early termination:

[E]ither party may terminate this contract without particular cause by giving written notice to the other party of the terminating party's exercise of this right to terminate. Such termination shall be effective immediately upon receipt of such written notice by the other party, unless specified otherwise in said written notice.<sup>21</sup>

## II. WILLIAMS' JOB INTERVIEW AND RESIGNATION AT OSU

Smith interviewed Williams on Friday, March 29, 2007, during Final Four weekend.<sup>22</sup> Smith and Williams talked about a number of topics, including Williams's

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<sup>17</sup> In its report dated February 19, 1976, the NCAA's Committee on Infractions found that Williams committed numerous major violations of NCAA rules and imposed upon Williams personally a two year suspension from recruiting. Tr. Ex. 128. In its March 3, 1988 report, the NCAA's Committee on Infractions found multiple rule violations, and cited Williams for a "knowing and willful effort . . . to operate the university's men's intercollegiate basketball program contrary to the requirements and provisions of NCAA legislation." Tr. Ex. 103.

<sup>18</sup> *Id.*

<sup>19</sup> App. 60-61 (Tr. 457-58 (Williams)).

<sup>20</sup> Ct. Ex. F at 14-15 (S. Sutton).

<sup>21</sup> Tr. Ex. 101 at 5.

<sup>22</sup> App. 56-58 (Tr. 451-53 (Williams)); Tr. 1045 (Smith).

coaching experience.<sup>23</sup> Although Williams mentioned his experience coaching at the University under previous head coaches, he did not provide any information about his numerous major NCAA violations. He did not tell Smith that these violations occurred when he was previously a University employee, or that the University had suffered severe repercussions as a result of his infractions.<sup>24</sup>

After the interview, Smith intended to continue his search for assistant coaches, and intended to interview other candidates.<sup>25</sup> Smith also intended to speak to OSU coach Sean Sutton about Williams.<sup>26</sup> Smith testified he would never make a final decision on a candidate until first speaking to that candidate's current head coach.<sup>27</sup> Smith was unable to accomplish these tasks at that time, however, because the day after his Friday interview of Williams he had to rush to Maryland to attend to his ailing father.<sup>28</sup>

By Monday, April 2, Smith's father's health had improved.<sup>29</sup> While at the airport in Washington, D.C. that evening, Smith returned a phone call from Williams. They spoke for 14 minutes.<sup>30</sup> Williams testified that Smith told him that Smith could get him the money Williams had demanded (\$200,000), and also told him that they would make a great team in Minnesota.<sup>31</sup> Williams testified that Smith asked, "Are you ready to come

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<sup>23</sup> Tr. 1046 (Smith).

<sup>24</sup> App. 87 (Tr. 543 (Williams)); Tr. 1046-47 (Smith).

<sup>25</sup> Tr. 1045-46 (Smith).

<sup>26</sup> Tr. 1048-49 (Smith).

<sup>27</sup> Tr. 1019 (Smith).

<sup>28</sup> App. 88 (Tr. 544 (Williams)); Tr. 1049-50 (Smith).

<sup>29</sup> Tr. 1051 (Smith).

<sup>30</sup> Tr. 1054-55 (Smith); Tr. Ex. 102.

<sup>31</sup> App. 59-60 (Tr. 456-57 (Williams)).

to Minnesota?" Williams replied, "Yes."<sup>32</sup> Williams claims that, based on that exchange, he understood Smith to be offering him a job.<sup>33</sup> Williams testified that Smith offered to call OSU head coach Sutton, but that Williams said he wanted to call him.<sup>34</sup>

Williams specifically testified that Smith never said during this call that he had complete and final hiring authority.<sup>35</sup>

Later that same night, at 9:36 p.m., Williams called Coach Sutton.<sup>36</sup> Williams told him he was quitting to go to the University of Minnesota. Sutton told Williams that he needed to come in the next day and submit a letter of resignation.<sup>37</sup>

Williams testified that the next morning, Tuesday, at 8:22 a.m., Smith called Williams and told him that Smith had to get a "sign-off" on the hiring from University Athletic Director Joel Maturi. Williams' specific testimony is as follows:

What he said was that I had to go over and see him and that I've got to get - 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."<sup>38</sup>

Williams admitted that an individual who needs someone else to "sign off" does not have complete and final hiring authority.<sup>39</sup>

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<sup>32</sup> App. 62-63 (Tr. 459-60 (Williams)).

<sup>33</sup> App. 63 (Tr. 460 (Williams)).

<sup>34</sup> App. 64 (Tr. 461 (Williams)). Smith disputes Williams's depiction of their conversation. He did not know that Williams intended to quit his job and he did not intend to offer the position to Williams. Tr. 1055-1059 (Smith).

<sup>35</sup> App. 80-81 (Tr. 534-35 (Williams)).

<sup>36</sup> App. 89-90 (Tr. 549-50 (Williams)); Tr. Ex. 102.

<sup>37</sup> App. 89-90 (Tr. 549-50 (Williams)); Ct. Ex. F 22-24 (S. Sutton). Sutton so instructed Williams because Williams's OSU contract required receipt of written notice of termination to effectively terminate the employment contract. Tr. Ex. 101.

<sup>38</sup> App. 91 (Tr. 551 (Williams)).

<sup>39</sup> App. 82-83 (Tr. 537-39 (Williams)).

Later that same morning, Smith and Williams spoke again. Williams testified that Smith told him that Maturi strongly opposed hiring Williams.<sup>40</sup> Earlier that morning, Maturi had learned for the first time about Williams's multiple major NCAA rules infractions as a University employee years earlier.<sup>41</sup> Given the unfortunate history of NCAA rules violations involving the University men's basketball team, Maturi wanted a clean program staffed with those who follow the rules.<sup>42</sup>

Williams testified that he went into his office sometime that morning to draft a resignation letter, and that he later gave it to his secretary to type.<sup>43</sup> OSU coach Sutton testified that he received Williams's letter of resignation in the afternoon.<sup>44</sup>

Although Williams saw Sutton prior to the delivery of his resignation letter on April 3, Williams did not tell his coach that Maturi had not approved his hire, or that Maturi strongly opposed hiring him at the University.<sup>45</sup>

Although Williams saw Sutton prior to the delivery of his resignation letter on April 3, Williams did not tell his coach that Maturi had not approved his hire, or that Maturi strongly opposed hiring him at the University.<sup>46</sup>

Sutton testified that he would have been happy if Williams had changed his mind and had decided to stay at OSU rather than resign.<sup>47</sup> He also testified that had Williams

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<sup>40</sup> App. 92-93 (Tr. 552-53, Tr. Ex. 9 (Williams)).

<sup>41</sup> Tr. 670 (Maturi).

<sup>42</sup> Tr. 676 (Maturi).

<sup>43</sup> App. 65 (Tr. 473 (Williams)).

<sup>44</sup> Ct. Ex. F at 31 (S. Sutton).

<sup>45</sup> App. 92-93 (Tr. 552-54 Williams)); Ct. Ex. F 35 (S. Sutton).

<sup>46</sup> App. 92-93 (Tr. 552-54 Williams)); Ct. Ex. F 35 (S. Sutton).

<sup>47</sup> Ct. Ex. F at 24 (S. Sutton).

told him that there had not yet been any final approval by Maturi of Williams's hiring at Minnesota, he would have postponed contacting another individual to fill Williams's assistant coach position.<sup>48</sup> Sutton testified that he offered Williams's position to another individual the same day, but that OSU could not hire a replacement until a few weeks later because of university posting requirements.<sup>49</sup> That individual was hired by OSU on April 23, but only stayed for six weeks before leaving for another job.<sup>50</sup>

### III. TIMELINE RELATING TO ALLEGED DAMAGES

Williams made no effort to retain or regain his position at OSU.<sup>51</sup> Williams never asked for his job back.<sup>52</sup> Even when that *very job* opened up again just six weeks after Williams left OSU, Williams did not seek his job back.<sup>53</sup> Williams's failure to even try to regain his job is striking in light of Sutton's testimony that Williams would be his *first choice* as an assistant coach if Sutton ever got another head coaching position.<sup>54</sup>

In April 2007, the same month Williams resigned, he interviewed with the University of Kentucky (UK) for an assistant coaching position.<sup>55</sup> Williams testified that UK knew he had resigned from OSU, and knew he had not been hired by Minnesota, but nevertheless chose to interview him and liked him.<sup>56</sup> He testified, however, that he

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<sup>48</sup> Ct. Ex. F at 36 (S. Sutton).

