Not Reported in N.E.2d, 2007 WL 2729077 (Ohio App. 10 Dist.), 2007 -Ohio- 4833
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Briefs and Other Related Documents

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Tenth District, Franklin County.
James J. O'BRIEN, Plaintiff-Appellee/Cross-Appellant,
v.
The OHIO STATE UNIVERSITY, Defendant-Appellant/Cross-Appellee.
No. 06AP-946.

Decided Sept. 20, 2007.

Background: Terminated men's basketball coach filed action against state university for breach of employment contract. Following bench trial on liability, the Court of Claims, 2006 WL 2615550, Clark, J., rendered verdict for coach, granted in part coach's motion for summary judgment on damages, and entered total judgment for coach of approximately $2.49 million. Both parties appealed.

Holdings: The Court of Appeals, Tyack, J. held that:
(1) coach did not materially breach employment contract with university, so as to permit termination for cause, by loaning $6,000 to family of player who was never eligible to play college basketball and by not reporting loan to university for over five years;
(2) after-acquired evidence doctrine did not apply so as to completely bar coach's claim;
(3) coach did not earn two additional years on contract, for which he sought liquidated damages, based on purported achievement of conference championships; and
(4) incentive payments he received for purported championships were deductible from liquidated damages.

Affirmed.

French, J., filed a dissenting opinion.

West Headnotes

[1] Appeal and Error 30 893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Issue of whether state university acted in accordance with undisputed terms of employment contract when firing men's basketball coach, which ultimately turned on whether coach materially breached contract in making loan to a recruit and not reporting it to university for over five years, was a question of fact for which de novo review was not appropriate on university's appeal from judgment for coach.

[2] Appeal and Error 30 654

30 Appeal and Error
30X Record
30X(J) Defects, Objections, Amendments, and Corrections
30k652 Amendment in Appellate Court
30k654 k. Supplying Omissions. Most Cited Cases
Appellate court would not supplement the record, on state university's appeal from judgment for fired men's basketball coach in his action for breach of contract, with subsequent determinations by National Collegiate Athletic Association (NCAA) as to whether coach's conduct in connection with a loan he made to a recruit constituted a major or sec-

ondary rules' infraction, or as to what extent university had been harmed as a direct result of that conduct; trial court made specific findings on both issues, which obviated need to supplement record if those findings were supported by some competent, credible evidence, and, further, appellate court was not bound by NCAA's determination.

[3] Colleges and Universities 81 8.1(3)

81 Colleges and Universities
81k8 Staff and Faculty
81k8.1 Duration of Employment and Removal or Other Discipline
81k8.1(3) k. Grounds for Termination. Most Cited Cases

Basketball coach's employment contract with state university, allowing termination for cause based on a material breach by coach or a finding by National Collegiate Athletic Association (NCAA), with resulting sanctions, that coach had committed a major NCAA infraction, did not permit university to fire coach for material breach based on its opinion that coach violated NCAA bylaws in connection with a loan to family of recruit; such reasoning rendered provision about findings by NCAA useless and created "bootstrapping" effect by allowing university to substitute its judgment for that of NCAA, which at the time had not determined if violations occurred.

[4] Colleges and Universities 81 8.1(3)

81 Colleges and Universities
81k8 Staff and Faculty
81k8.1 Duration of Employment and Removal or Other Discipline
81k8.1(3) k. Grounds for Termination. Most Cited Cases

Independently of allegedly violating National Collegiate Athletic Association (NCAA) bylaws, basketball coach did not materially breach employment contract with state university, so as to permit termination for cause, by loaning $6,000 to family of player who was never eligible to play college basketball and by not reporting loan to university for over five years; university suffered no serious harm, coach did not act out of bad faith and would forfeit millions of dollars in guaranteed salary if university's nonperformance were excused, and university failed to give coach an opportunity to cure purported breach, as required by contract. Restatement (Second) of Contracts § 241.

[5] Colleges and Universities 81 8.1(3)

81 Colleges and Universities
81k8 Staff and Faculty
81k8.1 Duration of Employment and Removal or Other Discipline
81k8.1(3) k. Grounds for Termination. Most Cited Cases

After-acquired evidence doctrine did not apply so as to completely bar fired state university basketball coach's claim for breach of employment contract arising from his termination in connection with a loan he made to family of a recruit; facts contained in a subsequent infractions report issued by National Collegiate Athletic Association (NCAA) were already known to university before it terminated coach and thus did not provide an independent basis for the termination, and, moreover, doctrine does not serve as a complete bar to a former employee's claims.

[6] Colleges and Universities 81 8.1(7)

81 Colleges and Universities
81k8 Staff and Faculty
81k8.1 Duration of Employment and Removal or Other Discipline
81k8.1(6) Judicial Review
81k8.1(7) k. Relief; Reinstatement or Damages. Most Cited Cases

Men's basketball coach did not earn two additional years on contract with state university, under provision relating to supplemental compensation for achieving championship or co-championship of team's National Collegiate Athletic Association (NCAA) conference, and thus salary for those additional years was not recoverable by coach as liquidated damages for being terminated without cause,

where NCAA vacated records of team from the years in which team purportedly won co-championship and championship.

[7] Colleges and Universities 81 8.1(7)

81 Colleges and Universities
81k8 Staff and Faculty
81k8.1 Duration of Employment and Removal or Other Discipline
81k8.1(6) Judicial Review
81k8.1(7) k. Relief; Reinstatement or Damages. Most Cited Cases
Incentive payments representing a portion of base salary, made by state university to men's basketball coach for purportedly winning co-championship of team's National Collegiate Athletic Association (NCAA) conference in one year and championship of the conference in another, were overpayments and thus were deductible from liquidated damages to which coach was entitled under contract for termination without cause, where NCAA had vacated team's records from the years of the purported championships.

APPEAL from the Ohio Court of Claims.Murray Murphy Moul + Basil LLP, Joseph F. Murray and Brian K. Murphy, for plaintiff-appellee.

Marc Dann, Attorney General, and Peggy W. Corn, for defendant-appellant.

Vorys, Sater, Seymour and Pease LLP, David S. Cupps and William G. Porter II, special counsel to the Attorney General, and counsel for defendant-appellant.

TYACK, J.

***1** {¶ 1} After The Ohio State University ("OSU") fired former men's basketball coach James J. O'Brien ("O'Brien"), O'Brien brought suit against OSU alleging it breached his employment contract, which had three years remaining on its term. OSU argued that it was O'Brien who breached the contract when he made a loan to a Serbian basketball recruit in 1998, and failed to disclose it until 2004, which OSU believed was an egregious violation of the National Collegiate Athletic Association ("NCAA") rules constituting a material breach of the employment contract such that OSU was entitled to terminate O'Brien's employment immediately.

{¶ 2} Original jurisdiction over this claim lay with the Ohio Court of Claims, which held a bench trial to determine liability. Following the trial, the court determined that the loan (and failure to disclose) was the sole cause for O'Brien's termination, and that O'Brien's conduct and breach were not a material breach of the contract so that OSU would have cause to terminate the contract immediately. *O'Brien v. The Ohio State Univ.*, Ct. of Cl. No.2004-10230, 2006-Ohio-1104 (hereafter "Liability"). OSU did not dispute that O'Brien's intentions in making the loan were humanitarian, that his conduct was not motivated by desire to gain a recruiting advantage in basketball, and, further, that the loan recipient was not even eligible to participate in intercollegiate athletics at the time of the loan because the recipient was a professional athlete. Thus, although O'Brien breached his contract by making the loan, the court determined that the breach was not "material," and that OSU was without cause to terminate him on that basis alone.

{¶ 3} Following the bench trial, the trial court rendered a verdict for O'Brien, and both parties filed motions for summary judgment as to damages. *O'Brien v. Ohio State Univ.*, 139 Ohio Misc.2d 36, 859 N.E.2d 607, 2006-Ohio-4346, at ¶ 1-3 (hereafter "Damages"). The trial court found the employment contract clearly and unambiguously contemplated the amount of damages OSU would owe to O'Brien in the event he was terminated without "cause," as defined by the contract; thus, there was no dispute as to any material fact in that regard. Construing the evidence in a light most favorable to OSU, the trial court found that reasonable minds could come to but one conclusion-that conclusion being that O'Brien was entitled to judg-

ment as a matter of law. The trial court granted, in part, O'Brien's motion for summary judgment as to damages, and entered judgment in the amount of $2,253,619.45, plus pre-judgment interest of $241,353.98, for a total judgment of $2,494,972.83. *O'Brien v. Ohio State Univ.*, Ct. of Cl. No.2004-10230, 2006-Ohio-4737, Final Entry, Aug. 18, 2006, at ¶ 2, 10 (hereafter "Final Entry"). OSU and O'Brien, both, have appealed from that judgment and decision.

{¶ 4} Appellant OSU presents two assignments of error for our review:

I. The Court of Claims erred by holding that O'Brien did not materially breach his employment contract-which clearly and unambiguously required that he run a clean and compliant program and immediately report any NCAA violations-when he gave an impermissible $6,000 cash inducement to the family of a basketball recruit in 1998 and then failed to report that violation to the University for more than five years.

***2** II. The Court of Claims erred by holding that the after-acquired evidence of O'Brien's additional, pervasive misconduct, as confirmed by the NCAA in March of 2006, did not bar O'Brien's claim altogether.

{¶ 5} O'Brien also cross-appeals from the trial court's partial grant of his motion for summary judgment, contending that the court miscalculated the amount of liquidated damages. He raises the following assignments of error:

[I.] The trial court erred as a matter of law in failing to properly calculate the amount of damages due to the Plaintiff Jim O'Brien pursuant to the liquidated damages provisions contained in his Employment Agreement.

[II.] The trial court erred as a matter of law in finding that the Defendant University was entitled to a setoff for certain bonus amounts previously paid to Plaintiff Jim O'Brien.

I.

{¶ 6} Our scope of review is limited to examination of the transcript from the proceedings, and the remainder of the trial court record, which includes the evidence admitted at trial, and to some extent, the evidence excluded by the trial court, provided such evidence was proffered, preserving it for our review.

{¶ 7} The law is well settled that we review evidentiary matters with an abuse-of-discretion standard. *State v. Drummond*, 111 Ohio St.3d 14, 854 N.E.2d 1038, 2006-Ohio-5084 ("[T]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court"), quoting *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus; *State v. Swann*, 171 Ohio App.3d 304, 870 N.E.2d 754, 2007-Ohio-2010, at ¶ 41. An abuse of discretion is more than an error of law or judgment; rather, it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable, or that there was "no sound reasoning process" to support the trial court's ruling. See, e.g., *AAAA Enterprises., Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597; see, also, *Pilz v. Dept. of Rehab. & Corr*, Franklin App. No. 04AP-240, 2004-Ohio-4040, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 8} Similarly, we accept each finding of fact made by the trial court as issued in the decision of the trial court, provided those findings are supported by "some competent credible evidence." *Columbus Homes Ltd. v. S.A.R. Constr. Co.*, Franklin App. No. 06AP-759, 2007-Ohio-1702, at ¶ 52, quoting *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.

[1] {¶ 9} Counsel for OSU has urged this court to toss out the trial court's findings of fact and to reexamine the entire case de novo. However, de novo is not the appropriate standard of review given the issues at bar. Although contract interpretation is a question of law, which does receive de novo review

on appeal, the terms of the contract are not in dispute here. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108, 652 N.E.2d 684. The issue here is whether OSU acted in accordance with those undisputed contractual terms when firing O'Brien, which ultimately turns on whether O'Brien's breach was material. This is a question of fact, which must be determined after weighing the evidence, and the credibility of witnesses. *E.g.*, *State v. Wilson*, 113 Ohio St.3d 382, 865 N.E.2d 1264, 2007-Ohio-2202, at ¶ 24. Ours is not the job of re-trying the case, or re-weighing the testimony of witnesses and evidence that were already weighed; rather, we conduct an independent review of everything that transpired in the case to determine whether the trial court committed reversible error that would necessitate granting a new trial. *Id.; Hardy v. Fell*, Cuyahoga App. No. 88063, 2007-Ohio-1287, at ¶ 29 ("This court will not sit as trier of fact de novo"). De novo review is therefore inappropriate here. Counsel for OSU further argues that "whether a breach of a contract is material is a mixed question of law and fact that is also reviewed de novo," for which counsel cites an 87-year-old case from another jurisdiction.

***3** {¶ 10} Counsel is correct in noting that some issues are mixed questions of law and fact, and that, in such circumstances, a hybrid standard of review may be appropriate. *State v. Burnside*, 100 Ohio St.3d 152, 797 N.E.2d 71, 2003-Ohio-5372, at ¶ 8 (holding that appellate review of a suppression motion is a mixed question of law and fact). This court, however, is not a trial court, and we cannot be the de novo trier of fact. *Hardy*, supra. Trial courts have the traditional role as the trier of fact because they are "in the best position to resolve factual questions and evaluate the credibility of witnesses." *Burnside*, supra, quoting *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Consequently, we review the trial court's findings of fact to the extent necessary to determine if the findings are supported by *competent, credible evidence. Id.*, quoting *State v. Fanning* (1982), 1 Ohio St.3d 19, 437 N.E.2d 583; *Columbus Homes Ltd.*, supra. " *Mere disagreement* with the trial court's findings is not sufficient to overturn them." *Wilson*, at ¶ 40. (Emphasis added.)

