I. Introduction

Contract law principles have remained relatively constant and stable for centuries, including fundamentals such as the implied duty of good faith when bargaining and freedom of contract generally.1 One of the fundamental principles in contract law is whether or not a promise made to another is legally enforceable in the first place.2 An unenforceable promise made to another, whether in the employment context or other transaction, is characterized as being a *nudum pactum*, often referred to as a non-binding, gratuitous or illusory promise that lacks the element of consideration to form

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2 See RESTATEMENT (SECOND) OF CONTRACTS §1 (1981) (“A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”); see also Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821, 823-24 (1997) (noting that traditionally speaking, the consideration element of a contract is what differentiates a legally binding agreement from a gift).
a contract. Put differently, there must be a “this for that” or *quid pro quo* between the promisor and the promisee.

On the other hand, once an enforceable promise has been established, thereby becoming the basis for an enforceable contract, it is generally not the role of courts to undo these agreements which are sometimes referred to as being sacred. This principle is characterized as *pacta sunt servanda*, translated as “agreements must be respected.” In fact, the sanctity of upholding a legally binding agreement is found in the U.S. Constitution itself. A contract is intended to represent the intent of the parties, to ultimately serve as a tangible, written vehicle to memorialize the parties’ mutual assent, and to define the boundaries and four-corners of the obligations and duties of the parties. It often times also addresses the

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5 DiMatteo, supra note 1, at 332 (citing the British Judge Sir George Jessel who advanced the principle of *freedom of contract* and who stated: “If there is one thing which more than another public policy requires, it is that men shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with freedom of contract.”).


7 U.S. Const. art. 1, §10, cl. 1 (“No State shall…pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts…”).

possible consequences of actions outside those agreed boundaries in the form of agreed-upon or liquidated damages.9

The competing legal doctrines of *nudum pactum* and *pacta sunt servanda* collided at the University of Minnesota (UM) beginning in 2007 when UM was in the process of forming a new basketball staff.10 The primary purpose of this article is to explore the 2012 legal decision that stemmed from an employment-related fiasco when Coach Orlando Henry “Tubby” Smith first formed his staff at UM and asked a coach from Oklahoma State University (OSU) to join him as an assistant coach.11 Smith’s offer, however, proved not to be a legally binding offer, at least according to the Minnesota Supreme Court, because Smith apparently did not have the authority to make the offer in the first place.12

To make matters worse, Jimmy Williams, the assistant coach who accepted Smith’s solicitation, was declared by the Minnesota Supreme Court majority to have been sophisticated enough to know that such offers of employment need bureaucratic approval before being relied upon at this level of college sports.13 After reading this decision, one must ponder the implications of this “sophisticated parties” test in employment offers at least as posed now in Minnesota.14

A study of the Minnesota Supreme Court decision 2012, *Williams v. Smith*, provides an excellent example for instructors particularly in the context of contract law, tort law and employment law. The case does not center upon whether or not an enforceable promise was made to Williams, but the decision focuses on tort law rather than contract law in its analysis. In fact, the court did not address whether or not a contract had been formed from the outset, whether the alleged offer (and subsequent reliance by

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10 Williams v. Smith, 820 N.W.2d 807, 809-10 (Minn. 2012) (hereinafter *Williams*). The authors note that the case involved complex, numerous and circuitous appeals and decisions, many of which are unpublished decisions, and they were ultimately consolidated into one case.

11 *Id.* at 810.

12 *Id.* at 822.

13 *Id.* at 819.

14 *Id.* at 817-18 (noting in footnote 4 that the Minnesota Court of Appeals had declined to recognize a claim of negligent misrepresentation in the context of private, sophisticated parties negotiating a commercial transaction at arm’s length, citing Smith v. Woodwind Homes, Inc., 605 N.W.2d 418, 424-25 (Minn. Ct. App. 2000)). Throughout the *Williams* decision, the words sophisticated parties and sophisticated business persons were apparently used interchangeably but never clearly defined in the decision.
Williams) constituted a breach of contract, or whether it even rose to the level of detrimental reliance, also known as promissory estoppel. This judicial decision focused instead on one issue only—negligent misrepresentation—the tort akin to fraudulent misrepresentation but without the intent to deceive. From the outset, the issue was isolated as to whether the court “…should extend the protection against negligent misrepresentation to prospective employees of the University of Minnesota…”

This article is divided into three parts. Part II addresses the tort of negligent misrepresentation and how several states approach this tort in the statutory employment context. This includes a brief discussion of the employment-at-will doctrine as relating to negligent misrepresentation in pre-employment offers. Part III explores the Williams case itself. Part IV explores examples of promises or offers made in the context of the intercollegiate sport landscape that have been similarly controversial. It includes a brief discussion of the criticism surrounding the National Letter of Intent (NLI) program.

The fundamental lessons learned from Williams are not new to professor or student. The case should demonstrate that what appears to be a promise of employment to one person could be considered merely a preliminary negotiation to another. At least in Minnesota, whether an offer or acceptance actually exists appears to depend upon the sophistication of the parties when certain types of individuals are involved. The definition of what constitutes sophistication and under what circumstance and context remains somewhat ambiguous, however.

II. EMPLOYMENT-AT-WILL AND NEGLIGENT MISREPRESENTATION

In preface to discussion of the Williams case, it is useful to review the fundamentals of the doctrine of employment-at-will and its relation to the tort

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15 Id. at 811 (offering that before the trial, the district court had granted Coach Smith’s motion to dismiss the contract and promissory estoppel claims and dismissed the athletic director, Joel Maturi, as a party to the litigation).

16 Id. at 819 (noting that Williams could have had a claim for intentional or fraudulent misrepresentations, but that there was no evidence in the record to suggest that there was fraud involved in the situation). This was not the first time that the basketball program was involved in national controversy. See, e.g., Frank J. Ferraro, When Athletics Engulfs Academics: Violations Committed by University of Minnesota Basketball, 1 DEPAUL J. SPORTS L. CONTEMP. PROBS. 13 (2003) (discussing the case of former University of Minnesota basketball coach Clem Haskins involving academic fraud which broke on the day before the 1999 NCAA Tournament).