<sup>49</sup> Ct. Ex. F at 40 (S. Sutton).

<sup>50</sup> App. 99-100 (Tr. 560-61 (Williams)).

<sup>51</sup> App. 95-96 (Tr. 555-56 (Williams)).

<sup>52</sup> *Id.*

<sup>53</sup> App. 99-100 (Tr. 560-61 (Williams)).

<sup>54</sup> Ct. Ex. F at 18, 21 (S. Sutton).

<sup>55</sup> App. 101 (Tr. 562 (Williams)).

<sup>56</sup> App. 102 (Tr. 563 (Williams)).

believed UK lost interest in him after he told them he intended to sue the University of Minnesota.<sup>57</sup> No one from UK testified at trial.

In May 2007 an assistant coaching position became available at Oral Roberts University.<sup>58</sup> The head coach at Oral Roberts was Scott Sutton, the brother of Sean Sutton. Williams testified that he knew of the job opening but chose not to apply.<sup>59</sup>

That same month, a position with Florida State University (FSU) became available.<sup>60</sup> Williams testified that the head coach called him about the opening, knowing what had happened at OSU and at the University of Minnesota.<sup>61</sup> But, according to Williams, FSU's interest ended when Williams told FSU that he intended to sue the University of Minnesota.<sup>62</sup> No one from FSU testified at trial.

With respect to the rest of 2007, and 2008, 2009, and 2010, Williams offered *no evidence* of any job search efforts, other than a vague reference to "making telephone calls."<sup>63</sup> Williams did not send a single letter or application to any school or other employer regarding a basketball coaching position in 2008, 2009, or 2010. No evidence was offered that a single prospective employer chose not to hire Williams because of anything relating to any action or decision of the University of Minnesota or Smith, let alone because of Smith's alleged negligent misrepresentation. In fact, the only potential employer to testify at trial, the current head men's basketball coach at the University of

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<sup>57</sup> App. 102-03 (Tr. 563-64 (Williams)).

<sup>58</sup> App. 100 (Tr. 561 (Williams)).

<sup>59</sup> App. 99-100 (Tr. 560-61 (Williams)).

<sup>60</sup> App. 104 (Tr. 565 (Williams)).

<sup>61</sup> *Id.*

<sup>62</sup> App. 105 (Tr. 566 (Williams)).

<sup>63</sup> App. 97-98, 106-09 (Tr. 558-59, 601-604 (Williams)).

Houston, testified that he did not consider Williams for employment in 2010 because Williams was preoccupied with litigation against the University of Minnesota.<sup>64</sup>

### **ARGUMENT**

The Court of Appeals' decision represents a fundamental change in Minnesota law that improperly expands the liability of government entities and of all Minnesota employers.

First, prior to this decision, Minnesota government entities retained exclusive control of who may bind them to contracts and whose promises may otherwise trigger governmental liability. The Court of Appeals failed to apply this well-settled law, and instead imported an outdated and disfavored "proprietary" exception. If allowed to stand, Minnesota government entities of all types will face massive fiscal uncertainty as they no longer will have the power to designate who may bind them or otherwise create liability for them in negotiations. Neither law nor public policy supports the Court of Appeals' decision, and it should be reversed.

Second, prior to this decision, neither Minnesota employers nor prospective employees owed a duty of care to the other in pre-employment negotiations. Rather, as in any arm's length transaction, the parties retained primary responsibility to protect their own interests, with protection from the courts in circumstances involving fraud or breach of contract. The Court of Appeals, however, imposed a new legal duty upon the University and its representative, Smith, for the benefit of a prospective employee, Williams. If allowed to stand, all Minnesota employers and prospective employees will

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<sup>64</sup> Tr. 203 (Dickey).

be exposed to an unprecedented legal risk: anything they say (or fail to say) during a job interview or employment negotiation may be the basis for a claim alleging an absence of due care. This would be a fundamental shift in our employment law, contrary to the Restatement (Second) of Torts and public policy. The Court of Appeals should be reversed.

If judgment as a matter of law is not ordered, a new trial or remittitur is appropriate.

First, the Court of Appeals' decision should be reversed for failure to correct material prejudicial errors by the trial court, most significantly, the improper admission of inadmissible character evidence. The Court of Appeals rightly found that the trial court erred by allowing Williams to begin his case with two well-known character witnesses—Congressman Jim Ramstad and Minnesota sports hero, Kevin McHale—and then rely on that evidence to secure a verdict. Yet, in what amounts to a complete discounting of Rule of Evidence 608, the Court of Appeals found that the improper manner in which Williams first presented his case to the jury was not a prejudicial error.

Second, the evidence at trial did not support the damage award. There was no evidence of mitigation; in fact, the evidence showed Williams's own actions were the cause of not obtaining particular new jobs. At most, his loss, as properly measured, was the value of the remaining year of his OSU contract.

**I. AS A MATTER OF LAW WILLIAMS'S NEGLIGENT MISREPRESENTATION CLAIM FAILS BECAUSE HE IS CONCLUSIVELY PRESUMED TO KNOW THAT SMITH DID NOT HAVE AUTHORITY TO HIRE HIM.**

For over one hundred years, Minnesota government entities have had exclusive authority over who may bind them to public contracts, and which governmental agent's

statements may otherwise result in liability. This Court has held that those who deal with the government are “conclusively presumed to know the extent of authority possessed by the officers with whom they are dealing.” *Jewell Belting Co. v. Village of Bertha*, 97 N.W. 424, 425 (Minn. 1903). This rule has been uniformly followed—by this Court, the Minnesota Court of Appeals, and the United States Court of Appeals for the Eighth Circuit—in both contract and tort cases. *See, e.g., Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995) (finding that there can be no reasonable reliance and, therefore, no fraud claim, where officials did not actually have authority to make alleged promise); *Contractors Edge, Inc. v. City of Mankato*, No. A11-916, 2012 WL 118409, at \*5-6 (Minn. Ct. App. January 17, 2012) (finding equitable estoppel claim failed because of absence of actual authority); *Morris v. Perpich*, 421 N.W.2d 333, 336 (Minn. Ct. App. 1988), *review denied*, (Minn. May 16, 1988) (noting that apparent authority cannot bind government because a plaintiff’s knowledge of government official’s scope of authority is presumed); *City of Geneseo v. Utils. Plus*, 533 F.3d 608, 617 (8th Cir. 2008) (holding that Minnesota law does not permit a finding of reasonable reliance on a promise made by a government official without actual authority). Williams cannot recover in this case because, as a matter of law, he cannot establish reasonable reliance, which is an essential element of his negligent misrepresentation claim. *See Safeco Ins. Co. of Am. v. Dain Bosworth Inc.*, 531 N.W.2d 867, 870-71 (Minn. Ct. App. 1995), *review denied* (Minn. July 20, 1995).

Neither the Court of Appeals nor the District Court questioned the validity of this long-standing law; instead they improperly imported an ambiguous and unmanageable

exception to this law. The lower courts first engrafted an outdated and disfavored “proprietary” exception, and then without any factual record held that the University’s men’s basketball program is a “proprietary” function. Because the lower courts erred in refusing to apply long established law, judgment should be entered for the University and Smith.

**A. Parties negotiating contracts with government entities are conclusively presumed to know the limits of the authority of the representative with whom they are dealing**

The conclusive presumption governing this case was established as early as 1903 by this Court in *Jewell Belting Co.*, which held as follows:

All persons contracting with municipal corporations are conclusively presumed to know the extent of authority possessed by the officers with whom they are dealing.

97 N.W. at 425. Federal law is identical, as declared by the United States Supreme Court:

Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.

*Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947).