{¶ 11} The determination of whether a party's breach of a contract was a "material breach" is generally a question of fact. See *Kersh v. Montgomery Developmental Center* (1987), 35 Ohio App.3d 61, 63, 519 N.E.2d 665. That has been the law for at least two decades, and it has been upheld by other courts. *Klaus v. Hilb, Rogal & Hamilton Co. of Ohio* (S.D.Ohio 2006), 437 F.Supp.2d 706, 730-731; *Lewis & Michael Moving and Storage, Inc. v. Stofcheck Ambulance Serv., Inc.*, Franklin App. No. 05AP-662, 2006-Ohio-3810, at ¶ 20-22; see, also, Williston on Contracts (4th Ed.1990), Section 63:3; E. Allan Farnsworth, Contracts (1982), Sections 8.16-18, at 612. The reasoning behind this principle is that to determine whether a party's breach was material requires, inter alia, an examination of the parties' injuries, whether and how much the injured parties would or could have been compensated, and whether the parties acted in good faith. *Id.* All of these inquiries turn on subjective facts.

{¶ 12} If we accept the facts found in the trial court as true, we must then independently determine-without deference to the trial court's conclusion-whether those facts satisfy the trial court's legal conclusion. *Burnside*, supra. We must not, however, simply re-weigh the evidence, substituting our own judgment for that of the trial court. *Wilson, ibid.*

II.

{¶ 13} Turning to the evidence, in April 1997, OSU hired O'Brien as head men's basketball coach. When O'Brien arrived at OSU, the men's basketball program was, by his own account, "not in great shape" and, in fact, OSU had not been to the Final Four in men's basketball in nearly three decades. (Tr. 84, 201.)

{¶ 14} O'Brien's first season as head coach at OSU was the 1997-1998 season, which O'Brien described as "not very bright." Indeed, the team won only eight games that year. (Tr. 84, 85, 200.) The following year, O'Brien turned the Buckeyes around. From winning only one-fourth of their games in 1997-1998, the 1998-1999 team won more games than any other Buckeye men's basketball team in history. (Tr. 200-201.) That year, O'Brien led the Buckeyes to a Big Ten conference title, and an NCAA tournament berth culminating in a trip to the Final Four. O'Brien was named 1999 National Coach of the Year, and received numerous other coaching awards and accolades. (Tr. 85, 200-201.) Obviously, OSU was pleased with O'Brien, which was evidenced by the fact that Andy Geiger, Ohio State's Director of Athletics ("Geiger"), approached O'Brien immediately after the 1998-1999 season to offer him a new contract, despite the fact that he still had three years remaining on his then-current contract. *Id.* Geiger testified that, after the 1998-1999 season, he was extremely "enthusiastic about O'Brien," and "enthusiastic about [OSU's] basketball program" because they had just gone to the Final Four. Geiger told the trial court that he initiated talks about a new contract with O'Brien because he "was anxious to have [Coach O'Brien] feel good about Ohio State." (Tr. 200.)

***4** {¶ 15} The terms of the new contract were negotiated over several months, and the final version o f the agreement was delivered to O'Brien for his approval on or about October 1, 1999. The new contract took effect just prior to the 1999-2000 season, and it was the parties' intent that the new contract supersede the previous contract for O'Brien in toto. (Tr. 86-87.) This new contract was substantially superior to the previous contract because it extended O'Brien's tenure at OSU by five years, through the 2007 season, and markedly raised his salary, guaranteeing that he receive total compensation in the neighborhood of $800,000 per year, plus incentives. (1999 Employment Agreement, at Section 3.0 [hereafter "contract"]). In addition, the 1999 contract put strict limitations on the circumstances under which O'Brien could be terminated prior to the end of the contract's term. Id; see, also, Damages, 2006-Ohio-4346, at ¶ 34, 139 Ohio Misc.2d 36, 859 N.E.2d 607 ("The contract is extremely favorable to plaintiff, but it is not unreasonable"). Specifically, under the new contract, OSU could not terminate O'Brien without "cause," which was defined in Section 5.1 thereof:

Termination for Cause-Ohio State may terminate this agreement at any time for cause, which, for the purposes of this agreement, shall be limited to the occurrence of one or more of the following:

(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 [S]tate specifying the act(s), conduct or omission(s) constituting such breach;

(b) a violation by Coach * * * 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 * * *.

{¶ 16} Notwithstanding Section 5.1, OSU could terminate O'Brien without cause, but, if so, would be obligated to pay O'Brien liquidated damages. Collectively, Sections 5.2 and 5.3 provided the formula for the calculation of liquidated damages, in the event OSU decided to terminate O'Brien for any reason(s) other than those described in Section 5.1:

5.2 *Termination Other Than For Cause/Partial Liquidated Damages.* If Coach's employment hereunder is terminated by Ohio State *other than for cause* (as delineated in Section 5.1 above), Ohio State shall pay and provide to Coach, as *partial*

liquidated damages * * * (i) the full amount of Coach's then-current base salary (see Section 3.0 above) and (ii) such normal employee benefits as Ohio State then provides generally to its administrative and professional employees * * *.

5.3 *Termination Other than for Cause/Additional Liquidated Damages.* If Coach's employment is terminated *other than for cause* (as delineated in Section 5.1 above), in addition to the liquidated damages to be paid and provided by Ohio State pursuant to Section 5.2 above, Ohio State shall compensate Coach for the loss of collateral business opportunities (whether media, public relations, camps, clinics, apparel or similar contracts, sponsorships or any other supplemental or collateral compensation or benefit of any kind) by paying Coach *as additional liquidated damages* * * *[.]

***5** * * *

b. an amount equal to three and a half (3.5) times the product of (y) the Coach's then current base salary * * * and (z) the number of years remaining under the term of this agreement * * *, if Coach's employment is terminated after June 30, 2003.

Such amount shall be paid in a lump sum within thirty (30) days after termination of Coach's employment hereunder, and shall be in lieu of any other obligation of Ohio State * * *.

(Emphasis sic.)

{¶ 17} The events that gave rise to this case, however, all transpired before the negotiation and execution of the 1999 contract.

{¶ 18} When O'Brien arrived in Columbus in the spring of 1997, the OSU men's basketball program was in disarray, and it was his responsibility, as head coach, to change that. (Tr. 787.) Although winning is arguably every head coach's first priority, Division-I [FN1] college sports coaches have a number of responsibilities beyond what they do on the court or at game time. (Contract, Section 4.0 et seq.) O'Brien cited a host of duties for which he was responsible as the head coach at OSU: The first one-"Win," the second-"Recruit student-athletes." (Tr. 81.)

FN1. The NCAA's member institutions are divided into three divisions (I, II, and III), by size. Division-I schools are the larger universities, while Division-III institutions are the smaller colleges, community colleges, etc. OSU, being one of the largest institutions in the United States, belongs to Division-I.

{¶ 19} Shortly after the close of the dismal 1997-1998 season, 21-year-old Alex Radojevic arrived at OSU's campus for an *unofficial recruiting visit* [FN2] Radojevic hailed from the Republic of Serbia,[FN3] stood seven-feet-three-inches tall, and, at the time, played Division-III basketball at a community college in Kansas. Radojevic came to visit OSU because he wanted to transfer to a Division-I school, to get the kind of national exposure that would improve his chances for the NBA draft. Given his size alone, Radojevic was seen as a "difference maker," and he was heavily recruited by a number of top schools.

FN2. An "unofficial visit" is a recruiting visit initiated by the player or prospective student-athlete, and is not solicited or sponsored by the university; thus, the athletics department does not pay for or reimburse the athlete for travel or expenses relating to the trip.

FN3. Formerly part of Yugoslavia.

{¶ 20} O'Brien and his staff began recruiting Radojevic, and visited him in Kansas while on an official recruiting tour in early September 1998. While O'Brien was visiting Radojevic, Radojevic received word from Serbia that his father had passed away. (Tr. 126.) O'Brien was sympathetic toward Radojevic, who wanted badly to return

home to his mother and family, but could not go back because of the likelihood that the government would force him into military service amidst the ongoing war in Yugoslavia.[FN4] (Tr. 127.) O'Brien was already familiar with Radojevic's plight because Slobodan "Boban" Savovic, a then-current member of O'Brien's team, gave almost daily reports of the situation, and Savovic was purportedly from the same geographical region as Radojevic. *Id.*

FN4. See, generally, Jane Perlez, *U.S. Finds No One to Back Among Milosevic's Foes*, N.Y. Times (July 12, 1999), at A 8. Although Serbia remained relatively peaceful throughout the Yugoslav-Bosnia-Croatia conflict that erupted during President Clinton's first term, beginning in 1998, tension worsened in Kosovo where the Serbs were battling Yugoslav security forces and the Kosovo Liberation Army. The Serbian attacks in Kosovo prompted a NATO aerial bombardment lasting 78 days.

{¶ 21} Shortly after his September 1998 recruiting tour, O'Brien received information that Radojevic had signed a professional basketball contract with a Yugoslavian team in 1996, that he had played for that team, albeit sparsely, and was compensated in consideration of his service. If true, this meant that Radojevic could not play for OSU (or any college) because signing a professional sports contract instantly strips that player of his amateur status, a baseline requirement to be eligible to play collegiate sports in the NCAA.[FN5]

FN5. *See* NCAA Bylaw 12.1.1, Amateur Status, in 2006-2007 NCAA Division-I Manual (Aug. 1, 2006), *available at www.ncaa.org*, at Membership Publications. An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual:

"(a) Uses his * * * athletics skill * * * 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 * * *;

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

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

Id.; see, also, The Online Resource for the NCAA, About the NCAA, *available at www.ncaa.org*, at Membership Publications (last visited May 29, 2007); Amateur Certification Process ("In response to the NCAA membership's concerns about amateurism issues related to both international and domestic prospective student-athletes, President Myles Brand has authorized the creation of a centralized amateurism certification process.").

***6** {¶ 22} Despite speculation that Radojevic had "professionalized" himself, O'Brien and his staff continued their recruiting efforts, apparently in the hopes that OSU could petition the NCAA to have him reinstated. To make a successful case, the

school seeking the athlete's reinstatement must file an application with the NCAA's reinstatement department presenting facts and circumstances that mitigate both the player's professional involvement, and the presumed competitive advantage that school might gain from having the professionalized player on their roster. If either circumstance is borderline, a school can, for example, recommend self-imposed conditions for reinstatement to persuade the NCAA decision-makers to rule in their favor. (Tr. 658-659.) Given that O'Brien did not give up recruiting Radojevic, even after learning about the professional contract, he was apparently counting on Radojevic's reinstatement, which is evidenced by the fact that, shortly after learning about the contract, OSU accepted what is known as a *National Letter of Intent* ("NLI") [FN6] from Radojevic, on November 11, 1998. (Tr. 604, 649-650.) The significance of the NLI is two-fold: it represents Radojevic's commitment to OSU, to enroll there as a student-athlete and play basketball, and also represents OSU's commitment to provide Radojevic with one of its coveted basketball scholarships. (Tr. 357-358.)

FN6. The NLI acts as a contract between a school and a prospective student-athlete, and also serves as a notice provision to all of the other schools attempting to recruit the same athlete-so they are apprised of the athlete's commitment to attend the school designated in the NLI.

{¶ 23} In December 1998, Radojevic came back to OSU for an *official visit* [FN7] (Tr. 305, 652-654.) He spent two days on the campus, attended a basketball game, and was chaperoned to several other school-sponsored events by fellow Serb, Boban Savovic. After this visit, an individual associated with the Radojevic family contacted one of O'Brien's staff soliciting financial assistance from O'Brien, purportedly for Radojevic's mother back in Yugoslavia. (Tr. 125-126.) O'Brien testified that he considered the request, weighing the fact of Radojevic's father having recently passed, and also what O'Brien had come to know about what life must have been like for the Radojevic family, amidst the bombings and ongoing military violence. O'Brien also considered whether any NCAA rule prevented him from offering help to the family of an athlete who was, in all likelihood, ineligible to play collegiate sports on account that he had already played professional basketball in Yugoslavia. (Tr. 112.) [FN8] O'Brien resolved that Radojevic was already a professional, and would most likely never play for OSU, which meant that no NCAA rule could control whether it was permissible for him to offer financial assistance to the Radojevic family in their time of need. Thereafter, O'Brien gave then-assistant coach Paul Biancardi an unmarked envelope containing $6,000, instructing Biancardi to take the envelope to New York City and deliver it to a waiter known as Spomenko "Semi" Patrovic. (Tr. 130.) There was speculation as to what specific role Patrovic played in soliciting the loan, and how he was related to or affiliated with the Radojevic family. Although it was not foreseen at that time, Semi Patrovic ultimately became Radojevic's sports agent.

FN7. See NCAA Bylaw 13.02.11.1(a) (Recruited Prospective Student-Athlete). Generally speaking, the bylaws set strict guidelines as to the amount of time a recruit can spend at the school, what kinds of activities they can participate in, and how much money the school is allowed to spend on such activities. All details of an official visit are documented and reported to the NCAA. (Tr. 652-654.)

FN8. OSU contended that the loan was a blatant or egregious violation of "Recruiting 101." (Tr. 608, 762); NCAA Bylaw 13.2.1.