17 Id. at 809 (noting that the University of Minnesota is also a “constitutional corporation and agency of the state.”).

of negligent misrepresentation in employment law cases. A discussion of its specific application in the Williams case appears later in this paper.

A large portion of employment law in the U.S. stems from a common law contractual, or more accurately, quasi-contractual basis known as employment-at-will. This legal doctrine establishes that generally speaking, an employment relationship can be established at any time and terminated at any time by either the employer or the employee, typically with cause or without cause, with or without notice (i.e. at-will). While much of the analysis focuses on breaches to already-established employment relationships, it is important to note that the doctrine also extends to the issue of offers for employment (hence offers to contract). Consequently, the tort of negligent misrepresentation (or, in some cases fraudulent misrepresentation) has often been a basis of a complaint that employment ties were wrongfully offered and unfulfilled, terminated or severed in violation of the law. Over time, both statutory rights and judicial interpretation of the

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19 See Alan Hyde, Labor Arbitration of Discrimination Claims After 14 Penn Plaza v. Pyett: Letting Discrimination Defendants Decide Whether Plaintiffs May Sue Them, 25 OHIO ST. J. ON DISP. RESOL. 975, 995-96 (2010) (noting that the state of Montana remains the only state that by statute does not recognize the doctrine of employment at will).


21 See Richard P. Perna, Deceitful Employers: Intentional Misrepresentation in Hiring and the Employment-at-Will Doctrine, 54 U. KAN. L. REV. 587, 611-15 (2006) (recognizing that some plaintiffs have attempted to recover for claims of “hiring fraud,” and some courts have concluded that relying on employer pre-hiring statements is always unreasonable when the employment in question is at will, citing McNierney v. McGraw-Hill, Inc., 919 F. Supp. 853, 861 (D. Md. 1995), which upheld the basics of the employment-at-will doctrine, emphasizing that the relationship was without a specified duration and could be terminated at the pleasure of either party at any time); see also Stephen A. Plass, Mandatory Arbitration as an Employer’s Contractual Prerogative: The Efficiency Challenge to Equal Employment Opportunity, 33 CARDOZO L. REV. 195 (2011) (noting that employees usually lose on the issue of a mandatory arbitration system as consideration for a contract even though promises may be illusory because the employment is at-will).

22 Perna, supra note 21, at 605 n. 72 (stating that statements concerning the relationship between the employment-at-will doctrine and the action for hiring fraud seem to apply equally to cases of intentional misrepresentation and citing RESTATEMENT (SECOND) OF TORTS § 552(1) (1977); see also James G. Fannon, The Public Policy Exception to the Employment at Will Doctrine: Searching for Clear Mandates in the Pennsylvania Constitution, 27 RUTGERS L.J. 927, 934-37 (1996) (offering that Pennsylvania has a harsh employment at will doctrine, and asserting wrongful discharge claims under the guise of fraud, estoppel, or negligent misrepresentation often fail); Grouse v. Group Health Plan, Inc., 306 N.W.2d 114 (Minn. 1981) (reversing and remanding a new trial as to whether or not there was reasonable reliance on a job offer for at-will employment by a Minnesota plaintiff who quit an existing job and declined to subsequently pursue other opportunities before discovering that the employer did not honor its original offer of employment). This case, however, focused on the plaintiff’s promissory-estoppel claim, a legal theory that the Williams court did not address, discussed further infra.
law have carved out exceptions (i.e. defenses) to the employment-at-will doctrine. These exceptions fall into three general categories involving those based in: (1) contract, (2) tort, and (3) public policy. In egregious situations, such as intentional violations of anti-discrimination statutes, punitive damages have been awarded to deter improper behavior by the defendant in employment-related cases.

State courts and legislatures have become very exacting in examining the applicability of the tort of negligent misrepresentation in contract and related employment cases, sometimes in the pre-employment stage itself. In 2004, the South Carolina legislature addressed express or implied employment contracts in a unique way statutorily, apparently to minimize uncertainty in employment-related cases, at least when an employee handbook is involved. Meanwhile, the South Carolina Supreme Court has

23 MILLER & JENTZ, supra note 20, at 515-16. See also Susan R. Dana, South Dakota Employment at Will Doctrine: Twenty Years of Judicial Erosion, 49 S.D. L. REV. 47, 47-50 (2003) (discussing briefly the history of the employment at will doctrine in the United States and its continued presence despite judicial exceptions and statutory modifications with subsequent emphasis and discussion on South Dakota jurisprudence).

24 See generally Andrea Bough, Punitive Damages in the Title VII Employment Discrimination Cases: Redefining the “Standard,” 69 UMKC L. REV. 381 (2000) (noting that prior to the U.S. Supreme Court decision in Kolstad v. Am. Dental Assoc., 527 U.S. 526 (1999), the standards for awarding punitive damages under Title VII were in disarray); see also Andrea Meryl Kirshenbaum, Kolstad v. American Dental Ass’n: The Opportunity for Punitive Damages in Employment Discrimination Cases, 3 U. PA. J. LAB. & EMP. L. 617 (2001) (mentioning that the Civil Rights Act of 1991 (enables victims of employment discrimination who bring claims under either Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act of 1990 to receive compensatory and punitive damages). But see, e.g., Branch v. Homefed Bank, 8 Cal. Rptr. 2d 182, 186 (Ct. App. 1992) (reversing the trial court’s award to employee for damages for intentional infliction of emotional distress on the grounds that appellant bank’s misrepresentation was negligent, not intentional, and stating, “an employee incurring neither physical impact nor physical damage, and whose loss (other than emotional distress) is solely economic, is entitled neither to punitive damages nor to a recovery for emotional distress.” The employee accepted employment with the bank based on oral financial incentives which were never honored by the bank, and the appellate court reversed the jury’s decision holding that under CAL. CIV. PROC. CODE §3333, damages for emotional distress were not recoverable).


