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Marist Outfoxes Ex-Coach, But Does Not Score Damages

By Daniel B. Fitzgerald

Marist College v. Matthew Brady, The Commonwealth of Virginia andJames Madison University ("Marist v. JMU"), a lawsuit brought by a college against its former basketball coach and his new employer, recently concluded with a jury verdict against the coach. The jury, however, awarded no damages. Once considered to have the potential to alter the landscape of college coaching contracts, the case leaves an uncertain legacy.

Marist v. JMU arose from a rather ordinary occurrence in collegiate athletics. In the summer of 2007, Marist's men's basketball coach Matt Brady signed a four-year contract extension with the college. Less than one year into that contract, Brady sought to leave Marist for a head coaching opportunity at James Madison University (JMU).

Brady's contract with Marist contained two key terms. First, Brady was precluded from discussing employment opportunities and accepting another head coaching position without the written consent of Marist. Second, if the contract was terminated, Brady agreed to end all contact with Marist basketball program recruits and to refrain from offering scholarships to Marist players, or anyone Brady or his staff recruited to play at Marist.

When Brady's intentions become known to Marist's athletic administration, the college was prepared to grant Brady his freedom, notwithstanding the remaining years on his contract. For reasons unclear, Brady left Marist prior to receiving written permission from the college. But contrary to the terms of his contract, Brady and/or his staff contacted four players that he had recruited to attend Marist. According to the *Poughkeepsie Journal*, Brady testified that his staff continued to recruit those players, one of whom had signed a National Letter of Intent with Marist. Each of the four players were offered, and accepted, scholarships to attend JMU and play for Brady.

Marist took legal action, bringing suit not only against Brady for breach of contract, but against JMU for interfering with Marist's contract. In June 2010, Marist declared victory over JMU after a New York Supreme Court entered a judgment of default against JMU. However, JMU was able to set aside the default before settling the case days before jury selection commenced for a reported sum of $100,000.

The case against Brady proceeded to trial in the New York Supreme Court for Dutchess County. A jury ultimately found that Brady breached his contract with the college when he accepted the same position at JMU without Marist's permission. In addition, Brady and/or his staff recruited players to JMU that they had previously recruited to attend Marist, in contravention of one of the clauses in Brady's contract. Nevertheless, Marist's victory was arguably diminished as the jury awarded no damages.

Marist v. JMU not only made for good discussion for those interested in the legal issues surrounding collegiate athletics, but it provided a number of takeaways for coaches, colleges, and the attorneys who represent them:

Principle and Precedent

Marist and its attorneys consistently stated that this case was about the principle of honoring agreements, not about money. In that regard, Marist was unquestionably successful. A jury agreed that Brady breached his contract. Although Brady won't have to satisfy an award of damages, he likely has incurred significant attorney's fees and has spent valuable time dealing with this matter instead of recruiting and coaching. In addition, Marist extracted $100,000 from JMU by way of a settlement.

Evaluating whether this case set a precedent for other coaching cases is more difficult. At the outset of Marist v. Brady, many grappled with this issue, often mixing the concepts of legal precedent and business precedent. This case was never about whether coaching contracts are enforceable under the law – generally such contracts are enforceable. In fact, coaching contracts have been enforced by schools against coaches through the courts. Richard Karcher's law review article entitled The Coaching Carousel in Big-Time Intercollegiate Athletics: Economic Implications and Legal Considerations touches upon many of these cases, including the seminal case of Vanderbilt University v. DiNardo, 174 F.3d 751 (6th Cir. 1999).

Rather, the precedent at issue involved a business decision: whether a school would be willing to attempt to enforce a contract against a coach who resigns during the term of the contract. Time will tell whether *Marist v. Brady* emboldens other schools to enforce their coaching contracts, but it appears unlikely. The relatively small payout and seemingly large investment in time is unlikely to deter schools and coaches from continuing

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to operate a system in which coaches are essentially free agents each year, irrespective of the terms of their contracts. From a narrower perspective, Marist may have set precedent for its own coaches and prospective coaches who will know that Marist expects its coaches to honor their agreements. Perhaps this case will also send the message that Marist seeks long-term solutions to its coaching vacancies, and disfavors those who treat Marist as a stepping-stone to higher profile jobs.

