

[Cite as *O'Brien v. Ohio State Univ.*, 2006-Ohio-1104.]

IN THE COURT OF CLAIMS OF OHIO

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JAMES J. O'BRIEN :
Plaintiff : CASE NO. 2004-10230
v. : Judge Joseph T. Clark
THE OHIO STATE UNIVERSITY : DECISION
Defendant :

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{¶ 1} Plaintiff filed this action against defendant alleging breach of an employment agreement. The case proceeded to trial on the issue of liability. On December 21, 2005, the court ordered the parties to file post-trial briefs on or before January 23, 2006, and reply briefs on or before January 30, 2006.¹

FACTS

{¶ 2} On April 12, 1997, plaintiff was hired by defendant as the head coach of the men's basketball team. Plaintiff had worked as a basketball coach for more than 20 years prior to his taking the position. Defendant is a member of the National Collegiate Athletic Association (NCAA), a voluntary association governing the conduct of intercollegiate athletic programs of member institutions.

¹On January 30, 2006, plaintiff filed a motion to strike certain portions of defendant's post-trial brief. Upon review, and for good cause shown, plaintiff's motion is GRANTED, in part, as it relates to footnotes 2 and 3 which reference documents that were not admitted into evidence in this case.

{¶ 3} Plaintiff testified that his duties as head coach of the men's basketball team included coaching games, hiring and supervising a staff of assistant coaches, managing a budget, recruiting student-athletes, monitoring the athletic and academic progress of student-athletes, and attending team and other functions related to the university.

{¶ 4} On May 14, 1998, Alex Radojevic, a 21-year-old basketball player from Yugoslavia, arrived on the campus of The Ohio State University for an unofficial visit. Standing 7'3" tall and blessed with exceptional basketball skills, Radojevic at the time was enrolled as a student at Barton County Community College, a junior college in Great Bend, Kansas where he played center position. He planned to transfer from Barton to a four-year university and was being recruited by a number of schools. By all accounts, Radojevic was a prized recruit, a "difference maker." On a scale of one to five, plaintiff rated him a "four plus."

{¶ 5} In early September, while plaintiff was on an official visit to Barton, Radojevic received word that his father had passed away. According to plaintiff, Radojevic was distraught by the news of his father's death and he had expressed concern for his mother who was living in a war-torn region of Yugoslavia. Radojevic was unable to offer her any financial assistance and he could not return home for fear of being forced into military service. Because some of the players on plaintiff's current team were from that region, plaintiff was familiar with the hardships faced by families besieged by an ongoing military conflict there.

{¶ 6} In late September or early October plaintiff learned that in 1996 Radojevic had signed a contract to play professional basketball for a Yugoslavian team and had received some of the

compensation due him under the contract. Although Radojevic played only sparingly with the team, plaintiff learned that the team had tendered additional payments which Radojevic reportedly refused to accept. Plaintiff testified that based upon this information he concluded that Radojevic was a professional basketball player and that he was not eligible to play college basketball.

{¶ 7} Although plaintiff and his staff were aware of the professional contract, they continued to recruit Radojevic. On November 11, 1998, Radojevic signed a document known as a National Letter of Intent (NLI) which is utilized by NCAA member institutions to establish the commitment of a prospect to attend a particular institution. The NLI is available to member institutions in limited numbers for each recruiting year and once a letter is issued to a particular player it cannot be reissued to another player.

{¶ 8} On December 13, 1998, Radojevic arrived in Columbus for his "official visit." Radojevic's student-sponsor for the visit was Slobodan Savovic, a player on the men's basketball team who also hailed from Yugoslavia. The visit lasted two days during which time Radojevic attended a basketball game and some other events. The activities and the expenses associated with the visit were documented by defendant in accordance with NCAA rules.

{¶ 9} At some time in mid-to-late December 1998, plaintiff was asked to provide financial assistance to the Radojevic family. While the details surrounding the request are sketchy, it appears that the request originated from a man by the name of Spomenko Patrovic, a Yugoslavian national who worked as a waiter in New York City and who claimed to be either Radojevic's relative or his legal guardian. Plaintiff testified that in late December 1998 or early

January 1999 he removed \$6,000 in cash from a drawer in his office desk and placed it in an unmarked envelope. He gave the envelope to then assistant coach, Paul Biancardi, with instructions to deliver the envelope to Patrovic in New York City. Patrovic was to have the money delivered to the Radojevic family in Yugoslavia.

{¶ 10} Plaintiff has characterized the transaction as a loan. He has acknowledged, however, that there was no written loan agreement and that the terms for repayment were not discussed. Plaintiff maintains that it was Radojevic's dire family circumstances and not his interest in Radojevic as a potential college player that prompted him to provide the loan. He testified that he was certain that the loan did not violate NCAA rules because Radojevic had surrendered his amateur status in 1996. Plaintiff was also certain that there was no NCAA prohibition against lending money to the family of a professional basketball player.

{¶ 11} In February 1999, an NCAA student-athlete reinstatement representative notified defendant that Radojevic had signed a professional basketball contract in 1996. When Ferdinand "Andy" Geiger, defendant's athletic director, approached plaintiff and the coaching staff with this information he was assured that the circumstances surrounding the 1996 contract were such that Radojevic could regain his amateur status by applying to the NCAA for reinstatement. Defendant immediately declared Radojevic ineligible for competition in accordance with an NCAA directive and on March 24, 1999, defendant filed an application for his reinstatement. The application was denied and on May 24, 1999, the NCAA subcommittee denied the appeal from that decision.

{¶ 12} Radojevic never enrolled as a student-athlete at defendant's institution and he never played basketball for defendant's team. He entered the 1999 NBA draft and was selected by the Toronto Raptors as the 12th pick in the first round.

{¶ 13} Approximately three months later, on September 15, 1999, plaintiff signed an NCAA Certificate of Compliance certifying that during the 1998-1999 academic year he had "reported through the appropriate individuals *** any knowledge of violations of NCAA legislation involving [the] institution."

{¶ 14} In March 1999, defendant's men's basketball team completed one of its most successful seasons in recent memory. The team had won 27 games, a Big Ten conference title, and had advanced to the Final Four in the NCAA tournament. Plaintiff won several post-season awards for his coaching, including national coach-of-the-year honors.

{¶ 15} On the heels of this great success, Andy Geiger felt so enthusiastic about the basketball program and its head coach that he initiated discussions with plaintiff regarding a new contract. Geiger felt that renegotiating plaintiff's employment agreement was justified by defendant's desire both to reward plaintiff for the fine work that he had done with the basketball program and to make plaintiff feel good about his future with the program.

{¶ 16} Julie Vanatta, defendant's associate legal counsel, took the lead in drafting the agreement. Plaintiff was represented by private counsel during these negotiations.

{¶ 17} The new agreement took effect September 12, 1999. Everyone involved in the negotiation process agreed that the terms of plaintiff's new contract were much more favorable to plaintiff than those contained in his prior agreement. For example, under

the new agreement plaintiff received an eight-year extension through the 2007 season and a substantial increase in compensation.

The contract also contained financial incentives based upon team performance, coaching honors, and graduation rates. The new agreement also placed significant limitations upon defendant's right to terminate plaintiff's employment.

{¶ 18} On April 24, 2004, defendant held its annual spring football game at Ohio Stadium. Geiger had asked plaintiff to attend the game so that he could address a gathering of alumni. Just prior to the time that Geiger was to make his remarks, plaintiff pulled him aside and informed him about the financial assistance he had provided to the Radojevic family in 1998. He told Geiger that he had provided the assistance because of the serious financial hardships facing Radojevic's family and that his motives were purely humanitarian. Plaintiff explained that the transaction would likely be revealed to the public in a lawsuit that had been filed by a woman named Kathy Salyers. Plaintiff wanted Geiger to hear about the loan from him personally rather than from the press.

