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Case Summaries

Soccer Coach Obtains Partial Victory in Lawsuit Against University

By Jordan B. Rosenberg, Esq.

Former University of Montana soccer coach obtained a partial victory on his claims for defamation and tortious interference, as Montana's highest court reversed and remanded the lower court's decision in part. The Montana Supreme Court held the trial court properly dismissed soccer coach's right of privacy, invasion of privacy and negligence claims against the University as the claims were based on duties arising out of his employment contract and therefore time barred. However, the Montana Supreme Court reversed and remanded the trial court's decision on the coach's claims for defamation and tortious interference because they were found to arise under statutes and common law and thus brought within the statute of limitations.

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In a de novo ruling, the Montana Supreme Court reviewed the District Court's determination on the University's 12(b) motion to dismiss. The dispute was subject to the District Court's jurisdiction as the claims arose out of an express contract with the State or state entity or officer. Plaintiff was entitled to bring his suit for a single injury under both tort and contract claims because state entities are subject to general tort liability in the same manner as a private party.

The two-part decision turned largely on the appropriate statute of limitations for the respective claims. For a contract claim, a plaintiff must file suit within one year after a final administrative decision, or if the contract provides no settlement procedure, within one year of when the claim arises. In reaching its decision, the Court noted that tort liability is not negated merely by the existence of a contract between the parties concerning the same subject matter. Nor could the plaintiff escape the statute of limitations imposed on his contractual claim by characterizing it as a tort.

Montana recognizes a common law duty not to intentionally interfere with business relations for the purpose of causing damage or loss without justifiable cause. Since the coach alleged a duty imposed by the law which did not depend on his contractual provision or a breach of contract, the action qualifies as a breach of a legal duty rather than just a breach of contract and could therefore be brought as a tort claim.

The facts of the case concern a dispute between the University of Montana and their former women's soccer coach, Mark Plakorus. Plakorus had 17 years of coaching experience before his contract with the University. He was employed at the school from 2011 to 2018. The relationship turned sour in 2017 when one or more players complained of Plakorus sending messages too often or too late at night. In response, the University took a "climate survey" which determined the complaints lacked merit. However, in the course of the investigation there was an audit of the coach's University-issued cell phone wherein text messages and calls to and from persons associated with Las Vegas escort services were allegedly discovered. Plakorus denies this claim. The University informed Plakrous they would not be renewing is contract on January 29, 2018, five months before the contract was set to expire. While Plakorus believed he was to continue in his role, the following day the athletic director informed the players the coach would be moving on without any further disclosure.

Days after the coach was informed of the University's decision, an article was published in a local newspaper entitled "UM women's soccer coach fired after texts to Vegas escort services surface." The article described how the University had conducted an investigation in response to players' complaints about the coach's texting behavior and how the coach was asked to resign after learning he had contacted escort services on recruiting trips to Las Vegas. Additional articles were published in local and national media, including redacted copies of Plakorous's cell phone records, information relating to his personnel file and the non-renewal of his contract.

As a result, Plakorus alleged the University wrongfully and falsely implied he had committed acts of sexual misconduct, endangered his players' safety and inappropriately used University resources through the media reports, which prevented him from continuing his coaching career. Plakorus responded by filing his Complaint in April of 2019, a little over a year after the University's decision and the first related article. He then filed an Amended Complaint on August 7, 2019 removing his claim for breach of contract and adding claims for tortious interference, negligence and invasion of privacy.

The University then filed their motion to dismiss under two theories. First, they moved to dismiss for lack of subject matter jurisdiction arguing the claims should have been brought as part of a grievance through an administrative hearing under his contract. Alternatively, they moved to dismiss for failure to state a claim based on Montana's statute of limitations for claims arising out of contract. While the District Court granted the University's motion and dismissed the coach's claims, the higher court disagreed in part.

The Montana Supreme Court's decision turned largely on the nature of the coach's claims which sounded in both contract and tort law. The District Court had determined the theory of the coach's Amended Complaint were all based on the terms of his employment contract. The documents within his personnel file, as well as the investigation, audit and dissemination of information on his University-issued cell phone all related directly to his contract with the University and the District Court found no duty separate from the contract and therefore governed by contract law.

However, on appeal the coach argued his claims were actionable under Montana tort law and arose out of separate duties and thus the claims were brought within the statute of limitations. He argued the University violated certain duties after they notified him they were terminating the employment relationship. He also alleged that since the contract was not before the court no conclusions could be drawn from its terms and the University did not identify any contract language which would prevent the disclosure of personnel information, future interference with employment contracts or create a duty to be truthful when disclosing the results of investigations to the public. The University maintained the basis for each claim was rooted in his employment contract, but the court would only agree in part.

The case ultimately turned on the Court's interpretation of whether the theories sounded in contract or tort and accordingly whether they were controlled by the one-year statute of limitations for contract claims against the State. Despite the contract's requirement to exhaust administrative procedures, the District Court had jurisdiction over the State for any claim arising out of any express contract with the State or its entities and officers. As a rule, a plaintiff must file suit within one year after a final administrative decision or, if the contract provides no settlement procedure, within one year after the claim accrues. However, state entities are also subject to general tort liability. Liability for wrongful conduct resulting in a single injury can be brought under both tort and contract law and the plaintiff has discretion to pursue either or both forms of action. The Montana Supreme Court stated Montana case law makes clear the existence of a contractual relation giving rise to a set of events does not mean the only duties existing between those parties are based in contract. Contract law applies to violations of contractual provisions, but the existence of a contract concerning the same subject matter does not negate the existence of tort liability.

The coach's claims for right of privacy, invasion of privacy and negligence all arose out of the alleged improper release of personnel information gathered during the audit. While the coach alleged the University breached its duty to maintain the confidentiality of the information the court held that these claims were all based on duties arising out of the contract. Accordingly, the claims were properly dismissed for failure to file within the one-year statute of limitations for contract claims against the State.

Alternatively, the claims for defamation and tortious interference, if taken as true, arise form statute and common law independent of any contractual duties. As a result, these claims sound in tort rather than contract law and are subject to a different statute of limitations. Therefore, the Montana Supreme Court

reversed and remanded the District Court decision as to the tort claims for further proceedings.

The coach will have another day in court to pursue his defamation and tortious interference claims. However, the coach will likely still face an uphill battle. As noted by one of the judges in a dissenting opinion, even if the coach's claims sound in tort, rather than contract, he had still failed to follow the procedure for filing a grievance against the University, as is required when the defendant is a government entity. The coach had not presented his tort claims in an administrative hearing and by circumventing the grievance procedure may not be permitted to bring his claims in District Court even if he is within the statute of limitation of limitations for tort claims. The coach's case may be doomed on remand as a result.

Jordan B. Rosenberg is an associate in the Philadelphia office of Segal McCambridge Singer & Mahoney. His practice focuses on sports, recreation and entertainment, intellectual property and litigation. He can be reached at jrosenberg@smsm.com.

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First U.S. Circuit Court of Appeals Upholds Legal Internet Gaming

The First U.S. Circuit Court of Appeals has upheld the findings of a lower court, which had found that a 1961 statute aimed at stopping organized criminal sportsbooks does not prohibit states from licensing operations to take internet bets on casino games and poker.

iDEA Growth, a leading association of operators, payment processors and ancillary service providers, joined in the litigation as an intervenor in the case (New Hampshire Lottery Commission v. Rosen, No. 19-1835 (1st Cir. 2021)).

"This landmark decision is a victory for states' rights; for clear reading of federal statutes, and for the gaming industry and its customers," said IDEA attorney Jeff Ifrah. "Uncertainty surrounding the ambit of the Wire Act has been a cloud over the internet gaming industry since 2018. Today's decision will hopefully put to rest the question of whether federal law prohibits states from licensing internet gaming within their borders and compacting with each other to allow such gaming on an interstate basis."

Passed in 1961, the Wire Act (18 U.S.C. §1084 et seq.) was part of a package of bills enacted to curb the activities of organized crime. The statute makes it a crime to transmit information related to "bets or wagers on a sporting event or contest." Nonetheless, when internet gaming arose in the 1990's, the Criminal Division of the Department of Justice (DOJ) originally asserted that the Wire Act prohibited both sports betting and non-sports gaming such as casino games, poker and lotteries.

In 2011, in response to an inquiry from two states, the Office of Legal Counsel (OLC) of the DOJ undertook a review of the Criminal Division's interpretation of the Wire Act. After considering the findings of the courts, the context in which the statute was enacted and the plain language of the statute, the Obama-era OLC concluded that the Wire Act only applied to sports betting. In response to this, several states enacted legislation to license internet gaming operators in their state, while other states began selling lottery tickets on-line.

However, in 2018, the Trump Administration DOJ had the OLC revisit the 2011 guidance, resulting in a new opinion maintaining that the Wire Act prohibited all betting over the internet.

"The 2018 OLC opinion was a blow to states that had chosen to act pursuant to the 2011 OLC opinion, and to the reputation of the OLC as an objective, apolitical arbiter of law for the federal government," said Ifrah. "Fortunately, most of the gaming industry and the state lotteries came together to challenge that poorly-reasoned opinion."

In 2018, the New Hampshire Lottery and its partner NeoPollard filed suit against DOJ in the District of New Hampshire. On behalf of the internet gaming industry, IDEA Growth joined the suit as an intervenor. On June 3, 2019, the District Court issued its opinion in New Hampshire Lottery et a. v. Barr finding that the Wire Act applied only to sports betting and striking down the 2018 OLC opinion.

"DOJ doesn't often lose litigation over the meaning of federal statutes," said Ifrah. "However, the OLC's

2018 opinion was so misguided that the court resoundingly rejected it."