26 See S.C. CODE § 41-1-110 (2012) (“It is the public policy of this State that a handbook, personnel manual, policy, procedure, or other document issued by an employer or its agent after June 30, 2004, shall not create an express or implied contract of employment if it is conspicuously disclaimed. For purposes of this section, a disclaimer in a handbook or personnel manual must be in underlined capital letters on the first page of the document and signed by the employee. For all other documents referenced in this section, the disclaimer must be in underlined capital letters on the first page of the document. Whether or not a disclaimer is conspicuous is a question of law.”).
utilized a six-part test in order to establish liability for negligent misrepresentation.\(^{27}\) A plaintiff must show that the defendant:

1. made a false representation to the plaintiff;
2. had a pecuniary interest in making the representation;
3. owed a duty of care to see that he communicated truthful information to the plaintiff;
4. breached that duty by failing to exercise due care;
5. that the plaintiff justifiably relied on the representation; and
6. that the plaintiff suffered a pecuniary loss as the proximate result of the reliance upon the representation.\(^{28}\)

Evidence of a mere broken promise is not sufficient to prove actionable as negligent misrepresentation.\(^{29}\) With regard to this tort, South Carolina’s test is typical of that used in other states and even north of the Minnesota border, in Canada.\(^{30}\)

A key case involving pre-employment negotiations has emanated from the State of Maryland. In *Griesi v. Atlantic General Hospital Corp.*, the Maryland Court of Appeals held that a *prima facie* case of negligent misrepresentation was present when an applicant for a management position was given misrepresented material facts by the hospital’s CEO during pre-employment negotiations.\(^{31}\) Here, plaintiff Griesi was made a job offer by the hospital CEO only to discover after acceptance that the CEO had not


\(^{28}\) *Id*.

\(^{29}\) *Id.* (citing Winburn v. Ins. Co. of N. Am., 339 S.E. 2d. 142, 147 (S.C. Ct. App., 1985)).

\(^{30}\) *See*, e.g., Ross v. Kirner, 172 P.3d 701, 704 (Wash. 2007) (noting that in Washington state, a plaintiff claiming negligent misrepresentation must prove by clear, cogent, and convincing evidence that (1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages); *see also* Queen v. Cognos, Inc., 1 S.C.R. 87 (1993) (acknowledging that the tort of negligent misrepresentation is well-established in Canadian tort law and that there are five general requirements for a successful claim: (1) there must be a duty of care based on a “special relationship” between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making the misrepresentation; (4) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted), available at http://www.canlii.org/en/ca/scc/doc/1993/1993canlii146/1993canlii146.html (last visited May 7, 2013).

cleared the hiring with hospital authorities. The plaintiff was not hired and in the process had lost other job offers that were pending. The court, citing precedent, held that the hospital owed the job applicant a duty of care in part due to the bond between the parties during the pre-employment negotiations.

The state of California has specific language in its Labor Code that governs misrepresentation in the potential employment relationship. More specifically, California prohibits misrepresentation in employment that is used to induce an employee to move to another location (an issue in the Williams case), although the misrepresentations must be knowingly false according to the statute. While originally enacted as a protection for agricultural employees, it has become applicable to all employment in that state. Fraudulent deceit is further canonized in California’s Civil Code (as opposed to its Labor Code) that could apply to employment situations as the case may be. Again, however, in California it appears that this applies when an employer willfully makes a misrepresentation.

32 Id. at 551-52.
33 Id. at 556.
34 Id. at 555 (citing Weisman v. Connors, 540 A.2d 783, 793 (Md. Ct. App. 1988)).
35 See CA. LAB. CODE §970 (2013) (“No person, or agent or officer thereof, directly or indirectly, shall influence, persuade, or engage any person to change from one place to another in this State or from any place outside to any place within the State, or from any place within the State to any place outside, for the purpose of working in any branch of labor, through or by means of knowingly false representations, whether spoken, written, or advertised in printed form, concerning either: (a) The kind, character, or existence of such work; (b) The length of time such work will last, or the compensation therefor; (c) The sanitary or housing conditions relating to or surrounding the work; (d) The existence or nonexistence of any strike, lockout, or other labor dispute affecting it and pending between the proposed employer and the persons then or last engaged in the performance of the labor for which the employee is sought.”).
36 Id.
38 See CA. CIV. CODE §1710 (2013) (“§ 1710. A deceit, within the meaning of the last section [1709], is either: 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; 2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true; 3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or, 4. A promise, made without any intention of performing it.”).
39 Id.; see also CA. CIV. CODE §1709 (2013) (“Fraudulent deceit. One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.”).
III. THE CASE OF WILLIAMS V. SMITH

James R. (Jimmy) Williams was an assistant basketball coach at OSU. In 2007, newly hired Golden Gophers coach Orlando “Tubby” Smith telephoned Williams in April of that year shortly after Smith began as head basketball coach at UM. Smith offered Williams the job at a salary of $175,000 plus $25,000 in summer basketball camp money. Williams, in good faith reliance upon the discussion’s verbal offer, resigned from OSU shortly thereafter and put his house up for sale. According to the case, the rush to resign and sell the house was so Williams could start recruiting prospective student-athletes for UM.

Key to the case, however, was that Smith apparently also telephoned Williams prior to submitting his resignation telling him that UM athletic director Joel Maturi had final authority to approve of the offer first. After the offer was made over the telephone to Williams, athletic director Joel Maturi decided against the decision to hire Williams even though a written Memorandum of Agreement had been prepared. Maturi discovered that Williams had been connected with NCAA recruiting violations decades before at UM when Williams had worked there as an assistant coach from 1971 to 1986. As a result, Williams had resigned from OSU but was not officially offered the job at UM by Maturi. Williams filed one lawsuit against both the Board of Regents of the University of Minnesota and Maturi, and he filed a second lawsuit against Coach Smith alone. Coach Smith, however, apparently told Williams that the decision to hire Williams was subject to Maturi’s prior approval.