{¶ 19} On cross-examination at trial, Geiger acknowledged that during this conversation he told plaintiff "we will try to work through this together." Geiger also testified that he believed that plaintiff's motivation for making the loan was purely humanitarian and that he had referred to the loan as a "noble act."

Geiger claimed that plaintiff admitted that the loan was made in violation of NCAA rules. Both plaintiff and Geiger have testified that the conversation was brief, lasting no more than five minutes.

However, plaintiff strongly disagreed with Geiger's assertion that he had admitted violating NCAA rules.

{¶ 20} Some time in May 2004, Vanatta obtained transcripts of deposition testimony filed in the Saylers' lawsuit and reviewed the testimony with Geiger. It was at that time that Geiger learned of Saylers' allegation that she had provided improper benefits to Slobodan Savovic throughout his playing career.

{¶ 21} Plaintiff was out of town for the two weeks following the spring football game. Consequently, the next time he spoke with Geiger was at the Big Ten basketball meeting which took place in Chicago from May 18-20, 2004. Plaintiff and Geiger attended those meetings together, discussed the basketball program, and socialized; they did not discuss the loan or plaintiff's employment status.

{¶ 22} After returning to Columbus, Ohio, Geiger summoned plaintiff to meet with him and Vanatta on May 26, 2004. During a five or ten minute meeting, Geiger told plaintiff that the loan had been reported to the NCAA and that there was going to be an investigation. Geiger also suggested that plaintiff hire an attorney.

{¶ 23} Plaintiff contacted Geiger on the following day and asked him if he was going to be fired. According to plaintiff, Geiger told him he was not going to be fired. Plaintiff testified that he apologized to Geiger for putting him in an "awkward position" and offered to talk about resigning his coaching position if the university felt that public knowledge of the loan would harm the basketball program. Plaintiff, however, refused to discuss the allegations regarding Slobodan Savovic.

{¶ 24} Several days later, Geiger called plaintiff to confirm whether he had retained counsel and to inquire whether plaintiff intended to resign. Plaintiff told Geiger that he had retained the

services of an attorney by the name of James Zeszutec. The issue of plaintiff's resignation was not resolved during that conversation.

{¶ 25} Attorney Zeszutec sent a letter to defendant on June 4, 2004, informing defendant that he had been retained by plaintiff to represent him in the matter and that he was willing to cooperate with defendant in the investigation. Defendant did not respond to the letter.

{¶ 26} At approximately 7:30 a.m. on June 8, 2004, plaintiff was summoned to Geiger's office for a meeting. At 8:30 a.m., Geiger handed plaintiff a letter notifying him of defendant's intention to terminate his employment as head coach of the men's basketball team and informing him that his dismissal would be announced at a news conference that afternoon. Plaintiff was given an option to resign his employment in lieu of termination.

{¶ 27} Later that morning, plaintiff's counsel contacted Geiger's office seeking more time for plaintiff to consider his options and for an opportunity to discuss the issue. Geiger declined to speak with plaintiff's counsel and plaintiff refused to resign. At an afternoon press conference Geiger announced plaintiff's dismissal, effective immediately.

{¶ 28} On May 13, 2005, more than 11 months after plaintiff's dismissal, defendant received a "Notice of Allegations" from the NCAA. The notice contained enumerated allegations against the men's basketball program, the women's basketball program, and the men's football program. Six of the violations involved Slobodan Savovic² and three concerned the loan to the Radojevic family.

²Although the name of the other men's basketball player identified in the Notice of Allegations has been redacted from the copy admitted into evidence as

CERTAIN EVIDENCE

{¶ 29} A threshold issue in this case is the admissibility of certain deposition testimony and exhibits that were offered into evidence by defendant. The deposition testimony at issue is that of NCAA Assistant Director of Enforcement, Steve Duffin; NCAA Director of Enforcement, Julie Roe; NCAA Vice President for Enforcement Services, David Price; and NCAA Director of Member Services, William Saum. The primary exhibits in dispute are Defendant's Exhibits N-1 through N-9. Objections to the admission of evidence were held for later ruling.

{¶ 30} The crux of this evidentiary issue is the testimony regarding a document wherein Duffin summarized his November 9, 2004, interview with Radojevic. (Defendant's Exhibit N-2.) In an effort to circumvent the obvious hearsay issues, defendant went to great lengths to qualify the interview summary and other NCAA-generated documents as business records under Evid.R. 803(6).

{¶ 31} Upon review of the depositions, the court finds that the testimony is riddled with inadmissible hearsay and lay opinions. Moreover, even if the statements attributed to Radojevic could somehow qualify for admission under an exception to the hearsay rule, the statements simply lack credibility. The interview was not recorded by stenographic or other means and Radojevic was not under oath at the time. In addition, the statements are contained in documents prepared by NCAA enforcement personnel who have taken a position adverse to plaintiff in the underlying NCAA proceedings.

Defendant's Exhibit O, the testimony in this case establishes that Slobodan (Boban) Savovic, is the player identified in those allegations. See O'Brien's Testimony at Trial Transcript, Page 120; Geiger's Testimony at Trial Transcript, Page 766.

Finally, even defendant's own athletic director testified that Radojevic lied to the NCAA reinstatement committee in connection with those proceedings.

{¶ 32} For the foregoing reasons the court finds that the testimony and exhibits at issue shall not be admitted as evidence in this case. For the same reasons, Defendant's Exhibits N-1, N-3, N-4, N-6, N-7, N-9, P, and Q shall not be admitted.

ANALYSIS

{¶ 33} Plaintiff brought this action against defendant alleging a single claim for breach of contract. In order to recover for breach of contract, plaintiff must prove the following elements: existence of a contract, performance by the plaintiff, breach by the defendant, and damages or loss as the result of the breach. *Samadder v. DMF of Ohio, Inc.*, 154 Ohio App.3d 770, 2003-Ohio-5340; *Doner v. Snapp* (1994), 98 Ohio App.3d 597, 600.

Existence and Performance of Contract

{¶ 34} There is no dispute in this case that the relationship between the parties is governed by plaintiff's 1999 employment contract. Defendant contends, however, that plaintiff has not satisfied the second element of his claim because he has not proven that he substantially performed his obligations under the agreement. The evidence does not support that contention.

{¶ 35} Plaintiff's direct supervisor during his tenure as head coach was Michelle Willis, defendant's associate athletic director for basketball. Willis testified that she was satisfied with plaintiff's job performance and that she could not recall fielding any complaints about plaintiff's performance.

{¶ 36} Additionally, Geiger has acknowledged that plaintiff did a "wonderful job of straightening out a program that was in disarray when he took it over." (Trial Transcript, Page 787, Lines 20-22.) David Williams II, defendant's former vice president of student affairs and Geiger's direct supervisor, expressed similar sentiments about the job plaintiff had done with the program. He stated that plaintiff took over a largely unsuccessful men's basketball program that was plagued by discipline problems among the student-athletes and turned it into a winning program. Williams believed plaintiff to be a good coach and a person of "high integrity." (Plaintiff's Exhibit 61.)

{¶ 37} Despite this testimony, defendant argues that plaintiff's alleged violation of NCAA rules is a failure of performance that precludes him from recovering in this action for breach of contract. The court disagrees.