On December 20, 2019, DOJ filed an appeal of the District Court's decision to the First Circuit Court of Appeals. IDEA Growth again intervened in a successful effort to persuade the First Circuit to uphold the District Court's finding.

"Today's landmark ruling brings us closer to long-overdue clarity as to the legality of state-licensed internet gaming," said Ifrah. "Like nearly every other industry, the gaming industry must embrace the internet to engage today's customers and to thrive in the economy of the future."

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Tattoo Copyright Lawsuits Trace Out Fair Use Standards in Sport Franchises

By Kevin Wenzel, GWU 3L

A ruling in the Southern District of New York has elucidated the boundaries of copyright protection when it comes to including professional athletes' tattoos to depict their likeness in video games.

Solid Oak Sketches, LLC., a tattoo licensing company, brought a copyright infringement suit in district court against the video game developer Take-Two Interactive Software. Take-Two develops, markets, and publishes the popular NBA 2K video game franchise through its wholly owned subsidiary 2K Interactive, LLC.. Solid Oak's suit alleges that the 2013, 2014, and 2015 versions of the NBA 2K video game series infringed their copyright by recreating realistic depictions of tattoos that Solid Oaks holds an exclusive license to. At question are five distinct tattoos on three athletes featured in the games: Lebron James, Eric Bledsoe, and Kenyon Martin. While Solid Oaks has an exclusive license to the tattoos being depicted on these NBA athletes, they do not have a license to use the athletes' publicity or trademark rights.

In a decision dated March 26, 2020, the Court took the side of Take-Two, granting their motion for summary judgment on the grounds of de minimis use, implied license, and fair use, and finding that Take-Two's use of the tattoos did not violate Solid Oak's copyright protection.

In addressing the de minimus use claim the court examined factors of the amount the copyrighted work was used, the observability of the work within the game, and factors involving "focus, lighting, camera angles, and prominence." The court agreed with Take-Two and found that the use of plaintiff's tattoos within the games are used fleetingly and out of focus enough to not violate Solid Oak's copyright. The court noted that the tattoos are not included in any marketing materials, but rather just in NBA 2K's gameplay and only are included on 3 of the over 400 available players in the series. In determining de minimus use, the court reasoned that during normal gameplay players' tattoos "appear entirely out-of-focus" and "are further obscured by the Players' quick and erratic movements up and down the basketball court."

The court also held that the tattoo artists had granted an implied license to the basketball players to use and display as part of their personas, and that these basketball players had then licensed the use of their likeness to be included in the NBA 2K video games. The finding relied on declarations by multiple tattoo artists who inked the five tattoos in question where they acknowledged that they intended for their artwork to become part of the players' likenesses, and they also were cognizant of the fact that the players they tattooed were public figures and were likely to display their work publicly through their profession. The court looked to the prior case of Weinstein Co. v. Smokewood Entertainment Group in the Southern District that found grounds for an implied non-exclusive license "where one party created a work at the others request and handed it over, intending that the other copy and distribute it." In the present case of Solid Oak, the court held that "(i) the Players each requested the creation of the Tattoos, (ii) the tattooists created the tattoos and delivered them to the Players by inking the designs onto their skin, and (iii) the tattooists intended the Players to copy and distribute the tattoos as elements of their likenesses, each knowing that the Players were likely to appear in public, on television, in commercials, or in other forms of media" Since the players had granted Take-Two permission to use their likeness and the players had an implied license to use the tattoos as part of their likeness, the court found no fault with Take-Two's use of the tattoos.

Lastly, the district court granted Take Two's counterclaim declaring that their use of the tattoos constituted fair use through a four-factor analysis. In looking at the purpose and character of the work the court found that the use was transformative, where the tattoos were included for the purpose of recreating the likeness of the player depicted. Then the court examined the nature of the copyrighted work, determining that the designs were more factual than expressive and contained commonly used motifs and designs, lending itself to fair use. The court considered the amount and substantiality of use, finding that while Take-Two copied the entirety of the work, it was for a transformative purpose, and the tattoos were reduced in size, so the visual impact of their artistic expression was significantly limited. Finally, the court determined that there was no relevant market for Solid Oak to license tattoos in videos games and that such a market was unlikely to develop. Since all four of these factors weighed in favor of fair use, the district court granted Take-Two's fair use counterclaim.

With the boundaries of de minimus and fair use becoming a little clearer, this case could help to serve as a guide for the use of tattoos in future video games, where publishers can now move forward more confidently, including these copyrighted works in their projects. While accurately depicting real-life public figures is certainly a central aspect of professional sport franchises, the issue is becoming more pertinent with different video game genres and titles as well. For example, video games like Gears of War 4 and Cyberpunk 2077 license the use of celebrities to play their main characters. While past suits on the subject frequently ended with a settlement before a decision could be reached, this decision in the Southern District of New York has helped to provide certainty and fill the void for copyright holders and video game publishers as we move forward in the virtual world.

Solid Oak Sketches, LLC v. 2K Games, Inc., No. 16-CV-724-LTS-SDA

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Brandt v. Davis: Injured College Softball Player Loses Civil Case

By Nicholas Barrios & Jeff Birren, Senior Writer

Few human activities are free from injuries, especially sports. So many injuries occur during athletic participation that many courts have increased the barrier for a plaintiff to be able to pursue redress for those injuries. It was so for Brooke Brandt, a college softball player at Suffolk University. Brandt was injured during practice and filed a civil case against Suffolk, her coach and the teammate who caused a serious concussion. The Superior Court granted the defendants' summary judgment motions, and recently the Massachusetts Court of Appeals affirmed, holding that to prevail, a plaintiff must prove gross negligence or recklessness, but ordinary negligence was insufficient (Brooke A. Brandt v. Jaclyn Davis, Meredith Ball, and Suffolk University, 98 Mass. App. Ct. 734 ("Brandt") (11-2-20)).

Facts

Brandt played four years of high school softball in St. Paul, Minnesota and was team captain her senior year. She entered Suffolk as a business major in 2013, and that year she played both infield and outfield while starting 37 games. At Suffolk "Brandt signed a participant waiver and release of liability form" that "released Suffolk University, and its employees and agents from liability for any claims arising from her participation in the athletic program to the extent 'permitted by the law of the Commonwealth of Massachusetts'" (Id. at 735). That year, the waiver was irrelevant. Unfortunately, Brandt's sophomore season was a different story.

The team often used an indoor practice facility. During such practices the "team engaged in the same general pattern of activities." The players would warm up, leave the playing field to get their equipment that would be hung on a fence, and then meet on the field. They would "run through a series of rotating stations to develop their different skills" and each station required different personal equipment. When all were in position with the correct equipment at the next station, the coach would say "go" before the players resumed (Id.).

The batting tees were usually in the batting cages, but the tees were not in the cages on March 7, 2014. The movable screens that were typically there were

also not present that day. The players entered that area from one side and hit balls into netting. Brandt's first station that day was fielding, and batting was to be her second station. She left the field "to retrieve her batting helmet and began jogging back with her helmet in hand" (Id. at 736). When she returned to the batting area, teammate Ball "was practicing hitting" at the last tee "because of the additional time [she] spent practicing [her] footwork." Ball was left-handed and "chose the tee nearest to the door so that the right-handed players in the station would not be within her swinging radius" (Id.).

Brandt testified "that she saw that the teammate had a bat in her hand…and was preparing to bat." Ball's back was to Brandt, and Brandt "did not know whether the teammate could see her" due to the limited peripheral vision caused by the batting helmet. Brandt also testified "that she yelled 'Wait.' However, she could not remember when she said wait or even whether she said it out loud. She admitted that it was possible that she 'said wait only in [her] own head'" (Id.).

Ball testified in her deposition that "she did not begin swinging until instructed to do so by her coaches." An assistant coach testified that the players in the batting area "were already swinging before the accident." Ball also testified that "she 'always look[ed] around… before… every single swing.' She did not see" Brandt. Ball "hit the ball off the tee" and the "swing hit the plaintiff in the back of the head." Brandt "suffered a concussion and required four stiches at a hospital." She was released that evening and Ball, her best friend, "stayed with the plaintiff in her dormitory room that night." Within a few days "it became evident that" Brandt "was suffering long-term effects from the accident, including difficulty reading" (Id.). Brandt left Suffolk and returned home. She graduated from the University of Minnesota-Twin Cities and became a digital marketer.

Brandt filed a civil case on March 1, 2017 asserting claims against Ball "for negligence, gross negligence and recklessness," and against Suffolk and Coach Davis for gross negligence and recklessness. The defendants eventually filed summary judgment motions. The Superior Court determined that Brandt "needed to show recklessness on the part of the teammate to prevail" and that the record "did not raise a triable issue of recklessness or gross negligence on the part of either the teammate," Suffolk or Coach Davis and dismissed the case. Brandt appealed (Id. at 737). Her opening brief was filed on 10-7-19 (Brandt, Court of Appeals Doc. No. 5), Ball responded on 12-16-19 (Brandt Doc. No. 15), Suffolk and Davis did so on 12-17-19 (Brandt Doc. #17) and Brandt filed a Reply (Brandt Doc. # 21 (1-6-20)). Oral argument was held on 5-22-20. It is available on the Court's website: https://www.ma-appellatecourts.org/docket/2019-P-1189.

In the Court of Appeals

The Court reviews a summary judgment decision "de novo, because we examine the same record and decide the same questions of law." The question "is whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established" so that the moving party is entitled to judgment as a matter of law. Typically, "negligence and recklessness involve question of fact left for the jury" but "where no rational view of the evidence would permit" such a finding, "summary judgment is appropriate" (Id.).

