

Marquette Sports Law Review

Volume 30
Issue 1 *Fall*

Article 6

2019

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Adam Epstein, *Kentucky and Sports Law*, 30 Marq. Sports L. Rev. 117 (2019)
Available at: <https://scholarship.law.marquette.edu/sportslaw/vol30/iss1/6>

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KENTUCKY AND SPORTS LAW

ADAM EPSTEIN*

INTRODUCTION

The purpose of this article is to explore many of the prominent ethical and legal incidents, cases, laws, and other relevant material related to sports law emanating from Kentucky, the 26th most populous state with almost 4.5 million residents.¹ It is also designed to serve as a springboard for further research. Since there are not currently² any major league professional sports teams within the borders of Kentucky,³ the least populous state among the four found in the Sixth Circuit,⁴ it should come as no surprise that most sports law-related subjects

* Professor, Department of Finance and Law, Central Michigan University. This article was originally presented at the Tri-State Academy of Legal Studies in Business in Cincinnati, Ohio in 2017, and the author wishes to thank the attendees who provided thoughtful insights and updates to produce this final product.

1. *List of States and Territories of the United States by Population*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_population (last visited Dec. 6, 2019).

2. *See Sports in Kentucky*, WIKIPEDIA, https://en.wikipedia.org/wiki/Sports_in_Kentucky (last visited Dec. 6, 2019) (offering a complete list of the history of mostly defunct professional sports teams in Kentucky and stating, “The National Football League and National League had early franchises in Louisville, and the Kentucky Colonels were a mainstay of the American Basketball Association that joined the National Basketball Association with the ABA-NBA merger in 1976; the Colonels were one of only two ABA teams that were kept out of the merger (the other was the Spirits of St. Louis).” It should be noted, however, that there are four minor league baseball teams within Kentucky including Louisville Bats (AAA International League affiliate of the Cincinnati Reds), Bowling Green Hot Rods (Class A Midwest League affiliate of the Tampa Bay Rays), Lexington Legends (Class A South Atlantic League affiliate of the Kansas City Royals), and Florence Freedom (Independent, Frontier League)). *Id.*

3. *Id.* The state of Kentucky borders Cincinnati, Ohio, being separated merely by the Ohio River. Cincinnati hosts the National Football League’s (NFL) Cincinnati Bengals and Major League Baseball’s (MLB) Cincinnati Reds whose stadiums (Paul Brown Stadium and Great American Ball Park, respectively) are clearly visible to those on the other side of the river in Covington and Newport, at the confluence of the Ohio and Licking Rivers. These areas are considered part of the Cincinnati metropolitan area also known as Greater Cincinnati. Some refer to Kentucky as a Commonwealth rather than a state, like three other states of Massachusetts, Pennsylvania, and Virginia, but this distinction is in name only and there is no real difference other than historical in nature. *See What’s the Difference Between a Commonwealth and a State?*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/whats-the-difference-between-a-commonwealth-and-a-state> (last visited Dec. 6, 2019).

4. The others in terms of population being Michigan (10th), Ohio (7th) and Tennessee (16th). *List of States and Territories of the United States by Population*, *supra* note 1.

emerge from both the intercollegiate and interscholastic (high school) levels of competition. Indeed, Kentucky has many major college sports programs, including three National Collegiate Athletic Association (NCAA) Division I Football Bowl Subdivision (FBS) programs: the University of Kentucky (UK) Wildcats, the Western Kentucky University (WKU) Hilltoppers (since 2009), and the University of Louisville (UofL) Cardinals.⁵

While there does not appear to be extraordinarily unique sports law decisions from the state of Kentucky, there are some very interesting examples including some legal gems that could be well-served pedagogically, and these will be noted as such where appropriate. The article also demonstrates the volume and impact that intercollegiate and interscholastic athletic disputes have on sports law within a state jurisdiction—as opposed to professional athletics—thereby demonstrating and reinforcing the broad range of cases and issues that the subject and study of sports law within a jurisdiction can offer the researcher.

The article is divided into three parts. Part I explores sports law examples from the intercollegiate level of competition. Part II dives into issues at the interscholastic level and covers a wide variety of other subjects including sports crimes, sports torts, horse-related matters, and a few others as well. Finally, Part III provides some additional sports law-related examples, cases, and issues for the reader to explore, including how UK became a pioneer for integration and sport during the Civil Rights Era of the 1960s. Indeed, Kentucky does offer a worthwhile spectrum for sports law enthusiasts. Unfortunately, many of Kentucky's issues have become the primary subject of legal analysis, discussion, and criticism nationwide.

PART I: INTERCOLLEGIATE SPORTS LAW ISSUES

A. UK and UofL Men's Basketball: Ethical and Legal Issues for Decades

Both UK and UofL have had two of the most winning men's basketball programs throughout the history of the NCAA.⁶ Combined, these premier

5. *Sports in Kentucky*, *supra* note 2. Division I football is divided into two subdivisions now: FBS (formerly known as I-A and the more revenue-generating and prominent of the two) and Football Championship Subdivision (FCS), formerly known as I-AA.

6. *Kentucky-Louisville Rivalry*, WIKIPEDIA, https://en.wikipedia.org/wiki/Kentucky-Louisville_rivalry (last visited Dec. 6, 2019); *Kentucky Wildcats Men's Basketball*, WIKIPEDIA, https://en.wikipedia.org/wiki/Kentucky_Wildcats_men%27s_basketball (last visited Dec. 6, 2019) (quoting “Kentucky leads all schools in total NCAA tournament appearances (59), NCAA tournament wins (131), NCAA Tournament games played (184), NCAA Sweet Sixteen appearances (45), NCAA Elite Eight appearances (37), and total postseason tournament appearances (68). Further, Kentucky has played in 17 NCAA Final Fours (tied for 2nd place all-time with UCLA), 12 NCAA Championship games, and has won 8 NCAA championships (second only to UCLA's 11).”). Kentucky is also the only program with 5 different NCAA Championship coaches (Adolph Rupp, Joe B. Hall, Rick Pitino, Orlando “Tubby” Smith, and current coach John Calipari). *Id.*

programs have won 11 national championships.⁷ No doubt, the State of Kentucky takes its basketball and college recruiting quite seriously, sometimes crossing the line.

For example, in 2017, Kentucky fans took their hostilities out against an NCAA referee during the post-season for their perception of his performance during the 2017 March Madness men's basketball tournament versus the University of North Carolina in which UK lost 75-73 during the tournament's Elite Eight stage.⁸ John Higgins, the referee at issue, claimed that after the game, he received threats over the phone and poor ratings and reviews online via social media against his private roofing business, Weatherguard, Inc., resulting in an ongoing federal lawsuit initiated by Higgins in Nebraska, though later moved to Kentucky, against Kentucky Sports Radio (KSR) and two of its operators, Matthew Jones and Drew Franklin, who he claims incited the collective action.⁹

However, given the high-profile programs and their national success, it is not surprising that both UK and UofL have had significant ethical and legal issues related to their basketball programs,¹⁰ and the NCAA has punished both

7. *Kentucky-Louisville Rivalry*, *supra* note 6 (quoting, "Kentucky has eight national championships and Louisville two. Combining for nine national championships over the last 38 years, Kentucky and Louisville have captured 24% of the national championships, or greater than one every five years.").

8. See ASSOCIATED PRESS, *College Basketball Referee John Higgins Sues Kentucky Media Company Over Harassment*, ESPN (Oct. 5, 2017), http://www.espn.com/mens-college-basketball/story/_id/20907295/college-basketball-referee-john-higgins-sues-kentucky-media-company-harassment (offering, "The suit alleges intentional infliction of emotional distress, invasion of privacy, tortious interference with a business and civil conspiracy." The article states further, "After defendants' publication of Mr. Higgins' business and contact information, as well as their encouragement and enticement to thousands of people to utilize the contact information, Weatherguard received over 3,000 phone calls during the two days after the game, of which approximately 75 percent were from Kentucky area codes[.]").

9. *Id.*; see also Emma Baccellieri, *Referee John Higgins Sues Kentucky Sports Radio Over Trolling*, DEADSPIN, Oct. 3, 2017, <https://deadspin.com/referee-john-higgins-sues-kentucky-sports-radio-over-tr-1819121784> (offering a copy of the complaint itself and reporting: "a flood of negative online reviews pushed Weatherguard from being the top-rated roofing company in Omaha to the last-ranked business in all categories. His 4.8-out-of-5 star ranking on Google became a 1.2, with 80 one-star reviews filed in a 24-hour period. (None of those reviews were traced to computers in the Omaha area; the majority were from Kentucky.) A total of 181 false reviews were ultimately discovered."); Jason Riley, *Nebraska Judge Moves Referee's Lawsuit Against Kentucky Sports Radio to Kentucky*, WDRB.COM (Jan. 5, 2018), http://www.wdrb.com/story/37201261/nebraska-judge-moves-referees-lawsuit-against-kentucky-sports-radio-to-kentucky#.Wk_Simbcq0.twitter.

10. Though this part focuses primarily on men's basketball, it is not the only sport to have legal issues. See, e.g., *Bassett v. NCAA*, 428 F. Supp. 2d 675 (E.D. Ky. 2006), *aff'd* 528 F.3d 426 (6th Cir. 2008) (affirming that Claude Bassett, a former recruiting coordinator for UK's football team, had no legal claim to sue NCAA, the Southeastern Conference (SEC) and the University of Kentucky Athletic Association (UKAA), alleging conspiracy to violate antitrust laws, fraud, civil conspiracy and tortious interference with contract. UK conducted an internal investigation of its football program for possible NCAA rules violations, Bassett resigned in November 2000, and then the NCAA conducted its own investigation related to allege violations of NCAA recruiting rules. In 2002, the NCAA placed UK on probation for more than three dozen recruiting

men's basketball programs throughout the years. Indeed, UofL and its athletic department (and its relationship with Adidas) were all involved in a chaotic display of accusations of corruption, allegations involving illegal payments, and NCAA rules violations resulting in lawsuits and terminations of employment relationships with several individuals, including iconic men's Head Basketball Coach Rick Pitino and its storied Athletic Director Tom Jurich.¹¹ In fact, the Federal Bureau of Investigation (F.B.I.) became involved, "implicating certain members of the University's men's basketball program in a scheme of fraud and malfeasance in the recruitment of student athletes"¹² on the college landscape, primarily "regulated" by the NCAA itself through the self-enforcement of its rules (i.e. Bylaws), which resulted in federal criminal convictions in late October 2018 against three individuals involved in an illicit student-athlete recruiting scheme.¹³

violations committed between 1998 and 2000, banned UK from a bowl game for one season, and ordered the forfeiture of nineteen scholarships over a three-year period. Bassett, under then-coach Hal Mumme, was found in violation of NCAA ethical conduct bylaws and was effectively banned from working for any NCAA school for eight years via the NCAA "show cause" provision. The Sixth Circuit characterized various NCAA recruiting rules as "noncommercial restraints" beyond the reach of the Sherman Act and Bassett's complaint as well.). For a copy of the NCAA Infractions Committee Appeals report, see NCAA News Release, *University of Kentucky. Public Infractions Appeals Comm. Report*, NCAA (Sept. 17, 2002), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102487>.

11. Steve Fainaru & Mark Fainaru-Wada, *Louisville Athletic Director Tom Jurich Leveraged Big Deals to Build University into Sports Powerhouse Only to Watch it Amid Charges of Excess*, ESPN (Dec. 10, 2017), http://www.espn.com/espn/otl/story/_/id/21710106/louisville-athletic-director-tom-jurich-leveraged-big-deals-build-university-sports-powerhouse-only-watch-burn-amid-charges-excess (discussing the events on the morning of September 26, 2017—and the chaotic aftermath—in which "the FBI had announced a sweeping corruption investigation into college basketball. In one of the most explosive allegations, Adidas employees . . . had paid a \$100,000 bribe to a blue-chip recruit's family.").

12. Justin Sayers, *Louisville Basketball Scandal: Tom Jurich Was Fired in Scathing Letter*, COURIER J., Oct. 24, 2017, <https://www.courier-journal.com/story/sports/college/louisville/2017/10/24/postel-jurich-failed-promote-zero-tolerance-scandals/795596001/>.

13. The F.B.I. corruption case, *United States v. Gatto*, 313 F. Supp. 3d 551 (S.D.N.Y. 2018), resulted in jury convictions against ex-Adidas executive James Gatto, ex-Adidas consultant Merl Code, and sports business agent Christian Dawkins on felony charges of wire fraud and conspiracy to commit wire fraud by improperly attempting to influence high-profile basketball recruits to attend the universities of Kansas, Louisville and North Carolina State. See Mark Schlabach, *James Gatto, Merl Code and Christian Dawkins Found Guilty in Pay-for-Play Trial*, ESPN (Oct. 25, 2018), http://www.espn.com/mens-college-basketball/story/_/id/25072946/james-gatto-merl-code-christian-dawkins-found-guilty-college-basketball-pay-play-trial. For another Kentucky-related sports law case involving NCAA Bylaws. See *Bleid Sports, LLC v. NCAA*, 976 F. Supp. 2d 911 (E.D. Ky. 2013) (deciding that the bylaw that is "clearly a recruiting rule" is not commercial in nature and thus immune from antitrust liability under the Sherman Act. Bleid Sports coordinated the "Rumble at Rupp" and had been given permission to run the event, but 36 hours before the event, the NCAA declared that the high school and middle school basketball tournament scheduled for November 25, 2011, would violate NCAA rules and refused to allow the event to occur at Rupp Arena in Lexington without a violation occurring. As a result, Bleid Sports relocated the event to Lexington Christian Academy, but unsuccessfully sued (motion to dismiss granted to NCAA) claiming that it had lost sales and

The following sub-sections offer summaries of some of the more egregious sports law examples of intercollegiate impropriety, mostly involving the two major basketball programs in the State of Kentucky, the *Bluegrass State*, and are addressed in chronological order.

1. UK Point-Shaving Scandal under Storied Coach Adolph Rupp

UK did not play during the 1952-53 basketball season due to a point-shaving (sports bribery) cheating scandal revealed in 1951, in which players were arrested for taking bribes to influence games in Madison Square Garden (MSG).¹⁴ Characterized as the NCAA's first "death penalty,"¹⁵ the scandal involved 32 players from seven colleges and universities including: UK, City College of New York (CCNY), Manhattan College, New York University, Long Island University, Bradley University, and the University of Toledo.¹⁶

New York District Attorney Frank Hogan had players Ralph Beard, Alex Groza, and Dale Barnstable for accepting \$500 bribes to shave points in an NIT game against Loyola of Chicago in MSG in 1949.¹⁷ Judge Saul Streit suspended all of their sentences even though they were also barred from sports for three years, not to mention that the NBA Commissioner Maurice Podoloff suspended all three as well.¹⁸ Further, UK All-American center Bill Spivey, who led UK to a national championship in 1951, was named as part of the scandal,¹⁹ though he never admitted to being involved or even having any knowledge of the

registration fees as a result with the court dismissing claims for fraud, negligent misrepresentation, tortious interference with contractual relationships, and tortious interference with prospective business relationships. With regard to antitrust claims under Section 1 of the Sherman Act, the court held that the NCAA Bylaw 13.11.1.8 was not commercial in nature and Bleid failed to state a claim under the Sherman Act. The court stated, "To state a claim under the Sherman Act, the rule at issue must be commercial in nature." See also *id.* at 916 (citing *Bassett v. Kentucky Athletic Ass'n.*, 528 F.3d 426, 433 (6th Cir. 2008), a case involving a lawsuit by former UK football recruiting coordinator Claude Bassett who was terminated for violations of NCAA recruiting rules, discussed further *supra*, note 10).

14. *Kentucky Schedule (1952-53)*, BIG BLUE HISTORY (Jan. 26, 2011), <http://www.bigbluehistory.net/bb/Statistics/1952-53.html> (offering a comprehensive history of the scandal involving Kentucky players and others).

15. Curry Kirkpatrick, *Dodging a Bullet: Kentucky Could Have Received the Death Penalty for Basketball Misdeeds; By Cooperating, the Wildcats Stayed Their Execution*, SPORTS ILLUSTRATED, May 29, 1989, at 24, <https://www.si.com/vault/1989/05/29/119965/dodging-a-bullet-kentucky-could-have-received-the-death-penalty-for-basketball-misdeeds-by-cooperating-the-wildcats-stayed-their-execution>.

16. Joe Goldstein, *Explosion: 1951 Scandals Threaten College Hoops*, ESPN CLASSIC (Nov. 19, 2003), https://www.espn.com/classic/s/basketball_scandals_explosion.html.

17. *Id.*

18. *Id.*

19. See *Kentucky Schedule (1952-53)*, *supra* note 14.

circumstances surrounding the game-fixing incidents and he, too, was barred from playing for UK and the NBA as well.²⁰

UK proposed an investigation of the incident, and the Southeastern Conference (SEC) conducted one too, resulting in its decision to suspend UK from any conference games during the 1952-53 season.²¹ The NCAA—through its Infractions Subcommittee—also brought formal membership charges against UK including:

1. In the spring of 1948, members of the basketball team, on their departure for the NCAA tournament, were given \$50 each by sports enthusiasts not connected with the university.
2. In the spring of 1949, before their departure for the NCAA tournament, members of the basketball team were given \$50 each by sports enthusiasts not connected with the university.
3. Before the Kentucky team left for the St. John's game in New York City in December 1950, six of the players were given \$50 each.
4. After the basketball team returned from the Sugar Bowl game in January 1951, several of the players were given sums ranging from \$25 to \$50.
5. Between October 1946, and December 1950, two members of the basketball team had received monthly stipends of \$50 from sports enthusiasts not connected with the university.²²

Kentucky accepted the NCAA's decision without appeal.²³ Rupp remained the coach of UK until he was forced to retire in 1972.²⁴ Still, in the end, the year

20. See Frank Litsky, *Bill Spivey, 66, Kentucky Star Implicated in Scandal of 1950's*, N.Y. TIMES, May 10, 1995, <http://www.nytimes.com/1995/05/10/obituaries/bill-spivey-66-kentucky-star-implicated-in-scandal-of-1950-s.html> (quoting, "After Spivey had told a New York grand jury he was not guilty, he was accused of lying under oath seven times. After a 13-day trial in January 1953, the jury was deadlocked, 9-3, in favor of acquittal. A mistrial was declared, and the charges were later dropped.").