{¶ 38} Even the most casual reading of plaintiff's 1999 employment agreement reveals that NCAA compliance is but one of plaintiff's many duties. Moreover, the contract provisions related to termination for cause clearly evidence the parties' intention that a failure of performance by plaintiff may not, in every instance, justify termination for cause. In short, the court finds that plaintiff's performance was sufficient to satisfy his burden on this element of his claim for breach of contract.

Breach of Contract

{¶ 39} Defendant notified plaintiff of its intention to terminate his employment and cited the contractual provisions upon which defendant relied in Geiger's letter of June 8, 2004. That letter reads in pertinent part as follows:

{¶ 40} " Dear Jim:

{¶ 41} "As you know, you informed me on April 24, 2004, that you had paid approximately six thousand dollars (\$6,000) to Radojevic, a men's basketball prospective student-athlete. You admitted that you gave him this money sometime after Mr. Radojevic signed his National Letter of Intent to attend The Ohio State University (November 11, 1998), but before May 24, 1999, the date that Mr. Radojevic's request for reinstatement to the NCAA was denied by the NCAA's Subcommittee on Student-Athlete Reinstatement. Although you explained that you gave him the money to assist him with his family's dire financial situation in light of the Serbian war, that reason, however noble, does not excuse your action.

{¶ 42} "In our discussion on April 24, 2004, you admitted that you knew your action was a violation of NCAA rules, and you are correct. In particular, it is a recruiting inducement in violation of NCAA Bylaw 13.2.1. Despite the fact that the University was no longer actively recruiting Mr. Radojevic after he signed his National Letter of Intent, he is considered a 'prospect' according to NCAA rules until he officially registers and enrolls in a minimum full-time program of studies and attends classes for autumn quarter. Furthermore, for each of the past five years, you violated NCAA Bylaw 30.3.5 which, by your signature on the annual NCAA Certification of Compliance form, requires you to confirm that you have self-reported your knowledge of any NCAA violations. We have self-reported this matter and other allegations related to the program to the NCAA.

{¶ 43} "Section 4.1(d) of your employment agreement requires you to 'know, recognize and comply' with all applicable rules and regulations of the NCAA and to 'immediately report to the Director

[of Athletics] and to the Department of Athletics Compliance Office' if you have 'reasonable cause to believe that any person *** has violated *** such laws, policies, rules or regulations.' You have materially breached this important term of your contract.

{¶ 44} "Unfortunately, your admitted wrongdoings leave the University no choice. Pursuant to Section 5.1(a) of your employment agreement, we intend to terminate such agreement *for cause*, effective at 5:00 p.m. today, June 8, 2004. Rather than being terminated *for cause*, you may choose to terminate your employment agreement (including your Letter of Agreement regarding supplemental compensation for appearing on radio and television programs, and for summer basketball camps and miscellaneous bonuses and benefits) and resign from your position as head men's basketball coach provided that you agree to continue to cooperate fully with the University and the NCAA in our investigation of issues related to the men's basketball program. Under either scenario, the University has no obligation to provide compensation or benefits (other than the availability of continued health benefits) to you past the effective date of such termination or resignation.

{¶ 45} "I deeply regret that we have come to this circumstance. After we have celebrated so much success together, this is very hard."

{¶ 46} When Geiger handed this letter to plaintiff on June 8, 2004, he told plaintiff that his only contribution to the drafting process was the very last paragraph.

{¶ 47} "Q. Do you remember in that meeting telling Coach O'Brien that your only contribution to this letter was the last paragraph?

{¶ 48} "A. I said that the last paragraph was entirely mine. The lawyers had had a hand in drafting the rest of it." (Trial Transcript, Page 215, Lines 4-10.)

{¶ 49} The letter clearly identifies the contractual provisions upon which defendant relies in exercising its right of termination. Specifically, defendant claims that plaintiff breached Section 4.1 which provides in relevant part:

{¶ 50} "4.1 In consideration of the compensation specified in this agreement, Coach shall:

{¶ 51} "****

{¶ 52} "(d) Know, recognize and comply with all applicable laws, policies, rules and regulations of Ohio State, the Big 10 Conference and the NCAA; supervise and take appropriate steps to ensure that Coach's assistant coaches, any other employees for whom Coach is administratively responsible and the members of the Team know, recognize and comply with all such laws, policies, rules and regulations; and *immediately report to the Director and to the Department of Athletics Compliance Office if Coach has reasonable cause to believe that any person or entity, including without limitation, representatives of Ohio State's athletic interests, has violated or is likely to violate any such laws, policies, rules or regulations.* Coach shall cooperate fully with the Department's Compliance Office at all times." (Emphasis added.)

{¶ 53} Upon review of the language used by the parties in Section 4.1(d), the court finds that plaintiff could breach his duties thereunder if either he fails to comply with NCAA rules or he has reasonable cause to believe that an NCAA violation has occurred and that he fails to immediately report it to the director. As written, Section 4.1(d) could be breached by

plaintiff without the actual commission of an infraction so long as plaintiff had reasonable grounds to believe that an infraction had or was likely to occur.

NCAA Rules

{¶ 54} There is no question in this case that plaintiff failed to immediately report the loan to either defendant's director or its Department of Athletics Compliance. In fact, plaintiff told no one about the loan for almost five years. Thus, at the outset the court must determine whether plaintiff had reasonable cause to believe that he had violated an NCAA rule when he loaned money to the Radojevic family.

{¶ 55} The basic policy of the NCAA as expressed in Article 1, Section 1.3.1 of its Constitution is to "maintain intercollegiate athletics as an integral part of the education program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports."

{¶ 56} In the June 8, 2004, letter, defendant identified NCAA Bylaw 13.2.1 as the primary violation. That Bylaw provides in pertinent part:

{¶ 57} "13.2.1 General Regulation. An institution's staff member or any representative of its athletics interests shall not be involved, directly or indirectly, in making arrangements for or giving, or offering to give any financial aid or other benefits to the prospect or the prospect's relatives or friends, other than expressly permitted by NCAA regulations. ***"

{¶ 58} Plaintiff's position is that the loan to the Radojevic family did not violate Bylaw 13.2.1 because Alex Radojevic was a

professional athlete at the time the loan was made. Plaintiff testified:

{¶ 59} "*** I had resolved in my own mind that what I did was the right thing to do. I felt it was the right thing to do because of the circumstances of this woman's family, and I had known that the kid was a professional -- had played in the pros and he had, in fact, professionalized himself. And I had just gotten to the point where because he was a pro and he was ineligible, I decided that I wasn't sure if this kid was ever going to come and play for Ohio State. I wasn't sure what his future status was going to be and I just didn't feel the need to have to reveal this scenario if in the -- if in the event that the kid was never going to come to Ohio State." (Trial Transcript, Page 112, Lines 3-19.)

{¶ 60} David Swank, a professor of law at the University of Oklahoma, was called by plaintiff to testify as an expert witness on the issue of NCAA compliance. In 1975, Professor Swank became a member of the NCAA Executive Committee which he described as the "business arm" of the NCAA. After three years on the executive committee, Professor Swank returned to the University of Oklahoma where he became university president in 1986. As president, he represented the university in proceedings before the NCAA infractions committee.

{¶ 61} In 1990, Professor Swank was recruited by the NCAA to serve on its Committee on Infractions. He was a member of that committee for the next nine years, serving as committee chairman from 1992 to 1999. According to Professor Swank, the committee met four to six times per year during his tenure and at each meeting the committee typically heard two to four cases involving major

infractions. He estimated that he had heard and decided roughly 90 or 100 major infractions cases.