40 Williams, 820 N.W.2d at 810.
41 Id.
42 Id. at 823.
43 Id. at 810.
44 Id. at 810, 824.
45 Id. at 810-11.
46 Id. at 810.
47 Id. at 811 (noting that given the University’s history of NCAA rules violations in the men’s basketball program, Maturi was concerned about maintaining a clean program and the potential media reaction if Williams returned).
48 Id.
49 Id. The lawsuit against the Board of Regents of the University of Minnesota and Maturi asserted common law breach of contract, negligent misrepresentation, and estoppel claims (among others), and constitutional claims under 42 U.S.C. §1983. The lawsuit against Coach Smith asserted claims for fraud, negligent misrepresentation, interference with contract, and promissory estoppel.
50 Id. This lead to a chaotic 48-72 hours in which Williams offered his resignation to his current coach at the time, Sean Sutton, and Williams contacted his real estate agent to put his house on the market as well.
A. Minnesota Trial and Appellate Courts

An eight-day jury trial ended with a Hennepin County District Court jury verdict against Tubby Smith and UM for offering the assistant coaching job to the Williams and then withdrawing the offer. The jury awarded $1,247,293 in damages to Williams. At first glance, this would appear to be a classic case involving breach of contract or promissory estoppel, the legal theory involving a promise by one and reasonable and detrimental reliance on the promise by the other. However, neither of these legal theories made it to the jury even though Williams’ suit originally asserted them within numerous other legal theories and claims. Other claims included breach of contract, interference with contract estoppel and equitable estoppel, defamation, violation of 42 U.S.C. §1983 (civil action for deprivation of rights), and negligent misrepresentation.

The trial court threw out all the other claims on the basis that UM employment decisions, according to Minnesota statutes, may only be reviewed by certiorari by Minnesota’s Court of Appeals within 60 days. The trial court dismissed §1983 civil rights claims stating that they lacked merit. Additionally, in 2009 the court held that Maturi could not be sued because he was entitled to qualified immunity based upon his employment with UM.

The Court of Appeals affirmed the district court’s dismissal of the common law, estoppel, and §1983 claims, but reversed as to the negligent

52 Williams, 820 N.W.2d at 812. The district court reduced the award pursuant to MINN. STAT. § 3.736, subd. 4(e) (2010) because Smith was acting within the scope of his employment at the time he made the misrepresentations.
53 Id. at 811.
54 Id.
55 Id.
56 Id. at 813, citing MINN. STAT. § 606.01 (2010) (“No writ of certiorari shall be issued, to correct any proceeding, unless such writ shall be issued within 60 days after the party applying for such writ shall have received due notice of the proceeding sought to be reviewed thereby. The party shall apply to the Court of Appeals for the writ.”).
57 Id. at 811. For further analysis, one might consider that UM could have also asserted 11th Amendment sovereign immunity from suit in Federal court had the case attempted to remove the case to federal jurisdiction, in accordance with U.S. CONST. amend. XI. See, e.g., Kelly Knivila, Public Universities and the Eleventh Amendment, 78 GEO. L.J. 1723 (1990).
58 Williams v. Bd. of Regents of Univ. of Minn. (Williams I), 763 N.W.2d 646, 654-55 (Minn. Ct. App. 2009).
misrepresentation claim.\textsuperscript{59} The case was then remanded to the district court for trial solely on the negligent misrepresentation claim.\textsuperscript{60} Coach Smith, then, remained the sole defendant as the case proceeded, anew, and only one claim survived: that being the tort of negligent misrepresentation.\textsuperscript{61} Even though the jury originally found in favor of Williams and awarded $1.2 million, the state of Minnesota maintains a statutory cap on such damages at $1 million.\textsuperscript{62} The verdict was reduced accordingly and upheld by the Minnesota Court of Appeals in 2011.\textsuperscript{63}

B. Minnesota Supreme Court

The case was next further appealed to Minnesota’s high court and after five years of circuitous litigation the Supreme Court of Minnesota on August 8, 2012 reversed the decision of the jury, also holding in favor of Coach Smith on the negligent misrepresentation claim.\textsuperscript{64} The Minnesota Supreme Court considered the questions of (1) whether a duty of care exists in arm’s length negotiations between a prospective employer and a prospective employee, and (2) whether a person negotiating a contract with a government representative is conclusively presumed to know the extent of the authority of that representative.\textsuperscript{65} The result was that the Williams case somewhat clarified and narrowed the scope of the tort of negligent misrepresentation in Minnesota. UM prevailed in a 3-2 decision, in which Hon. Christopher J. Dietzen wrote the opinion for the majority.\textsuperscript{66}

Before the case was heard by the Minnesota Supreme Court, however, four of the seven justices recused themselves due to perceived ties to the University of Minnesota, thereby exhibiting potential bias.\textsuperscript{67} When UM is

\textsuperscript{59} Id.
\textsuperscript{60} Williams, 820 N.W.2d at 811.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id. at 812.
\textsuperscript{64} Id. at 822.
\textsuperscript{65} Id. at 812.
\textsuperscript{66} Id. at 811.
\textsuperscript{67} See Katherine Lymn, The University of Minnesota and the Supreme Court: Too Close for Comfort?, (Apr. 10, 2012), http://www.mndaily.com/2012/04/10/university-minnesota-and-supreme-court-too-close-comfort (noting that both Williams v. Smith and Tatro v. Univ. of Minn., both argued before the Minnesota Supreme Court in 2012, have presented potential bias challenges resulting in recusal); see also Abby Simons, Are Judges’ Ties to the U of M the Ones that Bind?, STAR TRIBUNE (Feb. 19, 2012), http://www.startribune.com/local/139656503.html?refer=y (referencing the Williams and Tatro cases and noting that according to Minnesota statutes, Supreme Court justices may disqualify themselves from any case although they are not required to give an explanation). The four justices who recused were Lori Gildea (C.J.), Paul H. Anderson, Alan Page and David Stras. This proves to be a common problem in cases against a state entity where the
involved, many judges in the state’s judicial system have either attended, taught, contributed financially or sat on committees related to the university, including serving as a former university lawyer or sitting on the Board of Regents for UM. This has presented challenges to avoid the appearance of bias between the litigants when the university is involved. It also raises questions of the ability of litigants against a state university to have the same complete due process as other cases before the high court. The issue of conflicts of interest involving the Minnesota Supreme Court rose to the level of controversial national discussion as demonstrated by Williams and another Minnesota case the same year, 2012.