21. *Kentucky Schedule (1952-53)*, *supra* note 14 (quoting, "The university had the right to appeal the penalties, but under the guidance of UK President H.L. Donovan, the school chose to accept the SEC ruling as-is. While acknowledging that UK had broken rules, Donovan did express his objection to the severity of the penalty.").

22. *Id.*

23. *Id.* (writing, "As with the SEC ruling and Judge Streit before him, while President Donovan did admit that wrongdoing had occurred, he did take issue with some of the particular findings and the overall harshness of the punishment. 'It is the opinion of our athletics board that the penalty inflicted upon the University of Kentucky is unduly severe and far more harsh than any penalty that has ever been inflicted upon a member for violation of the NCAA rules in the past.' wrote Donovan to NCAA President Hugh C. Willett.").

24. See Bob Carter, *Rupp: Baron of the Bluegrass*, ESPN CLASSIC, http://www.espn.com/classic/biography/s/Rupp_Adolph.html (last visited Dec. 6, 2019); see also Sam Goldaper, *Adolph Rupp, Basketball Coach Who Won 879 Games, is Dead at 76*, N.Y. TIMES, Dec. 11, 1977, <http://www.nytimes.com/1977/12/11/>

after UK won the NCAA National Championship, the university was suspended for the entire next season, representing a dark chapter in the storied history of UK basketball.²⁵

2. Several UK NCAA Violations under Coach Eddie Sutton

In the 1980s, UK's Head Basketball Coach Eddie Sutton, who coached the team for four years, became involved in a scandal much more egregious than just finishing with the team's first losing full-season record since 1927.²⁶ As it turned out, the NCAA announced at the end of the 1988-89 season that its investigation into the basketball program had found several items extremely disturbing and in violation of NCAA policies.²⁷

Emery Worldwide (a delivery service at the time) employees discovered \$1,000 in cash in an envelope that UK assistant coach Dwane Casey was accused of sending to UK forward Chris Mills' father, Claud Mills, though Casey maintained his innocence.²⁸ Coach Sutton resigned shortly before the final report came out along with UK athletic director Cliff Hagan.²⁹ As a result of improprieties in the program, UK received three years' probation, a two-year ban from postseason play, a ban from live television during the 1989-90 season, and was ordered to return its share of receipts from the 1988 NCAA basketball tournament.³⁰

archives/adolph-rupp-basketball-coach-who-won-879-games-is-dead-at-76.html (providing that Rupp retired in 1972 having won 879 games and four national championships, but that the mandatory retirement age was 70 in Kentucky).

25. Matt Jones, *UK History: The 1951 UK Gambling Scandal*, KY. SPORTS RADIO (Aug. 19, 2007), <http://kentuckysportsradio.com/1/uk-history-the-1951-uk-gambling-scandal/> (noting, "Kentucky was able to overcome the adversity and rose back to prominence in college basketball, but it has never been able to completely remove the stain which the scandal left, even over 50 years after the fact.").

26. Bryan the Intern, *BTI's Rants and Ramblings: Gillispie or Sutton, Who Did It Worse?*, KY. SPORTS RADIO (June 5, 2014), <http://kentuckysportsradio.com/basketball-2/btis-rants-and-ramblings-gillispie-or-sutton-who-did-it-worse/> (providing Coach Sutton's coaching records and offering that his 1988-89 record was 13-19 and that his UK team missed both the NCAA and NIT Tournaments).

27. See Kirkpatrick, *supra* note 15.

28. *Id.* Kirkpatrick stated: "[t]he NCAA placed Casey on conditional probation for five years, meaning that if he seeks employment at another NCAA member school during that period, he and representatives of that school will be requested to appear before the NCAA's Committee on Infractions and 'show cause' why he should be hired. 'I know I didn't do it [put 20 \$50 bills in the Emery envelope] and will proclaim my innocence until the day I die.'" *Id.*

29. *Id.* Hagan was replaced thereafter by C.M. Newton, a former UK basketball and baseball player, a former Transylvania, Alabama, and Vanderbilt basketball coach thereafter, and from 1979 to 1985, the chair of the NCAA Rules Committee. See *C.M. Newton*, WIKIPEDIA, https://en.wikipedia.org/wiki/C._M._Newton (last visited Dec. 6, 2019).

30. *Id.* Kirkpatrick also stated that UK had to "strike its two victories in the tournament from the record for deliberately using an ineligible player, forward Eric Manuel of Macon, Ga., who was then a freshman."

3. The NCAA and UofL's Muhammed Lasege

Muhammed Lasege came to the United States from Nigeria and enrolled at the UofL to play basketball.³¹ The UofL, having become aware that Lasege entered into a professional basketball contract in Russia and received other benefits prior to his enrollment, declared Lasege ineligible in March 2000, but UofL asked the NCAA to reinstate the Lasege “because of Lasege’s ignorance of NCAA regulations and other mitigating factors.”³² The NCAA disallowed Lasege from playing at UofL because he had played professionally in Moscow, had agreed to work with a Russian sports agency, and had received a salary of \$9,000 with incentives, all clearly in violation of NCAA rules.³³

UofL appealed the NCAA’s decision, but the NCAA’s Division I Subcommittee on Student-Athlete Reinstatement denied the appeal, ruling that “Lasege’s Bylaw violations exhibited a clear intent to professionalize . . . [.]”³⁴ which violated NCAA’s principles related to amateurism. The NCAA’s determination of Lasege’s ineligibility prompted litigation, and Lasege brought a legal claim on November 27, 2000 in the Jefferson Circuit Court, seeking immediate reinstatement of his eligibility and an injunction against the NCAA for its decision in that it was “arbitrary and capricious.”³⁵

Id. Kirkpatrick offers that Manuel was banned from NCAA basketball because he “committed academic fraud by cheating on his college entrance exam, reportedly by copying answers from the test of another student in the Lexington school where the test was administered.” *Id.*; see also Alexander Wolff, *Odd Man Out*, SPORTS ILLUSTRATED, Feb. 11, 1991, <https://www.si.com/vault/1991/02/11/123584/odd-man-out-three-years-after-the-scandal-that-stained-kentucky-its-coaches-and-three-players-only-eric-manuel-is-still-paying-a-heavy-price> (referring to Mills' envelope incident as “Bills ‘n’ Mills Affair” and authoring two years after the NCAA decision that while Casey, Mills and Sutton had moved on, that “Manuel is the only one of the principals still living in a clouded world of motions and court orders.”). Wolff then recounts that Manuel did play ten games his freshman year, but when the NCAA began investigating the UK program, “[s]omeone noticed that Manuel, after having scored the American College Test equivalents of a 3 and a 7 on his two cracks at the Scholastic Aptitude Test, received a 23 on the ACT that he took on June 13, 1987, his final attempt to become eligible as a freshman under Prop 48, which then required a score of 15. Moreover, Manuel’s answers were uncannily similar to those of a student sitting to his left that morning at a table in the cafeteria at Lexington’s Lafayette High. Both Manuel and Chris Shearer, a Lafayette senior and capable student, answered exactly 219 questions. Of those 219, 211 of Manuel’s responses, both right and wrong, matched Shearer’s. Manuel voluntarily left the team pending further investigation. The NCAA later suspended him permanently.”).

31. NCAA v. Lasege, 53 S.W.3d 77, 80 (Ky. 2001).

32. *Id.*

33. *Id.* at 81.

34. *Id.*

35. *Id.*

The trial court was considerably critical of the NCAA's decision.³⁶ As a result, the court threw out the NCAA's decision and granted a temporary injunction allowing Lasege to play for UofL.³⁷ The court went further, however. Indeed, UofL was concerned that the NCAA's Bylaw 19.8, known as the "Restitution Rule," the controversial rule [enumerated in the most recent NCAA Manual as 19.2] that allows the NCAA to punish UofL (or any member institution) for using what the NCAA deemed to be an ineligible player if the court order were subsequently vacated by another court.³⁸ As a result, the trial court "declare[d] that NCAA Bylaw 19.8 is invalid because it prevents parties from availing themselves of the protections of the courts" and ordered:

that the University of Louisville shall abide by this injunction and shall not prohibit Muhammed Lasege from engaging in intercollegiate basketball;

IT IS FURTHER ORDERED AND ADJUDGED that the NCAA and its members are hereby ordered to take no action to prevent or interfere with the University of Louisville's ability to abide by this Order by attempting to enforce NCAA Bylaw 19.8.³⁹

Thus, the court entered the temporary injunction and Lasege played basketball for UofL during the 2000-2001 season.⁴⁰ The NCAA appealed the decision, but the Kentucky Court of Appeals upheld the decision, though not ruling on the merits itself.⁴¹ Lasege's victory was short-lived, however. The Kentucky

36. *Id.* at 81-82 (stating, "(1) suggested that the NCAA had ignored what it described as 'overwhelming and mitigating circumstances,' including economic and cultural disadvantages, a complete ignorance of NCAA regulations, and elements of coercion associated with execution of the contracts; (2) believed the NCAA's determination to conflict with the NCAA's own amateurism guidelines and past eligibility determinations regarding athletes who had engaged in similar violations; (3) expressed its doubts about whether the first contract signed by Lasege was legally enforceable as an agency contract both because of Lasege's minority at the time he executed it and because the trial court disputed that the contract created an agency relationship; and (4) opined that a clear weight of evidence suggested Lasege committed these violations not in order to become a professional athlete, but only to obtain a visa which would allow him to become a student-athlete in the United States.").

37. *Lasege*, 53 S.W.3d at 82.

38. *Id.* (citing NCAA Bylaw 19.8, which "allows the NCAA to seek restitution from member institutions who permit student-athletes found ineligible by the NCAA to compete for their athletic teams pursuant to court orders which are later vacated."). For further exploration of the most recent NCAA bylaws, including the current version of 19.8, now characterized as 19.12, see 2017-2018 NCAA DIVISION I MANUAL art. § 19.12 (titled "Restitution") [hereinafter NCAA MANUAL], <https://www.ncaapublications.com/p-4511-2017-2018-ncaa-division-i-manual-august-version-available-august-2017.aspx> (last visited Dec. 6, 2019).

39. *Lasege*, 53 S.W.3d at 82.

40. *Id.*

41. *Id.*

Supreme Court vacated trial court's temporary injunction, finding it abused its discretion by:

- (1) substituting its judgment for that of the athletic association on the question of the student-athlete's intent to professionalize;
- (2) finding that the athletic association had no interest in the case which weighed against injunctive relief; and
- (3) trial court erred by declaring the athletic association bylaw invalid.⁴²

The Kentucky Supreme Court observed that "relief from our judicial system should be available if voluntary athletic associations act arbitrarily and capriciously toward student-athletes."⁴³ The Supreme Court stated:

In our opinion, the trial court wrongfully substituted its judgment for that of the NCAA after it analyzed the evidence and reached a different conclusion as to Lasege's intent to professionalize. The mere fact that a trial court considering mitigating evidence might disagree with the NCAA's factual conclusions does not render the NCAA's decision arbitrary or capricious.⁴⁴

The Court went further and opined, "Accordingly, we believe the trial court abused its discretion when it found that Lasege had a high probability of success on the merits of his claim."⁴⁵ In this case, Lasege's victory was short-lived, and the Supreme Court of Kentucky gave considerable deference to the NCAA and its authority over eligibility disputes.⁴⁶ The Court vacated the trial court's temporary injunction entirely.⁴⁷ It also stated with regard to the NCAA's Restitution Rule, "Accordingly, we vacate that portion of the temporary injunction which prohibits the NCAA from potentially pursuing NCAA Bylaw 19.8 restitution."⁴⁸ In the end, Lasege sat out the rest of the 2000-2001 season

42. *Id.* at 84.

43. *Id.* at 83.

44. *Id.* at 85.

45. *Lasege*, 53 S.W.3d at 85.

46. *See id.* at 87 (stating, "By becoming a member of the NCAA, a voluntary athletic association, U of L agreed to abide by its rules and regulations." This included abiding by the NCAA's Restitution Rule.).

47. *Id.* at 89.

48. *Id.*

as a result of the 4-3 Kentucky Supreme Court decision and he was declared permanently ineligible by the NCAA.⁴⁹

4. The Memorandum of Understanding and Billy Gillispie: UK Head Basketball Coach

On April 6, 2007, an announcement was made that UK had hired Billy Gillispie from Texas A&M to the position of head basketball coach, replacing Coach Tubby Smith, who left a few weeks earlier for the University of Minnesota.⁵⁰ Gillispie signed a Memorandum of Understanding (MOU) with UK the same day which outlined his salary and benefits.⁵¹ The MOU also stated that contract negotiations would be concluded with “every reasonable effort” within 60 days of his start date, but UK and Gillispie never signed a formal contract thereafter.⁵² In fact, Gillispie’s MOU stated:

It is a great pleasure that I offer you the position of Head Men's Basketball Coach for the University of Kentucky, effective April 6, 2007. This Memorandum of Understanding, which presents the material terms of our offer, will be expanded and incorporated into an employment contract with the University of Kentucky for execution at the earliest possible date. The employment contract will be for a period of 7 years with an

49. Charles Wolfe, *Justices Void Court Order That Made Muhammed Lasege Eligible*, LOUISVILLE CARDINALS (June 14, 2001), http://www.gocards.com/news/2001/6/14/Justices_Void_Court_Order_That_Made_Muhammed_Lasege_Eligible.aspx; see also Josephine (Jo) R. Potuto, *The NCAA Student-Athlete Reinstatement Process: Say What?*, 63 BUFF. L. REV. 297, 329-31 (2015) (discussing the Lasege case along with similar cases involving student-athletes Jeremy Bloom (University of Colorado) and Andrew Oliver (Oklahoma State University) who sought reinstatement of their eligibility through the courts. Only Oliver’s challenge was successful, and Potuto described it as “rare” and in general student-athletes face and their universities face a “steep climb” when seeking reinstatement eligibility from the NCAA). For further research on the Ohio Oliver case, see reported decisions in *Oliver v. NCAA*, 920 N.E.2d 196 (Ohio Com. Pl. 2008) [Oliver I] (Judge Tygh M. Tone’s decision denying the NCAA’s first motion to dismiss); *Oliver v. NCAA*, 920 N.E.2d 190 (Ohio Com. Pl. 2008) [Oliver II] (denying the NCAA’s motion for summary judgment); *Oliver v. NCAA*, 920 N.E.2d 203 (Ohio Com. Pl. 2009) [Oliver III] (bench trial judgment granting declaratory and permanent injunctive relief).

50. See Associated Press, *Kentucky Introduces Gillispie as New Coach*, ESPN (Apr. 6, 2007), <http://www.espn.com/mens-college-basketball/news/story?id=2828248> (authoring “[d]ubbed a ‘miracle worker’ by some for his success at UTEP and Texas A&M, Gillispie is the only one in NCAA history to coach the nation’s most improved team in two consecutive seasons.”).

51. Martin Greenberg & Kaitlyn Wild, *Leaping Without Looking: MOUs Create Risks When Univ. Do Not Know Their Legal Significance*, FOR THE RECORD (Nat’l Sports L. Inst., Milwaukee, Wis.), Jan.-Mar. 2010, at 1, <https://law.marquette.edu/assets/sports-law/pdf/for-the-record/v2li1.pdf>.

52. *Id.* at 2-3.

option for a 2-year extension after a 24-month review at the University's discretion.⁵³

The MOU continued:

While these terms are contingent upon our executing an employment contract, and are subject to the approval of the Board of Directors of the University of Kentucky Athletic Association and if necessary the Board of Trustees of the University of Kentucky, I trust that every reasonable effort will be made to mutually conclude that process within 60 calendar days of your start date.

It is with great anticipation and enthusiasm that I offer you the position of Head Men's Basketball Coach at the University of Kentucky. Assuming you are amenable, please indicate your acceptance by signing below. I have every confidence that you will lead our basketball program with integrity and pride, and I look forward to welcoming you as a member of the Wildcat Family.⁵⁴

“On March 27, 2009, Gillispie was fired from his position without cause[,]”⁵⁵ and for “‘philosophical differences’ between the University and Gillispie on the role the school’s coach plays in the fabric of a fan base that refers to itself as the Big Blue Nation.”⁵⁶ UK’s athletics director Mitch Barnhart, who hired Gillispie two years earlier, went further and stated, “The chemistry is just not right,” and “[t]he relationship between [Gillispie] and the University is simply not a good fit in many ways. The inability to come to an agreement on critical terms of an employment contract after two years of negotiation is just one indication of this incompatibility.”⁵⁷

After Gillispie was fired, Gillispie claimed that the MOU was indeed a legally binding contract and that UK owed him the \$6 million (four years at \$1.5 million per year).⁵⁸ UK said the “MOU [was] only a year-to-year contract[,]” and that the “termination without cause provision” was only enforceable if both parties signed the contract itself, as opposed to just the MOU.⁵⁹

53. *Id.* at 1-2 (quoting Memorandum of Understanding Between the University of Kentucky and Billy C. Gillespie (Apr. 6, 2007)).

54. *Id.* at 2.

55. *Id.*

56. *Id.* at 3 (quoting Associated Press, *Kentucky Fires Billy Gillispie*, KOLOTV.COM (Mar. 27, 2009), <http://www.kolotv.com/sports/headlines/42025207.html>).

57. Greenberg & Wild, *supra* note 51, at 3.

58. *Id.*

59. *Id.*

As a result, on May 27, 2009, Gillispie filed a lawsuit against the UK Athletic Association (UKAA) for breach of contract, among other things, in the U.S. District Court for the Northern District of Texas.⁶⁰ The next day, the university filed a countersuit against Gillispie in Franklin Circuit Court in Kentucky, seeking a declaratory judgment that the MOU did not rise to the level of a formal contract.⁶¹ On October 13, 2009, UK and Gillispie agreed to settle the dispute via mediation, and Gillispie was awarded \$2.9 million plus legal fees.⁶²

Had the parties to the MOU handled it appropriately, the above situation should never have been an issue had UK required Gillispie to sign a contract near the outset of the relationship. As stated by Greenberg and Wild, who analyzed the MOU, the claims, the lawsuits and the ultimate result, “[T]here should be a good faith obligation to eventually execute a formal contract, and there should be a time limit put in place for doing so, time being deemed of the essence.”⁶³

Today, MOU’s are certainly part of the landscape for college coaches and contract drafters, who use them frequently and effectively, but that is not to say—as demonstrated by the Gillispie situation—that they are not controversial at times and not without risk to all parties involved.⁶⁴ This was demonstrated, for example, by a nationally discussed debacle involving the University of Tennessee (UT) and an MOU offered to assistant football coach Greg Schiano (The Ohio State University) in late 2017 to become the new head coach for the

60. *Id.* (citing Complaint, Gillispie v. Univ. of Ky. Athletic Ass’n, Inc., No. 3:09-cv-970 (N.D. Tex. May 27, 2009)).