Until this case, the Court of Appeals has uniformly held that a plaintiff may not use the doctrine of apparent authority to bind the government; third-parties cannot rely on the appearance of authority by a government agent. *See Morris*, 421 N.W.2d at 336 (“All persons contracting with municipal corporations are conclusively presumed to know the extent of the authority possessed by the officers with whom they are dealing.”). *See also*

*Plymouth Foam Prods., Inc. v. City of Becker*, 944 F. Supp. 781, 785 (D. Minn. 1996) (applying *Jewell Belting* and finding apparent authority insufficient to bind a city).

*Jewell Belting* unequivocally stands for the basic proposition that the government cannot be bound unless its employee has actual authority. A village council passed a motion directing the president and recorder to enter into a contract to purchase a fire engine. *Jewell Belting*, 97 N.W. at 424. The president and recorder then entered into a “formal contract” and the seller shipped the fire engine. *Id.* The village council, though, refused to accept the fire engine. *Id.* This Court held that the village could not be bound—despite the affirmative act of delegation. Because the village council did not have authority to delegate to the president and recorder, that authority was not, in fact, delegated. *Id.* at 425. Thus, even though the seller of the fire engine had very good reason to believe that the village president and recorder had authority to enter into the contract, the conclusive presumption trumped his good faith belief and precluded any recovery.

Importantly, the conclusive presumption not only acts to bar actions in contract, but also other actions where reasonable reliance is an essential element. In *City of Geneseo*, the United States Court of Appeals for the Eighth Circuit, applying Minnesota law, considered claims for promissory estoppel and fraud by a plaintiff city that alleged a government official had promised that energy would be sold to the city at a certain price. *City of Geneseo*, 533 F.3d at 613-14. The government official, however, lacked authority to make such a promise on behalf of his government employer. *Id.* The Eighth Circuit

held that claims for promissory estoppel and fraud failed as a matter of law because there could be no reasonable reliance on an unauthorized promise of a government official:

City's promissory estoppel claim fails because, as a matter of law, it was unreasonable for City to rely on a promise from [the government official], when it is conclusively presumed to know the limited extent of his authority.

....

City cannot prevail on its fraud claim for the same reason. It was unreasonable, as a matter of law, for City to rely on any representation by [the government official] of his authority to bind [the government entity].

*Id.* at 617.

*City of Geneseo* was based, in part, on a 1995 Minnesota Supreme Court decision, *Nicollet Restoration*, in which this Court considered claims against the City of St. Paul based on promises allegedly made by two St. Paul city officials. *Nicollet Restoration*, 533 N.W.2d at 847. This Court first noted that the plaintiff's claims—whether sounding “in contract or in tort”—required proof of reasonable reliance on the promises. *Id.* at 848. This Court found no proof of reasonable reliance because there was no evidence that the officials had authority either to make the promises or to guarantee adoption of the proposals at issue. *Id.* As a result, the claims were dismissed. *Id.* at 848-49.<sup>65</sup>

This black-letter law establishing a conclusive presumption regarding the claim here was denied by neither the District Court nor the Court of Appeals, and has never been

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<sup>65</sup> The Court of Appeals, in an unpublished decision issued only days ago, properly applied *Jewell Belting*, finding that an equitable estoppel claim failed because the plaintiff was conclusively presumed to know the extent of authority of the government representative with whom he was dealing. *Contractors Edge, Inc. v. City of Mankato*, No. A11-916, 2012 WL 118409, at \*5-6 (Minn. Ct. App. January 17, 2012).

seriously disputed by Williams. Instead, the lower courts refused to apply this law, by inventing and applying a “proprietary” exception to it.

**B. There is no “proprietary” exception to the conclusive presumption.**

The Court of Appeals relied on a single case that supposedly, in its word, “trumps” one hundred years of law: *Stein v. Regents of the Univ. of Minn.*, 282 N.W.2d 552 (Minn. 1979). The Court of Appeals cited *Stein* for the general proposition that “[i]f the government is to enter into businesses ordinarily reserved to the field of private enterprise, it should be held to the same responsibilities and liabilities,” and characterized this as an “expansive rule.” The Court of Appeals then summarily declared that the men’s basketball team is a “proprietary endeavor” and therefore “*Stein* trumps the century-old law of *Jewel Belting* [sic].” *Williams v. Smith*, Nos. A10-1802, A11-567, 2011 WL 4905629, at \*6 (Minn. Ct. App. Oct. 17, 2011) (Add. 6). The Court of Appeals’ application of *Stein* here, and its creation of a “proprietary” exception to the *Jewell Belting* conclusive presumption was error.

*Stein* has no application here. *Stein* did not involve the *Jewell Belting* presumption, or even the issue of apparent authority, but rather involved a question of sovereign immunity, which has absolutely nothing to do with this case. *Stein* addressed whether the operation of the University's Hospital and Clinic was a governmental activity, which would insulate it from common law tort liability for torts committed prior to the enactment of the Minnesota Tort Claims Act. The University and Smith have never claimed immunity from suit in this case. Moreover, as recognized in *Stein*, sovereign immunity has been essentially abolished in Minnesota. 282 N.W.2d at 559. The

legislature extinguished the proprietary/governmental distinction with the Minnesota Tort Claims Act, which provides that the state is subject to suit “whether arising out of a governmental or proprietary function.” Minn. Stat. § 3.736, Subd. 1.

This Court has never suggested that the government’s control over who may bind it somehow is related to sovereign immunity, or somehow is limited by the nature of the government activity at issue. Sovereign immunity was not even mentioned by this Court in *Jewell Belting*, nor has this Court indicated in any way that the *Jewell Belting* principle was limited to only certain types of governmental transactions. *Jewell Belting*, 97 N.W. at 425. Likewise in *Nicollet Restoration*, when this Court held that there could be no reasonable reliance on a representation by a government official who had no power to bind the government, there was no suggestion that sovereign immunity doctrine was the basis of the decision, or that there might have been a different result depending of the government activity at issue. *Nicollet Restoration*, 533 N.W.2d at 848.

Relying upon Minnesota law, the Eighth Circuit in *City of Geneseo* directly addressed and firmly rejected the argument that a governmental entity is liable if the entity acts in a “proprietary” rather than “governmental” capacity. *City of Geneseo*, 533 F.3d at 616. In that case, plaintiff argued that the sale of energy was “proprietary” rather than governmental, and therefore the government was bound by its agent’s alleged promises. The Eighth Circuit held that “the distinction between proprietary and governmental activities is not relevant in this context,” and explained that when the law limits the authority of the agent to bind the government entity, that limit applies “regardless of any such proprietary-governmental distinction.” *Id.* Importantly, the

court relied on this principle in rejecting the plaintiff's claims for promissory estoppel and fraud. Observing that both claims require reasonable reliance, the court held as a matter of law that the plaintiff could not rely on a promise from the governmental employee because the plaintiff was conclusively presumed to know the limited extent of the employee's authority. *Id.* at 617.

The Minnesota Court of Appeals' novel importation and expansion of a "proprietary" exception controverts this Court's clear direction that the exception is disfavored and is not to be resurrected or expanded. In *Imlay v. City of Crystal Lake*, this Court specifically addressed and rejected an argument that "would entail a resurrection of the 'governmental-proprietary' distinction." 453 N.W.2d 326, 330 (Minn. 1990) (citation omitted). After noting the legislature had abolished the distinction between governmental and proprietary functions, this Court refused to resurrect the "proprietary exception," stating that it did "not wish to reinstate this troublesome dichotomy." *Id.*

*Imlay* rejected the very same argument offered by Williams here. Williams argued to the Court of Appeals that "shielding government from its liability for proprietary functions lacks any rational basis." Resp.'t Br. (Court of Appeals) 30. The appellants in *Imlay* similarly argued that a statute capping municipal liability lacked any rational basis when applied to functions that do not provide a "public service." 453 N.W.2d at 329. This Court concluded that a rational basis did exist, namely to protect the government from high judgment awards and to promote "fiscal stability." *Id.* at 330. These same public policies apply here.

