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Case Summaries

Two ‘Greek Freak’ Lawsuits over the Same Trademark Lead to Different Outcomes

By **Jana S. Farmer** and **Adam R. Bialek**

The owner of the trademark **Greek Freak™**, 2021 NBA Finals MVP Giannis Antetokounmpo, received different outcomes in two seemingly similar trademark infringement actions heard by the U.S. District Court for the Southern District of New York. At

first glance, the facts are nearly identical: defendants sold infringing products, received cease-and-desist letters, and failed to stop the infringing activity; subsequently, default judgments were issued against them after their respective failures to answer the complaints. Inquest hearings to decide the amount of money due on claims for damages were set in both cases. Yet, only one resulted in an award of statutory damages.

How may the differing outcomes be explained?

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Background

Antetokounmpo is a professional basketball player of Greek-Nigerian descent, acclaimed for his skill on the basketball court, which twice garnered him the NBA Most Valuable Player award and earned him MVP honors for the 2021 NBA Finals. He registered his nickname, “Greek Freak,” as a trademark on the federal trademark principal registry in international classes 018 (Backpacks) and 025 (Shirts, t-shirts, sweatshirts, hooded sweatshirts, jackets, hooded jackets, sports jerseys, socks, warm-up suits, caps, hats). He also applied for registration of a clever spelling variation of the nickname, “Greek Fr34k,” which incorporates his NBA jersey number. This application, covering nine different international classes, seeks protection for men’s self-care products, apparel, snack foods, sports drinks and others, including a class 35 recitation for “promoting the goods and/or services of others through the issuance of product endorsements.”

Antetokounmpo distributes merchandise under his trademark online and via retail stores in the United States. He has also entered into licensing and endorsement agreements with third parties to use his mark in commerce for a variety of goods. In July 2020, he announced “his cooperation with GFG (Greek from Greece) Bakery-Café to advertise, promote and sponsor [Greek inspired] products of a brand called 776 Deluxe.” Among other products, GFG sells a line of gourmet salts, herbs and spices. An announcement on the 776deluxe.com website contains a headline, “[t]he Giannis Antetokounmpo family and GFG join forces to

explore the Greek taste” and further references GFG’s cooperation with Antetokounmpo.

The Lawsuits

The first lawsuit, captioned *Antetokounmpo v. Searcy* (USDC SDNY 20-CV-5055), involved the sale of a variety of phone cases, pillows, mugs, t-shirts, laptop covers, clocks, cards, pouches, notebooks, scarves and prints on Redbubble.com under the **Greek Freak** trademark by defendant Kenneth Searcy. Antetokounmpo’s legal team sent a cease-and-desist letter to the defendant, demanding that the infringing sales stop immediately and that Searcy provide a full accounting of merchandise sold. While Searcy responded with a promise to remove the infringing items from Redbubble.com, no accounting was provided. Furthermore, approximately 30 different types of infringing products remained available for sale by the defendant on Redbubble.com. Antetokounmpo commenced a lawsuit, which Searcy failed to answer. Following the entry of a certificate of default, this matter was referred to a Magistrate Judge for an inquest on damages.

In the second matter, *Antetokounmpo v. Paleo Prods. LLC & Nick Massie* (USDC SDNY 20-cv-6224), defendants engaged in online sales of spices under the brand name Paleo Grind, with one of the spices named “Greek Freak.” Defendants’ use of the **Greek Freak** mark postdated plaintiff’s first use of the mark. Similar to *Searcy*, Antetokounmpo sent a cease-and-desist letter to the defendants, who never provided the requested accounting and continued to sell the “Greek Freak” spice. After a lawsuit was commenced, defendants similarly defaulted by failing to file an answer, and this matter also was referred to a Magistrate Judge for an inquest for damages.

The Southern District followed the same legal test to determine liability for trademark infringement: (1) whether the allegedly infringed mark is entitled to the protection and (2) whether the allegedly infringing mark is likely to cause consumer confusion as to the origin and sponsorship of the products to which it is attached. The court noted that a certificate of registration with the United States Patent and Trademark Office (USPTO) is prima facie evidence that the mark is registered and valid; and furthermore, that the mark **Greek Fr34k** was exclusively affiliated with the plaintiff, his products and services. In the absence of any

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other submission, plaintiff's allegations that the defendants were not authorized to use the marks were taken as true.

In assessing the likelihood of confusion, the court considered the *Polaroid* factors (see *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F2d 492 (2nd Cir. 1961)). Observing that plaintiff's marks are strong and successful, defendant's marks were "essentially identical," and that defendants acted in bad faith in adopting the use of plaintiff's marks, the court decided that the goods sold by both parties in the *Searcy* matter were largely similar whereas in *Paleo Products*, the plaintiff endorsed a similar line of products.

It is in the analysis of the remaining *Polaroid* factors that the two decisions begin to diverge. In the *Paleo Products* matter, the court highlighted the fact that the plaintiff does not sell spices; but due to his endorsement of another company that does, the court found that there may be a greater likelihood that customers may be confused into believing that the plaintiff also endorsed the Paleo spice. Interestingly, the court also was of the opinion that the respective quality of the parties' goods was not particularly relevant to the "false endorsement" claim whereas it was relevant in the *Searcy* matter. There, the court found that since the plaintiff had no control over the quality of the mark, any complaints or problems with the quality could harm the plaintiff's mark. The balance of the *Polaroid* factors weighed in favor of a likelihood of confusion, and the court moved on to considering the issue of damages.

The Issue of Damages

Under section 35(a) of the Lanham Act, a trademark owner may recover either actual or statutory damages for the marketing, sale and distribution of goods with counterfeit marks. In the *Searcy* matter, the Southern District relied on Second Circuit case law that treats a default as evidence of willfulness for the purposes of determining statutory damages, further noting that "the lack of information regarding defendants' sales and profits make[s] statutory damages particularly appropriate for these kinds of default cases." If a trademark owner elects statutory damages in lieu of actual damages, it may be awarded "not less than \$1,000 or more than \$200,000 per counterfeit mark," which can be increased to "not more than \$2,000,000" if the court

finds that the use was willful. Antetokounmpo requested and was awarded \$9,000, the minimum compensation he could recover under the statute (\$1,000 per the nine categories of goods that the defendant was selling using the plaintiff's mark). Antetokounmpo was also awarded interest and attorney's fees, in addition to a permanent injunction.

Following the issuance of the Report and Recommendation, the time for filing objections passed with no objection and Judge Koeltl reviewed it and found that it was well-founded, ordering that a judgment be presented.

In the *Paleo Products* matter, unlike the *Searcy* matter wherein the plaintiff requested the minimum statutory damages, Paleo requested \$100,000 in statutory damages. The court determined, however, that plaintiff was not "entitled to statutory damages based on the types of infringement at issue in this case," observing

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that “trademark use will be deemed a counterfeit only if used on the same goods or services for which the trademark is registered.” Since Antetokounmpo did not have a registration for “spices,” the plaintiff was not “passing off” its product as the original and thus was not a counterfeit. Rather, it was just presented in a manner likely to confuse some consumers. Antetokounmpo’s theory was therefore grounded in false endorsement and not false designation of origin. Thus, the Magistrate, in issuing his Report and Recommendation, held that statutory damages were not available. Antetokounmpo was thus entitled only to recover defendant’s profits, any damages sustained by plaintiff and the costs of the action under 15 U.S.C. 1117(c). Since Antetokounmpo did not provide any information as to profits or damages, the court declined to award any compensatory damages (the court, however, issued an injunction and awarded attorney’s fees and costs, deeming the case “exceptional”).

Antetokounmpo objected to the Report and Recommendation, arguing that counterfeiting should be found, since the mark “‘*is in use*’ for the advertisement and promotion of spice products that are sold, offered for sale and distributed.” Claiming that “false endorsement” “entails the element of false designation of origin,” Antetokounmpo argues that he alleged that defendants “intended to create the mistaken belief in consumer minds that Defendants’ product is somehow legitimately affiliated, connected, associated with, or endorsed by Plaintiff.” The Objections to the Report and Recommendation are pending.

The divergence of the outcomes between the *Searcy* and the *Paleo Products* matters provides two lessons for trademark owners. First, when seeking a counterfeiting finding, plaintiff may need to seek a determination based on a false designation of origin, rather than merely a false endorsement. Second, in a false endorsement case, if a plaintiff wants to recover, it must take care and submit *evidence* of its damages or defendant’s profits (which admittedly are usually difficult to prove). Defendants, on the other hand, should remember that in the event they choose to ignore cease and desist correspondence or default in trademark infringement

actions, they may face monetary consequences, including the award of plaintiff’s attorneys fees.

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Arizona Case Pits Environmentalists Against S.F. Giants’ Training Facility

By Gary Chester, Senior Writer

Public objections over sports facilities are often directed at tax subsidies, but in one notable case it’s all about the environment and quality of life. In *Norgaard-Larsen v. City of Phoenix*, 2021 U.S. Dist. LEXIS 128673, (D. Az. 2021), two Arizona residents are suing the cities of Phoenix and Scottsdale over the development of the San Francisco Giants’ year-round training facility in Papago Park.

