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Case Summaries

Even in Extreme Sport, Court Accords Primacy of Primary Assumption of Risk

By Jon Heshka, Associate Professor at Thompson Rivers University

An appellate court in *Wolf v. Kaplan*, 2021-Ohio-2447 has ruled that a triathlete injured when she crashed in a race after being clipped by a competitor cannot claim damages because the collision was an inherent risk that she assumed.

Mary Ellen Wolf was an experienced triathlete. She was a certified race director for USA Triathlon, the national governing body for triathlon, and had qualified for the USA Triathlon Nationals. During the August 2018 race, she crashed just over a mile into its bicycling portion and sustained a concussion, a closed fracture of the sacrum, two fractures of the left pubic bone, and multiple abrasions.

Table of Contents

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Case Summaries

Articles

News Briefs

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In April 2019, Wolf filed a complaint against Gregory Kaplan and asserted claims for battery, assault, negligence, and gross negligence. Wolf alleged that Kaplan violated the drafting rules and caused her to crash. Kaplan filed a motion for summary judgment that was opposed by Wolf.

In becoming a member of USA Triathlon, Wolf electronically signed a Waiver and Release of Liability, Assumption of Risk and Indemnity Agreement, under which she understood and acknowledged that triathlon events – including its swimming, bicycling and running portions – are "inherently dangerous" and that participation involves risks and dangers which include the potential for serious bodily injury caused by contact or collision with other participants. Wolf agreed to release claims for liability caused in whole or in part by the negligence of other participants in the race.

Another athlete witnessed the accident and testified that, while he did not see the exact moment of contact, it was impossible to think that contact was not made due to Kaplan's proximity to Wolf at the time of her crash. This athlete testified that Kaplan momentarily and inadvertently drafted behind Wolf and then passed her in an unsafe manner. Kaplan denied making any contact and there was no physical evidence to show contact between the bikes that Kaplan and Wolf were riding.

The trial court granted Kaplan's motion for summary judgment saying that there was no evidence Kaplan intentionally or recklessly injured Wolf. Wolf appealed claiming that the record contains questions of material fact as to whether Kaplan's actions involved reckless and/or intentional conduct that was in violation of the race rules, which she claimed caused the crash and her resulting injuries.

In July 2021, the Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County held that the alleged conduct was a foreseeable and customary risk of the sport of triathlon, that the doctrine of primary assumption of risk applies, and that, as a matter of law, the alleged conduct could not be found intentional or reckless.

The court recognized that a participant in a recreational or sport activity assumes the ordinary risks and cannot recovery for an injury without showing that the other participant's action was either reckless or intentional. This limitation is premised upon the doctrine of primary assumption of risk and is based on the rationale that such a participant assumes the inherent risks associated with the sport or activity. Citing *Gentry v. Craycraft*, 101 Ohio St.3d 141, 2004-Ohio-379, 802 N.E.2d 1116 at 10, the court said that the underlying policy is to "strike a balance between encouraging vigorous and free participation in recreational or sports activities, while ensuring the safety of the players."

The court cited a 2003 Court of Appeal of California case of *Moser v. Ratinoff*, 105 Cl. App. 4th 1211, 1222-1223, 30 Cal.Rptr.2d 198 (2003) which involved one cycling swerving into another during a long-distance ride. That court stated that "in various sports, going too fast, making sharp turns, not taking certain precautions, or proceeding beyond one's abilities are actions held not to be totally outside the range of ordinary activities involved with those sports." The court in *Moser* said that the defendant's actions may have been negligent, but they were not intentional, wanton or reckless conduct totally outside the range of ordinary activity involved in the sport.

The appellate court in *Wolf v. Kaplan* noted that "there is no question that triathlon is an inherently dangerous sport and that participation involves foreseeable risks and dangers for serious bodily injury that can arise from accidents, contact, or collision with other participants" [24]. Even though it was alleged that Kaplan passed Wolf with an unsafe maneuver, such conduct is not outside the range of ordinary activity involved in the sport.

The court further found it is not outside the range of ordinary activity involved in the cycling portion of

a triathlon race for participants to come into close contact with one another, collide with another participant, or commit a rule infraction in an effort to advance their position. Such conduct is anticipated by the customs and practices of the sport, is reasonably foreseeable, and presents a risk of injury inherent in the sport.

In an extreme sport where the general public may question the extent to which it is reasonable at all, the courts have again recognized the primacy of the doctrine of primary assumption of risk, that a rule violation is in itself an insufficient basis by which to attach liability, and that free and vigorous participation in triathlons would likely be adversely affected if liability were imposed under the circumstances at bar.

Return to Table of Contents

Wilbourn V. BRG Sports: Plaintiff Fails to Prove Defective Football Helmet Caused CTE

By Gary Chester, Senior Writer

In concussion cases, the plaintiffs can often raise issues of fact as to three of the four negligence requirements. But proving causation is often a steep hurdle, as the plaintiff discovered in *Willbourn v. BRG Sports, Inc.,* No. 4:19cv00263 (N.D. Tex. 2019).

DuQuan Myers was a high school football player who allegedly sustained at least 14 concussions while wearing a Riddell football helmet. In 2017, Myers committed suicide. Myers' mother, Letitia Wilbourn, sued BRG, the parent company of Riddell, for wrongful death, negligence, design defect, and failure to warn. BRG brought a motion for summary judgment that raised several issues that are common in concussion cases.

The Facts

Following Myers' death, Wilbourn submitted his brain to the Boston University School of Medicine's Chronic Traumatic Encephalopathy (CTE) Center. The Center examined Myers' brain and diagnosed him with depression and post-concussive syndrome. The Center noted that Myers' depressive symptoms were amplified after the death of his cousin and the ending of a romantic relationship.

The plaintiff alleged that Myers' concussions caused his CTE and that the CTE caused or contributed to his suicide. It was alleged that the Riddell football helmet was inadequately designed to protect against brain injuries and that Riddell intentionally misled football players by misrepresenting how effective their helmets are at preventing concussions. Wilbourn further alleged that Riddell inadequately warned of the dangers associated with concussions.

The plaintiff designated Dr. Randall Benson, a neurologist, as an expert on causation. Dr. Benson linked concussions to CTE, which is a "progressive neurodegenerative disease caused by repetitive trauma to the brain" with "symptoms similar to Alzheimer's disease." Dr. Benson further connected head impacts in football to permanent brain injury and explained how helmets can reduce the potential for harm by "compressing to absorb force."

The plaintiff also relied on a report by two medical doctors at Boston University who found that

depression was the primary diagnosis for Myers' death, and that "post-concussive syndrome" was a contributing diagnosis.

The Procedural History

After discovery, BRG moved to exclude the experts' testimony as unreliable pursuant to Federal Rule of Evidence 702. The court denied the motion as to Dr. Benson and the Boston University experts, but it excluded the testimony of an additional expert. BRG also moved for summary judgment on all claims.

BRG argued that: (1) the statute of limitations barred Wilbourn's wrongful death claim; (2) Wilbourn did not properly represent Myers' estate; and (3) there was no evidence that its Riddell helmets caused Myers to commit suicide.

Summary Judgment Granted on all Claims

The court granted summary judgment because the plaintiff missed Texas' two-year statute of limitations for wrongful death claims by filing the complaint on March 31, 2019 – two years and 42 days after the plaintiff died.

The court rejected the plaintiff's argument that the statute was tolled by the filing of a class action with nearly identical claims in Illinois, *Adams v. BRG Sports*, 2021 WL 1517881 (N.D. Ill. Apr. 17, 2021). (See *Sports Litigation Alert* for August 13, 2021, p. 7.) Wilbourn argued that Myers' claims were nearly identical to the claims in the class action, so the statute of limitations should be tolled under the doctrine established in *American Pipe & Construction v. Utah*, 414 U.S. 538, 554 (1974).

There, the Supreme Court held that "commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties" to the suit if the case continued as a class action (the *American Pipe* doctrine). But the trial judge found that the *American Pipe* doctrine did not apply to Wilbourn because the Illinois case was a federal case and Texas does not extend the doctrine to cases brought under state law (Wilbourn's wrongful death and survival claims were based on state law).

The court also granted summary judgment because the administration of Myers' estate was still pending, so Wilbourn lacked the legal capacity to act on behalf of the estate.

Finally, the court found that Wilbourn could not, as a matter of law, establish proximate cause on any of the four claims. The court stated that Dr. Benson's report "falls short of providing sufficient evidence to raise a genuine issue of whether Riddell helmets cause long-term brain injuries…[the] report never evaluates the effectiveness of Riddell helmets at preventing brain injuries…The closest Dr. Benson comes to making any claim about helmet efficacy is that [a] poorly-designed helmet 'can lead to increased brain injuries, including CTE.'"

The court further reasoned: "[Dr. Benson] does not address the key question: whether Myers's CTE still would have occurred without the use of Riddell helmets. Benson's report presents no evidence to show that the helmets were a 'substantial factor' in Myers's death."

The court noted that BRG was granted (partial) summary judgment in *Adams* because the plaintiffs failed to adduce sufficient evidence to create an issue of fact as to whether Riddell helmets were a substantial cause of death.

The Court Empathized, but Adhered to the Law

In emphasizing that judges are people too, some law school professors will impart the caveat that in some David vs. Goliath cases, such as a grieving widow suing a multinational corporation, courts may stretch their reasoning to find for the underdog. While the trial judge here did not engage in this practice, the court tried to place the tragedy in context and express empathy for Ms. Wilbourn.