*Imlay*'s holding logically follows this Court's rejection of the "proprietary" exception for claims such as adverse possession and equitable estoppel. *See, e.g., Fischer v. City of Sauk Rapids*, 325 N.W.2d 816, 819 (Minn. 1982) (refusing to "overturn a longstanding body of law" regarding adverse possession); *Mesaba Aviation Div. v. County of Itasca*, 258 N.W.2d 877, 880 (Minn. 1977) (estoppel).<sup>66</sup>

Application of a proprietary exception would frustrate longstanding public policy of this State that the government must have authority to decide who may bind it, and that government entities should be protected from employee misrepresentations (or omissions) about their contracting authority.<sup>67</sup> *See Imlay* 453 N.W.2d at 330. To protect this important public interest and promote "fiscal stability" those who wish to contract with the government conclusively are presumed to know the extent of the authority of the government employees with whom they deal. *Jewell Belting*, 97 N.W.2d at 425. It is for this reason—whether sounding in contract or tort—that claims against the government based on a government employee's alleged misrepresentation of authority fail as a matter of law.

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<sup>66</sup> The governmental/proprietary distinction remains viable only in very narrowly defined areas, such as with respect to the imposition of appellate costs and disbursements. *See Lund v. Comm'r of Pub. Safety*, 783 N.W.2d 142, 143 (Minn. 2010).

<sup>67</sup> The Board of Regents has expressly maintained the right to decide who may take actions on the University's behalf. *See* University of Minnesota Board of Regents Policy: Reservation and Delegation of Authority, Section VI, Subd. 1 (originally adopted April 5, 2001; amended most recently February 12, 2010) ("No . . . employee of the University shall have any authority to take any action or make any representation on behalf of the University beyond the scope of, or materially inconsistent with, the authority delegated to such . . . employee as provided in this policy"), available at [http://www1.umn.edu/regents/policies/delegation/Reservation\\_and\\_Delegation.pdf](http://www1.umn.edu/regents/policies/delegation/Reservation_and_Delegation.pdf).

Application of this principle here case is particularly apt because this case, at worst, involves a mere omission: Williams does not claim that Smith affirmatively misrepresented anything to him.<sup>68</sup> Instead, Williams claims that because Smith failed to tell Williams explicitly on the night of April 2 that the athletic director had final hiring authority, Williams assumed that night that Smith had such authority. It is undisputed that Williams disregarded Smith's explicit statement to him the very next morning clarifying that the Athletic Director needed to sign-off on the hiring.<sup>69</sup> Minnesota law requires that when dealing with government agent's authority, liability cannot be based on an assumption; the law conclusively presumes knowledge by Williams.

**C. The Court of Appeals erroneously held that the University's men's basketball program is a "proprietary" function.**

The lower courts should never have considered the wholly irrelevant question of whether intercollegiate men's basketball at the University is a governmental or "proprietary" function. But they did so, and their erroneous determination highlights the problematic nature of the "proprietary" function exception.

The lower courts decided that the University men's basketball program is a "proprietary" function without benefit of any record evidence or, in the case of the trial court, any briefing or submissions on the issue. The University moved for summary judgment, in part based on the conclusive presumption established by *Jewell Belting*. Williams opposed the motion, but did not assert or even suggest that there was or should

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<sup>68</sup> App. 80 (Tr. 534-35 (Williams)).

<sup>69</sup> App. 91 (Tr. 551 (Williams)). Williams also cannot establish reasonable reliance here because the alleged omission was corrected before detrimental reliance occurred.

be a “proprietary” exception engrafted on the *Jewell Belting* line of cases. The District Court, though, *sua sponte*, decided that an exception should be engrafted and then made factual findings about the “proprietary nature” of the University’s men’s basketball program *without any record basis*. The University thus had no opportunity to submit evidence or briefing on this significant point because it had no notice that a “proprietary” exception to the *Jewell Belting* caselaw was even under consideration by the District Court. The Court of Appeals did not acknowledge this history; rather, it simply endorsed the District Court’s conclusion, saying “As the district court noted below, “[t]here is no regulatory or other public interest served by the basketball team.” *Williams*, 2011 WL 4905629, at \*6. The lower courts’ summary treatment of this issue was highly improper.

Had they been given the opportunity, the University and Smith would have produced evidence completely undercutting the District Court’s erroneous characterization of the University’s intercollegiate sports program in general, and the men’s basketball program in particular. As Maturi later testified at trial, intercollegiate athletics at the University provide educational and other opportunities for about 750 student-athletes in twenty-five sports, and these student-athletes provide many hours of community service.<sup>70</sup> Further, Williams and his own witnesses made it clear that men’s basketball does not simply serve a money-generating function. Williams himself actually touted the primary function of the basketball program as providing mentoring, tutoring, and counseling to student-athletes.<sup>71</sup> His other witnesses also testified to the educational

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<sup>70</sup> Tr. 639 (Maturi).

<sup>71</sup> App. 70 (Tr. 500) (Williams).

function and benefits of intercollegiate basketball programs.<sup>72</sup> The District Court did not have the benefit of any of this or other evidence when it issued its pronouncement about men's basketball. To put exclusive weight on one factor—an assumption about gross revenue—with no consideration of evidence of the educational and other benefits of intercollegiate athletics, was clear error.<sup>73</sup>

The lower courts' opinion of intercollegiate athletics is not shared by other courts. For example, in *Harris v. Michigan Board of Regents*, a Michigan appellate court engaged in a detailed analysis of this very issue, and concluded that intercollegiate athletics at a Big 10 university is “inherently educational,” serving a governmental function. 558 N.W.2d 225, 228 (Mich. Ct. App. 1996) (relying, *inter alia*, upon, among other court decisions in Virginia and Tennessee). The court cited a Tennessee appellate court decision that stated:

[F]or well over one hundred years athletic programs have been an integral part of the educational process in colleges and universities throughout this country, not only in football, but baseball, basketball, and other sports too numerous to mention. The development of a student's physical body, team work, and sportsmanship have all been part of the college and university educational process, notwithstanding the fact that in recent years big-time college athletics have at times taken on a tinge of commercialism.

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<sup>72</sup> Tr. 142-45, 292, 324-26.

<sup>73</sup> The emphasis by the District Court and the Court of Appeals on “profitability” has two significant flaws. First, the introduction of television revenue in college athletics is a relatively recent event. The lower courts' suggestion that the purpose of the program is to generate revenue ignores the long history of the program and the reasons for its creation and continuation. Second, the fact of revenue production simply cannot be dispositive. The University obtains substantial revenue through countless academic, research, public outreach, and other activities occurring within literally hundreds of collegiate units and departments. Presumably, this Court would not consider University research, as one example, to be a “proprietary” function simply because it generates significant revenue for the institution.

*Id.* (quoting *Greenhill v. Carpenter*, 718 S.W.2d 268, 271 (Tenn. Ct. App. 1986)). These judicial decisions concerning intercollegiate athletics are entirely consistent with the limited evidence subsequently heard at trial regarding the University’s basketball program.

Importantly, the lower courts’ conclusion here on the insignificant educational value of the basketball program improperly intrudes on the constitutional deference owed to the University with respect to determining the educational value of its own programs. This Court has recognized “the very substantial deference to be accorded the governing authority of the [Board of Regents],” and that the “general educational management” of the University is exclusively vested in the Board of Regents. *Bailey v. Univ. of Minn.*, 187 N.W.2d 702, 704 (Minn. 1971); *State ex rel. Peterson v. Quinlivan*, 268 N.W. 858, 860 (Minn. 1936); *see also Gleason v. Univ. of Minn.*, 116 N.W. 650, 652 (Minn. 1908) (concluding that “the government of the university as to educational matters is exclusively vested in the Board of Regents, and . . . the courts of the state have no jurisdiction to control the discretion of the board.”). The creation and continuation of intercollegiate basketball programs—common at hundreds of public educational institutions nationwide, large and small, generating revenue ranging from trivial to substantial—is an educational and programmatic decision of the University’s Board of Regents. Under the Minnesota Constitution, the Board is assigned exclusive responsibility to make such decisions. The Board has formally determined that intercollegiate athletics is an important part of the educational mission of the University

of Minnesota and has directed that intercollegiate athletics “shall have a mission . . . emphasizing the pursuit of academic and athletic excellence,” and “shall serve the well being of student-athletes by promoting academic and athletic accomplishments, supporting and encouraging their graduation, and supporting their development as individuals in an educational setting.”<sup>74</sup> The district court and the Court of Appeals seriously erred by independently assessing the value of intercollegiate athletics at the University, and without according any deference to the considered judgment of the Board of Regents.

