Marquette Sports Law Review

Volume 14
Issue 2 *Spring*

Article 12

Spring 2004

2003 Annual Survey: Recent Developments in Sports Law

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2003 ANNUAL SURVEY:

RECENT DEVELOPMENTS IN SPORTS LAW

I. INTRODUCTION

This article focuses on important cases in the field of sports law during the period of January 1, 2003 to December 31, 2003. It does not discuss every case related to sports law during the past year, but instead provides a survey and summary of some of the more important and more interesting decisions of this period. The article is divided into a number of categories based on particular focus, with some categories further sub-divided by area of law or area of the sports field.

II. ATHLETE AGENT ISSUES

In *Bauer v. Interpublic Group of Cos.*,[1] the U.S. District Court for the Northern District of California considered allegations by the plaintiff, an athlete agent, that another sports agency firm provided plaintiff's player with negative information about him, thus, intentionally interfering with the contract between plaintiff and player, and therefore, inducing the eventual termination of the player's representation agreement with the plaintiff.[2] The plaintiff, Francis G. Bauer was a registered player agent with the National Football League Players' Association.[3] David Carr signed a representation agreement with Bauer on January 1, 2002.[4] However, Carr terminated his representation agreement with Bauer on January 12, 2002,[5] signing instead with the defendants on January 22, 2002.[6] Although Carr's mother told Bauer that David Carr had recently received negative newspaper articles in the mail prior to termination of the agreement, Carr attested that no one at Octagon Marketing and Athlete Representation, Inc. ever commented on Bauer.[7]

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1. 255 F. Supp. 2d 1086 (N.D. Cal. 2003).
2. *Id.* at 1088.
3. *Id.*
4. *Id.*
5. *Id.* at 1089.
6. *Bauer*, 255 F. Supp. 2d at 1092.
7. *Id.* at 1090-92.

To prove that the defendants had intentionally interfered with Bauer's contract with David Carr, Bauer was required to prove: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage."[8] Because Bauer could not produce evidence that the defendants had sent the letters to David Carr, he failed to meet his burden under the law, and summary judgment was granted in favor of the defendants.[9]

The Superior Court of Connecticut considered similar contractual issues between athlete and agent in *Lounsbury v. Camby.*[10] In this case, the plaintiff, John Lounsbury, alleged that, while a student-athlete at the University of Massachusetts, the defendant, Marcus Camby, promised to sign an exclusive agency agreement with Lounsbury at the completion of his collegiate playing career if Lounsbury provided him, his friends, and family with money, gifts, and other services.[11] Camby moved to dismiss Lounsbury's complaint for lack of subject matter jurisdiction, asserting that "a dispute between a player and his agent is subject to the mandatory arbitration provisions of the [National Basketball Players Association Regulations Governing Player Agents]."[12] At the time of the promise, Lounsbury was not a certified agent and, therefore, was not authorized to represent Camby in contract negotiations with any NBA team in accordance with the NBA collective bargaining agreement.[13] In 1996, Camby signed an exclusive representation agreement with defendant Proserv, Inc.[14] Lounsbury alleged that Camby had breached their oral agreement and that Proserv had tortiously interfered with that oral agreement.[15] Had Lounsbury been a certified NBA player agent, his dispute with Camby would have been subject to the resolution provision outlined in section 5 of the National Basketball Association Regulations.[16] However, the court noted that the term "agent" found within the provision referred to a certified agent.[17] Accordingly, the court stated that there was no basis for

8. *Id.* at 1094 (quoting Quelimane Co. v. Stewart Title Guaranty Co., 19 Cal. 4th 26, 55 (1998)).

9. *Id.* at 1095.

10. No. CV 990150580S, 2003 Conn. Super. LEXIS 2273, at *1 (Conn. Super. Ct. Aug. 12, 2003).

11. *Id.*

12. *Id.*

13. *Id.* at *1-2.

14. *Id.* at *2.

15. *Lounsbury,* 2003 Conn. Super. LEXIS 2273, at *2-3.

16. *Id.*

17. *Id.* at *5.

concluding that an uncertified agent, such as Lounsbury, was subject to the same regulations.[18] In fact, it held that an uncertified agent has no legal right to represent an NBA player in contract negotiations with any team.[19] Because Lounsbury was not subject to the NBA regulations, the court denied Camby's motion to dismiss.[20]

Subsequently, the court also considered the motion for summary judgment of the defendant, Proserv, Inc.[21] In its motion, Proserv alleged that Lounsbury could not maintain an action based on the alleged contract with Camby, because the contract is illegal and violates public policy.[22] Proserv alleged that the contract violated Connecticut civil and criminal law regarding athlete agents.[23] Connecticut General Statutes § 20-555 states that an athlete shall not:

> (4) Enter into an oral or written agent contract or professional sport services contract with an athlete before the athlete's eligibility for collegiate athletics expires; or (5) Give, offer or promise anything of value to an athlete, his guardian or to any member of the athlete's immediate family before the athlete's eligibility for collegiate athletics expires.[24]

However, as the court noted, the acts occurred while Camby was a student at the University of Massachusetts, and therefore, Connecticut law would not apply.[25] Because Connecticut law could not apply to this particular claim, a genuine issue of material fact remained, and the court denied Proserv's motion for summary judgment.[26]

III. ANTITRUST LAW ISSUES

In *Major League Baseball v. Crist,*[27] the Eleventh Circuit considered the effect of federal antitrust law on state antitrust law matters and whether baseball's antitrust exemption extends to the realm of investigation.[28] This

18. *Id.* at *6.

19. *Id.*

20. *Lounsbury,* 2003 Conn. Super. LEXIS 2273, at *6.

21. Lounsbury v. Camby, No. CV990150580S, 2003 Conn. Super. LEXIS 3128, at *1 (Conn. Super. Ct. Nov. 13, 2003).

22. *Id.* at *2-3.

23. *Id.* at *5.

24. *Id.* at *5-6.

25. *Id.* at *8.

26. *Lounsbury,* 2003 Conn. Super. LEXIS 3128, at *9.

27. 331 F.3d 1177 (11th Cir. 2003).

28. *Id.*

case arose following Major League Baseball's decision to eliminate two teams, allegedly the Florida Marlins and the Tampa Bay Devil Rays, from the league on November 6, 2001.[29] This particular case arose after Florida's Attorney General, Robert Butterworth, issued several civil investigative demands (CIDs) to Major League Baseball pursuant to his authority under Florida's antitrust statute.[30] Major League Baseball challenged these CIDs, contending that its federal exemption provided a federal right to be free of both antitrust prosecution and investigation under either federal or state antitrust law.[31] It argued that the "business of baseball" was exempt from enforcement of an antitrust suit and investigation.[32] Furthermore, it argued that the Attorney General's state antitrust investigation was precluded by the exemption because state antitrust law, as applied to the business of baseball, was preempted by federal law.[33] The court, despite its distaste for baseball's antitrust exemption, held that, based on Supreme Court precedent and the Supremacy Clause, contraction was clearly a matter that fell within the "business of baseball" and, accordingly, could not be subject to federal antitrust prosecution.[34] Additionally, the court held that because contraction did not violate state or federal antitrust law, an investigation into the matter violated Fourth Amendment protections against baseless searches.[35]

In *Worldwide Basketball & Sports Tours, Inc. v. NCAA,*[36] the court applied a rule of reason analysis when it permanently enjoined the NCAA from enforcing its "Two in Four Rule."[37] In this case, the plaintiff sports promoters sued the NCAA, alleging that the "Two in Four Rule" violated federal antitrust law.[38] The "Two in Four Rule" was adopted in 1999, limiting Division I college basketball teams from participating in more than two "exempt" tournaments every four seasons.[39] For years, participation in these "exempt" tournaments was not considered in calculating the number of each team's regular season games, allowing teams participating in these events to exceed the NCAA's maximum regular season game limit without penalty.[40]