1. Majority Opinion

The majority opinion (Dietzen) empathized with assistant coach Williams. The court stated,

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...Without it, liability cannot attach.

The court justified its reversal of the lower court, however, by stating that when a governmental employment relationship is negotiated at arm’s length between sophisticated business persons, the prospective employee is not entitled to protection against the negligent misrepresentations made by the government-employer’s representative, in this case Coach Smith. The majority decision agreed and opined that unlike the other aspects of the lawsuit, the tort of negligent misrepresentation was not automatically barred and the court did have subject-matter jurisdiction over this claim. Still, it

justices themselves are product of the state university in question. It certainly raises the issue of due process for litigants against the state university.

68 See Lymn, supra note 67.
69 Id.
70 Id.
71 Williams, 820 N.W.2d at 816.
72 Id. at 809.
73 Id. at 814. The court concluded that a tort claim, such as for negligent misrepresentation, is “separate and distinct” from the government agency’s employment decision, and therefore was not subject to certiorari review.
held that Smith did not owe Williams a duty of care during the contract negotiations.74

In refusing to recognize a duty of care, the court specifically mentioned three things: (1) that the potential employment relationship between coaches Smith and Williams was not a professional, fiduciary, or special legal relationship in which one party had superior knowledge or expertise;75 (2) that the nature of the relationship between Smith and Williams did not support recognizing a duty of care, especially in light of the fact that both men were sophisticated business people with decades of experiences with hiring practices of universities who were negotiating at arm’s length and watching out for their own interests;76 and (3) public policy did not warrant imposing a duty of care.77

2. Minority Opinion

The dissenting opinion was authored by Hon. Helen M. Meyer, and her opinion expressed disagreement with the majority’s analysis stating that they ignored Minnesota case law in their analysis.78 Meyer wrote, “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.”79 Justice Meyer continued, “…the failure to use due care had enormous consequences for Williams, who suffered losses exceeding $1 million in reasonably relying on Smith’s false

74 Id. at 822 (opining, also, “Our conclusion that no duty of care was owed makes it unnecessary to address the issue of Williams’ reliance.”); see also MacDonald v. Thomas M. Cooley Law Sch., 880 F. Supp. 2d 785, 799 (W.D. Mich. 2012) (noting that plaintiffs could not legitimately state a claim for negligent misrepresentation because employment statistics provided by the law school were vague, incomplete, essentially meaningless and therefore could not reasonably be relied upon, citing precedent that, “A claim for negligent misrepresentation requires plaintiff to prove that a party justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care.”).
75 Id. at 818.
76 Id. at 819 (noting that Williams had successfully negotiated coaching contracts with elite institutions in the past including UM, OSU, The University of Tulsa, San Diego State University, the University of Nebraska, the University of Louisiana--Lafayette, and the NBA’s Minnesota Timberwolves. The court noted that Williams’ contract with OSU was in writing).
77 Id. at 819.
78 Id. at 822.
79 Id. at 823-24.
representation that he had final authority to hire assistant coaches.”

Meyer felt that the jury verdict should have been upheld.

**IV. USING WILLIAMS TO TEACH THE LAW OF NEGLIGENT MISREPRESENTATION**

The Minnesota Supreme Court concluded that Williams’ claim of negligent misrepresentation was not subject to certiorari review because it is separate and distinct from the University’s decision not to hire him. The Williams decision referenced the Restatement (Second) of Torts: § 552 for negligent misrepresentation five times. According to the Restatement § 552, “Information Negligently Supplied for the Guidance of Others”:

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

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons

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80 *Id.* at 824-25.

81 *Id.* at 825-26. Meyer also noted that as a matter of public policy in Minnesota, the government has a duty to use due care in supplying factual information that is not otherwise accessible to the public.

82 *Id.* at 814 citing MINN. STAT. ch. 606 (2010). Nonetheless, the Supreme Court did not rule in Williams’ favor.

83 Fraudulent misrepresentation, according to the *RESTATEMENT (2ND) OF TORTS*, is found in § 531: “One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced.”
for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.\textsuperscript{84}

The \textit{Williams} case allows the professor and student to explore the role of the Restatement of Torts in general as a secondary source of American law.\textsuperscript{85}

Similar to the Restatement (Second) of Torts, the court noted that for negligent misrepresentation in Minnesota one must prove:

1. A duty of care owed by defendant to plaintiff;
2. False information supplied by defendant to plaintiff;
3. Justifiable reliance upon the information by plaintiff; and
4. Failure by defendant to exercise reasonable care in communicating the information.\textsuperscript{86}

However, in Minnesota, the tort of negligent misrepresentation has only been applied to professional relationships such as accountant-client; attorney-client; directors of corporations; guardians and executors.\textsuperscript{87} The court declined to adopt a negligent misrepresentation claim “in all contexts.”\textsuperscript{88} The court also noted that it extended such a duty in special legal relationships in which one party has superior knowledge or expertise.\textsuperscript{89} In sum, the court concluded that the legal relationship between Williams and Smith was not the type of relationship entitled to legal protection, and therefore no duty of care against negligent misrepresentation was owed.\textsuperscript{90}