The lower courts’ “proprietary” exception based simply on athletic profitability is arbitrary and practically unworkable. If profitability were the test, then if this case involved a prospective wrestling coach rather than a men’s basketball coach, the result would have been different. But what would the result be in the case of a women’s basketball coach or a baseball coach? All these intercollegiate athletic programs provide vital opportunities for academic and athletic development; they all offer quality mentoring for student-athletes; and they all contribute to the overall collegiate experience of the University’s student body, as well as its faculty. The fortuity that one such program may generate more revenue than the other, or may do so during one year but not the next, is not a reasonable basis for categorically excluding it from being a

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<sup>74</sup> University of Minnesota Board of Regents Policy: Intercollegiate Athletics – Twin Cities Campus, 1 (July 8, 2009), *available at* [www1.umn.edu/regents/policies/academic/Intercollegiate\\_Athletics\\_TC.pdf](http://www1.umn.edu/regents/policies/academic/Intercollegiate_Athletics_TC.pdf).

governmental function of the University.<sup>75</sup> And what of the hundreds of other non-athletic University programs, or, for that matter, the thousands of state, county, city, and other public programs throughout Minnesota? The new law created by the lower courts here—if affirmed—would create enormous uncertainty not only for the University, but throughout Minnesota government, as to what governmental programs qualify as being “proprietary” and during what time frame. This Court was correct in *Imlay*—the proprietary/governmental dichotomy is troublesome and should not be expanded.

**II. WILLIAMS’S NEGLIGENT MISREPRESENTATION CLAIM FAILS BECAUSE THERE IS NO LEGAL DUTY BETWEEN AN EMPLOYER AND A PROSPECTIVE EMPLOYEE.**

Williams’s negligent misrepresentation claim also fails as a matter of law because no duty of care exists between an employer and a prospective employee. The threshold question in any negligent misrepresentation case is whether a duty of care exists. *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 287 (Minn. 1992). Whether such a duty exists is a question of law which this Court determines *de novo*. *Foss v. Kincade*, 766 N.W.2d 317, 320 (Minn. 2009). Here, the Court of Appeals erroneously imposed a duty of care between the University and Smith as prospective employers, and Williams as a

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<sup>75</sup> In this context, it is right to note that under the University’s Charter, the University is a single corporate entity and is subject to suit as such. University Charter, Minn. Territorial Laws 1851, Ch. 3, § 7. The intercollegiate athletic department, and the individual team sports within it, are not separate corporate entities, and the Board of Regents does not treat them as such. Revenues and costs are commonly shared among and between University units. Maintaining programs that generate significant revenue is vital to enable other valuable University programs to survive, even if they produce less income. The lower courts’ facile conclusion that the men’s basketball program is “proprietary” ignores this reality, and gives no weight to the educational judgment of the Board of Regents in determining the value and contribution of various intercollegiate athletic programs to the overall educational mission of the University.

prospective employee. Neither this Court nor any other Minnesota court has previously recognized such a duty in this context.

In *Bonhiver v. Graff*, 248 N.W.2d 291, 298 (Minn. 1976), this Court recognized the tort of negligent misrepresentation as defined in the Restatement (Second) of Torts, Section 552. See also *Florenzano v. Olson*, 387 N.W.2d 168, 174 (Minn. 1986) (explaining that in *Bonhiver* “we adopted the Restatement (Second) of Torts definition of negligent misrepresentation” as set forth in Section 552). The Restatement provides, in relevant part, that a duty of care exists for “one who, in the course of his business, profession or employment, or in a transaction in which he has a pecuniary interest, supplies false information for the guidance of others.” *Id.* at 198 (quoting Restatement (Second) of Torts § 552 (1966)). The official comments to Section 552 provide that liability for negligence under this section is limited to commercial transactions and that not every user of commercial information “may hold every maker to a duty of care.” Restatement (Second) of Torts § 552 cmt. a (1965)). Moreover, the duty recognized under Section 552 is “unlike the duty of honesty.” *Id.*

Before this case, no court in Minnesota has ever extended Section 552 to find a duty of care between an employer and a prospective employee in the context of discussions about possible employment. Rather, as the Minnesota Court of Appeals has observed, a cause of action for negligent misrepresentation “has been asserted most frequently against professionals who negligently supply inaccurate information to a client and cause pecuniary loss to the party receiving the information.” *Vaa v. Clay County*, No. A04-

311, 2004 WL 2590602, at \*3 (Minn. Ct. App. Nov. 16, 2004), *review denied* (Minn. Jan. 26, 2005).

Although this Court has not yet opined on that issue, *see Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 370 n.7 (Minn. 2009) (declining to consider the issue because claim dismissed on other grounds), the Court of Appeals has consistently held that Section 552 does not recognize a duty of care between parties engaged in arm's length, commercial negotiations. *Williams*, 2011 WL 4905629, at \*4 (*citing Safeco Ins.*, 531 N.W.2d at 870).<sup>76</sup> In so ruling, the Court of Appeals sought guidance from other jurisdictions that have similarly adopted Section 552's negligent misrepresentation definition, and correctly observed that those jurisdictions have "held that where adversarial parties negotiate at arm's length, there is no duty imposed such that a party could be liable for negligent misrepresentations." *Safeco Ins.*, 531 N.W.2d at 871, *review denied* (Minn. July 20, 1995). The Court of Appeals has observed that other remedies are available to parties in these situations, including fraud and breach of contract:

It would be unreasonable to impose a duty whenever a party gives *any* information to another party. That is why the law of negligent misrepresentation imposes a duty on parties providing information for the

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<sup>76</sup> Williams argued in his opposition to the University's Petition for Review, that the alleged misrepresentation occurred after negotiations had concluded. This argument is not only factually inaccurate (since there never was a conclusion to negotiations as Williams was never hired), but also contrary to Williams's own pleadings. For example, Williams's Complaint against Smith specifically pleads that "Between March 30, 2007, and April 2, 2007, Smith made representations to Williams that he had complete and final authority to hire Williams for an assistant coaching position, including, but not limited to, Smith's overt act during the conversation of offering Williams an assistant coaching position with the University's men's basketball team, and *discussing a financial package with him.*" App. 30-31 (emphasis added). Williams's case is premised on the notion that the misrepresentation occurred during employment negotiations.

guidance of others in the course of business or where there is a pecuniary interest. In other commercial relationships, for example between parties to a contract, *the aggrieved party is limited to suit in contract or in fraud.*<sup>77</sup>

Until this case, the Minnesota Court of Appeals consistently applied these principles to find that when “adversarial parties negotiate at arm’s length, there is no duty imposed such that a party could be liable for negligent misrepresentations.” *Smith v. Woodwind Homes, Inc.*, 605 N.W.2d 418, 424 (Minn. Ct. App. 2000) (citing *Safeco Ins. Co. of Am. v. Dain Bosworth Inc.*, 531 N.W.2d 867, 870-71 (Minn. Ct. App. 1995)); *see also Baker v. Sunbelt Bus. Brokers*, No. A07-0514, 2008 WL 668608, at \*10 (Minn. Ct. App. Mar. 11, 2008). The Court of Appeals has found no duty to support a negligent misrepresentation claim in many circumstances, including where a defendant sold its business to a plaintiff;<sup>78</sup> where a defendant business supplied a plaintiff business with a large supply of automotive paint;<sup>79</sup> and where a defendant bank recommended that a plaintiff bank participate in a loan.<sup>80</sup> The parties in these cases did not have a unity of interest in the transaction and/or were sophisticated or experienced. *Rasmussen*, 2008 WL 1868314, at \*5; *Valspar Refinish*, 2007 WL 4237504, at \*6; *Signature Bank*, 2006 WL 2865325, at \*5; *see also Crosstown Holding Co. v. Marquette Bank, N.A.*, No. A04-1693, 2005 WL 1154271, at \*6 (Minn. Ct. App. May 17, 2005); *Woodwind Homes*, 605 N.W.2d at 425; *Hunerberg Const. Co. v. Glass Serv. Co., Inc.*, Nos. C9-97-1737, C3-97-

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<sup>77</sup> *Id.* (emphasis added).