The plaintiffs are two individuals who alleged in a *pro se* complaint that the two cities unlawfully leased the land in Papago Park to the baseball team.

The defendants filed motions to dismiss the complaint and challenged the plaintiffs’ legal standing to bring the lawsuit.

“The City of Scottsdale is confident that it will prevail in this suit,” a Scottsdale spokesperson told the *Arizona Republic*. But the court dealt the defense a blow in refusing to dismiss the lawsuit outright.

The Facts

Papago Park is a 1,500-acre park located between Tempe and Phoenix. Tempe residents voted in 2018 to designate the Tempe part of the park as a preserve. Phoenix owns the remaining 1,200 acres of land which is designated as a desert park and does not adhere to the same type of protections.

Phoenix leased nearly 37 acres of the park to Scottsdale in 2018; Scottsdale subleased it to the Giants for 25 years with an option to extend the lease for another 10 years. The Giants have played their spring training games at Scottsdale Stadium since 1986, but they began renovating the Papago Sports Complex for year-round training in 2019. The complex had been used by the Oakland Athletics until they moved to Mesa in 2014.

The plaintiffs base their case on a land deed issued in 1959 to Phoenix stating that the park should be used for “park, recreation, public convenience purposes, including the construction of a baseball stadium.”

The Litigation

The lawsuit was filed on behalf of the Friends of Papago Park (FOPP), a non-profit association of park users organized to protect the native habitat of the park. The complaint sets forth the following causes of action:

- Violation of the Land and Water Conservation Fund of 1965 (LWCFA);
- Violation of the Federal Property and Administrative Services Act (FPASA);
- The Property Clause of the U.S. Constitution; and,
- The Contracts Clause of the U.S. Constitution.

Do the Plaintiffs Have Standing?

The court first addressed the issue of whether the plaintiffs had the right to bring the lawsuit. The court noted that the Constitution “grants the federal courts the power to hear only ‘Cases’ and ‘Controversies... Standing includes two components: Article III constitutional standing and prudential standing.”

The court stated that prudential standing involves the question of whether the statute in issue grants a particular plaintiff the right to sue.

The Property Clause Claim

The Property Clause set forth in Article IV of the U.S. Constitution gives Congress the authority to govern federal lands. The defendants argued that the third-party standing doctrine bars the plaintiffs from bringing this claim.

The court rejected the argument and explained that the third-party standing doctrine does not bar the plaintiffs from bringing their claim. The court stated: “The

third-party standing doctrine bars litigants from raising another person’s legal rights... In *Bond v. United States*, the Supreme Court explained that “[a]n individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when enforcement of those laws causes injury that is concrete, particular, and redressable.”

The court held that the plaintiffs (users of Papago Park) have a direct interest in the defendants’ alleged use of excessive authority in permitting development of the training complex at the park. Thus, the Property Clause claim will continue.

The LWCFA and FPASA Claims and the Contracts Clause

The LWCFA is a 1965 law designed to promote citizen access to recreational facilities. The FPASA is a 1949 law relating to the use, management and transfer of federal lands. The court dismissed these claims because neither statute permits a private cause of action.

The Contracts Clause set forth in Article I of the Constitution restricts the power of the states to disrupt contractual arrangements. Since the plaintiffs did not allege that they have vested contractual rights, the court dismissed the Contracts Clause claim.

The defendants also raised a statute of limitations defense. The basis for the argument was that the lease and sublease were entered into in 2018 and the lawsuit was commenced in 2021 after Arizona’s two-year limitation period had expired. But the court ruled that the cause of action may not have accrued until September 2019, when a construction fence blocked one of the plaintiffs from entering a walking trail in the park.

The Takeaway

A basic description of this controversy is that the plaintiffs assert that the federal government granted this land to the municipalities in 1959 for a public purpose (recreation) and that the defendants have no legal right to put it to private use. They also contend that the deed restricts development to a stadium and a training complex is substantially different from a stadium.

“When does it end?” Norgaard-Larsen told the *Republic*. “You can’t just keep chipping away at public lands.”

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Federal Judge Refuses to Dismiss Action Seeking to Classify Student-Athletes as Employees

By **Gregg E. Clifton** and **John G. Long**, of **Jackson Lewis**

A case that may signal the continued erosion of the amateur status of college student-athletes will continue as the action in *Ralph “Trey” Johnson et al. v. NCAA* has survived the defendants’ motion to dismiss the complaint.

U.S. District Court Judge John Padova allowed the six student-athlete plaintiffs’ claims against Villanova, Fordham, Sacred Heart, Cornell and Lafayette to proceed as he concluded the schools had failed to show at this stage of the litigation that the student-athletes were not employees. The student-athletes brought their claims as a proposed collective or class action. They seek to be classified as employees pursuant to the Fair Labor Standards Act (FLSA) and state labor laws and be entitled to paid minimum wage.

Judge Padova’s 30-page order discussed familiar arguments made by the plaintiffs’ attorney Paul McDonald in *Berger v. NCAA*, a 2016 case decided by the U.S. Court of Appeals for the Seventh Circuit. In *Berger*, the Seventh Circuit rejected the “employee” argument, concluding the amateur status of college athletes prevented their classification as employees of their individual schools. Judge Padova rejected the schools’ argument that the student-athletes are enrolled as students and do not perform functions of an employee.

Judge Padova distinguished *Berger* and referred to the recent U.S. Supreme Court decision in *NCAA v. Alston*,

which rejected the argument that student-athlete compensation for educational benefits should be limited. He further rejected the position of the NCAA and the individual schools “that Plaintiffs are not employees entitled to minimum wage pursuant to the FLSA because there is a long-standing tradition of amateurism in NCAA interscholastic athletics that defines the economic reality of the relationship between the Plaintiffs and schools.”

In his analysis, Judge Padova applied the Second Circuit’s *Glatt* test. This test is used for assessing when

an intern should be considered an employee based upon the benefits received and an analysis of seven factors.

The seven factors are:

1. The interns expected payment for the internship program;
2. The training in the internship was consistent with what they would have learned in an educational environment;
3. The internship was for academic credit or was part of the intern’s formal education;
4. The internship period was consistent with an academic calendar;
5. The internship duration was for a valuable period;
6. The interns displaced paid employees through the tasks they perform; and
7. The interns expected an offer of paid employment following the internship.

Judge Padova stated that under some of the factors, such as whether there was an expectation of compensation or a job, student-athletes would not appear to be employees. He considered two other factors, whether an intern receives training similar to that in an educational environment and the extent to which the internship is limited to the period in which it provides beneficial learning, as neutral.

However, Judge Padova found other *Glatt* factors suggest the athletes are employees.

These factors included the extent to which: an internship is related to an intern’s education, an internship accommodates an intern’s academic commitments, and the intern complements instead of displaces the work of employees.

“Balancing all of these factors,” Judge Padova concluded, “that the complaint plausibly alleges that plaintiffs are employees of the [schools] under the *Glatt* test.”

While the denial of the motion to dismiss will allow the action to continue, an analysis of the merits has yet to begin. The standard to oppose a motion to dismiss is much lower than the burden of proof facing the plaintiffs in a potential trial.

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Phillies get the Best of Phanatic Creators – for Now

Score one for the Philadelphia Phillies in its long-simmering battle with the creators of the Phillie Phanatic mascot after a federal magistrate judge ruled in August that the changes the Phillies made to the mascot were sufficient to allow the continued use of the mascot by the club.

Unfortunately for the club, the 91-page opinion may not be the final out as the original creators of the Phanatic, Harrison/Ericksen (H/E), have all but promised an appeal.

At the center of the court's decision was its conclusion was that the Phillies had made enough changes to the mascot of the Phanatic "that it would no longer be recognizable as the Phanatic." In sum, it "would not be a derivative of the Phanatic, and instead would be a completely different mascot," the court wrote in relying heavily on the 1991 U.S. Supreme Court decision, *Feist Publications Inc. v. Rural Telephone Service Company Inc.*

"To be sure, the changes to the structural shape of the Phanatic are no great strokes of brilliance," according to the court. "But as the Supreme Court has already noted, a compilation of minimally creative elements, 'no matter how crude, humble or obvious,' can render a work a derivative."

Long-time contributor to Hackney Publications Jordan Kobritz wrote about the case in 2019 in which he provided a timeline.

"According to a complaint filed in United States District Court for the Southern District of New York in February of 1978, Bill Giles, who was the Executive Vice President of the Phillies, decided to develop a mascot for his team. Giles had a vision for the team mascot — "he would be green, fat, furry, big-nosed and instantly accessible to children."

"To help him develop a costume, Giles sought the assistance of H/E, a design and marketing company in New York City.

"On March 17, 1978, the Phillies and H/E entered into an agreement whereby H/E would provide a design and construct a costume based on Giles' specifications for \$3,900, plus expenses. In exchange, the Phillies were granted the right to use the costume on TV,

in commercials and personal appearances to promote the team.