Claims against Ball

The Court stated that "participants in an athletic event owe . . . to other participants" the duty to "refrain from reckless misconduct." However, even in noncontact sports ordinary negligence is not comparable to reckless misconduct, and this standard applies to a participant's duty towards fellow players. The issue was whether or not this standard of care regarding misconduct should be applied not only in a game setting but also in an athletic practice setting (Id.).

The Court determined that the duty "to refrain from reckless conduct applies to athletic practices as well as to athletic contests" (Id. at 738) because a stringent restriction on participants' actions would likely reduce the physical competition amongst athletes. This same reasoning was determined to apply to athletic practices as well. Practices are opportunities for players to improve competitive performance through scrimmages and drills against fellow teammates. "Players, when they engage in sport, agree to undergo some physical contact which could amount to assault and battery absent the players' consent" (Id.).

Batting practice allows players to "increase the strength and accuracy of their swings." To prevent

players from practicing as vigorously as they play in a game setting would under prepare them for the amount of physical activity expected in a game and increase the risk of injury. The Court "find[s] support for this conclusion in other states," and cited cases from Indiana, Ohio and Michigan that had reached that conclusion. Consequently, the negligence claim asserted against Ball was properly dismissed on summary judgment (Id).

The Court then looked at the reckless conduct claim. When gauging the knowledge of the risk of harm, the burden of liability for reckless conduct can be either viewed from a subjective or object standard (Id. at 739). The plaintiff has to prove that "the actor knows, or has reason to know . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fails to act, in conscious disregard of, or indifference to, that risk" (quoting the Restatement (Second) of Torts § 500 comment a, at 588 (1965)). Here, there is no evidence or testimony from Brandt that could lead a jury conclude that Ball "engaged in extreme misconduct outside the range of the ordinary activity inherent in the sport" (Brandt at 739).

Brandt testified that her "teammate had her back towards the entrance and had a batting helmet on that limited her peripheral vision." She was also not able to remember certain facts concerning the incident including whether or not the teammate had looked around prior to swinging the bat or if Brandt told Ball to "wait" out loud. Due to the lack of evidentiary support, there is "no rational view of the evidence that the teammate in fact saw the plaintiff before the teammate swung the bat with enough time to prevent the accident . . . and as a matter of law did not rise to the level of recklessness." Even with Brandt's assertion that Ball was given permission by the coach to swing the bat right before the accident, the experience and skill level of the parties involved make the incident at most a negligent one, and thus summary judgment for Ball was appropriate (Id.).

Claims against Davis and Suffolk

The Court again began by stating the proper duty of care. A coach "has a duty of ordinary reasonable care to [her] own players" (Id.). However, it recognized that Suffolk requires its players to sign an enforceable liability waiver that bars players from bringing any ordinary negligence claims against the school or its coaches (Id. at 741). While this liability waiver is enforced for ordinary negligence, it does not extend to actions that are determined to be of gross negligence or reckless or intentional conduct. Thus, for these claims, the Court only examined "the plaintiff's claims for gross negligence and recklessness."

Actions that qualify as gross negligence are considered to be of a substantially higher magnitude than that of ordinary negligence. However, the only evidence Brandt could propose was "the positioning of the tee station near the entrance enhanced the risk of serious danger for the players when there were safer alternative locations for the drill." Given the experience and knowledge of these collegiate players, it would be expected these athletes would know not to enter the field while teammates are "swinging their bats at the tee station." Even if the coach's positioning of the tee station is considered "inadequate planning, makes out at worst, ordinary negligence" and thus not gross negligence (Id.).

The final claim was for recklessness. "[I]n order to impose liability on a coach for the conduct of a player, there must be, at the least, evidence of 'specific information about [the] player suggesting a propensity to engage in violent conduct, or some warning that [the] player . . . appeared headed toward such conduct as the game progressed'" (quoting Kavanagh v. Trustees of Boston University, 440 Mass. 195, 203 (2003) (Brandt at 741). Brandt testified that Ball was her best friend and that she did not believe Ball hit her on purpose. This testimony, along with the other evidence stated earlier, gives a jury no basis "to find that the head coach had acted recklessly in allowing the teammate to practice hitting off tees." The same standard and reasoning also applied to Suffolk. With that, the Court affirmed the grant of summary judgment to all the defendants (Id.).

Conclusion

This is a sad case. Brandt was accidently injured by Ball, her best friend on the team, and the one person who spent the night with her after she was released from the hospital. Nevertheless, Brandt sued that best friend as well as her coach and Suffolk, and the case will forever bear Ball's name. For Brandt, the accident led to a very serious head injury, the end of her athletic career and her time as a student at Suffolk.

Athletics will never be free from serious injuries and this is just another example. Courts across the country continue to wrestle with the proper standard of care and have been moving from a negligence standard towards a recklessness standard. Brandt has since filed for review in the Massachusetts Supreme Court (FAR-27928), but one can only hope that she is not overly optimistic that the Court will reverse the decision.

Mr. Barrios: It is hard to imagine this case going against the defendants given the relationship between Brandt and Ball and the evidence that was provided. The physical activity required to compete, especially in team sports requires a lot of training. It would be detrimental to the spirit of competition if participants feared facing legal action for every accident that occurs during the course of an athletic practice or game. I believe the Court came to the correct conclusion in this case.

Mr. Birren: Suffolk may also want to amend the liability waiver to bar claims for negligence against teammates. A failure to do so could lead to catastrophic results for college athletes that lack the requisite insurance to defend such cases.

Mr. Barrios is a first-year student at Southwestern University School of Law in Los Angeles. He graduated Cum Laude from Texas A&M University and is a member of Sports Law Society.

Mr. Birren is the former general counsel of the Oakland Raiders and taught sports law at Southwestern.

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Washington State Appeals Court Affirms Ruling that School District Fulfilled Its Duty in Concussion Case

An appeals court in the state of Washington has affirmed a lower court's ruling that a school district and its employees did not breach their duty of care after a student suffered head injuries, including a concussion, while riding on an amusement park ride on a school field trip.

In sum, the district discharged its duty when the parent was informed of the head injury, according to the court.

In 2014, Haley Anderson was a student at Snohomish High School in the Snohomish School District No. 201. On April 8 of that year, she went on a band-sponsored field trip to Disneyland.

Along with her boyfriend at the time, Mitchell Gibbs, the two got on the Matterhorn ride at Disneyland between 1:30 p.m. and 2:00 p.m. Gibbs testified that he sat in front of Haley during the ride. After the two got off the ride, Gibbs testified that Haley told him she hit her head and did not feel well. As a result, they sat down, and Gibbs went to get Haley something to drink. When Gibbs returned, he asked Haley if she was feeling better. He testified that Haley said he was and the two went to meet their friends at the Haunted Mansion ride. He testified that they also went on some nighttime rides after dinner, including the Matterhorn again.

However, when they stopped at a chaperone station at 10:30 p.m., he stated that Haley fell asleep and he had trouble waking her up. Once he woke her up, he carried her back to the hotel and told another student to tell Wendy Nelson, a parent volunteer on the trip, about Haley hitting her head. Nelson served as the trip coordinator. Nelson recommended she take pain medication, call her parents, and that she would check on her in the morning. Just after midnight, Haley texted her father. But neither parent made any effort to contact any of the adults on the trip, according to the court.

Haley testified that the morning of April 9, she had a headache. While she was eating breakfast that morning, she recalled Nelson asking her how her head was. She told Nelson that she was fine. She did not recall telling Nelson anything else. Throughout the remainder of the trip, Haley continued to go on rides at amusement parks and experienced symptoms like headaches and nausea.

Particularly, on April 12, she rode a rollercoaster at SeaWorld called Manta. She testified that, after the ride, her head was spinning and hurt worse than it had on the previous days. She also stated that she could not think straight and felt nauseous. However, she concedes that she did not report any symptoms she experienced after April 8 to Nelson or her assigned chaperones. She explained "that because Nelson told her she did not have a concussion, she was under the impression that she had only a headache."

The band flew home on April 13. When Haley arrived at home, she told her parents that she did not feel

well. The next morning, she had a headache and felt dizzy, and she told her mother that she still did not feel well. Jodie took Haley to the Everett Clinic that same day, where she was diagnosed with a concussion.

Haley continued to experience symptoms and did not return to school for most of the remainder of the year. In September 2015, Dr. Stephen Glass, a child neurologist, opined that Haley suffered a concussion after hitting her head on the between April 8 and April 13. Because she "was not properly treated for the concussion, he concluded that this second impact was causing her persistent symptoms and ongoing impairment."

In May 2016, the Andersons sued Snohomish School District No. 201 alleged that while acting as agents for the District, Wilson and Nelson failed to provide Haley reasonable and necessary medical care after her head injury. Although Nelson was not a District employee, the District admitted that she was its agent and was acting under the scope of her agency on the trip.

The District moved for summary judgment, claiming that it implemented "reasonable measures for students to report injuries during the trip, but that Haley did not use them. Instead, it pointed out, she failed to disclose any other symptoms beyond her initial headache until after the trip. The Andersons countered that the injuries were foreseeable.

The District has student athletes, and their parents sign a waiver regarding the risks and symptoms of a concussion. It directs parents to seek medical attention right away if their child reports any concussion symptoms, or if they notice any concussion symptoms in their child.

The Andersons argued that even if Jodie and Dean acted wrongfully in not doing more after learning Haley hit her head, the District necessarily acted wrongfully based on the custodial relationship it had with her.

The court disagreed, concluding that Wilson and Nelson did enough.

The Andersons appealed, arguing that the trial court erred in granting the summary judgment motion because there was a genuine dispute of material fact as to whether the District breached its duty of care to Haley. "Specifically, the Andersons assert that the trial court failed to review the facts regarding its duty."