61. *Id.* at 4 (stating “the MOU was expressly intended to be a letter of intent or agreement to agree, and that it did not constitute a fully integrated writing or a final expression of the parties’ entire agreement. Kentucky claimed that during the twenty-one months of Gillispie’s employment, it had proposed at least six written offers of long-term employment, each of which had been rejected by letter or counteroffer.”).

62. *Id.* at 8.

63. Greenberg & Wild, *supra* note 51, at 6. (The authors go further and offer six requirements by contract drafters to prevent this from occurring again, “If the MOU is not the final agreement because a formal contract is still being negotiated, the MOU must include appropriate language, such as: 1. The memorandum is only an expression of the party’s intent concerning some of the material elements of the proposed University/Coach contract. 2. It is understood and agreed that all material terms of the proposed contract are not yet agreed upon between the parties and mutually satisfactory language therefore must still be agreed upon. 3. It is further understood that no contractual liabilities and obligations whatsoever are intended to be created by parties. 4. The memorandum is not intended to constitute a legally binding contract to consummate the transaction. 5. No party may claim any legal rights against the other based on the memorandum and no party may take any action in reliance thereon. 6. Each party is required in good faith to complete a contract reflecting the terms of the memorandum within ____ days, time being deemed of the essence.”).

64. Gillispie’s post UK coaching career was short-lived as he announced his retirement from coaching in 2016. See Matt Norlander, *Former Kentucky Coach Billy Gillispie Says He’s Retiring, Citing Urgent Health Concerns*, CBS SPORTS (Dec. 8, 2016), <https://www.cbssports.com/college-basketball/news/former-kentucky-coach-billy-gillispie-says-hes-retiring-citing-urgent-health-concerns/>.

Volunteers, which never materialized and resulted with Schiano retaining his position and UT terminating its athletic director.⁶⁵

5. Morals Clauses and UofL Head Basketball Coach Rick Pitino: Extension and Extortion

It is common knowledge that termination “for cause” clauses are found in sports contracts, including the professional level, endorsement agreements, and college coaching contracts.⁶⁶ These clauses, known interchangeably as morality and moral turpitude clauses, allow one of the parties to a contract to terminate a relationship for bad behavior “for cause” thereby allowing a justifiable termination for misconduct of various sorts.⁶⁷ Throughout the years, prominent college coaches including Bruce Pearl (UT), Kelvin Sampson (Indiana Univ.), and Jim O’Brien (The Ohio State Univ.) were terminated based upon subjective determinations by their employer-universities that justified ending the relationship for cause.⁶⁸

UofL Head Coach Rick Pitino’s 2007 contract extension with the University of Louisville Athletic Association (ULAA) had morals clauses which allowed for termination:

6.1.2 Disparaging media publicity of a material nature that damages the good name and reputation of Employer or University, if such publicity is caused by the Employee’s willful misconduct that could objectively be anticipated to bring Employee into public disrepute or scandal, or which tends to greatly offend the public, or any class thereof on the basis of invidious distinction.

6.1.4 Employee’s dishonesty with Employer or University; or acts of moral depravity; or conviction of a felony or employment or drug related misdemeanor; or intoxication or being under the influence of a psychoactive substance when performing duties under this contract, when students [sic]

65. See Blake Toppmeyer, *Schiano Paperwork Lacked Signature Required to Make it Binding*, KNOX NEWS, Dec. 11, 2017, <http://www.knoxnews.com/story/sports/college/university-of-tennessee/football/2017/12/11/ut-vols-greg-schiano-mou-signatures-binding-john-currie-beverly-davenport-tennessee-volunteers-tn/940152001/> (offering a link to the MOU).

66. See Adam Epstein, *An Exploration of Interesting Clauses in Sports*, 21 J. LEGAL ASPECTS OF SPORT 5, 17-18 (2011).

67. *Id.*

68. *Id.* at 17-22.

athletes are present, when attending scheduled public events or appearances, or during media contacts.⁶⁹

Pitino, who coached at UK and most recently at UofL, led both to National Championships in 1996 and 2013 respectively,⁷⁰ “has, and may always be, a larger-than-life figure, at least in college basketball.”⁷¹ Still, “Pitino has exhibited moral imperfections that have brought him, his teams and his family, public scorn.”⁷²

One example that brought to light Pitino’s imperfection, coupled with the morals and termination clauses in Pitino’s contract, involved a sexual tryst in 2003 with a woman, who was not his wife, named Karen Cunagin Sypher (Karen Sypher), in which they had sex in a restaurant following the celebration of the hiring of Reggie Theus as an assistant coach at UofL.⁷³ Six years later in 2009, Pitino received phone calls from a man who threatened to expose the sexual encounter to the media, which also included a threat to expose Pitino having paid Sypher for an abortion as a result of the encounter.⁷⁴ Pitino went to federal authorities over the matter, and Sypher was sent to federal prison in 2011 having been found guilty of attempting to extort Pitino after an eight-day trial.⁷⁵ In fact, Sypher was “convicted of lying to the FBI, retaliating against a witness and extortion for trying to force Pitino to give her money and other items in exchange for her silence on her allegations that he raped her twice in 2003, including once at a Louisville restaurant.”⁷⁶

UofL could have attempted to terminate its relationship with Pitino in accordance with the terms of his contract extension, in particular clause 6.1.2, which said that “willful misconduct that could objectively be anticipated to bring him into public disrepute or scandal.”⁷⁷ However, UofL chose not to

69. Cari Stern, *Rick Pitino and the “Cardinal” Morals Clause*, FORDHAM SPORTS L. F., <http://fordhamsportslawforum.com/wp-content/uploads/2013/05/Rick-Pitino-and-the-%E2%80%9CCardinal%E2%80%9DMorals-Clause-.pdf> (last visited Dec. 6, 2019).

70. *Rick Pitino: From Pro Ball to Louisville Hoops*, COURIER J., June 15, 2017, <https://www.courier-journal.com/story/sports/college/louisville/2017/06/15/louisville-basketball-rick-pitinos-coaching-record/394111001/>.

71. Stern, *supra* note 69, at 9.

72. *Id.*

73. *Id.* at 7 (citing *United States v. Sypher*, 684 F.3d 622 (6th Cir. 2012)).

74. *Id.* at 7-8.

75. Andrew Wolfson, *Karen Sypher’s Finishes Sentence in Pitino Case*, COURIER J., July 27, 2017, <https://www.courier-journal.com/story/news/2017/07/27/karen-syphers-sentence-extorting-rick-pitino-expires-but-shes-still-under-federal-supervision/516147001/> (offering that she was released in 2017).

76. *Id.* (stating “[s]ix years, five months and 11 days after she was sentenced to prison for trying to extort cash, cars and a house from University of Louisville basketball coach Rick Pitino, Karen Cunagin Sypher’s sentence officially expires Friday.”).

77. Stern, *supra* note 69, at 8.

terminate Pitino.⁷⁸ Interestingly, though not surprisingly, Pitino and UofL won the National Championship in 2013 despite the public embarrassment suffered by both with regard to the Pitino-Sypher situation.⁷⁹ Pitino's contract clauses and UofL's decision in this situation represents not only the subjectivity of the terms of the agreement, but also that an employer does not necessarily have to exercise termination of employment under morals clause if it so chooses.⁸⁰ Still, the Sypher scenario proved to be only one of several issues that UofL would have to address with Coach Pitino in subsequent years.

6. UofL Notice of Allegations of NCAA Bylaw Violations Involving an Escort Service

On October 17, 2016, the NCAA enforcement staff via a Notice of Allegations (NOA) email to UofL's President Neville Pinto charged head coach Rick Pitino and UofL staff members with severe breaches of conduct involving NCAA bylaws.⁸¹ In fact, prior to issuing the NOA, the NCAA and UofL "conducted more than 90 interviews with current and former players and recruits, parents, coaches and others involved in the case."⁸² More specifically, the NCAA charged UofL with four Level I violations, including two against director of basketball operations Andre McGee (a former UofL player), one against Pitino, and one against Brandon Williams, a program assistant, for his failure to cooperate in the investigation.⁸³ McGee apparently led basketball recruits to an escort who alleged that she provided strippers and prostitutes on

78. *Id.*

79. See, e.g., Zach Braziller, *The Incredible Rise and Fall of Long Island Kid Rick Pitino*, N.Y. POST, Sept. 27, 2017, <https://nypost.com/2017/09/27/the-incredible-rise-and-fall-of-long-island-kid-rick-pitino/> (characterizing Pitino as a "Hall of Fame coach" and referencing various scandals under Pitino's watch at UofL including the Sypher extortion attempt).

80. See Stern, *supra* note 69, at 8 (quoting University of Louisville President James Ramsey, "[a]s we try to teach our students, when you make a mistake you admit it and right it as best you can. Coach has done that today."); see also Michael J. Fensom, *Louisville Basketball Coach Rick Pitino Apologizes After Admitting to Sex in Restaurant, Abortion Payments*, NJ.COM, Aug. 13, 2009, http://www.nj.com/sports/index.ssf/2009/08/louisville_basketball_coach_ri.html (authoring, "Athletic director Tom Jurich said he was 'a million percent' behind Pitino and he expects him to remain the head coach at Louisville 'for a long time.'").

81. See Jonathan F. Duncan, NCAA Vice President of Enforcement, *Notice of Allegations, University of Louisville, Case No. 00527*, (Oct. 17, 2016), http://sidearm.sites.s3.amazonaws.com/gocards.com/documents/2016/10/20/gen_102016_news.pdf (outlining the allegations and the various, specific NCAA bylaws that were violated).

82. *Pitino, Jurich Apologize for McGee's 'Mistakes,' Say They'll Dispute Allegations*, WDRB.COM (Oct. 20, 2016) https://www.wdrb.com/news/raw-video-pitino-jurich-apologize-for-mcgee-s-mistakes-say/article_b9e308a2-e39b-588c-9090-0c22c7b4792b.html.

83. Duncan, *supra* note 81, at 9.

campus from 2010-2014.⁸⁴ Indeed, the NOA discusses fourteen strip shows, eleven sex acts, and two declined sex acts.”⁸⁵

Noteworthy, the NCAA did not allege that Pitino had knowledge of the stripper parties, did not allege that UofL lacked institutional control, a failure to monitor, nor that Pitino failed to promote an atmosphere of compliance at the institution.⁸⁶ UofL disputed charges regarding Pitino when responding to the NCAA’s NOA on January 17, 2017, but acknowledged that violations occurred.⁸⁷

As for McGee and his “‘inducements, offers and/or extra benefits in the form of adult entertainment, sex acts and/or cash’ to players and recruits, UofL said in its response that it ‘agrees that 37 of the alleged 40 instances of impermissible benefits took place and disagrees with the (NCAA) enforcement staff on three of these instances.’”⁸⁸ Escort Katina Powell alleged in her book, *Breaking Cardinal Rules: Basketball and the Escort Queen*, that McGee paid her \$10,000 to perform twenty-two shows from 2010-2014 at the players’ dormitory during the period in which UofL won the 2013 NCAA championship.⁸⁹

UofL had announced several self-imposed sanctions, including a postseason ban before the NCAA tournament, as well as the loss of two scholarships and limited recruiting visits by its staff.⁹⁰ However, the NCAA was not impressed. The NCAA’s Committee on Infractions (COI) responded with major sanctions to the UofL basketball program, including suspending Pitino for the first five games of Atlantic Coast Conference games during the 2017-2018 season, four years of probation, vacating records in which three student-athletes involved

84. *Id.*

85. *Id.*

86. *Id.*

87. See Jeff Greer & Danielle Lerner, *UofL Disputes NCAA’s Pitino Allegation*, COURIER J., Jan. 25, 2017, <https://www.courier-journal.com/story/sports/college/louisville/2017/01/25/university-louisville-response-ncaa-notice-of-allegations-basketball-rick-pitino/97051970/> (writing the UofL challenged the allegation that Pitino “violated NCAA head coach responsibility legislation.”).

88. *Id.*

89. Associated Press, *Katina Powell Sorry for Fallout in Louisville Cardinals Basketball Scandal, Says Ordeal ‘Worth It’*, ESPN (June 18, 2017), http://www.espn.com/mens-college-basketball/story/_/id/19665852/katina-powell-sorry-fallout-louisville-cardinals-basketball-scandal-says-ordeal-worth-it.

90. Erick Smith, *Louisville’s Rick Pitino Suspended Five Games, Louisville’s NCAA Title in Jeopardy As Part of NCAA Sanctions*, USA TODAY, June 15, 2017, <https://www.usatoday.com/story/sports/ncaab/acc/2017/06/15/rick-pitino-suspended-five-games-ncaa-sanctions-louisville/399271001/> (providing a pdf copy of the NCAA Committee on Infractions (COI), University of Louisville Public Infractions Decision, June 15, 2017).

competed while ineligible from December 2010 and July 2014 and reducing four scholarships during its probationary period.⁹¹

No criminal charges were filed against Powell or McGee after a thorough investigation by the UofL Police Department and a comprehensive review by three prosecutors in the Office of the Jefferson County Commonwealth's Attorney.⁹² The Jefferson County grand jury declined to return an indictment, agreeing that there was insufficient evidence to bring criminal charges against either of them.⁹³ McGee, who was an assistant coach at the University of Missouri-Kansas City when the stripper story was publicly revealed, resigned from his coaching position at UMKC during the investigation.⁹⁴ Pitino, however, remained at UofL.⁹⁵

As discussed in this section, both UK and UofL's men's basketball programs, from coaches to athletic directors to student-athletes to sports talk radio hosts and others, have been involved in a variety of scandals, controversies, ethics violations, and lawsuits throughout the years, including violations of NCAA Bylaws. The F.B.I. investigation involving UofL, payments to recruits, and Adidas resulted in the termination of UofL Head Basketball Coach, Rick Pitino, and athletics director, Tom Jurich, and the vacating of 123 UofL basketball victories from 2012-2015 (including the 2013 men's basketball title) including returning substantial payouts from the 2012-15

91. *Id.*

92. See Cardinal Connect Staff, *Grand Jury Declines to Indict Andre McGee & Katina Powell*, CARDINAL CONNECT (May 25, 2017), <http://www.thecardinalconnect.com/grand-jury-declines-to-indict-andre-mcgee-katina-powell/> (providing the official release from the Commonwealth's Attorney Office).

93. *Id.*

94. Jill Martin, *Andre McGee, Former Louisville Assistant Coach, Resigns from UMKC*, CNN (Oct. 23, 2015), <http://www.cnn.com/2015/10/23/us/louisville-ex-assistant-resigns-from-umkc/index.html> (providing that McGee had been an assistant at UofL from 2010-2014 but accepted the job at UMKC later in 2014).

95. *Id.* (offering that Pitino stated in a public letter to fans on his website, "I will not resign and let you down," Pitino wrote. "Someday, I will walk away in celebration of many memorable years but that time is not now." "I do not fight these accusations but rather turn the other cheek. Couldn't do it at 33, but at 63 it's the wise thing to do." Martin also quotes then athletics director Tom Jurich, regarding Pitino, "He has a long-term contract . . . [and] [h]e absolutely did not know anything about these allegations.").

NCAA Tournaments.⁹⁶ However, these basketball programs are not the only sports to be involved in issues related to sports law at these two institutions.⁹⁷

B. UofL and Duke: Controversial Liquidated Damages Clause and Football

In 2008, a liquidated damages clause provision was the focus of litigation when the University of Louisville (UofL) sued Duke University for breach of their 1999 Athletic Competition Agreement.⁹⁸ Following a 2002 game, Duke cancelled football games with UofL that had been also scheduled for 2007, 2008, and 2009 (four games total).⁹⁹ Under paragraph 13 of their contract, liquidated damages of \$150,000 per game were to be paid to the non-breaching party (in this case, UofL).¹⁰⁰ However, the contract itself excused the breaching party (Duke) from paying if the non-breaching party (UofL) scheduled a replacement game “with a team of similar stature.”¹⁰¹ This case presented the court with a “question of contract interpretation.”¹⁰²

UofL sued Duke in Franklin Circuit Court, but in fact, UofL did find replacement games for 2007 and 2008.¹⁰³ The court recognized Duke’s argument that it won only one football game in 2007 (lost 11) and was essentially the worst team in Division I-A (FBS) football at that time; and, therefore, finding a “team of similar stature” could be quite problematic.¹⁰⁴ The court excused Duke from paying the liquidated damages, however, because UofL found replacement games for 2007 (with the University of Utah, another

96. See Fainaru & Fainaru-Wada, *supra* note 11 and accompanying text; see also Marc Tracy, *Louisville Must Forfeit Basketball Championship over Sex Scandal*, N.Y. TIMES, Feb. 20, 2018, <https://www.nytimes.com/2018/02/20/sports/ncaabasketball/louisville-ncaa-title.html> (providing that it was the first time the NCAA had ever vacating a championship won by a Division I basketball team); see also Emily James, *Louisville Men’s Basketball Must Vacate Wins and Pay Fine*, NCAA (Feb. 20, 2018), <https://www.ncaa.org/about/resources/media-center/news/louisville-mens-basketball-must-vacate-wins-and-pay-fine> (providing a summary of the Committee on Infractions Appeals Committee decision including a link to the decision itself).

97. See, e.g., Danielle Lerner, *Former U of L Lacrosse Coach Fired “Without Cause” Is Owed \$80K*, COURIER J, Dec. 4, 2017, <https://www.courier-journal.com/story/sports/college/louisville/2017/12/04/former-louisville-lacrosse-coach-kellie-young-fired-without-cause-contract/919406001/> (reporting that Young was fired in November, 2017, 12 days after the newspaper “reported that Young was accused of negligence in a lawsuit filed by a former player in August 2016 and more than four years after Courier Journal reported accusations Young used abusive coaching tactics with players.”).

98. *Univ. of Louisville v. Duke Univ.*, No. 07-CI-1765 (Franklin Cir. Ct. June 19, 2008), <http://www.ncbusinesslitigationreport.com/Duke%20Opinion.pdf>.

99. *Id.* at 1-2.

100. *Id.* at 2.

101. *Id.*

102. *Id.*

103. *Id.* at 3.

104. *Univ. of Louisville*, No. 07-CI-1765, 3.