{¶ 62} At trial, Professor Swank was asked by plaintiff's counsel to offer his opinion whether plaintiff had violated any NCAA rules in connection with the loan to the Radojevic family. On that issue Professor Swank testified:

{¶ 63} "Q. And, Professor Swank, again, in December of 1998, you were actually, at that point in time, still the chairman on the NCAA committee on infractions, correct?

{¶ 64} "A. Yes.

{¶ 65} "Q. Okay. Professor Swank, have you reached an opinion regarding whether or not Coach O'Brien's loan to Alex Radojevic's mother violated any NCAA bylaws?

{¶ 66} "A. Yes.

{¶ 67} "Q. And what is your opinion in that regard?

{¶ 68} "***

{¶ 69} "A. My opinion is because he was not a prospective student-athlete at that time, that it was not a violation of NCAA rules." (Trial Transcript, Page 367, Lines 5-23.)

{¶ 70} Professor Swank's opinion was based upon his review of several relevant provisions of the NCAA Constitution, Bylaws, and ethical rules. For example, he cited "The Principle of Amateurism" which is set forth in Article 2, Section 2.9 of the NCAA Constitution as follows:

{¶ 71} "2.9 THE PRINCIPLE OF AMATEURISM

{¶ 72} "*Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an*

avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises." (Emphasis added.)³

{¶ 73} A professional athlete is defined in Bylaw 12.02.3 as "*** one who receives any kind of payment, directly or indirectly, for athletics participation except as permitted by the governing legislation of the association."

{¶ 74} Professor Swank believed that Radojevic irrevocably lost his amateur status and became ineligible for intercollegiate competition when he signed a professional contract in 1996. He explained that Bylaw 12.1.1 lists six separate events, the occurrence of any one of which will cause an individual to lose amateur status.⁴ In the case of Alex Radojevic, Professor Swank

³The term student-athlete as used in Article 2 is defined in Bylaw 12.02.5 as follows:

"12.02.5 Student-Athlete. A student-athlete is a student whose enrollment was solicited by a member of the athletics staff or other representative of athletics interests with a view toward the student's ultimate participation in the intercollegiate athletics program. Any other student becomes a student-athlete only when the student reports for an intercollegiate squad that is under the jurisdiction of the athletics department, as specified in 3.2.4.4. A student is not deemed a student-athlete solely on the basis of prior high-school athletics participation."

⁴"12.1.1 Amateur Status. An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual:

"(a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport;

"(b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation;

"(c) Signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received;

"(d) Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based upon athletics skill or participation, except as permitted by NCAA rules and regulations;

"(e) Competes on any professional athletics team and knows (or had reason to know) that the team is a professional athletics team (per 12.02.4), even if no pay or remuneration for expenses was received; or

"(f) Enters into a professional draft or an agreement with an agent (see

found that five of those six events occurred in 1996, two years before plaintiff made the loan. Professor Swank knew of no NCAA Constitution, Rule, or Bylaw prohibiting a coach from lending money to the family of a professional athlete. In his opinion, it was reasonable for plaintiff to believe that he could make a loan to the Radojevic family without fear of committing an NCAA infraction.

{¶ 75} Professor Swank stated that in formulating his opinions in this case he did not consider the possibility of reinstatement, since he did not consider the issue to be relevant.

{¶ 76} Professor Swank also believed that even if plaintiff's conduct were to be treated as an infraction, the NCAA would be barred from pursuing sanctions against defendant because of the four-year limitation period set forth in Bylaw 32.

{¶ 77} In stark contrast to the opinions held by Professor Swank, defendant's expert witness, Dan Beebe, opined that the loan to the Radojevic family in 1998 was made in violation of NCAA Bylaw 13.2.1. Beebe characterized the loan to the Radojevic family as a major infraction.

{¶ 78} Beebe is the senior associate commissioner of the Big Twelve Conference. As such, he is the "point person" for the conference with respect to national governance and compliance matters. He previously worked as an enforcement officer for the NCAA from 1982-1986 and as the director of enforcement in 1987.

{¶ 79} Beebe agreed that Radojevic became a professional athlete in 1996. He also agreed that there were no specific NCAA Bylaws prohibiting a coach from lending money to the family of a

professional athlete; however, he did not agree that plaintiff complied with NCAA rules. Beebe's opinion was based upon his understanding of the basic philosophy underlying Bylaw 13.2.1 and the definition of the term "prospective student-athlete" found in Bylaw 13.02.10.⁵

{¶ 80} NCAA Bylaw 13.02.10 defines the term Prospective Student-Athlete as follows:

{¶ 81} "13.02.10 Prospective Student-Athlete. A prospective student-athlete ('prospect') is a *student who has started classes for the ninth grade.* ***" (Emphasis added.)

{¶ 82} Based upon Beebe's interpretation of the rules, his knowledge of the facts and circumstances surrounding the loan, and his experience with the NCAA, it was his opinion that Radojevic was still considered a prospective student-athlete in 1998 even though he had professionalized himself in 1996. According to Beebe, the loan to the Radojevic family was an obvious infraction of NCAA Bylaw 13.2.1. He also opined that plaintiff's conduct in knowingly providing an improper recruiting inducement to Radojevic was "unethical conduct" as that term is defined in NCAA Bylaw 10.01.⁶

⁵It was Beebe's understanding, from reviewing interview summaries authored by the NCAA enforcement staff, that plaintiff agreed to make the loan in September 1998. There was no credible evidence presented in this case to support such a finding.

6

"10.01 UNETHICAL CONDUCT

"Unethical conduct by a prospective or enrolled student-athlete or a current or former institutional staff member (e.g., coach, professor, tutor, teaching assistant, student manager, student trainer) may include, but is not limited to, the following: ***

"(c) Knowing involvement in offering or providing a prospective or an enrolled student-athlete an improper inducement or extra benefit or improper financial aid."

{¶ 83} With respect to the four-year limitation period, Beebe testified that the NCAA may prosecute infractions that occurred more than four years earlier if the conduct demonstrates a "blatant disregard" for NCAA legislation. In Beebe's opinion, plaintiff's conduct demonstrated a blatant disregard for Bylaw 13.2.1. He did concede, however, that the NCAA has the burden of proof on this issue.

{¶ 84} The views espoused by defendant's experts are based upon a literal interpretation of Bylaw 13.2.1 and the extremely broad definition of the term "prospective student-athlete" found in NCAA Bylaw 13.02.10. In the court's opinion, Professor Swank's view represents a more practical application of the rules. Nonetheless, the evidence in this case shows that the NCAA enforcement staff has adopted a more literal approach, having cited defendant for the alleged recruiting violation.

{¶ 85} Ultimately, the determination whether plaintiff committed a major infraction of NCAA rules and what sanctions, if any, may be imposed upon defendant will be made by the NCAA Committee on Infractions and not this court. As of the date of publication of this decision, the NCAA has yet to decide the issue. In this case, in order to determine that plaintiff breached Section 4.1(d) of the employment agreement, the court need only find that plaintiff had reasonable cause to believe that he committed an infraction when he made the loan to the Radojevic family. The circumstances surrounding plaintiff's decision to make the loan combined with plaintiff's subsequent words and conduct convince the court that plaintiff had reasonable cause to believe that he had committed an infraction.⁷

⁷Plaintiff has argued that, at worst, the loan to the Radojevic family was

{¶ 86} Plaintiff testified that he found out about the professional contract in September 1998 and that he was certain at that time that Radojevic was not eligible to play college basketball. Yet Radojevic signed an NLI and he was brought in for an official visit. Professor Swank was unable to think of any reason why Radojevic would be offered an NLI and invited to make an official visit to the school if plaintiff were convinced that Radojevic was ineligible to play.