29. *Id.* at 1179.
30. *Id.* at 1179-80.
31. *Id.* at 1181.
32. *Crist,* 331 F.3d at 1181.
33. *Id.*
34. *Id.* at 1184-86.
35. *Id.* at 1188-89.
36. 273 F. Supp. 2d 933 (S.D. Ohio 2003).
37. *Id.* at 935.
38. *Id.*
39. *Id.*
40. *Id.*

The NCAA cited a need to limit the total number of games because of concern for student welfare and the opportunity to allow lesser-known schools to play in more desirable tournaments.[41] Since its adoption, the rule has led to a significant decrease in the number of exempt tournament games, number of tournaments, and in the number of basketball games scheduled by Division I teams.[42] Additionally, in adopting the rule, the NCAA also increased the maximum number of allowed regular season games.[43] As the number of opportunities for lesser-known teams had actually decreased and because of an increase in the number of regular season games, the NCAA's justifications for the rule were not deemed as credible by the court.[44] The plaintiffs were also successful in showing that the "Two in Four Rule" had a substantially adverse effect on competition in the relevant product market, all Division I college basketball games.[45] No detailed market analysis was necessary, however, as the plaintiffs were able to show that the restraint had significant anti-competitive effects, such as a reduction in output.[46] The restraint had clearly reduced output in the number of exempt games and the number of tournaments. Following this showing of significant anti-competitive effects, the burden shifted to the NCAA to show procompetitive justifications for the restraint.[47] The NCAA contended that the rule: "(1) further[ed] the goals of competitive equity between large and smaller schools, (2) further[ed] the goal of students avoiding missed class time, and (3) ma[de] a more uniform season by stabilizing schedules and preventing an excessive number of games from being played."[48] However, the court found these justifications unpersuasive in balancing against the anti-competitive effects of the restraint, therefore permanently enjoining the NCAA from enforcing the "Two in Four Rule."[49]

The Sixth Circuit decided another Rule of Reason case involving player restraints in *National Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*.[50] Here, the plaintiffs alleged that the defendants conspired to violate the Sherman Antitrust Act by virtue of the "Van Ryn Rule" restraining

41. *Worldwide Basketball*, 273 F. Supp. 2d at 936.
42. *Id.* at 935.
43. *Id.* at 936.
44. *Id.*
45. *Id.* at 949-52.
46. *Worldwide Basketball*, 273 F. Supp. 2d at 949.
47. *Id.* at 952-54.
48. *Id.* at 952.
49. *Id.* at 954-55.
50. 325 F.3d 712 (6th Cir. 2003).

player movement.[51] The "Van Ryn Rule," adopted by the defendant Ontario Hockey League (OHL), required any overage player signed by the league to have been on a Canadian Hockey Association (CHA) or USA Hockey Player's Registration Certificate during the prior season.[52] The rule "effectively prevent[ed] OHL teams from signing any twenty-year-old U.S. colleg[iate] hockey players."[53] The district court applied a per se analysis to this case, finding that the "Van Ryn Rule" represented a per se illegal group boycott.[54] However, the Sixth Circuit overruled this application, noting that a rule of reason analysis was the proper standard, as hockey leagues involve the same types of restraints considered by the Supreme Court in *NCAA v. Board of Regents of University of Oklahoma,*[55] which the Court recognized as horizontal restraints necessary for the product to exist at all.[56] Under the Rule of Reason, however, the plaintiffs failed to meet their burden of proof. The plaintiffs did not show that the "Van Ryn Rule" resulted in antitrust injury to the relevant market of competition for players.[57] In fact, the plaintiffs only alleged that the rule had significant adverse impact on the player. However, because the antitrust injury must result in anticompetitive affect on the relevant market, plaintiffs had failed to meet their burden.[58] Accordingly, because the lower court had failed to apply the proper antitrust standard and because the plaintiffs had failed to meet their burden under the proper rule of reason analysis, the court reversed the district court's grant of a preliminary injunction and remanded the case for further proceedings under the proper standard of law.[59]

IV. ATHLETIC SCHOLARSHIP ISSUES

The Supreme Court of South Carolina recently carved out an important standard in the realm of institutional duties to scholarship athletes. In *Hendricks v. Clemson University*,[60] the court refused to uphold a decision recognizing a duty of advisors to students, including student-athletes,

51. *Id.*

52. *Id.* at 715.

53. *Id.* at 715, n. 1.

54. *Id.* at 718.

55. *Plymouth Whalers,* 325 F.3d at 718-19 (citing NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 98 (1984)).

56. *Id.* at 718-19.

57. *Id.* at 720.

58. *Id.* at 719-21.

59. *Id.* at 721.

60. 578 S.E.2d 711 (S.C. 2003).

regarding negligent guidance in curriculum planning.[61] This particular case involved a student-athlete at an NCAA Division II school who transferred to a Division I university, Clemson University, and was subsequently declared ineligible to play baseball.[62] The student's assigned academic advisor miscalculated the total number of electives that the student could take; consequently, the student was unable to comply with the NCAA's "Fifty Percent" rule, making him ineligible to play baseball.[63] Hendricks then sued Clemson for negligence, breach of fiduciary duty, and breach of contract based on the advisor's mistakes that caused him to become ineligible.[64] Hendricks argued that the university affirmatively assumed a duty of care when advising him on courses to take to maintain eligibility.[65] However, the court rejected this position, noting that the argument did not fit into any of the causes of action currently recognized in the state.[66] The court also viewed the recognition of a duty flowing from advisors to students as unwise due to the potential for a flood of litigation.[67] Because no court in South Carolina had yet recognized the relationship between student and advisor as a fiduciary one, the court refused to extend the definition of a fiduciary relationship in this case.[68] Finally, although Clemson admitted that some aspects of the student/university relationship between Hendricks and Clemson were in fact contractual, the court noted that Hendricks had not asserted an identifiable contractual promise that Clemson had breached in this matter.[69] It therefore reversed the decision of the Court of Appeals and reinstated the trial court's grant of summary judgment in favor of Clemson on all causes of action.[70]

Similarly, in *Scott v. Savers Property & Casualty Insurance Co.*,[71] the Supreme Court of Wisconsin considered a suit brought by a high school student and his parents against the defendant school district and its insurer alleging negligence, breach of contract, and promissory estoppel leading to the loss of a collegiate hockey scholarship.[72] Ryan Scott and his parents alleged that the guidance counselor at Stevens Point Area Senior High School

61. *See id.*
62. *Id.* at 712-13.
63. *Id.* at 713.
64. *Id.*
65. *Hendricks*, 578 S.E.2d at 714.
66. *Id.*
67. *Id.* at 715.
68. *Id.* at 715-16.
69. *Id.* at 717.
70. *Hendricks*, 578 S.E.2d at 717.
71. 663 N.W.2d 715 (Wis. 2003).
72. *Id.*

provided inaccurate information about NCAA student athlete scholarship eligibility requirements, informing them that "Broadcast Communication" was approved by the NCAA as fulfilling a core English requirement.[73] However, the course did not satisfy the NCAA's core English requirement, and Scott lost a hockey scholarship to the University of Alaska.[74] Although the guidance counselor had provided erroneous information in a situation where accurate information was readily available to him, the court nevertheless upheld the dismissal of the plaintiffs' complaint.[75] The court held that providing guidance services was inherently discretionary, not ministerial, as no statutes requiring the district to provide counseling created an absolute or certain duty.[76] Additionally, the breach of contract claim failed because any promise to provide counseling to students was a promise to perform a preexisting legal obligation, not any new obligation under contract.[77] This preexisting duty did not become a contractual duty simply because of the plaintiffs' use of the services.[78] Finally, the court rejected the promissory estoppel claim, viewing it as a contravention of government immunity that would allow plaintiffs to obtain damages from an immune government official.[79] Therefore, although the result fails to remedy the harm suffered by the plaintiffs, the court nonetheless affirmed the decision of the Court of Appeals in dismissing the plaintiffs' complaint.[80]

