PROFESSIONAL SPORTS and the LAW

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Lengthy Minor League Wage Case Tentatively Settled Weeks Before Trial Commenced

By Ed Edmonds, Professor Emeritus of Law, Notre Dame Law School

Over eight years after attorneys from Korein Tillery, LLC, in St. Louis, Missouri, and Pearson, Simon & Warshaw, LLP, in San Francisco, California, filed a class action complaint on behalf of minor league baseball players in the United States District Court for the Northern District of California charging the Office of the Commissioner of Baseball, Major League Baseball, Bud Selig, and three MLB teams with a violation of both state and federal wage and hours laws (Senne v. Kansas City Royals Baseball Corp., N.D. Cal., Case No. 14-cv-00608-JCS ("Senne")) the parties notified the court on May 10, 2022, that they had reached a settlement in principle based on a confidential memorandum of understanding. (Letter available at Letter to the Court Regarding Settlement, https://www.baseballplayerwagecase.com/documents). The settlement also prompted a request to adjourn a pre-trial conference scheduled for that day plus the jury trial set for June 1. The parties also asked for a

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Cleveland Browns Fan Sues Goodell, Unsuccessfully

By Jeff Birren, Senior Writer

In 2021 Patricia Breckenridge sued NFL Commissioner Roger Goodell, but not the NFL, seeking an injunction to place the Cleveland Browns in the Super Bowl. She also sought damages for Goodell's "breach" of "his NFL contract for helmet-to-helmet" collusions and because "her relative" was not allowed "to play in Super Bowl LV" (Patricia A. Breckenridge, Pro Se Litigant v. Roger Goodell, ("Breckenridge v. Goodell"), N.D. Ill, Case No. 21-cv-00674, (2-4-21)). The District Court dismissed the case, and Breckenridge appealed. The Seventh Circuit affirmed in April 2022(Breckenridge v. Goodell, ("Breckenridge"), Case No. 21-1618, (4-8-22)).

Facts, As Can Be Ascertained

The 2020 Cleveland Browns were 11-5 in the regular season. They defeated the Steelers in the Wild Card game but lost at Kansas City in the Divisional Playoff game. The Chiefs lost to Cincinnati the next week in the Conference Championship Breckenridge was not happy. She filed a one-page, handwritten complaint on February 4, 2021, just three days before the Super Bowl. Breckenridge sought a mere $10,000,000 in damages if the Browns were not placed in the Super Bowl, punitive damages for

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THIS ISSUE

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Trailblazing Labor Contracts End U.S. Women's Soccer Players' Equal Pay Lawsuit

By Patrick L. Egan & Ryan C. Chapoteau, of Jackson Lewis

The U.S. Soccer Federation (USSF), the governing body for international soccer in the United States, and the unions representing the women's and men's national soccer teams, U.S. Women's National Team Players Association, and the U.S. National Soccer Team Players Association have reached a pair of collective bargaining agreements (CBAs) with identical economic terms. For the first time, equal pay to the players of each team will be provided.

The historic agreements also resolve the long-running equal pay lawsuit women players had brought against USSF. The labor contracts run through 2028.

The key driver in pay disparity between the compensation for the Men's and Women's National Teams (USMNT and USWNT, respectively) had been the World Cup prize money received by them from FIFA, the international soccer governing body. The prize money for the men's World Cup has been about 10 times as large as that of the women's World Cup. While that disparity, though smaller, will continue, the Men's and Women's National Teams and USSF have agreed to pool the prize money received from FIFA for the next two pairs of men's and women's World Cup tournaments and divide the players' share of the pool equally between the players on the two teams. No other country's soccer federation pools prize money and divides it equally to its men's and women's national teams.

USSF will sign separate labor contracts with each union, but the economic terms of each will be the same. These include appearance fees (for participating in a training camp) and game bonuses (for being named to a gameday roster), other prize money, and commercial revenue share. Single game payments can amount to $18,000 for matches, while tournament prize money can reach as much as $24,000 per game. This will ensure that the USMNT and USWNT will both be among the highest paid national teams throughout the world.

USSF has issued a fact sheet providing an overview of the terms reached in both CBAs. Generally, prize money from non-World Cup FIFA tournaments, regional tournaments, and other official tournaments in which both the USWNT and USMNT participate also will be pooled. For the first time, the contracts provide that USSF will share a portion of broadcast, apparel, and sponsorship revenue with the players' share divided equally between USWNT and USMNT. Ticket revenue and game sellout bonuses also will be equal for the USWNT and USMNT. Further, non-economic conditions are being equalized. Playing surfaces, travel, accommodations, and national team training staffs (allowing for the unique needs of each team) will be the same. Guaranteed salaries and other benefits enjoyed by the USWNT are no longer needed as the various domestic women's league continue to prosper.