The court noted that more than more than a million high school students play competitive football and "serious questions have been raised about tackle football's safety." The court discussed Congressional hearings on the connection between football and CTE.

The court stated that while it has "grave concerns about the long-term effects of CTE and desires to protect players, especially youth who may not fully understand the risks of the game, the Court is bound to follow the law and the evidence that is brought before it."

In an unusual footnote, the court wrote: "The Court is reminded of the words of the celebrated Virginia jurist Brockenbrough Lamb who observed in a similar tragic case several decades ago that although he regret[ed] that the conclusion reached will prevent a

recovery and may thereby defeat the ends of justice in the particular case before [the court], but however that may be, we must declare the law as we find it written and comfort ourselves with the confident belief that in its results it will promote the ends of justice to all."

[Judge Brockenbrough Lamb, *The Duty of Judges: A Government of Laws and Not of Men, in* HANDBOOK FOR JUDGES 93 (Donald K. Carroll ed., 1961).]

Return to Table of Contents

Former Arena Employee Defeats Summary Judgment Motion in Employment Law Case

By Jeff Birren, Senior Writer

James Sobucki worked at Fox Valley Ice Arena in Geneva, Illinois, for approximately six and a half years. Fox Valley is owned by Centrum-East West Arenas Venture. It also in Geneva. Sobucki was originally on an hourly basis at the facility but was later converted to a salaried office role. A change at Centrum led to a change in duties for Sobucki, and he began cleaning restrooms. On April 3, 2019, Sobucki sued Centrum in federal court seeking overtime pay. Not surprisingly, Sobucki was not long for Centrum, and he was terminated on May 31, 2019.

Sobucki amended his complaint that July, adding a claim that he was fired in retaliation for filing the lawsuit. Centrum filed a motion for summary judgment in November 2020. Sobucki's opposition came in January 2021, and Centrum replied in February. In August, Judge Mary Rowland denied the motion (*Sobucki v. Centrum-East West Arenas Venture, LLC,* N.D. Ill, E. D., Case No. 19-cv-02279 *(8-5-21)).*

Relevant Facts

Centrum operated two arenas in the area. Craig Welker was the general manager and oversaw operations at both. Matt Leonard was the Director of Operations at Fox Valley and was the second highest executive there. Sobucki was hired at Fox Valley in November 2012. He began as an office employee and was paid on an hourly basis. He was promoted to a salaried position in 2014. Within 18 months Welker told Sobucki that he "was not a good fit for the office manager role" and "Centrum wished to find a role for which he was better suited" (Id. at 2). Sobucki operated the Zamboni and did custodial work, including cleaning the bathrooms. He was given a choice between being on a salary or working on an hourly basis. He chose the salary and earned "at least $455 per week."

Sobucki "worked with customers to coordinate skating competitions and hockey games for the rink" (Id. at 3). This included "scheduling, managing logistics for our-of-state participants, planning the set-up for events, providing directions, and addressing issues related to the rink, bleachers, and locker room." Sobucki testified that "he was essentially a custodian" though he admitted that "he would occasionally ask employees for help in completing tasks" and "would also field questions from other employees and occasionally would divvy up tasks when Leonard and Welker were not present." He did this "because he was the most experienced employee, not because he had any formal management role."

In February 2019 Centrum sold its other arena and sought to eliminate employees. Centrum made the decision to fire Sobucki because, according to Welker, Sobucki "had mentioned that he was looking for other jobs and because his replacement had more experienced, more motivated, and more committed to the company." Welker also testified that Sobucki "was notified in February that changes were coming to his position and he should prepare accordingly." That he did.

Sobucki sued Centrum on April 3, 2019, claiming that Centrum violated federal and state laws for failing to pay overtime. That rarely improves employer-employee relations. Welker and Sobucki met five days later. In his deposition Sobucki stated that Welker "asked questions about why he had filed the suit" but he "declined to respond." In his declaration Sobucki added that Welker "asked if he was sure he wanted to 'go down this road.'" Sobucki "said he would not answer questions without his lawyer" and Welker responded, "that not answering his questions would be considered insubordination."

Ten days later "Welker issued Sobucki an 'Employee Warning Notice' for failing to properly log his hours worked" (Id. at 4). Three days after that Sobucki "was issued another notice for arriving late to the arena, causing the director of tournaments to have to put out the goals himself." This notice "warned that further

infractions would result in a "final warning and/or termination." The long knives were out. Sobucki was fired on May 31, 2019. He was told that it was "due to the restructuring." Sobucki amended his complaint on July 30, 2019, to addthe retaliation claim.

The Court's Analysis: Fair Labor Standards Act Claim

Federal law is simple enough: "employers are not required to pay overtime wages to 'executive' employees." The regulations define "an executive when: 1) her pay exceeds a regulatory minimum; 2) her 'primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof'; 3) she 'customarily and regularly directs the work of two or more other employees'; 4) she 'has the authority to hire or fire the other employees or whose suggestions and recommendations…are given particular weight.'" This is "a question of fact to be determined by a jury if there is a dispute." It is "necessarily fact-intensive."

Sobucki did not dispute the first element, and there was "uncontroverted evidence that his suggestions as to hiring and firing were given particular weight." The focus was therefore on the second and third elements of the test. Centrum claimed that Sobucki was "Head of Operations." He admittedly did not set up the department's schedule, but he supervised and assigned tasks to other employees. Sobucki, however, "asserts that his primary duties were driving the Zamboni and custodial work" and that he "did not supervise employees or assign tasks, and he had no formal title" though "he sometimes answered questions and divvied up responsibilities as the most experienced employee—a team member coordinating with his coworkers, not manager assigning tasks."

Sobucki's evidence "draw primarily from his deposition and declaration" while Centrum's evidence is "grounded in the testimony of Leonard and Welker. It is, essentially, their word against his. At summary judgment, the Court is required to consider the evidence in the light most favorable to the non-moving party" i.e., Sobucki (Id. at 5). "Given the conflicting testimony as to whether Sobucki was an exempt executive, summary judgment must be denied."

Centrum insisted that Sobucki failed to create a genuine issue of fact, arguing that he simply denied that the was a manager "without addressing the specific factual allegations." The Court disagreed, as "he lays out a coherent account of what his roles and responsibilities were as a Zamboni driver and custodian" and "his account contradicts specific factual claims made by Centrum." Centrum's evidence rests "on the testimony of two of its employees. It is up to the trier of fact to weigh the credibility of his opposing testimony."

Centrum also tried to "undermine the record Sobucki relies upon" by arguing that it had factual contradictions. It cited a case that held that a plaintiff cannot use a declaration to contradict his deposition testimony. "Sobucki's declaration, although at times more detailed, is generally consistent with his deposition." Consequently, "summary judgment on the overtime claims is premature."

"Retaliation Claim"

Sobucki alleged that he was fired "in retaliation for filing the present FLSA claim." Centrum asserted that it was due to the closing of the other arena and had nothing to do with the lawsuit. This claim requires plausible allegations that the plaintiff engaged in protected activity and that the employer took adverse employment action, and a causal link between the two. The "record does not provide any direct evidence that Sobucki was fired because of his lawsuit." He relied on "circumstantial evidence." That allows a jury to infer retaliation, and it may include "(1) suspicious timing, ambiguous statements or behaviors; (2) evidence that similarly situated employees were treated differently; or (3) a pretextual reason for adverse employment action." Close timing alone is not enough.

Sobucki did not offer evidence related to similarly situated employees, nor did he demonstrate that Centrum's stated reasoning was pretextual. Rather, "his argument rests on Welker's comments to him about the lawsuit five days after" it was filed, the write up ten days later, and then the write up three days after that. In his years with Centrum prior to that he had never received a write up (Id. at 6). The Court stated that this "is a close case." Sobucki's circumstantial evidence "is weaker" than in his cited cases. However, "a reasonable jury could find the rapid issuance of two written warnings, after years without any, suspicious."

The "unusual resort to documented reprimands for relatively mundane missteps might have been intended to 'set the stage' for covert retaliation. This might be true even if" he really had been late to work or forgot to log his time. Moreover, Welker's suggestions that the lawsuit was a mistake and his alleged frustration when Sobucki would not discuss it "may suggest that retaliation was imminent."

"Viewing the suspicious timing, actions, and statements together, Sobucki has raised a question of fact as to the reason for his filing." A "reasonable jury" could conclude that the firing was in retaliation for filing the *FSLA* complaint. The motion was denied.

Conclusion

The Court subsequently scheduled a trial setting conference. It asked if a settlement conference would be productive, and one is scheduled for November 3, 2021. They might be well served to settle. The Court stated that Sobucki's second cause of action was a "close case" and was based "on circumstantial evidence." There is also something strange going on here. In February 2020, one of his lawyers sought to withdraw as his counsel. In January 2021 a second member of his legal team filed a motion to withdraw. Then, less than two weeks after the summary judgment ruling, a third attorney filed a motion to withdraw. All three motions were granted so Sobucki has lost three lawyers in less than three years. Accepting a settlement would put that to bed and allow Sobucki to get on with the rest of his life.

Centrum is hardly covered in glory. To begin with, regularly cleaning restrooms is not the stuff of executives. If he was truly "Head of Operations" documentary proof would have been produced. Furthermore, Centrum needs to learn to step lightly after an employee makes legal claims. The law's requirements fly in the face of human nature, but it is the law, and it will be enforced.

Return to Table of Contents

Reluctantly Dragged into Title IX Case, Court Sides with a SUNY School in Title IX Dispute

By Brian G. Nuedling, of Jackson Lewis P.C.