\section*{A. Questions and Concerns}

As demonstrated by \textit{Williams}, the duality of a state institution acting as an enterprise in one context (intercollegiate sports) and as an arm of the state in another has presented a conundrum.\textsuperscript{91} Arguably, this duality has led to effectively a two-tiered system of justice depending on the context in which,

\begin{itemize}
\item \textsuperscript{84} \textsc{Restatement (Second) of Torts} § 552 (1977).
\item \textsuperscript{86} \textit{Williams}, 820 N.W.2d at 815-16.
\item \textsuperscript{87} \textit{Id.} at 816.
\item \textsuperscript{88} \textit{Id.} at 816-17 (citing Smith v. Brutger Cos., 569 N.W.2d 408, 414 n.4 (Minn. 1997)).
\item \textsuperscript{89} \textit{Williams}, 820 N.W.2d at 816 citing M.H. v. Caritas Family Servs., 488 N.W.2d 282, 288 (Minn. 1992) (concluding that adoption agency with superior factual knowledge regarding health and genetic history of a child’s birth parents owed a duty to adoptive parents who sought information on that history).
\item \textsuperscript{90} \textit{Id.} at 818.
\item \textsuperscript{91} See Lymn, \textit{supra} note 67 (discussing bias issues among the courts in Minnesota).
\end{itemize}
in this case, a university might seek to cloak its operations. On the one hand, a state university seeks to use all the various devices of contract to run its NCAA sports program as a for-profit enterprise. Yet, when challenged for violating fundamental business or legal principles, the state entity could seek to cloak itself in the mantle of an “arm of the state” and invoke state sovereign immunity.92 The government might seek immunity based upon the Eleventh Amendment.93

After reading Williams, professors and students alike should ask numerous questions. For example, would this case have been decided differently if it were a private business rather than an enterprise housed within the State of Minnesota’s flagship university? Since courts depend upon funding from the state legislature, and four of the seven justices recused themselves due to conflicts related to being graduates of the flagship state university, could politics have been involved to protect UM’s basketball program rather than make a decision under the rule of law? What implications to due process are presented when the majority of a state’s supreme court justices cannot sit in judgment regarding an issue involving a state university? Might the decision have a future impact on negotiations between the UM athletic department and other coaches by indirectly encouraging bad faith during negotiations under the pretext of color of state law? Or, does such a decision portend the need for excessive documentation and stipulations in negotiating with Minnesota entities, not found elsewhere, posing a chilling effect on Minnesota’s professional recruitment efforts?

After this decision, it appears that college coaches are presumed to be sophisticated business people in Minnesota. However, does that apply to all sports or just revenue sports such as football and men’s basketball? What if promises are made to a prospective student-athlete, but the player becomes injured, loses skills, is beaten out by another player or is hindered by the lack of academic performance? What about offers made in the age of Facebook, Twitter, and text messages? Might coaches be deterred from accepting offers from UM, at least until the offer is memorialized in writing?

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93 Id. at 164 (referencing U.S. CONST. amend. XI., “[t]he Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . .”); see also Henry Lowenstein, Two Faces of State University Employment: Ethics in Access to Federal Due Process, 11 ETHICS AND BEHAVIOR J. 39-53 (2001).
This Minnesota decision further poses serious issues from the perspective of the law of unintended consequences. Though the Williams case dealt directly with UM, it has now established precedent that could be applied to other entities both public and private and in a variety of settings. It remains unclear who are considered sophisticated parties under Williams. Honeywell Corporation, one of the largest engineering firms in the world, is based in Minnesota. Would the same standard of sophistication apply to a similar pre-employment job offer made by the company to an engineer with a Ph.D.? Would a verbal offer to a world-class physician or biomedical Ph.D. incur the same legal standard of sophistication involving the Mayo Clinic?94

B. Epilogue and Lessons

Coach Williams was jobless after athletic director Maturi declined to support his hiring.95 Williams subsequently began to train players by himself, joining later the John Lucas basketball camp in Houston, Texas.96 Williams eventually took a position as an assistant coach at another UM: the University of Memphis in 2011.97 Maturi retired as athletic director on June 30, 2012.98 Meanwhile, in 2013 after a successful season at UM, head basketball coach Smith was terminated from his own employment contract after six seasons.99 Though he led the Gophers to the 2013 NCAA’s March Madness basketball tournament, he was removed from his coaching position after the Round of 32 defeat to the University of Florida.100 Many were shocked at the decision to end his employment with UM, and the reason for Smith’s termination remained dubious, though he was hired by Texas Teach University within a week.101

94 One could also ponder whether a sophisticated parties test could now become an exception to the parol evidence rule in contract disputes in Minnesota. See, e.g., David G. Epstein, Melinda Arbuckle & Kelly Flanagan, Contract Law’s Two “P.E.’s”: Promissory Estoppel and the Parol Evidence Rule, 62 BAYLOR L. REV. 397 (2010) (discussing whether the parol evidence rule should apply to promissory estoppel cases).
97 See ESPN.com News Services, supra note 99.
UM immediately replaced Smith with thirty-year-old coach Richard Pitino, head coach at Florida International University and the son of 2013 national champion University of Louisville basketball coach Rick Pitino. UM’s contract with Pitino-the-younger has a specific “hiring authority” contract clause in his contract which appears to address the hiring debacle of his predecessor and to avoid this situation again. No doubt, the Williams case had an impact on UM, establishing this more detailed contract language:

1.6. Hiring Authority. Coach understands and acknowledges that he will not have authority to unilaterally make or accept offers of employment for assistant coaches or other support staff; and that ultimate authority over such hiring decisions rests with the Director. Coach further understands and acknowledges that all Men’s Basketball program hires, including Coach’s hire, are subject to and contingent upon a review of the applicant’s background and experience, including any history of NCAA violations, to be conducted by the Director and/or his designee(s). Coach agrees not to make any representation to potential hires, applicants, or anyone else that is contrary to the provisions of this paragraph.