"The Phanatic, brought to life by Dave Raymond, an intern in the Phillies' marketing department, debuted on April 25, 1978 and was an instant hit, thanks to his playful routines that poked fun at anyone in the ballpark.

"In case you're not familiar with the Phanatic, his biography describes him as standing 6-foot-6, boasting a 90-inch waistline and a slight case of body odor. He allegedly hails from the Galapagos Islands and his diet consists of cheesesteaks, soft pretzels, hoagies, scrap-ple and Tastykakes. His favorite movie is Rocky.

"The Phanatic was so well received, the Phillies decided to develop Phanatic-related promotional items like key chains, pennants, t-shirts and a Phanatic doll to be given away to fans. In order to do that, they entered into a second agreement with H/E on July 15, 1978. The team was given exclusive rights to make reproductions of the costume on souvenir items and agreed to pay H/E \$5,000 per year plus 7% of the greater of the manufacturing cost or retail selling price of the licensed items

"Less than a year later, H/E was back for more. In May 1979, they sued the Phillies over the extent to which H/E's approval was needed on promotional and merchandising items. Apparently unbeknownst to the Phillies, H/E had obtained a copyright on the Phanatic, claiming in their application to the Copyright Office that the Phanatic was an "artistic sculpture," rather than a 'costume.' The distinction may have been relevant had the matter gone to trial. What H/E had created, with substantial assistance from the Phillies, was a costume; it wasn't a true sculpture without someone inside it. Had H/E been fully transparent in their application, they may not have been able to copyright the costume.

"The parties settled the litigation in November 1979 by renegotiating their agreement. The Phillies received exclusive rights to use the Phanatic costume and make certain reproductions. In return, they agreed to pay H/E a lump sum of \$115,000 plus \$5,000 annually, increasing by \$1,000 per year.

"Thanks to the growing popularity of the Phanatic, H/E's desire for a piece of his ever-growing merchandise sales remained unsatiated. In 1984, the parties renegotiated yet again. This time, the Phillies, no doubt

fed up with H/E's greed, insisted that H/E convey its rights to the Phanatic 'forever.' In exchange for the sum of \$215,000, which the Phillies paid in three installments, H/E agreed to convey whatever rights it had in the 'artistic sculpture known as the Phillie Phanatic.'

"The exact language reads: 'H/E hereby sells, assigns, and transfers to the PHILLIES, its successors and assigns, all of HE's right, title and interest in and to (a) the copyright in the artistic sculpture (Phanatic) and all renewals and extensions thereof and (b) any and all causes of action heretofore accrued in HE's favor for infringement of said copyright.'

"The Phillies allege that had they understood the 1984 agreement would not be an assignment 'forever,' they would have paid less than \$215,000.

"H/E has a different interpretation of the 1984 agreement. Last year the design firm sent the Phillies a termination letter under the provisions of the U.S. Copyright Law that allows an author to reclaim rights after 35 years. If H/E can terminate the 1984 agreement, the Phillies could lose exclusive control of the mascot after June 15, 2020, making him a free agent and licensable to another sports team.

"The Phillies claim that due to their contribution to the origination of the Phanatic and their significant investment in the mascot over the past four decades — the team holds eight trademarks related to the Phanatic — his name and image have come to be strongly associated with the team's identity.

"Like most disputes and lawsuits, this one is about money, gobs of it. Unlike the three prior renegotiations with H/E, the Phillies are unwilling — at least for the present — to accede to the firm's demands. Unlike the prior renegotiations, there's a lot more at stake, for both parties. If the Phillies win, H/E stands to lose potentially millions of dollars. If H/E is successful, the Phillies could lose their iconic mascot, or as the team claims, their very identity.

"The lawsuit involves authorship and intellectual property along with issues related to contract law. Regardless of the outcome, there are broad implications for the entertainment industry, which means lawyers who specialize in that realm are paying attention as a matter of professional interest. Phillies fans, on the other hand, are on edge hoping their furry mascot doesn't become a free agent, which would allow him to root for another team.

"If H/E can prove authorship of valid copyrighted material, the court may decide the firm's termination of a license is effective notwithstanding a 'forever' agreement to the contrary."

Picking up where Kobritz left off, the Phillies were forced to come up with a substantially new mascot, which the magistrate judge validated.

Appeal May be Forthcoming

However, H/E's attorneys—Paul Montclare, Matthew Williams, Leo Lichtman, Eric Schwartz, and Elaine Nguyen, all of Mitchell Silberberg & Knupp LLP—were putting a different spin on things in a press release, suggesting that the judge "categorically rejected the Phillies' claim that they had in any way contributed under copyright law to the creation of the Phanatic or its character. This decision rightfully found that (the defendants) were the sole copyright creators of the iconic Phanatic."

Further, "our clients are gratified that the decision confirmed the undeniable truth: that they alone created and originally owned the Phanatic—baseball's most famous and enduring mascot who is enshrined in the Baseball Hall of Fame in Cooperstown."

They added that the court "also rejected the Phillies' empty argument that the Phanatic was not properly registered with the U.S. Copyright Office, instead finding the registration made in 1979 to be valid. The Phillies' attack on the validity of the registration by Bonnie and Wayde, and their ownership of the Phanatic, rang particularly hollow given that The Phillies organization has acknowledged Bonnie and Wayde's authorship and original ownership for more than four decades, including doing so explicitly in the 1984 agreement with their business entity Harrison/Erickson.

"Perhaps most significantly, the magistrate judge recognized that as the original authors and copyright owners, Bonnie and Wayde had the absolute right under U.S. copyright law to terminate the 1984 Phanatic copyright assignment to the Phillies, and properly did so on June 15, 2020. Thus, all rights to the original Phanatic were properly recaptured by Bonnie and Wayde in 2020, and his use by the Phillies after June 2020 requires a new license."

The attorneys, however, acknowledged an area of disagreement, or the court's findings "that very minor changes to the Phanatic made by the Phillies

(characterized even by the judge as ‘no great strokes of brilliance’) were sufficient to create a 2.0 derivative Phanatic that the Phillies can use (but with significant limitations) going forward. We maintain that none of the trivial changes made by The Phillies—which debuted four months before their rights in the original Phanatic expired—are original artistic expression, and do not individually or collectively constitute a copyrightable derivative work.

“If left uncorrected this low bar for a derivative work will thwart the very purpose and intent of the copyright termination provisions established by Congress to fairly compensate original creators for their works 35 years after they have licensed or granted rights in their creations, as Bonnie and Wayde did in 1984.

“The fight of the original creators for their just due will continue.”

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Magistrate Judge Breathes Life into Plaintiff’s Disability Claim, Arising from Past Concussions

A magistrate judge from the Southern District of Texas has found mistakes in an administrative court’s decision, which denied the application of a former NFL player for disability insurance benefits under Title II of the Social Security Act. Thus, the court granted the appeal and remanded the case for further proceedings.

The plaintiff in the case was Robert E. Wilson, Jr., a former NFL player. In retirement, Wilson learned that he suffers from various symptoms that are allegedly consistent with a chronic traumatic encephalopathy (CTE) diagnosis.

Based on his purported CTE symptoms and other ailments, Wilson filed an application for benefits with the Social Security Administration on August 23, 2017, alleging that his disability beginning January 15, 2012.

His application was denied and denied again upon reconsideration. Subsequently, an Administrative Law Judge (ALJ) held a hearing and found that Wilson was not disabled. Wilson appealed the decision to the Appeals Council. The Appeals Council denied review, making the ALJ’s decision final and leading to the instant judicial review.

The standard of judicial review for disability appeals is provided in 42 U.S.C. § 405(g). See *Waters v. Barnhart*, 276 F.3d 716, 718 (5th Cir. 2002). Courts reviewing the Commissioner’s denial of social security disability applications limit their analysis to (1) whether the Commissioner applied the proper legal standards, and (2) whether the Commissioner’s factual findings are supported by substantial evidence. See *Estate of Morris v. Shalala*, 207 F.3d 744, 745 (5th Cir. 2000).

Addressing the evidentiary standard, the Fifth Circuit explained:

“Substantial evidence is that which is relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion; it must be more than a scintilla, but it need not be a preponderance. It is the role of the Commissioner, and not the courts, to resolve conflicts in the evidence. As a result, [a] court cannot reweigh the evidence, but may only scrutinize the record to determine whether it contains substantial evidence to support the Commissioner’s decision. A finding of no substantial evidence is warranted only where there is a conspicuous absence of credible choices or no contrary medical evidence. *Ramirez v. Colvin*, 606 F. App’x 775, 777 (5th Cir. 2015).

The court continued, noting that “under the Act, ‘a claimant is disabled only if she is incapable of engaging in any substantial gainful activity.’” *Anthony v. Sullivan*, 954 F.2d 289, 293 (5th Cir. 1992). The ALJ uses a five-step approach to determine if a claimant is disabled, including:

(1) whether the claimant is presently performing substantial gainful activity; (2) whether the claimant has a severe impairment; (3) whether the impairment meets or equals a listed impairment; (4) whether the impairment prevents the claimant from doing past relevant work; and (5) whether the impairment prevents the claimant from performing any other substantial gainful activity.