(Editor's Note: What follows is an article from Title IX Alert*, a Hackney Publications periodical.)*

The interplay between a Resolution Agreement and a private cause of action for injunctive relief presented a unique set of circumstances for a court that was faced with determining its role in supervising the enforcement process between the Department of Education and a public university.

In *Duguid v. State University of New York at Albany* ("SUNY"),[1] former members of the women's tennis team brought suit after the school canceled the women's tennis program in the spring of 2016. The plaintiffs alleged that by eliminating the team, SUNY violated their rights under Title IX of the Education Amendments of 1972 ("Title IX"). Gordon Graham ("Graham"), the coach of the team, joined the suit and added claims that SUNY subjected him to gender discrimination and violated his equal protection rights, alleging that the university fired him because of his age.[2]

The plaintiffs contended that SUNY violated Title IX by failing to provide women with opportunities to participate in intercollegiate athletics in number proportionate to their representation in the student body. They contended that the university decided to eliminate the women's tennis team because of cost; the gender of the players; the national origin of the players, most of whom came from foreign countries; and the expectation that Graham, who was 65 years old, would retire.

SUNY asserted that it discontinued the women's tennis team based on "a lack of Division I competition opportunities." The university had participated in the America East Conference ("AEC"), but several members of the AEC had eliminated women's tennis. SUNY noted that after 2015, the AEC no longer had a sufficient number of teams needed for automatic qualification to the NCAA tournament. As a result, the AEC

1 No. 1:17-cv-1092 (TJM/DJS), 2021 U.S. Dist. LEXIS 125301 (N.D.N.Y., July 6, 2021).

2 Graham, who was 60 years old when SUNY hired him, was employed at the university until his contract expired in August 2017.

stopped sponsoring women's tennis. The university further contended that its attempts to find other options were unsuccessful. Specifically, no other conferences in the eastern United States could accommodate SUNY. In addition, competing in a conference elsewhere in the country was deemed too expensive and likely to result in the tennis players missing excessive class time.

Prior to the court proceedings, the dispute over the fate of the SUNY women's tennis team came before the Office of Civil Rights ("OCR"), which enforces Title IX for the United States Department of Education. After investigating the university's varsity intercollegiate sports programs, based on a complaint that had been filed by Graham, OCR and the university entered into a Resolution Agreement in August 2017. Among other things, the agreement provided that OCR would continue to monitor the SUNY athletic programs until the agency was satisfied that the university had fulfilled the terms of the agreement and was in compliance with Title IX.

During the court proceedings, the plaintiffs acknowledged that they had initiated their cause of action after ORC had reached an agreement with the university that was designed to correct the violations that had been identified in Graham's complaint.[3] The plaintiffs filed their initial complaint on September 29, 2017, approximately one month after the ORC agreement. On November 8, 2017, the plaintiffs sought a preliminary injunction that reinstated the tennis team. However, the court determined that the plaintiffs had waited too long to seek this remedy and held that a preliminary injunction was not available. The plaintiffs contemporaneously filed a state court action seeking similar relief, which delayed the ability of the federal court to address the matter. In the period of delay, Graham filed the OCR complaint, which resulted in the Resolution Agreement that was meant to address the imbalance of intercollegiate athletic opportunities at SUNY.

The plaintiffs turned to the federal court for relief that included an order that SUNY take action to establish athletic opportunities for women, to report on those efforts, and to end discrimination against women in athletics. The plaintiffs also asked the court to enjoin the university from eliminating any women's sports and to appoint a special master to supervise SUNY's compliance with the court's directives. The court observed that the requested remedies were covered in the Resolution Agreement. The court also noted that a special master would serve much the same role as that of the OCR. The court concluded that establishing the procedures requested by the plaintiffs would likely duplicate, or even undermine, the provisions of the Resolution Agreement and the efforts of the OCR.

While noting that Title IX does not contain an explicit private right of action, the Supreme Court has found an implied right of action in that legislation. The court observed that the narrow issue was whether the court could enjoin a university in a way that interfered with a Resolution Agreement that was already in place before the plaintiffs took action. The court noted that it had not found a case in any circuit that offered a holding on the issue of whether a Resolution Agreement precluded or mooted a private action for injunctive relief under Title IX.

However, in recounting the Eighth Circuit case of *Gebser v. Lago Vista Independent School District,*[4] the court found that an implied private action for system Title IX relief must be secondary to an agency proceeding that has resulted in satisfactory voluntary compliance. In interpreting *Gebser,* the court found implication that a private action seeking to alter or enforce the terms of an agreement between OCR and a university that is designed to rectify a Title IX violation would be an unwarranted interference in the Department of Education's administrative authority. The court held that, absent direct holdings on this issue, it was persuaded that the implied right of action in Title IX does not permit suits filed after a settlement between OCR and a university and which attempted to alter or enforce the terms of a settlement that remained in place.

With this framework in place, the court considered the parties' motions for summary judgement. The court chose to focus on SUNY's motion, since granting it would dispose of all issues raised by the plaintiffs.

As to Title IX, the defendants argued that the Resolution Agreement vitiated any need for the court to provide the injunctive relief that the plaintiff sought. The court held that by filing an action for injunctive relief

3 By the time the matter came before the court, all of the tennis players had either graduated or had left the school. They were replaced by other plaintiffs.

4 524 U.S. 274 (1998).

to compel SUNY to comply with Title IX, the plaintiffs were seeking remedies that would be independent of the Resolution Agreement, which was already aimed at obtaining compliance with Title IX. The court noted that even if injunctive relief were necessary, Title IX does not permit a court to require particular positive actions to satisfy the statute's requirements. The court concluded that providing the injunctive relief would undermine OCR's enforcement powers, interfere with an agreement between a federal agency and an educational institution partly supported by federal grants, and disrupt a process that was contemplated by the regulations implementing Title IX. In sum, the court concluded that the plaintiffs were effectively attempting to monitor, implement, and alter the Resolution Agreement. As it held that it did not have such power, the court granted the defendants' motion for summary judgment as to the Title IX claim.

The defendants further sought summary judgment on Graham's claims, arguing that a claim of employment discrimination by an individual employee is not available under Title IX. The defendants further claimed that Graham had not demonstrated any damages, and that no evidence existed to support his claim. The defendants further argued that the court must dismiss his equal protection claim, which alleged discrimination on the basis of his age. As to gender, the court found that the plaintiffs had not shown any evidence that Graham's gender had played any role in the decision to eliminate the women's tennis team. In an effort to show disparate treatment, the plaintiffs attempted to draw a comparison between Graham and Mary Grime, a women's basketball coach who was made an assistant for the football team after being required to leave the basketball job. However, SUNY had also assigned alternate duties to Graham after his term ended. The court found the Grime and Graham were not similarly situated and, therefore, granted the defendants' motion for summary judgment on this count as well.

Return to Table of Contents

Murder Charge Levied Against High School Coaches, Already Accused of Negligence

By Rachel S. Silverman, MS

On August 13, 2019, Imani Bell, a 16-year-old student at Elite Scholars Academy in Jonesboro, GA, died after collapsing during running drills during a basketball practice in 100-degree weather. At the time of the incident, the temperature was 98 degrees with a heat index temperature of 101 to 106. A heat advisory had been declared for Clayton Country that day. Bell was running up football stadium steps at the time of her collapse. The autopsy by the Georgia Bureau of Investigations confirmed that Bell's death was due to heatstroke caused by the vigorous physical exertion in the extreme heat. The official cause of death stated, "Hyperthermia and rhabdomyolysis during physical exertion with high ambient temperature," and the manner of death was listed as an accident (Albright, 2019). She had no pre-existing medical conditions.

For the defendants, the civil case named the head basketball coach, the athletic director, the principal, and the assistant principals. The civil lawsuit included multiple claims against the defendants, including failures to pay attention to the heat index, to monitor students for signs of overheating, and to provide rest period and water breaks (Diaz, 2021). However, the case became a criminal case in July of 2021 when a grand jury in Clayton County indicted Head Basketball Coach LaRosa Walker-Asekere and Assistant Basketball Coach Broom Palmer on charges of second-degree murder, cruelty to children, involuntary manslaughter, and reckless conduct. In bringing the charges, Tasha Mosley, the Clayton Country district attorney, stated that "[t]he murder charge is second degree and is based on criminal negligence as opposed to malice" (Murphy, 2021).

Civil negligence is the failure to use reasonable care that results in damages or injury to another person. To prove if negligence has occurred, the plaintiff must prove duty, breach of duty, cause of action, and damages/injuries. Criminal negligence is when the actions by a person ignore an obvious risk or disregard the life and safety of others. To prove criminal negligence, the state will have to show that the defendants acted

recklessly and created a high risk of injury or death, as well as that a reasonable person would have known that these actions posed such a risk. However, in the Bell case, the murder charges based on criminal negligence may have been to encourage a plea deal, according to Jessica Gabel Cino, a partner at a law firm in Atlanta. She stated that "[a] murder charge strapped on to a child endangerment/abuse charge isn't obviously inappropriate, but I do question whether the prosecution can prove it beyond a reasonable doubt." This case has yet to be decided.

A similar case was filed in Kentucky in 2009, with the heat-related illness death of football player, Max Gilpin. Gilpin collapsed during a football practice at which the heat index was 94 degrees. Head Football Coach, Jason Stinson was charged with wanton endangerment and reckless homicide, the first time a football coach had been criminally charged for the heat-related death of a player. Following a jury trial, Stinson was found not guilty on both charges.