Division I-A FBS school) and for 2008 as Louisville had not offered any evidence to the contrary for the upcoming and finalized 2008 schedule at the time of the opinion.¹⁰⁵

According to Judge Phillip J. Shepherd's opinion, finding a replacement of "similar stature" literally meant that any NCAA Division I team would be sufficient, including those in the FCS, formerly known as I-AA, because technically that is still Division I football, even though it is not considered FBS, formerly known as I-A.¹⁰⁶ Shepherd opined,

Duke is an NCAA Division I school that regularly competes with football teams in both the Football Bowl Subdivision and the Football Championship Subdivision, as does Louisville. The Court therefore finds that it is reasonable as a matter of law to interpret the plain language of the contract in accordance with the established practice of both parties to this agreement, in which football games are regularly scheduled with Division I schools from both Subdivisions.¹⁰⁷

Therefore, the court granted summary judgment for Duke, stating, *inter alia*:

To say that one thing is "of a similar stature" to another is to say that the two are on the same level. Nothing in the language of the agreement suggests that it is necessary or appropriate to conduct an in-depth analysis of the relative strengths and weaknesses of the breaching team and its potential replacements. Nor does the agreement specify that replacement teams must be from a particular major athletic conference or even a particular division of the National Collegiate Athletic Association (NCAA). The term "team of similar stature" simply means any team that competes at the same level of athletic performance as the Duke football team. At oral argument, Duke (with a candor perhaps more attributable to good legal strategy than to institutional modesty) persuasively asserted that this is a threshold that could not be any lower. Duke's argument on this point cannot be reasonably disputed by Louisville.¹⁰⁸

Duke was granted a motion for summary judgment for the 2007 and 2008 games, and the 2009 game—yet to be finalized or played at the time of the 2008

105. *Id.* at 5-6.

106. *Id.* at 4; *see supra* explanatory note 5.

107. Univ. of Louisville, No. 07-CI-1765, 4.

108. *Id.* at 2.

judicial decision—was dismissed without prejudice for lack of ripeness.¹⁰⁹ Judge Shepherd’s opinion reflected a fundamental contract tenet: that courts are to interpret words according to their plain and ordinary meaning, absent an ambiguity, which, in this case “of similar stature,” was not ambiguous to the court on that day.¹¹⁰

C. Other Intercollegiate Examples

1. UK Baseball, James Paxton, and the NCAA’s “No Agent Rule”

In *Paxton v. University of Kentucky*,¹¹¹ the NCAA believed that James Paxton, University of Kentucky (UK) pitcher, violated the NCAA’s “no agent” amateurism rule because of a Google search that revealed a reporter’s blog post suggesting that Paxton had a representative agent speak with the Toronto Blue Jays, the team that drafted him 37th overall in the 2009 draft on, Paxton’s behalf.¹¹² Paxton had already rejected a \$1M signing bonus and decided to return to UK for his senior season.¹¹³

Unfortunately for Paxton, UK declared him ineligible to play if Paxton continued to not cooperate with the NCAA and UK to determine if he had an agent, which is a violation of the NCAA’s amateurism rules.¹¹⁴ Indeed, UK was fearful that playing an ineligible player could result in severe penalties to UK, though admittedly, UK was not sure which rules Paxton may have violated or the specific circumstances of the situation; he just needed to cooperate with the NCAA, and UK was merely a “messenger.”¹¹⁵ As a result, Paxton sued UK.

109. *Id.* at 1.

110. *Id.* at 2.

111. See Richard G. Johnson, *Submarining Due Process: How the NCAA Uses Its Restitution Rule to Deprive College Athletes of Their Right of Access to the Courts . . . Until Oliver v. NCAA*, 11 FL. COASTAL L. REV. 459 (2010) (providing, in footnote 70, the case citations as *Paxton v. Univ. of Ky.*, No. 09-CI-6404 (Ky. Cir. Ct., Jan. 19, 2010) (motion to dismiss and motion for temporary injunction both denied), motion for interlocutory relief denied, No. 10-CA-000178-I (Ky. Ct. App. Feb. 19, 2010). Indeed, Johnson was lead counsel for Paxton during the litigation).

112. Johnson, *supra* note 111, at 578-79; see also *Judge Rules in Paxton vs. UK Case*, WKYT (Jan. 17, 2010), <http://www.wkyt.com/sports/headlines/81932327.html> (reporting that “prominent sports agent Scott Boras may have committed an NCAA violation by negotiating on Paxton’s behalf.”).

113. Johnson, *supra* note 111, at 572.

114. See *Judge Rules in Paxton vs. UK Case*, *supra* note 112; see also Johnson, *supra* note 111.

115. See Johnson, *supra* note 111, at 578 (authoring that UK Associate Athletic Director Sandy Bell, “[n]otified Paxton that she needed to talk with him because the NCAA wanted to interview him. Disturbingly, Bell told Paxton that he was not to tell anyone, including his parents and baseball coach, about the interview. At the hearing, Bell admitted having made that statement, but explained that she had been ‘instructed’ to do so by the NCAA. She later apologized to Paxton and told him that she was the NCAA’s ‘messenger.’”).

Paxton claimed that a UK athletic department administrator told him to meet with an NCAA investigator but instructed him not to tell his parents or his lawyers about the interview.¹¹⁶ Additionally, Paxton claimed that UK's athletic director, Mitch Barnhart, told him that, even though he was technically eligible to play and had met all eligibility requirements, Paxton would not be allowed to play until Paxton cooperated with the NCAA interview over his situation.¹¹⁷ Still, NCAA Bylaw 10.1 stated that the failure to cooperate with an NCAA investigation could be interpreted as unethical conduct, which is something that UK clearly wanted to avoid.¹¹⁸

Paxton's attorney unsuccessfully argued that the Kentucky Constitution and UK's Code of Student Conduct barred arbitrary discipline that Paxton was receiving, and the court deferred to UK in the matter.¹¹⁹ UK stated, "Due to the possibility of future penalties, including forfeiture of games, UK could not put the other 32 players of the team and the entire UK 22-sport intercollegiate athletics department at risk by having James compete."¹²⁰ Paxton was suspended from the team, ending his intercollegiate baseball career.¹²¹ The case represented, like the *NCAA v. Lasege* case discussed in Part I(A)(3) above, that courts tend to defer to the NCAA and its amateurism rules, particularly its Restitution Rule.¹²²

116. *Id.*

117. *Id.* at 579-80.

118. Darren Heitner, *James Paxton's College Baseball Career Is Over*, SPORTS AGENT BLOG (Mar. 3, 2010), <http://sportsagentblog.com/2010/03/03/james-paxtons-college-baseball-career-is-over/> (last visited Dec. 6, 2019).

119. See Johnson, *supra* note 111, at 571-72; see also *Judge Rules in Paxton vs. UK Case*, *supra* note 112 (authoring that Fayette County Circuit Judge James Ishmael ruled in UK's favor, and that "Ishmael ruled from the bench that even though the NCAA's request was ambiguous, the school could be subjected to possible sanctions—including forfeiture of games—if it allowed Paxton to play without clearing up his status. The judge also rejected Paxton's argument that his due process rights guaranteed under the school's student code were violated.").

120. See Heitner, *supra* note 118; see also Taylor Branch, *The Scandal of NCAA College Sports*, ATLANTIC, Oct. 2011, <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> (offering, "[t]hough Paxton had no legal obligation to talk to an investigator, NCAA Bylaw 10.1(j) specified that anything short of complete cooperation could be interpreted as unethical conduct, affecting his amateur status. Under its restitution rule, the NCAA had leverage to compel the University of Kentucky to ensure obedience.").

121. Branch, *supra* note 120 (writing, "Paxton was stranded. Not only could he not play for Kentucky, but his draft rights with the Blue Jays had lapsed for the year, meaning he could not play for any minor-league affiliate of Major League Baseball. . . . Once projected to be a first-round draft pick, Paxton saw his stock plummet into the fourth round. He remained unsigned until late in spring training, when he signed with the Seattle Mariners . . .").

122. See *supra* note 38 and accompanying text for further discussion of the NCAA's Restitution Rule; see also Johnson, *supra* note 111, at 463 (outlining the history of the case—with relevant case citations and

2. Hazing at Western Kentucky: Swim Program Suspended for Five Years

On April 14, 2015, Western Kentucky University (WKU) in Bowling Green, Kentucky, suspended its Hilltoppers' swimming and diving program for five years after WKU investigated hazing allegations that occurred off-campus.¹²³ As a result of the inquiry, three aquatics coaching positions were eliminated accordingly.¹²⁴ Collin Craig, the swimmer who filed a complaint with WKU, filed a federal lawsuit on September 30, 2015, in the U.S. District Court for the Western District of Kentucky in Bowling Green, alleging that he was ordered to strip to his underwear, blindfolded, and ordered to wear a horse mask.¹²⁵ Additionally, he alleged that "he was threatened into obedience with the use of a rifle and drawn on with permanent marker," which coaches could see during swim practice, in addition to being forced to drink alcohol until he vomited or passed out.¹²⁶

Craig's lawsuit was comprehensive and named numerous defendants, including three former swim team members, the former swim team head coach, the former associate swim coach, the WKU Athletic Director, Associate Athletic Director, and Associate Athletic Director for Compliance.¹²⁷ The legal theories were numerous, and he demanded a federal jury trial for violations of

numerous external academic resources and references—involving former Oklahoma State pitcher Andy Oliver whom Johnson previously represented against the NCAA under very similar circumstances). *But see* Potuto, *supra* note 49, at 330-31 (offering, "A rare example of a student-athlete who prevailed on a contract challenge is Andrew Oliver . . . [H]e was declared ineligible for intercollegiate competition because his lawyer was present during contract discussions between him and Twins management, conduct that the NCAA treated as prohibited agent involvement. The trial judge held that it violated Ohio public policy to prevent a student-athlete from obtaining a lawyer's help in contract negotiations. It seems doubtful that the trial judge would have been similarly impelled to find a violation of public policy had access to a lawyer not been at issue. For that reason alone, the decision likely has limited persuasive value. In addition, the decision was not appealed. There is no knowing whether it would have been upheld on appeal . . .").

123. *See WKU Suspends Swimming and Diving Program for 5 Years*, WKU SPORTS (Apr. 14, 2015), http://www.wkusports.com/news/2015/4/14/WKU_Suspends_Swimming_and_Diving_Program_for_5_Years.aspx (stating, "[t]he investigation by the Bowling Green Police Department and WKU's Title IX Coordinator . . . found evidence of violations of WKU's Student Code of Conduct, Discrimination and Harassment Policy and Title IX Sexual Misconduct/Assault Policy.").

124. *Id.* (stating that positions for Head Coach, Associate Head Coach and Head Diving Coach would be eliminated in June).

125. *See* Retta Race, *Read the 21-Page Complaint against WKU, Former Swimmers*, SwimSwam (Oct. 3, 2015), https://cdn.swimswam.com/wp-content/uploads/2015/10/Craig_v_Western_Kentucky_University_et_kywdce-15-00120_0001.0.pdf (offering a link to the complaint *Collin Craig v. W. Ky. et al.*, 1:15-CV-120-GNS, W.D. Ky. 2015) (last visited Dec. 6, 2019); *see also* Natalia Martinez, *Exclusive Pictures of Police Investigation into WKU's Swim Team*, WAVE 3 NEWS (Oct. 2, 2015), <http://www.wave3.com/story/30171374/wku-sued-after-hazing-allegations-that-shut-down-swim-team>.

126. Natalia Martinez, *Exclusive Pictures of Police Investigation into WKU's Swim Team*, WAVE 3 NEWS (Oct. 2, 2015), <http://www.wave3.com/story/30171374/wku-sued-after-hazing-allegations-that-shut-down-swim-team>.

127. *Id.*

20 U.S.C. § 1681(a) and 42 U.S.C. § 1983 and claimed “negligence, negligent hiring, supervision, and training, assault, defamation, defamation *per se*, intentional infliction of emotional distress, and tortious interference with contractual relations, and for punitive damages under Kentucky law.”¹²⁸ Craig, a native of California, alleged that he was subjected to “verbal, physical, mental, and emotional abuse as a result of the tortious conduct of the Defendants including discrimination on the basis of sex, not limited to violence, threats, and humiliation.”¹²⁹

The fallout from the incident was immense. Bruce Marchionda, a swim coach for thirty years with ten at WKU, penned a letter in April 2015 in response to the allegations defending himself and his coaching staff, which states in part:

The recent Title IX investigation brought to light problems with in [sic] our Program that are disappointing and clearly unacceptable. I am truly saddened by how these events have tarnished the Program and negatively impacted all those associated with it. I want to dispel the misperception that the coaching staff knowingly turned a blind eye to this misconduct. First, neither my staff nor I would ever condone hazing, harassment, or underage/excessive drinking of our student-athletes in any form. Second, as head coach one of my responsibilities was to discipline student-athletes for misbehavior. A few examples of the disciplinary actions taken over the past two years include: suspending swimmers for an entire semester of competition for breaking team rules (whereas normal university policies would enact only a one-game suspension); removing scholarship money for violations of the team’s code of conduct; and not allowing swimmers to compete at the conference championship for violating mandatory dry periods. In short, when misconduct issues were brought to my attention, I strived to find a solution that was in the best interest of the athletes, the Program and the university [sic] as a whole.¹³⁰

An attorney who represented the athletic directors and the swim coaches at WKU denied that they should be legally responsible for the off-campus

128. See Race, *supra* note 125, at 2.

129. *Id.* The lawsuit also alleged, *inter alia*, that the head coach “created a culture of silence and encouraged swim team members not to disclose wrongdoing[.]” *Id.* at 9. See Martinez, *supra* note 126.

130. Braden Keith, *A Letter from Western Kentucky Head Coach Bruce Marchionda*, SWIM SWAM, Apr. 22, 2015, <https://swimswam.com/a-letter-from-western-kentucky-head-coach-bruce-marchionda/>.

activities that occurred during the fall 2014 semester and sought dismissal of the lawsuit.¹³¹

Ultimately, Craig's lawsuit was settled out of court for \$75,000.¹³² WKU lost its swim program for five years, along with the swimming and diving coaches and student-athletes, but its administration sent a clear message that hazing and other misconduct would not be acceptable in any way surrounding the institution or its athletics department regardless of where it took place.

As demonstrated in Part I, the relationship between intercollegiate athletics and sports law is significant in Kentucky, particularly—but not exclusively—with UK and UofL. Further sports law research could include how, in 2007, the NCAA ejected a Louisville Courier-Journal reporter from blogging from the press box during the College World Series and whether this credentialed-only blogging policy could violate the First Amendment, intellectual property rights, or contract law.¹³³ One could also explore the implications of a 2011 Americans with Disabilities Act (ADA) federal lawsuit against UK, though later settled, brought by Charles Mitchell, a hearing-impaired season ticket holder, who claimed that closed-captioning needed to be placed on the scoreboards at Commonwealth Stadium.¹³⁴

Given the decades of these examples, coupled with Jurich from UofL and Pitino's release from their association with the university, along with an on-going investigation by the F.B.I., there is no reason to believe that the State of

131. See Justin Story, *Dismissal Sought on Former WKU Swimmer's Lawsuit*, BOWLING GREEN DAILY NEWS, Jan. 1, 2016, http://www.bgdailynews.com/news/dismissal-sought-on-former-wku-swimmer-s-lawsuit/article_cd0b0e05-cc75-5514-8d1d-8f18aefcd377.html (providing the attorney's claim, "[t]his court should not impose a duty on WKU employees to control the conduct of its students at off-campus parties that are not sanctioned by the university [I]f the court were to impose such a duty, WKU's employees would be forced to infringe on the private affairs of its students, most of whom are over the age of 18, to ensure that they are safe in all of their daily activities.").

132. See *Former WKU Swimmer Reaches \$75,000 Settlement in Hazing Suit*, WDRB (Aug. 10, 2016), <http://www.wdrb.com/story/32730220/former-wku-swimmer-reaches-settlement-in-hazing-suit>.

133. See, e.g., Joe LaPointe, *Blogger's Ejection May Mean Suit for N.C.A.A.*, N.Y. TIMES, June 14, 2007, <http://www.nytimes.com/2007/06/14/sports/baseball/14blogs.html> (discussing the uncertainty in the law regarding how quickly new technology has changed reporting news, the circumstances surrounding reporter Brian Bennett of The Courier-Journal being thrown out of the press box for posting live game updates, and whether there was enough "state action" to invoke the First Amendment since the game was played in a public facility, the Jim Patterson Stadium at UofL). For an interesting Kentucky Supreme Court decision in favor of the NCAA's contractual right to control the choice of broadcaster for a telecast, see also *Nat'l Collegiate Athletic Ass'n v. Hornung*, 754 S.W.2d 855 (Ky. 1988) (holding that the NCAA had the right to disapprove Hornung from broadcasts and that it was a legitimate exercise of its contract right, thereby reversing both the jury's decision to award consequential and punitive damages of \$1.16 million and court of appeals affirming of the decision, for Hornung's claim for intentional interference with a prospective contractual relation).

134. See Brett Barrouquere, *University of KY Settles Suit for Captioning of Football Games*, N. VA. RES. CTR. (Feb. 15, 2012), http://nvrc.info/nvrc_org_historic/2012/02/university-of-ky-settles-suit-for-captioning-of-football-games/.

Kentucky and its various colleges and universities will not continue to remain prominent in providing future sports law cases, incidents and improprieties involving NCAA rules, and other legal issues alongside the simultaneous success of their athletics programs.

PART II: INTERSCHOLASTIC AND OTHER SPORTS LAW ISSUES

The purpose of Part II is to explore several sports law cases and issues that have emanated from the interscholastic level in Kentucky. It will also address relevant statutes and incidents from the state demonstrating that there is more to Kentucky than just college sports when it comes to the study of sports and its relationship to the law.