{¶ 87} Plaintiff also chose not to seek the guidance of his own compliance office prior to making the loan even though he was aware that the compliance office was available to answer his inquiries with reasoned responses. Similar services were available to plaintiff at the Big Ten conference level and from the NCAA itself.

The court finds that plaintiff ignored these resources not because he was certain that the loan complied with NCAA rules but because the Radojevic family desperately needed his help and because he believed that giving help was the right thing to do.

{¶ 88} After making the loan to the Radojevic family in December, plaintiff and his coaching staff assured Geiger that reinstatement was possible and actively participated in the reinstatement process. The testimony of Geiger and Heather Lyke Catalano, defendant's chief compliance officer, was that plaintiff was genuinely upset and frustrated with the NCAA when he learned that the appeal had been denied.

a secondary NCAA rules infraction. According to the experts in this case, the distinction between a major and a secondary infraction depends largely on the actor's level of culpability and the extent of the recruiting benefit derived by the institution. Plaintiff's expert, David Swank, has conceded that if plaintiff's conduct is treated as an NCAA infraction, it would be a major infraction. While the degree of the violation may be of great importance in proceedings before the NCAA, it is not particularly important in this case.

{¶ 89} Plaintiff's words and conduct are not those of a person who was sure that Radojevic would never play college basketball. Indeed, plaintiff acknowledged on cross-examination that if Radojevic had been reinstated, he would not have been eligible to play because of the loan plaintiff made to his family. Plaintiff testified that he would have had to reveal the loan if reinstatement had been granted.

{¶ 90} In consideration of all of the evidence presented, the court finds that in December 1998 plaintiff had reasonable grounds to believe that he had violated NCAA Recruiting Bylaw 13.02.1 by making a loan to the family of Alex Radojevic. Plaintiff's conduct in making the loan and then failing to report it to the director was a breach of Section 4.1(d) of the contract.

Materiality and Termination for Cause

{¶ 91} As stated above, plaintiff's 1999 employment contract placed significant limitations upon defendant's right to terminate plaintiff's employment. For example, defendant was obligated to pay plaintiff a substantial portion of his remaining salary if plaintiff were terminated other than for cause. Conversely, if plaintiff were terminated for cause, defendant would be under no obligation to pay plaintiff any further compensation. Furthermore, it is clear from the plain language of the agreement that not every failure of performance by plaintiff provides cause for termination.

The specific language of the contract at issue is Section 5.1 which states:

{¶ 92} "5.1 Terminations for Cause - Ohio State may terminate this agreement at any time for cause, which, for the

purpose of this agreement, shall be limited to the occurrence of one or more of the following:

{¶ 93} "(a) a material breach of this agreement by Coach, which Coach fails to remedy to OSU's reasonable satisfaction, within a reasonable time period, not to exceed thirty (30) days, after receipt of a written notice from Ohio State specifying the act(s), conduct or omission(s) constituting such breach;

{¶ 94} "(b) a violation by Coach (or a violation by a men's basketball program staff member about which Coach knew or should have known and did not report to appropriate Ohio State personnel) of applicable law, policy, rule or regulation of the NCAA or the Big Ten Conference which leads to a 'major' infraction investigation by the NCAA or the Big Ten Conference and which results in a finding by the NCAA or the Big Ten Conference of lack of institutional control over the men's basketball program or which results in Ohio State being sanctioned by the NCAA or the Big Ten Conference ***

{¶ 95} "(c) any criminal conduct by Coach that constitutes moral turpitude or other improper conduct that, in Ohio State's reasonable judgment, reflects adversely on Ohio State or its athletic programs."⁸

{¶ 96} Defendant does not contend that plaintiff's termination for cause can be justified either by Section 5.1(b) or 5.1(c). The notice of termination references only Section 5.1(a). Thus, in deciding whether plaintiff's employment was terminated for cause,

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Plaintiff has argued that if he is accused of a violation of Section 4.1(d), defendant's right to terminate his position for cause is limited by the very specific provisions of paragraph 5.1(b). That argument was rejected by the court in a prior decision in this case.

the court need only consider whether plaintiff's breach was "material."⁹

{¶ 97} Under common law, "a 'material breach' is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract." Williston on Contracts Chapter §63:3. Defendant contends that plaintiff's conduct in violating NCAA rules and thereafter failing to immediately report the violation constitutes a "material breach" of the employment agreement and provides defendant with sufficient cause to terminate plaintiff's employment pursuant to paragraph 5.1(a).

{¶ 98} In *Kersh v. Montgomery Developmental Ctr.* (1987), 35 Ohio App.3d 61, 62-63, the Tenth District Court of Appeals adopted the approach taken in the Restatement of the Law 2d, Contracts (1981) 237, Section 241 in determining whether a breach of contract is material. Section 241 provides:

{¶ 99} "In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

{¶ 100} "(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

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Julie Vanatta testified as to the contractual basis for plaintiff's dismissal as follows:

"Q. Did the University point out to Coach O'Brien that it was terminating him under Section 5.1(a) of the employment agreement?

"A. Yes.

"Q. Did the University ever suggest to Coach O'Brien that it was relying upon any other of the for cause termination provisions to support its termination decision?

"A. No." (Vanatta Testimony, Trial Transcript, Page 514, Line 17 through Page 515, Line 3.)

{¶ 101} "(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

{¶ 102} "(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

{¶ 103} "(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

{¶ 104} "(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing."

{¶ 105} The standard is "necessarily imprecise and flexible." See Restatement of the Law 2d, Id. at Comment a. "[It] applies to contracts of all types without regard to whether the whole performance of either party is to be rendered at one time or," as in this case, "part performance is rendered at different times." Id.

Section 4.1(d)

{¶ 106} In relationship to the circumstances described under (a) above, and in view of the language used in Section 4.1(d) of the contract it is clear that defendant reasonably expected plaintiff to refrain from violating NCAA rules, to monitor assistant coaches and players to assure their compliance with those rules, to exercise a reasonable degree of vigilance to uncover any violations, and to immediately report any suspected violations.

{¶ 107} The specific conduct allegedly constituting plaintiff's breach of contract was described by Julie Vanatta as follows:

{¶ 108} "A. And it's the University's belief that everything in conjunction with the payment to Alex Radojevic and the reinstatement appeal of Alex Radojevic is a violation of 4.1(d)." ¹⁰ (Trial Transcript, Page 518, Lines 13 through 17.)

{¶ 109} Defendant argues that plaintiff's breach of Section 4.1(d) deprived it of the benefit it reasonably expected from the employment agreement in three ways: subjecting defendant to NCAA sanctions; adversely affecting defendant's reputation in the community; and breaching the trust between plaintiff and defendant's athletic director.

Sanctions

{¶ 110} In assessing the potential harm to defendant in the form of NCAA sanctions, the court is mindful that the NCAA notice of allegations lists a total of seven violations in the men's basketball program; six of those allegations involve a player other than Alex Radojevic. Thus, the extent of the harm to defendant in the form of NCAA sanctions that can be fairly attributed to the Radojevic matter is difficult to predict.