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Return to Table of Contents

Articles

Report from the NCAA Special Convention and the Proposed Changes to the NCAA Constitution

By Ellen J. Staurowsky, Ed.D., Senior Writer and Professor, Sports Media, Roy H. Park School of Communications, Ithaca College, staurows@ithaca.edu

On Monday, November 15, 2021, the National Collegiate Athletic Association (NCAA) hosted a special convention to discuss proposed changes to the first six articles in the NCAA's manual that constitute its constitution. Following the U.S. Supreme Court's resounding rejection of the NCAA's principle of amateurism as a defense for business practices that would not be tolerated in any other industry in the United States in NCAA v. Alston and the enactment of state laws opening up avenues for college athletes to be able to profit from their names, images, and likenesses in the summer of 2021, the NCAA Board of Governors (BOG) announced that the time had come for a major restructuring of the organization. As former U.S. Secretary of Defense Robert Gates, an independent member of the BOG noted, ""Until we can better align the mission of the Association with its authority, the NCAA will not be able to play the role it should play in governing college sports. We cannot go on as we are" (Durham, 2021).

The NCAA's Process Pre-Special Convention

The NCAA's process for preparing the membership to have a discussion about a change in its governance structure began with the appointment of a 28-member Constitution Committee.[5] Proceeding on a tight

5 In the NCAA Conference Committee Charge, the committee was to have been comprised of 28 members (NCAA Staff, 2021). In July of 2021, the number of members on the committee was to have been

timeline, the committee distributed two surveys to stakeholders (one to college presidents, conference commissioners, athletic director, coach association executives, faculty athletics representatives, athletics health care administrators and a second to athlete leaders) to be completed during a 10-day span between August 23 and September 1, 2021. As per the Executive Summary of Findings issued by the Committee, the surveys were designed to gauge sentiment among stakeholders regarding what were referred to as "constitutional" elements that should be carried forward into the future and ideas for modernization and improvement. The Committee was charged with focusing on Articles 1-6 of the NCAA's Constitution with an expectation that the remainder of the work on reshaping the rest of the operating bylaws (Articles 10-21) and administrative bylaws (Article 31) would be addressed by the membership, although the process for doing so was unspecified.

Based on the results, the NCAA reported that a substantial majority (over three-quarters) of respondents across the membership expressed strong or very strong agreement that six principles were "central to the future of the NCAA" including:

- Conducting national championships;
- Primacy of the academic experience in policy- and decision-making;
- Sport-specific rules for competition and participation;
- Standards for allocating national revenue;
- Standards for college athlete eligibility.; and,
- Standards for college athlete health and safety (NCAA Research Staff, 2021).

Further, results from the surveys as reported indicated that college sport leaders across all sectors (divisional affiliations) and roles (executives through athlete leaders) supported at least minimum standard requirements at the national level for health and safety, inclusion and equity, and sport-specific playing rules. The juxtaposition of those sentiments in light of the Association's position that it does not have a legal duty to protect the safety of college athletes (*Sheeley v. NCAA,* 2013) nor has a legal duty to ensure the integrity of the education provided to athletes seems to leave the door open for continuing questions about what the NCAA actually does. This perception is likely not to go away given the statement on page 5 of the draft Constitution distributed to the membership by Constitution Committee chair, Robert M. Gates, on November 5, 2021. As delineated under proposed Article 2A.2.g, Organization, The Association shall

> *defer to other regulating bodies the investigation of and sanctions against school and school representatives' conduct that violates other regulating body or legal standards (e.g., Title IX violations that may also violate NCAA gender equity principles or academic accreditation standards that may violate NCAA academic principles). After final determination by a regulating body or court of school and school representative misconduct, the NCAA Board of Governors or division Board of Directors or Presidents Council may issue a public censure or take disciplinary action.*

The NCAA Special Convention

The NCAA Special Convention started with constituents associated with each division meeting separately to review each of the six articles before moving into an Association-wide meeting. In his welcome to the meeting, University of Georgia President Jere Morehead, who is also president of the Southeast Conference and member of the BOG, noted that "The Board of Governors made the decision this past summer to call for a new constitution. It has become increasingly clear that our current framework is not sufficient in addressing the challenges now facing the association" (NCAA Special Convention, transcript, 12:16:11). After introductory remarks from members of the Board of Governors and athlete representatives, attendees were given the opportunity to raise questions or concerns about each of the six articles. Those designated as having voting privileges were then given an opportunity to participate in a straw poll to indicate their level of support for each of the articles. In Division I, the voting was as shown in the following table. The number voting fell short of the total number of members in NCAA Division I (n=358), representing approximately 60% (the number of votes varied by article). While support

22 (Durham, 2021). In the announcement of the committee roster on August 10, 2021, the committee had 23 members (Osburn, 2021).

	Strongly Support As Written	Somewhat Support	Do Not Support	Number Voting
Article 1. Principles	42.13%	56.35%	1.5%	197
Article 2. Organization- Composition, Selection, & Role of the BOG	11.48%	77.00%	11.48%	209
Article 2. Organizational Structure of the Association	19.52%	73.81%	6.67%	210
Article 3. Finance	34.27%	55.87%	9.86%	213
Article 4. Compliance & Article 6. Institutional Control	22.67%	71.04%	6.00%	221
Article 5. Amendments to the Constitution	38.91%	59.78%	1.36%	

overall seemed strong, the pattern of votes suggests that there were still issues to be resolved with each of the articles as proposed.

Concluding Thoughts

While the escalating legal challenges the NCAA has experienced over the past 15 years argues for the Association to change the way that it does business, the process as it has so far been unfolding seems to reflect more of a business as usual approach rather than a mindset reflective of the transformation that the NCAA has been messaging. Some journalists have noted the membership of the NCAA Constitution Committee itself was comprised of NCAA insiders for the most part, raising a question as to how transformational the process was designed to be (Brown, 2021; Christovich, 2021). Katie Lever (2021b), writing for LRT-Sports, also questioned the objectivity of the committee, noting that there were no current Division I athletes represented and that the athlete designee for Division I was Kendall Spencer, someone whose service as the head of the national athlete advisory committee ended in 2013.

Further, the ideas that have been identified in crafting a future for college sport appear more reactive to the moment rather than strategic in vision. As a case in point, the fact that there was still support within the membership by administrators for "maintaining a model that focuses on amateurism" seems to suggest that the leadership has not yet come to terms with the implications of the U.S. Supreme Court's ruling in NCAA v. Alston (2021). Justice Kavanaugh's opinion could not have been clearer that the NCAA's use of amateurism to justify its business practices is deeply problematic. He wrote, "Specifically, the NCAA says that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA, is that the student athletes are not paid. In my view, that argument is circular and unpersuasive. The NCAA couches its arguments for not paying student athletes in innocuous labels. But the labels cannot disguise the reality: The NCAA's business model would be flatly illegal in almost any other industry in America" (Kavanaugh, 2021, p. 3).

The NCAA's "modernizing" efforts were punctuated with an old vocabulary, namely prohibitions against paying athletes and the continued use of the term "student-athlete". In the 18 ½ page draft of the "new" constitution, the term appears 44 times. In the 150 minutes that transpired during the NCAA Division I meeting at the Special Convention, the term was used 96 times. The NCAA appeared to be a doubling down on the term following a memo issued in September of 2021 by Jennifer Abruzzo, General Counsel, National Labor Relations Board, cautioning that private institutions that used the term to misclassify college athletes could have a chilling effect on college athletes exercising their rights as employees. When asked at a post-convention press conference about the repeated use of the term, NCAA President Mark Emmert seemed to suggest that there was nothing to be done, that it was the athletes themselves who insisted on the language. Notably, the athletes selected to serve on the NCAA's Constitution Committee are athletes who have never sued the Association. The athlete voice might sound very different if athletes who felt compelled to sue the

NCAA or protest against it like Sedona Prince, Shawne Alston, Jeremy Bloom, Ed O'Bannon, or myriad others (Kain Colter, for example) were on the NCAA Constitution Committee.

There is also the very real question of whether the membership at large fully understands or has time to consider the changes that are being proposed. While the NCAA reported that the Special Convention drew 2500 attendees to the virtual event, the number voting in the straw polls was considerably less.

Further, Lever (2021a) raised some methodological issues associated with the Committee's data gathering process, noting that the timing of the survey at the start of an academic year likely affected response rates as well as the time and attention stakeholders could devote to completing it. The shift in language within the survey is also noticeable, where the term "primacy" as a value is placed before the principle regarding academic experience while none of the other principles respondents were asked to consider had a similar descriptor included in the principle being evaluated.

The next steps following the Convention include the distribution of a survey between November 16-20 to all identified voting delegates to provide feedback; results from that survey are expected to be reviewed by the Committee between November 21-December 5 and based on those results modifications may be made to the draft constitution; and a series of meetings with various constituents is expected to be done between December 6-11. The submission of a final draft of the "new" constitution to the NCAA Board of Governors is expected by December 15, 2021 and an expected vote on the document at the January 2022 NCAA Convention.

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Return to Table of Contents

Greenspoon Marder Attorney Share Insights on Major League Baseball's Impending Labor Crisis

Fresh off what was by all accounts a stellar postseason for Major League Baseball, the league is now staring into the abyss, facing its first work stoppage in 26 years.

The labor crisis could pause the free-agent market and even threaten the start of spring training in February 2022.