The Kentucky High School Athletic Association (KHSAA), as agent for the Kentucky Board of Education, is the major and voluntary association of members that governs athletic competitions for both public and private schools throughout the state, plus two federally administered schools—Fort Campbell (which straddles the border but is technically on the Tennessee side) and Fort Knox High School, both located on the U.S. Army bases.¹³⁵ Still, approximately two dozen small, private religious schools are sanctioned by the Kentucky Christian Athletic Association.¹³⁶

A. Interscholastic Issues

Like most states, Kentucky has an “Age Nineteen” rule in which students must be under age nineteen as of July 31st to participate in high school sports, unless a waiver is granted.¹³⁷ Kentucky students only get four years maximum

135. See *Kentucky High School Athletic Association*, WIKIPEDIA, https://en.wikipedia.org/wiki/Kentucky_High_School_Athletic_Association (last visited Dec. 6, 2019); see also *Ky. High Sch. Athletic Ass’n v. Hopkins Cty Bd. of Educ.*, 552 S.W.2d 685, 686-87 (Ky. Ct. App. 1977); see also *infra* notes 169-193 and accompanying text (describing the reluctance of Kentucky courts to become involved as a super-referee of the rules, interpretations and internal affairs of voluntary organizations such as the KHSAA); see also 702 KY. ADMIN. REGS. 7:065.2, <http://www.lrc.ky.gov/kar/702/007/065.htm> (last visited Dec. 6, 2019) (“The KHSAA shall be the Kentucky Board of Education’s agent to manage interscholastic athletics at the middle and high school level in the common schools, including a private school desiring to associate with KHSAA or to compete with a common school.”).

136. See *Kentucky High School Athletic Association*, *supra* note 135.

137. KY. REV. STAT. § 156.070(2)(f) (West 2017) (“Any student who turns nineteen (19) years of age prior to August 1 shall not be eligible for high school athletics in Kentucky. Any student who turns nineteen (19) years of age on or after August 1 shall remain eligible for that school year only. An exception to the provisions of this paragraph shall be made, and the student shall be eligible for high school athletics in Kentucky if the student: 1. Qualified for exceptional children services and had an individual education program developed by an admissions and release committee (ARC) while the student was enrolled in the primary school program; 2. Was retained in the primary school program because of an ARC committee recommendation; and 3. Has not completed four (4) consecutive years or eight (8) consecutive semesters of eligibility following initial promotion from grade eight (8) to grade nine (9).”)

to participate in high school sports with no more than four years in any single sport.¹³⁸ Homeschoolers are prohibited from participating in any KHSAA-sanctioned activities, and KHSAA schools are also prohibited from competing against homeschooled teams.¹³⁹ There have been attempts to modify this rule in recent years, but they have been met with resistance and have been unsuccessful.¹⁴⁰ Naturally, many of the legal issues that arise in interscholastic sports are directly connected to and intertwined with interpretations to KHSAA bylaws and participation rules. The following cases explore some of the more prominent ones emanating from Kentucky.

1. Softball and a Claim of Gender Discrimination

Beginning in the 1990s, Kentucky was forced to address a Title IX gender discrimination claim which lasted many years in the federal courts in *Horner ex rel. Horner v. Kentucky High School Athletic Association*.¹⁴¹ In 1992, Lorie Ann Horner and eleven other high schoolers sued the KHSAA (a.k.a. “Association”) and the Kentucky State Board for Elementary and Secondary Education

138. 2018-2019 KHSAA HANDBOOK, Bylaw 3 (2018), https://khsaa.org/common_documents/handbook/bylaws/bylaw3.pdf (last visited Dec. 6, 2019) [hereinafter, KHSAA HANDBOOK] (stating in Bylaw 3, sec. 1: “a) A student entering grade nine (9) for the first time in any high school shall have four (4) consecutive calendar years of eligibility from the date of first entry into grade (9) in any school provided the student is eligible according to this and all other Association bylaws. b) The eligibility shall conclude with the completion of the spring sports season following the fourth year. c) No additional eligibility may be granted in a case where the grant would allow a student to compete in all or part of the fifth competitive season in a single sport following the initial entry into grade nine (9).”). According to Bylaw 3, sec. 2, it is possible to gain a fifth year of participation in high school sports, but still not more than four years in any single sport, “[w]here it has been documented by the attending physician, Principal, and Superintendent that severe illness or injury has prevented the student from receiving basic education services and the right to an education has therefore been impacted rather than simply the loss of athletic privilege.” *Id.*

139. See Kentucky High School Athletic Association, *supra* note 135.

140. See, e.g., Morgan Watkins, *Schooled At Home But Playing On Public Teams?*, COURIER J., Mar. 14, 2017, <https://www.courier-journal.com/story/news/politics/2017/03/13/ky-may-let-homeschoolers-join-public-school-teams/99014820/>; But see Julian Tackett, *11/05/15 – Commissioner’s Response to BR396 (HB76) Regarding Participation by Non-Public School Students*, KHSAA (Nov. 5, 2015), <https://khsaa.org/110515-commissioners-response-to-br396-regarding-participation-by-non-public-school-students/> (offering the KHSAA Commissioner’s response in addition to background and general information on previous proposals regarding homeschooled students, posting a list of concerns including, “The main disconnect (between enrolled and non-traditional students) is academic accountability . . . Participating in high school sports is a privilege which is afforded to those students who regularly attend the school and enroll in the academic curriculum. . . . The displacement of an otherwise eligible public school student, who has earned their time to participate, by a non-enrolled student The argument that in allowing this type of participation, these entities appear to want the best of both worlds, with the membership traditionally forming the general consensus that if they (the parents and students) don’t want the academics, they don’t get the athletics.”).

141. *Horner ex rel. Horner v. Ky. High Sch. Athletic Ass’n*, 43 F.3d 265 (6th Cir. 1994) (hereinafter, Horner I); *Horner ex rel. Horner v. Ky. High Sch. Athletic Ass’n*, 206 F.3d 685 (6th Cir. 2000) (hereinafter, Horner II).

(“Board”) in federal court, “claiming that the Association’s failure to sanction fast-pitch softball violated the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. § 1983, Title IX, Section 3 of the Constitution of the Commonwealth of Kentucky, and Title XXVII, Labor and Human Rights, Chapter 344, Civil Rights (Ky. Rev. Stat. Ann. § 344.020(1)(b) (Banks-Baldwin 1997)).”¹⁴² More specifically with regard to Title IX, the plaintiffs alleged that they suffered the chance to earn college athletic scholarships in fast-pitch softball like the boys could obtain in baseball, the male equivalent sport, thereby resulting in sex discrimination.¹⁴³

At issue was the KHSAA’s defense of the “twenty-five percent rule,” a policy whereby a new sport such as fast-pitch softball would not be sanctioned unless at least twenty-five percent of the KHSAA member schools indicated a willingness to participate.¹⁴⁴ At the time the lawsuit was filed, two surveys in 1988 and 1992 revealed that the member schools indicated only a nine percent (1988) and a seventeen percent (1992) interest in fast-pitch softball for girls.¹⁴⁵ The first time around, the U.S. District Court for the Western District of Kentucky granted the defendants’ motions for summary judgment, but the plaintiffs appealed, and the Sixth Circuit Court of Appeals in Cincinnati affirmed in part and reversed in part in *Horner I*.¹⁴⁶

However, while the first appeal was pending at the Sixth Circuit Court of Appeals but before *Horner II* was heard on remand at the district court level (again), the Kentucky General Assembly intervened and amended Kentucky statutes so that “[w]here a school offered one of two similar sports, the amended statute directed the Board and the Association to promulgate regulations to offer the sport for which the National Collegiate Athletic Association (“NCAA”) offers athletic scholarships.”¹⁴⁷ Then, the KHSAA amended its bylaws to read:

if a member school sponsors or intends to sponsor an athletic activity that is similar to a sport for which NCAA members offer an athletic scholarship, the school shall sponsor the athletic activity or sport for which the scholarships are offered.
The athletic activities which are similar to sports for which

142. *Horner II* at 687-88 (referring to “Title IX of the Education Amendments of 1972, as amended by the Civil Rights Restoration Act of 1987 (20 U.S.C. § 1681-1688)”).

143. *Id.* at 688.

144. *Id.*

145. *Id.*

146. *Horner I*, at 275-76 (stating, “It is evident that genuine issues of material fact abound in this case and preclude any determination that defendants have complied with Title IX’s equal athletic opportunity mandate.” The Equal Protection dismissal was upheld, however.).

147. *Horner II*, at 688 (referencing KY. REV. STAT. § 156.070 (2) (Banks-Baldwin 1995) (effective July 15, 1994)).

NCAA members offer scholarships are: Girls' fast pitch softball as compared to slow pitch.¹⁴⁸

In other words, Kentucky now had to offer fast-pitch softball under the law and in accord with KHSAA rules.¹⁴⁹

Upon a second review of the case, now *Horner II*, on March 20, 2000, the Sixth Circuit affirmed the District Court's decision the second time around which granted summary judgment for the defendants.¹⁵⁰ The Court provided and cited a slew of significant Title IX decisions including, but not limited to, Supreme Court cases such as *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979),¹⁵¹ *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60 (1992),¹⁵² *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998),¹⁵³ and *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999).¹⁵⁴ Indeed, the Sixth Circuit sought guidance on how to interpret Title IX regarding "intent:" should there be a "discriminatory animus" to award damages or, rather, need the plaintiff only demonstrate a "deliberate indifference" when a facially neutral policy is challenged?¹⁵⁵

148. *Id.* (referencing KHSAA Bylaws, Div. IV, Bylaw 40).

149. See Mike Fields, *Fast-Pitch Softball Has Given Girls College Opportunities*, KHSAA, <https://khsaa.org/fast-pitch-softball-has-given-girls-college-opportunities/> (last visited Dec. 6, 2019) (providing an excellent historical perspective on softball in Kentucky and authoring, "In 1994, Kentucky was one of only four states that didn't offer fast-pitch softball to its high school athletes. UK did not have a fast-pitch program either The KHSAA, pushed by the state legislature, began offering fast-pitch softball in the 1994-95 school year. Schools were allowed to keep playing slow-pitch, too. That first year 229 schools had fast-pitch teams; 91 had slow-pitch teams; 61 had both . . . [T]he KHSAA kept sponsoring a slow-pitch state tournament through 2007.").

150. *Horner II* at 689, 698 (offering, "[t]he district court held that: (1) Plaintiffs' claims for class certification, injunctive relief, and declaratory relief under Title IX were moot because of the amendment to Ky. Rev. Stat. Ann. § 156.070; (2) the Title IX claims of Plaintiffs who had graduated were also moot; and (3) Plaintiffs' claims for monetary damages under Title IX failed because Plaintiffs had presented no evidence of intentional discrimination.").

151. *Id.* at 689 (construing an implied private right of action under Title IX).

152. *Id.* at 690 (providing damages as a remedy under Title IX for intentional discrimination).

153. *Id.* at 691 (holding that a school district could be "responsible for damages under Title IX, but only if the district had "actual notice" and was "deliberately indifferent" to the underlying violation).

154. *Id.* at 692 (summarizing that damages are available under Title IX against a school board for student-on-student harassment but only where the federal funding recipients act with "deliberate indifference" to "known" acts of harassment).

155. *Id.* at 692-93. It is also very important to recognize that the Sixth Circuit differentiated between the cited Supreme Court decisions which involved sexual *harassment* as opposed to a policy involving a claim of sexual *discrimination*. The Court stated, "[t]his leaves the question of what standard to apply to determine intent when a facially neutral policy is challenged. Currently, the only clear test in the Supreme Court is that of "deliberate indifference." However, the cases from which that test arose, *Franklin*, *Gebser*, and *Davis*, all address deliberate indifference to sexual harassment, and are not readily analogous to the present situation." *Id.* at 692-93.

Fatal to the plaintiff's claims in *Horner I* and *Horner II* was a lack of evidence; there simply was no evidence of intentional discrimination by the KHSAA, let alone a violation of Title IX.¹⁵⁶ To the Sixth Circuit in *Horner II*, the KHSAA did not intentionally violate Title IX when it refused to sanction girls' fast-pitch softball, and even if the plaintiffs were able to demonstrate that there was disparate impact (i.e. "unintentional") discrimination, the Court of Appeals stated, "[a]lthough the Supreme Court has not yet expressly ruled on the point, we think that it would likely hold that proof of intentional discrimination is a prerequisite for money damages under Title IX when a facially neutral policy is challenged under a disparate impact theory."¹⁵⁷

The *Horner I* and *Horner II* decisions ultimately were agents for change in Kentucky and could be considered a success though the ultimate resolution of the case ended long after Lorie Ann Horner and the other plaintiffs were far removed from their high school years.¹⁵⁸ Indeed, there is no doubt that the timing of the change in Kentucky law to allow fast-pitch softball was a bit curious.

Still, today, the opportunities to participate in high school sports for Kentucky girls and boys is significant and growing.¹⁵⁹ Regarding gender, the KHSAA has a formal, written policy that provides an opportunity for transgender students to participate.¹⁶⁰ Further, it also offers specific guidelines

156. *Horner II* at 693. (stating, "[w]e can envision various scenarios in which the discriminatory animus and deliberate indifference tests might help establish "intent" under Title IX when a facially neutral policy is challenged. However, because of Plaintiffs' fundamental failure to establish a violation of Title IX, let alone an intentional violation, we need not adopt any test at this time.")

157. *Id.* at 692.

158. *Horner II* was denied a petition for the writ of certiorari by the Supreme Court of the United States as styled in *Horner v. Ky. High Sch. Athletic Ass'n*, 531 U.S. 824 (2000), far removed from 1992 when the case was filed. For a more recent Kentucky-based federal Title IX case, see *M.D. v. Bowling Green Indep. Sch. Dist.*, No. 17-5248, 2017 U.S. App. LEXIS 19651 (6th Cir. Oct. 6, 2017) (affirming U.S. District Court's grant of summary judgment to the school district involving Bowling Green High School cheerleader's Title IX claim because she could not show "deliberate indifference" nor could she demonstrate retaliation after she reported that she was sexually assaulted by a teammate on the long drive home from the national cheerleading championships, especially after the principal emphasized to the cheerleading coaches that "she was to be treated just like any other team member." *Id.* at *10.).

159. See, e.g., Josh Moore, *Lacrosse Evolving in Kentucky*, LEXINGTON HERALD-LEADER, May 9, 2016, <http://www.kentucky.com/sports/high-school/article76618127.html> (stating with regard to lacrosse in Kentucky possibly becoming sanctioned by the KHSAA, "[r]ight now the state has 32 boys' teams and 25 girls' teams listed as active" Moore discusses a few other sports under consideration as well including dance, boys' and girls' rifle, and trap shooting).

160. 2018-2019 KHSAA HANDBOOK, *supra* note 138, at Policy – Transgender Participation, https://khsaa.org/common_documents/handbook/policies/policies-transgenderpolicy.pdf.

for “cross-gender participation” in the event girls wish to participate on boys teams and vice-versa.¹⁶¹

2. The Trial of Coach Jason Stinson and Football

A high school football player’s death in the Commonwealth during a hot summer football practice in 2008 resulted in criminal charges to the coach, a jury trial, an acquittal, and a national discussion over the unfortunate incident and high school football in general.¹⁶² Coach Jason Stinson of Pleasure Ridge Park High School, located in the Louisville area (Jefferson County), was charged with the crimes of reckless homicide and wanton endangerment in the heatstroke death of fifteen-year-old sophomore lineman Max Gilpin.¹⁶³

Stinson pleaded not guilty to the incident that occurred on August 20, 2008; with a heat index of 94 degrees, Stinson concluded practice by requiring his players to run sprints up and down the field known as “gassers.”¹⁶⁴ Gilpin was an offensive lineman that stood six-feet-two-inches tall and weighed almost 216 pounds, and he had taken the supplement creatine and the stimulant Adderall before practice.¹⁶⁵ When Gilpin reached the hospital, his body temperature was 107 degrees, and three days later he died of heatstroke.¹⁶⁶

Coach Stinson was found not guilty on the criminal charges, and the civil suit was settled out of court.¹⁶⁷ Prior to the criminal trial, Jefferson County

161. *Id.* at Policy – Cross-Gender Participation Policy, https://khsaa.org/common_documents/handbook/policies/policies-crossgenderpolicy.pdf (listing the policies of the various KHSAA sanctioned sports and providing an appeals process and stating, regarding football and wrestling, e.g., “a) If a girl desires to participate on a football or wrestling team, such participation opportunity shall be allowed. b) If a school develops a wrestling team for girls, a boy may not compete on a girls’ wrestling team.”).

162. See Thomas Lake, *The Boy Who Died of Football*, SPORTS ILLUSTRATED, Dec. 6, 2010, <https://www.si.com/vault/2010/12/06/106012866/the-boy-who-died-of-football> (offering, “[t]hree days after he collapsed from heatstroke at practice in 2008, 15-year-old Max Gilpin became one of at least 665 boys since 1931 to die as a result of high school football.”); see also CBS, *High School Coach on Trial*, YOUTUBE (Aug. 31, 2009), <https://www.youtube.com/watch?v=4cUddZEom0k&feature=youtu.be> (posting 5:21 video of Harry Smith-led inquiry and interviews on CBS’s *The Early Show* related to the Gilpin death and Stinson trial in Louisville).

163. Lake, *supra* note 162.

164. *Id.*; see CNN, *High School Football Coach Charged in Player’s Death*, CNN (Jan. 26, 2009), <http://www.cnn.com/2009/CRIME/01/26/football.coach.indicted/index.html> (stating that Stinson was the only person charged with a crime and that Gilpin’s parents filed a wrongful death lawsuit against six coaches at the high school).

165. See Lake, *supra* note 162.

166. *Id.*

167. *Id.* (authoring that the jury took less than 90 minutes to rule in favor of coach Stinson and that the school settled the civil suit for \$1.75 million without admitting liability or guilt); see CNN, *Coach Found Not Guilty in Death of Player*, CNN (Sept. 17, 2009), <http://www.cnn.com/2009/CRIME/09/17/kentucky.coach.trial/index.html>.

Public Schools completed a report that revealed that Stinson did not break any high school athletic rules.¹⁶⁸ However, the impact of charging a high school football coach with a crime in this situation gave considerable pause to schools and coaches around the country about practice conditions and player safety.¹⁶⁹ Indeed, there were no real winners in this case of first impression, and it drew attention to Kentucky for all the wrong reasons.¹⁷⁰

3. Judicial Deference to KHSAA Bylaws

Throughout the years, high schoolers (or their parents) have challenged the KHSAA rules, enforcement of its bylaws and its ability to regulate high school sports in Kentucky. However, Kentucky courts have, for the most part, given considerable deference to the KHSAA, the wide-range of its policies, and its ability to manage interscholastic sport in general, as long as the interpretations of the rules are fair and reasonable.¹⁷¹ The deference given to a high school athletic association reflects the decades-long principle that high school sport participation is a privilege, not a right, and that courts are not often the most appropriate forum to intervene in interscholastic athletic disputes.¹⁷²

168. See Associated Press, *School Report on Death of Kentucky High School Player Max Gilpin: Coach Followed Rules*, ESPN (July 1, 2009), <http://www.espn.com/highschool/rise/football/news/story?id=4299367> (offering that there was no evidence the players were denied water and that Gilpin may have died from something other than dehydration alone).