Salmond v. Berryhill, 892 F.3d 812, 817 (5th Cir. 2018) (quoting *Kneeland v. Berryhill*, 850 F.3d 749, 753 (5th Cir. 2017)).

“The burden of proof lies with the claimant during the first four steps before shifting to the Commissioner at Step 5. See *id.* Between Steps 3 and 4, the ALJ considers the claimant’s residual functional capacity (RFC), which serves as an indicator of the claimant’s

capabilities given the physical and mental limitations detailed in the administrative record. See *Kneeland*, 850 F.3d at 754. The RFC also helps the ALJ ‘determine whether the claimant is able to do her past work or other available work.’ *Id.*”

The court then examined the ALJ’s decision:

1. Wilson had not engaged in substantial gainful activity “during the period from his alleged onset date of January 15, 2012 through his date last insured of September 30, 2018.”
2. Wilson suffered from “the following severe impairments: depression, cognitive disorder, arthritis of the shoulders and obesity.”
3. None of these impairments met any of the Social Security Administration’s listed impairments.

“Prior to consideration of Step 4, the ALJ determined Wilson’s RFC as follows:

The claimant had the RFC to perform medium work as defined in 20 CFR 404.1567(c). The claimant can occasionally reach overhead. He requires a low stress work environment with simple and repetitive tasks. He can have occasional contact with the public.

“At Step 4, the ALJ found that Wilson was unable to perform his past work as a caterer’s helper or dining room attendant. And, at Step 5, the ALJ concluded that there are jobs that exist ‘in significant numbers in the national economy that Wilson can perform.’ *Id.* at 30.”

The court noted that to determine whether a claimant is disabled, “the ALJ generally asks a vocational expert (VE) whether a hypothetical person with the claimant’s RFC can perform jobs that are available in the national economy. In this appeal, Wilson argues that the ALJ posed a hypothetical question to the VE that failed to include Wilson’s nonexertional limitations as described in the ALJ opinion. Simply put, Wilson contends that the ALJ posed a flawed hypothetical to the VE.”

If proven, a “defective hypothetical is reversible error.” See *Boyd*, 239 F.3d 698, 708 (5th Cir. 2001); *Orosco v. Comm’r of Soc. Sec. Admin.*, 171 F. Supp. 3d 539, 544 (E.D. Tex. 2016).

In the instant case, the ALJ posed the following hypothetical to the VE during the hearing:

“If I have a person that’s approaching . . . age 50 during the process of the hearing time, 12th grade education. We have a medium RFC, limited to occasional overhead, simple instructions only. They should be simple repetitive instructions with occasional public contact and a low stress environment as defined [by] the doctor. Do you have jobs at medium that such a person could perform?”

“Within the hypothetical, the ALJ references a low stress work environment ‘as defined by the doctor,’ not as defined by the ALJ,” wrote the court. “The doctor referenced by the ALJ is Ashok Khushalani, a board-certified psychiatrist who testified in the administrative hearing. In pertinent part, Dr. Khushalani offered the following testimony regarding a low stress work environment:

A: He should be able to do simple repetitive tasks with occasional public contact.

Q: *What about stress?*

A: In a low stress environment he should be okay.

Q: *He needs a low stress environment?*

A: Yes, sir.

Q: *What about contact with workers, coworkers, and supervisors? Is there a limitation on that?*

A: *I don’t see any limitation on that except —*

Q: *Okay.*

A: — except the public contact should be limited.

“When specifically asked what he meant by low stress, Dr Khushalani stated that he meant ‘the individual is limited to one or two steps and there’s no quotas, or you know, impose an imposition of certain things to be done within a certain time.’ Notably, Dr. Khushalani’s definition does not include nonexertional limitations regarding workers, coworkers, and supervisors; he simply does not believe that Wilson had any such limitations.

“In short, Dr. Khushalani provided one definition of a low stress work environment at the administrative hearing that included no limitations on working with others, and the ALJ rendered an opinion afterwards that provided an entirely different definition that did include limitations on working with others. The error arises because only Dr. Khushalani’s definition of a low stress work environment made it to the VE. The

VE did not have an opportunity to consider the limitations the ALJ identified in his opinion regarding Wilson’s nonexertional limitations with respect to supervisors, coworkers, and peers.

“Instead, the VE only considered whether the jobs were limited to one or two steps without production quotas. This is reversible error. See *Walker v. Berryhill*, No. 7:16-CV-00150-O-BP, 2017 U.S. Dist. LEXIS 214742, 2017 WL 6883894, at *5 (N.D. Tex. Dec. 19, 2017) (‘Because the hypothetical question did not reasonably incorporate all disabilities of the claimant

recognized by the ALJ, the question is defective, and remand is required.’)”

Thus, the court granted Wilson’s motion.

Wilson v. Kijakazi; S.D. Tex.; CIVIL ACTION NO. 3:20-cv-00208; 7/30/21

Attorneys of Record: (for plaintiff) Karl E Osterhout, LEAD ATTORNEY, PRO HAC VICE, Osterhout Berger Disability Law LLC. (for defendant) Kadi Shay Rowe, LEAD ATTORNEY, Social Security Administration.

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Articles

What’s in a Name (Image or Likeness)? Quite a Bit for Star College Athletes

By Matthew Savare, Bryan Sterba, and Zachary Bocian, of Lowenstein Sandler

Many years ago, the state of the law regarding name, image, and likeness issues (“NIL” or right of publicity) was once described as a “haystack in a hurricane.” Such a description accurately depicted (and sadly, still depicts) this convoluted and often confusing area of the law. For college athletes, brands, and universities, the current state of affairs is more like a haystack in a category 5 twister!

Dozens of states have passed legislation regulating how National Collegiate Athletic Association (“NCAA”) athletes may capitalize on their persona. With several states’ athlete-compensation laws taking effect on July 1, 2021, the NCAA promulgated an interim policy permitting NCAA athletes to profit from their NIL. The policy, which is described in greater detail below, was passed in response to these various state laws and the U.S. Supreme Court’s *NCAA v. Alston* decision. It is intended to provide a national standard and some clarity for NCAA institutions, players, and brands.

How Did We Get Here?

Since the NCAA was founded in 1906, collegiate athletes have been prevented from profiting off of their persona. Throughout its 115-year history, the NCAA

has justified this policy by arguing that students should play sports as amateurs. More specifically, the NCAA has kept players from being paid “to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind.” The association also stated that players, with minimal exceptions, could not compete if they were represented by an agent.

Beyond receiving “educational benefits” legitimately tied to higher education, which the NCAA has restricted to scholarships, books, room and board fees, travel and other living expenses, the more than half-a-million student athletes under the NCAA’s control are not allowed to capitalize on their athletic prowess or potential celebrity. The NCAA has also argued in court (and the court of public opinion), that the amateur nature of college athletics is imperative to college sports’ popularity and that a lack of “guardrails” will destroy the competitiveness among schools, thus forcing schools to jettison non-revenue-generating programs, like Olympic sports.

The U.S. Department of Education estimates that college sports generate more than \$14 billion dollars of revenue per year. With the increasingly lucrative social media presence of many high-profile collegiate athletes, the NCAA and schools alike face swelling legal and political scrutiny to allow their athletes the ability to seek alternative compensation. In late 2019, California passed the Fair Pay to Play Act, becoming the first state to allow collegiate student-athletes to earn money for endorsements, advertising, and events such as autograph signings and public appearances.

What Is Happening Now?

On June 21, 2021, the U.S. Supreme Court released its decision in *NCAA v. Alston*, affirming the District Court, which had held that restrictions imposed on NCAA member institutions that limit what “educational benefits” schools can provide to their student-athletes violate §1 of the Sherman Antitrust Act. The Supreme Court rejected the NCAA’s arguments that allowing players to seek alternative compensation via branding, endorsements, public appearances, and similar activities would taint collegiate sports and dilute their popularity. The Supreme Court held that because the NCAA and college athletic conferences possess monopoly control over the services of collegiate student-athletes, they cannot effectively fix the price of “educational benefits” offered. Thus far, no case challenging the *Alston* decision has been initiated.

After California passed the Fair Pay to Play Act, numerous other states followed suit with their own legislation. Currently, forty other states have introduced similar bills, nineteen of which have been passed thus enabling student-athletes in those states the ability to earn compensation via branding, advertising, and endorsements. Tellingly, thirteen of the nineteen active laws successfully passed this year. On June 30, 2021, the eve of when several states’ student-athlete compensation laws were to take effect (i.e., those in Alabama, Connecticut, Florida, Illinois, Kentucky, Mississippi, New Mexico, Oregon, Pennsylvania, and Texas), the NCAA released its interim policy.