Specifically, the five-year labor contract expires at midnight on December 1, and, given the time constraints, getting a new agreement done in time will be challenging to say the least.

What exactly is driving this crisis?

We sought out **Michael Burwick**, a partner in the sport law group at Greenspoon Marder, for some insights. What follows below is his interview:

Question: What factors are driving the current scenario?

Answer: Typically, collective bargaining agreements (CBAs) have expiration dates. The current five-year MLB CBA ends at 11:59 p.m. EST on December 1, 2021, so, without a resolution to the issues dividing the MLB owners and the MLB Players Association, there is likely to be a work stoppage on December 2. This does not necessarily mean that the forthcoming season

will be affected, as there is still ample time to work out a new CBA, but it definitely places the issues dividing the two sides into sharper focus. Some of these factors include:

- Sharing percentage of MLB revenues / revenue split between labor and management;
- Pay scale for players, especially minimum pay level and pay in players' early years of service;
- Service-time manipulation or when teams hold back a ready prospect in order to delay free agency or arbitration eligibility for a full year; and
- Tanking.

Q: Have there been a similar scenarios in MLB or other sports?

A: While we have certainly seen impasses leading to strikes, lockouts, and other work stoppages across professional sports, it might be most helpful to look at Major League Baseball as a precedent. In late 1983, the owners and players agreed to a one-year extension to come to an agreement. That negotiation required significant MLB concessions to the Players Association in order to get the next season underway but was ultimately successful. In fact, the last CBA (the one in place before the soon-to-be-expiring agreement) was to expire on December 1, 2016, and the MLBPA and MLB did not arrive at an agreement until the day before expiration. Another happy ending, but the issues separating players and owners now are far more wide-ranging and also more complicated than those back in 2016.

Q: Does either side have the leverage going into negotiations?

A: Conventional wisdom and most prognosticators say that the owners have the leverage. I actually disagree. While the owners certainly have the financial advantage and are led by Commissioner Rob Manfred, who has a strong background in labor and employment law, the real question, in my opinion, is who the fans will blame for a work stoppage. The popularity of baseball is still quite tenuous right now, despite a fantastic post-season, especially with respect to younger demographics. There is also tremendous support these days for the worker over the owner, the little guy over the billionaire, pay equity, the optics of racial disparity between owners and players, diversity more generally, and concepts related thereto; that the fans, who are the real consumers in this case, may very well side with the players. Part of this also comes down to COVID-19 and filling ballparks again. Here, the power lies more with the owners, as they are in a better position to withstand a work stoppage. That said, both sides have extra incentive in the wake of COVID to fill seats and to participate in the revenue derived therefrom. The biggest issue is how that revenue will be allocated between players and owners.

Q: What is the most likely result to come from the negotiations?

A: MLB is playing defense right now in terms of the players asking more from the owners than vice versa. But the players are very united and there are definitely significant sticking points between the two sides with respect to pay, free agency, arbitration, rookie, and early-stage contracts. Baseball has always been a bit different than the NFL, NBA, and NHL. But the players' salaries have declined 6% since 2017 while the salaries of NBA players have exploded, the NFL continues to be lucrative for players, and even the NHL is starting to put up some bigger numbers in terms of the pay packages recently offered to its players. The owners will have a lot to concede to the players to reach a deal, but I believe that a strike or a lockout can be avoided by an agreement on a revenue split that is more generous to the players and some forward momentum, although not as much as the players are seeking, on some of these other significant issues.

Q: How could this have been avoided?

A: It is truly difficult to opine on how this impasse could have been averted. So much has changed over the past couple of years, changes that were in no way foreseeable when the last CBA went into effect in 2016. That is one of the problems with collective bargaining agreements that are in place for five or ten years. When the world changes substantially, the number of items in dispute between players and owners (or union members and their employers) increases dramatically, as do the qualitative differences between the parties on an issue-by-issue basis. Both sides have been working since last spring to resolve these issues prior to the deadline. Perhaps if they had begun their efforts earlier, we would not be cutting it so close. That said, there

is such a gulf that exists between the two sides that, no matter when negotiations began, we might very well still be in the same position we are in today.

Return to Table of Contents

Astroworld Reminds Us — Semper Vigilans

By Gil Fried, University of West Florida

Semper Vigilans is the motto of the Civil Air Patrol, of which I was a Lieutenant several years ago. It means "always vigilant." The motto was to enforce the concept that we should always be vigilant to respond to possible threat and concerns.

Several years ago, my oldest daughter came home for Thanksgiving. During a nice meal, she chimed in "Dad you ruined concerts for me." I was a bit taken aback. Yes, I was a strict dad, but I asked how I had ruined concerts for her. She responded, "Well, you used to always talk about all the cases you handled involving injuries that happened at so many sport and concert events that when I go anywhere, I constantly think about all that can wrong and how crazy all the case you have handled have been. I always look for exits. I look for unusual crowd behavior. I stay away from the barricades … I am always nervous." I lifted a finger into the air and gave myself an imaginary point. Score one for dad! I turned my daughter into a situationally aware person who could grasp hazards and concerns in numerous public crowd situations. Situational awareness was drilled into my head through all my training in Israel. No unattended bag goes unnoticed and there are safety clues all around us- if we look.

This training and mindset came into play recently with the tragic deaths at the Astroworld concerts in Houston where ten concert goers unfortunately passed away. It is too early to examine the facts associated with the case and the facts will eventually come out. There are investigation and reviews going on at the state level, county level, and eventually in the courts. I do not want to focus on the facts, the false news stories, or the conspiracy theories for now. The key is for us as an industry to examine ourselves and prepare for future events.

The need for better communication could be seen in a recent television interview with a self-proclaimed industry expert who gave three tips for fans caught in a crowd surge. He suggested not yelling, not fighting the crowds, and praying. Frankly, I found that appalling. Here is an opportunity to help educate many people, and a somewhat flippant answer is to pray. A better response could include: don't position yourself right in front of the stage at a GA event, don't try to be the first one to a stage/barricade, try to go to the sides, if you fall- crawl to the sides, have a buddy system, keep a water bottle with you in case you cannot leave and start getting dehydrated, and simialr valuable tips for those navigating the crowd.

I also started thinking about our society and whether social media is having a negative impact on how crowds (and the public at large) behave, especially in the post-COVID environment. The availability of smartphones is great for documenting what might have happened, but as seen in the horrific Philadelphia train rape case earlier this year- many people who in the past might have tried to help- are now too busy filming rather than helping. Second, when I was growing up there were no fan codes of conduct. People acted with civility. The uptick in road rage, confrontations on airplanes, and even shooting at high school football games, as well as all sort of milder unruly behavior might, unfortunately, indicate a more violent or aggressive society with less regard for others and their safety. Even if we as an industry implements numerous safety strategies, *all it takes are several idiots acting in an inappropriate manner to cause chaos and possible loss of lives*

With all these concerns as part of our reality, what can, and should we do as an industry?

1. We must be transparent. We have to share with the public some of the strategies we undertake to make sure the public is safe, even if in the past those crowd strategies were covert or not disclosed for legitimate security reasons. Clearly, we do not need to cover safety strategies to reduce the threat of terrorist acts, but we should be candid with our patrons about the types of strategies utilized such as coordinated efforts with various law enforcement agencies, presence of medical personnel, management receptiveness' to hear from and actively listen to various stakeholders, and similar concerns.

Stakeholders might think we, as an industry, have an agenda to generate revenue at any cost. We must dispel this vicious industry smear, with showing how we take so many steps to produce safe events. A safe event is always the top (and some may even say only) priority.

2. We must communicate more effectively. Whatever elements contributed to the Astroworld tragedy, the perception among many is a lack of communication. Mixed messages came from various sources. What did the artist know/do? What did the incident command center know, and when? What did security/law enforcement know, and when? So many of these questions will focus on the communication chain and its apparent breakdown. It is easy to say lets document everything, and our incident command systems help us tremendously in this regard. However, were all these voices listened to at Astroworld? Were past incidents analyzed and communicated with all relevant parties? I share with attorneys in crowd management cases a list of hundreds of questions they should ask in a deposition for a crowd management case- many questions revolve around the need for communication. The best policies and procedures have little value if there are communication lapses.

3. We must understand fans and their motivations. People's behaviors in sport and entertainment settings are changing –quite drastically, and we have to understand them and what motivates them. We might need more experts in fan behavior who can help us understand what messages resonate with people. We might have had specific industry best practices that we relied upon in the past, but those might fly out the window if they have not been modified over the years to go along with how people have changed and how they act, especially now given social distancing and crowd capacity considerations. Simialr to how the medical field is not static, the venue management industry is not static, and we must stay one step ahead of our customers. This is the key to hosting a safe event.

4. We must speak with a unified voice. Major events are often used as a tool to divide and attack an industry. After we hopefully surmount the COVID crises, we do not need another high-profile event such as Astroworld provides to attack our industry. That is why we need to go on the offensive and tell our story. We need to explain to everyone that the number one rule for facility managers is, was, and always should be the safety of everyone in our buildings. There will be calls for government oversight and new regulations. Such is the nature of the knee-jerk reaction after crowd tragedies. There will inevitably be finger pointing and the eventual blame game, with both lawyers and crowd managers included in this ongoing debate. However, if we as an industry speak with one voice and accentuate all the good we do (and have done recently) (e.g. using stadiums as mass vaccination clinics, etc.), and diligently work to address any shortcomings, we can respond in a positive and healthy manner that benefits all venue management stakeholders.