169. See Michael McCann, *Ruling in Wrongful Death Case May Affect How Coaches Treat Players*, SPORTS ILLUSTRATED, Aug. 26, 2009, <https://www.si.com/more-sports/2009/08/26/kentucky-coach>; see also David Marck, Comment, *Necessary Roughness?: An Argument for the Assignment of Criminal Liability in Cases of Student-Athlete Sustained Heat-Related Deaths*, 21 SETON HALL J. SPORTS & ENT. L. 177 (2011) (arguing in favor of the threat of criminal prosecutions to better serve as a deterrent for dangerous behavior by coaches and others or encouraging state legislatures to revisit immunity statutes).

170. See Jeff Caplan, *Kentucky Coach Cleared in Player's Death Understands Swim Coach's Fear*, FORT WORTH STAR-TELEGRAM, July 29, 2017, <http://www.star-telegram.com/news/local/community/northeast-tarrant/article164388382.html> (referencing and interviewing Stinson, and discussing the recent case of how a former Fort Worth, Texas area club swim coach was charged with abandonment and endangering of a child by criminal negligence after a 13-year-old swimmer drowned during a pre-dawn practice session).

171. See *Ky. High Sch. Athletic Ass'n v. Hopkins Cty. Bd. of Educ.*, 552 S.W.2d 685, 687 (Ky. Ct. App. 1977) (“As a general rule, courts will not interfere with the internal affairs of voluntary associations. In the absence of mistake, fraud, collusion or arbitrariness, the decisions of the governing body of an association will be accepted by the courts as conclusive . . . Voluntary associations may adopt reasonable bylaws and rules which will be deemed valid and binding upon the members of the association unless the bylaw or rule violates some law or public policy . . . It is not the responsibility of the courts to inquire into the expediency, practicability or wisdom of the bylaws and regulations of voluntary associations . . . These general principles are equally applicable to cases involving state high school athletic associations . . . Furthermore, the courts will not substitute their interpretation of the bylaws of a voluntary association for the interpretation placed upon those bylaws by the voluntary association itself so long as that interpretation is fair and reasonable.”).

172. See Tackett, *supra* note 140 (penning, “Participating in high school sports is a privilege which is afforded to those students who regularly attend the school and enroll in the academic curriculum.”).

In *Kentucky High School Athletic Association v. Hopkins County Board of Education*, high schooler Todd Lige Shadowen (“Todd” or “Shadowen”), had obtained an injunction in Hopkins Circuit Court against the KHSAA in order to play high school sports at his new high school, Madisonville-North Hopkins High School, after transferring from Union County High School.¹⁷³ However, that injunction was short-lived and reversed by the Kentucky Court of Appeals.¹⁷⁴ Todd’s parents were divorced since 1973, and Todd lived with his mother in Sturgis (Union County) who had legal custody at the time.¹⁷⁵ In fact, Todd was a first team performer at Union County High School during the 1975-76 school year.¹⁷⁶

Then, on or about May 28, 1976, Todd moved in with his father and step-mother in Hopkins County and enrolled in the new high school for reasons wholly unrelated to interscholastic sports.¹⁷⁷ Accordingly, Todd attempted to play football and basketball for the new school, but there was a KHSAA transfer rule at the time that required Todd to wait 36 weeks before he was eligible to play, unless he could obtain a waiver by the KHSAA Commissioner.¹⁷⁸ On June 23, 1976, the KHSAA Commissioner informed the principal of Madisonville-North Hopkins High School that Todd indeed was eligible, but then two months later (August 16), the Commissioner’s opinion changed, stating in a new letter to the school principal:

The Commissioner may waive By-Law 6 only in cases where there is a corresponding change of address on the part of the parent. I am now informed that Todd was living with his mother in Sturgis while attending Union County High School and she did not move to Madisonville. Since there was no change of

173. *Ky. High Sch. Athletic Ass’n v. Hopkins Cty Bd. of Educ.*, 552 S.W.2d 685, 686 (Ky. Ct. App. 1977).

174. *Id.* at 689.

175. *Id.* at 686.

176. *Id.*

177. *Id.* at 686-87 (stating, “Shadowen moved his residence from Union County with his mother to Hopkins County with his father for personal reasons unrelated to his participation in interscholastic sports events. Shadowen’s transfer was free from any motive related to his athletic ability. Shadowen was not recruited by the School or anyone on its behalf. The record indicates that he wished to move to Hopkins County to live with his father so that he could marry. His mother was opposed to the marriage. Shadowen did marry Nina Simpson on June 12, 1976, but they lived together for only a few weeks in Hopkins County. Since their separation, Shadowen has lived with his father in Hopkins County.”).

178. *Ky. High Sch. Athletic Ass’n*, 552 S.W.2d 685 at 686-90 (authoring, “The rule in question in this case, By-law 6, Transfer, provided: , SEC. 1. TRANSFER OF FIRST TEAM COMPETITOR. Any student who has represented a secondary school in a first team game in any sport and who changes schools with or without a corresponding change in the residence of his parents shall be ineligible for thirty-six school weeks. If there is a corresponding change in the residence of the parents, the commissioner may waive the penalty in any case where there is evident injustice.”).

residence on the part of the mother, I have no authority to declare Todd eligible. Therefore, I must rescind my decision of June 23, 1976, and state that Todd is ineligible to represent Madisonville-North Hopkins High School in athletics until he has been enrolled there for a period of thirty-six weeks.¹⁷⁹

Indeed, the Court of Appeals recognized that the KHSAA transfer rule was “a valid regulation intended to eliminate the pernicious practice of recruiting high school athletes.”¹⁸⁰

Todd appealed this determination, but he received a letter from the board of control, dated September 22, 1976, informing him that the appeals committee did not support his appeal and he would have to sit out during the school year because he was ineligible.¹⁸¹ Todd continued his fight to play and was successful at the circuit court level, which declared that Todd was immediately eligible and issued a temporary injunction against the Hopkins County Board of Education and his new school.¹⁸²

Procedurally speaking, the case became a complete nightmare for the Kentucky courts, which acknowledged the same. The KHSAA was left out of the first complaint, so the Circuit Court then issued a second temporary injunction enjoining the KHSAA from sanctioning the high school if Todd were to participate in interscholastic sports at the new school.¹⁸³ Then, the Supreme Court of Kentucky dissolved the second temporary injunction but not the first, which was granted to Todd against the Hopkins County Board of Education and the new school.¹⁸⁴ Then, the Circuit Court’s issuance of an injunction in the first place was reversed, and the Kentucky Court of Appeals stated:

This case demonstrates that courts are a very poor place in which to conduct interscholastic athletic events, especially because this type of litigation is most likely to arise at playoff or tournament time. If an injunction or restraining order is granted erroneously, it will be practically impossible to unscramble the tournament results to reflect the ultimate outcome of the case. In almost every instance, the possible

179. *Id.* at 686-87. Interestingly, the Lyon Circuit Court (the county where the parents originally were divorced) entered on September 1, 1976, *nunc pro tunc* as of June 8, 1976, custody of Todd from his mother to his father, and the father became obligated to make monthly support payments directly to Todd who now was already enrolled at the new school, Madisonville-North Hopkins High School.

180. *Id.* at 687.

181. *Id.*

182. *Id.* at 689-90 (The Court of Appeals, however, noted that this was error and a “procedural quagmire” to not include the KHSAA as a party to the complaint and resulting temporary injunction).

183. Ky. High Sch. Athletic Ass’n, 552 S.W.2d 685 at 690.

184. *Id.*

benefits flowing from a temporary restraining order or injunction will be far outweighed by the potential detriment to the Association, as well as to its member schools who are not before the court. Only in rare instances would the granting of the temporary restraining order or temporary injunction be a proper remedy.¹⁸⁵

In sum, the Kentucky Court of Appeals supported the KHSAA's decision to declare Todd ineligible for the year and ultimately reversed the judgment of the Circuit Court's granting of a temporary injunction, but the Court of Appeals also made sure that the high school was not punished by the KHSAA for following the order of the circuit court in the first place.¹⁸⁶

Still, the very next year, the Kentucky Court of Appeals held in favor of the transfer eligibility of a student in another interscholastic athletics case, this time involving Williamsburg High School (Whitley County).¹⁸⁷ The Court of Appeals, citing the decision involving Todd's case from Hopkins County, stated:

[C]ourts will not substitute their interpretation of an association's bylaws for the interpretation placed upon those bylaws by the association itself. However, that rule is applicable only so long as the association's interpretation is fair and reasonable. Applying the standards set forth in the *Hopkins County Board of Education* case, we conclude that it is unfair and unreasonable to require that the student's change of school be simultaneous with the custodial parent's change of residence.¹⁸⁸

In this case, *Kentucky High School Athletic Association v. Jackson*, the Court of Appeals again recognized the importance of the transfer rule, stating, "[t]he transfer rule is intended to eliminate the pernicious practice of recruiting high school athletes."¹⁸⁹ However, the Court agreed with the circuit judge that the KHSAA acted "arbitrarily" and therefore, ruled against the KHSAA in this case and stated:

The facts of this case are easily distinguished from the facts in the Hopkins County Board of Education case in which the

185. *Id.*

186. *Id.* (stating, "The judgment of the circuit court is reversed except for that portion of the judgment enjoining the Association from imposing sanctions against the School for playing Shadowen in conformity with the temporary injunction.").

187. Ky. High Sch. Athletic Ass'n. v. Jackson, 569 S.W.2d 185 (Ky. Ct. App. 1978).

188. *Id.* at 187-88.

189. *Id.* at 188.

application of the transfer rule was upheld. In that case, there was a change of custody but no change of residence by either parent.

Moreover, the change of custody was the result of the student's own wishes so that his change of residence from one school district to another could not be said to have been involuntary. In this case, Kevin's mother had legal custody of both children at all times after the final separation. As the custodial parent, it was her decision that both children follow her to Williamsburg at the end of the school year and that they move with her and her husband on two occasions during the summer of 1977. We agree with the judgment of the circuit judge that KHSAA acted arbitrarily when it applied the transfer rule to Kevin Jackson.¹⁹⁰

When taken together, based upon these two decisions, it appears that Kentucky courts will defer to the KHSAA and support decisions by the KHSAA with the caveat that they must not be applied arbitrarily and must be fair and reasonable. Today, the KHSAA transfer rules (Bylaws 6-8) can be found online and apply to and address not only U.S. citizens, but include "Foreign Exchange" and "Non-Exchange" Foreign Students as well.¹⁹¹

Still, as the above cases demonstrated, attempts to adjudicate interscholastic athletic issues in the courts can take considerable time. By the time a decision through the legal system could become final, the high schoolers might be far removed from high school.¹⁹² Other Kentucky examples abound and can be explored via further research. This includes a federal case in which the parents of four private school students unsuccessfully challenged KHSAA's Bylaw, which limited the amount and type of merit-based financial aid and scholarship assistance a student can receive at a non-public school and remain eligible to compete in KHSAA-governed high school athletics.¹⁹³

190. *Id.*

191. *See KHSAA*, 2018-2019 KHSAA HANDBOOK, KHSAA, <https://khsaa.org/general/khsaa-handbook/> (referencing Bylaws 7 and 8).

192. *See, e.g.*, Adam Epstein, *SPORTS LAW* 218 (2013) (discussing how the ten years of litigation involving Grand Rapids, Michigan area high school students and their parents seeking gender equity in the playing of sports seasons in interscholastic sports in Michigan resulting in the final order in *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 2008 U.S. Dist. LEXIS 25640 (W.D. Mich. Mar. 31, 2008)).

193. *Seeger v. Ky. High Sch. Athletic Ass'n*, 453 Fed. Appx. 630 (6th Cir. 2011), on appeal from *Evans v. Ky. High Sch. Athletic Ass'n*, 2010 U.S. Dist. LEXIS 39063, at 9-11. (W.D. Ky. Apr. 20, 2010) (holding that the KHSAA Bylaw 13 was not unfair, discriminatory, arbitrary and capricious, and did not violate constitutional rights under the First and Fourteenth Amendments. The Sixth Circuit stated, "[t]he 25% cap on merit-aid provision is, therefore, rationally related to the KHSAA's interest in preventing improper athletic recruitment.").

In another federal case, the courts upheld the KHSAA policy as reasonable providing that Kentucky students only get four years to compete in high school athletics once they are enrolled in the ninth grade, and this policy does not violate a student's constitutional rights.¹⁹⁴ Similarly, a Ballard County high schooler was denied a preliminary injunction after being placed in an alternative school for a violation of a code of conduct, and her claim that the punishment—which included not being able to participate in extracurricular activities—would hinder her hope of receiving a college softball scholarship did not succeed.¹⁹⁵

4. Governmental Immunity

In *Yanero v. Davis*, the Kentucky Supreme Court ruled that sovereign immunity did not protect two public high school baseball coaches from Waggener High School (Jefferson County) from a negligence claim after fifteen-year-old Ryan Yanero, one of the junior varsity players, was hit in the head by Ryan Coker, another member of the junior varsity team, when taking batting practice before a game in the batting cage in the school gymnasium in 1997.¹⁹⁶ Yanero, by and through his parents, brought a lawsuit against a bevy of defendants including the Jefferson County Board of Education (Board), the high school athletic director, an assistant coach assigned to coach the junior varsity baseball team, another assistant coach, and the KHSAA alleging liability for failing to require Yanero to wear a helmet, the failure to administer or obtain appropriate medical treatment, and the “fail[ure] to develop, implement and enforce rules and regulations pertaining to the proper hiring and training of coaches and athletic directors qualified to provide for the safety of students participating in batting practice and/or in the proper medical procedures to be followed in case of a head injury,”¹⁹⁷ including a claim of vicarious liability attributed to the Board and KHSAA.¹⁹⁸

The Jefferson Circuit Court granted summary judgment motions to all the defendants on grounds of sovereign, governmental, or official immunity; the

194. *Ledney v. KHSAA Bd. of Control*, No. 2005-223 (WOB), 2006 U.S. Dist. LEXIS 53207 (E.D. Ky. 2006) (ruling against Ledney who transferred from the private, college preparatory school Covington Latin School to Highlands High School (Fort Thomas) stating that the KHSAA Bylaw 4 was facially neutral, there was no evidence race played a part in the decision, and due process was not violated because there was not a protected interest in playing high school sports; citing *Thompson v. Fayette Cty. Pub. Schs.*, 786 S.W.2d 879, 881-82 (Ky. App. 1990) (ruling that there is no claim of property or liberty infringement based on denial of participation in interscholastic athletics under rule requiring minimum grade point average).

195. *S.B. ex rel Brown v. Ballard Cty. Bd. of Educ.*, 780 F. Supp. 2d 560, 568 (W.D. Ky. 2011) (noting that playing softball is a privilege and there is no general constitutional right to participate in extracurricular athletics).

196. *See generally Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001).

197. *Id.* at 517.

198. *Id.*

Court of Appeals affirmed, but the Kentucky Supreme Court held that all defendants were immune from suit except for the two coaches (Davis and Becker).¹⁹⁹ The *Yanero* decision is significant in that the Kentucky Supreme Court took the case “[f]or the purpose of clarifying the nature and extent of immunity from tort liability applicable to governmental agencies, officers, and employees.”²⁰⁰ In sum, when considering immunity from liability, the court viewed the coaches differently than all other defendants in that their actions were ministerial in nature rather than discretionary. The court stated, citing and quoting several other Kentucky decisions in the process,

Yanero’s cause of action against Davis and Becker is essentially one for negligent supervision. Teachers assigned to supervise juveniles during school-sponsored curricular or extracurricular activities have a duty to exercise that degree of care that ordinarily prudent teachers or coaches engaged in the supervision of students of like age as the plaintiff would exercise under similar circumstances. . . . The performance of that duty in this instance was a ministerial, rather than a discretionary, function in that it involved only the enforcement of a known rule requiring that student athletes wear batting helmets during baseball batting practice. The promulgation of such a rule is a discretionary function; the enforcement of it is a ministerial function. Yanero and other members of Waggener’s junior varsity baseball team testified in discovery depositions that team members were regularly permitted to engage in batting practice without wearing helmets.²⁰¹

The court went further and stated:

Yanero’s cause of action is not barred by his own negligence or that of Coker (who claims the errancy of his pitch was caused when he accidentally caught his toe in the pitching rubber as he threw the ball). “The very adventuresome nature of teenagers leads to experimentation and should place a teacher on notice that he can look forward not only to the expected but also to the unexpected. . . .” The issues with respect to the negligence of the coaches vis-à-vis that of Yanero and/or Coker is best left to a jury. . . .²⁰²

199. *Id.* at 529.

200. *Id.* at 517.

201. *Yanero*, 65 S.W.3d at 529.

202. *Id.*

Indeed, throughout the decision the Supreme Court explored the history and application of concepts including sovereign immunity, absolute immunity, governmental immunity, and official immunity. In the end, the school did not have a written policy that required the use of helmets, but the Supreme Court stated:

[T]here is no basis for concluding that his failure to promulgate a written rule requiring student athletes to wear batting helmets during baseball batting practice violated any constitutional, statutory, or other clearly established right applicable to Yanero, or amounted to a willful or malicious intent to harm Yanero, or was the product of a corrupt motive²⁰³

Still, the court concluded that the case “is essentially one for negligent supervision.”²⁰⁴ The court remanded the case accordingly, regarding the two coaches for a jury to determine whether or not they were negligent.²⁰⁵ To the court, the Board was performing a *governmental function* when it authorized interscholastic sports at the school and therefore was entitled to *governmental immunity*.²⁰⁶ The KHSAA was entitled to *qualified official immunity* that was afforded to officers and employees of the state, since it was interpreted as an agent for the Kentucky Board of Education.²⁰⁷

Two more recent cases also applied immunity concepts to interscholastic sport-related incidents. First, in the 2011 decision in *Faulkner v. Greenwald*,²⁰⁸ the defendant athletic director (Greenwald) at Seneca High School in Louisville was not protected under qualified immunity after an injury occurred at the school involving a concession stand door at an area located adjacent to the soccer field.²⁰⁹ Alleging negligence, the plaintiff parent who worked at the concession stand and who was injured by the stand’s overhead wooden door that slipped out of position sued, but the trial court granted summary judgment in favor of Greenwald based on *qualified immunity*.²¹⁰

The Kentucky Court of Appeals opined, “[p]ublic employees are afforded immunity for their discretionary acts performed in good faith and within the

203. *Id.* at 529.