The court noted that to prevail "in their negligence suit, the Andersons must show (1) the existence of a duty to the plaintiff, (2) a breach of that duty, (3) a resulting injury, and (4) the breach as the proximate cause of the injury. N.L. v. Bethel Sch. Dist., 186 Wn.2d 422, 429, 378 P.3d 162. The parties agree that the district owed a duty to Haley. What they disagree on is whether the evidence showed a genuine dispute of material fact as to whether the District breached that duty."

The issue "is whether the District exercised reasonable care in response to what it was told by and about Haley on April 8 and the morning of April 9. The form does not specifically address the protocol for handling student injuries,"

The plaintiffs argued on appeal that "because the District knew that every head injury to a student is serious, it also knew that continued activity after a head injury could cause additional serious injury. Last, they cite a declaration by their expert Dr. Ronald Stephens, executive director of the National School Safety Center."

Stephens opined that "the District, by and through its agents, violated its own standard of care by failing to provide sufficient information to adult volunteers on the trip as to how to properly respond to a student injury, specifically, a head injury. The District was aware, prior to the trip, [of] the potential severity of head injuries and that students underreport those injuries."

The appeals court did not budge, writing that "the District discharged its duty when Nelson instructed Haley to inform her parents, Haley then sent a text message to her parents about hitting her head, and Haley communicated with her parents the morning of April 9.

"… School districts have a duty to exercise the care that an ordinarily responsible and prudent person would exercise under the same or similar circumstances. N.L., 186 Wn.2d at 430. No authority has been advanced to suggest that in a nonemergency situation when a child is physically in the care of the school district this duty precludes the district from notifying parents and providing them the opportunity to exercise decision-making authority. Nor has any authority been advanced to suggest that this duty is greater than the duty of the parents in similar circumstances."

Haley A. Anderson et al. v. Snohomish School District No. 201 et al.; Ct. App. Wash.; No. 80218-6-I (consolidated with No. 8030-7-I); 8/24/20

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Articles

International Skating Union v. European Commission: What could be more competitive than sport?

By: Daniel L. Weiss and Iseult Derème

The very essence of sport is competition. Most sporting activities require cooperation and rules to turn the efforts of individuals into organized teams, contests, leagues and championships. On December 16, 2020, the General Court of the European Union (the "General Court") issued its Judgment in International Skating Union v. European Commission that provides some clarity to the circumstances in which a sports federation oversteps the bounds of legitimate behavior and to have acted in breach of the competition law rules of the European Union, which are similar to the antitrust laws in the United States.

The International Skating Union (the "ISU") is the sole international sports federation recognized by the International Olympic Committee and is responsible for the regulation and administration of figure skating and speed skating on ice at the worldwide level. The ISU, like many international sports federations, promulgated eligibility rules for athletes requiring them to participate only in events authorized by the ISU and/or its members. The ISU had broad discretion regarding which third-party events to authorize, and required a solidarity payment in an amount to be determined on a case-by-case basis. At the relevant time, athletes who participated in events not pre-authorized by the ISU could face up to a lifetime ban on their eligibility to participate in ISU events. Athletes could appeal against ineligibility decisions exclusively to the Court of Arbitration for Sport ("CAS") in Lausanne, Switzerland, and event organizers that had their authorization request denied could likewise appeal to CAS.

In 2014, two Dutch professional speed skaters filed a complaint with the European Commission (the "Commission") alleging that the ISU's eligibility rules violated competition laws. The two speed skaters claimed that they were prevented from participating in an unauthorized speed skating event because of ISU's then-existing potential lifetime ban. In 2016, the ISU changed its eligibility rules to, among other things, reduce the sanction on athletes who participated in unauthorized events (but maintained the possibility of a lifetime ban). Nevertheless, in 2017, following an investigation into the complaint, the Commission issued a decision finding that the ISU's eligibility rules constituted a clear breach of competition law.

According to the Commission, the ISU's eligibility rules had an anticompetitive purpose in the sense that they unjustifiably restricted professional athletes from freely participating in international sporting events organized by third parties. The Commission found that the main purpose of the rule was to protect the economic interests of the ISU. By restricting the freedom of athletes to engage in other sports events, and by applying nonobjective, nontransparent, and discriminatory criteria to the authorization of third-party events, the ISU prevented the organization and commercial exploitation of competing events. This foreclosed any (potential) third-party event organizers from the market and prevented competition between rival events.

The Commission also found that the severity of the sanctions on individual athletes for noncompliance was disproportionate, particularly in light of the athletes' average career span (eight years) and the fact that the ISU organizes and controls the athletes' participation in the most important international events for this particular sports discipline (that is, the Olympic Winter Games, the European and World championships, and the World Cup).

As far as the arbitration rules were concerned, the Commission recognized that arbitration is generally an accepted method of resolving disputes, and that agreeing to an arbitration clause did not in itself amount to a restriction of competition. In this particular case, however, the Commission found that the exclusive jurisdiction of CAS whose decisions were final and binding reinforced the restriction of the athletes' commercial freedom and the foreclosure of third-party event organizers.

The Commission directed the ISU to refrain from continuing its enforcement of the anticompetitive eligibility rules and pre-authorization system. The

Commission, however, noted that the ISU could remedy its anticompetitive practices without entirely abandoning the concept of a pre-authorization system.

The ISU appealed the Commission's decision to the General Court. As a threshold matter, the General Court relied on several previous European Union precedents to find that there is a potential conflict of interest where a sports federation has both the powers of a regulator (by being responsible for the adoption of membership rules and setting the conditions for participation in events) and is at the same time making commercial decisions in relation to those events. The General Court confirmed that such a conflict of interest gave the ISU obvious competitive advantages over its competitors, and was likely to give rise to anticompetitive effects.

The General Court further found that ISU's eligibility rules and pre-authorization requirements were disproportionate and not justified by their alleged legitimate objective, namely the integrity of the sport and the application of common standards to all events happening in this discipline. The General Court noted that the ISU had failed to issue clearly defined, transparent, nondiscriminatory criteria to ensure that third-party event organizers' authorization requests were fairly evaluated. A broad grant of discretion to the ISU could lead to the ISU denying authorization to third-party events on nonlegitimate grounds.

That said, the General Court recognized that the protection of the ISU's economic interests is not itself anticompetitive. When combined with the integrity of the sport, "the pursuit of economic objectives is an inherent feature of any undertaking, including a sports federation when it carries out an economic activity."

Nevertheless, the General Court held that in view of the average duration of a skater's career, the ISU's penalties that ranged between five years and a lifetime ban for an athlete competing in an unauthorized event were manifestly disproportionate to the ISU's objective of protecting the integrity of the sports discipline. The General Court found that such a significant sanction "may dissuade athletes from participating in events not authorized by the [ISU], even where there are no legitimate objections that can justify such a refusal, and, consequently, is likely to prevent market access to potential competitors who are deprived of the participation of athletes that is necessary in order to organize their sporting event." The General Court also noted that the system of penalties was not clearly set out, and thus presented a risk of arbitrary application of the penalties.

Further, the General Court agreed with the Commission that the ISU's rule requiring third-party event organizers to pay a solidarity payment that would be used to finance only its own events and those of its members was not appropriate. The General Court stated that a federation may legitimately decide which events to finance, but a blanket rule in which solidarity payments may be used to finance only the ISU and its members' events did not promote undistorted competition between competitors.

The General Court, however, disagreed with the Commission regarding the CAS arbitration clause. The General Court dismissed the Commission's finding that the exclusive arbitration procedure constituted an aggravating factor by making the ISU's infringement more harmful. Critically, the General Court noted that even though the provision stated that CAS jurisdiction was exclusive, the arbitration provision did not foreclose in its entirety an athlete's right to seek redress from the judicial system or the European Commission when applicable.

The General Court's decision, which remains subject to appeal, has long been awaited due to its significance for the sports federation and its athletes at issue, and sports in Europe generally. The ultimate result is not unexpected and largely in line with previous case-law. Notably, both sports federations and athletes can claim victory.

The General Court found that pre-authorization systems and eligibility rules by sports federations are not, in themselves, prohibited. In addition, the general acceptance of economic interests and solidarity considerations of the sports federation points to more federation-friendly future decisions. Moreover, the General Court has not sought to challenge the traditional appellate hierarchy established by many international sporting bodies, which choose to settle their disputes either through litigation or arbitration in institutions lying outside the European Union. From the perspective of sports federations, the General Court has approved a sports federation's use of pre-authorization systems and only took issue with the details of such systems.

While athletes may not have achieved a wholesale change to sports federations' pre-authorization systems

and eligibility rules, sports federations can no longer install anticompetitive and draconian pre-authorization systems and eligibility rules to the detriment of athletes. This should provide more opportunities for athletes to benefit from their talents. Indeed, representatives of athletes have stated that "[t]he judgement is like opening the Berlin Wall for athletes" and that it puts significant limits on sports federations.

The specific limits on sports federations, however, remain undefined. The decision makes clear that pre-authorization systems need to be justified on the basis of objective, nondiscriminatory and transparent criteria and eligibility rules must be proportionate to achieve the legitimate objectives of the sports federations. It can therefore be assumed – as had already been suggested by the Commission – that pre-authorization systems and eligibility rules can be maintained if they do not unjustifiably restrict athletes' rights to participate in competing sports events. The outer boundary of when pre-authorization systems and eligibility rules transform from the proper exercise of a sports federation's authority into an anticompetitive, unlawful restraint of trade has yet to be determined.