***7** {¶ 24} There were differing accounts as to precisely when the loan occurred; in fact, the trial court referred to the details as "sketchy." (Liability, 2006-Ohio-1104, at ¶ 9.) O'Brien testified that part of his consideration of whether to make the loan

was that he received the request around Christmas time, which supports his position that he made the loan in late December 1998 or early January 1999. (Tr. 128-129.) The NCAA Committee on Infractions, however, questioned O'Brien's recollection of the timing of the loan, and issued a report alleging that the terms of the loan could have been contemplated much earlier, vis-à-vis September 1998, during O'Brien's recruiting stop in Kansas.[FN9] The infractions committee's report was not issued until almost a year after O'Brien was fired, thus, it had no bearing on OSU's decision to terminate him. Regardless, the trial court found the NCAA report and its related testimony and evidence to be unreliable; moreover, the trial court correctly held that the report was not binding in these legal proceedings. Ultimately, the trial court found the testimony of former NCAA Committee on Infractions Chair Dr. David Swank more persuasive and credible as to the NCAA's bylaws and procedures:

> FN9. See Notice of Allegations from the NCAA Committee on Infractions to OSU (May 13, 2005). (Defendant's Exhibit No. O.)

> In the court's opinion, Professor Swank's view represents a more practical application of the rules. * * *
>
> Ultimately, the determination whether [O'Brien] committed a major infraction of NCAA rules and what sanctions, if any, may be imposed upon [OSU] will be made by the NCAA Committee on Infractions and not this court.

(Liability, 2006-Ohio-1104, at ¶ 84-85.)

{¶ 25} Indeed, Dr. Swank's credentials as an expert witness for O'Brien were impressive. After finishing law school at the University of Oklahoma, Dr. Swank worked in private practice in his hometown of Stillwater, Oklahoma, and shortly thereafter became an assistant prosecutor, followed by his election as county prosecutor. (Tr. 327-328.) He resigned his term as prosecutor to return to his alma mater as chief counsel for the university, and assistant professor of law. He later became chief compliance officer there, and at the same time was appointed and served seven years as an NCAA vice president. (Tr. 328-329.) Dr. Swank later became Dean of the University of Oklahoma College of Law, after which he became the university's president. (Tr. 335-336.) Dr. Swank served as president until 1990, when he joined the NCAA Committee on Infractions. Two years later, Dr. Swank was named chair of that committee, where he served seven more years, and was the chair of that committee at the time of the Radojevic loan. (Tr. 338-339.)

{¶ 26} Dr. Swank testified as an expert on NCAA bylaws and investigations on behalf of O'Brien, to provide an expert analysis of NCAA rules as applied to the Radojevic family loan, and whether that conduct constituted a major rules infraction thereof. (Tr. 326.) Further, Dr. Swank gave expert testimony relating to the four-year statute of limitations, and whether the limitation period precluded NCAA sanctions as a result of O'Brien's conduct. *Id.*, quoting NCAA Bylaw 32.6.3. Given the 40-year body of work representing Dr. Swank's experience, and the specificity of his expertise relative to the issue upon which he was called to opine, the trial court found Dr. Swank's testimony extremely credible and reliable. Thus, Dr. Swank's testimony was monumentally persuasive, and crucial to determining whether O'Brien materially breached his employment agreement.

***8** {¶ 27} The trial court adopted O'Brien's version of the timing of the loan, in part, because the court found O'Brien to be a credible witness, but, also, because there was no evidence to support the contrary viewpoint. The only evidence supporting the contrary viewpoint was a document authored by Assistant Director of Enforcement for the NCAA, Steve Duffin, which was prepared using Duffin's personal notes of his purported interview of Radojevic in November 2004. (Liability, 2006-Ohio-1104, at ¶ 29-32.) The trial court deemed Duffin's deposition and its related docu-

ments inadmissible because they all contained statements made out of court, which were offered for their purported truth, and that no exception to the hearsay rule was applicable:

> 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 [as] 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 * * * In addition, the statements are contained in documents prepared by NCAA enforcement personnel who have taken a position adverse to [O'Brien] in the underlying NCAA proceedings. Finally, even [Andy Geiger] defendant's own athletic director testified that Radojevic lied to the NCAA reinstatement committee in connection with those proceedings.

Id. at ¶ 31. (Emphasis added.) We note, especially, that the trial court did not exclude this evidence solely on account of a technicality (a rule of evidence). To the contrary, the trial court thoroughly examined the evidence prior to making the determination that its truthfulness simply could not be verified, corroborated, or relied upon.

{¶ 28} O'Brien consistently maintains that the $6,000 was a loan, nothing more, and that he was compelled to offer assistance out of sympathy toward Radojevic's mother. (Tr. 108-109, 126-130.) In short, O'Brien made the loan because he could-he had the money, could spare the money, and it was to go to a good cause. (Tr. 128-130.) O'Brien specifically refuted the idea that he might have made the loan to influence Radojevic's decision to attend OSU. *Id.* Accepting the trial court's finding as to the timing of the loan, the court could reasonably find that O'Brien was being truthful in this regard, because, based on the NLI's date of November 11, 1998, Radojevic had already made a final decision to come to OSU. The only possible opposing viewpoint is the one asserted by Steve Duffin: The evidence at trial did not support Mr. Duffin's view.

{¶ 29} O'Brien's credibility as a witness was also bolstered by evidence that his generosity in this situation was no anomaly. O'Brien testified to making loans to others close to him, including former players, friends, and assistant coaches. These other loans ranged in amounts from $3,500 to $10,000. (Tr. 131-132.) Geiger's testimony was consistent with O'Brien's, to the extent that Geiger believed O'Brien's intentions surrounding the loan to have been pure and humanitarian and that O'Brien had done a "noble act." (Liability, 2006-Ohio-1104, at ¶ 19.)

***9** {¶ 30} The NCAA requires each member institution to file annual affidavits, which certify that the school, its teams, student-athletes, etc., have complied with all applicable NCAA regulations for that year ("compliance certification"). As a head coach of a major sport, O'Brien was the chief compliance officer for the men's basketball program at OSU. One of O'Brien's primary duties as chief compliance officer was to file the annual compliance certifications for the men's basketball program. At trial, OSU argued that O'Brien's failure to report the Radojevic loan on the compliance certification(s) was deceitful, and that O'Brien's deceit constituted a material breach independent of whether the loan itself was a violation of NCAA rules. The strength of that argument, however, turned on O'Brien's subjective belief of whether he thought the loan could be a violation. Thus, a key determination in the trial court was whether O'Brien could have reasonably believed that the loan did not constitute an NCAA compliance infraction. (Liability, 2006-Ohio-1104, at ¶ 54.)

{¶ 31} O'Brien testified that, because Radojevic had professionalized himself in 1996, he could not have violated NCAA recruiting rules when he made the loan in 1998. (Tr. 112, 124-125.) He also maintained that there was no NCAA rule against loaning money to the family of a professional athlete. Dr. Swank concurred, and opined: "because

[Radojevic] was not a prospective student-athlete at th at time, that it was not a violation of NCAA rules." (Tr. 367.) To arrive at this conclusion, Dr. Swank explained NCAA Bylaw 12.1.1, which sets forth six independent circumstances under which an amateur athlete loses eligibility to participate in NCAA-sanctioned collegiate sports.[FN10] Dr. Swank explained that, out of the six disqualifying factors enumerated in Bylaw 12.1.1, in 1996, Radojevic performed five separate and distinct acts, any one of which sufficiently stripped him of amateur status, and that all these events occurred two years prior to the loan. *Id.* In Dr. Swank's expert opinion, the evidence that Radojevic had become a professional athlete in 1996 was unequivocal, which supported his conclusion that it was reasonable for O'Brien to believe he could make a loan to the Radojevic family without violating NCAA rules. (Tr. 367-372.)

FN10. See NCAA Bylaw 12.1.1, at fn. 5.

{¶ 32} Dr. Swank could not render an opinion as to why OSU would continue to recruit a player, and offer that player a scholarship, after learning that the player had played professionally, or was otherwise ineligible to participate in NCAA-sanctioned activities. The only explanation O'Brien offered for why he continued to recruit Radojevic was that he was planning on reinstatement. Subsequently, O'Brien made the loan. He explained that, if Radojevic had been reinstated, he would have had to disclose the loan, because he would have then offered financial assistance to th e family of a prospective student-athlete. Dr. Swank did not consider whether Radojevic could have or should have been reinstated, because, in his opinion, reinstatement was not even possible, much less plausible. Although Dr. Swank's position lends more credibility to O'Brien's justification of the loan, it leaves the door open to questions about why O'Brien pursued Radojevic's reinstatement so vigorously with the NCAA.

***10** {¶ 33} Although O'Brien probably learned about Radojevic's professional contract in September 1998, it was not commonly known within OSU until February 1999, which is when Geiger confronted O'Brien with the news. O'Brien and his staff assured Geiger that Radojevic's contract was essentially propaganda by the Yugoslav government, "a bun ch of hooey," and that Radojevic could still be reinstated. (Tr. 306, 308-309.) As part of the reinstatement procedure, OSU formally announced Radojevic's ineligibility and, on March 24, 1999, filed its petition for Radojevic's reinstatement with the NCAA. (Tr. 306-309, 658-669.) The NCAA denied the application, and OSU appealed. (Tr. 672.) The NCAA affirmed its decision on May 24, 1999-Radojevic had professionalized himself by signing a professional basketball contract in 1996, and would never play basketball at OSU, or any other NCAA institution for that matter. Geiger testified that, upon learning about the committee's final decision, O'Brien appeared deeply frustrated and disappointed, as if to say that O'Brien was expecting a different outcome. At trial, Geiger did not attempt to reconcile his recollection of O'Brien's reaction in May 1999, with O'Brien's story that he basically knew Radojevic was a professional all along.

{¶ 34} Radojevic never enrolled at OSU. Shortly after the appeal was decided, Radojevic declared himself eligible for the 1999 NBA draft. He was selected in the first round, as the twelfth overall pick by the Toronto Raptors. OSU closed out its basketball season in March 1999, winning the Big Ten conference title, and going to the Final Four in the NCAA basketball tournament. OSU did not dwell on having missed out on a promising recruit, because almost immediately after the season came to a close, Geiger began talks with O'Brien about the new contract they were about to sign. Other than O'Brien, and probably Paul Biancardi, no one at OSU knew anything about the Radojevic family loan until five years later.

{¶ 35} In 2003, O'Brien learned about a lawsuit, filed locally, involving an OSU athletics booster, Kathy Salyers, and then former player Boban Sa-

vovic. FN11 O'Brien related news about the lawsuit to Geiger because of the likelihood that sensitive information could become a matter of public record. Salyers was deposed around April 2, 2004, and O'Brien either knew, or at least suspected, that the subject matter of Salyers' deposition included information relating to Radojevic. O'Brien knew that, even though Radojevic never attended OSU and never played Division-I basketball, if the loan were discovered by local media it would become headline news, which is why he felt compelled to tell Geiger. (Tr. 110-112.) O'Brien wanted to be sure Geiger found out from him personally, rather than learn about it from the press.

FN11. The trial court held that the subject matter of the Salyers lawsuit was not relevant to the trial sub judice; however, we note that the matter involved the men's basketball program at OSU, namely Boban Savovic, the former OSU player who had chaperoned Radojevic during his official visit in the fall of 1998. In May 2004, attorneys in the OSU athletic department were able to review deposition transcripts from the Salyers trial, which revealed Salyers' claims that she provided improper benefits to Savovic while he played basketball at OSU.

{¶ 36} On April 24, 2004, O'Brien approached Geiger at the Huntington Club inside Ohio Stadium. They were both attending a donor reception on the day of the football team's annual "Scarlet & Gray" spring game. O'Brien told Geiger about the loan, briefly explaining the circumstances, why he had not disclosed it until then, and the reason for finally coming forward, to which Geiger responded that they would "work through it together." (Tr. 109, 224.)

***11** {¶ 37} Despite that, O'Brien believed the loan did not violate NCAA rules. Geiger and the attorneys in the OSU compliance office FN12 disagreed. (Tr. 112, 144, 223-227, 315.) Together, Geiger and his compliance staff attorneys determined that the loan should be self-reported to the NCAA, and did so the following month. (Tr. 229, 256.) Shortly thereafter, O'Brien met with Geiger and Julie Vannatta, one of the compliance office staff attorneys on May 26, 2004, to discuss the joint investigation of OSU and the NCAA, which was soon to ensue. During that meeting, Geiger advised O'Brien that O'Brien should retain independent counsel. (Tr. 241.)

FN12. Given that the NCAA is not a law-enforcement body with presence on each campus nationwide, it relies heavily on the member institutions monitoring and "self-reporting" all conduct relating to the rules promulgated by the organization. For that reason, inter alia, member institutions, like OSU, have entire offices or departments dedicated solely to overseeing university athletics and all compliance-related matters. Like OSU, compliance officers are staffed, at least in part, by attorneys trained to understand NCAA bylaws and how to keep their respective programs *in compliance* therewith. See, e.g., OSU Compliance Office, http:// ohiostatebuckeyes.cstv.com/compliance/osu-compliance.html (last visited May 22, 2007). Presently, half of the eight paid senior staff in OSU's compliance office are lawyers. The compliance office's mission statement is also posted on its website:

> "The Athletic Compliance Office is committed to a comprehensive compliance program that educates its constituents about the importance of adhering to NCAA, Big Ten, and institutional rules. Our goal is to create a 'compliance conscience' within the University and throughout the community. Maintaining a commitment to compliance ensures institutional control over the Department of Athletics and furthers the mission of The Ohio State University.