204. *Id.*

205. *Id.*

206. *Yanero*, 65 S.W.3d at 527.

207. *Id.* at 530.

208. *Faulkner v. Greenwald*, 358 S.W.3d 1 (Ky. Ct. App. 2011).

209. *Id.* at 2 (reversing the trial court’s decision that the athletic director had qualified immunity. The Court of Appeals stated, “Greenwald’s responsibilities included the safety and maintenance of the athletic facilities, including a concession stand located adjacent to the school’s soccer field.”).

210. *Id.*

scope of their authority. On the other hand, employees are not immune from suit for the negligent performance of a ministerial act.”²¹¹ The court then discussed the difference between discretionary acts as opposed to ministerial acts in Kentucky, offering, “Kentucky courts have clearly identified the two types of functions, and there is no confusion as to their definition.”²¹² The Court reversed and remanded the case, concluding that maintenance of the concession stand was *ministerial* in nature and therefore *qualified immunity* did not apply to Greenwald.²¹³

In the 2012 federal decision in *Brabson v. Floyd County Board of Education*,²¹⁴ the plaintiff was a spectator at a cheerleading event at Prestonburg High School in Floyd County when she tripped on the raised gymnasium floor.²¹⁵ The event was organized by a privately-owned company, Cheer Elite, in conjunction with the cheerleading team’s Boosters Club.²¹⁶ Brabson, whose daughter was competing, sued the Board of Education (Board) and Cheer Elite’s owner, alleging that she tripped over the raised floor as a result of the failure to warn her and other invitees and licensees of the dangerous floor condition.²¹⁷ The U.S. District Court for the Eastern District of Kentucky granted Cheer Elite’s owner, Sherri Patterson, summary judgment,²¹⁸ but the district court could not at first decide on summary judgment for the Board until it received

211. *Id.* at 3. (citing Yanero v. Davis, 65 S.W.3d 510, 522 (Ky. 2001)).

212. *Id.* at 4.

213. *Id.* at 4-5 (citing previous Kentucky decisions and offering that Kentucky law is, at least to this court, apparently clear on the difference between discretionary and ministerial duties and needed no further clarification); *cf.* Goodman v. Trousdale, No. 2015-CA-000127-MR, 2016 Ky. App. LEXIS 537 (Ct. App. Aug. 12, 2016) (affirming Warren Circuit Court decision which held that defendant teacher and cheerleading coach at Hart County High School (HCHS), during a two-hour practice session in Warren County, was not entitled to summary judgment under qualified immunity and owed ministerial duties (as opposed to discretionary duties as argued by defendant) to concussed plaintiff, a student and cheerleader at HCHS, by failing to properly supervise the cheerleading practice). The Kentucky Court of Appeals offered, “qualified official immunity operates to bar a negligence action against a public official when sued in his or her individual capacity.” Yanero, 65 S.W.3d at 510. To be entitled to the defense of qualified official immunity, the public official or employee must be performing a discretionary act in good faith and within the scope of employment. No immunity exists for performance of a ministerial act. *Id.* Thus, the distinction between a discretionary act and a ministerial act is pivotal. A discretionary act is one “involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment.” *Id.* at 522. Conversely, a ministerial act is generally “one that requires only obedience to the orders of others, or when the officer’s duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.” *Id.*

214. *Brabson v. Floyd Cty. Bd. of Educ.*, 862 F.Supp.2d 571, 573-74 (E.D. Ky. 2012).

215. *Id.*

216. *Id.* at 572-73.

217. *Id.* at 573.

218. *Id.* at 573-74.

“[a]dditional information about the relationship between the Board and the Boosters Club.”²¹⁹

After the court ordered the parties to take limited deposition testimony and file supplemental briefing on the factual issue – the relationship between the Board and the Boosters Club – the district court granted summary judgment to the Board.²²⁰ The court noted that the Board acted in two governmental functions: “first, the Board acted in ‘direct furtherance of education.’”²²¹ The court continued, “second, the Board also continued a tradition of making government property available for use by the Boosters Club on a not-for-profit basis.”²²²

In sum, governmental immunity prevents courts from “‘pass[ing] judgment on policy decisions made by members of coordinate branches of government in the context of tort actions’ because such actions ‘furnish an inadequate crucible for testing the merits of social, political or economic policy.’”²²³ The court reminded Brabson that she could still pursue the matter through the state’s Board of Claims despite her assertion that it would not adequately compensate her due to statutory limits.²²⁴

5. Additional Interscholastic Issues for Exploration

Indeed, the pursuit of interscholastic cases and incidents in Kentucky offers sports law enthusiasts a host of other opportunities for further exploration.²²⁵ Some have made their way into the national spotlight and discussion. For example, in 2013, the KHSAA became subject of ridicule after it was reported that it would no longer allow post-game handshakes among its sports after a

219. *Id.* at 575.

220. *Brabson*, 862 F. Supp.2d at 574.

221. *Id.* at 575 (citing *Yanero*, 65 S.W.3d at 527-28 (Ky. 2001) (“holding that authorizing and conducting interscholastic athletics is part of the governmental function” of public education), and stating, “by allowing the Boosters Club – the sole source of funding for the cheerleading team – to conduct a fundraiser on school property, the Board fostered interscholastic athletics.”).

222. *Id.*

223. *Id.* (citing and quoting, *Letcher Cty. Bd. of Educ. v. Tackett*, No. 2009-CA-001463-MR, 2011 Ky. App. Unpub. LEXIS 756, 2011 WL 4861128, at *2 (Ky. App. 2011) referencing and quoting *Yanero*, 65 S.W.3d at 521 (noting that the doctrine prevents state agencies from “having to answer for their [governmental] decisions in the context of tort litigation”).

224. *Id.* at 577.

225. *See, e.g.*, *Thompson v. Fayette Cty. Pub. Schs.*, 786 S.W.2d 879, 882 (Ky. Ct. App. 1990) (authoring, “a student has neither a property interest nor any fundamental right to participate in extracurricular activities in Kentucky.” The Court of Appeals affirmed a Fayette Circuit Court decision in favor of the school board’s policy requiring a student to maintain a 2.0 grade point average in five of six classes to remain eligible for extracurricular activities, and holding that preventing the student from competing in wrestling did “not in any way exceed the reasonable and legitimate interests of the school system.”).

“Commissioner’s Directive” was posted on its website, citing that in the last three years alone, more than two dozen incidents occurred in Kentucky.²²⁶ The reported KHSAA policy was not wholly true, as teams can still choose to have postgame handshakes, but if a fight breaks out, the KHSAA announced that it would no longer be responsible.²²⁷ The report garnered unwanted media attention due to the poorly worded press release.²²⁸

In 2009, a Kentucky parent expressed outrage that her sixteen-year-old son was baptized on a trip led by the high school head football coach on August 26, 2009.²²⁹ The coach took almost two dozen players on a field trip to an evangelist church service where nearly half the forty-six team members were baptized.²³⁰ The Breckinridge County High School coach defended himself in that although he used a school bus to transport them approximately thirty-five miles, it was characterized as a voluntary activity with a volunteer driver.²³¹ In fact, the Superintendent attended the service and witnessed the baptisms and did not have a problem with the extracurricular activity.²³² One could query the constitutional legitimacy of the coach-led, voluntary, public-school activity.

Finally, it is interesting to note that the KHSAA has, in its Bylaw 27, Sec. 2, *Imposition of Penalties*, that exempts a member school from punishment for complying with a court order that is later vacated or overturned.²³³ This is remarkably different than the NCAA’s approach in applying its Restitution Rule (today enumerated in the NCAA Manual as 19.12) regarding UofL’s basketball

226. See Foxsports, *Kentucky Retracts Handshake Ban*, FOX SPORTS (Oct. 8, 2013), <https://www.foxsports.com/other/story/kentucky-bans-postgame-handshakes-high-school-sports-khsaa-fines-additional-penalties-100813> (linking the Commissioner’s Directive to <http://khsaa.org/10082013-commissioners-directive-on-postgame-activity/>).

227. *Id.*

228. *Id.*; see Linda B. Blackford & Valarie Honeycutt Spears, *KHSAA Director Apologizes for Lack of Clarity in Recommendation to Stop Post-Game Handshakes*, HERALD-LEADER, Nov. 12, 2015, <http://www.kentucky.com/sports/high-school/article44448117.html>.

229. See Sarah Netter, *Kentucky High School Coach Gets Players Baptized*, ABC NEWS (Sept. 9, 2009), <http://abcnews.go.com/US/kentucky-high-school-football-coach-takes-players-baptized/story?id=8516661>.

230. *Id.*

231. *Id.*

232. *Id.*; see also Associated Press, *Ky. Mother Upset by Football Player Son’s Baptism*, NEWSDAY, Sept. 8, 2009, <https://www.newsday.com/news/nation/ky-mother-upset-by-football-player-son-s-baptism-1.1429944>.

233. See 2017-2018 KHSAA Handbook, *supra* note 138, https://khsaa.org/common_documents/handbook/bylaws/bylaw27.pdf (“A member school, student, coach, or administrator shall not be punished or sanctioned, in any manner, by the KHSAA for allowing a student to play in an athletic contest or practice with the team during a time when an order of a court of competent jurisdiction permits the student to participate or otherwise stays or enjoins enforcement of a final KHSAA decision on eligibility.”).

player Muhammed Lasege and UK's pitcher James Paxton, both discussed previously in Part I of this article.²³⁴

B. Other Sports Law Issues

This final section represents an amalgamation of statutes, cases and knowledge that could serve as a springboard for further research related to sports law in Kentucky. There are numerous sport-specific and other related and notable statutes, though it does not appear that Kentucky and sports torts are inconsistent with other states and sports law.²³⁵

1. Sports and Torts

Kentucky sports torts cases can be traced as far back as pre-Depression, as in the case of *McLeod Store v. Vinson*,²³⁶ in which the state's court of appeals ruled on whether a Madisonville department store owner should be held liable when he offered a promotional guinea hen (i.e., fowl, not a pig) race in front of his store, which resulted in a scramble and subsequent injury to a sixteen-year-old who was chasing down one of the birds.²³⁷ Catching the animal resulted in keeping it and earning a prize ranging in value from \$2.00 to \$7.00.²³⁸ A scramble of boys, and men ensued and the minor fell and seriously broke his leg when "six or eight" others fell on top of him.²³⁹

The boy sued and a jury awarded him \$5,000.²⁴⁰ However, the Kentucky Court of Appeals reversed and remanded, offering that his participation was voluntary and that he assumed the obvious risk involved even if he was not yet an adult.²⁴¹ The court state, that

An ordinary boy of that age is practically as well advised as to the hazards of baseball, basketball, football, foot races, and other games of skill and endurance as is an adult, and, if injured

234. *Supra*, note 38.

235. Adam Epstein, *Teaching Torts with Sports*, 28 J. LEGAL STUD. EDUC., 117, 127 (2011) (referencing the Coach David Jason Stinson criminal case).

236. *McLeod Store v. Vinson*, 281 S.W. 799 (Ky. 1926); For another venerable Kentucky torts case, see also A. David Austill, *When it Hits the Fan: Will There Be Liability for the Broken Bat*, 24 MARQ. SPORTS L. REV. 83, 95 n. 40 (2013) (offering, in footnote 40, that a Kentucky case "was the first reported case involving a lawsuit from an injury received by a broken wooden baseball bat" (citing *James v. Hillerich & Bradsby Co.*, 299 S.W.2d 92 (Ky. 1956)). N.B.: the reported decision refers to it as a "softball bat" that broke during a "softball game" in St. Louis, but this clearly did not affect the court's decision.

237. *McLeod Store*, 281 S.W. at 799.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

while voluntarily engaged therein, stands on an entirely different footing from an infant of tender years, or from one who is injured while lawfully and properly using the highway.²⁴²

The court, while sympathetic to the serious injuries suffered by the boy, precluded him from recovering from the danger of joining the race because by “entering the race he assumed the ordinary risks incident thereto.”²⁴³

In a more modern case, *Rogers v. Professional Golfers Association of America*,²⁴⁴ the Kentucky Court of Appeals affirmed summary judgment entered by the Jefferson Circuit Court after a plaintiff-spectator, Linda Rogers, suffered a leg injury when she slipped and fell on a hillside at the PGA Championship, suing the PGA and the host golf course, the Valhalla Golf Club in Louisville, over the four days of August 8-11, 1996.²⁴⁵ A rainstorm hit the course on the first day of the tournament, and on the second day, Rogers and her husband “proceeded across the grassy hillside toward the seventeenth green. While doing so, Rogers slipped and fell, injuring her leg.”²⁴⁶

The court of appeals addressed whether the defendants “owed Rogers any duty with respect to the hillside where she was injured.”²⁴⁷ The court characterized Rogers as an invitee and, in general, public premises invitees are owed a general duty to exercise ordinary care, and the premises should be kept in a reasonably safe condition.²⁴⁸ However, citing various Kentucky cases, the court opined that owners of business premises are not required to warn against known dangers or those that are “so obvious to him that he may be expected to discover them.”²⁴⁹

The court found Rogers’ testimony particularly helpful in affirming the lower court’s decision and dismissing her claim.²⁵⁰ Indeed, Rogers testified that she was aware of the significant rainfall the day before, that she had played golf three times per year for ten years, and that she knew that golf courses have varying terrain and conditions, including “hills, valleys, and undulating aspects of geography.”²⁵¹ In fact, she stated that she thought Valhalla was a little hillier

242. *McLeod Store*, 281 S.W. 799-800.

243. *Id.* at 800.

244. *Rogers v. Prof'l Golfers Ass'n of Am.*, 28 S.W.3d 869 (Ky. Ct. App. 2000).

245. *Id.* at 871.

246. *Id.*

247. *Id.* at 872.

248. *Id.*

249. *Id.* (citing *Johnson v. Lone Star Steakhouse & Saloon of Ky., Inc.*, 997 S.W.2d 490, 492 (Ky. Ct. App. 1999), quoting *Bonn v. Sears, Roebuck & Co.*, 440 S.W.2d 526, 528 (Ky. 1969)).

250. *Rogers*, 28 S.W.3d at 872.

251. *Id.*

than other courses.”²⁵² In the end, despite her claim that the grass was dry, but the ground was wet, and the “the hazard was therefore not open and obvious,” the court disagreed.²⁵³

2. Sport-Related Concussions

In 2017, Kentucky amended and clarified a law to prohibit coaches from returning students to a game or practice if they have been diagnosed with a concussion.²⁵⁴ In addition, the KHSAA has a policy that “[a]ny athlete who exhibits signs, symptoms, or behaviors consistent with a concussion (such as loss of consciousness, headache, dizziness, confusion, or balance problems) shall be immediately removed from the contest and shall not return to play until cleared by an appropriate health-care physician in order to return to play.”²⁵⁵ A concussion-related statute has been in place since 2009 to address concussions in interscholastic sports, but like many statutes, it has been modified several times.²⁵⁶

An example of the issue of concussions and interscholastic sports revealed itself in the unpublished 2016 Kentucky decision *Goodman v. Trousdale*.²⁵⁷ In this case, referenced herein,²⁵⁸ Carrie Goodman, a high school teacher and cheerleading coach at Hart County High School, was denied summary judgment for injuries suffered at practice by Emili Trousdale, a student and cheerleader at the school.²⁵⁹ Though much of the decision focused on whether Goodman should be entitled to qualified immunity, the issue in this section is related to

252. *Id.* at 872 (stating that the “rainfall was so heavy that she had to wear different shoes to the second day of the tournament because her other pair was soaked from the rain. Nevertheless, despite having had a prior knee surgery which continued to cause her concern and despite seeing the hillside with its matted grass before traversing it, Rogers chose to proceed.”).

253. *Id.* at 872-73. (Rogers also attempted to claim the condition was not natural since the course was converted from farmland to the course, but the court stated, “We believe it is irrelevant as to whether the hillside may be considered a natural or unnatural condition. Even if the condition is man-made, the open and obvious rule would apply.”)

254. *Summary Matrix of State Laws Addressing Concussions in Youth Sports*, NETWORK FOR PUB. HEALTH LAW (June 30, 2017). https://www.networkforphl.org/_asset/7xwh09/Sports-Concussion-Table.pdf (last visited Dec. 6, 2019).

255. KHSSA Sports Medicine Policy – Protocol Related to Concussions and Concussed Student-Athletes for All Interscholastic Athletics in the Commonwealth of Kentucky. <https://www.khsaa.org/sportsmedicine/concussion/concussion%20protocol.pdf>.

256. KY. REV. STAT. ANN. § 160.445 (LexisNexis 2017). (“Sports safety course required for high school athletics coaches; training and education on symptoms, treatment, and risks of concussion; venue-specific emergency action plans.”).

257. *Goodman v. Trousdale*, No. 2015-CA-000127-MR, 2016 Ky. App. Unpub. LEXIS 537, (Ct. App. Aug. 12, 2016).

258. *Id.*

259. *Id.* at *1.

potential liability in that Emili suffered practice session concussions that “ultimately developed difficulty with speaking and walking.”²⁶⁰ The court stated, “we are of the opinion that Goodman owed Trousdale myriad ministerial duties during the practice session at Prime Tyme and that material issues of fact exist as to whether Goodman breached those duties. We, thus, conclude that Goodman was not entitled to qualified official immunity.”²⁶¹ The court provided a history to the Kentucky concussion law, including referring to KHSAA policies on concussions.²⁶² The court offered:

Kentucky Revised Statutes (KRS) 160.445 was specifically designed to address safety in high school athletics, and it contains specific provisions regarding concussions in high school athletics. KRS 160.445 provides, in part:

(2) (a) Beginning with the 2012-2013 school year, and each year thereafter, the state board or its agency shall require each interscholastic coach to complete training on how to recognize the symptoms of a concussion and how to seek proper medical treatment for a person suspected of having a concussion. The training shall be approved by the state board or its agency and may be included in the sports safety course required under subsection (1)(a) of this section.

...

(3) (a) A student athlete suspected by an interscholastic coach, school athletic personnel, or contest official of sustaining a concussion during an athletic practice or competition shall be removed from play at that time and shall not return to play prior to the ending of the practice or competition until the athlete is evaluated to determine if a concussion has occurred. The evaluation shall be completed by a physician or a licensed health care provider whose scope of practice and training includes the evaluation and management of concussions and other brain injuries. A student athlete shall not return to play on the date of a suspected concussion absent the required evaluation.