Indeed, after the Commission's decision, the ISU revised its criteria for authorizing third-party events and its eligibility rules to further reduce the potential sanction on athletes who participate in unauthorized events, which now range from a warning up to a two-year ban. While the ISU's new pre-authorization criteria and eligibility rules have certainly moved in the direction of being consistent with the proper exercise of a sports federation's authority, whether it is enough to comply with the test set forth in the General Court's decision will have to be explored in the future.

It also remains unclear how the particularities of each sporting discipline will affect whether the federation's pre-authorization systems and eligibility rules comply with competition laws. For instance, the General Court relied on the average length of a skater's career when evaluating the reasonableness of the ISU's rules. Because the average length of an athlete's career varies between different sports, which sanctions are deemed proportional and which ones are not may vary across sports.

In the years to come, athletes and sports federations will continue to work on the correct and precise delineation between which pre-authorization systems and eligibility rules comply with competition laws and those that do not.

Daniel L. Weiss is of counsel in the Los Angeles office of Gibson, Dunn & Crutcher LLP and Iseult Derème is an associate in the Brussels office of Gibson, Dunn & Crutcher LLP.

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Examining the Legal Landscape Involving Amateurism and the NCAA

By Alex Sinatra

According to the National Collegiate Athletic Association (NCAA), it is a member-led organization dedicated to the well-being and lifelong success of college athletes[1]. It was founded in 1906 as the Intercollegiate Athletic Association of the United States (IAAUS) and later changed its name in 1910 to the NCAA. The need for an association like this was due to the lack of uniformity among collegiate athletics and the lack of athlete safety. Student athletes and schools were gaining unfair advantages over their rivals and there were a myriad of athlete deaths during practices and athletic contests.

The main objective of the NCAA in its infancy, was to create rules and regulations to govern intercollegiate athletic contests. These rules were meant to create an equal-playing field devoid of unfair advantages where athletes would be safe to compete in a collegial environment — at least that was the goal. However, over the years, the purpose and ethos of the NCAA changed. There was money to be made off of athletes and everyone seemingly wanted a piece.

Recently, the Supreme Court of the United States (SCOTUS) granted writ of certiorari to a case entitled National Collegiate Athletic Association v. Alston[2].

1 http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa

2 https://www.scotusblog.com/case-files/cases/national-collegiate-athletic-association-v-alston/

This case ultimately centers on the amateurism rules of the NCAA and whether compensation of student-athletes violates federal antitrust law. The issue presented in the case is: Whether the U.S. Court of Appeals for the 9th Circuit erroneously held, in conflict with decisions of other circuits and general antitrust principles, that the National Collegiate Athletic Association eligibility rules regarding compensation of student-athletes violate federal antitrust law.

The case centers on former West Virginia University student-athlete Shawne Alston who filed suit in the Northern District of California against the NCAA, SEC, ACC, Big 12, Pac 12 and Big Ten. He claims the defendants have "conspired to contain costs thereby fixing the value of full grant-in-aid in violation of Section 1 of the Sherman Act." Alston seeks two things: 1. to certify a class of similarly situated student-athletes who competed from February 2010 to the present and 2. monetary damages (which are trebled under antitrust laws) and to enjoin the NCAA from enforcing their bylaws that cap full grant-in-aid.

Amateurism has been an oft used battle cry for the NCAA when rules and regulations are questioned. The association consistently points to amateurism as their guiding principle. But if you break down the amateurism rules and what the schools are providing the athletes versus what they are potentially giving up, it seems lopsided in the NCAA's favor. In the most basic terms, in order to be eligible as a student athlete for an NCAA member school, an individual must not have received sports-related compensation[3]. In exchange for the student athlete giving away their ability to make money off their name, image, and likeness ("NIL") while a student-athlete, they are receiving a free education. However, studies have indicated that student athletes aren't always able to take full advantage of this "free" education because of the amount of hours they are taken out of the classroom by virtue of them representing their schools in athletic contests.

Why is the NCAA so adamant against athletes profiting off their own name, image, and likeness when students who are on academic scholarships and not athletes have full reign to create any legal business enterprise they desire?

I spoke with Ellen M. Zavian, a professor of sports law and entrepreneurship at George Washington University and Editor-in-Chief of esportsandthelaw, about this issue. In her entrepreneurship class, the students have an opportunity to create a startup. For the student-athletes in her class, they have additional hurdles imposed by the NCAA when launching a new enterprise.

"College should be a time to explore and take advantage of the resources universities offer, including developing and funding startups. If a Student-Athlete is a 'student' first, the NCAA should not require the entrepreneur Student-Athlete to share their startup idea nor require approval from the NCAA, no matter the product or service being launched."

Two sections of the NCAA Division 1 manual[4] seem particularly relevant to understanding the restrictions placed on student-athletes.

Section 2.9 The Principle of Amateurism. Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.

The NCAA specifically chose the word ***avocation*** here. The word avocation means a hobby or minor occupation as opposed to a vocation which is a person's employment or main occupation, especially regarded as particularly worthy and requiring great dedication. I do agree student-athletes should be protected from exploitation by professional and commercial enterprises, I contend, however, that NCAA is one such professional and commercial enterprises exploiting student-athletes.

While there is an NCAA rule known as the 20-hour rule, that limits the amount of time student-athletes are allowed to practice and participate in "countable" activities, many of the activities that aren't countable take up huge blocks of time from the student-athlete's schedule[5]. If you have ever spoken to a student athlete, they will tell you that the number of hours they are devoting to their sport is in sheer excess of twenty hours. The NCAA published a chart[6] to outline what

3 http://www.ncaa.org/student-athletes/future/amateurism

4 https://www.ncaapublications.com/productdownloads/D121.pdf

5 https://web3.ncaa.org/lsdbi/bylaw?ruleId=327&refDate=20200807

6 https://www.ncaa.org/sites/default/files/Charts.pdf

activities are countable and which ones are not. Things like traveling to and from competition sites, attending banquets, and fundraising activities or public relations/promotional activities and community service projects. Competitions and associated activities, regardless of their length, count as three hours. Under various federal and state laws, between 35-40 hours is considered full-time work and I would argue most student-athletes are devoting at least this amount of time to their athletic endeavors and therefore their participation in intercollegiate athletics is a vocation and not an avocation.

In is only natural that when an individual devotes a large chunk of time to either a vocation or an avocation, they would be inclined to profit off their expertise. However, the NCAA limits what the student-athletes can create with their own name, image, and likeness. For instance, Rule 12.4 governs employment of student-athletes and Rule 12.4.4 governs self-employment.

Rule 12.4.4 Self-Employment. A student-athlete may establish his or her own business, provided the student-athlete's name, photograph, appearance or athletics reputation are not used to promote the business.

This severely limits the types of businesses that student-athletes can create. It is akin to telling a fine arts student that they can create any business they choose, but it can't be centered-around their artistic abilities. Not only is this a ludicrous restraint on trade, but it might also be considered a violation of the law.

There have been a smattering of lawsuits brought against the NCAA in recent years regarding athlete compensation and NIL. The suits brought against the NCAA regard claims of antitrust violations and restraint of trade.

> *"Over the last few years, the attitude at the courthouse has seemed to change and be less favorable for the NCAA. Although the NCAA has an enormous history of success in antitrust litigation, these many mounting cases seek to change the fortune of student-athletes and the model for intercollegiate athletics,"*[7] *Sports attorney Christian Dennie shared on his sports law blog for law firm Barlow Garsek & Simon, LLP.*

Dennie has written numerous articles on the matter[8]. Prior to joining BGS, Christian worked in the athletics departments at the University of Oklahoma and the University of Missouri. Since his return to private practice, Christian has continued to work with and advise clients in the sports industry.

> *"Generally, I think the question is whether payment for items and expenses that are tethered to academics, but are not included within the NCAA's definition of full grant-in-aid would violate antitrust laws. It appears that academic expenses paid for by an institution would not be an issue that interferes with the protection of the amateur product. This would permit student-athletes to receive some academic expenses or items that could be above full cost of attendance. The trial court's order, and the appellate court's affirming opinion, does not address items in addition to expenses tethered to academics, which was upheld by the Ninth Circuit in O'Bannon. The US Supreme Court denied cert in O'Bannon."*

As recently as a January 11, 2021[9], the NCAA Division I Council tabled votes on proposed legislation surrounding rule changes regarding student-athletes' ability to transfer and to make money from the use of their name, image, and likeness. This comes after a letter from Justice Department's Antitrust division leader Makan Delrahim[10] warned the NCAA about the potential antitrust violations the proposed rules might have for the NCAA.

> *"Pursuing a goal of promoting amateurism does not insulate the NCAA's rules from scrutiny under the antitrust laws. ... The antitrust laws limit the NCAA's ability to restrict competition among college athletes, coaches, and schools. For example, if the NCAA adopted a rule that fixes the price at which students can license their NIL, e.g., based on what the NCAA determines to be a 'fair' market value, such a rule may raise*

7 https://bgsfirm.com/jenkins-v-ncaa-another-antitrust-lawsuit-challenging-the-athletic-scholarship/

8 https://bgsfirm.com/attorney-profiles-christian-s-dennie/

9 https://www.usatoday.com/story/sports/ncaaf/2021/01/11/ncaa-voted-delayed-transfer-rules-name-image-and-likeness/6629391002/

10 https://www.usatoday.com/story/sports/ncaaf/2021/01/08/justice-department-warns-ncaa-over-transfer-and-money-making-rules/6599747002/

concerns under the antitrust laws."–Justice Department's antitrust division leader sent a letter to NCAA President Mark Emmert, a copy of which was obtained by USA TODAY Sports[11].

As the SCOTUS prepares to hear National Collegiate Athletic Association v. Alston, many speculate on the decision. As a reminder, Chief Justice Roberts represented the NCAA before SCOTUS in Smith v. National Collegiate Athletic Association in the early 2000s and thus, he will likely have to recuse himself.