The Williams case is a reminder that when negotiating a contract, an individual should not resign one’s current position or give up other job opportunities until an offer is received in writing from the person who has the hiring authority. One might ask the prospective employer who actually has the authority to make the offer, though that seems a bit unrealistic in most employment situations. The case certainly suggests a greater duty of due diligence upon the offeree.

Still, as the dissent stated, “Williams never asked whether Smith had the authority to hire; he simply assumed that authority existed.” As aforementioned, in Minnesota at least, college coaches appear to be imputed

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103 See Marcus R. Fuller, Gophers Basketball Contracts: Richard Pitino vs. Tubby Smith, TWINCITIES.COM (Apr. 5, 2013), http://www.twincities.com/sports/ci_22966655/gophers-basketball-contracts-richard-pitino-vs-tubby-smith (stating that athletic director Norwood Teague included a “hiring authority” clause in Pitino’s contract which states that Pitino does not have authority to “unilaterally” offer jobs and hire assistants or other staff members). For further inquiry into interesting clauses in sports in general, see Epstein, supra note 6.  
105 Williams, 820 N.W.2d at 825.
with sophisticated, educated negotiating skills after this decision, and the likelihood of success on a claim of the tort of negligent misrepresentation in the pre-employment stage appears slim, especially in the context of government jobs. This does not include intentional or fraudulent misrepresentation, however. 106

V. ADDITIONAL SPORT-RELATED EXAMPLES INVOLVING MISREPRESENTATION ALLEGATIONS

The Williams case appeared to be, at first, a fundamental case involving promissory estoppel and breach of contract. However, after years of litigation it morphed into merely a negligent misrepresentation case alone. Whether one concurs with the rationale of the Minnesota Supreme Court or believes that that jury made the right call, this decision can be used as an excellent teaching case.

Given that the decision involved a high-profile college sports program, one of the ways to teach the tort of negligent misrepresentation in the law-related course is to use this case coupled with a few other sports law examples in the college sports environment. 107 Examples of claims of negligent misrepresentation, for example, have appeared in intercollegiate athletics to the point where they have been characterized as rampant when it comes to promises made by college coaches to prospective student-athletes. 108

For example, Katherine Sulentic stated in a 2009 law review article, “Some would also suggest that gone are the days of the honest football coach.” 109 She continues by noting that “What is noticeably absent in the NCAA regulations or anywhere else are restrictions on what a college football coach can say to a prospective student athlete during the recruiting process to entice them to commit.” 110 Sulentic notes that former Ohio State University football coach Jim Tressel apparently told 2008 recruit quarterback Terrelle Pryor that Ohio State would change its entire offense from the I-formation to the spread, just for him. 111 She also notes that there are times when it could be extraordinarily difficult to prove that a football

106 Id. at 819 n. 5 (citing Hoyt Props., Inc. v. Prod. Res. Grp., L.L.C., 736 N.W.2d 313, 318 (Minn. 2007)).
108 Id. at 149.
109 Id. at 128.
110 Id. at 130.
111 Id. at 136.
coach had the required *scienter* to prove intentional or fraudulent misrepresentation.\(^\text{112}\)

The following three brief examples illustrate the point and could be utilized by the instructor for further research assignments related to promissory estoppel, breach of contract and negligent (and possibly fraudulent) misrepresentation in the context of intercollegiate sport.

**A. The Case of Bryan Fortay**

In 1993, New Jersey high school quarterback Brian Fortay alleged there existed in 1991 an oral contract between himself and former University of Miami head football coach Dennis Erickson in which Erickson orally promised to give Fortay the starting quarterback position if he signed a football scholarship.\(^\text{113}\) Fortay claimed that the “representations by Miami athletic officials were the principal reasons he matriculated to the institution.”\(^\text{114}\) Further, Fortay stated that he was told he would be the starting quarterback at Miami and the team would be built around him.\(^\text{115}\) Gino Torretta, however, was named the starting quarterback and, in fact, won the Heisman Trophy in 1992.\(^\text{116}\) Fortay transferred to Rutgers University and eventually the case was settled out of court, but it was not without controversy and gained significant national attention with regard to promises made to recruits.\(^\text{117}\)

**B. Hendricks v. Clemson University**

In a South Carolina Supreme Court decision, college baseball player R.J. Hendricks, II, sued Clemson University for breach of contract for failure to maintain his athletic eligibility after transferring from a smaller state of Florida school, St. Leo University.\(^\text{118}\) On March 17, 2003, the Supreme

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\(^{112}\) *Id.* at 157. Sulentic also notes Kleinknecht v. Gettysburg College, 989 F.2d 1360, 1367-69 (3d Cir. 1993) in which the Third Circuit does reference the duty of care between a student-athlete and university as a special relationship.


\(^{114}\) Sulentic, *supra* note 107, at 142-43.


\(^{116}\) *Id.* at 231-32.

\(^{117}\) Sulentic, *supra* note 107, at 142-43; *see also* Kingsbury, *supra* note 113 (questioning whether Bryan Fortay’s lawsuit was merely a matter of sour grapes and noting further that Jimmy Johnson was the outgoing coach as Dennis Erickson was coming in); *see also* Rick Reilly, *See You in Court*, SI VAULT (Aug. 30, 1993), http://sportsillustrated.cnn.com/vault/article/magazine/MAG1138039/index.htm.

\(^{118}\) Hendricks v. Clemson Univ., 578 S.E.2d 711 (S.C. 2003).
Court of South Carolina reversed the Court of Appeals and declined to recognize the relationship between an academic advisor at Clemson University and a student-athlete as a fiduciary relationship. Hendricks claimed that Clemson University owed him a duty of care when it came to advising him regarding compliance with NCAA eligibility standards. However, he did not prevail in his claim.