{¶ 111} Moreover, a defense based upon the four-year limitation period is clearly available to defendant with respect to the Radojevic matter. The court finds that even though defendant has elected not to avail itself of this defense in proceedings before the NCAA, the availability of this defense is a mitigating factor

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In its post-trial brief, defendant argues that under the "after acquired evidence doctrine" the court should consider the allegations regarding Slobodan Savovic as additional justification for plaintiff's termination. Defendant's argument is fatally flawed given Geiger's testimony that he and Vanatta learned of the allegations on or about May 18, 2004, more than two weeks prior to plaintiff's dismissal.

in determining the extent that defendant is or will be deprived of the expected benefit of Section 4.1(d).

{¶ 112} Finally, the NCAA has not sought any sanctions arising from plaintiff's execution of allegedly false NCAA compliance certificates and the evidence shows that the NCAA rarely penalizes member institutions for such violations.

{¶ 113} With respect to self-imposed sanctions, Heather Lyke Catalano testified that member institutions, such as defendant, frequently self-impose penalties in advance of the NCAA findings in an effort to demonstrate good faith. The hope is that the NCAA will ultimately conclude that the self-imposed sanctions are sufficient and that no further penalty will be imposed.

{¶ 114} In September 2004, defendant self-imposed sanctions in response to the NCAA allegations. Those sanctions included the forfeiture of two scholarships in the 2005 recruiting class and a post-season ban for the 2004-2005 season. There was no testimony in this case whether those sanctions were imposed solely as a result of the Radojevic matter. However, even if the court were to assume that all of the sanctions relate to the alleged recruiting violation involving Radojevic, the evidence shows that these sanctions are not as debilitating to defendant's basketball program as defendant suggests. Michelle Willis testified that at the time the post-season ban was imposed, she did not believe that the team was good enough to merit a post-season tournament invitation. With regard to the two scholarships forfeited by defendant for the 2005 recruiting class, the evidence demonstrates that the loss may not result in significant harm to the basketball program given defendant's expectation that the recruiting class for the 2005-2006 year will be one of the best in its history.

Reputation

{¶ 115} Geiger testified emphatically about the harm to defendant's reputation that has resulted from the public disclosure of the loan and the protracted NCAA investigation.

{¶ 116} "Q. You've touched upon it today and in your - and even more directly in cross-examination, but in your words, sir, can you sum up how the University, if at all, has been harmed by the Coach's breach of contract, as you see it.

{¶ 117} "A. I thought there was a very poignant story in today's The Columbus Dispatch, in the sports section, about the agonizing lack of certainty and cloud that hangs over our basketball program as it goes forward.

{¶ 118} "There isn't anybody in our basketball program that was part of any of this - of any of this activity and yet they're going forward with uncertainty that they shouldn't have to carry.

{¶ 119} "The reputation of the University has been irreparably harmed. The - the essence of intercollegiate athletic competition is to engage respectfully in competition with other universities, and we've - we've damaged that.

{¶ 120} "I think alumni and members of the state of Ohio community, the adverse publicity nationally that the program has received has done damage that will take years to repair.

{¶ 121} "This is a fundamental violation, and I think the breach is - is - is very serious and the lack of - of - well, I just think that there has been enormous damage." (Trial Transcript, Page 788, Line 16 through Page 789, Line 23.)

{¶ 122} Section 5.1(c) of the parties' agreement defines cause as "any criminal conduct by Coach that constitutes moral turpitude

or other improper conduct that, in Ohio State's reasonable judgment, reflects adversely on Ohio State or its athletic programs." (Emphasis added.) In the June 8, 2004, letter notifying plaintiff of defendant's intention to terminate his employment, defendant did not identify Section 5.1(c) as a provision upon which it relied. Yet, in defending its decision to terminate plaintiff's employment under Section 5.1(a), defendant cites the adverse effect upon its reputation as proof that plaintiff's breach was material.

{¶ 123} A basic tenet of contract interpretation requires that contracts be read as a whole and interpreted so as to give effect to every provision. See *Farmers' National Bank v. Delaware Insurance Co.* (1911), 83 Ohio St. 309, 337. Given defendant's concession that it did not rely upon Section 5.1(c) in support of its decision to terminate plaintiff's employment and the omission of any reference to Section 5.1(c) in the Notice of Termination, it can be argued that the adverse effect upon defendant's reputation should not be considered by the court in determining materiality. It is reasonable to assume that if defendant had felt that the harm to its reputation was a factor in its decision to terminate plaintiff's employment for cause, defendant would have referenced Section 5.1(c) in the June 8, 2004, letter.

{¶ 124} Nevertheless, even if the court were to consider any injury to defendant's reputation occasioned by the specific conduct that led to plaintiff's termination, it is clear to the court that the harm is not as great as defendant believes it to be. First, the court finds that at least some of the injury to the men's basketball program has resulted from the six allegations surrounding Slobodan Savovic. The testimony in this case

established that Savovic was enrolled as a student-athlete with defendant from 1998 to 2002. Radojevic, on the other hand, was never enrolled at defendant's university and never played a single second for defendant's basketball team.

{¶ 125} Moreover, Williams testified that in an athletic program as large as defendant's, an NCAA investigation is not unexpected:

{¶ 126} "Q. Well, did you understand or expect that there was at least a possibility that the university might have to endure an investigation into its men's basketball program?

{¶ 127} "A. I think that in Division 1 athletics at a program like Ohio State, you constantly are aware of the fact that there will be allegations, many that are unfound, that will cause you to do investigations of aspects of the program, and we did that on a continuous basis, I mean, probably more in football than basketball, but certainly there were a number of times where we would get allegations about basketball and recruiting things that we would find.

{¶ 128} "***

{¶ 129} "So if you're asking the question did I think we would be investigating issues as it relates to our basketball program, absolutely, but that doesn't mean that I thought that there would be anything wrong with it. It's just that that's the nature of the beast." (Plaintiff's Exhibit 61, Page 50, Line 23 through Page 52, Line 3.)

{¶ 130} Based upon the evidence in this case, the court is not convinced that the Radojevic matter, standing alone, caused serious harm to the reputation of either the men's basketball program or the university as a whole.

Trust

{¶ 131} In explaining the loss to defendant caused by plaintiff's conduct in this case, Geiger spoke at some length about the debilitating effect that plaintiff's belated disclosure of the loan had on his relationship with plaintiff. In discussing the events that led up to plaintiff's dismissal, Geiger testified:

{¶ 132} "*** as I stated here in response to questions previously, our relationship, up until April 24th, 2004, going forward, had been a terrific relationship. I felt that Coach O'Brien did a terrific job for Ohio State. *** He did a wonderful job of straightening out a program that was in disarray when he took it over. He and I think had - I think had high regard for each other.

{¶ 133} "I also think that Ohio State did its fair share. I think that the team had a wonderful place to play, a wonderful place to practice, very fine facilities across the board, a more than adequate budget, and a -- and an operating environment that was conducive to success, and we were paying the Coach handsomely for his work.

{¶ 134} "And this behavior that we've been describing here this afternoon, is simply unconscionable in the face of the relationship that we had established, and to say nothing of the technicalities and the -- and the language that was in our framework and that is his contract." (Trial Transcript, Page 787, Line 14 through Page 788, Line 15.)

{¶ 135} The above-cited testimony was clearly the most probative of materiality. The court is convinced that plaintiff's failure to disclose the loan until he was forced by circumstances

to do so, damaged the relationship between himself and Geiger. The trial testimony of these two individuals established that prior to the night of April 24, 2004, they had forged a strong working relationship built upon a foundation of mutual respect, admiration, and trust. The court finds that both men cared deeply about the university, the basketball program, and the student-athletes involved in the program. The evidence shows that for seven years plaintiff and Geiger had worked effectively toward a shared goal of improving the quality of the men's basketball program. In the course of their labor, the two became friends.