While certain claims from the USWNT lawsuit settled in 2020, these labor negotiations will end litigation that commenced six years ago, which had an impact on sponsorship along with ongoing amassing legal fees. Part of the settlement included a $24 million pool of money that would be paid out upon reaching an agreement on these CBAs that provided the formal terms for equal pay between both teams. Now, the class members can seek a court order to certify the settlement so the payments can be issued to players.

Tennessee Court of Appeals Deals Final Blow to Initiative that Would Have Created Another Arena in Memphis

The Tennessee Court of Appeals (at Jackson) has affirmed the ruling of a trial court that a group of plaitniffs seeking to build a 6,200-seat arena and other structures lacked standing to pursue a declaratory judgment, which would have prevented the defendants – Memphis Basketball, LLC and others – from blocking the project.

By way of background, in 2014, Elvis Presley Enterprises, Inc., initiated a redevelopment project that involved the celebrated and renowned home of Elvis Presley, and Memphis tourist destination, Graceland. The purposed revitalization plan initially included the construction of a 450-room non-heartbreak hotel, convention and concert facilities, a theater, and a series of upgrades to the museum and archive studio.1

To make the Graceland project economically feasible, Elvis Presley Enterprises, Inc. approached the Economic Development Growth Engine for the City of Memphis and Shelby County to request a property tax benefit through its Tax Increment Financing Program (TIF). The Economic Development Growth Engine is a Tennessee non-profit corporation that, among other things, considers applications that promote industrial development.2 The TIF program, rather than providing for direct funding, allows developers to share in the increased property tax revenues received by the city and county from the surrounding area of the developer's project.3

After receiving TIF approval from both the city and the county for its initial revitalization project, Elvis Presley Enterprises, Inc. amended its application to include a 6,200-seat arena.4 After becoming aware of the changes made by Elvis Presley Enterprises, Inc. to its proposal, Memphis Basketball, LLC, contacted the City of Memphis to assert its position that the granting of a TIF to Elvis Presley Enterprises, Inc. for its proposed arena would violate the 'Non-Participation Provision' of the 'Arena Agreement' between the City of Memphis and Memphis Basketball, LLC.5 This 'Arena Agreement', signed by the two parties in 2001, requires Memphis Basketball, LLC to pay a rental fee to the city and county, while also covering any and all costs, expenses, and operational losses incurred in order for the Memphis Grizzlies' basketball team to call the FedEx Forum home. In exchange, the 'Arena Agreement' prohibits the City of Memphis from providing tax incentives for facilities that would compete with the FedEx Forum. Specifically, the 'Non-Participation Provision' of the 'Arena Agreement' states:

Non-Participation. During the Term, neither CITY/COUNTY nor any CITY/COUNTY Affiliate shall, without the prior written consent of [Memphis Basketball], design, develop, construct or otherwise fund, provide economic or tax benefits or incentives to, or materially participate in the design, development, construction or financing of . . . any new Competing Facility; provided, however, the foregoing provisions shall not be interpreted to prohibit transactions and activities normally and/or routinely engaged in by the (x) planning, building, permitting and engineering departments of CITY/COUNTY in the ordinary course of reviewing and/or approving projects submitted by private developers, or (y) CITY/COUNTY Industrial Development Corporations and/or other CITY/COUNTY Affiliates, the general purpose of which is to encourage private development, in the ordinary course of establishing tax freeze programs, tax incentive programs, PILOT programs and other similar economic programs aimed at encouraging private development.6

In addition, the 'Arena Agreement' defines 'Competing Facility' as follows:

Competing Facility means any now existing or new indoor or covered sports or entertainment arena, indoor or covered performance facility or other indoor or covered facility that (i) could compete with the [FedEx Forum] for the booking of any event, or (ii) has or will have a seating capacity of more than 5,000 persons and fewer than 50,000 persons; provided, however, the foregoing provisions shall not apply to any hotel ballrooms, movie theaters or convention and hotel facilities that are not designed or constructed to be able to accommodate or be used as venues for concerts, theatrical shows, public assemblies or sporting events.7

After reviewing the language of the 2001 'Arena Agreement', the Economic Development Growth Engine for the City of Memphis and Shelby County decided not to grant Elvis Presley Enterprises, Inc. TIF approval for its new, supplemental project that included the 6,200-seat arena.

Elvis Presley Enterprises, Inc, in November 2017, filed suit against the City of Memphis, Shelby County, and Memphis Basketball, LLC, requesting the court to find on its behalf a declaratory judgment, intentional interference of business relations, together with any and all other injunctive and equitable relief.

