AT LAST - RULINGS IN THE *WILLIAMS v. SMITH* AND *MARIST v. BRADY* CASES

By: Martin J. Greenberg

On August 8, 2012, by a 3-2 court ruling, the Supreme Court of the State of Minnesota (Supreme Court) ended five and a half years of litigation between the University of Minnesota (University), Tubby Smith (Smith), and Jimmy Williams (Williams).[1]

In an article published in *For the Record* (July-September 2010), entitled "Head Coach Authority to Hire Assistant Coaches and the Necessity of a Paper Trail - The Jimmy Williams Case," we focused more on a head coach's authority, pursuant to his employment agreement, to hire assistants, and the necessity for maintaining a paper trail with respect to negotiations relative to such employment.[2]

This article will report on the findings of the Supreme Court and the results of the litigation as between the parties.[3]

FACTS:

- Smith became the head basketball coach at the University in 2007.[4]

- Smith considered a number of individuals as candidates for assistant coaching positions, including Williams.[5]

- In March and April 2007, Smith and Williams had discussions as to Williams becoming an assistant coach at the University.[6] Williams was in the second year of a three-year assistant coaching contract with Oklahoma State University (OSU).[7]

- Williams and Smith had discussions relative to employment on March 30, 2007 and again on April 1, 2007, and Smith asked Williams to fax his

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[1] *See generally,* Williams v. Smith, No. A10-1801, 2012 WL 3192812, (Minn. Aug. 8, 2012).
[2] Martin J. Greenberg & Clark Griffith, *Head Coach's Authority to Hire Assistant Coaches and the Necessity of a Paper Trail- The Jimmy Williams Case,* 21 FOR THE RECORD 3 (National Sports Law Institute, Milwaukee, Wis.), July-Sept. 2010, at 1.
[3] The following section containing the facts of the case is taken from the Supreme Court case: Williams v. Smith, No. A10-1801, 2012 WL 3192812, 1-3 (Minn. Aug. 8, 2012).
[4] *Id.* at 1.
[5] *Id.* at 2.
[6] *Id.*
[7] *Id.*

résumé to the University basketball office.[8]

- On April 2, 2007, Smith spoke with Athletic Director, Joel Maturi (Maturi) indicating his desire to hire Williams.[9] Smith and Maturi discussed concerns raised regarding Williams' NCAA past history.[10]

- On April 2, 2007, Smith called Williams and told him the University would meet his contract demands.[11] Smith asked Williams if he was ready to join him at the University and Williams replied "yes”.[12] Williams believed that Smith had offered him a job and that he had accepted.[13]

- Williams spoke with OSU Head Coach Sean Sutton (Sutton) on April 2, 2007, and told Sutton that Smith had offered him a job and that he accepted the offer, and that he would resign from OSU.[14]

- On April 3, 2007, Williams went to OSU to prepare and submit his resignation letter.[15] Before Williams submitted his resignation letter, Smith called Williams to tell him that Maturi's approval was needed for the offer to Williams.[16]

- On April 3, 2007, later in the day, Smith told Williams that Maturi strongly opposed hiring Williams because Maturi had learned for the first time that Williams had multiple major NCAA violations when he was previously with the University.[17]

- Sutton received Williams' resignation letter on the afternoon of April 3, 2007.[18]

- By April 8, 2007, Williams knew that the University did not consider him to be one of its assistant basketball coaches.[19]

- On May 29, 2007, the University notified Williams that the position of assistant men's basketball coach had been filled.[20]

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[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.* at 3.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*

DISTRICT AND APPELLATE COURT HOLDINGS:[21]

- Williams sued the Board of Regents of the University and Maturi, asserting common law breach of contract, negligent misrepresentation, estoppel, and constitutional claims under 42 USC Section 1983.[22]