The NCAA policy permits college athletes to profit from their NIL. The NCAA Bylaw 12 restrictions for all incoming and current student-athletes in all sports are now suspended. The policy also provides for the following:

- Individuals can engage in NIL activities consistent with the law of the state the school is located. Colleges and universities may be a resource for state law questions.
- Individuals can engage professional services providers such as agents, lawyers, and consultants for NIL activities.
- College athletes who attend a school in a state without an NIL law can engage in NIL activity without violating NCAA rules.

- State law and schools/conferences may impose reporting requirements.

Although each state’s individual NIL legislation varies, the laws all broadly: (i) prevent the NCAA, conferences, and schools from barring student-athletes from receiving compensation for their NIL; and (ii) allow athletes to hire agents, lawyers, and other professional advisors to advise them on their deals and take a percentage of the deal. Some of the laws require athletes to report their advertising and endorsement deals to their schools, while others regulate specific fee structures and disbursements. For example, a proposed bill in South Carolina would create a Student-Athlete Trust Fund providing \$5,000 per year for each collegiate football and basketball player so long as they remain in good academic standing. The funds would be distributed post-graduation.

The NCAA’s interim policy prohibits athletes from accepting compensation in connection with the commercialization of their persona: (i) as an inducement for the athlete to enroll at a particular institution (i.e., such conduct would be an “impermissible inducement”); (ii) for athletic participation or achievement (in other words, “pay for play”); and, (iii) for services not actually performed by the athlete. It also outlines a litany of obligations for NCAA member schools, such as reporting potential violations of NCAA guidelines, certifying athlete eligibility, completing due diligence on the appropriateness of the proposed NIL activity, and potentially assessing compliance with state laws outside of the NCAA’s purview. The national NCAA office will enforce Bylaw 19 when the NIL activity violates the “pay for play” or “impermissible inducement” regulations, but much of the compliance responsibility will be left to individual athletes, as authorized under individual state laws, who choose to monetize their NIL.

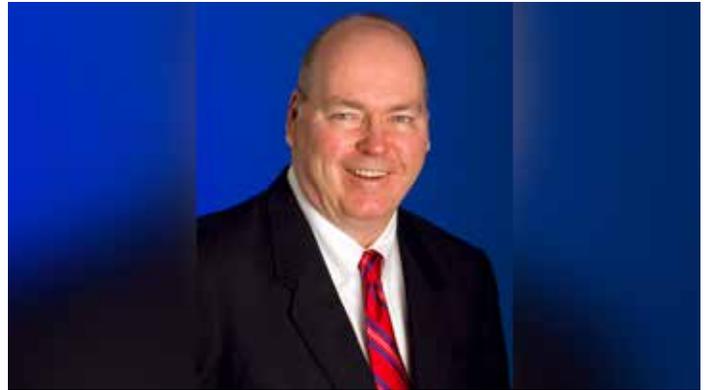
Some states specify the manner in which the athlete can promote or endorse a product or service. For example, some laws detail whether the athletes are allowed to display their school’s logos or insignias while engaging in paid ads or endorsements. In other cases, states mandate exactly what college athletes cannot promote or endorse. For example, in Texas, athletes are not allowed to endorse alcohol, tobacco products, e-cigarettes, anabolic steroids, sports betting,

or a sexually-oriented business. However, they may endorse firearms they can legally purchase. In states without specific product and service restrictions, such issues will presumably be left to the schools' compliance officers to discern the permitted parameters.

Where Do We Go From Here?

Despite the passage of the NCAA's interim policy, without a national law governing college-athlete NIL activities, the rules of the road will differ by state and even by school. Although Congress has repeatedly expressed interest in passing a new college-athlete NIL law, bipartisanship seems unlikely in the immediate future. Republicans want a narrowly-crafted measure around NIL, while Democrats want broader protections for student-athletes. Many administrators still hope that the federal government will act soon, as without any national law, these myriad state laws have the potential to create material advantages for some schools over others. For example, schools in states with legal guarantees that student athletes can earn NIL money will presumably be better positioned to recruit high-profile players, tipping the best talent in the direction of those specific institutions.

This complex, patchwork of disparate state laws and NCAA policy does not lend itself to efficient deal making between brands, agencies, and athletes. Athletes will understandably be reticent to jeopardize their eligibility by running afoul of this morass. As such, we will likely see niche agencies (or niche divisions within larger agencies) and other specialized service providers spring up to assist athletes and brands. Michael Beaton, owner of Atlanta-based marketing agency [Hyper Flywheel](#), is doing just that with his founding of [www.hireacollegeathlete.com](#). He believes that we are in dynamic period as brands, athletes, and marketers figure out how to work together efficiently, as this marketing ecosystem evolves over the next few years. Navigating your way through this hurricane will be a challenge. Buckle up.



Jim Riordan

Lack of Governance Around NIL Concerns Leading Sports Business Professor

Dr. Jim Riordan, the founder in 2000 of the MBA Sport Management program at Florida Atlantic University, has always had a keen interest in trends and developments that shape collegiate athletics.

In 2003, he served as a special consultant to the chair of the FAU Director of Athletics search committee. In 2004, he was named a member of FAU's Athletic Advisory Board, and served on the committee that coordinated FAU's Department of Athletics NCAA Self-Study Re-Certification. He served for two years as the NCAA Faculty Athletic Representative for FAU and was chair of FAU's Athletic Advisory Board. In 2006, Dr. Riordan was named a member of the National Advisory Board of the University of Washington's Executive Education Masters degree program in Intercollegiate Athletics Management and served as an adjunct professor there in 2007. He is a peer-reviewer for the NCAA Self-Study/Re-certification program.

In an exclusive Q&A feature, Dr. Jim Riordan shared his insights with us about the Name, Image and Likeness movement, a development that has dominated the headlines this summer.

Question: *What worries you most concerning the impact of NIL?*

Answer: Since its inception in the 1940s, the NCAA has been looked at by many as the strict, stern, overbearing parent, implementing rigid and sometimes-questionable rules and directives. Add in the "exceptions" and "waivers" and "interpretations" when

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administering these rules, and there sometimes seems to be a haze of confusion around the enforcement of these legislative actions.

Some individuals (student-athletes, parents, donors, advisers) and institutions (coaches, athletic directors, presidents) simply are trying to “push the envelope.” Others are trying to break open the envelope completely. I believe this chaotic state and associated occurrences will continue as the Name, Image and Likeness (NIL) legislations gain a stronger foothold in the American intercollegiate athletic landscape.

For now, the proposal, passing and implementing of NIL legislation is being deferred to each individual state. When all is said and done, there will be 50 distinctive laws/ordinances addressing NIL. Some state laws will be more free-flowing than others, creating a more so-called “attractive” option for potential student-athletes. This, in turn, may lead to the formation of bandit, unregulated organizations that will have only self-success on their minds and not the well-being of their potential, unknowing student-athlete clients. (It should be noted that there currently are well-intentioned, above-board organizations that have been formed to assist both student-athletes and intercollegiate athletic departments in their respective NIL needs and functions.) Further, for those states that do not and/or will not have NIL legislation, the NCAA is leaving NIL policy formation up to the individual institutions. Something akin to an honor code.

For the purposes of clarity, understanding, proper administration and maintenance of a sound ethical landscape, NIL must be governed under federal statutes. Sen. Mitch McConnell stated on June 29th that federal governance is “probably necessary” but calls on the NCAA for a plan that can be enacted on a federal level (National Law Review, 07/01/2021). Several bills already have been introduced in the Senate and the House, but have met with little success, suggesting there is still disagreement on what needs to be included in the bill (Ibid). An issue that could potentially cause a delay in passing of the federal NIL law is the developing and presenting to the House and Senate what McConnell refers to as the “plan.” Committees and tasks forces on the local, regional (possibly) and national (definitely) levels will need to be formed, consisting of members from the various stakeholder groups associated with intercollegiate athletics.

Q: How should athletic departments counteract this?

A: Regarding the specific role of athletic departments with concern to properly administering a sound and ethical NIL program, they should educate all stakeholders and constituents involved with the athletic department on the rules, regulations, policies and procedures of the NIL operation. It would be similar to what is done in educating donors, alums, faculty, etc. in the area of compliance. The department also should invest in the services of the previously mentioned organizations that handle NIL needs and wants of their student-athletes and of the department itself. Finally, the department can organize an extensive letter-writing, phone-call campaign by stakeholders to the locale’s federal representatives and senators, urging them to formulate, support and pass NIL legislation.

Q: As a sports business professor, what has been your involvement with the athletic department in terms of helping athletes leverage a real-world education?

A: I serve on the Athletic Advisory Board of Florida Atlantic University and chair the Institutional Performance sub-committee. Our MBA-Sport Management program is open to graduate transfers as well as red-shirt juniors or seniors who have earned their bachelor’s degrees but still have some eligibility remaining. We also welcome GA Coaches to our program. All our MBASport students participate in our renowned guest lecture series that brings in top-notch practitioners in the world of Sport and Entertainment. The students also are required to participate in an executive forum seminar that brings in high-end speakers from all facets of business. Student-athletes and GA coaches also are eligible to participate in our internship program, time permitting.