<sup>78</sup> *Rasmussen v. R & N Dvorak, Inc.*, No. A07-0909, 2008 WL 1868314, at \*5 (Minn. Ct. App. Apr. 29, 2008).

<sup>79</sup> *Valspar Refinish, Inc. v. Gaylord's, Inc.*, No. A06-2227, 2007 WL 4237504, at \*6 (Minn. Ct. App. Dec. 4, 2007).

<sup>80</sup> *Signature Bank v. Marshall Bank*, Nos. A05-2337, A05-2556, 2006 WL 2865325, at \*5 (Minn. Ct. App. Oct. 10, 2006), *review denied* (Minn. Dec. 20, 2006).

2253, 1998 WL 345470, at \*4 (Minn. Ct. App. June 30, 1998), *review denied* (Minn. Aug. 18, 1998).

In this case, however, the Court of Appeals drastically departed from its prior rulings and all but abandoned its previous understanding of the scope of Section 552. The Court of Appeals completely ignored the arm's length nature of the relationship between the University and Smith on the one hand, and Williams on the other. It is beyond dispute that Williams was a highly experienced individual with the ability to protect his own interests when seeking a high-paying, high-profile job. Williams is a self-described "longtime men's college basketball coach" with 36 years of experience, who had "received and accepted seven job offers from seven Division I head basketball coaches."<sup>81</sup> No Minnesota case supports the notion that such an experienced person engaged in arm's length negotiations about a new high-paying job can hold his prospective employer to a duty of care under Section 552.

The Court of Appeals ignored cases from other jurisdictions holding that Section 552 does not impose a duty of care in the prospective employment context. For example, in *Fry v. Mount*, 554 N.W.2d 263 (Iowa 1996), the Iowa Supreme Court held that, consistent with the comments to Section 552, no duty arises in the absence of facts that show the defendant is in the business of supplying information to others. *Id.* at 266. In so doing, the *Fry* Court rightly concluded that the relationship between employer and prospective employee was adversarial in nature, not advisory. *Id.* An employer's expressions of expectations of what might occur upon consummation of employment

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<sup>81</sup> Resp.'t Br. (Court of Appeals) 4.

cannot be compared with professional guidance or advice, as contemplated by Section 552. *Id.* at 267. The Iowa Supreme Court ultimately concluded that a cause of action for negligent misrepresentation exists where a defendant is in the business of supplying information, e.g., accountants, lawyers, abstractors.<sup>82</sup> *Id.* at 265.

Subsequently, the Iowa Supreme Court expressly declared that “the tort of negligent misrepresentation has no application in an employment relationship, where representations are made to ‘sell’ the [employer] company rather than to guide the employee ‘with professional advice.’” *Schoff v. Combined Ins. Co. of Am.*, 604 N.W.2d 43, 50 (Iowa 1999) (citing *Fry v. Mount*, 554 N.W.2d 263, 267 (Iowa 1996)). A duty of care arises only when a party is in the business of providing information, such as an accountant or a financial advisor. *See, e.g., Fry*, 554 N.W.2d at 265.

The decision by the Court of Appeals dramatically expands the reach of negligent misrepresentation beyond Section 552. The Court of Appeals concluded that, even though Smith was not in the business of providing information to anyone, liability may still attach because Smith engaged in discussions about job expectations with Williams.

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<sup>82</sup> *See also Schoff v. Combined Ins. Co. of Am.*, 604 N.W.2d 43, 50 (Iowa 1999) (citing *Fry v. Mount*, 554 N.W.2d 263, 267 (Iowa 1996) (holding no duty between potential employer and employee giving rise to negligent misrepresentation)); *see also Conway v. Pac. Univ.*, 879 P.2d 201, 204 (Or. Ct. App. 1994) (concluding that negotiation of employment contract “is one of those situations in which the parties are pursuing divergent rather than common interests,” and rejecting duty of care between potential employer and employee); *Bogue v. Better-Bilt Aluminum Co.*, 875 P.2d 1327, 1339 (Ariz. Ct. App. 1994) (“[Plaintiff] has not cited, and we are unable to find, any authority which would impose a duty on [Defendant] to take affirmative steps to protect a job applicant. We, therefore, conclude that [Defendant] owed no duty to [Plaintiff].”); *Thompson v. City of Des Moines*, 564 N.W.2d 839, 844 (Iowa 1997); *Alderson v. Rockwell Int'l Corp.*, 561 N.W.2d 34, 36 (Iowa 1997).

The Court of Appeals explained that because Smith discussed salary structure and a possible first assignment and recruiting trip, such discussions somehow imposed upon Smith a duty of care under the Minnesota law. There is absolutely no authority that such discussions create such a duty, and the Court of Appeals cited none. To the contrary, the Court of Appeals' decision contravenes its own precedent, *Safeco*, where one party provided information to the other party, but it was not for the other party's "guidance" as would be the case with a client, but rather to "sell a deal." 531 N.W.2d. at 872. In *Safeco*, the plaintiff argued—precisely as Williams did here—that the act of speaking about the future arrangement created a duty. The Court in *Safeco* flatly rejected this argument. *Id.* at 873.

This Court should confirm the limited scope of Section 552. Limiting Section 552 to where a party is in the business of providing information is consistent with this Court's statements that public policy will dictate whose interests should be protected by imposing a duty of care. For example, in *Caritas* this Court noted that no duty is owed "unless the plaintiff's interests are entitled to legal protection against the defendant's conduct" and that whether a plaintiff's interests are entitled to protection is a matter of public policy. 488 N.W.2d at 287 (citing *L & H Airco., Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 378 (Minn. 1989) (citing Prosser & Keaton on Torts § 53, at 357 (5th ed. 1984))). *Caritas* was an unusual case involving an adoption agency that was held to have a duty of care to prospective adoptive parents when providing information about a child's genetic parents and medical history. *Id.*

Public policy certainly supports protecting the interests of prospective adoptive parents, as well as the interests of those who seek professional guidance from a financial advisor, accountant, or similar professional. But these situations are very different than parties engaged in arm's length commercial negotiations involving employment contracts or other matters. Parties in these situations are normally both capable of, and responsible for, protecting their own interests. Moreover, as the Court of Appeals noted in *Safeco*, these parties have other meaningful remedies to redress a wrong—fraud, breach of contract, and the like. Those dealing with government entities such as Williams also have the protection provided by certiorari review of governmental action provided by the Minnesota Court of Appeals.

Importantly, public policy considerations militate against the creation of a new duty of care in this case. Discussions between employers and prospective employees often are marked by both parties selling themselves, “puffing,” and posturing. Creation of a new legal duty of care in the context of employment negotiations would open a Pandora's box of claims. Employees, including those employed at-will and those who have not been terminated, could file claims that the jobs were not precisely as advertised or discussed. Employers would have new claims against employees for negligently characterizing, or omitting, material facts about their backgrounds. In this case, for example, the University would have a claim against Williams for failing to disclose his very serious history of NCAA violations. Creating this new class of employment claims would substantially alter employment relations and Minnesota employment law and open the courts to a potential wide array of unprecedented claims.

This case involves arm's length employment negotiations between two highly experienced, very knowledgeable individuals, each acting in own interest. Neither was a client of the other. Neither had hired the other to supply him any commercial information. Minnesota law has never recognized a legal duty of care in these circumstances and public policy does not support creating such a new duty here. This Court should confirm that no duty of care arises in arm's length employment negotiations, especially between experienced parties such as those in this case.

**III. THE DISTRICT COURT COMMITTED PREJUDICIAL ERROR BY ADMITTING INADMISSIBLE CHARACTER EVIDENCE.**

Rule 608(a) of the Minnesota Rules of Evidence prohibits the introduction of character evidence unless a party's own character has been attacked. Here, the District Court allowed Williams to *begin his case in chief* with two very well-known character witnesses—witnesses whose sole role was to attest to the character and honesty of Williams, not to testify to any facts bearing on Williams's legal claims. These were not just any witnesses: they were well-respected Minnesotans plainly called to prejudice the case in favor of Williams before a single piece of relevant evidence was even offered to the jury. The Court of Appeals conceded admitting this testimony at the beginning of the trial was a clear error of law, but chose to excuse the error because it could not see how the evidence was prejudicial. This decision—if affirmed—would effectively gut Rule 608(a). At the outset of trials in Minnesota, litigants would be free to parade in inadmissible character evidence without fear of repercussions. If the extreme, expansive

use of character evidence to begin this trial does not warrant a new trial, it is hard to imagine a situation that would.