- The University moved to dismiss the common law as well as the constitutional claims, arguing that the District Court lacked subject matter jurisdiction over those claims because the issuance of writ of certiorari is the only method by which a party can challenge the University's employment decisions.[23] The University also sought dismissal of the constitutional claims for failure to state a claim upon which relief could be granted.[24] In March 2008, the District Court granted the motions and dismissed all claims.[25]

- Williams appealed.[26] The Court of Appeals affirmed the District Court dismissal of the common law estoppel and Section 1983 claims but reversed as to the negligent misrepresentation claim.[27] 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.[28]

- The Court of Appeals remanded to the District Court for trial solely on the negligent misrepresentation claim.[29]

- 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.[30]

- Before trial, the District Court granted Smith's motion to dismiss the contract and promissory estoppel claims and dismissed Maturi as a party

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[21] The following facts are taken from Williams v. Smith, No. A10-1801, 2012 WL 3192812, 3-4 (Minn. Aug. 8, 2012).

[22] *Id.*
[23] *Id.* at 3.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.* at 4.

to the litigation.[31]

- The case then proceeded to trial on negligent misrepresentations claims against the University and Smith, and the fraud claim against Smith.[32] During the trial, Williams dismissed his fraud claim against Smith.[33]

- The jury found for Williams and awarded damages.[34]

- The jury awarded damages in the amount of $1,247,293.[35] On post-trial motions, the District Court reduced the award to $1 million.[36]

- The parties thereafter appealed the decision to the Court of Appeals.[37] The Court of Appeals affirmed. In doing so, the Court of Appeals concluded that Smith owed Williams a duty of care during the hiring negotiations.[38] 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.[39]

- Finally, the Court concluded that the evidence supported the jury's findings that Williams reasonably relied on Smith's misrepresentations regarding his authority to hire; rejected 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 misrepresentations.[40]

- The University then sought review by the Supreme Court.[41]

SUPREME COURT DECISION[42]

The Supreme Court granted the University's petition to review on two issues: 1) whether duty of care exists in arm's-length negotiations between a prospective employer and a prospective employee, and 2) whether a person negotiating a

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[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Williams v. Smith,* No. A10-1802, 2011 WL 4905629, 9 (Minn. Ct. App. Oct. 17, 2011), review granted (Mar. 28, 2012), rev'd, A10-1802, 2012 WL 3192812 (Minn. Aug. 8, 2012).
[36] *Id.* at 9.
[37] *Williams v. Smith,* No. A10-1802, 2012 WL 3192812 at 4.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] The following facts included in this section are taken directly from Williams v. Smith, No. A10-1801, 2012 WL 3192812, 5-14 (Minn. Aug. 8, 2012).

contract with a government representative is conclusively presumed to know the extent of the authority of that representative.[43] The University also challenged the District Court's subject matter jurisdiction over Williams' negligent misrepresentation claim.[44]

In a lengthy analysis, the Court concluded that Williams' negligent misrepresentation claim is not subject to certiorari review under Minnesota statute Chapter 606(210) because it is separate and distinct from University's decision not to hire Williams.[45] 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.[46] As a result therefore, the Supreme Court concluded that the District Court had subject matter jurisdiction over Williams' negligent misrepresentation claim.[47]

After considering the subject matter jurisdiction issue, the Supreme Court further considered 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.[48]

The Supreme Court stated that in order 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.[49]

The Supreme Court indicated that at issue before the Court were the first and third elements, i.e. the duty of care and justifiable reliance. The Supreme Court stated that:

> 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.'

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[43] *Id.* at 5.
[44] *Id.* at 6.
[45] *Id.* at 7.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.* at 8.

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.[50]

After a lengthy analysis of case law, the Supreme Court considered whether public policy favors protecting a prospective government employee from the negligence of a government representative.[51] To do so, the Supreme Court considered the nature of the relationship between Williams and Smith.

The Supreme Court concluded 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 was owed.[52] Three reasons were supplied in order to support the Supreme Court's conclusion.

First, Smith and Williams' relationship in negotiating potential employment was not a professional, fiduciary, or a special legal relationship in which one party had superior knowledge or expertise.[53] The Supreme Court indicated that:

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.