> "To ensure institutional control and uphold the integrity of the Department, the Athletic Compliance Office is charged with the following tasks: Education, Monitoring, Enforcement, Institutional Control."

{¶ 38} The following day, O'Brien called Geiger to ask if he was going to be fired. O'Brien testified that Geiger had replied "no," however, Geiger could not confirm his reply. On cross-examination, when O'Brien's counsel asked Geiger whether he had told O'Brien he was not going to be fired, Geiger stated, "It's possible." (Tr. 243.) Geiger contacted O'Brien a few days later to find out if he had retained counsel, and also asked whether O'Brien intended to resign. O'Brien told Geiger that he had retained attorney James Zestzutec, but they di d not fully resolve the issue of O'Brien's resignation. O'Brien's attorney then sent a letter to Geiger, stating his client's intent and willingness to cooperate with the athletics department and the NCAA during the impending investigation. (Tr. 510-512.) Geiger did not respond to the letter, nor did Geiger or any of his staff meet with O'Brien's attorney before terminating him on June 8, 2004.

{¶ 39} At approximately 7:30 a.m., on June 8, 2004, Geiger called O'Brien at his home, and asked O'Brien to meet him at his office as soon as possible. (Tr. 211-213.) O'Brien arrived at Geiger's office within the hour, and, after waiting awhile, Geiger handed him a letter of termination. (Termination Letter from Geiger to O'Brien dated June 8, 2004, hereafter "termination letter.") Geiger told O'Brien that he had the option of resigning in lieu of termination, but that he had already scheduled an afternoon press conference to make the announcement, one way or the other.

{¶ 40} In the hours that followed, O'Brien's attorney tried contacting Geiger and OSU to request a meeting, or to be given more time for O'Brien to consider his options. (Tr. 511-512.) Although Julie Vannatta spoke briefly with O'Brien's attorney that day, she declined counsel's requests to meet, or for an extension of time. *Id.* Geiger announced the coach's firing as planned, at the afternoon press conference.

III.

{¶ 41} Nearly one year after O'Brien was fired, the NCAA issued a "notice of allegations" FN13 to OSU alleging major rules infractions by the men and women's basketball programs, and also the football program. Six of the alleged violations concerned former basketball player Boban Sovovic, and three of them related to Radojevic.

> FN13. See, supra, fn. 9. A notice of allegations functions similarly to an indictment or a bill of information. (Tr. 410-418.) Dr. Swank testified that the notice of allegations is a preliminary document that is written by the NCAA department acting as the "prosecutor" of the charges against a school. Thus, the notice of allegations is not a final judgment or verdict, and does not carry the imposition of sanctions.

***12** {¶ 42} Before and during trial, the trial court ruled in favor of OSU on several motions in limine, and routinely sustained OSU's objections to O'Brien's counsel making any reference to persons, facts, or events other than those specific to the Radojevic loan. (Tr. 8-51.) As a product of these rulings, the record is virtually silent to the circumstances surrounding the majority of the violations alleged in the notice issued March 13, 2005. Additionally, the trial was held in December 2005, while the NCAA did not conclude its investigation until March 10, 2006. Thus, at the time of trial, it was unknown (1) whether the loan to Radojevic constituted an infraction of NCAA rules; (2) if the loan was an infraction, whether the infraction was major, or only secondary; and (3) whether and to what extent OSU could be punished as a result of the Radojevic loan. For a number of reasons, these undetermined facts were problematic to litigation of the claims herein.

[2] {¶ 43} Counsel for both parties have submitted motions to supplement the trial court record, and/or to urge this court to take judicial notice of certain facts not in evidence. We previously determined that the record was sufficient to review the judgment of the trial court, and overruled all motions to supplement. Consequently, we will not review or give consideration to the subsequent determinations made by the NCAA with regards to (1) whether O'Brien's conduct constituted a major or secondary rules' infraction, or (2) to what extent OSU has been harmed as a direct or proximate result thereof. After thoroughly examining all the evidence in this case, the trial court made specific findings relating to both of these issues, which, provided they are supported by some competent, credible evidence, obviate the need to supplement the record. Further, this court is not bound by the determination of the NCAA.

IV.

{¶ 44} O'Brien brought a single claim against OSU, alleging that OSU breached his employment contract when it fired him on June 8, 2004. A contract is (1) an agreement, (2) with consideration (i.e., quid pro quo), (3) between two or m ore parties, and (4) to do or not to do a particular thing. *Powell v. Grant Med. Ctr.* (2002), 148 Ohio App.3d 1, 10, at ¶ 27, 771 N.E.2d 874, quoting *Lawler v. Burt* (1857), 7 Ohio St. 340, 350. Under Ohio law, to prevail on a claim for breach of contract, a plaintiff must prove: (1) the existence of, and terms of, a contract; (2) performance by the plaintiff; (3) nonperformance by the defendant; and (4) damages caused by defendant's breach. *Powell, ibid.; Roth Produce Co. v. Scartz* (Dec. 27, 2001), Franklin App. No. 01AP-480; *Doner v. Snapp* (1994), 98 Ohio App.3d 597, 600, 649 N.E.2d 42.

{¶ 45} There is no dispute, here, as to the existence of a contract. (Liability, 2006-Ohio-1104, at ¶ 34.) O'Brien's claim turned on demonstrating, by a preponderance of the evidence, that (1) he substantially performed under the contract, and (2) OSU breached the contract by terminating him.

***13** {¶ 46} The doctrine of substantial performance provides that, where a contract requires numerous performances by one or more of its parties, a party's breach of a single term thereof does not discharge the non-breaching party's obligations under the remainder of the contract *unless performance of that single term is essential to the purpose of the agreement. Kersh,* at 62, 519 N.E.2d 665, citing *Boehl v. Maidens* (1956), 102 Ohio App. 211, 139 N.E.2d 645. Stated another way, default by a party who has substantially performed does not relieve the other party from subsequent performance. See *Hansel v. Creative Concrete & Masonry Constr. Co.* (2002), 148 Ohio App.3d 53, 56-57, 772 N.E.2d 138; *Kersh,* citing *Hadden v. Consol. Edison Co. of New York, Inc.* (1974), 34 N.Y.2d 88, 356 N.Y.S.2d 249, 312 N.E.2d 445; cf. 6 Williston on Contracts (3rd Ed.1962) 165, Section 842; Restatement of Law 2d, Contracts (1981) 237, Section 241.

{¶ 47} OSU terminated O'Brien's contract prior to its term. The crux of OSU's argument is that, on account of the loan to Radojevic in 1998 (and subsequent failure to disclose), O'Brien did not substantially perform under the contract, which excused OSU from all future performances. Stated more simply, OSU asserts that it was justified in terminating O'Brien under the terms of his written contract.

{¶ 48} Several key witnesses, including OSU's athletics director, Geiger, testified that O'Brien had done a fine job as head men's basketball coach, which was evidenced demonstratively by the team's winning record, and O'Brien's numerous national coaching awards. (Tr. 200-201, 787.) Notwithstanding, OSU argued that the loan was such an egregious violation of NCAA rules that it constituted a material breach within the meaning of Section 5.1(a) of the contract, and that, because of that material breach, OSU was justified in its action terminating O'Brien's employment.

{¶ 49} In its first assignment of error, OSU asserts

that the trial court erred by finding that the Radojevic loan did not materially breach O'Brien's contract. They contend-notwithstanding Section 5.1, which explicitly provides the circumstances under which O'Brien could be fired "for cause"-that the Radojevic loan also violated Section 4.1(d), requiring O'Brien to "run a clean and compliant program." (Tr. 518.) In Geiger's termination letter to O'Brien, Geiger justified the decision to terminate him as follows:

> 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 * * * 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.
>
> ***14** Section 4.1(d) * * * 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.
>
> 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. * * *
>
> (Emphasis sic.)

{¶ 50} Although Geiger cited to specific NCAA bylaws in the letter, he offered only his own interpretations thereof. Thus, Geiger's assertion was that O'Brien violated what amounted to Geiger's own-or OSU's own-interpretation of the NCAA's rules, and, based on that interpretation, he concluded that O'Brien materially breached his contract. Accepting that analysis as apposite, Section 5.1(a) provides that OSU could terminate the coach, on the basis that he committed a material breach of the agreement. This was the basis Geiger cited for O'Brien's termination. No other basis for O'Brien's termination was set forth at that time.

{¶ 51} Section 5.1 of the contract provides that OSU could fire O'Brien for either, or both, of the following:

> (a) a material breach * * *; [or]
>
> (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 * * *.

When both subsections of 5.1 are read in pari materia, it becomes abundantly clear that subsection (b) provides the circumstances under which OSU could terminate O'Brien for conduct relating to NCAA rules or violations thereof. But OSU did not fire O'Brien under the authority of Section 5.1(b). In fact, there is no mention or reference to Section 5.1(b) in the entire body of the termination letter.

[3] {¶ 52} Geiger's letter to O'Brien gave the explicit reason(s) for his termination as: (1) violation of NCAA Bylaw 13.2.1; and (2) violation of NCAA Bylaw 30.3.5, which, together, constituted a materi-

al breach of the contract-cause for termination under Section 5.1(a). However, this reasoning is suspect on account of subsection (b), for two reasons: First, it violates basic principles of contract interpretation, by rendering subsection (b) useless. Contracts must be interpreted in a way that gives meaning to each term. *State ex rel. Gordon v. Taylor* (1948), 149 Ohio St. 427, 437, 79 N.E.2d 127; *Osborne v. Hartford Life and Accident Ins. Co.* (C.A.6, 2006), 465 F.3d 296. Secondly, its reasoning creates a "bootstrapping" effect by allowing OSU to substitute its own judgment for that of the NCAA. Doing so expressly violates the agreed-upon terms in Section 5.1(b), which require an NCAA determination (and sanctions resulting therefrom) of whether the coach committed a violation.

***15** {¶ 53} The parties to the contract at issue-i.e., the coach and OSU-negotiated the terms and circumstances under which OSU could terminate the contract prior to its term. The parties agreed that OSU could not fire O'Brien unless a specific condition occurred and, as of June 8, 2004, that condition had not occurred. In fact, the evidence does not conclusively show that that condition has occurred to date. Thus, we cannot say whether O'Brien could have been terminated pursuant to the NCAA's determination in 2006; however, even if it would have been proper to terminate him at that time, much of the liquidated damages awarded to O'Brien in the judgment of the trial court would have been earned as salary.

{¶ 54} Job security is not the first item on the lists of most high-profile coach's perks of employment, and when Geiger came to O'Brien in 1999 to renegotiate his contract, O'Brien bargained to have a contract that provided more certainty in that regard. O'Brien knew in 1999 that NCAA investigations happen all the time-or, in the words of OSU's Law Professor and Vice President of Student Affairs, David Williams: *It's just the nature of the beast.* O'Brien wanted to insulate himself from some of the uncertainty that goes with being a high-profile coach in Division-I college sports, which is why he sought the guarantee from OSU that he would not be fired prematurely, at the outset of a rumor, or speculation that, in the future, the NCAA might impose some sanction against OSU for some reason. OSU agreed with this term, and reduced it to writing. In doing so, OSU bargained away its unfettered discretion to terminate O'Brien, especially as it related to any conduct or subject matter arising in the context of NCAA rules.

[4] {¶ 55} Even if, however, OSU had not bargained away this right-its own discretion or self-determination of what constitutes an NCAA major infraction-this court cannot say that independently of being an alleged NCAA recruiting violation, O'Brien materially breached his contract with OSU by loaning $6,000 to the family of a player who was never eligible to play college basketball in the first place.

{¶ 56} At common law, a "material breach" of contract is a party's failure to perform an element of the contract that is "so fundamental to the contract" that the single failure to perform "defeats the essential purpose of the contract or makes it impossible for the other party to perform." 23 Williston on Contracts, Section 63:3. As applied to the facts here, based on our review of the contract itself, and the relevant testimony, we agree with the trial court's determination that NCAA compliance was but one of O'Brien's many duties. (Liability, 2006-Ohio-1104, at ¶ 38.) That said, failure to strictly comply with NCAA rules does not entirely frustrate the purpose of the contract, unless it were true that every time a coach or player within the NCAA's jurisdiction commits a violation of its rules, that athlete or coach (or the member school) is barred from competition. In other words, at common law, the Radojevic loan could have constituted a material breach if the NCAA had determined that the loan was a major infraction warranting a lengthy suspension from NCAA competition. For the purposes of this inquiry, however, the common law material-breach analysis is circuitous, because

it cannot be determined independent of the NCAA's findings. Again, OSU did not wait for the NCAA to make such a determination, and, essentially, OSU substituted its own judgment for that of the NCAA to make its own determination, which tends to controvert the very heart of the parties' agreement vis-à-vis Section 5.1(b).