Rule 608(a) allows evidence of a party's truthful character to be introduced only "after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise:"

**(a) Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) *evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.*

Minn. R. Evid. 608(a) (emphasis added). The advisory committee notes to Rule 608 state the obvious—the rule is about rehabilitation: "Evidence of truthful character is only admissible for rehabilitation purposes after the character of the witness is attacked."

Minn. R. Evid. 608(a) cmt.

The first character witness was former Congressman Jim Ramstad. Ramstad testified extensively about his own illustrious career: his military career; his time representing indigent clients in Washington D.C.; his ten years in the Minnesota State Senate; his 18 years in Congress; his recent time teaching at Harvard University; and his position as senior policy advisor at the Hazelden Treatment Centers.<sup>83</sup> Ramstad testified about the Paul Wellstone Mental Health and Chemical Addiction Treatment Equity Act.<sup>84</sup>

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<sup>83</sup> Tr. 80-83 (Ramstad).

<sup>84</sup> Tr. 82-83 (Ramstad).

Williams even asked Ramstad to talk about a photograph of the Congressman with Presidents Clinton and Kennedy.<sup>85</sup> Ramstad then testified:

And I quoted President Kennedy when I announced my retirement. You don't have to be in public office to do public service, and I know that to be true, and I'm just grateful I can continue the tradition that President Kennedy set for all Americans when he said that: Here on earth, God's work must truly be our own. And I really accept that and believe that.<sup>86</sup>

It did not stop there. Ramstad was asked to tell the jury about his work with senior citizens, his work with Big Brothers/Big Sisters, all the national awards he has won, and his work to pass the Jacob Wetterling Act.<sup>87</sup>

Finally, Ramstad was asked about Williams. Ramstad testified at length about his opinion of Williams's personal characteristics:

Like I said before, Jimmy Williams's word is his bond. He is a person of absolute integrity, and what he says is the truth, the whole truth and nothing but the truth. I always found him to be a person of absolute integrity, even when it goes against his self-interest.<sup>88</sup>

Ramstad continued in this vein vouching for his friend—his “brother I never had” as he put it.<sup>89</sup> On cross-examination, Ramstad was asked: “Did you know that the NCAA Committee on Infractions suspended Mr. Williams from recruiting for two years for all of these infractions?”<sup>90</sup> Ramstad's answer was “I know that he paid a penalty. And I also believe in redemption. And I also believe people can make mistakes.”<sup>91</sup>

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<sup>85</sup> Tr. 83-84 (Ramstad).

<sup>86</sup> Tr. 84-85 (Ramstad).

<sup>87</sup> Tr. 86-87 (Ramstad).

<sup>88</sup> Tr. 92 (Ramstad).

<sup>89</sup> Tr. 89-90 (Ramstad).

<sup>90</sup> Tr. 107-08 (Ramstad).

<sup>91</sup> *Id.*

Although the last part of the answer was stricken as non-responsive, the District Court later allowed Ramstad to offer his own religious views and experience with “redemption,” how it is a basic premise of his faith, and to offer the opinion, “I know first hand the power of redemption and so does Jimmy Williams.”<sup>92</sup> This testimony was outside the rules and highly prejudicial.

The District Court then allowed another pure character witness, Hall of Fame basketball player and well-known Minnesota celebrity, Kevin McHale.<sup>93</sup> The District Court allowed this witness to testify, despite the recognition that the character evidence was “getting out of control.”<sup>94</sup>

McHale first was allowed to testify at length about his illustrious basketball career—his accomplishments in high school, with the University of Minnesota, and with the Boston Celtics.<sup>95</sup> He talked about his experience in international competition, the Olympics, coaching, managing the Minnesota Timberwolves, and the ultimate retiring of his jersey number at the University.<sup>96</sup> As was done with Congressman Ramstad, McHale then was directed by Williams’s counsel to testify about his opinion of Williams as a person, mentor, and basketball coach.<sup>97</sup> He testified that Williams was “very much” a

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<sup>92</sup> Tr. 117-18 (Ramstad).

<sup>93</sup> Tr. 126.

<sup>94</sup> Tr. 126-27.

<sup>95</sup> Tr. 131-36 (McHale).

<sup>96</sup> Tr. 138-41(McHale).

<sup>97</sup> Tr. 141-47(McHale).

truthful person.<sup>98</sup> McHale's testimony was much like that of Ramstad, ending in McHale vouching for Williams's honesty.

Once Ramstad and McHale testified, the damage was done and the chance for a fair trial was all but over. But Williams made sure that the highly improper and prejudicial testimony was not overlooked by the jury. In his closing argument, Williams's counsel used the character evidence to the greatest extent he could, saying:

And then the testimony of U.S. Congressman Jim Ramstad, knowing Jimmy Williams for 30 years. There isn't a better person, person of greater character, person of greater integrity, person of greater honesty. And yet, the University wants to talk about what happened 25 and 30 years ago as if that's the only thing that counts. Shame on them.<sup>99</sup>

Again, it did not stop there. Williams's counsel further declared:

[Congressman Ramstad] talked about redemption. And he went on to spend 19 years in the United States Congress, authored numerous bills, talked about partnering with Patty Wetterling to enact *Jacobs Law*, talked about being actively involved in alcohol and drug legislation, and helping others from his experience. There was redemption for Congressman Ramstad from the voters of Minnesota. There was redemption for Senator Kennedy from the United States Senate and from the people of Massachusetts. There was redemption for Paul Horning from the National Football League. And there was redemption for Werner Von Braun from our Country's government.<sup>100</sup>

Williams's counsel's conclusion—after listing all of the famous figures who have been “redeemed”—was a condemnation of the University of Minnesota for not hiring his client: “There is no redemption from the University of Minnesota ever.”<sup>101</sup> This

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<sup>98</sup> Tr. 145 (McHale).

<sup>99</sup> Tr. 1394.

<sup>100</sup> Tr. 1396.

<sup>101</sup> *Id.*

argument was only possible because the District Court committed prejudicial error in allowing two character witnesses to open the trial.

The Court of Appeals properly noted that none of this evidence is admissible under the Minnesota Rules of Evidence. It also acknowledged that the District Court erred by allowing Congressman Ramstad and Kevin McHale to testify. But, the Court of Appeals inexplicably concluded that admission of this inadmissible evidence was not a prejudicial error. The Court of Appeals stated that because evidence of Williams' infraction history at the University was offered, it "struggle[d] to see how Williams's inadmissible character evidence was truly prejudicial." *Williams*, 2011 WL 4905629, at \*7. This reasoning ignores and renders meaningless Rule 608(a).

The University presented no character evidence at all about Williams. It only presented facts regarding the specific violations committed by Williams and made no attempt to impeach Williams's character for honesty. These historical facts did not open the door for Williams to begin his case in chief with literally hours of character evidence, ranging in nature from Williams's religious faith, to his truthful character, to his integrity. Plainly, the entire point of Williams devoting a significant portion of his case to character evidence was to poison the jury in Williams's favor, not with facts but with emotion. It is hard to imagine how the testimony of Congressman Ramstad and Kevin McHale would have anything but highly prejudicial impact on the jury.

Williams used this inadmissible testimony to the fullest effect. The very theme of his closing argument originated from this character testimony. Bookending a jury case with inflammatory, inadmissible character evidence is nothing but prejudicial. This

Court should not allow a litigant to secure a million dollar jury verdict upon inadmissible evidence, particularly when the litigant becomes, as the trial court described, “out of control” in his quest to offer inadmissible evidence to secure a verdict at any cost.<sup>102</sup>

This Court should send a strong message that jury litigation in Minnesota must adhere to the Rules of Evidence, including Rule 608(a).