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NIL and the Impact on High School Sports

By Hannah Dewey

While the NCAA has stated that high school students may engage in the same types of NIL opportunities available to current student-athletes under its interim policy without impacting their NCAA

eligibility, the same might not be true for high school competition.

In fact, engaging in NIL activities as a high school student may render that student ineligible for high school sports, thereby creating more incentives for high school athletes to play club sports or transfer to private schools, instead of playing for their public high school. This possible shift could impact college sports competition, and many have strong views about the importance of participation in high school sports.

In that light, LEAD1 Association (“LEAD1”) hosted its latest webinar on NIL and the impact of high school sports competition. The virtual forum was moderated by Karissa Niehoff, CEO of the National Federation of State High School Associations (NFHS), which is the national leader and advocate for high school athletics. The panel also featured Anson Dorrance, Head Women’s Soccer Coach at the University of North Carolina at Chapel Hill, and James Parker, Director of Athletics and Student-Activities, at Alexandria City Public Schools, in Virginia. *Here are the important takeaways from the panel:*

1. ***NFHS has made it clear that NCAA NIL rule changes do not affect current high school student-athletes.*** In fact, Niehoff kicked off the webinar stating that while NFHS recognizes the talents of high school student-athletes, its member state associations have rules in place that prohibit student-athletes from receiving money that is connected to wearing their school uniform.
2. ***Given that NFHS’s member state associations, which include 51 states and the District of Columbia, prohibit student-athletes from earning NIL compensation connected to high school athletics, it could create a shift in high school athletes transferring to private high schools or participating in more club sports, instead of playing for their high school teams.*** Indeed, according to Parker, overly restrictive high school NIL rules could create a trend in more high school student-athletes transferring to private schools that don’t restrict NIL opportunities. Dorrance believes that high school student-athletes should be allowed to “monetize their passions,” and that high school associa-

tions should find “compromise” so that high school athletes can pursue more entrepreneurial opportunities, aligned with the recent changes at the college level.

3. ***NIL could create opportunities for state high school systems to help student-athletes learn more about entrepreneurship and business at a much earlier age.*** According to Dorrance, NIL could create more opportunities for entrepreneurs in local communities to help teach high school student-athletes about business. In fact, he believes high school systems should develop more specific curriculum based upon helping students grow their brand. Attending public high school already provides significant social and communal benefits, according to Dorrance, so pairing those values with NIL catered education would be very beneficial for student-athletes. Parker explained that high schools might even be able to help some student-athletes broker NIL deals in their local communities and ensure that the deals are bona fide and compliant with applicable regulations. Of course, this is subject to NFHS member policies, and each state might act differently in terms of their future NIL policies.
4. ***NIL at the high school level could help student-athletes learn to better manage conflict earlier on.*** A student-athlete’s teammate making more NIL money or getting more media opportunities could create inherent conflict in terms of camaraderie on a high school sports team. But sports are supposed to be a place for students to learn how to better navigate life issues, beyond the playing field, Dorrance said.
5. ***According to Dorrance and Parker, youth athletes should have the same NIL opportunities that college athletes have, particularly for female athletes.*** It is no secret that those athletes who know how to best brand themselves will have the most NIL success. Starting NIL at the high school level would allow student-athletes, particularly female athletes, to start the learning process in terms of maximizing their future earning potential off the field, while they

continue to fight for equal pay (at least professionally) on the field, in professional soccer, for example.

So, while NFHS has made it known that NCAA NIL rule changes do not apply to high school athletes for now, more conversations like these from college sports stakeholders could help shape the future of youth sports, as we continue to move into a new era of sports competition.

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University of the Cumberlands Sued for Wrestler's Death—Brace v. Cumberlands

By John T. Wendt, J.D., M.A.

Grant Brace was a very good high school wrestler and football player in Alcoa, Tennessee. He went on to wrestle at the University of Cumberlands in Kentucky. In August of 2020, Grant's third year, the wrestling team began pre-season workouts and according to a recently filed lawsuit, Grant passed from exertional heat-stroke.¹

Grant's family sued. The complaint alleges negligence and gross negligence at the hands of his head coach Jordan Countryman and assistant coach Jake Sinkovics Both no longer work at Cumberlands.

According to the complaint, despite being diagnosed with ADHD and narcolepsy, Brace achieved both academic and athletic success. Not only was he a member of his high school's National Honor Society, but had a wrestling record of 128-33 and played on three state championship football teams. The complaint also notes that every school that he attended made accommodations for Brace given his medical conditions.

A key point in the complaint was that Brace's physicians prescribed Adderall to help Brace focus, and it was "critical" that he maintain hydration while using Adderall. And before attending Cumberlands, Brace and his family were assured by the administration, including Coach Countryman, that appropriate accommodations would be made regarding his medical condition and hydration needs.

The complaint alleges that the coaches Countryman and Sinkovics created a toxic atmosphere "of fear and intimidation... through emotional manipulation, emotional abuse, and physical abuse of student-athletes." This allegedly included a constant refrain that "water is for the weak." When Brace requested a water break, they refused and commented, "Do you think you are special and are allowed more water?"

The complaint goes on to allege that on August 31, 2021, after a summer break period of inactivity the wrestling team began with a track practice and the coaches forced the student-athletes to sprint and down a "punishment hill" seven times because a student-athlete failed a fundraising assignment. There is also an allegation that there was no athletic trainer present and that the coaches knew that the same "punishment hill" practice after inactivity had caused significant injuries to a different wrestler just one year ago.

The complaint continues to allege that while Brace completed several circuits, he eventually sat down exhausted whereupon Coach Countryman told Brace that he was off the team. While Brace ran to the top of the hill and said, "I'm done. I can't do this anymore," the coaches, despite objections and warnings about Brace's health, kept pushing Brace to finish the punishment circuits. When they returned to the wrestling room, Brace allegedly laid on the mat and asked for water. The coaches refused to let the other players render aid and told Brace to "get the water himself," according to the complaint.

The complaint alleges that Brace, suffering from heat stroke, continually asked for water, and begged, "[P]lease help me, you promised you would help me." Yet, the coaches allegedly refused and failed to contact the trainer or emergency medical personnel. Even after Brace began to speak and act in a nonsensical manner, consistent with the recognizable signs of heat stroke, the coaches yelled him to leave the room. They did not follow Brace. Brace frantically looked for water but the buildings on campus were locked and the water fountains did not work, according to the complaint. He collapsed and died. After more than 45 minutes, the coaches began to look for Brace and found him dead.

The plaintiffs include Brace's parents, Kyle Brace and Jacqueline Brace, his sister Kaylee Wagnon. The defendants include coach Countryman, Sinkovics, the university, The Cumberland Foundation, Cumberland

¹ Brace v. Cumberlands, No. 21-CI-429 (Whitley Cir. Ct. Court, Ky.)

Athletics Properties, Dr. Larry Cockrum (individually, and as President of the University), and Chris Kraftick (individually, and as Athletic Director). The complaint alleges that President Cockrum and A.D. Kraftick failed to provide appropriate funding to ensure that a trainer was physically present at all men's wrestling practices as required by their policies and procedures. It is alleged that they also knew of the "punishment exercises" and that another student-athlete suffered a permanent brain injury on the same circumstances with the same coaches just a year earlier.

Cumberlands spokesman Andrew Powell said, "Earlier today, University of the Cumberlands received notice of the lawsuit filed by the attorneys for Grant Brace's family. Grant's death was a tragic loss for his family, his friends, the University community, and all who knew him. In the wake of this tragedy, the University has tried its best to be sympathetic and respectful to Grant's family and to ensure that all of its athletic programs, including the wrestling program, were and are being operated in a safe manner. The University questions several of the allegations in the complaint and does not feel that the complaint is a fair reflection of its wrestling program. Out of respect for all concerned and for the legal process, the University will not address individual allegations publicly but will instead present its defenses to the claims through the legal proceeding."²

When Countryman resigned from the University, AD Chris Kraftick said, "Jordan has made a big impact on the wrestling program and Patriots athletics in his time at UC... We wish him the best of luck on the next chapter ahead."³ Countryman is now serving as a wrestling coach at Saraland High School in Alabama. Aaron Milner, the superintendent of Saraland said, "Saraland City Schools prioritizes safety in all endeavors both in and out of the classroom. Every employment decision made in Saraland City Schools is solely based on my recommendation as the superintendent and follows

a vetting process that includes criminal background clearance through the Alabama State Department of Education (ALSDE) working in partnership with the Alabama Law Enforcement Agency (ALEA)."

Recognizing the sensitivity of the claims and respecting those personally involved, I will continue to monitor the Kentucky case and respond as facts pertinent to the operation of Saraland City Schools are communicated by the legal authorities directly connected to the Kentucky lawsuit.⁴ Finally, according to his LinkedIn page, Jake Sinkovics is now the Director of Coaches/ Head Wrestling Coach at Midwest Xtreme Wrestling Club in Indiana.