The three named defendants moved the court to dismiss the plaintiff's claims. The Chancery Court agreed with the defendants, finding that plaintiff, Elvis Presley Enterprises, Inc. lacked standing because it failed to exhaust all administrative remedies before filing its lawsuit. Subsequent to the Chancery Court's ruling, however, both the Economic Development Growth Engine for the City of Memphis and Shelby County and the County Commission approved Elvis Pressley Enterprises, Inc.'s application for the amended TIF, which included the 6,200-seat arena. This approval was contingent, however, on either a court order or an agreement by the parties to the original 'Arena Agreement' (i.e. The City of Memphis and Memphis Basketball, LLC) that the Elvis Presley Enterprises, Inc. revitalization project did not violate their contract.8

As a result of the Economic Development Growth Engine for the City of Memphis and Shelby County's contingent approval, Elvis Presley Enterprises, Inc., on June 9, 2018, instigated a second lawsuit against the same three defendants, seeking a declaratory judgment that the TIF does not violate the "Arena Agreement" between the City of Memphis and Memphis Basketball. The Chancery Court, upon a motion to dismiss filed by the defendants, again dismissed the plaintiff's lawsuit for a lack of standing. The Court of Appeals affirmed, finding that the second lawsuit filed by Elvis Presley Enterprises, Inc. was barred by the legal concept of res judicata.9 The Tennessee Supreme Court granted an appeal on this issue.

The doctrine of res judicata is a rule that bars a second suit between the same parties on the same claim with respect to all issues which were, or could have been, litigated in the former suit.10 (It is a rule of rest, and it promotes finality in litigation,

prevents inconsistent or contradictory judgments, conserves judicial resources, and protects litigants from the cost and vexation of multiple lawsuits.) A party asserting a defense of res judicata must demonstrate to the court (1) that the underlying judgment was rendered by a court of competent jurisdiction; (2) that the same parties or their privies were involved in both suits; (3) that the same claim or cause of action was asserted in both suits; and (4) that the underlying judgment was final and on the merits.11

The Tennessee Supreme Court determined that the doctrine of res judicata was not applicable to the parties in this matter because the dismissal of the prior lawsuit for failure to exhaust administrative remedies did not constitute an adjudication on the merits. Therefore, since the second suit was not barred by the doctrine of res judicata, the Tennessee Supreme Court remanded the case back to the Court of Appeals for consideration of the standing issue.

As mentioned above, the appeals court found the plaintiffs lacked standing, pursuant to Tenn. Code Ann. § 29-14-107(a) (2012).

The applicable standing analysis had to consider the plaintiffs' relationship to the "Arena Agreement," and the plaintiffs had to show that they were either a party to or a third-party beneficiary of the "Arena Agreement," according to the panel.

"They were not a party to the contract, and their complaint contained no allegation that they were a third-party beneficiary," the panel wrote. "Furthermore, the plaintiffs were not conferred standing via a county resolution. Looking at the plain language of the resolution, it did not create an agency relationship," a requirement for standing.

Elvis Presley Enterprises, Inc. v. City of Memphis; Court of Appeals of Tennessee, At Jackson; No. W2019-00299-COA-R3-CV; 3/23/22

Attorneys of Record: Clarence A. Wilbon and J. Bennett Fox, Jr., Memphis, Tennessee, for the appellants, Elvis Presley Enterprises, Inc.; Guesthouse at Graceland, LLC; and EPPF, LLC.

Jonathan P. Lakey and John J. Cook, Memphis, Tennessee, for the appellee, City of Memphis.

Bruce D. Brooke, Memphis, Tennessee, for the appellee, Shelby County, Tennessee.

David Wade, Clayton C. Purdom, and Rebecca K. Hinds, Memphis, Tennessee, for the appellee, Memphis Basketball, LLC.

Marlins General Counsel Ashwin Krishnan Turns an Opportunity into a Career

Ashwin Krishnan, Vice President and General Counsel of the Miami Marlins. is an accomplished executive in the sports industry with more than a decade of extensive legal and business.

But it didn't always used to be that way.

As Krishnan tells it, he just another law student pining for a career in the sports industry when the proverbial golden opportunity came along – a summer internship with the Boston Celtics. Krishnan practically lived at the office that summer, which mad an impression – a good one .

Years later, Krishnan, sitting outside a Miami Beach restaurant, discussed his epic journey.

Question: When did you know you wanted to pursue a career in sports law?

Answer: It really started in law school. I had always been a huge sports fan. I knew early on that my athletic abilities would not lead to a career playing sports.