Two additional cases in Texas altered approaches typically applied to athletic scholarships. In *NCAA v. Yeo,*[81] the court considered a situation in which an intercollegiate swimmer at the University of Texas had been ruled ineligible by the NCAA following her transfer to Texas.[82] Joscelin Yeo was a world-class swimmer from Singapore who had competed in two Olympic games prior to her NCAA career.[83] After transferring to the University of Texas from the University of California at Berkeley, Yeo was not granted a one-time waiver of the transfer rule by her previous school and was therefore required to sit out two full semesters.[84] Cal-Berkeley was required to provide

73. *Id.* at 718-20.
74. *See id.* at 720.
75. *Id.*
76. *Scott,* 663 N.W.2d at 721-23.
77. *Id.* at 726-28.
78. *Id.* at 728.
79. *Id.* at 728-30.
80. *Id.* at 730.
81. 114 S.W.3d 584 (Tex. App. 2003).
82. *Id.* at 584-85.
83. *Id.* at 587-88.
84. *Id.* at 588.

Yeo with a timely appeal, but instead waited until a time too late for Yeo to qualify for the NCAA women's swimming and diving championship.[85] During the following fall, Yeo was to compete for the University of Texas and in the Olympics.[86] Because she did not feel she could perform in her classes, needing to devote time to the Olympic games, the Texas Athletic Department applied for and received a waiver of the NCAA's minimum twelve credit hour requirement.[87] After sitting out the 2000-2001 year, Yeo resumed competing for Texas until the NCAA determined that she had not met the requirement of two semesters in residence before returning to competition.[88] However, the Texas Athletic Department routinely failed to inform Yeo of her ineligibility and lingering eligibility questions until after hearings had been conducted.[89] Additionally, Yeo never received notice of the NCAA determinations in her situation, copies of the pertinent NCAA rules, notice of her right to retain counsel, or notice of the fact that her final hearing would be nonappealable.[90] The court found that Yeo had been denied due process in the actions of Texas and the NCAA.[91] It took a unique approach to this case in finding that Yeo had a constitutionally protected property interest in her athletic reputation as an Olympic swimmer, which had been formed prior to her enrollment at Cal-Berkeley.[92] The court took care to note that its holding was limited in application and that it did not suggest that there was a constitutionally protected interest in extracurricular participation.[93] However, on the merits of this particular case, the court found that Yeo had an established liberty interest in her reputation as an athlete and was thus entitled to due process.[94] Accordingly, as a state actor, the University of Texas had an obligation to protect that liberty interest and breached this duty in failing to provide notice to Yeo.[95] The court accordingly affirmed the lower court's decision granting a permanent injunction preventing the university from retroactively declaring Yeo ineligible.[96]

The Texas Court of Appeals also extended the application of an athletic

85. *Id.* at 588-589.
86. *Yeo*, 114 S.W.3d at 589.
87. *Id.*
88. *Id.*
89. *Id.* at 589-90.
90. *Id.* at 591.
91. *Yeo*, 114 S.W.3d at 596-97.
92. *Id.* at 597.
93. *Id.*
94. *Id.* at 598.
95. *Id.* at 600-01.
96. *Yeo*, 114 S.W.3d at 600-01.

scholarship in other situations.[97] The court held that the "duty to pay child support is not limited to an obligor's ability to pay from earnings, but also to his ability to pay from any and all sources that may be available."[98] Therefore, in a case where a student-athlete received a partial athletic scholarship paying for tuition, fees, books, and some meals,[99] the court properly considered that scholarship in determining the monthly amount of child support due.[100]

V. COACHING ISSUES

In 2003, courts decided numerous cases in the areas of employment law and torts involving coaches at various levels.

A. Hiring and Termination

In the past year, courts considered a number of complaints arising from the hiring and firing of coaches at both the intercollegiate and high school levels.

1. Intercollegiate Athletics

In a highly publicized matter, head football coach Mike Price sued the University of Alabama following his termination for alleged inappropriate behavior at a charity golf event.[101] Price claimed that his termination violated the Fifth and Fourteenth Amendments of the United States Constitution because it failed to give the coach proper notice and failed to provide a hearing.[102] Price had been hired as Alabama's head football coach in January, but he had yet to sign an employment contract with the university.[103] Following the allegations of inappropriate behavior at the April golf event,[104] and following a meeting on May 3, 2003, the Board of Trustees announced that Price had been terminated as head football coach.[105] Price's request for

97. In the Interest of L.R.P., 98 S.W.3d 312 (Tex. App. 2003).

98. *Id.* at 314.

99. *Id.*

100. *Id.* at 315.

101. *See* Price v. Univ. of Ala., No. CV-03-CO-01790-W, 2003 U.S. Dist. LEXIS 20160, at *1 (N.D. Ala. Oct. 23, 2003).

102. *Id.* at *1-3.

103. *Id.* at *1.

104. *Id.* at *2.

105. *Id.*

an appeal was denied, leading to this suit.[106] The court found that the president of the university was immune from suit in his official capacity under the Eleventh Amendment.[107] All individual complaints against the president were similarly dismissed, as the actions taken by the president fell within scope of his discretionary authority.[108] Additionally, the court held that Price did not have a property interest in his head coaching position as he had never signed an agreement with the university and that the remaining portion of the agreement was void under the Statute of Frauds.[109] Accordingly, the court dismissed the action.[110]

2. High School Athletics

The Tenth Circuit also considered similar issues involving a high school football and wrestling coach, following his termination from both coaching positions due to an ejection from a high school football game for alleged misconduct.[111] As in *Price,* Kelly contended that his termination without notice or hearing violated his rights to procedural due process under the Fourteenth Amendment.[112] However, because Kelly was subject to a teacher's contract which required 30-days notice for termination, by failing to provide notice or a hearing within that period, the court held that the school district had violated Kelly's right to procedural due process.[113]

Finally, the Fourth Circuit considered the termination of a coach who brought a claim for age discrimination under the Age Discrimination in Employment Act.[114] The football coach had been employed by the high school for over twenty years when his contract was not renewed.[115] At the time of termination, the coach was fifty-four years old and was replaced by a coach younger than age forty.[116] The Fourth Circuit reversed the lower court's decision for the school district, determining that it erroneously refused

106. *Price,* 2003 U.S. Dist. LEXIS 20160, at *3.

107. *Id.* at *12.

108. *Id.* at *13-17.

109. *Id.* at *17-24.

110. *Id.* at *5.

111. *See* Kelly v. Indep. Sch. Dist. No. 12, Nos. 02-6331 & 02-6339, 2003 U.S. App. LEXIS 21737, at *1, *4 (10th Cir. Oct. 23, 2003).

112. *Id.* at *5.

113. *Id.* at *13-14.

114. Kozlowski v. Hampton Sch. Bd., No. 02-1485, 2003 U.S. App. LEXIS 20226, at *1 (4th Cir. Oct. 3, 2003).

115. *Id.* at *3-4.