Hendricks relied upon his academic advisor at Clemson to ensure that he had earned enough credits to be eligible to play. The advisor made an error, however, and Hendricks was declared ineligible. This decision reflected a denial of a claim of fiduciary duty between academic advisors and negligence with regard to student-athlete eligibility or otherwise when it comes to academic advisement. The court stated, “We believe recognizing a duty flowing from advisors to students is not required by any precedent and would be unwise, considering the great potential for embroiling schools in litigation that such recognition would create.” In light of Williams, decided a decade later, one wonders post-Williams whether the court would have characterized either the student-athlete (Hendricks) or Clemson’s academic advisor as being sophisticated.

C. National Letter of Intent Program

Each February, talented high school football seniors participate in National Signing Day, a national event in which football players pick which university they will attend by signing a contract under the auspices of the National Letter of Intent (NLI) scholarship program. The NLI itself is a one-year contract which binds the future student-athlete to the school (and

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119 Id. at 458-60.
120 Id.
121 Id.
122 Id. at 453-54.
123 Id.
124 Id. at 459 (“Historically, this Court has reserved imposition of fiduciary duties to legal or business settings, often in which one person entrusts money to another, such as with lawyers, brokers, corporate directors, and corporate promoters. We decline to recognize the relationship between advisor and student as a fiduciary one.”). The authors note that Hendricks decision only mentioned the phrase negligent misrepresentation once and it was in the context of the California case Brown v. Compton Unified Sch. Dist., 80 Cal. Rptr. 2d. 171, 172 (Cal. App. 1998). The Hendricks court recognized that claims have consistently failed with regard to the supposed tort of “educational malpractice” which, in this case, a student sued his school for negligently advising him on which classes to take thereby losing his eligibility to play basketball (i.e. his athletic scholarship) at the University of Southern California.
125 Id. at 458.
vice-versa) in the form of an athletic scholarship also known as a grant-in-aid.\textsuperscript{127} In recent years, however, the program has become the subject of extreme scrutiny.\textsuperscript{128} For example, it is not out of the ordinary to have signed the NLI with the school of their choice only to have the coach that recruited them leave within moments after signing day.\textsuperscript{129}

Academicians have become increasingly uncomfortable with the language of the NLI.\textsuperscript{130} Paragraph 11 of the 2012-13 NLI states:

11. Coaching Changes: I understand I have signed this NLI with the institution and not for a particular sport or coach. If a coach leaves the institution or the sports program (e.g., not retained, resigns), I remain bound by the provisions of this NLI. I understand it is not uncommon for a coach to leave his or her coaching position.\textsuperscript{131}

Whether characterized as unfair, unconscionable or a contract of adhesion, the NLI program continues today. However, Warren K. Zola, the Assistant Dean for Graduate Programs in the Carroll School of Management at Boston College, recommends that there be an addendum added to the NLI that reads, in part:

If there is a coaching change that occurs within one calendar year of the execution of this contract, paragraph 11 is no longer valid, and, so long as I’m in good academic standing, I have the ability to transfer to another institution without losing a year of collegiate eligibility.\textsuperscript{132}


\textsuperscript{128} Id.


\textsuperscript{132} Zola, \textit{supra} note 126.
Thus, in general, a concern is that whether negligent or fraudulent, the recruiting process for high school athletic talent on the college sports landscape could be balanced a bit more toward the prospective student-athlete rather than coaches making unenforceable promises regardless of their intent or circumstances. Students and professors might analyze the NLI in a sports law, business law or contract-related course and provide their suggestions for improvement.133

In sum, the case of Brian Fortay demonstrated that coaches could be sued for what they say in the recruiting process. The Hendricks case demonstrated that reliance on statements or skills made by academic advisors might not rise to the level of a legal or fiduciary duty, at least in South Carolina. Finally, the NLI demonstrates by contract how promises (intentional or negligent) made during the recruiting process might be irrelevant if the prospective student-athlete relies on the statements made by coaches because the NLI dictates that a player signs with a school, not a coach.134

VI. CONCLUSION

In 2012, the course of the case against the University of Minnesota came to an end. The impact of the Williams case remains to be seen, but at least with UM it appears that the issue of who actually has the authority to make an offer in the first place has now been captured in the language contained in coach Richard Pitino’s contract. The Williams case should give pause as to the legitimacy of the decision. It suggests that there were conflicts of interest and politics involved in the case from the outset.

The Williams case further provides opportunities to explore how decisions of courts may have unintended consequences. Williams applies specifically to a state university in the intercollegiate sport environment. It could, however, be applied in cases as an affirmative defense by employers to offers in dispute as well as other application to employment-at-will negligence claims in unrelated areas of employment. How much education or experience is necessary to be labeled sophisticated when dealing with a potential employer? Would doctors, lawyers, engineers, professors, psychologists and other professionals now be put in a new unique contracting

133 The authors also note that an exploration of the NLI also demonstrates the use of a merger clause at the end of the agreement which states, in bold, “My signature on this NLI nullifies any agreements, oral or otherwise, which would release me from the conditions stated within this NLI.”
classification? Likewise, the sophisticated business-negotiator test that arises from *Williams* might be used in non-employment related contract disputes.

Finally, the case may be used to discuss further slippery slope issues of precedent such as the use of the Minnesota case as persuasive authority by litigants in other states. Where another state’s courts accept such precedent, the Minnesota decision could create common law beyond the original cases’ jurisdiction. While at least in Minnesota, the interrelationship between offers, illusory promises, and the tort of negligent misinterpretation in the pre-employment context has been further defined, possibly opening up a Pandora’s Box within Minnesota and elsewhere.

*Williams* allows for an exploration of contract, tort and employment law all in one and provides a real-world employment law case where the stakes are as high as the likelihood of the head coach being terminated with or without cause. Maturi is no longer the athletic director at UM, Smith is no longer the head coach, and Williams—at the time of this writing—is gainfully employed at the University of Memphis. One wonders in the end whether Minnesota actually won the legal battle or, instead, its victory was merely Pyrrhic.