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 is 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.[54]

Second, the nature of the relationship between Williams and Smith does not support recognizing a duty of care in this case.[55] The Supreme Court further

[50] *Id.*
[51] *Id.* at 10.
[52] *Id.*
[53] *Id.*
[54] *Id.* at 11.
[55] *Id.*

indicated that:

> 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.[56]

Third, the Supreme Court stated that it perceives 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.[57] The weight of authority from other jurisdictions refuses to recognize a claim for negligent misrepresentation in such circumstances. 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.[58]

As a result, the Supreme Court found that Williams' interests in prospective employment with the University men's basketball program are not entitled to legal protection against Smith's negligent misrepresentations.[59]

Now retired Justice Helen Meyer (Meyer) issued a concurring and dissenting opinion. Meyer agreed "that the district court had subject-matter jurisdiction to resolve the negligent misrepresentation claim[s], [but dissented] 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."[60] Meyer stated that "[t]he majority ignores [Minnesota] 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."[61] As a result, Meyer "would affirm the jury verdict on the

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[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.* at 14.
[60] Williams v. Smith, No. A10-1801, 2012 WL 3192812, 15 (Minn. Aug. 8, 2012) (Meyer, J., concurring in part, dissenting in part).
[61] *Id.*

negligent misrepresentation claim."[62]

Meyer concludes that "[t]he majority erroneously state[d] that [the Court] never recognized a duty of care in the context of prospective government transactions."[63] She then cites *Mulroy v. Wright,* 185 Minn. 84, 88, 240 N.W. 116, 117-18 (1931) and *Northernaire Prods., Inc. v. Cnty. of Crow Wing,* 309 Minn. 386, 390, 244 N.W.2d 279, 282 (1976) as case law that allows a cause of action against government officers and employees for negligent misrepresentation of fact.[64]
Meyer concludes as a result of such cases that:

> 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 give up his job at OSU, the University informed Williams that the assistant coaching position at Minnesota had been filed. 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. In fact, 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. Underwriting, 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

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[62] *Id.*
[63] *Id.*
[64] *Id.*

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 on 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 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."[65]

Meyer indicated that "[r]ecognizing 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."[66]

Meyer also notes that "[t]he majority noted 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."[67]
Meyer indicated that:

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 results, contrary to our standard of review.[68]

Meyer also noted that "the majority erroneously suggested that a duty did not arise under these circumstances, in part because 'Williams never asked whether Smith had the authority to hire.'"[69] Meyer concludes 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

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[65]*Id.* at 15
[66]*Id.* at 16.
[67]*Id.*
[68] *Id.*
[69] *Id.*

question of whether Smith supplied false information."'[70] Meyer concluded that "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."[71] "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.'"[72]

The majority criticized Meyer's opinion in that:

> 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 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.[73]

Minnesota general counsel Mark Rotenberg stated:

> The university is pleased with today's decision, which finally puts an end to this case and vindicates our long-standing position that Williams' claim against Coach Smith and the university had no legal merit. We are particularly gratified by the Court's clear recognition

[70] *Id.*
[71] *Id.* at 17.
[72] *Id.*
[73] Williams v. Smith, No. A10-1801, 2012 WL 3192812 at FN 5.

> that Smith did not mislead Williams into quitting his job at OSU. Williams' mistaken assumption was unfortunate, but that did not justify five years of litigation against the university.[74]

Rotenberg called the decision "a major vindication after five years of litigation."[75] He further stated, "Coach Smith feels vindicated that the court has now clearly said that he did not snooker Jimmy Williams into leaving his job and coming to Minnesota," Rotenberg said.[76]

Rotenberg added that the court recognized that Smith never told Williams he had a final job offer and indeed told him just the opposite -- that the athletics director would have the final say.[77]

Williams' attorney, Donald Chance Mark Jr., issued a statement expressing disappointment.