***16** {¶ 57} Amici argue on behalf of OSU that the above interpretation of Section 5.1(b) "undermines the institution's ability to self-monitor its programs, and to speedily put an end to any improper circumstances, self-report and self-sanction in an effective manner." (Amici Curiae brief, at 20.) Although amici do not cite to any case or authority for this proposition, we find it a persuasive o ne indeed. However, amici's policy argument, regardless of how logical or persuasive, fails to take the actual agreement between O'Brien and OSU into account. The specific problem we face is that, on these facts, in Section 5.1(b) of the contract, the parties specifically contemplated the consequences that would follow if an NCAA violation was alleged or believed to have occurred. Those consequences did not include termination of the contract prior to an NCAA determination. Thus, under the terms in Section 5.1(b), OSU acted prematurely by firing O'Brien on June 8, 2004.

{¶ 58} In turn, at oral argument, OSU attempted to circumvent the meaning of Section 5.1(b) by asserting that O'Brien's conduct (i.e., the loan, and failure to disclose) had significance independent of whether the conduct was a violation of NCAA rules. We cannot agree. If the NCAA did not prohibit a school's providing a cash incentive to prospective student-athletes, it does not seem logical that O'Brien's conduct would have been objectionable.

{¶ 59} The act of giving money to an athlete or prospective athlete is a common practice outside of the NCAA-professional franchises offer multi-million dollar signing bonuses to prospective athletes all the time, to encourage them to sign a contract with that respective team. Therefore, OSU's argument in that regard is unpersuasive, and we must determine whether O'Brien's conduct constituted a material breach within the meaning of the contract.

{¶ 60} Restatement of the Law 2d, Contracts, sets forth a more precise analysis for determining whether a party's breach of a contract was material, by using a five-prong test, which this court adopted in *Kersh,* at 62-63, 519 N.E.2d 665 (citing Restatement of the Law 2d, Section 241; see, also, *Klaus,* at 730-731; *Shanker v. Cols. Warehouse Ltd., Partnership* (June 6, 2000), Franklin App. No. 99AP-772. The Restatement test is prevailing law, and it was used by the Ohio Court of Claims in deciding this case:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

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

(c) the extent to which the party failing to perform * * * will suffer forfeiture;

(d) the likelihood that the party failing to perform * * * will cure his failure, taking account of all the circumstances including any reasonable [adequate] assurances;

(e) the extent to which the behavior of the party failing to perform * * * comports with standards of good faith and fair dealing.

***17** (Liability, 2006-Ohio-1104, at ¶ 100-104.)

{¶ 61} Under the first prong, Restatement of the Law, Section 241(a), OSU argues that the Radojevic loan deprived OSU of the benefit it reasonably expected from O'Brien's contract, because O'Brien's conduct: (1) subjected OSU to NCAA sanctions; (2) adversely affected OSU's reputation; and (3) breached the trust between O'Brien and Geiger, the athletics director. The trial court made factual findings with regard to each of t he three in-

juries claimed by OSU, and ultimately determined that, in and of itself, the Radojevic loan did not substantially harm OSU. We accept the trial court's findings provided they are supported by *some competent, credible evidence. C.E. Morris Co.; Columbus Homes Ltd.*, supra.

{¶ 62} As a preliminary matter, we note that "breach of trust" was not mentioned in the termination letter and, although there is an implied duty of good faith in every contract, trust was not specifically mentioned in the parties' agreement, nor was "breach of trust" cited as possible grounds for cause to terminate the contract.

{¶ 63} OSU's first claimed injury was NCAA sanctions. The trial court found that, because the NCAA's allegations related to matter(s) other than the Radojevic loan, the extent of harm caused to OSU "that *can be fairly attributed to the Radojevic matter* is difficult to predict." (Liability, 2006-Ohio-1104, at ¶ 110.) (Emphasis added.) Geiger and Julie Vannatta even acknowledged that the Radojevic matter was barred by the four-year limitation period in NCAA Bylaw 32.6.3. (Tr. 250, 526.) Thus, because the loan occurred in 1998 (or, at the latest, January 1999), the statute of limitations had already expired when OSU reported the matter to the NCAA on May 18, 2004. Dr. Swank concurred. (Tr. 368-369.) Further, the trial court made a specific finding that the NCAA did not seek any sanctions arising out of O'Brien's failure to report the loan on the annual compliance forms.

{¶ 64} The only sanctions suffered by OSU were self-imposed, with hopes the NCAA would view the institution's self-determined punishment as reasonable, and decline to impose further sanctions. (Miechelle Willis Depo., Aug. 18, 2005, at 101-102.) OSU argued that it was substantially injured by the self-imposed sanctions, which included a ban from post-season and NCAA tournament play for the 2004-2005 season, and relinquishing two basketball scholarships from the 2005 recruiting class. Contrary to OSU's argument, however, the trial court found these sanctions to be insubstantial. Geiger announced the one-year post-season ban in December 2004, and it appears from the timing of that announcement that Geiger made the decision based on the fact that the team was unlikely to be invited to a post-season tournament in the first place. Despite the fact that the 2004-2005 team finished by upsetting the nation's top-ranked team, prior to that game, the Buckeyes had played rather poorly throughout the year. Thus, the likelihood that OSU would have been invited to the 2005 NCAA tournament was slim, at best, and the post-season ban was illusory. As to the relinquished scholarships, the trial court found that the 2005 recruiting class was one of the best ever.

***18** {¶ 65} The second alleged harm was harm to OSU's reputation. The trial court found that any reputational harm was similarly exaggerated, at least as it specifically related to the Radojevic matter. Radojevic never enrolled at OSU, "and never played a single second for [OSU]'s basketball team." (Liability, 2006-Ohio-1104, at ¶ 124.) The matter involving Boban Savovic, conversely, was much more damaging to OSU's reputation, because Savovic was enrolled as a student-athlete at OSU for four years.

{¶ 66} NCAA investigations are not uncommon at Division-I institutions, such as OSU. The fact of the matter is, NCAA violations happen all the time, "[it's] the nature of the beast." (Williams Depo., at 52.) Also relevant to the issue of OSU's allegedly-damaged reputation is the fact that almost immediately after firing O'Brien, OSU was able to lure one of the nation's top coaching prospects to assume O'Brien's former position. (Thad Matta Depo., Aug. 25, 2005, at 5-8.) Shortly thereafter, Matta successfully recruited possibly the best recruiting class ever. Based on this evidence, the trial court could reasonably find the Radojevic loan did not cause serious harm to OSU.

{¶ 67} As noted earlier, the parties did not mention trust in the agreement, and OSU did not cite to such a proposition until after this litigation ensued. Regardless of whether OSU "manufactured" the trust

issue for the purposes of litigation, the issue should n ot be ignored altogether. The trial court found the breach-of-trust issue as most probative of a material breach. (Liability, 2006-Ohio-1104, at ¶ 135.)

{¶ 68} The trial court also concluded, however, trust was not contemplated in the written employment agreement as a requirement. "At best, the issue of trust is an implied term of the parties' agreement." *Id.* at ¶ 141. Because OSU did not place enough value on the parties' trust to incorporate it into the words of the contract, O'Brien's alleged failure to provide or perform this element cannot give rise to a material breach.

{¶ 69} When weighing Geiger's testimony concerning his relationship and friendship with O'Brien, the trial court found that O'Brien's conduct put a strain on the parties' relationship. However, the trial court found this mistake was not a fatal error, and "was not as profound and debilitating" as OSU contended. *Id.* Based on our thorough examination of Geiger's testimony, it appears that Geiger and O'Brien were, at one time, very close. Given their close and meaningful friendship, it was reasonable for Geiger to at least engage O'Brien in discussions about O'Brien's future after the Radojevic loan was revealed.

{¶ 70} The testimony of OSU President Karen Holbrook, and athletics department compliance attorneys Julie Vannatta and Heather Lyke confirm the fact that O'Brien was not given an opportunity to cure his mistake. Vannatta testified emphatically that some infractions are just so egregious that they cannot be cured. Vannatta's statement was hyperbolic, given the actual injury OSU suffered as a direct result of O'Brien's conduct. The trial court ultimately found the Radojevic loan was not nearly as egregious as OSU contends. And based on our review, that finding is supported by competent, credible evidence.

***19** {¶ 71} The second prong of the test, Restatement of the Law, Section 241(b), looks to whether the plaintiff can compensate the defendant for failing to perform under the contract. The tri al court correctly found this determination troubling, because OSU's injury was "largely non-economic." (Liability, 2006-Ohio-1104, at ¶ 142.) Logically, because OSU's injuries were mostly non-economic, it was not possible to fully compensate them. Although this factor weighs in favor of OSU, the fact that the actual injuries attributed to O'Brien's conduct were insubstantial de-emphasizes the need to be fully compensated.

{¶ 72} Restatement of the Law, Section 241(c) requires the court to examine the extent to which the breaching party will suffer forfeiture if the defendant's nonperformance is excused. Here, based on the liquidated damages formulae in Sections 5.2 and 5.3, and the fact that O'Brien had roughly three years remaining on his contract, excusing OSU from all future performance would impose a substantial hardship on O'Brien, because he would forfeit millions of dollars in guaranteed salary.

{¶ 73} OSU has persistently argued that O'Brien's failure under the contract could not be cured. The trial court determined that, because of the non-economic nature of OSU's injuries, "there is no meaningful cure with respect to those sanctions." (Liability, 2006-Ohio-1104, at ¶ 144.) Further, to the extent the court of public opinion formed any negative perceptions about OSU based on the Radojevic matter, that injury, also, could not be negated.

{¶ 74} As we stated above, the parties' good faith is implied in every contract, and t he Restatement specifically incorporates it into the final prong of the test. Restatement of the Law, Section 241(e). OSU argues that O'Brien acted in bad faith by covering up his misconduct for several years. In the words of OSU's counsel at oral argument: "*If lying to your employer for four years is not a material breach, it's hard to imagine what would be!* " Although the premise for counsel's argument is sound, it is unsound in application because it assumes facts not in evidence. Counsel for OSU assumes for the purposes of the argument that, between December

1998 and April 24, 2004, O'Brien systematically either denied allegations about the Radojevic loan, or took affirmative steps to conceal it from OSU. The evidence does not support such a conclusion. After O'Brien made the loan in 1998, and Radojevic was drafted by the NBA in the spring of 1999, there is not a single inference that can be drawn from the record to suggest that O'Brien even thought about the loan from the time it occurred until he learned about Kathy Salyers' lawsuit. Again, in O'Brien's own mind, he did not believe he had done anything wrong, thus, he would not have had a motive to conceal what he had done. In his mind, he came forward to Geiger on April 24, 2004, as a matter of courtesy. The fact that he came forward, of itself, was not an admission of guilt.

***20** {¶ 75} As to a good-faith analysis, under Restatement of the Law, Section 241(e), it appears from the record that O'Brien demonstrated good faith on more than one occasion subsequent to April 24, 2004. He stayed in contact with Geiger, complied with each of Geiger's requests, continued to do his job, and he offered to fully cooperate with the impending NCAA investigation. OSU on the other hand, did not reciprocate O'Brien's good-faith efforts, and, despite Geiger's words on April 24, 2004, neither Geiger nor anyone else from OSU attempted to work anything out with O'Brien.

{¶ 76} Even the language in Section 5.1(a)-the provision under which O'Brien was purportedly fired-stated that prior to termination for a "material breach," OSU had to put O'Brien on notice that he was in breach, and to give O'Brien an opportunity to cure. OSU made no attempt to comply with this contractual term. OSU drafted the contract, therefore its terms must be resolved in favor of O'Brien. Under the terms of the agreement, OSU should have given O'Brien an opportunity to cure what OSU apparently believed to have been a material breach.

{¶ 77} It is clear from the record that the underlying nuances to the trial court's findings of fact were heavily influenced by the credibility of the witnesses in the proceedings. O'Brien, himself, was a credible witness because, with one exception, nearly every material fact to which he testified was independently corroborated by another witness. Dr. Swank's testimony was also very influential on the trial court's determination. Indeed, a very brief summary of Dr. Swank's credentials took nearly an entire page of this text above. The trial court found Dr. Swank's expert opinion to be the more credible, reasonable, and ultimately persuasive opinion as to the issues at bar. The key portions of Dr. Swank's testimony included a well-reasoned opinion that O'Brien's conduct did not constitute a violation, and the fact that the four-year limitation period ultimately precluded OSU from being sanctioned even if the NCAA did find that a violation occurred. As a law professor, former law school dean, former university president, and perhaps most importantly, as the former Chair of the NCAA Committee on Infractions, Dr. Swank's testimony could not be ignored.

{¶ 78} In sum, even though in our view Section 5.1(a) did not give OSU the right to terminate t he contract pursuant to allegations of an NCAA violation, after examining the material breach factors applied by the trial court, its determination is not against the manifest weight of the evidence.

{¶ 79} OSU's first assignment of error is overruled.

[5] {¶ 80} In its second assignment of error, OSU argues that the after-acquired evidence doctrine should have barred O'Brien's claim altogether pursuant to the NCAA's OSU Public Infractions Report issued March 10, 2006. We disagree.