The current NCAA model is not working for the student-athletes nor for the NCAA. Something must change fundamentally. Do not be surprised if SCOTUS finds that the NCAA eligibility rules regarding compensation of student-athletes violate federal antitrust law. The sports world has seen unprecedented changes in the past five years, and this will likely be one more.

Alex graduated from Texas A&M University School of Law and has worked in-house for a private family, a multinational company, and most recently, a professional sports team. She works for USA TODAY SMG's NFL Wire sites as a journalist and sits on the Esports Trade Association Board of Directors and chairs the Legal & Governance Committee. She hosts a podcast, Your Potential for Everything, and has a book series to supplement it. Alex assesses company policies to help them negotiate and set internal metrics in a more strategic and effective way. Email her at yourpotentialforeverything@gmail.com to schedule a consultation.

References

Books: https://amzn.to/34QeETc

Podcast: https://bit.ly/YPFEapple

https://www.usatoday.com/story/sports/college/2020/12/16/supreme-court-hear-case-ncaa-athlete-compensation/3894835001/

https://www.usatoday.com/story/sports/columnist/dan-wolken/2020/12/16/supreme-court-decision-take-ncaa-case-one-reason-2021-looms-large/3930158001/

https://www.altiussportspartners.com/post/3-considerations-for-athletic-directors-with-upcoming-nil-changes

https://www.accdocket.com/ethical-evolution-ncaa

https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1393&context=sportslaw

https://www.businessinsider.com/ncaa-college-athletes-march-madness-basketball-football-sports-not-paid-2019-3

http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa

https://www.usatoday.com/story/sports/college/2019/10/10/ncaa-amateurism-model-being-pushed-change-legislation/3928243002/

11 Ibid.

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Mount Everest Guide Sued for Fraud and Breach of Contract

By Jon Heshka, Associate Professor at Thompson Rivers University

Mountains were formerly thought of as a refuge of scoundrels. From Warren Harding's iconoclastic first ascent of The Nose on El Cap in Yosemite to Osama Bin Laden hiding in the mountains in eastern Afghanistan, its reputation as a place unsullied by the constraints of civilization and untouched by the law has been challenged by lawsuits last year involving a mountain guide, a millionaire client, and the world's highest peak.

The client, Zachary Bookman, is a Yale and Harvard educated lawyer who clerked for the U.S. Court of Appeals for the Ninth Circuit and is the CEO of Silicon Valley technology company. The guide, Garrett Madison, says he's "America's premier Everest guide and climber."

Bookman paid Madison $69,500 to join a Mount Everest expedition that Madison was leading. Bookman alleges that Madison cancelled their September 2019 Mount Everest expedition because a member of the four-person team – the president of an outdoor company who was paying for or otherwise subsidizing the trip – was so out of shape that the trip was cancelled one day after the president quit. Madison is sponsored by the same company and endorses its gear.

Bookman filed suit in San Francisco County Superior Court in the spring 2020 seeking $100,000 in punitive and compensatory damages, claiming fraud as Madison didn't even try to summit Mount Everest and that Madison "represented that the summit of Everest was going to happen" and also that Madison breached an oral agreement made at Base Camp for a partial refund of $50,000 due to the expedition being cancelled.

Bookman claims it was largely an official expedition meant to test gear and take pictures as part of a photo shoot and that once its president and another client – who was also a sponsored climber with the same

company – left, Madison had no real reason or the motivation to continue. Bookman also alleges that the Sherpas hired by Madison were "lazy and inefficient" and had not prepared the route through the Khumbu Icefall above Base Camp.

Madison disputes Bookman's allegations.

What is not disputed is that there was a gigantic serac, a freestanding column of glacial ice, looming about 2600 feet above the climbing route between Base Camp and Camp 1. It's estimated that the serac weighed 54 million pounds. In 2014, a serac collapsed on Mount Everest which triggered an avalanche that killed 16 Sherpas in the same area of the Khumbu Icefall.

Madison says the executive was in excellent physical shape and that he and the other client pulled out of the expedition because of his concerns about the serac. The executive has said they "chose safety over ego" and Madison has stated in court filings that it was a "no-brainer" to pause climbing after becoming aware of the serac and the danger it posed.

The decision by the executive and sponsored climber to cancel was made one day after being made aware of the serac. Bookman was not present when those two were making their decision.

The San Francisco County Superior Court granted Madison's motion to dismiss the suit because it lacked jurisdiction as his company is based out of Washington state.

In the fall 2020, Madison filed his own suit in King County Superior Court in Seattle seeking a declaratory judgment that Bookman assumed the risks associated with the expedition, has no right to a refund and that he should pay all of Madison's legal fees, expenses and costs.

The adventure industry is concerned and worried about this case. Notwithstanding the optics of the executive pulling out of the expedition and that Madison's decision to cancel it outright appears to have been hastily made (expeditions regularly wait out storms for days or even weeks), he has a strong case.

It is highly improbable that Madison would have ever made any sort of representation to Bookman about guaranteeing a summit attempt. Madison fulfilled his duty of care in his role as mountain guide by properly identifying and assessing the risk, communicating that risk to the clients, and making what seems like the reasonable call in the circumstances to not unnecessarily expose the clients to the very real chance of the serac collapsing and thereby killing them. Lastly, Bookman – a trained lawyer from an Ivy League law school who clerked for the Ninth Circuit – will likely be deemed to have understand what he signed and be bound by the contract which has an explicit no-refund policy which stated: "You are required to pay a $69,500.00 USD non-refundable, non-transferable full payment to reserve your space on the trip." Bookman also signed an Assumption of Risk and Release of Liability Agreement which stated that he was aware of the inherent risks and dangers involved, including but not limited to weather and forces of nature.

The case has not gone to trial and none of the charges have been proven in court.

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A Former Miami Dolphin Accountant's Claim That His Employment Status Was Intentionally Misclassified, May Not Add Up in Federal Court

By Robert J. Romano, Assistant Professor at St. John's University

On December 31, 2020, Ronald Katz, an accountant who once served as a vice president for the Miami Dolphins, filed a six-count federal lawsuit in the United States District Court, Southern District of Florida. Per his lawsuit, Mr. Katz claims that the NFL franchise misclassified him as an independent contract instead of an employee so that the team could avoid providing him with certain employee benefits, such as a pension and health insurance.

Mr. Katz, who from 2008 through 2016, earned approximately $600,000 a year while associated with the Dolphins, now, almost five years later, alleges that in addition to this salary, the franchise is responsible for paying him 100% of any pension and welfare benefits that he should have received if not for the misclassification, together with all costs incurred as a result of Mr. Katz obtaining these benefits on his own.

To determine whether or not Mr. Katz was misclassified as an independent contractor by the Miami

Dolphins requires, under Florida law, a court to first review the terms of any and all written agreements between the parties.[12] If any provision of the agreement disclaims or refutes an employer-employee relationship in favor of independent contractor status, a court must respect that provision. However, if a party can establish that "other provisions of the agreement, or the parties' actual practice, demonstrate that it is not a valid indicator of status," the court may find otherwise.[13] Therefore, independent contractor or employee status in Florida "depends not only on the [written] statements of the parties, but also upon all the circumstances of their dealings with each other."[14]

Absent a formal written agreement, as is presumed to be the case between Katz and the Miami Dolphins, Florida courts use the 'right of control' test to determine whether the circumstances and dealings between the parties rise to the level of an employee-employer relationship. The Florida courts have adopted a number of criteria to assist in making such a finding and such criteria include the following:

a. the extent of control which the master may exercise over the details of the work;

b. whether or not the one employed is engaged in a distinct occupation or business;

c. the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

d. the skill required in the particular occupation;

e. whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;

f. the length of time for which the person is employed;

g. the method of payment, whether by the time or by the job;

h. whether or not the work is a part of the regular business of the employer;

i. whether or not the parties believe they are creating a master/servant relationship; and

j. whether the principal is or is not in business.

12 Keith v. News & Sun Sentinel Co., 667 So. 2d 167, 171 (Fla. 1995).

13 Id.

14 Cantor v. Cochran, 184 So. 2d 173, 174 (Fla. 1966).

A court, however, does not need to find that every factor "is so clearly present as to establish beyond argument of the arrangement between the parties."[15] The Florida courts have instead found that the "extent of control" the employer has over the worker is the most important factor when determining whether a person is an employee or independent contractor.[16] Florida courts have defined control as "the right to direct what shall be done and how and when it shall be done."[17]

Of course, both employees and independent contractors "are subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on simply the result to be obtained or extends to the means to be employed."[18] "If control is confined to results only, there is generally an independent contractor relationship."[19] By contrast, however, "if control is extended to the means used to achieve the results, there is generally an employer-employee relationship."[20]

Per Mr. Katz's complaint, he argues that the services he provided on behalf of Dolphins were integral to the team's business, but, more importantly, were also assigned, directed, supervised, and controlled by the team's management.[21] He claims employee status because the Dolphins gave him a company credit card, an office in both New York and Miami, and two email addresses. In addition, Mr. Katz asserts that he endorsed checks on behalf of the franchise, analyzed the team budget and cash flow, attended quarterly owners' meetings, negotiated contracts and settlement reports, met with the Miami Dade County Budget Committee on behalf of the team and even helped refinance the stadium debt.[22] In total, Mr. Katz refers to twenty-four

15 Miami Herald Publ'g Co. v. Kendall, 88 So. 2d 276 (Fla. 1956).

16 Verchick v. Hecht Invs., Ltd., 924 So. 2d 944, 946 (Fla. 3d DCA 2006) ("It is well-established that the main test in determining the existence of an employer-employee relationship is whether the employer has direction and control over the employee.").