We are fortunate enough to work in a great industry. Every industry goes through certain hardships. The test of our character is how we respond to these challenges. Semper Vigilans!

Return to Table of Contents

The Cleveland Guardians Sue the Cleveland Guardians

Wait . . . What? No, He's on Second

By Robert J. Romano, Senior Writer

In a case of *who's on first*, or more accurately – *who got there first*, the Cleveland Guardian Roller Derby Team has filed a federal lawsuit against the city's MLB franchise, the formerly named Cleveland Indians, claiming trademark infringement after the baseball team announced it was changing its name to, yes you guessed it, the *Cleveland Guardians*. Per the Roller Derby's complaint, it claims that two sports teams in the same city cannot have identical names, and since they were first, apparently being the *Who*, the baseball club's planned name change needs to be either . . . *I*

don't know . . . sent to third base, or better yet, benched altogether. In addition to its trademark infringement claim, the Guardian Roller Derby Team alleges that the Cleveland Indians franchise engaged in *Unfair Competition* and *Deceptive Trade Practices* and because of this, Roller Derby is entitled to injunctive relief under both federal and Ohio law.

In December 2020, the Cleveland Indians organization, after years of protests from both fans and Native American groups, announced it would change the team's name, moving away from the nickname that had long been the subject of criticism. The baseball franchise settled on the name *Cleveland Guardians* and on April 8, 2021, according to the Roller Derby Team's complaint, 'surreptitiously' filed a trademark application to secure the *Cleveland Guardians* name and moniker in the small, East African island nation of Mauritius.[6] Additionally, on July 22, 2021, the day before the team's press release announcing the name change, the Cleveland baseball franchise filed two federal U.S. trademark applications claiming the exclusive right to use the name *Cleveland Guardians* for a range of goods and services including shirts, jerseys, and other various team merchandise.[7] For both applications, the Roller Derby Team contends that "the Indians relied for priority on their Mauritius trademark filings from earlier."[8]

In its leadoff argument, the Roller Derby Team contends that the Indians organization's intent to rebrand itself as the *Cleveland Guardians* amounts to unfair competition under federal law, specifically Section 1125(a) of Title 15 of the United States Code, because it owns the trademark to the name *Cleveland Guardians* under common law. To establish an **infringement** of an unregistered mark under Section 1125(a), Roller Derby must establish that a) it had a valid and legally protectable mark; b) it owns the mark; and c) the baseball team's use of the mark to identify goods or services causes a likelihood of confusion.[9]

The Guardian Roller Derby Team alleges that in 2014, under the *Cleveland Guardian* name and moniker, it began selling a variety of merchandise including patches, shirts, jerseys, cups, and bumper stickers to fans and supporters at events the team was either participating in or hosting.[10] In addition, the Roller Derby Team utilized Facebook and Instagram to promote itself and to interact with fans and supporters, while also using its www.clevelandguardians.com website to sell team merchandise. By promoting its name and logo through these various mediums, the Guardians Roller Derby Team asserts that it has generated 'goodwill' throughout the greater Cleveland area that entitles it to a common law trademark based on a priority of use, which, if the baseball club now intends to use in connection with its sports teams, will likely cause confusion in the marketplace for the sport consumer.[11]

Up second on the batting order of claims, the Roller Derby Team alleges Trademark Infringement because in January 2017, it registered its rights to the trade name *Cleveland Guardians* with the Ohio Secretary of State's Office.[12] Therefore, the Indians organization's unauthorized use of the *Cleveland Guardians* name in connection with a sports team and the sale of related merchandise will likely cause confusion between Roller Derby's goods and services and the baseball team's goods and services. Interestingly, however, the Roller Derby Team did not apply for a federal trademark of the *Cleveland Guardians* name and logo until after the baseball franchise submitted its application.[13]

And finally, batting third in the Roller Derby's rotation, is the claim that the Indians' act of acquiring its own trademark to the *Cleveland Guardians* name violates Ohio's Deceptive Trade Practices Act since it was done intentionally, willfully, wantonly, and maliciously, and without regard for Roller Derby Team's rights.[14] The Guardian Roller Derby Team alleges that the Indians knew or should have known of its use and of priority of rights to the name since it would be "inconceivable that an organization worth more than $1B and estimated to have annual revenues of $290M+ would not at least have performed a Google

6 Case: 1:21-cv-02035 Doc #: 1 Filed: 10/27/21.

7 Trademark application serial nos. 90844557 and 90844546.

8 Case: 1:21-cv-02035 Doc #: 1 Filed: 10/27/21.

9 **A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc., 237 F.3d 198 (3rd Cir. 2000)**.

10 Case: 1:21-cv-02035 Doc #: 1 Filed: 10/27/21.

11 Id.

12 Certificate No. 3975830.

13 Serial Nos. 90850953 and 90850972 pending before the U.S. Trademark Office.

14 Ohio Revised Code § 4165.02.

search for *'Cleveland Guardians'* before settling on the name, and even a cursory search would have returned the website (www.clevelandguardians.com) as the first hit."[15]

Instead, the Indians intentionally and maliciously filed a trademark application for the *Cleveland Guardians* name, first, with the East African island nation of Mauritius, (effectively hiding the application unless one knew where to look), before filing its federal U.S. trademark applications based on its 'priority of rights' due to Mauritius trademark filings from earlier."[16]

The Guardian Roller Derby Team asserts that it wasn't until after the baseball organization filed its federal trademark applications that it informed them of its intended use of the name. The Roller Derby Team response was to offer its trademark rights to the team's names, including the website, and invited the MLB team to make an offer.[17] The Indians replied by saying *I don't give a darn* (shortstop) and offered a "a nominal amount". Said amount was summarily rejected by the Guardians Roller Derby Team.[18]

Apparently, the Indians organization would rather play a game of *Who's on First* by engaging in costly and time-consuming litigation instead a paying a fair value for the rights to the trademark. By throwing the baseball/trademark around the proverbial horn, i.e. Mauritius, the MLB franchise can defer and possibly avoid paying any of its $290 million in annual revenue to a non-profit organization whose profits are used to provide "funding for training its skaters and for hosting community events."[19] And we thought they were bad when they were using a Native American name and symbol as its trademark.

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Return to Table of Contents

15 Case: 1:21-cv-02035 Doc #: 1 Filed: 10/27/21.

16 Id.

17 https://www.nytimes.com/2021/10/27/sports/mlb-roller-derby-cleveland-guardians-lawsuit.html

18 Id.

19 Id.

The Anti-Cheating Movement: Ridding Esports of Cheats

By Erick Orantes, Aalok Sharma and Habib Ilahi, of STINSON LLP

Over a hundred years ago, several Chicago White Sox baseball players were credibly accused of tanking against the Cincinnati Reds in the 1919 World Series. Allegedly, a criminal syndicate led by mobster Arnold Rothstein paid those players to deliberately throw the games. A criminal trial later took place; however, all players were acquitted of all charges. Nonetheless, the scandal, which later became known as the Black Sox Scandal, rocked professional baseball for decades.

More recently, some esports titles have encountered their own matchfixing scandals which may become synonymous with the Black Sox.[20] With millions of dollars in wagers in legal and illegal gambling marketplaces, it should come as no surprise that some esport matches are thrown or fixed. Recently, the FBI has conducted probes into Counter Strike Global Offensive (CSGO) teams and tournaments for purported bribery, match fixing and other cheating. Similar to the Black Sox Scandal, criminal syndicates approach gamers to purposefully throw their match for the benefit of the syndicate. The investigation into cheating and fixing in CSGO is ongoing. According to media reports, the illegal activity between syndicates and some players has been going on for quite some time. This type of match fixing results in considerable harm to game publishers, tournament organizers, leagues, teams, players, coaches, fans, advertisers and sportsbooks.

Since some esports tournaments take place across the globe, criminal enforcement can become complicated. Certainly, global competitions raise the issue of jurisdiction and conflicts of laws. However, for cheating that occurs within the United States, some laws may be used to ferret out cheating in esports. For example, the Sports Bribery Act of 1964 provides for criminal penalties "for any person who carries into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme

20 Other than organized match fixing, esport organizations are focused on eradicating corruption and doping. This conduct is being monitored by some game publishers, governmental authorities, and third parties such as Esports Integrity Coalition (ESIC).

in commerce to influence, in any way, by bribery any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest."[21] Violations of the Sports Bribery Act permit fines and imprisonment for up to five years. To date, the Sports Bribery Act has been used very little by prosecutors. There are less than two dozen reported decisions, with the majority of those cases involving manipulated results in horse racing. Besides federal laws, state law can be used to prosecute criminal conduct. As an example, New Jersey law prohibits "rigging publicly exhibited contest[s]." Under that law, it is a crime to tamper with a sporting event, including the solicitation or acceptance of benefits for rigging an event. The ultimate goal of this law is to insure integrity so that the outcome is not affected by nefarious conduct.

Increasingly, some believe that recently passed legislation, titled the Rodchenkov Anti-Doping Act of 2019, may assist in the crackdown of cheating in esports. The act was passed to provide criminal enforcement mechanisms to counter cheating or doping. This act was created as a result of the state-sponsored doping scheme employed by the Russian Olympic Committee during the 2014 Olympic Winter Games held in Sochi, Russia. Unlike the Sports Bribery Act or other federal and state laws, the Rodchenkov Act specifically provides for extraterritorial enforcement. Thus, global esports competitions would not escape enforcement by federal prosecutors. Under the Rodchenkov Act, it is unlawful for any person to use a "prohibited method" or "prohibited substance" in any international sports competition. However, the term "prohibited method" relates solely to methods or practices which involve illegal doping. Accordingly, the Rodchenkov Act could be used to crackdown on illegal doping in esports, but it would provide little assistance in rooting out illegal match fixing.