{¶ 81} The after-acquired evidence doctrine applies to cases where, subsequent to terminating an employee, the employer learns about independent facts or circumstances that were alternatively sufficient grounds for the employee's termination. See *McKennon v. Nashville Banner Pub. Co.* (1 995), 513 U.S. 352, 362-363, 115 S.Ct. 879, 130 L.Ed.2d 852; see, also, *San v. Scherer* (Feb. 5, 1998), Franklin App. No. 97APE03-317. Typically, this type of

situation arises when a former employee brings a Title VII (discriminatory discharge) action against their former employer. See, *ibid.* The doctrine serves to limit the employee's damages at trial if the employer can show after-acquired evidence of facts or circumstances unknown at the time of termination, which provide an independent basis for the termination. This doctrine has very limited application. For example, the after-acquired evidence must relate to facts not known at the time the employer terminated the employee. Also, the doctrine does not serve as a complete bar to relief. *McKennon*, at 360-361.

***21** {¶ 82} Clearly, the after-acquired evidence doctrine has no application in this case. First of all, OSU does not point to a specific piece of evidence that was later-acquired, which would have been an independent basis for O'Brien's termination. OSU does point to the March 2006 NCAA infractions report, however, the facts therein were already known to OSU prior to terminating O'Brien. Therefore, that report does not satisfy the requirement of the after-evidence doctrine. Furthermore, OSU's argument that the NCAA report is after-acquired evidence is counterintuitive because it tends to suggest that OSU acknowledges the lack of a legal basis for O'Brien's termination on June 8, 2004. Secondly, the after-acquired evidence doctrine does not serve as a complete bar to a former employee's claims.

{¶ 83} OSU's second assignment of error is overruled.

V.

{¶ 84} In his cross-appeal, O'Brien argues that the trial court miscalculated the damages owed on the contract by failing to include years allegedly added to the contract term as earned incentives, and also by deducting cash incentives paid by OSU from the final judgment (“setoffs”). We disagree.

{¶ 85} On cross-appeal, O'Brien's first assignment of error asserts that th e trial court's calculation of liquidated damages was flawed because it concluded only three years were remaining on the contract at the time O'Brien was fired. O'Brien claims that, under Section 3.4, he earned two additional years by winning Big Ten Conference Championships in 2000 and 2002, which vested simultaneously with the occurrence of events serving as conditions precedent thereto, and that the two additional years should have been aggregated to the three-year base term found by the trial court. Also, in the second assignment of error, O'Brien argues that the trial court erred by reducing the final damages award by $35,609, the amount OSU paid O'Brien in cash incentives during the 2000 and 2002 seasons. Both assignments of error turn on interpretation of the same contractual terms as applied to the same facts and reasonable inferences drawn therefrom; thus, we will address both assignments of error together.

{¶ 86} The errors claimed on cross-appeal pertain to the trial court's interpretation of the terms providing the conditions and payment of performance incentives under Section 3.4 of the contract. Because contract interpretation is a legal determination, we review the contract de novo. See *West v. Household Life Ins. Co.*, 170 Ohio App.3d 463, 867 N.E.2d 868, 2007-Ohio-845, at ¶ 7; *McConnell v. Hunt Sports Ent.* (1999), 132 Ohio App.3d 657, 675, 725 N.E.2d 1193. Where the trial court has made a finding of fact requisite to resolving a particular legal issue therein, we presume the trial court's findings are correct. *Wilson; C.E. Morris; Columbus Homes Ltd.*, supra.

{¶ 87} At common law, a “setoff” is a defendant's counter-demand against the plaintiff, arising out of a transaction wholly separate or independent of the litigated claim, which the judgment-debtor has a right to apply towards the judgment awarded to the plaintiff. See Black's Law Dictionary 1404 (8th Ed.2004). The judgment or debt is, thus, *setoff*-reduced by whatever amount the plaintiff previously (or concurrently) owed the defendant. Thomas W. Waterman, A Treatise on the Law of

Set-Off, Recoupment, and Counter Claim (2nd ED.1972) 1, Section 1; R.C. 2333.09. Setoff is distinguished from a counterclaim because it is an amount owed that is not in dispute, and is not the subject of the litigation. Setoff is most common in an action where one of the parties is a lending institution; however, it can arise under a variety of contractual circumstances provided there exists a contractual right between two parties where each party owes a finite sum to the other. The parties' respective debts are offset by way of mutual deduction. *Walter v. Natl. City Bank of Cleveland* (1975), 42 Ohio St.2d 524, 525, 330 N.E.2d 425 (citing *Witham v. South Side Bldg. & Loan Assn. of Lima* [1938], 133 Ohio St. 560, 562, 15 N.E.2d 149). For example, courts have held that a bank may setoff a bank account against the matured indebtedness of its depositor, although the bank has been garnished at the instance of a creditor of the depositor. *Walter*, at 526, 330 N.E.2d 425 (citing *Schuler v. Israel* [1887], 120 U.S. 506, 7 S.Ct. 648, 30 L.Ed. 707). In *Bank of Marysville v. Windisch-Muhlhauser Brewing Co.* (1893), 50 Ohio St. 151, 33 N.E. 1054, the Ohio Supreme Court held that a bank could setoff the amount of an insolvent depositor's checking account against the depositor's unpaid and overdue note. Furthermore, the lender could take action without the knowledge or consent of the depositor, and the bank could refuse payment of future checks drawn on the insolvent account. *Id.; Walter*, supra, at 526-527, 330 N.E.2d 425.

***22** [6][7] {¶ 88} In this case, during the damages phase of the litigation, both parties stipulated that OSU paid O'Brien cash incentives totaling $35,609. (Final Entry, 2006-Ohio-4737, at ¶ 9.) In accordance with Section 3.4 of O'Brien's employment agreement, on April 30, 2000, OSU paid O'Brien $17,500 in recognition of the men's basketball team's achievement of co-champion of the Big Ten Conference, and on March 31, 2002, OSU paid O'Brien $18,109 in recognition of the team's outright Big Ten Championship. *Id.* The trial court found, however, that the events triggering the incentives to become payable to O'Brien did not actually occur; thus, that OSU overpaid O'Brien. *Id.* at ¶ 11.

{¶ 89} Section 3.4 of O'Brien's contract stated the following:

> Coach shall also receive the following sums within sixty (60) days of the achievement, as supplemental compensation, in consideration of his efforts in contributing to the exceptional achievements listed below:
>
> * * *
>
> Awarded title of Big Ten Conference Champions or Co-Champions[:] 10% of then-current base salary plus one (1) additional year added to term of this agreement[.]

{¶ 90} O'Brien argued to the trial court that, under that contractual provision, and in light of the occurrence (s) of the aforementioned achievements, that there were five years plus 22 days remaining on his contract as of June 8, 2004. (O'Brien's Motion for Summary Judgment on Damages, at 3; Damages, 2006-Ohio-4346, at ¶ 42, 139 Ohio Misc.2d 36, 859 N.E.2d 607.) OSU argued, however, that O'Brien did not earn the aforementioned incentives in light of the NCAA's determination vacating the OSU men's basketball team's records from both purported championship years. (OSU's Motion for Summary Judgment on Damages, at 6; Damages, 2006-Ohio-4346, at ¶ 46, 139 Ohio Misc.2d 36, 859 N.E.2d 607.) The trial court found that the evidence better supported OSU's argument. This court agrees.

{¶ 91} In this appeal, O'Brien urges this court to take judicial notice that the NCAA did not vacate OSU's conference championships from the years in question, only that OSU's NCAA tournament records were vacated. Despite counsel's persuasively-briefed arguments to this court, the result desired tends to defy common sense. Counsel's argument, in effect, is a jurisdictional one-that the NCAA and the Big Ten Conference are separate and sovereign

entities, and that what the Big Ten giveth, the NCAA cannot taketh away. Although the argument is sound, it lacks evidentiary support.

{¶ 92} A judicially-noticed fact is that which is not subject to reasonable dispute because either: (1) it is generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination. See Evid.R. 201. Counsel urges this court to take notice of a fact published by the Big Ten Conference itself, i n what is known as the official records book, which is available to download from their website http://bigten.cstv.com/trads/big10-recordbook.html. (Cross-Appellant's brief, at 10, fn.3.) The records book lists the number of championships held by each respective school in each respective sport, for all of the schools comprising the Big Ten. See 2006-2007 Big Ten Records Book 24, *available at* Big Ten Conference Official Site, supra (last visited June 4, 2007). Therein, the OSU men's basketball school record is specially denoted by a footnote, which states: "*Due to NCAA sanctions, Ohio State has vacated the men's basketball records of 34 games in 1998-99, 16 games in '99-00 and the entire '00-01 and ' 01-02 seasons (including two shared Big Ten Men's Basketball Championships (2000 and 2002 titles).*" *Id.* (Emphasis sic.) We cannot see how this fact, if judicially noticed, supports counsel's argument.

***23** {¶ 93} That said, we believe the trial court correctly calculated the contract's liquidated damages in accordance with Sections 5.2 and 5.3. The trial court correctly concluded the period remaining on the contract's term, and the trial court correctly deducted amounts OSU paid to O'Brien pursuant to events that never occurred. O'Brien's first and second cross-assignments of error are overruled.

{¶ 94} The trial court found O'Brien's contract was "extremely favorable" to himself, but "not unreasonable." (Damages, 2006-Ohio-4346, at ¶ 34, 139 Ohio Misc.2d 36, 859 N.E.2d 607.) The court's analysis included a proper examination of the contract's terms to determine that all relevant provisions were valid and enforceable, and that no provision was contrary to law or public policy. Further, the trial court found:

> The stipulated damages were clearly reasonable in light of the anticipated salary and collateral income [Coach O'Brien] could have earned had he remained in defendant's employ. * * *
>
> * * *
>
> The court recognizes that * * * it may seem unreasonable for a party to recover * * * damages without any reduction arising from his own breach of contract. However * * * it is clear that this seemingly unfair result arises from the extremely favorable provisions of the contract as it relates to [Coach O'Brien] in respect to termination and not from any lack of proportionality with respect to the amount of liquidated damages.
>
> Trial Court Decision, at 13-14.

{¶ 95} Again, the decision of this court does not ratify or condone the conduct of O'Brien. Under different facts, or even more likely, broader contractual terms not favoring the employee to such a degree, the result here would not be the same. When two parties agree to do a particular thing, and the parties precisely and deliberately contract for every foreseeable circumstance that could arise in the performance thereunder, a court must honor the parties' agreement absent unconscionability. *Lake Ridge Acad. v. Carney*, (1993), 66 Ohio St.3d 376, 381, 613 N.E.2d 183; *Westfield Ins. Co. v. HULS Am., Inc.* (1998), 128 Ohio App.3d 270, 291, 714 N.E.2d 934 (holding that Ohio law allows parties to freely agree upon contractual terms). Unconscionability is typically characterized by absence of one party's "meaningful choice" or opportunity to negotiate the terms of a contract, which invariably results in terms substantially favoring the other party. See, e.g., *Eva v. Midwest Natl. Mtge. Bank, Inc.* (N.D.Ohio 2001), 143 F.Supp.2d 862, 895 (A "contract is unconscionable if it did not result from real bargaining between the parties who had free-

dom of choice and understanding and ability to negotiate in a meaningful fashion"). *Lake Ridge*, at 383, 613 N.E.2d 183. Invariably, an unconscionable contract will have terms favoring the drafting party. There is no evidence to suggest OSU lacked a meaningful choice or opportunity to negotiate the contract with O'Brien; moreover, OSU was the drafting party. OSU is not lacking in sophistication, and has only been prejudiced as a result of being held to its own bargain. OSU entered into this agreement with O'Brien having more-than-adequate knowledge and awareness of the risks and liabilities appurtenant to competing in NCAA Division-I collegiate sports. The Radojevic matter was not the first problem to hit the OSU campus. The tradition and legacy of OSU and its sports team, however, has survived, and will continue to do so. The judgment of the Ohio Court of Claims is hereby affirmed.

***24** *Judgment affirmed.*

BOWMAN, J., concurs.
FRENCH, J., dissents.
BOWMAN, J., retired of the Tenth Appellate District, assigned to active duty under the authority of Section 6(C), Article IV, Ohio Constitution.
FRENCH, J., dissenting.

{¶ 96} I respectfully dissent, and I would reverse the judgment of the trial court.

{¶ 97} First, unlike the majority, I do not interpret Section 5.1(b) of the Employment Agreement (the "contract") as the exclusive means by which OSU could terminate O'Brien for a breach relating to NCAA violations. Rather, as discussed below, I agree with the conclusion the trial court reached in its June 22, 2005 decision denying O'Brien's request for summary judgment, i.e., that the plain language of paragraph 5.1(a) permitted OSU to terminate O'Brien for cause where a material breach occurred, even if the breach related to an NCAA violation.

{¶ 98} The interpretation of a contract is a matter of law that we review de novo. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 652 N.E.2d 684, 1995-Ohio-214. Our purpose in interpreting contracts is to ascertain and effectuate the intent of the parties, and we presume that the intent of the parties resides in the language they chose to use. *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 313, 667 N.E.2d 949, 1996-Ohio-393. We must give ordinary meaning to common words appearing in a written contract unless "manifest absurdity" results, or unless the face or overall contents of the contract evidence some other meaning. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 374 N.E.2d 146, paragraph two of the syllabus. If a con tract is clear and unambiguous, we need not go beyond the plain language of the agreement to determine the parties' rights and obligations; instead, we must give effect to the agreement's express terms. *Uebelacker v. Cincom Sys., Inc.* (1988), 48 Ohio App.3 d 268, 271.