17 Herman v. Roche, 533 So. 2d 824, 825 (Fla. 1st DCA 1988).

18 Harper ex rel. Daley v. Toler, 884 So. 2d 1124, 1131 (Fla. 2d DCA 2004).

19 4139 Mgmt. Inc. v. Dep't of Labor & Emp't, 763 So. 2d 514, 517 (Fla. 5th DCA 2000).

20 Id.

21 Case 1:20-cv-25338-XXXX Document 1 Entered on FLSD Docket 12/31/2020 / paragraph 20.

22 Id. Paragraph 19.

various functions that he performed on behalf of the Dolphins that evidence his position as an employee rather than that of an independent contractor.

However, even with his twenty-four various functions, Mr. Katz is lacking two vital elements that may hinder a successful legal outcome against the Dolphins: a contract and credibility. A court will be hard pressed to find that Mr. Katz was business savvy enough, in part, to "review, negotiate and execute contracts on behalf of the franchise", but not savvy enough to negotiate and reduce to writing the employment agreement between himself and the Miami franchise.

The question becomes, over the eight years that he was associated with the franchise, how was it that he was so sophisticated a business person to both "[n]egotiate numerous refinancing transactions for the stadium, including the negotiation of letters of credit for the tax-exempt portion of the debt" and "[r]eview an execution of 2010 NFL financing transaction and swap agreements to convert fixed rate debt to floating rate based upon three-month LIBOR"[23], but not so sophisticated a business person to negotiate and execute an employment agreement that would provide him a pension and health benefits?

In addition, Mr. Katz may lack credibility. In 2016, he was convicted of tax fraud and lying to the IRS which resulted in him serving nine months in a federal prison. According to federal court records, he concealed approximately $1.2 million in personal income, while also helping a fellow tax professional hide over $3 million in income from the IRS.[24]

It is not clear how Mr. Katz's criminal history will impact his current litigation, but that being said, without a written employment agreement he will have a difficult time proving to the court the extent of control the Dolphins had over him that would allow for it to find that he was misclassified as an independent contractor. And without such a finding, he will not be awarded any retroactive pension or health benefits, nor will he be reimbursement for costs incurred as a result of him obtaining those benefits on his own.

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23 Id. Paragraph 19.

24 https://news.yahoo.com/dolphins-win-one-former-vp-223300055.html

Ifrah's George R. Calhoun Discuss Sports Betting and Pivotal Case Law

By Ellen M. Zavian, Esq.

(Editor's Note: This interview appeared in the recent issue of My Legal Bookie, a complimentary subscription publication produced by Hackney Publications.)

George Calhoun is the attorney who rolls up his sleeves and gets in the trenches when representing his clients in complex business disputes. As the Chair of Ifrah Law's Financial Services Practice, he works with international companies as they prepare for litigation while keeping a keen eye on resolving their business disputes during the pre-litigation window. George views it as a WIN, whether the win comes in the courtroom, at the settlement table, or in an arbitration proceeding.

It is his attention to detail, while not losing the big picture, that enables him to bring tremendous value to the emerging issues in the iGaming space. Especially when overlaying his expertise over the current EA Sports case that was filed in August 2020. Specifically, in Kevin Ramirez, et al. v. Electronic Arts Inc., the Defendant was sued for $5M over claims their FIFA Ultimate Team mode constituted gambling and should be regulated under gambling laws. While most attorneys were focused on the gambling allegations, Calhoun was focused on just how players could file a class action when EA's Player Agreement (wrap agreement) included a 'class action waiver clause' as well as a 'mandatory arbitration' clause.

We caught up with Calhoun to find out why he was focused on the 'wrap agreement' aspect of the case:

Question: EA's user wrap agreement includes language that informs players that their disputes will be resolved through arbitration (rather than through litigation). Why was this so important to EA (as well as the industry)?

Answer: Arbitrations are confidential and tend to be resolved more quickly and inexpensively than litigation. Arbitrations are also typically conducted on an individual basis. Few claimants in the EA Sports case would be likely to pursue such an arbitration on their own because individual damages are low. Nor would a

gaming company want a public spectacle that a high-profile customer dispute my bring.

Q: EA's user wrap agreement also includes language that gamers waive the right to pursue class actions. Why was this so important to EA (as well as the industry)?

A: As noted above, any individual claimant's damages are likely to be low and EA can probably settle any claim where the claimant is actually interested in pursuing an individual claim. But in class actions, the plaintiffs' lawyer drives the ship and purports to speak for all class members collectively. Class actions thus dramatically increase the cost and risk to a consumer-facing company. If the class action waiver provisions are enforceable, EA can avoid the cost and risk involved in high stakes class action litigation. The Supreme Court ruled in Epic Systems Corp. v. Lewis, Nos. 16-285, 16-300, 16-307, 2018 U.S. LEXIS 3086 (May 21, 2018)[25] that such waivers are enforceable in the employment context in 2018 and will likely continue to affirm their enforceability. The issue, in these cases, therefore, is whether the provision is adequately disclosed to the consumer in the terms of service to which they agree when signing up for the game.

Q: Is the mere 'filing of the suit' a 'win' for the Plaintiffs?

A: Well, here in America, anyone can file a suit. The suit does garner a bit of notoriety and puts EA on the radar of plaintiffs' lawyers, but I would not go so far as to call it a win. Similar cases have been filed against Apple and Google and likely will be dismissed, albeit on different grounds.

Q: What does this case mean for EA?

A: There are multiple answers to this question. From a game perspective, if EA loses this case, it likely will have to scrap its loot box model. That may lead to increased subscription or other costs if EA looks to recoup that revenue. From a corporate perspective, the enforceability of click through and wrap agreements is critical to companies that operate through the internet. If a company cannot enforce terms of use, it will have no way to protect itself from consumer claims, regardless of their merit.

Q: What should the gaming space be watching for when it comes to class actions and mandatory arbitration language?

A: Class action and arbitration provisions continue to be of vital importance to the industry as it continues its move online. We represent WorldPay in the MDL pending against DraftKings and others; the parties in that case have spent years litigating the enforceability of the terms of use for the fantasy companies. As an industry, we are beginning to reach some consensus on what needs to be done to ensure that a company's terms are enforceable. Every company in the gaming space should be paying attention to that growing consensus and updating their processes to make certain that their carefully crafted provisions are enforceable.

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Facing Title IX Lawsuit, East Carolina University Agrees to Reinstate Sports Programs, Develop Gender Equity Plan

East Carolina University (ECU) has agreed to reinstate its women's swimming, diving, and tennis teams, develop a gender equity plan, which would bring it into full compliance with Title IX and avoid a threatened class action sex discrimination lawsuit.

On May 21, 2020, ECU announced that it was eliminating its women's (and men's) varsity swimming & diving and tennis teams.

On November 16, 2020, attorneys representing members of the affected women's team wrote to ECU's Interim Chancellor, Dr. Ron Mitchelson, to inform him that the teams' elimination violated Title IX.

The letter, written by Arthur Bryant of Bailey Glasser, noted that ECU violated the law, which prohibits universities from eliminating women's teams for which interest, ability, and competition are available unless "intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments."

Specifically, it charged that ECU failed that test, noting that its undergraduate enrollment is 56.57% women, but the school offers females only 50.43% of

25 Related case: Lamps Plus, Inc. v. Varela, 587 U.S. ___ (2019).

the opportunities to participate in intercollegiate athletics. And, after the teams' elimination, it would still offer women only 50.49%. ECU would need at add 70 women to its athletics program to reach gender equality – more than twice the number on the women's swimming, diving, and tennis teams.

Bryant wrote that he and his co-counsel would file a class action lawsuit in federal court against ECU for depriving women athletes and potential athletes of equal opportunities, athletic financial aid, and treatment unless the school agreed to reinstate the teams and comply with Title IX.

The settlement agreement, reached on January 7, 2021, avoids the need for the class action.

Under the settlement agreement, ECU will immediately reinstate its women's swimming, diving, and tennis teams and develop a gender equity plan no later than December 31, 2021. The school will solicit input for the plan from student-athletes for all teams and expressly invite participation by the female swimming, diving, and tennis team members. It will post the plan on ECU's athletics department's website and ensure that ECU's intercollegiate athletic program complies with Title IX during the 2023-24 academic year and beyond. The university will continue to monitor and manage the plan on an on-going basis (including prior to its official adoption) to maintain and improve ECU's Title IX compliance.

In the wake of the news, ECU Director of Athletics Jon Gilbert issued the following statement:

"We are looking forward to having women's swimming and diving along with women's tennis return as a part of our sport offerings," Gilbert said. "When we went through the process of eliminating four programs in May, we understood we needed to reconstitute the athletic department in terms of sports programs and to do so while facing significant budget restraints due to COVID and its uncertainties.

"We worked directly with a Title IX consultant on how best to address our compliance with Title IX while also addressing our financial issues. Title IX is an on-going commitment and it's a priority for our university and athletics department."

Interim Chancellor Ron Mitchelson added: "ECU is fully committed to providing meaningful opportunities to female athletes. And I am confident that the return of these two sports will help us accomplish that goal. The COVID-19 pandemic has caused unprecedented financial disruption to operations across the university and exacerbated the already significant financial challenges faced not only by our athletics department, but also the university. Gender equity is a priority to our institution, and we will continue to take all the necessary steps to be compliant with Title IX."