While we believe the decision of the Supreme Court is in error, and we are considering our remaining legal options, we simply note for now that the university should be neither proud of nor emboldened by this decision relieving it of the legal consequences for its actions. It is hoped this experience will prompt the University to instead do what's right and provide truthful and accurate information to prospective employees in the future," the statement said.[78]

Attorneys for Jimmy Williams filed a petition for rehearing on August 20, 2012, asking the Supreme Court to reconsider its ruling.[79] The petition argues that the Supreme Court erred in not following the Minnesota Tort Claims Act but instead grounding its analysis on the university's government status.[80] It also argues that the Court ignored prior case law and made errors in its multiple findings of fact.[81]

Whether you agree with the legal reasoning of the majority or not, there are practical lessons to be learned from the Williams - Smith case. Employers must have clear hiring procedures which need to be communicated to prospective employees, clearly identifying who has hiring authority and who does not. The coach's employment agreement must clearly delineate his authority as to hiring. Such conditions and the authority thereof must be communicated to potential

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[74] *Statement by University of Minnesota General Counsel about Supreme Court decision on Williams v. Smith and U of M,* UNIVERSITY OF MINN. NEWS RELEASE (Aug. 8, 2012), http://www1.umn.edu/news/newsreleases/2012/UR_CONTENT_404741.html

[75] Steve Karnowski, *Court Nixes $1M Award Against U. of Minn., Smith,* HUFFINGTON POST (Aug. 8, 2012), http://www.huffingtonpost.com/huff-wires/20120808/bkc-tubby-smith-lawsuit.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] Barbara L. Jones, *Williams Asks for Rehearing,* MINNLAWYER (Aug. 21, 2012). http://minnlawyer.com/minnlawyerblog/2012/08/21/williams-asks-for-rehearing.

[80] *Id.*

[81] *Id.*

hirings, preferably in writing, a paper trail that must be created that specifically documents how and when the potential hire ultimately becomes an employee of the university. Preferably this information is communicated at the commencement of employment discussions and as part of any Memorandum of Understanding (MOU). If these practices are followed, financial exposure to the university and the necessity of litigation would be greatly eliminated.

In my article, "Take My Coach and I'll Take You to Court" (Jan. 4, 2011), I discussed various breaches of contract and the concept of tortious interference with contract as it related to Matthew Brady (Brady) becoming the head basketball coach at James Madison University (JMU) and the claims of Marist College (Marist).[82]

The case has now been concluded against JMU as well as Brady.

FACTS:

- Marist commenced an action in the Supreme Court, Dutchess County, on July 9, 2009, which was served on all defendants on July 20, 2009.[83] Brady's contract contained two covenants with respect to termination of employment that are the subject of this lawsuit. In the first instance, Brady was precluded from entering into any employment discussions with any other collegiate or professional basketball program and from accepting a head coaching position with any program without the prior written consent of Marist.[84] In addition, if Brady's contract was ultimately terminated for any reason, including Brady accepting another coaching position pursuant to such written consent, Brady agreed to (1) return all basketball program records and files, (2) end any and all contact with Marist basketball program recruits, and (3) not offer a scholarship to current Marist basketball players nor any persons that he or his staff recruited to play basketball at Marist.[85] Marist alleges that Brady breached his contract and JMU tortiously interfered with the contractual rights of Marist.[86]

- On August 14, 2009, Brady filed an Answer and Notice of Removal to the United States District Court for the Southern District of New York.

- Marist filed a motion to remand the matter back to the Supreme Court,

[82] Martin J. Greenberg, *Take My Coach And Ill Take You To Court, Greenberg's Coaching Corner,* NAT'L. SPORTS LAW INST (JAN. 4, 2011), https://law.marquette.edu/national-sports-law-institute/take-my-coach-and-ill-take-you-court-january-4-2011.
[83] *See generally* Marist Coll. v. Brady, et. al, 2009-5006 (N.Y. Sup. 2009).
[84] Complaint, Marist Coll. v. Brady, et. al, No.:709CV7262 at ¶ 14 (S.D.N.Y. 2009).
[85] *Id.* at ¶ 15.
[86] *Marist Red Foxes vs. Matthew Brady and JMU,* JMU SPORTS BLOG (July 21, 2010), http://jmusportsblog.com/?p=1060.