Corruption, match fixing, bribery, and other misconduct has existed in traditional stick-and-ball sports for centuries. Given the meteoric growth in the esports marketplace, it was only a matter of time until this industry faced similar misconduct. While there are a number of tools available to prosecutors to seek out corruption, the most effective methods involve self-governance, and may include rigorous investigations by outside counsel. Due to the irreparable harm that teams and organizations face with this growing threat, the esports marketplace must take protective measures itself and rid itself of cheating.

21 It's unclear whether the Sports Bribery Act applies to esports. The statute only applies to "sporting contests," which means "a contest in any sport, between individual contestants or teams of contestants (without regard to the amateur or professional status of the contestants therein), the occurrence of which is publicly announced before its occurrence."

Return to Table of Contents

Former Oregon Athlete Requests the 'Max' After Suffering a Concussion During a High School Football Game

By Robert J. Romano, Senior Writer

It is settled law that within interscholastic athletics, high schools, together with the coaches they employ, have little to no legal responsible for ensuring the health and safety of the student-athletes that play under them. This is because courts have held that, in most cases, high school athletes assume the inherent risks involved within a sport. Therefore, because of the voluntary nature of athletic participation, schools and coaches can avoid liability for injuries that are considered 'part of the game'. This is not the circumstance, however, when a high school student sustains a head injury and possible concussion.

Currently, all fifty states have enacted legislation, in some form, regarding high school and youth sport-related concussion management guidelines. Each adopted law varies, therefore, coaches, athletic trainers, physical education teachers, and other school personnel need to familiarize themselves with their state and local concussion policies, in addition to any school specific policies, so that they can best serve their student-athletes and to ensure that they are protecting them against any and all the long term effects associated with concussions.

The State of Oregon implemented a concussion management guideline for interscholastic sports in 2010 entitled Max's Law. Oregon's concussion statute reads, in part, as follows:

> *(3)(a) A coach may not allow a member of a school athletic team to participate in any*

athletic event or training on the same day that the member:

(A) Exhibits signs, symptoms or behaviors consistent with a concussion following an observed or suspected blow to the head or body; or

(B) Has been diagnosed with a concussion.

(b) A coach may allow a member of a school athletic team who is prohibited from participating in an athletic event or training, as described in paragraph (a) of this subsection, to participate in an athletic event or training no sooner than the day after the member experienced a blow to the head or body and only after the member:

(A) No longer exhibits signs, symptoms or behaviors consistent with a concussion; and

(B) Receives a medical release form from a health care professional.

According to court records, on September 13, 2019, Newport (Oregon) High School football player, Ashton Sampson, after receiving a hit to the head by an opposing player, reported to the coaching staff that he felt a 'tingling sensation' radiating down through his arm. Newport High's head football coach, Rod Losier, pulled Sampson from the field of play for the remainder of the game. What is interesting however, and what may cause the high school and the school district to ultimately be held liable, is that Coach Losier failed to notify either the 'game administrator' or Sampson's parents of Ashton's injury and then, upon returning back to Newport High School after a three and a half-hour bus ride, allowed the injured athlete to drive himself home. A few days later, Ashton was seen by a physician who diagnosed him with a concussion.

On September 9, 2021, the former high school athlete sued Newport High School and the Lincoln County School District claiming that they, both jointly and severely, were negligent by a) failing to have appropriate policies and procedures in place for concussions, b) failing to follow protocols and Oregon law regarding injured students, and c) failing to recognize his head injury and take any and steps to provide proper notification and medical attention.

Per his lawsuit, Ashton is asking for non-economic damages in the amount of $75,000 and $3,000 for medical expenses. These dollars figures are based on the claim that as a result of the concussion, the young athlete suffers from chronic headaches and head pressure, tingling in both arms, difficulty with memory and concentration, vision problems, sensitivity to light and sound, mental fog, low energy and drowsiness, and recurrent vomiting and nausea.

While we all may agree that Coach Losier's actions on that September night in 2019, wherein he failed to inform the school administration and the athlete's parents that Ashton received a head injury during the course of the game, coupled with the fact that he then allowed Ashton to drive himself home, especially after a long bus ride, were clearly not the best decisions based on the circumstances, do they, however, rise to the level wherein both the high school and the school district would be liable per the state's Max's Statute? That question will undoubtable be answered by a judge per a summary judgment motion or ultimately by a jury after trial. What is clear, however, is that all high school coaches, athletic trainers, and school administrators must be diligent, know and understand their state's concussion management laws, and most importantly, make sure that in all circumstances, any athlete who suffers a head injury receives proper attention and care. If not, they may end up paying the Max under their state's implemented concussion management statute.

Return to Table of Contents

Appeals Court Approves Settlement Restoring Equal Opportunities For Women In Brown University Athletics

A federal appeals court has unanimously affirmed approval of a **settlement agreement** between Brown University and a class of women student-athletes at Brown which resolved a class-action court challenge to Brown's decision in June 2020 to cut women's teams from its varsity athletics program. The court action, filed last June by cooperating attorneys from Public Justice and the ACLU of Rhode Island and two private law firms, alleged that the cuts violated a 1998 consent agreement that the University entered to

comply with Title IX, the federal law that guarantees equal access to athletic programs for female athletes.

In December 2020, U.S. District Judge John McConnell, Jr. **approved the agreement**, which, among other things, reinstated two women's teams and barred elimination or reduction in the status of any women's varsity team for at least the next four years. The agreement was approved over the objections of twelve students who are members of two women's sports teams (gymnastics and ice hockey) that were not directly affected by the 2020 program cuts. Those students appealed the settlement to the U.S. Court of Appeals for the First Circuit in Boston, largely objecting that it provides for sunsetting the 1998 consent decree in 2024.

The appellate court agreed with the attorneys for the ACLU and Public Justice that the settlement agreement "conferred demonstrable benefits" to students, and further noted that "the passage of time had eroded the advantages" of the 1998 decree and that there "was never any realistic prospect" that the agreement would last forever. Students will continue to have the ability to file a new lawsuit should any future violations of Title IX be alleged.

The appellate court opinion concluded:

"Ensuring gender equality in collegiate athletic programs is serious business. Over nearly three decades, Brown and the class representatives have made considerable strides in this direction, and the need for judicial supervision has diminished. The district court fairly concluded that the finish line is in sight."

Public Justice and ACLU of Rhode Island cooperating attorney Lynette Labinger argued the case in support of the settlement agreement in September. The lawsuit was also handled by Leslie Brueckner of Public Justice; Arthur Bryant and Lori Bullock of Bailey & Glasser, LLP; and Jill Zwagerman of Newkirk Zwagerman in Des Moines, IA.

Public Justice and ACLU cooperating attorney Lynette Labinger said today: "We are pleased to see that the protections for women athletes at Brown achieved by the settlement approved last year remain in place and that Brown's obligation to hold the line against any more cuts to its women's program is secure for the remaining life of the agreement."

Arthur Bryant of Bailey & Glasser, LLP, co-counsel for the women, who first brought this lawsuit with Public Justice (then Trial Lawyers for Public Justice) in 1992, added: "This is a major victory for our clients – the female student-athletes and potential student-athletes at Brown – and everyone committed to advancing gender equity. In June 2020, Brown University intentionally violated the 1998 settlement agreement in this landmark Title IX case, announcing it would reinstate men's varsity teams it had said it would eliminate, but no women's teams. Our clients forced Brown to reinstate the women's equestrian and fencing teams – and won additional protections for all its women's teams. They proved again the critical value and importance of Title IX."

Return to Table of Contents

Fifteen-Year-Old Soccer Player Seeks Order to Prevent National Women's Soccer League From Preventing Her From Playing on Team

By Charlie S. Shin, MS & Michael S. Carroll, PhD

On May 4, 2021, 15-year-old Olivia Moultrie filed a complaint and motion for a temporary restraining order (TRO) and preliminary injunction against the National Women's Soccer League (NWSL) from enforcing its age rule to prevent her from signing a professional contract with a club in the league. At the time of the complaint, NWSL rules required an individual to be at least 17 years old in order to be eligible to join one of their teams. Moultrie was not seeking to require the NWSL or any of its member teams to hire her nor interfere with the collective bargaining agreement (CBA) between NWSL and the NWSL Players Association (NWSL PA). but instead wanted an opportunity to compete for a spot on a professional soccer team based on her merit, free from the Age Rule's restrictions. The court granted the temporary restraining order on May 24, 2021 until a preliminary injunction hearing could be held.

Moultrie's complaint challenges the NWSL's Age Rule as a violation of the Sherman Anti-Trust Act, 15 U.S.C. § 1, alleging that it serves no legitimate business justification or procompetitive purpose, and instead impedes her career development as a soccer player and fails to serve any legitimate public interest.

Sherman Anti-Trust Act

Moultrie argues that the ten teams in the NWSL have agreed among themselves and with the League not to contract with soccer players under the age of 18, without regard to their talent or their ability to compete in the League. Additionally, additional evidence supports that the NWSL and its member teams are not a single entity under § 1 of the Sherman Act despite the League classification as an LLC.

Business Justification

Moultrie also argues that the NWSL is the only option for women to play professional soccer in the United States, and that the Age Rule serves no legitimate business justification or procompetitive purpose.