{¶ 99} Here, the language at issue arises from Section 5.1 of the contract, entitled "Termination for Cause," which provides, in full:

> Ohio State may terminate this agreement at any time *for cause*, which, for the purposes of this agreement, shall be limited to the occurrence of one or more of the following:
>
> (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 [S]tate specifying the act(s), conduct or omission(s) constituting such breach;
>
> (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 in one or more of the following ways:

***25** (i) a reduction in the number of scholarships permitted to be allocated;

(ii) a limitation on recruiting activities or reduction in the number of evaluation days;

(iii) a reduction in the number of expense-paid, official recruiting visits;

(iv) placement of the men's basketball program or Ohio State on probation;

(v) being banned from NCAA post-season play for at least one season;

(vi) being banned from regional or national television coverage for at lest one basketball season with a consequent loss by Ohio State of television revenues for at least one basketball season; or

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

(Emphasis sic.)

{¶ 100 } Nothing in Section 5.1, or any other provision of the contract, suggests that Section 5.1(b) is the exclusive means by which OSU could terminate O'Brien for conduct related to NCAA violations. In fact, Section 5.1 allowed OSU to terminate "for cause" if "o ne or more" of the identified actions occurred, i.e., for material breach, NCAA violations meeting certain specified criteria, and criminal or other improper conduct. Thus, the unambiguous language of the contract indicates that conduct could fall under an y one of the identified reasons or all of the identified reasons and still support a termination for cause.

{¶ 101} It is not difficult to find a set of facts that demonstrate the reasonableness of giving subsections (a) and (b) independent meaning, as the NCAA enforcement proceedings related to, but having no substantive bearing upon, this case present a perfect example. In its March 2006 report, the NCAA Committee on Infractions found NCAA violations in the OSU men's basketball programs, and some of them related to the conduct at issue here. On appeal, however, the NCAA concluded that a statute of limitations barred an NCAA enforcement action on those violations.

{¶ 102} Specifically, NCAA bylaws normally impose a four-year statute of limitations on NCAA violations. In other words, the NCAA may only investigate and take action on a violation within four years after it occurs; after four years, NCAA action on that violation is time-barred. NCAA bylaws provide an exception to this four-year statute of limitations, however, where information about certain violations does not become available during the four-year period. In that case, the NCAA may obtain a one-year extension of time to pursue a violation, but to do so, the NCAA enforcement staff must "investigate and submit" an official inquiry to the subject institution within one year after the date information becomes available to the NCAA.

{¶ 103} Here, the NCAA first learned about O'Brien's 1998-99 conduct involving Radojevic on May 14, 2004, when OSU self-reported. Therefore, even though the four-year statute of limitations had already expired, the NCAA could obtain a one-year extension of time for enforcement if it notified OSU by May 14, 2005. On May 13, 2005, the NCAA enforcement staff placed its notice to OSU in a Federal Express package for delivery to OSU, and OSU received the notice on May 16, 2005.

***26** {¶ 104} In its April 2007 report, the NCAA concluded that the NCAA enforcement staff's notice to OSU was untimely because the staff did not "submit" the notice until OSU received it, and OSU received it on May 16, 2005, two days beyond the deadline. Be cause of this late submission, the

NCAA did not get the benefit of the one-year extension of time, the four-year statute of limitations applied, and it barred the NCAA from taking action on the 1998-99 violations involving Radojevic. As a result, the NCAA reversed some of its April 2006 report and remanded the matter back to the NCAA Committee on Infractions to reconsider an appropriate penalty.

{¶ 105} Returning to the contract, in O'Brien's view, Section 5.1(b) is the exclusive means by which OSU could terminate him for conduct related to NCAA violations, and *all* of the criteria found in Section 5.1(b) must apply in order for "cause" to arise. As applied here, even though the NCAA conducted a "major" infractions investigation and the NCAA found significant violations-two prerequisites for termination under 5.1(b)-OSU still would have no power to terminate O'Brien for cause if a procedural bar (like the statute of limitations) precluded the NCAA from imposing one or more of the sanctions identified in 5.1(b)(i) through (vi). I agree with OSU that this view of the contract is untenable.

{¶ 106} First, such a reading elevates the importance of NCAA action, or even inaction, above the commission of clear and obvious NCAA violations, a reading in conflict with the numerous contract provisions requiring the coach to know, enforce, and comply with NCAA rules. Second, it would allow a coach to hide possible violations until a time beyond the statute of limitations and then avoid termination, a result in conflict with the contract's requirements for immediate disclosure of know n or suspected violations.

{¶ 107} For these reasons, in my view, the trial court correctly concluded that subsections (a) and (b) of Section 5.1 have independent meaning and are not mutually exclusive. Therefore, the contract did not preclude OSU from terminating O'Brien for cause under 5.1(a), even though the alleged breach related to NCAA violations.

{¶ 108} Next, unlike the majority, I conclude that Section 5.1(a) allowed OSU to terminate O'Brien for cause because O'Brien materially breached his contract with OSU. In framing this issue, it is important to recall the trial court's finding that O'Brien breached the contract. Specifically, the court found:

> [O'Brien's] words and conduct are not those of a person who was sure that Radojevic would never play college basketball. Indeed, [O'Brien] acknowledged on cross-examination that if Radojevic had been reinstated, he would not have been eligible to play because of the loan [O'Brien] made to his family. [O'Brien] testified that he would have had to reveal the loan if reinstatement had been granted.
>
> In consideration of all of the evidence presented, the court finds that in December 1998 [O'Brien] 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. [O'Brien'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.
>
> ***27** (Feb. 15, 2006 Decision ["Decision"] at 22.)

{¶ 109} Having determined that a breach occurred, the court proceeded to determine whether that breach was material, a result that would discharge OSU from its obligation to pay under the contract. A breach of a portion of the terms of a contract does not discharge the obligations of the parties, unless performance of the breached terms is "essential to the purpose of the agreement." *Kersh v. Montgomery Developmental Ctr.* (1987), 35 Ohio App.3d 61, 62, 519 N.E.2d 665.

{¶ 110} Ohio courts have held that the question whether a breach is material is primarily a question of fact. *Unifirst Corp. v. M & J Welding & Machine, Inc.* (Sept. 27, 1996), Scioto App. No. 95CA2401; *Cent. Trust Co. v. Fleet Natl. Bank* (May 11, 1994), Hamilton App. No. C-930162. While I agree with the majority that an appellate court generally must defer to a trial court's findings

of fact, we need not always affirm them, nor should we affirm them blindly. Instead, where no competent, credible evidence supports the trial court's findings, we may conclude that those findings-even as to whether a breach was material-are against the weight of the evidence and reverse them on that basis. See, e.g., *Kersh* at 62-63, 519 N.E.2d 665 (reversing trial court decision on grounds that breach was not material); *Kichler's, Inc. v. Persinger* (1970), 24 Ohio App.2d 124, 265 N.E.2d 319 (reversing trial court's finding that breach was not material); *Boehl v. Maidens* (1956), 102 Ohio App. 211, 139 N.E.2d 645 (reversing trial court's finding that breach was material).

{¶ 111} We have previously applied the Restatement of the Law 2d, Contracts (1981) 237, Section 241 when determining whether a breach is material. See *Shanker v. Columbus Warehouse Ltd. Partnership* (June 6, 2000), Franklin App. No. 99AP-772; *Software Clearing House, Inc. v. Intrak, Inc.* (1990), 66 Ohio App.3d 163, 170, 583 N.E.2d 1056; *Kersh* at 62, 519 N.E.2d 665. Accordingly, in determining whether O'Brien's breach was material, we consider the following:

(a) the extent to which OSU will be deprived of the benefit it reasonably expected;

(b) the extent to which OSU can be adequately compensated for that lost benefit;

(c) the extent to which O'Brien will suffer forfeiture;

(d) the likelihood that O'Brien will cure his failure; and

(e) the extent to which O'Brien's behavior comports with standards of good faith and fair dealing.

{¶ 112} As to the first factor-the extent to which OSU will be deprived of the benefit it reasonably expected-the trial court looked to Section 4.1(d) of the contract and found that OSU reasonably expected O'Brien "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." (Decision at 25-26.) The court rejected OSU's argument that O'Brien's breach deprived it of these benefits when he subjected OSU to NCAA sanctions, adversely affected OSU's reputation in the community, and breached the trust between O'Brien and Athletic Director Andy Geiger. However, I disagree with the manner in which the court defined the "benefit" OSU "reasonably expected" from its contract with O'Brien and, therefore, the conclusions the court drew regarding whether O'Brien's breach "deprived" OSU of that benefit. (Decision at 26.)

***28** {¶ 113} Specifically, in determining the extent to which OSU would be deprived of the benefit it reasonably expected, the court limited the expected benefit to the interests reflected in Section 4.1(d) of the contract, which required O'Brien to comply with NCAA rules and report any suspected violations. Section 4.1(d) imposed wide-ranging duties upon O'Brien t o ensure not only that he would abide by university, Big Ten, and NCAA rules and policies, but also that he would ensure compliance by everyone around him, including the assistant coach to whom he entrusted the $6,000 in cash. It also required him not only to report violations, but also to report actual or suspected past or present violations by any person or entity, whether associated with OSU or not, presumably including individuals who might seek financial incentives on behalf of a young player or his family. But even beyond this broadly defined expectation of NCAA compliance, the contract encompassed additional expectations, three of which are particularly important to our analysis here.

{¶ 114} First, it goes without saying that OSU expected O'Brien to produce winning seasons, and numerous sections throughout the contract reflect that interest. The contract does not reflect an interest in winning at all costs, however. Section 4.0, which defines O'Brien's "Specific Duties and Responsibil-

ities," required O'Brien, at Section 4.1(b), to "[d]evelop and implement programs and procedures with respect to the evaluation, recruitment, training, and coaching of Team members to compete successfully while assuring their welfare[.]" At a minimum, this section reflects an expectation that O'Brien would engage in recruiting activities that not only ensured success, but also assured the welfare of the basketball program as a whole.

{¶ 115} Second, the contract reflects OSU's expectation that O'Brien would carry out his duties in full cooperation with the athletic director and the compliance office of the athletic department. Section 1.2 of the contract establishes the reporting relationship between the coach and the athletic director, and it provides that the coach must confer with the director or the director's designee "on all administrative and technical matters." References to this relationship occur throughout the contract. See, e.g., Sections 4.1(b), 4.1(d), 4. 4, 4.6, 4.7, and 4.8.

{¶ 116} Third, the contract reflects OSU's expectation that O'Brien would guard the university's reputation carefully, even as O'Brien acknowledged, by signing the contract, "that the local and national media interest in the Team and the men's basketball program in general is extremely high." Contract at 4.3. Pursuant to Section 1.4 of th e contract, O'Brien "agree[d] to represent Ohio State positively in public and private forums" and agreed not to "engage in conduct that reflects adversely on Ohio State or its athletic programs." Pursuant to Section 4.2, he agreed not to undertake any "professional or personal activities or pursuits * * * that, in the opinion of Ohio State, would reflect adversely upon Ohio State or its athletic programs." And, pursuant to Section 4.4, he agreed not to participate in business transactions, product endorsements or media appearances that "may discredit or bring undue criticism to Ohio State."

***29** {¶ 117} Given these additional contract provisions, the trial court should not have limited its material breach analysis to OSU's expectation of NCAA compliance. Rather, in addition to that and other benefits, OSU reasonably expected competitive teams based on a compliant program, full cooperation with its athletic director and compliance office, and protection of its reputation and interests. Having defined OSU's expected benefits, I turn to the question whether, or to what extent, O'Brien's breach deprived OSU of these benefits.

{¶ 118} As to possible sanctions against OSU, the trial court concluded that any NCAA sanctions may not be attributable solely to matters related to Radojevic and, in any event, the statute of limitations might preclude NCAA sanctions altogether. The court also concluded that OSU's self-imposed sanctions-the post-season ban for the 2004-2005 season and forfeiture of two scholarships for the 2005 recruiting class-were not "as debilitating to [OSU's] basketball program as [OSU] suggests." (Decision at 27.) While one could certainly argue that OSU would have been even more successful without the sanctions, I cannot conclude that the trial court erred in making these findings. But more important for our analysis here, and tying these findings back to OSU's expectations under the contract, the threatened or actual sanctions did not significantly deprive OSU of the competitive teams it expected.

{¶ 119} As to the adverse impact on OSU's reputation, the trial court concluded that it should not consider this alleged adverse effect because Section 5.1(c), as quoted above, allowed OSU to terminate O'Brien for criminal conduct or for "other improper conduct that, in Ohio State's reasonable judgment, reflects adversely on Ohio State or its athletic programs." Instead, the court concluded that, if this harm to reputation were a factor in O'Brien's termination, OSU would have cited Section 5.1(c) in its termination letter.

{¶ 120} Nevertheless, t he trial court stated further that, even if it were to consider the adverse impact on OSU's reputation, "it is clear to the court that the harm is not as great as [OSU] believes it to be." (Decision at 29.) In reaching this conclusion, the trial court considered that some of the harm resul-

ted from other allegations relating to the basketball program, not just from those relating to Radojevic alone. In addition, the trial court considered testimony that "an NCAA investigation is not unexpected" in an athletic program as large as OSU's. *Id.* at 30, 519 N.E.2d 665.