116. *Id.* at *4.

to instruct the jury that it could infer that age was the real reason for the termination decision if it did not believe the justifications of the principal and that the evidence presented by the coach undermined some of the principal's justifications for termination.[117]

B. Tort and Vicarious Liability

In 2003, courts decided multiple cases involving negligence and other torts committed by coaches, but where the coaches were acting within the scope of their responsibilities, the courts found them to be immune from liability. In a Mississippi case concerning a student who suffered heatstroke while at football practice, although a full hearing revealed that the student had suffered damages amounting to $350,000 due to the school district's and coach's negligence, the court affirmed a finding that both were immune from liability under the Mississippi Torts Claims Act.[118] The acts or omissions of the football coach, performed within the scope of his employment as coach, were discretionary and entitled to immunity.[119]

In an Alabama case in which a boy was rendered a quadriplegic following a wrestling maneuver with a coach, the court held that it could not determine, as a matter of law, whether the coach's wrestling maneuver conformed to the local and national wrestling guidelines and refused to grant state-agent immunity to the coach.[120] Therefore, it reversed an earlier grant of summary judgment in favor of the coach, remanding the case for determination on the issue of liability.[121] However, on the issue of whether the athletic director and principal were negligent in failing to provide a qualified wrestling coach, absent any evidence of bad faith or willful, malicious, or fraudulent acts, the court found that the athletic director and principal were entitled to state-agent immunity.[122]

However, immunity is not available for a coach when the coach has committed gross negligence or an intentional tort. In a Virginia case involving battery of, and injury to, a student football player by his coach at practice, the court did not shield the coach from liability based on any assumption of risk by the student of the dangers of football.[123] The coach asked the student to

117. *Id.* at *14-29.

118. Harris v. McCray, No. 2001-CA-01627-SCT, 2003 Miss. LEXIS 553, at *1-2 (Miss. Oct. 23, 2003).

119. *Id.* at *16.

120. Giambrone v. Douglas, No. 1020234, 2003 Ala. LEXIS 226, at *1 (Ala. Aug. 1, 2003).

121. *Id.* at *27.

122. *Id.* at *25.

123. Koffman v. Garnett, 574 S.E.2d 258 (Va. 2003).

"stand upright and motionless" to allow the coach to explain proper tackling techniques.[124] He then lifted the player up and slammed him to the ground, breaking his arm.[125] However, the court ruled that the coach's knowledge of his size, his experience, the force applied, and his prior practice of not using force to teach technique could lead a reasonable person to find that the coach had been grossly negligent in acting with utter disregard for player safety.[126] Similarly, although the player consented to the contact of playing football, whether he consented to the particular type of bodily contact inherent in the coach's conduct was a factual issue, which, like the question of gross negligence, should be weighed by the jury.[127]

VI. CONTRACTUAL ISSUES

Courts throughout the country have considered countless sports law cases in the past year involving contractual issues. The following cases represent some of the most interesting fact patterns and judicial decisions. The United States District Court for the Eastern District of Pennsylvania considered a tenuous attempt at an action for breach of an oral contract in *Blackmon v. Iverson*.[128] The defendant, NBA basketball player Allen Iverson, filed a motion to dismiss the claims of the plaintiff, a family friend, who sought damages for claims of breach of contract arising out of Iverson's use of "The Answer" as a nickname and marketing tool.[129] Blackmon alleged that he suggested that Iverson use "The Answer" as a nickname one evening in 1994 before Iverson promised to pay, although Iverson did promise to pay Blackmon later that same night.[130] Blackmon began working on marketing for the nickname and was assured on multiple occasions that he would be paid twenty-five percent of the earnings related to its use.[131] Disclosure of the nickname idea occurred before Iverson told Blackmon that he was going to use the idea in his 1996 shoe contract and before sales of products bearing "The Answer" began in 1997.[132] However, because disclosure of the nickname idea had occurred before Iverson told Blackmon that he was going to use the idea in his shoe contract, the court concluded that the disclosure was

124. *Id.* at 260.
125. *Id.*
126. *Id.* at 262.
127. *Id.*
128. No. 01-CV-6429, 2003 U.S. Dist. LEXIS 6614, at *1 (E.D. Pa. Apr. 4, 2003).
129. *Id.*
130. *Id.* at *3.
131. *Id.* at *3-4.
132. *Id.* at *4.

past consideration insufficient to create a binding contract and accordingly dismissed Blackmon's complaint.[133]

The Connecticut Superior Court considered the assorted contractual issues associated with the breakup of the Big East Conference in *University of Connecticut v. University of Miami.*[134] This matter arose due to Miami University's decision to jump from the Big East Conference to membership in the Atlantic Coast Conference.[135] Miami's motion to dismiss for lack of personal and subject matter jurisdiction was denied for a number of reasons.[136] First, the court held that the Big East Conference constitution was a contract partially performed in Connecticut with the cause of action arising out of that contract, making jurisdiction proper.[137] Additionally, the court properly exercised personal jurisdiction over the University of Miami, as there was a causal connection between Miami's contact with Connecticut through its participation in athletic events within the state and the plaintiffs' injuries.[138]

Finally, in *Yarde Metals, Inc. v. New England Patriots,*[139] the court considered a suit by a plaintiff ticket holder alleging breach of contract and equitable estoppel.[140] The plaintiff sought specific performance of a season ticket account as a contractual relationship.[141] The plaintiff had maintained a season ticket package of six tickets for twenty years.[142] The tickets were routinely distributed to employees and customers.[143] After a male customer was arrested for using the women's restroom, the plaintiff was informed by the team that all ticket privileges were being revoked.[144] The team emphasized the relationship with the ticket holder as one of a revocable license instead of contract.[145] The court also highly valued the public policy factor of deterring unruly conduct in denying the plaintiff's application for an injunctive order.[146]

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133. *Blackmon,* 2003 U.S. Dist. LEXIS 6614, at *28-29.

134. No. X07CV030081757S, 2003 Conn. Super. LEXIS 2745, at *1 (Conn. Super. Ct. Oct. 10, 2003).

135. *See id.* at *2.

136. *See id.* at *3-11.

137. *Id.* at *5.

138. *Id.* at *7-8.

139. No. 03-3832-E, 2003 Mass. Super. LEXIS 274, at *1 (Mass. Super. Ct. Sept. 26, 2003).

140. *Id.* at *6-7.

141. *Id.* at *7.

142. *Id.* at *2.

143. *Id.*

144. *Yarde Metals,* 2003 Mass. Super. LEXIS 274, at *5-6.

145. *Id.* at *7-8.

146. *Id.* at *24-25.

VII. CRIMINAL LAW ISSUES

In *People v. Graziosa*,[147] the court considered a motion to set aside the verdict after the defendant was convicted of third degree assault.[148] The case involved an altercation in a diner between the defendant and David Wells, a pitcher for the New York Yankees, in which the defendant broke two of the victim's teeth.[149] Throughout the proceedings, Graziosa maintained a defense of justification, alleging that he was not the instigator of the aggression, but merely acted in self-defense to repel an assault by Wells.[150] The defendant also argued that admission into evidence of testimony that he had been smiling following his arrest and the prosecutor's reference to this testimony in summation had been improper and would require a reversal as a matter of law if raised on appeal.[151] However, the court disagreed with this contention and denied the motion to set aside the verdict. It noted that although "a post-arrest smile is generally inadmissible to establish consciousness of guilt because it can convey many different states of mind and is therefore often ambiguous and minimally probative[,]"[152] the facts of this case were distinguishable. "Here, the evidence was unambiguous and highly probative of the defendant's state of mind, a matter central to his asserted defense of justification."[153] Rather than being merely testimony of an after-the-fact smile or a smile at trial, the testimony admitted in this case "concerned the defendant's continuous conduct before and during the incident and its uninterrupted continuation following his arrest."[154] Therefore, this testimony was not merely ambiguous proof of "consciousness of guilt."[155] In fact, it was direct evidence that the defendant viewed the events as a source of amusement and celebration.[156] Accordingly, the motion to set aside the verdict was denied, as the court ruled that the testimony had been properly admitted by the trial court.[157]

147. 756 N.Y.S.2d 825 (N.Y. Crim. Ct. 2003).
148. *Id.* at 826.
149. *Id.*
150. *Id.*
151. *Id.* at 826-27.
152. *Graziosa*, 756 N.Y.S.2d at 826-27.
153. *Id.* at 827.
154. *Id.*
155. *Id.*
156. *Graziosa*, 756 N.Y.S.2d at 828.
157. *Id.* at 829.