Lessons for Schools

The result in *Marist v. Brady* could have been much different had Marist included a reasonable liquidated damages clause or a buyout clause, rather than leave the difficult issue of damages to the purview of the jury. There are also lessons for schools, like JMU, in hiring coaches under contract with another school. The hiring school would be wise to review the coach's existing contract to determine whether permission is required and what, if any, restrictions are contained in the contract. The school should also insist upon a standard clause in the coach's contract stating that he or she is not violating any existing contracts to which he or she is a party by entering into the new contract.

Lessons for Coaches

Considering the transient nature of the coaching profession, coaches, their agents and their attorneys must ensure that their contracts provide them with the flexibility to take advantage of new opportunities. Clauses that allow coaches to escape from their contract if particular jobs become available might be difficult to negotiate, but provide the coach with certainty as to whether his or her existing contract can be broken. The famous example of a "dream job provision" was provided by Lou Holtz, who negotiated an escape clause in his contract with the University of Minnesota should the head coaching position at the University of Notre Dame become available. That job became available, and Holtz became a coaching legend. Performance-based escape clauses and retention bonuses can also be used to provide a coach flexibility while avoiding potential litigation.

An arbitration clause can also be useful for coaches. Although the jury in *Marist v. Brady* declined to award damages, the case was costly to Brady. Besides the legal fees that he endured, Brady and his actions were the focus of a very public dispute affecting his former and current employers. The dispute and trial is likely to have an adverse effect on Brady's reputation and possibly his recruiting efforts. A clause requiring private and confidential arbitration could have shielded Brady and his current employer from the public eye. Moreover, Brady could have some control over the rules of arbitration, including controlling when, where and how he would testify.

Difficulty with Damages

It can be extremely difficult for a college to prove damages arising from the loss of a head coach. It is for this reason that colleges often insist upon liquidated damages or buyout clauses. In Vanderbilt University v. DiNardo, the Sixth Circuit Court of Appeals upheld the trial court's enforcement of a liquidated damages clause triggered when football coach Gerry DiNardo left Vanderbilt for Louisiana State University. The District Court's discussion of whether the liquidated damages clause was reasonable, and not a mere penalty, included the difficulty in determining damages:

> The potential damage to [Vanderbilt] extends far beyond the cost of merely hiring a new head football coach. It is this uncertain potentiality that the parties sought to address by providing for a sum certain to apply towards anticipated expenses and losses. It is impossible to estimate how the loss of a head football coach will affect alumni relations, public support, football ticket sales, contributions, etc...

Vanderbilt University v. DiNardo, 174 F.3d 751, 756 (6th Cir. 1999) quoting 974 F.Supp. at 642. In the absence of a liquidated damages clause, Marist relied upon expert testimony to establish damages. According to Sean McCann of the Poughkeepsie Journal, Marist claimed the following damages through their expert, James Markham, an economist from Brandeis University:

> …Brady's alleged breach caused Marist $420,247 in damages stemming from lost ticket sales ($83,498), the loss of that 2008-09 recruiting class ($188,899) and the cost of hiring new assistant coaches ($147,850).

Damages from lost ticket sales, even with expert testimony, are very difficult to prove due to the many variables involved with ticket sales and a head coach's effect there on. The cost of hiring new coaches is quantifiable, although subject to the argument that the profession suffers from high turnover by its very nature. However, damages from the loss of the recruiting class were not only quantifiable but could be attributed directly to Brady, who recruited these players while working for Marist, using Marist's funds, only to bring them to JMU. Nevertheless, the jury found the claim to be speculative and awarded no damages.

In August 2010, I wrote as follows:

> Emboldened by Marist's success, colleges and universities may now seek to change the prevailing attitude that coaching contracts are no more than prenuptial agreements, setting forth the penalties should either party decide to end the relationship. Should this culture change, Marist may be remembered as a beacon for other colleges and universities with regard to enforcing and protecting its contractual relationships with coaches.

Although Marist emerged victorious, the lack of a damages award and public nature of the case is unlikely to convince other schools to follow Marist into the courtroom. Rather than serving as a beacon for other colleges and universities, *Marist v. Brady* has provided valuable lessons for coaches, colleges, agents and sports lawyers concerning the drafting and enforcement of coaching contracts. ■

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