In addition to Bryant, the legal team for the female student-athletes included Bailey Glasser's Cary Joshi, Britney Littles, and Elliott McGraw (DC), Sharon Iskra and Laura Babiak (Charleston, WV), Ben Hogan (Morgantown, WV), and Nicole Ballante (St. Petersburg, FL); Lori Bullock of Newkirk Zwagerman in Des Moines, IA; and Daniel K. Bryson, Jeremy Williams, and Sarah Spangenburg of Whitfield Bryson LLP in Raleigh, NC.

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Jackson Lewis Reinforces Title IX Legal Team with New Hires

Jackson Lewis P.C., one of the country's leading workplace law firms, has announced the addition of Principal Josh Whitlock and Of Counsel Sarah Ford Neorr, both formerly of Parker Poe.

"Josh and Sarah will significantly enhance the depth and breadth of our Higher Education Group," said Firm Chair Kevin G. Lauri. "Both have invaluable experience with Title IX compliance, litigation, investigations, and training, which is critical as we continue to expand our capabilities for our higher education clients. Josh is considered as one of the top national thought leaders in this space, and his knowledge will be an asset for higher education institutions all over the country. Additionally, Sarah is a highly respected attorney with experience assisting colleges and universities with the complexities of handling sexual misconduct incidents. I am excited both have decided to join the firm."

Whitlock represents numerous colleges and universities and has extensive experience defending clients in a broad range of litigation and investigations, as well as counseling them on campus sexual misconduct, disability accommodation, faculty tenure, and student discipline, safety, and privacy. He frequently interacts with the U.S. Department of Education, having

successfully represented schools in dozens of federal investigations and participated in multiple, invitation-only small group sessions with Education Department leadership on topics such as Title IX regulatory reform and the rights of transgender students. He is a national thought leader on Title IX- and disability-related claims and compliance, frequently speaks and publishes on those matters, and has conducted Title IX- and disability-related trainings for hundreds of institutions.

Whitlock was the Leader of Parker Poe's Education Industry Team, is the former chair of the North Carolina Bar Association Education Law Section and is an active member of the National Association of College and University Attorneys. Additionally, he was part of a team of attorneys that taught the Higher Education Practicum at the Washington and Lee University School of Law. Whitlock earned his J.D. from William & Mary and his B.A. from Brigham Young University.

Neorr also focuses her practice on higher education and provides Title IX training and other legal services to colleges and universities. As an employment lawyer, Neorr has experience handling sensitive issues such as claims of sexual harassment, racial bias, and disability discrimination. She brings this background to her work as a Title IX attorney, helping clients navigate the legal, practical, and ethical complexities of addressing sexual misconduct on campus. Neorr also defends educational institutions in lawsuits brought by students or employees and in inquiries conducted by state and federal agencies. Neorr earned her J.D. from New York University and her B.A. from Miami University.

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Can a Trainer Can Be Liable for a Fighter Getting CTE?

By Erik Magraken, of https://combatsportslaw.com/

Chronic Traumatic Encephalopathy ("CTE") is the brutal, degenerative and incurable brain disease linked to repeated head trauma. Cases of the disease are linked to basically all contact sports and mixed martial arts is no exception with the list of known cases steadily growing.

If you are a combat sports trainer and your athlete develops CTE and it can be proven that your training methods played a role can you be held legally liable? The analysis would differ from jurisdiction to jurisdiction and based on the specific facts but there is no reason given the correct fact pattern that the answer could not be yes.

Trainers owe a duty of care to their athletes. They have to take reasonable steps to prepare them for the task at hand and be mindful that un-needed harm is not part of the training process.

Other than potential death, brain damage and chronic variants of it like CTE are the greatest harm you can expose your fighters to. If you are a trainer and are not familiar with this get started now. Some quick research will teach you that mileage matters (number of hits matter and number of years exposed to hits). Here are some quick articles just for starters:

- Study Shows Mileage Matters When It Comes to Brain Health and Contact Sports
- CDC Finds Mileage is the "Greatest Risk Factor" in Developing Chronic Traumatic Encephalopathy
- Study – Mileage (More-so Than Concussions) Predict Long Term Brain Risk in Contact Sports
- Study – Mileage is One of Biggest Factors for Brain Trauma in Boxing
- Subconcussive Impacts – Frequency and Magnitude Matter

The takeaway is simple. The fewer hits to the head your athletes take and the shorter the duration of their career exposure to hits the better. Every hit matters. Every time training involves an intentional hit to the head there better be a damn good reason behind it to avoid a negligence analysis. The best analysis I ever heard about hits to the head and CTE is that it is akin to cigarettes and lung cancer. Everyone has a number as to how many they can have before the point of no return. The number is secret and different for everyone. No matter who you are less is better.

There is caselaw holding combat sports coaches liable for negligent teaching. To take one simple example this BC case found a coach responsible for negligently teaching a heel hook and in doing so provided the following concise summary of the duty of care and standard of care a coach owes a combat sports athlete

> *[21] Mr. Sinnott admits that Mr. Ingalls owed a duty of care to Mr. Parker. That duty was to take reasonable care that Mr. Parker would not*

be injured during Mr. Ingalls' course of instruction. Mr. Sinnott notes, correctly, that Mr. Ingalls was not an "insurer" guaranteeing that Mr. Parker would not sustain an injury while training.

Brain injury is no exception to this simple principle. If you are exposing your students to training that does not recognize the reality of how CTE is acquired a negligence action could be in your future.

If you don't care to listen to an ambulance chaser listen to decorated UFC veteran Max Holloway who, after this past weekend's record setting striking performance at UFC Fight Island 7 provided the following wise words explaining why he has abandoned all hard sparring:

Re"Save y'all chickens right here," Holloway said following his lopsided decision win over Kattar (h/t Clyde Aidoo of MMA News). "You guys only get one brain. Save it. You guys don't need to do it. You sparred enough. You trained enough. You know how to punch someone. You know how to slip a punch. Why even take unnecessary damage before the main game, you know? That's just the way I think. And everybody who keep telling me that I should be training, no! I been training, baby!...Please, protect you guys' head. If I got to tell an up-and-comer coming: be smart. Figure out a way of taking less damage. You want to be in this game for a long time."

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Hornets Name Tamara Daniels SVP and General Counsel

Hornets Sports & Entertainment (HSE) has announced that the organization has named Tamara Daniels Senior Vice President & General Counsel. Daniels, who will serve as a part of HSE's executive leadership team and will advise and counsel across all areas within the organization, will begin her role with the franchise in February.

Daniels joins the Hornets after serving as Vice President & General Counsel of the NHL's Vegas Golden Knights and the organization's other properties: the Henderson Silver Knights, Henderson Event Center, Lifeguard Arena and City National Arena. Daniels, who started with the Golden Knights in 2017 prior to the team's inaugural season, played an extensive role in the team's start up efforts as a member of the leadership team. She was involved in each aspect of the business operations since the team's inception and was responsible for the team's government affairs, investor relations, team business agreements (including sponsorship, marketing, ticketing and entertainment production), intellectual property portfolio, risk management, human resources, and large-scale projects supporting growth into new industries and arena developments.

"We are very excited to have Tamara join our organization and be a part of our senior leadership team," said HSE President & Vice Chairman Fred Whitfield. "Tamara is a talented and experienced executive who brings a wealth of knowledge in the sports and entertainment industry that will greatly benefit all areas of our organization. I'd like to welcome Tamara, her husband, Jordan, and their family to Charlotte."

"I am thrilled to join HSE as General Counsel and look forward to contributing to the ongoing success of the team's business units," said Daniels. "The Hornets have a stellar reputation for their commitment to the community and their team members. The newly launched Social Justice Platform is just one example of the franchise's dedication to crucial initiatives beyond the game that gets me excited. While I will be forever grateful to Bill Foley and the Foley family for the time I spent with the Vegas Golden Knights and its affiliates, joining the Hornets presents an incredible opportunity for me and my husband. We cannot wait to start this new chapter of our lives in Charlotte."

Prior to her role with the Golden Knights, Daniels spent several years working for affiliates of the team under the common ownership of Bill Foley. Beginning in 2013, she served in various legal roles as Associate Counsel for Fidelity National Financial before transitioning to General Counsel for Foley Family Wines and Epic Wines and Spirits in 2016. Following graduation from Georgetown Law in 2005, Daniels served as an Assistant District Attorney in Queens County, NY, where she prosecuted felonies and handled criminal case appellate work before moving to civil practice in big law from 2010-2013.

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News Briefs

Bellarmine University Welcomes Sports Lawyer to Compliance Staff

Brandon Talbert has joined the Bellarmine University athletics department as an Assistant Director of NCAA Compliance. Talbert comes to Bellarmine after spending a year at the University of Central Florida as an athletics compliance coordinator. Prior to his time at Central Florida, Talbert spent several months as a law clerk following nearly two years of service as an athletics compliance intern at Northern Illinois University. Talbert earned his bachelor's degree in human relations from the University of Oklahoma. He earned a law degree from Marquette University Law School.

USA Swimming Condemns Former Gold Medal Winner for Role During the U.S. Capitol Insurrection

USA Swimming has issued the following statement about gold medal winner Klete Keller, whose involvement in the insurrection has been widely reported: "Since first learning of Mr. Keller's possible involvement in the events of January 6, and awaiting official confirmation or charges by law enforcement, we made it very clear in responses to the media that, while we respect private individuals' and groups' rights to peacefully protest, we strongly condemned the unlawful actions taken by those at the Capitol last week. It is very simple and very clear. Mr. Keller's actions in no way represent the values or mission of USA Swimming. And while once a swimmer at the highest levels of our sport – representing the country and democracy he so willfully attacked – Mr. Keller has not been a member of this organization since 2008. We stand with Team USA and echo their plea to celebrate our diversity of background and beliefs, stand together against hatred and divisiveness, and use our influence to create positive change in our communities."

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