Dutchess County.[87]

- The United States District Court remanded the matter back to the Supreme Court on December 28, 2009.[88]

- Marist is a private university located in Dutchess County, New York.[89] Brady was employed as the head basketball coach of Marist for four seasons between 2004 and 2008.[90]

- Marist alleges that under Brady's employment contract, which was set to expire on March 31, 2011, Brady was "precluded from entering into any employment discussions with any other collegiate or professional basketball program and further he was precluded from accepting a head coaching position with any program without the prior written consent of Marist."[91]

- “Marist further contends that JMU's Director of Athletics, Jeff Bourne, telephoned its Director of Athletics, Tim Murray, requesting specific information regarding any ‘buy out’ provision in Matt Brady's contract.”[92]

- Murray subsequently advised Bourne that Marist would permit Brady to terminate his employment as head basketball coach, provided that both he and JMU abided by the rest of the contract's provisions, including Brady's obligation to cease all contact with players being recruited by Marist.[93]

- In a letter dated April 10, 2008, Murray reiterated the school's position with regard to its potential recruits to his JMU counterpart by identifying 19 men's basketball players who had been actively recruited by Brady on behalf of Marist.[94]

- Marist alleges that with JMU's full knowledge and encouragement, Brady contacted Marist basketball recruits in order to entice them to join JMU's basketball program.[95]

- Marist also claims that JMU offered scholarships to four Marist basketball recruits previously identified in Murray's April 10, 2008 correspondence to

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[87] Marist Coll. v. Brady, et. al, 2009-5006 (N.Y. Sup. 2009). The following facts in FN 6-25 are taken directly from this Supreme Court decision.
[88] *Id.* at 2.
[89] *Id.* at 1.
[90] *Id.*
[91] *Id.*
[92] *Id.* at 2.
[93] *Id.*
[94] *Id.*
[95] *Id.*

Bourne. One of those scholarship recipients had already committed to play for Marist.[96]

- As such, Marist contends that JMU intentionally procured a breach of Brady's contractual obligations to Marist.[97]

SUPREME COURT RULING:

Marist moved for default judgment against the Commonwealth of Virginia (Commonwealth) and JMU and the Commonwealth and JMU moved for an order dismissing Marist's claims against them for lack of personal jurisdiction, lack of subject matter jurisdiction, failure to state a cause of action, and inconvenient forum.[98] In a decision dated June 30, 2010, Judge Charles D. Wood denied JMU's motion to dismiss. The Court indicated that

> The plaintiff has adequately articulated the elements for a claim of tortious interference with a contract. To establish a cause of action for tortious interference with a contract, the plaintiff must show: "the existence of a valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages" (White Plains Coat & Apron Co., Inc. v. Cintas Corp., 8NY3d 422, 426 [2007]; Lama Holding Co. v. Smith Barney, Inc., 88 NY2d 413, 424 [1996]. "Here, the plaintiff has met its burden. A valid, enforceable employment contract with Brady has been alleged. It has also been alleged that JMU, as an agency for the Commonwealth, knew of the existence of the contract. The complaint further claims that JMU's as agent for the Commonwealth, intentionally induced Brady to violate his fiduciary obligations under that contract. Lastly, the plaintiff alleges that it suffered damages as a result of the breach of those obligations.[99]

The Court also found that plaintiffs have also met their initial burden of pleading the elements of tortious interference with a fiduciary duty.[100] Under New York law,

> 'such a claim consists of three elements: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that the plaintiff suffered damages as a result of the breach' (Hannex Corp. v. GMI, Inc., 140F3d 194, 203 [2d Cir 1998] quoting S&K Sales Co. v. Nike,

[96] *Id.*
[97] *Id.*
[98] *Id.* at 2-3.
[99] *Id.* at 8.
[100] *Id.* at 9.