VIII. DEFAMATION AND FREE SPEECH ISSUES

A variety of cases involving defamation and free speech issues were decided by courts in 2003. In *Wilson v. Daily Gazette Co.*,[158] the Supreme Court of Appeals of West Virginia considered a libel action brought by a high school student athlete against the local newspaper.[159] The student athlete had received awards as the state's top football player and also played in his team's state championship basketball victory.[160] The newspaper reported that Wilson had exposed himself to the opposing team's fans after the victory.[161] The court determined that the overarching theme of the articles involved sportsmanship rather than athletic ability.[162] It also reversed the lower court's determination that the athlete was a public figure, therefore, needing to prove that the newspaper acted with actual malice instead of negligence.[163] It held that the newspaper did not prove by clear and convincing evidence that the athlete was a public figure.[164] Additionally, it noted that the student was not a public figure simply because he was an athlete.[165]

In a case involving similar issues, the Illinois Court of Appeals ruled that a former high school football coach was a public figure, and therefore, needed to prove that the defendant acted with actual malice.[166] The coach sought damages for defamation allegedly leading to his termination as high school football coach.[167] Because issues of material fact remained as to the existence of actual malice, the court reversed the grant of summary judgment on this issue and remanded the case for further proceedings.[168]

Finally, the Supreme Court of Hawaii considered an interesting First Amendment issue involving a student manager for an intercollegiate basketball team.[169] The student manager for the University of Hawaii men's basketball team was sued, along with the university, by one of the team's fans,

158. 588 S.E.2d 197 (W. Va. 2003).

159. *Id.*

160. *Id.* at 200.

161. *Id.* at 200-201.

162. *Id.* at 202.

163. *Wilson,* 588 S.E.2d at 203-08.

164. *Id.* at 209.

165. *Id.*

166. Myers v. Levy, No. 2-02-1334, 2003 Ill. App. LEXIS 1399, at *1 (Ill. App. Ct. Dec. 1, 2003).

167. *Id.* at *1-5.

168. *Id.* at *23.

169. State v. Hoshijo, 76 P.3d 550 (Haw. 2003).

alleging racial discrimination.[170] The student manager had yelled and threatened the fan using racial slurs during the final minutes of a basketball game in 1995.[171] The manager's conduct was regulated by a university handbook, and he received an athletic scholarship from the university.[172] The court held that the university was liable for the acts of the manager because he was an agent by virtue of the handbook and scholarship, and therefore, was acting within the scope of his position as manager when the remarks were made.[173] Additionally, the court held that the manager's comments were not protected by the First Amendment because they constituted fighting words.[174]

IX. DRUG TESTING ISSUES

Numerous courts have addressed issues involving drug testing policies of athletes in the past year. The United States District Court for the Northern District of Texas decided two related matters.[175] Each arose out of challenges to the constitutionality of a drug testing policy that applied only to student athletes.[176] In the first decision, the student's father alleged that officials performed a drug test on his son after he had withdrawn his consent and that the policy was instituted with racial bias in violation of equal protection guarantees.[177] The court granted summary judgment for the school district, finding that the policy was not unconstitutional as written and that Bean had failed to meet his burden, stating only conclusions, subjective belief, and hearsay.[178]

Bean also brought a civil rights action against the lab worker who tested his son's sample, claiming that the worker conducted an unreasonable search in collecting the urine sample.[179] The court noted, however, that even if the drug testing policy violated constitutional principles, it was not alleged that the lab worker deviated from the standards and procedures of the policy.[180]

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170. *Id.* at 552-53.

171. *Id.* at 554.

172. *Id.* at 552.

173. *Id.* at 561-62.

174. *Hoshijo,* 76 P.3d at 564-65.

175. Bean v. Tulia Indep. Sch. Dist.., No. 2:01-CV-394-J, 2003 U.S. Dist. LEXIS 14617, at *1 (N.D. Tex., Aug. 22, 2003); Bean v. Tulia Indep. Sch. Dist., No. 2:01-CV-0394-J, 2003 U.S. Dist. LEXIS 220, at *1 (N.D. Tex. Jan. 8, 2003).

176. *See id.*

177. *Bean,* 2003 U.S. Dist. LEXIS 14167, at *2-3.

178. *Id.* at *6-10.

179. *Bean,* 2003 U.S. Dist. LEXIS 220, at *2-3.

180. *Id.* at *6.

Accordingly, there were insufficient allegations against the lab worker to support the action, and summary judgment was granted in his favor.[181]

In New Jersey, the state supreme court upheld the constitutionality of a random drug and alcohol testing program of the school district that applied to all students participating in both athletic and non-athletic extracurricular activities, as well as students who possessed school parking permits.[182] The court reversed the trial court's finding that the policy violated the protection against unreasonable searches and seizures under the New Jersey constitution.[183] The court stated that the students' expectations of privacy were reduced in a public-school setting; the degree of obtrusiveness was minimal because the manner in which the urine testing was done limited the intrusion on students' privacy and protected their personal dignity; and the need for conducting the testing in order to attempt to reduce the major drug problem in schools was strong.[184]

In another challenge to a school drug testing policy in Texas, the court considered an argument that the policy violated constitutional protections of freedom of religion.[185] Like a growing number of other drug and alcohol testing policies, the school district's policy applied to all students participating in extracurricular activities.[186] In this case, the students were Jewish and drank wine as part of their religion.[187] The appellate court held that the policy did not violate the Texas constitution because the policy applied to every junior high and high school student participating in extracurricular activities and because it was facially neutral regarding religion.[188] Additionally, the court upheld the policy because there is no fundamental right to participate in extracurricular activities, the policy was rationally related to a legitimate state interest in student welfare, and students have a lessened expectation of privacy in the public school setting.[189]

X. GENDER EQUITY AND GENDER DISCRIMINATION ISSUES

Numerous courts considered cases in 2003 involving gender equity or

181. *Id.* at *7.

182. Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ., 826 A.2d 624 (N.J. 2003).

183. *See id.* at 626-27.

184. *See generally id.*

185. Marble Falls Indep. Sch. Dist. v. Shell, No. 03-02-00693-CV, 2003 Tex. App. LEXIS 2845, at *1 (Tex. App. Apr. 3, 2003).

186. *Id.* at *2-3.

187. *Id.* at *3.

188. *Id.* at *9.

189. *Id.* at *16-18.

gender discrimination issues under either Title IX or Title VII.

A. Title IX

In *National Wrestling Coaches Ass'n v. U.S. Department of Education,*[190] the court considered claims that the enforcement policies of the Department of Education caused institutions to cut men's sports teams, artificially limit the number of participants on men's teams, discriminate against men, and deny male athletes equal protection under the law.[191] The court dismissed the action because the associations failed to meet their burden of proof on whether they were the proper parties to bring this action.[192]

In November, the U.S. District Court for the Eastern District of Pennsylvania considered a claim filed by eight student gymnasts against the University of Pennsylvania, alleging violations of Title IX.[193] The court found that the institution failed to provide equal coaching services to male and female student athletes and failed to pay coaches of women's teams the same salaries as coaches of men's teams.[194] It ordered the school to immediately reinstate women's gymnastics as a fully-funded intercollegiate athletic team, provide a coaching staff for that team, provide funding in an amount equal to or greater than previously provided, and provide adequate facilities and equipment necessary for the team to compete.[195]

In December, the U.S. District Court for the District of Minnesota ruled that plaintiff high school girls' hockey players had not satisfied their burden in attempting to show that the site for the girls' hockey tournament was not substantially equal to or a comparable facility to the arena hosting the boys' tournament, and accordingly denied the plaintiffs' motion for injunctive relief.[196]

B. Title VII

In April, the U.S. District Court for the District of Arizona considered a suit against the universities and state colleges of Arizona alleging gender

190. 263 F. Supp. 2d 82 (D.D.C. 2003).