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Attorney Warns College President of Lawsuit If School Does Not Comply with Title IX

One of the nation's leading Title IX attorneys for plaintiffs, Arthur H. Bryant of Bailey & Glasser (www.baileyglasser.com), has suggested to Dickinson College President John E. Jones, III that the school is out of compliance with Title IX and a lawsuit may be forthcoming.

The letter follows:

Dear President Jones:

I and my co-counsel have been retained by members of the women's varsity squash team to prevent their team's elimination and, if necessary, pursue a sex discrimination class action against Dickinson College ("Dickinson") for depriving its female athletes and potential athletes of equal participation opportunities and treatment in violation of Title IX of the Education Amendments of 1972. Please respond to this letter as soon as possible and, in any event, no later than Wednesday, September 15, 2021.

Two weeks ago, on August 26, 2021, your office sent an email to the Dickinson Community from

² Erin Cox, *University of the Cumberlands sued for wrestler's death*, The Times-Tribune.com (2021), https://www.thetimestribune.com/news/local_news/university-of-the-cumberlands-sued-for-wrestlers-death/article_6945c063-1bcb-5061-b5ba-85376189577a.html (last visited Aug 26, 2021).

³ Victory Sports Network, *Countryman Resigns As Cumberlands (KY) Wrestling Coach* (2021), <http://www.victorysportsnetwork.com/Clip/news/countryman-resigns-as-cumberlands-ky-wrestling-coach.htm> (last visited Aug 30, 2021).

⁴ Tyler Fingert, *Saraland High School wrestling coach named in Kentucky wrongful death lawsuit*, FOX10 News (2021), https://www.fox10tv.com/news/mobile_county/saraland-high-school-wrestling-coach-named-in-kentucky-wrongful-death-lawsuit/article_9b23fb92-06c3-11ec-b260-a7dcdedac3f.html (last visited Aug 27, 2021).

George Stroud, Vice President & Dean of Student Life. The email started, “When Dickinson was chartered in 1783, Benjamin Rush viewed athletics as a vital facet of a well-rounded educational experience, and we still view it as such today.” It then said—in a stunning twist—that Dickinson had decided to eliminate the women’s and men’s varsity intercollegiate athletic squash teams at the end of the 2021-22 season.

Dickinson’s decision to eliminate its women’s and men’s squash teams does not appear to have been publicly announced otherwise. As best we can tell, no press release was issued about it. An internet search produces no news about it. Even now, it is not mentioned on Dickinson’s web site, including the sections of Dickinson’s web site dedicated to its intercollegiate athletic program, the women’s squash team, or the men’s squash team.

It appears that Dickinson is not interested in having the general public know about its decision. Sadly, there is an obvious reason that could be so: the elimination of the women’s squash team flagrantly violates Title IX, which bars sex discrimination by all educational institutions receiving federal funds.

Under Title IX, schools cannot eliminate 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.” 44 Fed. Reg. 71418 (Jan. 16, 1996). Dickinson fails this test.

According to the most recent publicly available data, which Dickinson submitted and verified to the U.S. Department of Education under the Equity in Athletics Disclosure Act, Dickinson had an undergraduate population in 2019-20 of 1,193 women and 898 men. So undergraduate enrollment was 57.05% women. The school’s intercollegiate athletic teams had 326 men and 243 women, or 42.71% women—creating a 14.35% gap between the women’s undergraduate enrollment rate and their intercollegiate

athletic participation rate. Dickinson needs to add women’s opportunities to comply with Title IX.

Instead, Dickinson just announced that it is eliminating its women’s squash team (along with the men’s team). As a result, again according to the most recent publicly available data, the school’s athletic participation numbers will drop to approximately 314 men and 231 women, or 42.39% women—creating a 14.67% gap. Dickinson would need to add approximately 186 women to reach gender equity under Title IX. This is, of course, far more opportunities to participate in athletics than the women’s 14-member squash team provides.

Given these facts, Dickinson’s decision to eliminate the women’s squash team (and the men’s squash team) was especially ill-considered. It should not have been made—and needs to be reversed right away. This should not be a surprise. As your office emphasized, “When Dickinson was chartered in 1783, Benjamin Rush viewed athletics as a vital facet of a wellrounded educational experience.” The law still views it “as such today.” For that reason, Title IX requires Dickinson to continue the women’s squash team and provide women with equal opportunities to participate and equal treatment and benefits throughout its intercollegiate athletic program.

I would like to meet with you and/or the school’s lawyers and discuss the relevant facts and the law, as well as the likely outcome if a lawsuit is filed. It is my hope that, considering these factors, Dickinson will agree to reinstate the women’s squash team (and men’s squash team) and come into compliance with Title IX to avoid the need for a lawsuit.

Unless Dickinson does so—or has plans for compliance with Title IX we do not know about—we will file a class action and seek a preliminary injunction immediately preserving the women’s squash team. Courts throughout the country have consistently issued preliminary injunctions preserving women’s varsity teams when the elimination of a women’s team violates Title

*IX. See, e.g., Lazor v. Univ. of Connecticut, No. 3:21-CV-583 (SRU), 2021 WL 2138832, at *1 (D. Conn. May 26, 2021) (granting temporary restraining order to reinstate the women's rowing team); Ohlensehlen v. Univ. of Iowa, 509 F. Supp. 3d 1085, 1088 (S.D. Iowa 2020), appeal dismissed, No. 21-1203, 2021 WL 3174982 (8th Cir. Feb. 26, 2021) (granting preliminary injunction to reinstate the women's swimming and diving team); Mayerova v. E. Michigan Univ., 346 F. Supp. 3d 983, 997 (E.D. Mich. 2018), appeal dismissed, No. 18-2238, 2020 WL 1970535 (6th Cir. Apr. 20, 2020) (granting preliminary injunction to reinstate the women's varsity softball and tennis teams); Portz v. St. Cloud State Univ., 196 F. Supp. 3d 963, 978 (D. Minn. 2016) (granting preliminary injunction to reinstate the women's varsity tennis team); Biediger v. Quinnipiac Univ., 616 F. Supp. 2d 277 (D. Conn. 2009) (granting preliminary injunction to reinstate the women's varsity volleyball team); Choike v. Slippery Rock Univ., 2006 WL 2060576 (W.D. Pa. July 21, 2006) (granting preliminary injunction to reinstate the women's varsity water polo and swimming teams); Barrett v. West Chester Univ. of Penn., 2003 WL 22803477 (E.D. Pa. Nov. 12, 2003) (granting preliminary injunction to reinstate the women's varsity gymnastics team); Favia v. Indiana Univ. of Penn., 812 F. Supp. 578 (1993) (granting preliminary injunction to reinstate the women's varsity gymnastics and field hockey teams); Cohen v. Brown Univ., 809 F. Supp. 978 (D. R.I. 1992), *aff'd* 991 F.2d 888 (1st Cir. 1993) (granting preliminary injunction to reinstate the women's varsity gymnastics and volleyball teams).*

We hope that will not be necessary in this case. I look forward to hearing from you as soon as possible and, in any event, no later than Wednesday, September 15, 2021.

Former University of Minnesota Lineman Sues School, Conference, and NCAA

The NCAA is being forced to play defense again after a former University of Minnesota (UM) offensive lineman filed suit against the association, as well as the Big Ten conference and the school, claiming that the defendants' negligence contributed to multiple concussions he suffered and the debilitated state that he finds himself in today.

Plaintiff Josh Champion played for the Gophers from 2011 to 2015. During that span, he suffered four diagnosed concussions and "innumerable undiagnosed concussions," according to the lawsuit. Further, he alleged that he now suffers post-concussion syndrome and has irreversible brain damage.

Specifically, Champion alleges that the NCAA and U of M "failed ... to educate student football players not to lead with the front of the helmeted head in blocking and tackling, and failed to educate coaches, players, and trainers to identify routine 'dings' and 'seeing stars' as concussive and/or sub-concussive injuries.

In his complaint, filed in Hennepin County District Court, he noted that the defendants "failed to implement and enforce reasonable precautions to create a safe playing environment for college football players, failed to inform the teenage Josh Champion about the risks he faced, and failed to teach safe playing techniques to minimize sub-concussive and concussive injury."

Elaborating on the first point, he claimed "U of M football coaches encouraged and never discouraged helmet first contact in blocking and tackling at a time when U of M, the NCAA, and the Big Ten were fully aware that helmet first techniques in blocking and tackling were dangerous and could lead to concussive and sub-concussive injuries."

He also alleged school officials failed to remove him when they should have.

"Because U of M's football coaching staff, trainers, and team doctors did not remove Josh Champion from the game at the time of the collision in the second quarter, Josh Champion sustained repeated concussive and sub-concussive blows to the head in the third and fourth quarters that aggravated the existing injury,"

according to the complaint. “At no time between 2011 and 2015 did U of M provide Josh Champion with an examination by a neurologist or neuropsychologist in response to any diagnosed concussion.”

He is represented by David Langfitt of Pennsylvania and Garrett Blanchfield of St. Paul. Langfitt has led personal injury litigation against the NFL and NCAA involving brain injuries, representing more than a thousand former players.