{¶ 121} In my view, the court's legal conclusion that it should not consider the adverse impact on OSU's reputation was in error. As discussed above, Section 5.1(a), (b), and (c) provide independent grounds for terminating O'Brien. The fact that OSU chose to rely on Section 5.1(a), and not Section 5.1(c), in its termination letter has no bearing on whether OSU was deprived of a benefit it reasonably expected for purposes of determining whether O'Brien's breach was material.

***30** {¶ 122} More troubling, however, is the trial court's discussion of the alleged harm to OSU's reputation. In numerous contexts, courts have recognized the public interest and concern that surround a university's athletics programs, particularly if allegations of recruiting violations arise. In *Barry v. Time, Inc.* (N.D.Cal.1984), 584 F.Supp. 1110, a California federal court considered libel and slander claims brought by a former head basketball coach at the University of San Francisco. In doing so, the court had to decide whether the controversy surrounding alleged recruiting violations was a "public controversy." In the course of finding that a public controversy did exist, the court considered that the outcome of the controversy "could reasonably have been expected to have a significant impact on members of the [university] community, since the reputation of their university was at stake." *Id.* at 1116. "Furthermore," the court stated, "this controversy must be viewed in the context of the larger public debate over the proper role of athletic programs at institutions of higher learning." *Id.* at 1116-1117.

{¶ 123} In *Cottrell v. Natl. Collegiate Athletic Assn.* (June 1, 2007), Case No. 1041858, 2007 Ala. LEXIS 104, 2007 WL 1696564 the Supreme Court of Alabama similarly considered whether the NCAA and a sportswriter had defamed two football coaches from the University of Alabama in the course of an NCAA investigation into alleged recruiting violations. In the context of finding that a "public controversy" existed, the court considered the "widespread local and statewide media coverage" surrounding the NCAA investigation "as the media sought to unravel precisely what had happened that resulted in The University's being charged and found guilty of several rule violations." *Id.* at *61. The court also stated:

> Moreover, the citizens of Alabama had a legitimate interest in the controversy because The University is a public institution that receives State funds. The football program provides revenue for The University and, in light of the football program's tradition and history, is a source of pride for many of its graduates and the citizens of this State. Therefore, when "The University of Alabama football program was staring down the barrel of a gun"-facing potential termination of its football program-public discussion of all the circumstances creating the risk that the program could be terminated was rampant; a public controversy existed.

Id. at *61-62. See, also, *Kneeland v. NCAA* (W.D.Tex.1986), 650 F.Supp. 1076, 1084, overturned on other grounds (C.A.5, 1988), 850 F.2d 224 (in determining whether NCAA investigatory records were subject to disclosure under state law, finding that the "public has a legitimate interest in knowing who recruits illegally, how these unscrupulous individuals operate, which institutions tolerate or encourage such activity, and what, if any, sanctions are imposed upon these individuals or institutions when discovered"); *Justice v. NCAA* (D.C.Ariz.1983), 577 F.Supp. 356, 372, fn. 13 (concluding that NCAA sanction rendering University of Arizona football team ineligible for postseason competition did not deprive plaintiff student-athletes of property interest in violation of due process rights, but acknowledging that "the sanctions carry with them a stigma and loss of prestige in the academic community that are of no small

event").

***31** {¶ 124} To be sure, no amount of negative media attention will change the terms of a contract between consenting parties, and, to be clear, this is a case involving contract law, not defamation. But it is impossible to properly analyze whether O'Brien's breach deprived OSU of an expected benefit without at least acknowledging the seriousness of O'Brien's admission and the public scrutiny and criticism that necessarily follow a n admission of this magnitude.

{¶ 125} In determining that OSU did not suffer significant harm to its reputation, the trial court's discussion focuses on OSU's expectation and acceptance that NCAA investigations would occur within the basketball program, and that at least a portion of the investigation at issue here related to circumstances unrelated to Radojevic. But the trial court gives no consideration to the more significant harm, which arose, not from the investigation, but from the nature of O'Brien's own actions-his admission that he asked an assistant coach to transmit $6,000 in cash to the family of a player (whatever his official status) being recruited by OSU and other schools, that he participated fully in the university's attempts to reinstate that player immediately thereafter, that he told university and NCAA officials that he was unaware of any circumstances, other than prior professional play, that would make the player ineligible, and that he did not disclose his actions until five years later, when it became clear that another source would reveal them. OSU should have expected, and clearly did expect, NCAA investigations, and even some violations, to occur within the contract period. See, e.g., Testimony of Heather Lyke, OSU Associate Athletic Director, Tr. at 620 (OSU reports "between 30 and 45" secondary violations to the NCAA annually). But this record contains no evidence that anyone at OSU expected O'Brien's blatant disregard for university, Big Ten, and NCAA ethical standards or the fundamental principles on which they are based.

{¶ 126} NCAA member institutions share a common goal: maintaining intercollegiate athletics as an integral part of higher education. In order to meet this goal, universities must agree on common principles that protect the amateur character of college sports and ensure fair competition among participating schools. In the context of deciding the legality of an NCAA limitation on college football telecasts, in *NCAA v. Bd. of Regents* (1984), 468 U.S. 85, 101, 104 S.Ct. 2948, 82 L.Ed.2d 70, the United States Supreme Court explained:

> * * * What the NCAA and its member institutions market in this case is competition itself-contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. * * *

***32** The United States Supreme Court agreed that the "interest in maintaining a competitive balance among amateur athletic teams is legitimate and important[,]" although it did not justify the broadcasting limitations at issue in the case. *Id.* at 117.

{¶ 127} Indeed, before the trial court, one expert witness similarly explained the principle behind collegiate recruiting restrictions:

> * * * It's one that really goes through all of our rule making in regard to recruiting, and that is that we have a level playing field or competitive equity between institutions.
>
> * * *
>
> A. That is, you know, what we wrestle with consistently in the * * * proposed rules considering and in enacting rules, because unlike the professional ranks, we are not able to have a draft, and so a lot of our competitive equity between institutions de-

pends significantly upon the fairness in recruiting between those institutions.

(Tr. at 979-980.)

{¶ 128} Regardless of whether O'Brien violated an NCAA rule, his conduct strikes at the heart of these fundamental principles, principles that ensure fairness among competing schools and maintain amateur sports as an adjunct to higher education. As a result, as Andy Geiger explained:

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.

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.

This is a fundamental violation, and I think the breach is * * * very serious and the lack of-of-well, I just think that there has been enormous damage.

(Tr. at 789.)

{¶ 129} Even O'Brien acknowledged the perception that would be created once his actions were revealed. OSU's counsel asked: "[W]hat on earth is the reason for not revealing the $6,000 payment?" (Tr. at 184.) O'Brien responded:

A. Well, for exactly what is going on now. Because the whole idea, in my mind, was the perception of what could conceivably come from this gesture, and that's exactly what's been taking place.

Q. The perception that you were paying money for a kid to come to your school?

A. The perception because of words that I hear are payment, inducement, and none of that is accurate. It's for those reasons.

(Tr. at 184-185.)

{¶ 130} O'Brien entered into the contract with an express understanding of OSU's position within the national spotlight. He did not just promise to comply with NCAA rules. He promised to protect the university's reputation and interests and to develop recruiting programs and procedures that assured the welfare of its team and program. Far from contracting away its reputation, OSU sought in many ways to protect its reputation and to guard against O'Brien harming it, and, in this respect, OSU got none of the benefit it expected from O'Brien's promises.

***33** {¶ 131} Finally, I find no evidence in this record to support the trial court's finding that "the loss of trust caused by [O'Brien's] failure of performance was not as profound and debilitating as [OSU] contends." (Decision at 33.) In coming to this conclusion, the court focused on the absence of an express contract provision regarding the trust that must exist between O'Brien and Geiger. As detailed above, however, the contract did contain provisions requiring cooperation and consultation between O'Brien and the athletic department, both for purposes of maintaining NCAA compliance and for other administrative purposes.

{¶ 132} Geiger testified that, "gradually from April 24th [2004], as-as I worked with University officials on this issue, we all, I think, developed the feeling that this breach was so great that it would be impossible for us to carry forward our * * * men's basketball program with Coach O'Brien, and that our only recourse was termination." (Tr. at 786.) Geiger personally "viewed it as impossible to continue" his relationship with O'Brien. (Tr. at 787.) Geiger stated:

A. That was my view. I-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. Clearly the record on the court was good. 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.
>
> 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.
>
> 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.

(Tr. at 787-788.)

{¶ 133} While O'Brien presented evidence that a coach conceivably could continue to serve out a contract while an NCAA investigation was pending, and that other coaches had, O'Brien presented no evidence that OSU had the willingness or ability to trust him again. In the end, while the trial court may have discounted Geiger's testimony about whether he could have continued or repaired his relationship with O'Brien, the contract expressly provided for a close relationship between O'Brien and Geiger and between O'Brien and the athletic compliance office. Therefore, regardless of the weight the trial court ultimately gave Geiger's testimony, at a minimum, OSU did not receive the benefit it reasonably expected from those contract terms.

{¶ 134} For all of these reasons, O'Brien's breach significantly deprived OSU of the benefits it reasonably expected from the contract, the first factor we must consider in determining whether O'Brien's breach was material. While O'Brien's conduct may not have significantly deprived OSU of its ability to recruit players and produce competitive teams, the conduct deprived OSU of the benefits of a compliant program, full cooperation with its athletic director and compliance office, and protection of its reputation and interests.

***34** {¶ 135} In addition, OSU could not be adequately compensated for the losses it suffered, nor could O'Brien cure his breach, the second and fourth factors, respectively, for determining whether O'Brien's breach was material. As the trial court recognized, "with respect to the damage to [OSU's] reputation and any loss of trust that can be fairly attributed to this breach, [OSU] cannot be fully compensated." (Decision at 34.) And, "[a]ny negative perceptions of [OSU] that may arise from the public knowledge of [O'Brien's actions] cannot be nullified." *Id.* at 35.

{¶ 136} Despite these findings, the trial court concluded that the loss of trust between Geiger and O'Brien was nevertheless " curable." *Id.* The trial court noted Geiger's testimony that O'Brien's loan to Radojevic's family was a "noble act" and Geiger's admission "that, other than [O'Brien's] conduct in the Radojevic matter, [O'Brien's] overall performance of the contract had bee n excellent." *Id.* at 35. That is akin to saying that, other than O'Brien's flagrant disregard for the fundamental principles of fair competition in college sports, his overall performance had been excellent. It simply ignores the most important fact.

{¶ 137} In the end, the trial court concluded that any loss to OSU did not outweigh the forfeiture O'Brien suffered (the third factor in the material breach analysis) or the relative good faith of the parties (the fifth factor). Instead, the trial court conclude d that the parties did not consider O'Brien'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 [OSU] reasonably expected perfect compliance, Section 5.1(b) would not have been made part of the agreement." (Decision at 40.)

{¶ 138} In this respect, the trial court appears to contradict its earlier legal conclusion that Section

5.1(b) did not preclude OSU from terminating O'Brien for cause under Section 5.1(a), even where a breach related to an NCAA violation. As explained above, however, as a matter of law, Sect ion 5.1(a) provides independent grounds for O'Brien's termination, and Section 5.1(b) did not preclude OSU from terminating O'Brien here.

{¶ 139} Furthermore, there is no evidence in this record and no provision in the contract to indicate that OSU "expected perfect compliance[.]" Instead, the evidence shows that OSU reports many violations to the NCAA annually and surely expected NCAA investigations during the contract period. But there is no evidence that OSU expected the wholesale disregard for compliance at issue here.

{¶ 140} Lastly, I find no support for the trial court's characterization of O'Brien's conduct as a "single, isolated failure of performance[.]" (Decision at 42.) That characterization hardly describes the magnitude of O'Brien's actions and, again, misses the larger point that O'Brien's conduct violated, as Geiger put it, the "essence" of college sports. (Tr. at 789.) O'Brien gave $6,000 in cash to the family of a player he was recruiting. He lied about the player's status to OSU and the NCAA. And he only came clean when he had to. His actions are nothing less than shocking, and the repercussions from them went well beyond a single concern for compliance with the technicalities of the contract or NCAA rules.

***35** {¶ 141} In the final analysis, the key to determining whether a breach is material is whether performance of the breached terms was "essential to the purpose of the agreement." *Kersh* at 62, 519 N.E.2d 665. While perfect compliance was not essential to the purpose of the agreement between O'Brien and OSU, minimal adherence to fundamental principles of fair competition certainly was. Without it, OSU lost the benefit of numerous aspects of its agreement with O'Brien: compliance with, and assurance of, NCAA, Big Ten, and university rules and standards; competitive teams based on a compliant program; recruiting procedures that assured the welfare of the team and the men's basketball program; a trusting relationship with its athletic director and compliance office; and the protection o f its reputation and interests. Therefore, O'Brien's breach was material, and OSU had good grounds to terminate him.

{¶ 142} For these reasons, I would sustain the first assignment of error. I would not reach OSU's second assignment of error or O'Brien's cr oss-appeal. Having concluded that the trial court erred in entering judgment for O'Brien, I would reverse the judgment of the trial court and enter judgment in favor of OSU.

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