191. *Id.* at 85.

192. *Id.* at 129-30.

193. Barrett v. W. Chester Univ. of Pa., No. 03-CV-4978, 2003 U.S. Dist. LEXIS 21095, at *1 (E.D. Pa. Nov. 12, 2003).

194. *Iid.* at *51.

195. *Id.*

196. Mason v. Minn. State High Sch. League, No. 03-6462, 2003 U.S. Dist. LEXIS 23460, at *1 (D. Minn. Dec. 30, 2003).

based discrimination in violation of Title VII and the Equal Pay Act.[197] The plaintiff failed to show that his job and his co-worker's job were substantially equal in skill, effort, and responsibility under the Equal Pay Act.[198] However, Lewis did establish a case under Title VII by showing that he was given greater or similar responsibilities for less pay.[199]

In July, the Third Circuit considered a reverse gender discrimination case filed by a job applicant under Title VII.[200] A male applicant for a women's crew coaching position sued the university when he was not hired or interviewed.[201] The court affirmed the jury's verdict in favor of the plaintiff because the evidence sufficiently supported the rejection of the university's stated reason for hiring a woman over the plaintiff.[202]

Also in July, the Sixth Circuit rejected the Title VII gender discrimination and retaliation claim of an assistant coach against the University of Cincinnati because the plaintiff failed to establish that she was qualified for her position because she routinely failed to meet the institution's expectations after being hired or to show that she was treated worse than a similarly situated male.[203]

XI. HIGH SCHOOL ATHLETIC ASSOCIATION ISSUES

A. Federal Court Issues

In January, the U.S. District Court for the Middle District of Tennessee decided an extremely important case on remand from the Sixth Circuit.[204] The case arose after the association penalized the school for violating its recruiting rule by sending a spring practice letter to all incoming ninth grade students and following the letters with phone calls.[205] The court held that the recruiting rule was not narrowly tailored to meet the association's substantial interests as a state actor.[206] It held that the letter and phone calls did not threaten any harm to any of the association's legitimate interests as a state actor, but instead

197. Lewis v. Smith, 255 F. Supp. 2d 1054, 1055-56 (D. Ariz. 2003).

198. *See id.* at 1058-60.

199. *Id.* at 1060-63.

200. Medcalf v. Trs. of Univ. of Pa., 71 Fed. Appx. 924 (3d. Cir. July 30, 2003).

201. *Id.* at 925.

202. *Id.* at 933.

203. *See* Murphy v. Univ. of Cincinnati, 72 Fed. Appx. 288 (6th Cir. July 29, 2003).

204. Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, No. 3:97-1249, 2003 U.S. Dist. LEXIS 24769, at *1 (M.D. Tenn. Jan. 13, 2003).

205. *Id.* at *12-13.

206. *Id.* at *36-38.

represented harmless informational speech about athletic practice.[207] Therefore, the recruiting rule was unconstitutional.[208]

B. State Court Issues

In Michigan, the court of appeals held that the Michigan High School Athletic Association was not a public body for purposes of the Freedom of Information Act because it was not primarily funded through government authority and because it was not created based on government authority, as required under Michigan Law.[209]

In Colorado, the court of appeals considered a claim by a high school wrestling coach against the Colorado High School Activities Association, alleging the taking of a vested property right following sanctions levied against him.[210] The court held that, although the coach had a vested property right in his employment, the association did not deprive him of that right, because the association was not his employer, and therefore, had no contractual relationship with him.[211] It also found that the association did not deprive the coach of a protected liberty interest by failing to provide prompt review because mere reputational injury or alleged future harm was not sufficient.[212]

XII. INTELLECTUAL PROPERTY ISSUES

In 2003, courts considered a variety of sports cases involving copyright or trademark law.

A. Copyright Issues

In September, the United States District Court for the District of Minnesota considered a claim of copyright infringement arising from a credit card company's advertising campaign.[213] The plaintiffs, wanting to keep Major League Baseball in Minnesota, produced a videotape showing them traveling to major league cities with urban stadiums, for which they obtained a

207. *Id.* at *38-39.

208. *Id.* at *41.

209. Breighner v. Mich. High Sch. Athletic Ass'n., Inc., 662 N.W.2d 413, 419-21 (Mich Ct. App. 2003).

210. Babi v. Colo. High Sch. Activities Ass'n, 77 P.3d 916, 919 (Colo. Ct. App. 2003).

211. *Id.* at 920-21.

212. *Id.* at 920-22.

213. Hoch v. Mastercard Int'l, Inc., 284 F. Supp. 2d 1217 (D. Minn. 2003).

copyright in 2001.[214] After the defendants began airing advertisements in its "Priceless" campaign showing two people traveling to baseball stadiums and paying for their expenses with credit cards, the plaintiffs brought this action.[215] Summary judgment was granted for the defendants because of a lack of direct evidence of copyright infringement, because the plaintiffs could not produce enough circumstantial evidence to show that the advertising agency had access to their tape, and because the ads were not substantially similar to the copyright owners' tape.[216]

B. Trademark and Cybersquatting Issues

In June, the Sixth Circuit considered a trademark infringement claim associated with an artist's prints of a painting of Tiger Woods.[217] The court found that a claim for violation of a registered mark was barred by the fair use defense and further held that a person's image or likeness could not function as a trademark.[218]

In August, the U.S. District Court for the Northern District of Texas decided a case concerning the validity of the phrase "march madness" as a trademark.[219] The court found that, based on survey evidence and expert testimony, "march madness" was a protectable mark because it was a descriptive term that had acquired secondary meaning.[220] The court also found a strong likelihood of confusion because the phrase was a strong mark in the basketball context, the domain name was identical to the mark, and the website and the mark sought business from the same customers.[221] Additionally, use of the domain name was not fair use according to the Anti-Cybersquatting Consumer Protection Act because the defendants did not have reasonable grounds to believe that their use of the phrase was fair use.[222]

In September, the U.S. District Court for the District of Columbia considered a challenge to the existing marks of the Washington Redskins of the National Football League through a trademark cancellation proceeding.[223]

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214. *Id.* at 1219.

215. *Id.*

216. *Id.* at 1220-24.

217. ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915 (6th Cir. 2003).

218. *Id.* at 920-21.

219. March Madness Athletic Ass'n v. Netfire, Inc., No. 3:00-CV-398-R, 2003 U.S. Dist. LEXIS 14941, at *1 (N.D. Tex. Aug. 27, 2003).

220. *Id.* at *45-48.

221. *Id.* at *49-53.

222. *Id.* at *78-84.

223. Pro-Football, Inc. v. Harjo, 284 F. Supp. 2d 96 (D.D.C. 2003).

The team challenged the decision of the Trial Trademark and Appeal Board (TTAB) canceling six of its trademark registrations because the TTAB found that the marks disparage Native Americans.[224] The court granted summary judgment for the team, finding that the TTAB did not have substantial evidence to support its conclusion that the marks were disparaging to a substantial composite of Native Americans when used in connection with the team's football entertainment services.[225]

Finally, in December, the United States District Court for the Western District of Washington considered a claim of trademark infringement arising out of ESPN's "Playmakers" series.[226] The plaintiff sports agency alleged that there was a likelihood of confusion between use of the mark in association with the television series and the agency's use of the mark in association with its sports agency services.[227] The agency also raised concerns about negative associations with the mark due to the controversial content of the series.[228] However, the court refused to recognize tarnishment as a new factor in the analysis of a trademark claim.[229] It ultimately denied the motion for injunction, finding no likelihood of confusion, based on the visual differences of the marks, the differences in services provided by the parties, and the differences in the marketing channels utilized.[230]

XIII. LABOR LAW ISSUES

Various courts also considered sports labor law issues during 2003. In *East Coast Hockey League, Inc. v. Professional Hockey Players Ass'n.*,[231] the Fourth Circuit considered whether disputes between the hockey league and the players association were subject to the arbitration provision of the collective bargaining agreement (CBA) between them.[232] "Article XII of the CBA contained a grievance and arbitration procedure for resol[ving] disputes between the parties."[233] The provision states:

> Any dispute, controversy, claim or disagreements (1) arising out of or relating to this Agreement; (2) arising out of or related to the [League]

224. *Id.* at 99.
225. *Id.* at 144-45.
226. Playmakers, LLC v. ESPN, Inc., 297 F. Supp. 2d 1277 (W.D. Wash. 2003).
227. *Id.* at 1278-79.
228. *See id.* at 1283-85.
229. *Id.* at 1284-85.
230. *Id.* at 1285-86.
231. 322 F.3d 311 (4th Cir. 2003).
232. *Id.*
233. *Id.* at 313.