> Inc., 816 F2d 843, 847-848 [2d Cir 1987]. As discussed above, the allegations have been sufficiently pleaded to survive the defendants' motion (see generally Delaney v. City of Mount Vernon, 28 AD3d 416, 417 [2d Dept 2006]. Here, Marist has averred that JMU knowingly interfered with the contractual obligations and fiduciary duties owned by Brady to Marist under the New York contract. Allegedly, JMU's interference led Brady to steer students away from Marist and instead to JMU. Marist has asserted that JMU's alleged wrongful actions in causing Brady to breach his contractual obligations caused Marist to suffer financial harm.[101]

The Court ordered default judgment. "CPLR §3215 (a) provides that "when a defendant has failed to appear, plead or proceed to trial of an action reached, and called for trial…the plaintiff may seek a default judgment against him.[102] If the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default."[103] CPLR §3215 (f) "requires that an application for a default judgment file 'proof by affidavit made by the party of the facts constituting the claim'" (Woodson v. Mendon Leasing Corporation, 100 NY2d 62, 70 [2003]).[104] Moreover, the moving party must demonstrate that they have a viable cause of action (Resnick v. Lebovitz, 28AD3d 533 [2d Dept 2006])."[105]

The default judgment against JMU was overturned.[106]

SETTLEMENT AND JURY TRIAL:

The case was scheduled for a jury trial in May of 2012. In May of 2012 it was announced that Marist reached a settlement agreement with JMU relative to the Brady matter.[107]

> Under the terms of the settlement, JMU will pay Marist $100,000 after acknowledging that Marist's contract with Brady was violated when JMU hired Brady as its men's head basketball coach in 2008."[108] JMU hired Brady while he was in the first year of his new, four year contract with Marist College.[109] The settlement between JMU and Marist "resolves one piece of a lawsuit that Marist had hoped to avoid, and which was initiated only after the college's

[101] *Id.* at 9.
[102] *Id.* at 10.
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.* at 11.
[107] *Marist, JMU reach an agreement over Brady,* HUDSON VALLEY PRESS (May 2, 2012), http://www.hvpress.net/news/151/ARTICLE/11057/2012-05-02.html.
[108] *Id.*
[109] *Id.*

> efforts to resolve the matter amicably were rebuffed by both JMU and Brady.[110]

Coach Brady's contract with Marist required Brady to have “prior written permission" before he could discussion employment with any other colleges or professional teams.[111] In addition to the ban on employment discussions, “Brady could not accept any new job offers without first obtaining a written waiver from Marist college.”[112]

In agreeing to the settlement, JMU concedes that Brady did not obtain a written waiver from Marist college before discussing and accepting a job offer from JMU.[113] JMU President Linwood H. Rose said in a letter to Marist President Dr. Dennis J. Murray that ‘(H)ad I been made aware by Brady of the binding agreements and restrictions in his contract with Marist College, the (JMU) Athletics Director would have been instructed to require Matthew Brady to obtain a written release from all of the binding agreements and restrictions set out in Brady's contract with Marist prior to offering Brady the position of men's head basketball coach at JMU.’[114]

"Marist pursued this case against James Madison University because we thought that an important principle was at stake," said Murray. "We believe that contracts are binding on both individuals and on the organizations for which they work. JMU should have obtained a release from Marist before entering into discussions with Matt Brady. This settlement acknowledges that principle on behalf of both institutions."[115]

The case proceeded to a jury trial in May of 2012 in the New York Supreme Court for Dutchess County. The jury ultimately found that Brady had breached his contract with Marist by accepting the same position at JMU without Marist's permission.[116] Brady also breached the contract by recruiting players to JMU that he had previously recruited to attend Marist.[117] However, the jury awarded no damages.[118]