Champion, who is joined by his wife in the suit, is seeking damages in excess of \$25,000.

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Attorney Analyzes Pennsylvania Supreme Court’s Ruling in Onyshko

The NCAA may be losing court cases on multiple fronts, but when it comes to concussion litigation, the association appears to be holding its own.

Most recently, the Pennsylvania Supreme Court refused to reconsider a lawsuit brought by a former college football player, Matthew Onyshko, who blamed the NCAA for brain injuries that left him debilitated and in a wheelchair.

The ruling came after Onyshko appealed the decision of a Pennsylvania Superior Court, which also refused to revive the case.

“On September 2, 2021, the Pennsylvania Supreme Court issued a per curiam denial of Onyshko’s Petition for Allowance of appeal, signaling what is for now the end of Matthew and Jessica Onyshko’s legal effort to link his ALS to his college football career,” Anthony Corleto of Gordon & Rees told Sports Litigation Alert.

“In May 2019, a Pennsylvania Jury returned a verdict in favor of the NCAA, finding no liability. In October 2019, the court denied Onyshko’s post trial motion to set aside the verdict and grant a new trial, arguing among other things that the court incorrectly excluded the opinion of Dr. Bennet Omalu. In March of this year, an appellate panel (mentioned above) affirmed the post-trial order, adopting it ‘as their own.’

“Onyshko’s legal team has stated publicly that they intend to bring a wrongful death suit when he ultimately and presumably passes due to ALS (Lou Gehrig’s disease). A few things have to happen for that to succeed. First, science has to advance to the point that

ALS as a disease process and his ultimate death can be tied to his athletic experience. Second, the court would have to hold the NCAA to a standard of care based on that newly found causal connection between football and ALS. Neither of which is likely to happen.”

A previous story was written on the Superior Court and can be found in SLA Vol. 18, Iss. 5.

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Lawsuit Alleges Former University of South Alabama Head Women’s Volleyball Coach Sexually Harassed Abused Former Players

A former NCAA Division I head women’s volleyball coach sexually harassed, and physically and emotionally abused her players for several years, according to a federal lawsuit filed last week in Alabama.

The case was brought by several former University of South Alabama volleyball players against former head coach, Alexis Meeks-Rydell. Also named as defendants are the University, Athletic Director Joel Erdmann, and former assistant coaches Rob Chilcoat and Patricia Gandolfo.

Rachael DeMarcus and Alexis Silver came to the University of South Alabama in 2018 to pursue their academic career and compete as NCAA Division I athletes on the school’s women’s volleyball team.

Once on campus, however, they allegedly were routinely subjected to blatant sexual harassment and sexual, physical, and emotional assault by Meeks-Rydell. The lawsuit alleges Meeks-Rydell created a climate of fear and intimidation among the volleyball team. According to the lawsuit, she regularly overtrained players and coerced them to practice or play while injured, in violation of NCAA bylaws. Allegedly, she would often verbally abuse injured players, ridiculing and accusing them of faking injuries and forcing them to play through serious medical conditions, including concussions and asthma attacks, as well as ankle and knee injuries.

The complaint also alleges that Meeks-Rydell physically and sexually abused her players, pinching each players buttocks as they exited the team bus, and forcing them to engage in “floor hugs” in which team

members laid on the ground while Meeks-Rydell laid on top of them. And on at least one occasion, Meeks-Rydell, apparently upset with DeMarcus, slapped her across the face. The complaint alleges that this behavior continued, unchecked, throughout 2019 and 2020 with the direct knowledge of Erdmann, Chilcoat, Gandolfo, and other university officials, “all of whom either could have or should have reported or stopped the abuse, but did neither,” according to their attorneys.

Specifically, the lawsuit charged that the plaintiffs’ “athletic and academic aspirations were negatively impacted by the misconduct of Meeks-Rydell, and by the University’s facilitation and ratification of her conduct and by the University’s decision to ignore Meeks-Rydell’s relentless and pervasive pattern of harassment and physical, psychological, and emotional abuse, in addition to other wrongful acts by the Defendants. Between 2018 and 2019, both plaintiffs matriculated at the University of South Alabama with the express promise of a prestigious Division I volleyball career and competitive academic opportunities and have since transferred from the University.”

Meeks-Rydell was hired as the University’s Women’s Volleyball Team Head Coach on December 31, 2018, and served in that role until she resigned in February 2021. She currently serves as an assistant coach at Purdue University Fort Wayne. Former assistant coaches Chilcoat and Gandolfo have also moved on from the university to serve as assistant coaches at Brown University and the University of West Florida, respectively. Erdmann remains at South Alabama as the school’s Athletic Director.

The case is Rachel DeMarcus and Alexis Silver v. University of South Alabama, Alexis Meeks-Rydell, Joel Erdmann, Rob Chilcoat, and Patricia Gandolfo, in the U.S. District Court for the Southern District of Alabama, Mobile Division.

Sports Lawyer John Mack Named Director of Athletics at Princeton

John Mack, who has previously held the title of student-athlete, coach, and administrator at Princeton University, has added another role to his resume – Director of Athletics. He succeeds Mollie Marcoux Samaan, who announced in May she would be stepping down to take over as commissioner of the LPGA.

Mack, who has spent time as a collegiate athletics administrator at Princeton as well as with the Big Ten Conference and at Northwestern University, has most recently spent the last decade in the legal field as a practicing lawyer.

His career in college athletics began at his alma mater where from 2000-04 he served as Assistant Director of Intercollegiate Programming responsible for coordinating facility use and competition schedules for all varsity programs as well as event operations for home contests. In addition, he served as assistant women’s track and field coach from 2002-04, working directly with the team’s sprinters and helping lead team-wide recruiting efforts.

Mack then transitioned to a role at the Big Ten where he served as Associate Director of Championships from 2004-06. From 2006-11, Mack worked at Northwestern, where he was Senior Associate Director of Athletics for Sales and Marketing. While with the Wildcats, he negotiated sponsorship agreements with corporate partners and managed all aspects of the university’s licensing and merchandising program.

In 2011, Mack began his legal career as a law student at Northwestern where he graduated from in 2014 with cum laude honors. While a law student, Mack was Associate Editor of Northwestern’s Journal of Law and Social Policy, captain of the Mock Trial Team, and Education Chair of the school’s Black Law Students’ Association. His legal practice focused on complex commercial litigation and products liability cases, and he is admitted to practice in state and federal court in Michigan.

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News Briefs

Webinar Examines the ‘Dos and Don’ts of Advertising in iGaming’

IDEA, the voice of the online gaming and betting industries in the U.S., will host one of its “Power Lunch” webinars on September 13 at noon EST, addressing the “Dos and Don’ts of Advertising in iGaming.” The webinar, which lasts one hour, will “explore one of the central challenges of successful iGaming and sports betting in the US: the imperative of advertising for customer acquisition while abiding by differing state laws and prioritizing responsible gaming practices. How can companies position their advertising to both meet consumers where they are and abide by varying state rules and regulations? Learn from a leading advertising lawyer, iGaming Media CEO, state regulator and responsible gaming expert as they discuss the best ways to navigate the complex, but essential business of advertising.” Among the panelists are [Michelle Cohen](#), a partner at Ifrah Law, who will also serve as the moderator for the event. For info on other panelists and to register, visit: [REGISTER NOW: iDEA + GeoComply Webinar Series Sept 13-14 \(mailchi.mp\)](#)

AG Sues Biden Administration to Stop Enforcement of Guidance that Threatens Women’s Sports and Student and Employee Privacy

Tennessee Attorney General Herbert H. Slatery III, leading a 20-state coalition, filed a lawsuit in the Eastern District of Tennessee today. The complaint seeks to stop the Biden Administration from enforcing new, expansive, and unlawful interpretations of federal antidiscrimination laws. In the complaint, the multi-state coalition challenges federal guidance

issued by the Equal Employment Opportunity Commission (EEOC) and the Department of Education (the Department) concerning issues of enormous importance. The guidance purports to resolve highly controversial and localized issues such as whether schools must allow biological males to compete on girls’ sports teams, whether employers and schools may maintain sex-separated showers and locker rooms, and whether individuals may be compelled to use another person’s preferred pronouns. The federal agencies claim that the guidance simply implements the Supreme Court’s decision in *Bostock v. Clayton County*, but that decision did not address any of the issues covered by the guidance. The agencies have no authority to unilaterally resolve these sensitive questions, let alone to do so without providing the public with notice and an opportunity to comment.

Spry Announces Partnership with The Atlantic East Conference to Manage Compliance with the Name, Image, and Likeness (NIL) Movement

The Atlantic East Conference and Spry announced last week a conference-wide partnership to help each school manage the NIL compliance landscape. In a proactive move, conference leadership will assist in providing Spry software to all seven of the Atlantic East schools. Spry, a third-party technology solution designed to help colleges and universities navigate the rapidly evolving NIL landscape, has been very active in the NIL space since becoming an LLC in January 2020. Spry is known as the only compliance-focused solution for the athletic departments.

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