> Standard Player's Contract or any alleged breach thereof; (3) arising out of or relating to any term or condition of a Player's employment; (4) arising out of or related to the [Association]; and/or (5) arising out of or related to a Player and any other [League] Club and/or the [League] shall be submitted to final and binding arbitration . . . .[234]

Two disputes were at issue before the court. The first dispute, the "Tallahassee dispute," was between a club and the association involving the league's salary cap.[235] The second dispute, the "Sugden dispute," concerned the lifetime suspension of a player by the league for throwing a stick at a patron.[236] The league rejected the Association's demands for arbitration on either dispute, contending that neither dispute was subject to the arbitration provision.[237] The court noted that it must "uphold a claim that a dispute is subject to arbitration 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'"[238] However, it did not find that the arbitration provision could not apply to either dispute.[239] It stated that "clearly, a violation of a salary cap is a breach of the CBA . . . [and thus], the arbitration provision of the CBA must be applied as written and the Tallahassee dispute is subject to arbitration."[240] Similarly, because the association did not challenge the league president's power to suspend a player, the court saw no "inconsistency in the president being given the 'sole discretion' to make a decision and that exercise of discretion being reviewable."[241] Accordingly, because the clarity of the arbitration provision in stating that any dispute "arising out of or related to any term or condition of a Player's employment . . . shall be submitted to final and binding arbitration" could hardly be questioned, the Fourth Circuit held that the magistrate-judge erred in his decision and should have granted summary judgment in favor of the Association.[242] It therefore reversed the decision and remanded the case with instructions to enter summary judgment for the Association, declaring that the disputes are subject to the arbitration provision

234. *Id.*

235. *Id.* at 313-14.

236. 322 F.3d at 314.

237. *Id.*

238. *Id.* at 314-15 (quoting AT & T Techs., Inc. v. Communications Workers of Am., 475 U.S. at 650).

239. *Id.* at 315-16.

240. *Id.*

241. *East Coast Hockey,* 322 F.3d at 316.

242. *Id.*

found in the CBA.[243]

The United States District Court for the Southern District of New York considered a similar factual situation in *Office of the Commissioner of Baseball v. World Umpires Ass'n.*[244] This case concerned a dispute between the employer and union over a warning letter sent to umpire John Hirschbeck, president of the World Umpires Association, related to his conduct in recent games.[245] The plaintiffs maintained that the union's grievance was not arbitrable pursuant to the parties' collective bargaining agreement (CBA) because the underlying disputes involved discipline of an employee that required application of dispute resolution procedures.[246] However, the union argued that the dispute was a grievance under the CBA that required arbitration.[247] Disputes related to discipline or termination of umpires are governed exclusively by Article 10 of the CBA, which states:

> The procedures and remedies, if any, that are set out in this Article 10 shall be the sole and exclusive means available to an umpire (and to the Union) to challenge any decision by the Office of the Commissioner to discipline, or to terminate . . . the employment of an umpire.[248]

The union relied on Article 23 of the CBA, which permits "third-party arbitration of 'grievances' that are not resolved informally. 'Grievance' is defined as: 'any dispute or disagreement involving the interpretation or application of any provision of this Agreement.'"[249] However, the court stated that, although Article 23 does allow for arbitration of "certain matters involving a 'rule, policy, directive or instruction issued by the Office of the Commissioner . . .' the union's grievance does not challenge a 'policy, directive, or instruction.'"[250] Rather, the grievance challenges a disciplinary letter to an individual umpire for specific conduct, thus falling directly within the confines of disputes subject to dispute resolution procedures spelled out in Article 10 of the CBA.[251] Accordingly, the union's dispute was not subject to arbitration and summary judgment was granted in favor of the employer.[252]

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243. *Id.*
244. 242 F. Supp. 2d 380 (S.D.N.Y. 2003).
245. *Id.* at 382-83.
246. *Id.* at 381-82.
247. *Id.* at 383.
248. *Id.* at 382.
249. *World Umpires Ass'n,* 242 F. Supp. 2d at 382.
250. *Id.* at 387.
251. *Id.*
252. *Id.*

XIV. SPORTS OFFICIALS ISSUES

In a Title VII case involving an intercollegiate baseball umpire, the United States District Court for the Southern District of New York ruled that a plaintiff's suit against the defendant athletic conference was not proper, as the umpire was an independent contractor and not an employee of the conference.[253] The umpire brought an action under 42 U.S.C. § 2000e and the New York Human Rights Law § 296, alleging that the conference had discriminated against him based on his race.[254] However, although the conference provided umpires for its games, coordinated schedules, assigned umpires to games, approved travel expenses for umpires, provided a dress code, and evaluated umpires' abilities, the conference did not employ the umpires because it did not pay them or reimburse travel expenses.[255] Without the key factor of payment creating an employment relationship, the court found that the umpire was an independent contractor who was not covered by Title VII or the New York Human Rights law, and therefore, granted summary judgment for the conference.[256]

The United States District Court for the Eastern District of Louisiana also considered a case involving a sports official, although this time involving a tort issue.[257] In this case, the plaintiff, a high school basketball referee, brought a suit against the defendant school, a player's parent, and three other individuals for injuries suffered while working a basketball game.[258] The plaintiff and a fellow referee were attacked by the defendants after a player was ejected from the game because of a technical foul.[259] The defendant parent moved to dismiss the complaint, arguing that the plaintiff had failed to allege that the parent personally punched, kicked, or clawed him.[260] However, the court denied the motion because the defendant's actions occurred at a high school sports event where the plaintiff was responsible for officiating and keeping order and because the defendant failed to establish that he owed no duty to the plaintiff to refrain from coming onto the basketball court and

253. Wadler v. E. Coll. Athletic Conference, No. 00 Civ. 5671 (JSM), 2003 U.S. Dist. LEXIS 14212, at *1 (S.D.N.Y. Aug. 13, 2003).

254. *Id.*

255. *Id.* at *3.

256. *Id.* at *7-10.

257. Brantley v. Bowling Green Sch., No. 03-173, 2003 U.S. Dist. LEXIS 20070, at *1 (E.D. La. Nov. 3, 2003).

258. *Id.* at *2.