At the jury trial, Marist attempted to prove damages through an expert witness, James Markham, an economist at Brandeis University.[119] Marist alleged that

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[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] Dan, Fitzgerald, *Marist v. Brady: Lessons & Takeaways,* CT SPORTS LAW (May 15, 2012), http://ctsportslaw.com/2012/05/15/marist-v-brady-lessons-and-takeaways.
[117] *Id.*
[118] *Id.*
[119] Dan, Fitzgerald, Marist Outfoxes Ex-Coach but does not score damages, CT SPORTS LAW (June 21, 2012),http://ctsportslaw.com/2012/06/21/marist-outfoxes-ex-coach-but-does-not-score-damages.

Brady's breach of contract caused Marist $420,247 in damages, which included $83,498 from lost ticket sales, $188,899 for losses of 2008-2009 recruiting class, and $147,850 for the cost of hiring new assistant coaches.[120]

It was reported that Marist will not appeal the decision not to award money damages.[121] "Attorney Paul Sullivan sa[id] Marist sued to establish that a contract is binding on both the college and the coach."[122] Brady's lawyers, as well, indicated that they were satisfied with the verdict.[123]

LESSONS TO BE LEARNED FROM MARIST-BRADY

- Marist was an anomaly because today in most coaches' contracts the issue of early or premature termination and tortious interference is covered by a liquidated damage clause.[124]

- Marist is one of the first reported cases where one university sued another university for tortious interference with an existing contract.

- A prospective employer who is desirous of hiring a coach currently under a contract should, without exception, review that contract to ascertain whether any form of written or oral permission is required and what restrictions or prohibitions are contained in the contract, including recruiting restrictions.[125]

- The hiring university should require some form of contractual representation and warranty in the new coach's contract that clearly indicates that they are entering into a new contract with the prospective employer and it does not in any way violate any pre-existing agreement with an appropriate hold harmless and indemnification clause.

- The back end of the contract, the exit provisions, is as important as the front end of the contract, the compensation provisions.

- Marist put forth expert testimony relative to the damages that it has sustained in the Brady case as it relates to lost ticket sales, loss of recruiting class, and the cost involved in hiring new assistant coaches.[126]

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[120] *Id.*
[121] *Jury: JMU Coach Brady Breached Marist Contract,* WHSV (May 9, 2012), http://www.whsv.com/home/headlines/Jury_JMU_Coach_Brady_Breached_Marist_Contract__150810385.html.
[122] *Id.*
[123] *Id.*
[124] Dan Fitzgerald, *supra* note 38.
[125] *Id.*
[126] *Id.*

The jury found those proffered damages to be speculative.[127] Damages may be difficult to prove in these cases.

- There is an extreme difference between the negotiating powers of a top-paid coach and a second-tier coach. Coaches on a second-tier basis need to be aware of permission clauses and no recruitment clauses. At least in the Brady case, Marist was willing to enforce its contractual rights.

- It appears that Marist's main reason for commencing the lawsuit was Brady's activities relative to committed recruits and other players interested in Marist, which was specifically provided for in the contract -- not because Brady left -- and because JMU approved and encouraged Brady's behavior, i.e. Marist's no contract with recruits clause.[128] "I dread the day that a school can have any influence or where a kid is allowed to play because a coach spurned that school."[129]

- A university cannot legally prevent the movement of athletes to another college or university, nor can a university require student athletes to remain at that university. A no-recruit clause may be void on public policy grounds in that it interferes with educational opportunities for student athletes.

A special thank you to third year Marquette University Law School tudent Alyssa Curtis for her assistance in editing and footnoting of this article.

[127] *Id.*
[128] *The ruling in the Marist v. Matt Brady case may end up hurting recruits the most* BALLIN' IS A HABIT (July 20, 2010), http://www.ballinisahabit.net/2010/07/ruling-in-marist-v-matt-brady-case-may.html.
[129] *Id.*