When I got to law school, I kind of fell into this sports law field. I saw there was a sports law class on campus taught by Peter Carfagna. There was also a very nascent sports law society at the time, which I became involved with. It really opened my eyes to all the legal jobs in this field, which I didn't really appreciate. Understanding that there's lawyers that work at teams,

leagues, unions, agencies, sponsors, apparel companies, media rights companies, and on and on. There's this whole universe of sports lawyers

So, a light bulb went off in my head, where I said, wait a minute, "I'm really passionate about the sports field. I'm checking ESPN a hundred times a day. There's also a room for lawyers in this field. I'm passionate about being a lawyer. Maybe there's a way I can combine the two. So, I decided that I'm going to do everything I can to, to get involved in the field, whether that meant attending conferences, writing articles, speaking on panels. Etc.

Q: What was your big break in sports law?

A: My biggest break was getting an internship with the Boston Celtics as a 2L in law school. Professor Carfagna had developed a relationship with Mike Zarren, who's the general counsel there at the Celtics. Together, they created an internship program, which was just a great opportunity for a student to kind of shadow and learn on the job. Professor Carfagna had recommended a group of students for Mike to interview for a spot in his program. I was very fortunate that Mike and I connected. He selected me to be an intern in that program.

I really dove in and really embraced every opportunity. And, in fact, I would say I almost focused more on that internship, than any of my other coursework. In fact, I would bring my other textbooks to the Celtics offices and just sit there and study because I was so enthralled and enamored with being part of this team sports environment.

That was the threshold moment for me, where I said, "This is what I want to do. Let me figure out how to get into this field."

Q: What, what do you like most about the job?

A: Two things. First, I love the people. I love the fact that we're an organization, we're a team. We have so many different disciplines and specialties. From creative people to technical people to baseball people to operations people to finance people. You name it, we've got them. However, we're all United, we're all working towards one goal. I love working with so many different types of people.

The other thing I really love about it is just the uniqueness of the issues that we deal with every day. Every day I go, not knowing exactly what I'm going to be dealing with. I love the fact that every day I get challenged to think about new problems, new issues. I don't know what's coming at me, but I have to kind of figure it out. Its problem solve, or use my judgment, my intuition, and try to figure new issues out every day. I just don't know which part of the business is going be popping up that day. And I compare it kind of like a little bit to whackamole where yeah, different issues pop up and you just have to kind of put on different hats and take care of them and try to keep everything under control.

Q: Sounds like you really have to be kind of a multitasker. You can't focus on one area?

A: Absolutely. When people always ask me what the biggest challenges are with my job, I say it's the time management prioritization, because we've got so many different business units that are activating and doing things. And everybody thinks their issue is the most important and needs to be solved right away. I'm not necessarily communicating with everyone else, nor do they see my to-do list. So, for me, it's always a challenge to kind of communicate to everybody and and let them know how my priorities are driven by what's most important to the organization. For example, here are the five issues that I've been hit with. Which

one do I tackle first? How long is each one going to take? How do I communicate to each person? So, every day is an exercise in prioritization and time management.

Q: How much do you interact with GCs in other sports?

A: A fair amount. Our roles are fairly unique in terms of the issues we deal with from fans, vendors, ticketing, etc. We may deal with privacy laws. Or it might be IP issues that are very unique to the sports world. Living in Florida, we also have our own set of laws and everything else we need to kind of comply with and deal with. I'm very close with the legal folks, at the Dolphins, Heat, and Panthers. I can quickly call them and say, "Hey, we're facing this issue. What are you guys doing about it? Or what are your thoughts on this? Or have you explored this or? Or hey, this is a new thing that is coming, have you guys thought about it yet?

And we can have those kinds of collaborative discussions because, while we are all trying to get fans to come to our buildings, on a legal front, we're all trying to solve the same issues. And nobody wants to see anybody else go down the wrong road, where they set bad precedent for all of us, or just suffer negative consequences. I'm very grateful for that because that's usually one of the first networks that I tap into and say, "Hey guys, what are you doing about this?"

Hernandez v. Office of the Comm'r of Baseball – Protecting Court Orders from Reevaluation Without Proper Justification

By Michael A. Ross, MS

FACTUAL BACKGROUND

Stemming from and following the Court's Opinion and Order granting summary judgement in favor of the Defendants (The Office of the Commissioner of Baseball and Major League Baseball Inc.) on March 31, 2021, the Plaintiff (Angel Hernandez) filed a motion to alter, amend, or vacate the decision pursuant to Federal Rule of Civil Procedure 59(e).