{¶ 136} The court notes, however, that the issue of trust about which Geiger testified so emphatically during his direct examination was not referenced in the parties' written agreement. It was also absent from the June 8, 2004, letter notifying plaintiff of defendant's intention to terminate plaintiff's employment. Geiger spoke to that issue as follows:

{¶ 137} "Q. And can you point to me where in the letter you identified any other breach of his contract other than violating NCAA rules?

{¶ 138} "A. I think implicit in the letter is the - the issue of trust and the issue of the - of the values that I - that I stated earlier we impugn to a contract.

{¶ 139} "NCAA rules are cited in the - in this document, but there are other principles that are cited as well. For example, section 4.1(d) just talks about rules of the NCAA - it doesn't - that part doesn't talk about other than NCAA rules, but the contract is clear, that trust and accurate and full disclosure, and those kinds of things, are germane to the contract and germane to

our employment agreement." (Trial Transcript, Page 215, Line 21 through Page 216, Line 15.)

{¶ 140} Given the detail with which other important aspects of the parties' relationship were set out in the language of the agreement, it is certainly reasonable to assume that if defendant believed that the trust of the athletic director were of critical importance to the transaction, there would have been some provision in the agreement concerning that issue. After all, it was defendant who initiated the process of reshaping plaintiff's contractual provisions, and there has been no suggestion in this case that defendant lacked sophistication in either the negotiation or the drafting of coaching contracts. Thus, the only reasonable conclusion to draw from the omission of such a provision is that defendant bargained away its right to terminate plaintiff's employment on the basis of some subjective evaluation made by defendant's athletic director.

{¶ 141} At best, the issue of trust is an implied term of the parties' agreement. The question in this case is whether this implied term is so fundamental to the contract that a single isolated breach by plaintiff can defeat the essential purpose of the contract or make it impossible for defendant to perform. While the court agrees that a good working relationship between the athletic director and the coach is an important aspect of this agreement, the court finds that the loss of trust caused by plaintiff's failure of performance was not as profound and debilitating as defendant contends.

Compensation

{¶ 142} Turning to the circumstances described in Section 241, Subsection (b) of the Restatement, the court must consider the extent to which plaintiff can compensate defendant for his failure of performance. The issue of compensation is complicated in this case by the fact that the injury to defendant is largely non-economic. With respect to the NCAA sanctions, there was testimony in this case that specific corrective actions can be undertaken by member institutions to ensure future compliance with NCAA rules. In fact, Williams testified that certain educational measures were introduced by defendant following an NCAA investigation into the men's basketball program that occurred under plaintiff's predecessor. However, with respect to the damage to defendant's reputation and any loss of trust that can be fairly attributed to this breach, defendant cannot be fully compensated.

Forfeiture

{¶ 143} The circumstances described in Section 241, Subsection (c) of the Restatement require the court to examine the extent to which plaintiff will suffer forfeiture. Plaintiff was dismissed as the men's head basketball coach with roughly three years remaining on his contract. The contract contains two provisions requiring defendant to pay liquidated damages in the event that plaintiff is terminated other than for cause. If plaintiff were terminated for cause, defendant would have no obligation to provide compensation. Under such circumstances, plaintiff would suffer a significant forfeiture if his failure of performance were treated as material.

Cure

{¶ 144} The circumstance the court must consider pursuant to Section 241, Subsection (d) of the Restatement is the likelihood that a party will cure his failure. Defendant has argued that a cure by plaintiff is an impossibility. With respect to the potential NCAA sanctions, such things as the mitigating factors associated with the making of the loan, the self-imposed sanctions, and other corrective measures should lessen the impact of any NCAA sanctions. Strictly speaking, however, there is no meaningful cure with respect to those sanctions. Similarly, it would be difficult for plaintiff to cure the injury to defendant's reputation occasioned by the Radojevic matter. Any negative perceptions of defendant that may arise from the public knowledge of such a loan cannot be nullified.

{¶ 145} The breach of trust between plaintiff and Geiger is another matter. Based upon the testimony of the principals involved, and given the long-standing personal and working relationship between these two individuals, the court finds that the damage was reparable. Indeed, the court finds that with time and effort, trust could have been restored. Geiger has acknowledged that he considered the loan to be a "noble act." He has also admitted that, other than his conduct in the Radojevic matter, plaintiff's overall performance of the contract had been excellent. As stated above, the contract that the parties executed in 1999 contemplated possible NCAA infractions in the basketball program. Under the circumstances, the breach of trust was curable.

Good Faith

{¶ 146} The extent to which plaintiff's failure to perform comports with good faith and fair dealing is the final circumstance

the court must consider in determining materiality. Defendant argues that plaintiff acted in bad faith by paying a recruit and then engaging in a "cover-up" designed to prevent defendant from discovering his misconduct. The evidence does not support such a sinister view of plaintiff's conduct.

{¶ 147} The court has found that plaintiff had reasonable cause to believe that he had committed an NCAA infraction when he made the loan and that he breached Section 4.1(d) of the agreement by doing so. Thus, it follows that plaintiff's failure to disclose the loan was not completely consistent with good faith and fair dealing.

{¶ 148} The court is mindful, however, that the loan was made for humanitarian purposes and not for the purpose of gaining an improper recruiting advantage. Moreover, as the court has already observed, Professor Swank testified that it was reasonable for plaintiff to believe that he could make a loan without committing an infraction of NCAA Bylaws. Thus, plaintiff's conduct does not demonstrate the degree of willfulness normally associated with bad faith.

{¶ 149} Additionally, the drafters of the Restatement of Contracts have stated that "the obligation of good faith and fair dealing extends to the assertion, settlement and litigation of contract claims and defenses." See Restatement of Contracts 2d, Section 205, Comment e. As stated above, after plaintiff disclosed the loan to Geiger he expressed regret for putting his Athletic Director and the University in an "awkward position." And, prior to the point in time when he was told by Geiger that the process had become adversarial, plaintiff offered to discuss his resignation. Plaintiff also gave assurances to defendant, both

personally and through counsel, that he would cooperate in any subsequent NCAA proceedings.

{¶ 150} On the other hand, the evidence reveals conduct on the part of defendant that was not consistent with good faith and fair dealing. For example, after plaintiff's revelation of April 24, 2004, Geiger either failed or refused to work with plaintiff toward a resolution even though he had stated that he would do so. Furthermore, after Geiger informed plaintiff that the process was going to become adversarial and encouraged plaintiff to retain legal counsel, Geiger did not permit counsel the opportunity to discuss the issue with him. Finally, Geiger allowed plaintiff only four hours to consider his fate after delivering the June 8, 2004, letter.

{¶ 151} Upon consideration of the relevant circumstances for determining materiality, the court finds that plaintiff's failure of performance was not material. Although plaintiff breached Section 4.1(d) by making and then failing to timely disclose a loan, the extent to which defendant was deprived of the benefit it reasonably expected from the employment agreement was not as significant as defendant contends. For example, the evidence shows that the NCAA sanctions and the injury to defendant's reputation that can be fairly attributed to the loan are relatively minor. Additionally, while plaintiff may not be able to cure either the reputational injury or the NCAA sanctions, the evidence shows that the breach of trust could have been repaired. In comparison, plaintiff's forfeiture of salary and benefits is substantial. Furthermore, while plaintiff's conduct prior to disclosing the loan was not completely consistent with good faith and fair dealing,

plaintiff did make a good faith effort to resolve the dispute. Defendant chose a course that was adversarial.