Career Development and Public Interest

Moultrie asserts that keeping her out of the NWSL will continually slow her development, delay her improvement, and more generally impede her career as a soccer player. Additionally, she points to the absence of any age restrictions for male soccer players to demonstrate the public interest in open competition and the equal treatment of men and women.

On June 7, 2021, the Court held a hearing on the preliminary injunction motion. Both parties presented additional evidence and arguments, but the Court again found that the NWSL had not presented any compelling procompetitive reasons to justify its anticompetitive policy, nor has it shown that eliminating the Age Rule would cause any concrete injury to the NWSL. As a result, the Court again found that the merits clearly favored Moultrie's position, that she would be irreparably harmed if it did not grant the preliminary injunction, and that the balance of equities and the public interest strongly favor affording girls in the United States the same opportunities as boys. Finally, the Motion for Preliminary Injunction was granted. The Court again found that Moultrie had met her burden under either the mandatory or prohibitory injunction standard, and therefore assumes without deciding that Plaintiff requests a mandatory injunction. There were a number of factors that lead to Preliminary Injunction.

Anticompetitive Effect

The Court analyzed the Age Rule under "rule of reason" analysis, which is the accepted standard for testing whether an alleged restraint on competition imposed by a sports league violates § 1 of the Sherman Act. Moultrie has established concerted action between the NWSL and its member teams to enforce the Age Rule, thus restricting the market for players in which the member teams compete. Thus, the Court found that Moultrie has satisfied the first step of her initial burden by showing the existence of a contract, combination, or conspiracy among two or more separate entities.

The Court also found that, as the only professional women's soccer league in the United States, the NWSL clearly has market power in the labor market for women professional soccer player. The Court then found that the Age Rule unreasonably harmed competition in the same way the NBA's "four years from high school" rule did in *Denver Rockets v. All-Pro Mgmt., Inc*., (1971) and *Haywood v. Nat'l Basketball Ass'n*, 1971).

Finally, the NWSL failed to show a procompetitive rationale for the Age Rule's restraint on the market. The league offered justifications for the Age Rule which focused on cost reduction, without explaining how its proffered rationales improve or broaden competitive choices in any way. In addition, the NWSL claimed that the Age Rule is designed to create operation efficiencies, but failed to demonstrate how the rule increases efficiency. The Court concluded that the NWSL failed to meet its burden of demonstrating a procompetitive rational for the Age Rule and that Moultrie has shown that the law and facts clearly favor her position that it violates § 1 of the Sherman Act.

The Non-statutory Labor Exemption

The Court rejected the NWSL's argument that the Age Rule became immunized from antitrust scrutiny once NWSL recognize the NWSL PA as an exclusive bargaining agent and began the collective bargaining process. The Court also found that the NWSL had not identified a single case where the non-statutory labor exemption applied to a regulation created before the recognition of a union, and which had not been subsequently included or implicitly incorporated into a collective bargaining agreement. The Court again found that the non-statutory labor exemption did not apply to this case.

Irreparable Harm

The Court found that Moultrie had shown that she has the requisite skills and is ready to play professional soccer, that the Age Rule is impeding her development as a soccer player in an irreversible manner, that the career of a professional soccer player is short, and that there are no substitutes to actual professional competition to help her realize her full potential. Additionally, she does not contend that playing in the NWSL as a minor is necessary to achieve her goal of playing on the National Team. Rather, she asserts that the Age Rule interferes with that goal by requiring her to wait several years before she can play professional soccer. Thus, the Court again found that Moultrie has shown that she would suffer irreparable injury in the absence of an injunction.

Balance of the Equities and the Public Interest

The Court found that the threat of irreparable injury to Plaintiff was not counterbalanced by any cognizable harm to Defendant from a temporary injunction and that the public interest weighed in favor of granting the requested injunction. Specifically, the Court found that the Defendant provided insufficient evidence of the hardships it would allegedly suffer in the face of an injunction, and that enjoining the Age Rule serves the public interest because it both preserves free and open competition and promotes gender equity. The Court noted that the NWSL's comparable men's league in the United States, MLS, has no age limit and employs players under the age of 18.

By satisfying all four of the elements outlined above, Moultrie's motion for Preliminary Injunction was granted, stating that that NWSL and its members, officers, agents, servants, employees, attorneys, teams, and all persons in active concert or participation with them are enjoined from enforcing the Age Rule against Plaintiff, unless and until such Age Rule is contained in a fully effective collective bargaining agreement that would apply to her, as permitted by law.

Charlie S. Shin is a first-year doctoral student in Sport Management at Troy University. He is currently a Vice President of Data Strategy & Analytics at the Indianapolis Colts. He also serves as an adjunct faculty for Sports Management at Columbia University.

Michael S. Carroll is a Full Professor of Sport Management at Troy University specializing in research related to sport law and risk management in sport and recreation. He also serves as Online Program Coordinator for the University. He lives in Orlando, FL.

Return to Table of Contents

Pennsylvania Woman Sues, Claiming She Suffered Concussion on Giant Slide

An Allegheny County (Pa.) woman has sued Mt. Pleasant Township after she suffered a concussion and other injuries while riding down the Giant Side at Mammoth Park last year.

Michelle D. Lynch, who filed the lawsuit in Westmoreland County, alleged that she became airborne during her ride on the 100-foot slide, resulting in numerous injuries.

Lynch claimed in the lawsuit that as she approached the bottom of the slide, she took to the air, striking the metal sides of the ride before skidding several feet on the concrete.

In the suit, she claimed she continues "to endure great pain," as well as suffers "inconvenience, embarrassment and mental anguish."

She has also missed work and spent "large sums of money" on medical treatment that continues as she recovers, according to the complaint.

Another woman, Melissa A. Cooley of Allegheny County, also sued the Township earlier this year.

Both women are reportedly represented by attorney Richard G. Talarico of Pittsburgh,

The slide has been a fixture in the park since 1973. It was redesigned and reconstructed as part of $1.1 million project in 2020 and renamed the Giant Slide.

Return to Table of Contents

News Briefs

Hogan Lovells Advises USA Cricket as It Wins Historic First T20 World Cup Hosting Bid

Hogan Lovells, which boasts one of the leading sports practices in the legal industry, advised USA Cricket on its successful bid to co-host the International Cricket Council's (ICC) Men's T20 World Cup in 2024. The event is historic in that it will be the first global cricket tournament to be staged in the United States. The sport's global governing body, the ICC, announced the decision on November 16, with Cricket West Indies joining USA Cricket in the successful bid. The Hogan Lovells team was led by partner Michael Kuh and included partners Matt Eisler, Mark Weinstein, Siobhan Rausch and Nitin Gambhir, and counsel Steve Argeris.

Power & Cronin Expands Sports Law Practice Group with Hire of Michael Viverito

Power & Cronin, Ltd announced today the hire of Michael Viverito, building upon its existing sports law practice group. Besides sports law, Viverito will also focus his practice on Corporate Law, Workers' Compensation, and Intellectual Property. He will support Jared P. Vasilauskas, who heads the practice group. Vasilauskas noted that one of the things that attracted the firm to Viverito was his "experience in drafting and negotiating a variety of different business and licensing agreements on behalf of both companies and employees." Viverito, who is licensed in both Illinois and Wisconsin, is a recipient of the Sports Law Certificate issued by the National Sports Law Institute.

Greenspoon Marder Attorney Will Teach Sports Law as Adjunct at Georgia Tech University

Bruce B. Siegal, who joined Greenspoon Marder in its Atlanta office over the summer as of counsel in its Entertainment, Media & Technology Industry Group, will be an adjunct professor of sports law this spring at Georgia Institute of Technology. Siegal, who has more than 30 years of sports industry and intellectual property experience, focuses on sports brand protection and enforcement, licensing, contract negotiation, marketing, and business operations, helping brand owners maximize intellectual property value through licensing, sponsorship, and endorsement agreements, and assisting licensees on navigating the licensing marketplace.

Journal of NCAA Compliance Expands Editorial Review Board

The Journal of NCAA Compliance (JONC), a peer-reviewed journal published by Hackney Publications, has expanded its Editorial Review Board to accommodate the growing interest compliance professionals have in writing for the publication. **JONC**, which is led by Academic Co-Editors Dave Ridpath (Ohio) and Clay Bolton (Texas A&M – Commerce), has been produced for 15 years and has a readership of approximately 1,000 NCAA compliance professionals.

The new ERB members and their terms are:

- Rob Mathner, Troy State University,2019-23
- Brandon Wright, Ohio University ,2019-23
- Ed Edmonds, University of Notre Dame,2019-23
- Kerri Cebula, Kutztown State University,2019-23
- Joshua Lens, University of Arkansas,2019-23
- Lauren McCoy, Winthrop University,2019-23
- Bruce Smith, Whittier College,2019-23
- Joe Sabin, SE Louisiana University,2021-25
- Ali Fridley, University Southern Mississippi,2021-25
- Chase Smith, University of Southern Indiana,2021-25
- Peyton Stensland, University of Cincinnati, 2021-25
- Farah Ishaq, Northern Illinois University, 2021-25
- Andrew Goldsmith, Colorado State University 2021-25
- Sarah Stokowski, Clemson University,2021-25

Those interested in writing for the publication, should visit: **https://journalncaacompliance.com/journal-of-ncaa-compliance-bylaws-and-submission-procedures-01-1-21/**. Those in the academic community who are interested in subscribing should visit: **https://hackneypublications.com/our-publications/the-journal-of-ncaa-compliance/**

Return to Table of Contents