#### **IV. THE DISTRICT COURT ERRED BY NOT GRANTING REMITTITUR BASED ON THE DAMAGE AWARD**

An excessive damage award may be grounds for remittitur—or a new trial—where the award reflects a failure to follow the law, or the award “appear[s] to have been given under the influence of passion or prejudice,” or “is not justified by the evidence, or contrary to law.” Minn. R. Civ. P. 59.01(e), (g). Here, the Court of Appeals erred by failing to either reduce the award to an amount consistent with the law and the evidence, or grant a new trial.

When Williams resigned his position at OSU, he had one year left on a \$158,000 per year employment contract. The jury awarded almost eight times this amount, nearly \$1.25 million. This award was contrary to the undisputed evidence and contrary to law. The verdict represents a windfall to Williams whose only damages, at best, was the loss of the last year of his contract with OSU. Even that amount assumes that he adequately mitigated his damages, which the evidence shows he did not. The only explanation for this excessive jury verdict is that Williams’s trial strategy to plead about “redemption”

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<sup>102</sup> Tr. 127.

was effective. This Court should reduce the jury award to reflect the record facts and the law.

**A. The verdict was not justified by the evidence.**

Williams failed to meet his burden to prove the alleged misrepresentation caused the future damages awarded by the jury. A plaintiff fails to meet his burden to establish proximate cause where his theory of the case “is no more supported by or consonant with the facts than other theories which could be developed, theories which would relieve defendants of liability.” *Zinnel v. Berghuis Const. Co.*, 274 N.W.2d 495, 499 (Minn. 1979) (affirming a directed verdict for defendants).

Where the entire evidence sustains with equal justification two or more inconsistent inferences so that one inference does not reasonably preponderate over the others, plaintiff has not sustained the burden of proof on the proposition which alone would entitle him to recover and it becomes the duty of the trial court to direct a verdict for the defendant because any verdict to the contrary would be based on pure speculation or conjecture.

*Vill. of Plummer v. Anchor Cas. Co.*, 61 N.W.2d 225, 227 (Minn. 1953) (citations omitted). “If the facts furnish no sufficient basis for inferring which of several possible causes produced the injury, a party who is responsible for only one of such possible causes cannot be held liable.” *E.H. Renner & Sons, Inc. v. Primus*, 203 N.W.2d 832, 835 (Minn. 1973) (citations omitted) (noting that “[p]roof of a causal connection must be something more than merely consistent with the complainant’s theory of the case”).

The University cannot be liable for Williams’s claimed future wage loss because Williams did not prove that the alleged misrepresentation was the proximate cause of his

not working as a basketball coach following his resignation from his OSU job. Williams did not offer *any* evidence that the alleged misrepresentation caused an adverse employment decision by any third party. Instead, the evidence Williams did offer showed only that he was unable to obtain other employment as a result of his own, voluntary acts.

First, Williams admitted that his inability to secure future employment resulted from his voluntary disclosure to potential employers that he intended to sue the University of Minnesota.<sup>259</sup> Williams admitted that after he revealed that he intended to hire a lawyer and sue the University, both UK and FSU rejected his application.<sup>260</sup> Second, Williams admitted that he did not apply for certain positions—including the very position he formerly held at OSU—even though the evidence at trial showed that he likely could have obtained the positions.<sup>261</sup> Third, University of Houston’s Head Basketball Coach James Dickey testified that the reason he did not consider Williams for an available position was because Williams would be distracted by his legal action

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<sup>259</sup> App. 102-103 (Tr. 563-64 (Williams)). The doctrine of compelled self-publication applies exclusively in the defamation context. *See Phillips v. State*, 725 N.W.2d 778, 785 (Minn. Ct. App. 2007) (“Minnesota has recognized the doctrine of compelled self-publication, but only as it relates to defamation actions.”). Williams’s defamation claims were dismissed and the University is unaware of any case in any jurisdiction applying the doctrine of compelled self-publication to augment damages in a negligent misrepresentation case. In any event, Williams was not compelled to disclose his intention to sue the University. Williams did not actually commence his suit until many months after he applied for the UK and FSU positions. When Williams did commence this action, he held a press conference voluntarily and broadly publishing his claims. App. 79 (Tr. 529 (Williams)).

<sup>260</sup> App. 102-03 (Tr. 563-66 (Williams)).

<sup>261</sup> App. 71-72, 99-100, 108-09, 350-51, 359-60 (Tr. 502-03; 560-61; 603-04 (Williams)).

against the University.<sup>262</sup> Fourth, Williams testified that he did not submit any other applications for employment.<sup>263</sup> There was simply no evidence offered that the alleged misrepresentation caused Williams to be unable to secure future employment.

The Court of Appeals rejected the University's arguments and found a nexus based on one supposed area of testimony. The Court of Appeals erroneously stated that "Williams presented testimony that the uncertainty regarding his fallout with Minnesota adversely impacted his interview process at Florida State and Kentucky; this evidence was sufficient for the jury to find a proximate nexus between the misrepresentation and damages." *Williams*, 2011 WL 4905629, at \*9. But, as discussed above, Williams did testify specifically about the reason FSU and UK did not hire him, and it was *not* because of uncertainty. He testified these schools did not hire him because he voluntarily disclosed his intent to sue the University. His own sabotage of his job prospects cannot be blamed on the University, and cannot serve as a nexus between the alleged misrepresentation and damages. The Court of Appeals erred in its analysis and should be reversed.

Williams failed to meet his burden to prove that the alleged misrepresentation was a substantial factor in his inability to secure future employment. He also failed to present any evidence showing any reasonable effort to mitigate his damages; instead his testimony showed that he either did not seek opportunities or voluntarily sabotaged those that he did seek. The lower courts erred in refusing to appropriately discount the damage award.

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<sup>262</sup> Tr. 203 (Dickey).

<sup>263</sup> App. 107 (Tr. 602 (Williams)).

## **B. Passion or prejudice fueled the jury's award.**

Williams's counsel blatantly appealed to the jury's passion and prejudice from his decision to open the case with impermissible character evidence to his closing argument. He did everything he could to try to inflame the jury—referring in his closing argument to Pearl Harbor, the assassination of President Kennedy, and even the destruction of the Twin Towers in New York City.<sup>264</sup> His closing theme centered on “redemption” and was all about passion and emotion, not about facts or the issues involving proof of negligent misrepresentation.<sup>265</sup> He spoke about famous figures who he said had been “redeemed”: Wernher Von Braun, Paul Hornung, and Ted Kennedy.<sup>266</sup> He spoke about former Congressman Ramstad going from waking up drunk in a jail cell to being a member of Congress.<sup>267</sup> He told the jury there was redemption for all these people, but “[t]here is no redemption from the University of Minnesota ever.”<sup>268</sup> Of course, this argument had nothing to do with a claim of negligent misrepresentation, but was instead intended to persuade the jury that the University made the wrong decision in refusing to hire Williams, enflaming the jury's emotion and passion, and influencing the jury to want to punish the University for its hiring decision.

Williams's strategy for closing argument is the likely reason why, lacking evidence to support over a million dollar verdict, the jury nonetheless awarded such an outsized

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<sup>264</sup> Tr. 1373-4.

<sup>265</sup> Tr. 1396-7.

<sup>266</sup> *Id.*

<sup>267</sup> Tr. 1396.

<sup>268</sup> *Id.*

amount. The District Court erred by not reducing the verdict to an amount that was supported by the evidence in the record.

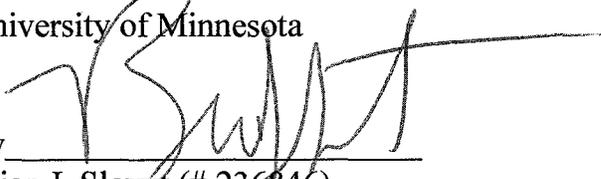
### CONCLUSION

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

Dated: January 20, 2012

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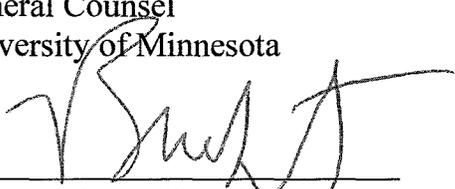
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