{¶ 152} Because plaintiff's failure of performance was not material, defendant did not have cause for termination. Because defendant did not have cause for termination, defendant was contractually obligated to pay plaintiff in accordance with the provisions relating to termination other than for cause. Defendant breached the contract by refusing to pay plaintiff.

Case Law

{¶ 153} In addition to the court's own analysis of the circumstances affecting materiality, the court examined two Ohio cases dealing with the issue.

{¶ 154} In *Russell v. Ohio Outdoor Advertising Corp.* (1997), 122 Ohio App.3d 154, the issue was whether a billboard lessee, Ohio Outdoor Advertising (OOA), had materially breached the lease by displaying an advertisement which subjected the lessor to a potential lawsuit by the adjoining landowner.

{¶ 155} The Sixth District Court of Appeals, applying the five-factor test set forth in *Kersh*, supra, found that OOA had breached the advertising restriction and that the breach was material to the transaction. In holding that the breach was material, the court stated:

{¶ 156} "The motel/hotel advertising prohibition was critical to [Russell's] interest, since he had limited the use of his property by entering into the restrictive covenant with his adjoining landowner. By keeping the advertising in place, [OOA] subjected [Russell] to a potential cause of action and exposed him to possible damages. In other words, OOA deprived Russell of a

reasonably expected benefit – the right not to be subject to a possible lawsuit from his neighbor.”

{¶ 157} The *Russell* case is similar to this case in that plaintiff’s breach of Section 4.1(d) subjects defendant to potential liability in the form of NCAA sanctions. However, as discussed above, the possible NCAA sanctions arising from the Radojevic loan may not be as serious as defendant would have this court believe. Additionally, in *Russell* the advertising restriction was absolute, there were no exceptions. Here, Section 5.1(b) of plaintiff’s employment agreement clearly contemplates a scenario whereby plaintiff could retain his employment during the pendency of a major infractions investigation by the NCAA. Thus, the breach in this case is not nearly as critical to the parties’ agreement as the breach considered by the court in the *Russell* case.

{¶ 158} In *England v. O’Flynn*, Montgomery App. No. 18952, 2002-Ohio-103, Dr. O’Flynn became associated with an obstetrics practice owned by Dr. England. A dispute regarding the allocation of income arose and O’Flynn terminated his relationship with England. England brought suit to recover under a promissory note. The trial court dismissed England’s action because England had breached the on-call provisions of the parties’ agreement. In affirming the decision of the trial court, the Second District Court of Appeals applied the five-factor test set forth in *Kersh*, supra, and found that:

{¶ 159} “O’Flynn reasonably expected the parties to share equal on-call time, but was deprived of his expectation. This was partly a financial deprivation. However, the lost benefit was also non-economic, in that O’Flynn was deprived of personal time during

almost three years of the contract. Under the circumstances, the loss was non-compensable and the breach was material."

{¶ 160} In the *England* case, as in this case, the loss to defendant was largely non-economic. In the court's view, however, the loss suffered by defendant in this case as a result of the isolated recruiting violation involving Radojevic does not compare to the loss suffered by the non-breaching party in the *England* case.

{¶ 161} Although the contractual provisions at issue in the *England* and *Russell* cases differ from the relevant provisions of plaintiff's employment agreement, the analysis employed in those cases is instructive to the court in determining the materiality of plaintiff's breach. In both cases, the court looked to the testimony of the parties and the language used in the contract to determine whether the reasonable expectations of the parties were met.

Compliance

{¶ 162} With respect to Section 4.1(d) of the instant agreement, it is clear to the court that NCAA compliance is important to defendant; it is one of the specified duties of the coach. However, Section 5.1(b) of the contract contemplates a chain of events whereby plaintiff could retain his employment in the face of an ongoing major infractions investigation by the NCAA and that he could remain so employed absent the imposition of certain serious sanctions. From this language the court concludes that the parties did not consider plaintiff's performance under Section 4.1(d) of the contract to be so critical that a failure of any kind would justify immediate termination for cause. If

defendant reasonably expected perfect compliance, Section 5.1(b) would not have been made part of the agreement.

{¶ 163} Similarly, Section 5.5 of the agreement provides the court with insight into the relative importance of absolute NCAA compliance. Section 5.5 provides:

{¶ 164} "5.5 Suspension of Other Disciplinary Action. If Coach is found to have violated any law, policy, rule or regulation of the NCAA, the Big Ten Conference or Ohio State, Coach may be subject to suspension or other disciplinary or corrective action as set forth in the applicable enforcement procedures (subject to the provisions of Section 5.6 hereof)."

{¶ 165} Reading such provision in conjunction with Section 5.1(b) it is clear that a violation of NCAA rules, even a major infraction, will not justify termination for cause under Section 5.1(a) unless that violation has some independent significance which prevents future performance.

{¶ 166} Geiger testified that, in his opinion, defendant had no choice but to immediately terminate plaintiff's employment. Suspension, Geiger explained, was not a viable option.

{¶ 167} "A. We're now in the 19th month of the NCAA process. Having a coach in limbo or having a coach suspended would be grossly unfair to the young people that play basketball at Ohio State, would have arrested any development of our program, and that is - that was an untenable solution." (Trial Transcript, Page 783, Line 21 through Page 784, Line 1.)

{¶ 168} It is difficult to square Geiger's testimony with the language of the parties' agreement. Although Geiger testified that suspending plaintiff for the pendency of the NCAA investigation was an "untenable solution," the agreement entered into by the parties

clearly contemplates such action. Moreover, at the time the parties entered into the 1999 employment agreement Geiger was aware that NCAA investigations proceed very slowly. When asked if he had told plaintiff that the NCAA investigation would move at a snail's pace he answered: "I probably did because they always do." Based upon the language of the agreement, and the evidence admitted in this case, the court finds that defendant bargained away its right to immediately dismiss plaintiff simply because of the inconvenience occasioned by a protracted NCAA investigation.

CONCLUSION

{¶ 169} In summary, Geiger's June 8, 2004, letter speaks to a single, isolated recruiting infraction by plaintiff and plaintiff's failure to timely disclose that violation. The evidence shows that the violation consists of a loan made to the family of a prospect for humanitarian reasons. The evidence also demonstrates that such prospect was ineligible to participate in intercollegiate athletics at the time that the loan was made. Although plaintiff breached his contract by making the loan under these circumstances, the court is persuaded, given the contract language, that this single, isolated failure of performance was not so egregious as to frustrate the essential purpose of that contract and thus render future performance by defendant impossible. Because the breach by plaintiff was not a material breach, defendant did not have cause to terminate plaintiff's employment. Defendant's decision to do so without any compensation to plaintiff was a breach of the parties' agreement.

{¶ 170} For the foregoing reasons, the court finds that plaintiff has proven his claim of breach of contract by a

preponderance of the evidence and accordingly, judgment shall be rendered in favor of plaintiff.

IN THE COURT OF CLAIMS OF OHIO
www.cco.state.oh.us

JAMES J. O'BRIEN	:	
Plaintiff	:	CASE NO. 2004-10230
	:	Judge Joseph T. Clark
v.	:	
	:	<u>JUDGMENT ENTRY</u>
THE OHIO STATE UNIVERSITY	:	
Defendant	:	

: : : : : : : : : : : : : : : :

This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of plaintiff in an amount to be determined after the damages phase of the trial. The court shall issue an entry in the near future scheduling a trial on the issue of damages.

JOSEPH T. CLARK
Judge

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