Pursuant to KRS 160.445(2)(a), every interscholastic coach is required to complete training upon how to recognize the

260. *Id.* at *1-2 (offering, “it is undisputed that Goodman and a parent transported members of the cheerleading team to Prime Tyme Athletics for a two-hour practice session in Warren County.”).

261. *Id.* at *4.

262. *Id.* at *2.

symptoms of concussion in a student-athlete. Further, KRS 160.445(3)(a) mandates a coach to remove any student-athlete "suspected . . . of sustaining a concussion" from practice or competition in order to be medically evaluated.²⁶³

The court of appeals was not persuaded by the coach's argument that the duties imposed by the Kentucky statute and the KHSAA policies did not apply since the injuries occurred off-site at Prime Tyme and therefore not a "practice" under the statute,²⁶⁴ and nor could Goodman be considered a coach under the statutory framework as well.²⁶⁵ "Accordingly, we hold that Goodman was charged with the ministerial duties of knowing the signs/symptoms of a concussion and of immediately removing Trousdale from the practice session at Prime Tyme if Trousdale displayed any signs/symptoms of concussion, or if Goodman suspected Trousdale of sustaining a concussion."²⁶⁶ Certainly, the issue of concussions in all sports activities is a hot topic in sports law, and the importance of monitoring and treating concussions at all levels of competition—in — this case at the interscholastic level—cannot— be understated.²⁶⁷

3. Sports Crimes

For example, Kentucky has statutes which criminalize certain conduct related to sports. Assaulting sports officials has become a serious problem²⁶⁸ and Kentucky passed a statute to protect sports officials in 1998 making *assault of*

263. *Goodman*, No. 2015-CA-000127-MR, LEXIS 537 at *5-6.

264. *Id.* at *10-11 (opining, "KRS 160.445(3)(a) and the KSHAA policies use the general terms 'athletic practice' or simply 'practice.' Considering that Goodman set up the practice sessions at Prime Tyme, transported cheerleaders to the practice sessions and attended the two-hour sessions, we believe the practice sessions at Prime Tyme qualify as athletic practices or practices within the meaning of KRS 160.445 and KHSAA's policies.").

265. *Id.* at *4 ("Goodman was not a disinterested third party at the practice sessions but attended the practice sessions as coach of the cheerleading team. In such an environment, the ministerial duties set forth in KRS 160.445(3)(a) and in the KHSAA's policies were triggered.").

266. *Id.*

267. *See, e.g.*, Laura Wright & Allison Perry, *Sports Concussions: What About the Jockeys? University of Kentucky Researcher's Pilot Project Could Be the Answer*, UKNOW (Oct. 20, 2017), <https://uknow.uky.edu/uk-healthcare/sports-concussions-what-about-jockeys-university-kentucky-researchers-pilot-project> (offering, "Concussions - a brain injury caused by whiplash or other blow to the head - are notoriously difficult to diagnose, and symptoms are transient but can last several days or even weeks. Repeated concussions have a cumulative effect.").

268. Jason Frakes, *Kentucky Town Helping Basketball Referee Hospitalized by a Coach*, USA TODAY HIGH SCHOOL SPORTS, (Apr. 21, 2019), <https://usatodayhss.com/2019/kentucky-town-helping-referee-punched-by-basketball-coach>.

a sports official a Class A misdemeanor.²⁶⁹ However, it could be a felony if the defendant assembles with five or more persons to assault a sports official, in which case it is a Class D felony.²⁷⁰ It is also a felony for a second or subsequent offense for the assault of a sports official.²⁷¹

Along the same lines in the criminal law, Kentucky has created a framework of crimes involving sports bribery²⁷² and receiving a sports bribe²⁷³ both of which are felonies, and tampering with or rigging a sports contest,²⁷⁴ which is a Class A misdemeanor. Ticket scalping is a violation in Kentucky if the resale price is above the charged price or the price printed on the ticket.²⁷⁵ Local ordinances might apply as well including, for example, a city ordinance banning the sale of any food or merchandise within a block radius of Rupp Arena and The Lexington Center on game days.²⁷⁶

Cruelty to animals in the second degree is broadly defined and, in general, is considered a Class A misdemeanor under the Kentucky Penal Code with some exceptions.²⁷⁷ The statute does not apply to sporting activities involving any animal, such as horses, which are killed, “for humane purposes”²⁷⁸ or “for purposes relating to sporting activities, including but not limited to horse racing at organized races and training for organized races, organized horse shows, or other animal shows.”²⁷⁹

269. KY. REV. STAT. ANN. § 518.090 (LexisNexis 2017); see Garrett Wymer, *Referee Attacked by Player, Spectator, During Lexington Soccer Match*, WKYT (June 2, 2015), <http://www.wkyt.com/home/headlines/Lexington-Police-investiate-report-soccer--305840291.html>.

270. KY. REV. STAT. ANN. § 518.090(3) (2017).

271. KY. REV. STAT. ANN. § 518.090(4) (2017).

272. KY. REV. STAT. ANN. § 518.040 (2017).

273. KY. REV. STAT. ANN. § 518.050 (2017).

274. KY. REV. STAT. ANN. § 518.0506 (2017). This statute does not apply to beauty pageants in Kentucky, however. See *Davis v. Commonwealth*, 564 S.W.2d 33, 35, 1978 Ky. App. LEXIS 494 (Ky. Ct. App. 1978).

275. KY. REV. STAT. ANN. § 518.070 (2017); see Stephan Johnson, *Louisville Metro Police Confiscate Hundreds of NCAA Game Tickets*, WDRB.COM (Mar. 20, 2015), <http://www.wdrb.com/story/28574642/louisville-metro-police-confiscate-hundreds-of-ncaa-game-tickets>.

276. Herald-Leader Staff Report, *Police Watching for Ticket Scalpers at NCAA Games in Rupp*, HERALD-LEADER, Mar. 19, 2013, <http://www.kentucky.com/sports/college/mens-basketball/article44412069.html>.

277. KY. REV. STAT. ANN. § 525.130 (LexisNexis 2017).

278. KY. REV. STAT. ANN. § 525.130(2)(c) (LexisNexis 2017).

279. KY. REV. STAT. ANN. § 525.130(2)(e) (LexisNexis 2017). See, KY. REV. STAT. ANN. (noting, that § 525.130(5) (LexisNexis 2017), specifically addresses the possible punishment to an offense “arising from the person’s treatment of an equine.”).

PART III: ADDITIONAL AND FINAL SPORTS LAW ISSUES FOR EXPLORATION

There are plenty of opportunities for those interested in sports law to explore other material related to the state of Kentucky.²⁸⁰ For those interested in the relationship between civil rights, race and sport, for example, Kentucky has several prime examples of milestones in American history. For example, UK was the first school in the Southeastern Conference (SEC) to play a black football player in an SEC varsity game, Nate Northington from Louisville, on September 30, 1967, in Lexington against the University of Mississippi.²⁸¹ Although Northington left UK and transferred to WKU, a statue memorializing UK's breaking of the SEC color barrier was unveiled on UK's campus in September 2016.²⁸² Interestingly, at the time, Louisiana and Mississippi still had statutes prohibiting their universities from participating in any athletic event involving black players.²⁸³ Indeed, the SEC was the last major athletic conference to integrate.²⁸⁴

280. See, e.g., Valarie Honeycutt Spears & Josh Moore, *Petition Created Against Stallions Mascot for Lexington's New High School*, HERALD-LEADER, Jan. 3, 2017, <http://www.kentucky.com/news/local/education/article124334374.html> (providing a discussion of how a Lexington woman created a petition on the change.org website against naming athletic teams and the school mascot at the new Frederick Douglass High School the "Stallions" because "it is inappropriate and sexist" in relation to female sports teams at the school since it is a "male breeding horse." The school eventually settled on "Broncos."); see also, Josh Moore, *Frederick Douglas High School Students Choose New Nickname*, HERALD-LEADER, Aug. 16, 2017, <http://www.kentucky.com/sports/high-school/article167549772.html>. (discussing why UofL changed the name of its football stadium in 2018); see also Jenna West, *Papa John's Cardinal Stadium Name Changed After John Schnatter Racist Comments*, SPORTS ILLUSTRATED, July 12, 2018, <https://www.si.com/college-football/2018/07/12/louisville-football-players-ask-papa-johns-cardinal-stadium-name-change>.

281. See C.J. Schexnayder, *The Integration of Football in the Southeastern Conference*, TEAM SPEED SKILLS (May 9, 2012), <https://www.teamspeedkills.com/2012/5/9/3008248/the-integration-of-football-in-the-southeastern-conference> (writing that Northington only played in three minutes as he suffered a separated shoulder in the game against the University of Mississippi (Ole Miss), though it represented the first integrated SEC game); see also Mark Story, *Nate Northington, the Man Who Integrated SEC Football*, HERALD-LEADER, Sept. 29, 2017, <http://www.kentucky.com/sports/spt-columns-blogs/mark-story/article176106916.html> (discussing how Northington and teammate Greg Page from Middlesboro were going to both shatter the color barrier but Page died the night before the big game, thirty-eight days after a freak accident during practice caused him to be paralyzed).

282. Story, *supra* note 281 (offering that UK's statue recognized the four Wildcats football players who broke the SEC color barrier, including Mel Page, who represented his brother Greg; Nate Northington; and two underclassmen at that same time, Wilbur Hackett and Houston Hogg); see Mark Story, *Kentucky Unveils Sculpture Honoring Pioneers of SEC Football Integration*, HERALD-LEADER, Sept. 22, 2016, <http://www.kentucky.com/sports/college/kentucky-sports/uk-football/article103568827.html>.

283. See Hank Rippetoe, *Shades of the Past: Kentucky's First Two Black Players*, A SEA OF BLUE (Oct. 7, 2013), <https://www.aseaofblue.com/2013/10/7/4789174/kentuckys-first-two-black-players> (offering that two other significant events also changed the SEC and its position on race and college sports. Those events were: "Kentucky's loss to Texas Western in the NCAA basketball championship and Alabama's home loss to Southern Cal in football forced a change in thinking.").

284. *Id.*

In a federal antitrust case, Kentucky Speedway, LLC (KYS) claimed the National Association of Stock Car Auto Racing, Inc. (NASCAR) and International Speedway Corp. (ISC) conspired to monopolize and restrain trade in auto racing at the premier racing circuit level.²⁸⁵ KYS alleged that the two business entities, both controlled by the France family at the time, conspired in violation of sections 1 and 2 of the Sherman Antitrust Act to prevent KYS and other tracks from hosting the Sprint Cup (formerly Nextel Cup).²⁸⁶

Unfortunately for the plaintiff, the dismissal of the case at the U.S. District Court for the Eastern District of Kentucky and Sixth Circuit Court of Appeals case was due to insufficient evidence,²⁸⁷ unreliable expert witness testimony,²⁸⁸ and the plaintiff's failure to define the relevant market (which consists of both geographic and product components).²⁸⁹ In the end, the Sixth Circuit questioned whether KYS was simply a "jilted distributor"²⁹⁰ that NASCAR bypassed to host its races, but the refusal to grant KYS a Sprint Cup race may have involved "the quintessential business judgment of whether expanding the Sprint Cup to northern Kentucky makes economic sense in developing the NASCAR brand on a national basis."²⁹¹

A variety of other sports law subjects or concerns are available for examination.²⁹² For those interested in sports agency, Kentucky has adopted the Uniform Athlete Agents Act (UAAA)²⁹³ in which the possible penalties for violations of the act include a Class A misdemeanor or a Class D felony.²⁹⁴ In 2016, Governor Matt Bevin created the Kentucky Boxing and Wrestling Commission (KBWC) and the KBWC Medical Advisory Panel (replacing the Kentucky Boxing and Wrestling Authority of 2008 and repealing numerous

285. *Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc.*, 588 F.3d 908, 911 (6th Cir. 2009).

286. *Id.* at 913-15.

287. *Id.* at 914.

288. *Id.* at 919.

289. *Id.* at 921.

290. *Id.*

291. *Ky. Speedway*, 588 F.3d at 920-21 (quoting *Expert Masonry, Inc. v. Boone Cty. Ky.*, 440 F.3d 336, 347 (6th Cir. 2006) ("whether the parties exercise wise business judgment in any given transaction is not a concern of antitrust laws")).

292. KY. REV. STAT. ANN. § 311.668 (LexisNexis 2017).

293. Revised Uniform Athlete Agents Act, KY. REV. STAT. ANN. §§ 164.6901-164.6935 (LexisNexis 2017).

294. KY. REV. STAT. ANN. § 164.6927 (LexisNexis 2017).

statutes).²⁹⁵ The KBWC now oversees all “unarmed combat,”²⁹⁶ including professional boxing, wrestling and full contact competitive bouts and exhibitions held in Kentucky.²⁹⁷ The KBWC licenses contestants, officials and promoters.²⁹⁸

Finally – and obviously – the role that farm animals (including horses) and “horse racing activities”²⁹⁹ have on the state’s economy is significant and attracts a large number of nonresidents to the state.³⁰⁰ Indeed, there is plenty to research regarding horse racing and betting in Kentucky though, this article has intentionally sought other Kentucky-related material under the umbrella of sports law.³⁰¹ Still, contemporary sports law concerns include the banned use of anabolic steroids and other doping in Kentucky horse racing since Governor Steve Beshear signed emergency regulations banning the use for Thoroughbred and Standardbred racing in 2008.³⁰² How betting on horse races is legal in Kentucky in the first place is worthy of exploration as well.³⁰³

295. Press Release, *Governor Creates New Kentucky Boxing and Wrestling Commission*, BLUEGRASS MMA (May 17, 2016), <https://www.bluegrassmma.com/2016/05/governor-creates-new-kentucky-boxing-wrestling-commission/>.

296. KY. REV. STAT. ANN. § 229.151(1) (LexisNexis 2017).

297. Nathan Lyttle, *Bevin Appoints New Commission to Oversee Contact Sports*, WYMT (May 17, 2016), <http://www.wymt.com/content/news/Bevin-appoints-new-commission-to-oversee-contact-sports-379816661.html>.

298. *Public Protection Cabinet*, KY. BOXING AND WRESTLING COMM’N, <http://kbwa.ky.gov/Pages/default.aspx> (last visited Dec. 6, 2019).

299. KY. REV. STAT. ANN. § 247.401(8) (LexisNexis 2017) (stating, “Horse racing activities” means the conduct of horse racing activities within the confines of any horse racing facility licensed and regulated by KRS 230.070 to 230.990 but shall not include harness racing at county fairs.”).

300 KY. REV. STAT. ANN. § 247.401 (LexisNexis 2017) (providing “Legislative findings for KRS 247.401 to 247.4029.”).

301. E.g., Joan S. Howland, *Let’s Not “Spit the Bit” in Defense of “The Law of the Horse”: The Historical and Legal Development of American Thoroughbred Racing*, 14 MARQ. SPORTS L. REV. 473 (2004) (discussing the history of American Thoroughbred racing and Kentucky).

302. See Press Release, *Governor Signs Steroids Ban into Law*, KYGOV <https://sportsanddrugs.procon.org/sourcefiles/KYGov.pdf> (last visited Dec. 6, 2019) (stating, “The new rules set forth acceptable levels of the naturally occurring steroids Boldenone, Nandrolone and Testosterone. A horse may be given one of those steroids only under certain therapeutic conditions, and a horse may not race for at least 60 days afterwards.”); see also Tom LaMarra, *Kentucky Panel Approves Ban on Steroids*, BLOOD HORSE (Aug. 25, 2008), <http://www.bloodhorse.com/horse-racing/articles/152514/kentucky-panel-approves-ban-on-steroids>.

303. KY. REV. STAT. ANN. §§ 138.510-138.550 (LexisNexis 2017) (Pari-Mutuel Betting); see generally *Commonwealth v. Ky. Jockey Club*, 38 S.W.2d 987, 1009 (Ky. 1931) (finding that “betting on horse races by the pari-mutuel [sic] system does not constitute a lottery” under the Kentucky Constitution); see generally Bennett Liebman, *Pari-Mutuels: What They Mean and What is at Stake in the 21st Century?*, 27 MARQ. SPORTS L. REV. 45 (2016) (discussing comprehensive history of gambling on horse races in the United States and relevant cases and statutes and stating, “Largely because of the move to pari-mutuels, Kentucky and Maryland were the only two major racing jurisdictions to escape unscathed from the attack on racing from the Progressive Movement.”).

In addition to the depth of intercollegiate and interscholastic sports law decisions in Kentucky, the state offers other areas of exploration for the researcher. As just demonstrated, this includes how Kentucky was a pioneer when it came to race-relations and sport during the civil rights era. The breadth over coverage in the Bluegrass State extends to antitrust law, agency, the regulation of boxing, wrestling and combat sports and, of course, horse racing.

CONCLUSION

This article was written to provide to explore many of the prominent ethical and legal incidents, cases, laws and other relevant material related to sports law emanating from Kentucky. Though there are not currently any major league professional sports teams in the state, and it remains the least populous state in the Sixth Circuit, clearly the state provides a rich opportunity to explore intercollegiate and interscholastic examples for further exploration by students of sports law.

From pre-Depression era decisions involving injuries suffered from chasing guinea hens to the ignominious point-shaving incident of the 1950's to the F.B.I. investigation into the UofL athletics program resulting in three federal convictions in 2018 to the NCAA's decision to strip UofL of its 2013 national championship, it seems almost every decade provides something new or scandalous or ripe for national discussion, including the relationship between Kentucky institutions of higher learning and the NCAA. On the other hand, the Title IX challenge which resulted in the adoption of fast pitch softball coupled with breaking the color barrier in SEC football demonstrate that Kentucky can be a leader for change and a model example for other jurisdictions. Indeed, the role of the KHSAA and its interaction with member institutions has provided plenty of solid examples of the importance of high school sports to the state.

In sum, the spectrum for sports law is quite broad in the Bluegrass State most noted for its basketball, bourbon and horse-racing. From the curious MOU involving Coach Gillispie and UK, to the liquidated damages dispute involving UofL and Duke, to the exploration of morals clauses in Coach Pitino's contract, to the trial of Coach Stinson, to the hazing incident at WKU, to allegations of strippers and recruits at UofL, to the baptism of high school players, legal issues related to sport in Kentucky are abundant and can be amazing. Nonetheless, there is no reason to suspect that Kentucky will stop providing opportunities for national discourse related to ethics and the law in the context of sport in both in a positive and negative light.