259. *Id.*

260. *Id.* at *2-3.

assaulting any person.[261]

XV. STADIUM ISSUES

In February, the Illinois Supreme Court decided a case brought by parks groups and members alleging a violation of the public trust doctrine in the renovation of Chicago's Soldier Field to accommodate the Chicago Bears.[262] The court was required to defer to the legislative findings of the Illinois Sports Facilities Authority Act unless there was a showing by the plaintiffs that those findings were evasive and that the Act's purpose was primarily to benefit private interests.[263] The court found that, although the Bears would benefit from this project, the facility would remain a public one owned and operated by the park district.[264] Additionally, given the stadium's long history of hosting events that provided benefits to private groups, there was no evidence of evasiveness in the findings.[265] Therefore, the court upheld the lower court's grant of summary judgment for the defendants.[266]

In November, the Seventh Circuit decided a case concerning the recurring problem of ticket scalping. In *Arlotta v. Bradley Center*,[267] Arlotta had been arrested for scalping tickets and sued the Bradley Center and the city of Milwaukee, alleging false arrest, illegal confinement, and malicious prosecution.[268] The Bradley Center had enlisted the city police department to help fight the scalping problem by having plainclothes and uniformed officers arrest and detain scalpers.[269] The court found that the fact that Arlotta did not assert that others had been wrongfully arrested was strong evidence that the anti-scalper plan actually worked and the arrest was not due to a problem with the policy but due to the fact that Arlotta violated the policy.[270]

XVI. TAXATION ISSUES

In *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*,[271] the

261. *Id.* at *4-5.
262. Friends of the Parks, v. Chi. Park Dist., 786 N.E.2d 161 (Ill. 2003).
263. *Id.* at 165-69.
264. *Id.* at 168-69.
265. *Id.* at 167.
266. *Id.* at 171.
267. 349 F.3d 517 (7th Cir. 2003).
268. *Id.* at 521.
269. *Id.* at 520-21.
270. *Id.* at 522-24.
271. 823 A.2d 108 (Pa. 2003).

court considered a case involving taxation of the team's media receipts.[272] The team shared a percentage of revenues received by the league from its contracts with television networks for broadcasting of league football games.[273] The lower court properly held that the city's Business Privilege Tax (BPT)[274] applied to these media receipts, but violated the commerce clause's apportionment requirement by applying the tax to 100% of the receipts when only 50% of the games were played in the city.[275] The Supreme Court reversed the judgment that 100% of the receipts were subject to the BPT and remanded the case.[276]

Additionally, in *Quad Cities Open, Inc. v. City of Silvis*,[277] the Illinois Court of Appeals reversed a finding that a tax was properly imposed on admission to a charitable golf tournament because the plaintiffs presented undisputed facts showing that each year the net proceeds from the golf tournament were distributed to charities, there was no evidence that anyone had been operating the golf tournament for personal profit, and the statements of the sponsors illustrated the intent to use the property exclusively for charitable purposes.[278]

XVII. TORT ISSUES

During 2003, a multitude of courts considered tort actions brought by injured participants or spectators at sporting events and locations.

A. Participant Injury Cases in Federal Courts

In *Bresnahan v. Bowen*,[279] the United States District Court for the District of Maine considered a negligence action arising out of a collision between two skiers on a ski slope.[280] The injured plaintiff asserted that the defendant was skiing too fast, beyond the scope of his ability, and out of control.[281] The plaintiff further alleged that the defendant failed to yield to the plaintiff as the

272. *Id.*
273. *Id.* at 115.
274. *Id.* at 113.
275. *See id.*
276. *Phila. Eagles Football Club*, 823 A.2d at 135-136.
277. 785 N.E.2d 1031 (Ill. App. Ct. 2003).
278. *See id.*
279. 263 F. Supp. 2d 131 (D. Me. 2003).
280. *Id.*
281. *Id.* at 134.

downhill skier and was thus liable for damages.[282] The defendant countered by asserting two affirmative defenses.[283]

First, the defendant argued that by signing release forms with the ski school and ski resort without expressly reserving the right to sue the defendant, the plaintiff had waived her negligence claims.[284] The defendant had signed identical releases with the ski resort.[285] However, the court noted that the fact that each party had signed an identical release with the resort did not create a contract between them, nor was it possible to find that the defendant was an immediate party to the plaintiff's release with the resort.[286]

Second, the defendant claimed that the plaintiff had expressly assumed the risk of colliding with other skiers by signing the releases and was thus barred from bringing a negligence claim.[287] However, once again, the defendant could not prevail on this defense when the signed release was between the plaintiff and the resort, not the plaintiff and the defendant.[288] Accordingly, the court denied the defendant's motion for summary judgment on the plaintiff's negligence claims.[289]

In *Umali v. Mount Snow Ltd.*,[290] the United States District Court for the District of Vermont decided a case in which a participant sued the defendants for gross negligence, willful and wanton acts, and omissions in the construction of a dual slalom bicycle race course.[291] The plaintiff was injured while participating in the defendant's dual slalom mountain bicycle race.[292] The plaintiff was a novice dual slalom bike racer and signed several application forms, each containing releases and waivers pertaining to events organized by the defendants.[293] The plaintiff was injured badly when he landed headfirst against a double jump, leaving him a paraplegic.[294] The court held that the releases signed by the contestant were void as against public policy by releasing the defendants from liability for negligence.[295] The court

282. *Id.*
283. *Id.* at 135.
284. *Bresnahan*, 263 F. Supp. 2d at 135-36.
285. *Id.* at 133-36.
286. *Id.* at 135-36.
287. *Id.* at 136-37.
288. *Id.*
289. *Bresnahan*, 263 F. Supp. 2d at 137.
290. 247 F. Supp. 2d 567 (D. Vt. 2003).
291. *Id.* at 568.
292. *Id.* at 568-69.
293. *Id.* at 569.
294. *Id.* at 570.
295. *Umali*, 247 F. Supp. 2d at 272-75.

cited Vermont Supreme Court precedent declaring "it is simply wrong to put one party to a contract at the mercy of the other's negligence."[296] Additionally, because experts testified, "the dangerous condition of the track and jump was neither an obvious risk nor a necessary one[,]"[297] summary judgment for the defendant was inappropriate under the Vermont Sports Injury statute,[298] as a material issue of fact remained.

B. Participant Injury Cases in State Courts

In a unique attempt at a negligence claim, the Illinois Court of Appeals considered a case in which a plaintiff was injured by an errant shot on a golf course.[299] The injured plaintiff alleged that the defendant did not properly swing his club and was careless and negligent in making his shot.[300] In assessing this unusual claim, the court found no evidence of anything more than a bad golf shot, recognizing risks inherent to the game of golf and the assumption of those risks.[301] It thus upheld the lower court's grant of summary judgment in favor of the defendant golfer on the allegations that he did not properly swing the club.[302]

C. Spectator Injury Cases

In 2003, courts considered a plethora of cases brought by plaintiffs injured by foul balls or errantly thrown balls at baseball games across the country. These cases have generally been decided in favor of the defendants under a theory of assumption of inherent risk associated with the game of baseball. The Virginia Supreme Court granted summary judgment in favor of the defendant baseball clubs in an action brought by a woman seriously injured when struck by a foul ball, recognizing that warning signs alerting spectators to the danger of batted balls were posted at the entrances to seating areas and that the back of each ticket contained a statement that the holder of the ticket assumed the risk of being injured by a batted ball.[303] The Minnesota Court of Appeals reached a similar decision when faced with nearly identical facts in

296. *Id.* at 573.

297. *Id.* at 575.

298. *Id.* (citing Vt. Stat. Ann. tit. 12, § 1037).

299. Heiden v. Cummings, 786 N.E.2d 240 (Ill. App. Ct. 2003).

300. *Id.* at 241.

301. *Id.* at 242-43.

302. *Id.*

303. Thurmond v. Prince William Prof'l Baseball Club, 574 S.E.2d 246, 246-47 (Va. 2003).

Alwin v. St. Paul Saints Baseball Club, Inc.[304] In an analogous scenario in New York, the court considered a claim by an injured party, alleging that the defendants were negligent in failing to provide proper protection to spectators at the stadium.[305] The court held that by providing sufficient protective netting behind home plate where the danger of being struck by a baseball was greatest, the defendants had fulfilled their duty of care and could not be held liable for negligence.[306]

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304. 672 N.W.2d 570 (Minn. Ct. App. 2003).

305. Ray v. Hudson Valley Stadium Corp., 306 A.D.2d 264 (N.Y. App. Div. 2003).

306. *Id.* at 264-65.