While addressing the claims set forth by the Plaintiff, the Court assumed familiarity with the factual background in this specific case as established in the previous opinion delivered. See Hernandez v. Office of Comm'r of Baseball, No 18 Civ. 9035, 2021 U.S. Dist. WL 1226499 (S.D.N.Y. Mar. 31, 2021). Or visit https://sportslitigationalert.com/mlb-umpire-sues-the-league-commissioner-for-racial-discrimination/

The decision rendered in March of 2021, granted the MLB's motion for summary judgement and denied the partial summary judgement motion set forth by Hernandez as moot. In regard to the disparate claims set forth by Hernandez, the Court found that the Plaintiff failed to demonstrate that there were genuine issues of material fact proving the MLB proffered reasons for not promoting the Plaintiff to crew chief based on the foundation and reasoning of discrimination. More specifically addressing the disparate impact claims established by the Plaintiff, the Court determined that a failure to demonstrate that disparity existed, that there was a casual connection between the process and disparity, and that there existed an alternative practice for choosing crew chiefs that would satisfy MLB's business needs without inflicting discrimination as required by the case law.

As a result of the original findings and Orders issued forth by the Court, Hernandez moved to alter, amend, or vacate the Court's Opinion and Order through the lens on Rule 59(e) of the Federal Rules of Civil Procedure. It is noted that Rule 59 may be granted only if the movant satisfies the heavy burden of demonstrating an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice. Additionally noted is the understanding and perspective stating that Rule 59 is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a second bite at the apple. Applying Rule 59 must be narrowly construed and strictly applied as to not serve as an avenue for a substitute for appealing a final judgement and as a means to provide a second attempt for those who do not satisfy original claims or receive the favorable verdict they wish to receive during the original Court decision. Because of the parameters and application of such a rule, Rule 59 is treated as an extraordinary remedy and is to be utilized sparingly.

CASE ANAYLSIS AND KEY FACTORS

The Plaintiff contends that the Court made clear errors in law in its analysis of Hernandez's disparate claims, and that the Court improperly assumed the role of factfinder.

Addressing the suggested errors of law first, Hernandez contends that the Court failed to follow key precedents in regard to the inexorable zero. In addition to this claim, Hernandez also contends that the Court incorrectly relied on MLB's statistical analysis because the sample size was too small. Within these claims, Hernandez solely references precedential cases that were previously cited in the original ruling when addressing such matters as they were considered and weighed upon before the original ruling was delivered. It is noted that the Court adequately discussed in-depth Hernandez's argument about the inexorable zero resulting in the determination that

it was less compelling in the present context, where both the pool of umpires and the number of available promotions were small. The Court does reference the small applicant pool, small number of minority umpires, and the small number of promotion opportunities renders the fact that very few minorities were promoted is statistically meaningless because of the parameters being evaluated. Although consideration of the points provided by Hernandez were given, the Court finds that "merely repeating the arguments (Hernandez) previously made and that the Court already considered and rejected, is not sufficient to meet the high standard for a Rule 59(e) motion."

The second implication within Hernandez's claim insists the Court did not fully consider the legal impact of whether the small sample size of umpires and crew chiefs was a direct result of MLB's own discriminatory conduct. Extending upon this argument, Hernandez furthers that the Court's decision would incentivize employers to keep relevant employee pools and the number of minority employees small enough to avoid liability for disparate impact discrimination, which is contrary to the Second Circuit law and policy. In response to these claims, the Court finds that neither of these arguments suggest a "change in controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice" as is required. As a result of the Court's determination toward these claims, it is decided these are essentially policy arguments that are inappropriate to consider in a Rule 59(e) motion.

The third argument provided by Hernandez states that the precedential cases used to determine the Court's granting of summary judgement previously do not fully support their ruling. Hernandez's relies on two court cases that were a part of the original ruling thus introducing no new evidence or new valid perspective that should be considered. The Court, as a result, determines there is no law that can be deemed to have been overlooked resulting in the agreement that Hernandez simply disagrees with the interpretation and application of the caselaw established in the previous ruling delivered.

The remainder of the arguments set forth by Hernandez through the lens of errors or law were already addressed previously during the original case and presented no counter argument needing further consideration and evaluation to justify the application of Rule 59(e). Based on the aforementioned criteria and consideration, the Court concluded that it did not overlook a controlling issue of law or did it make a clear error of law.

In regard to the role of the factfinder issue, Hernandez contends that throughout the original case resulting in the Opinion and Order in question, the Court improperly assumed the role of factfinder. By definition, the factfinder is someone or an entity that is an impartial party or examiner that is des-

ignated to appraise the facts underlying a particular matter of a case. Hernandez states that the Court improperly made credibility determinations and weighed evidence, primarily pointing out instances in which the Court referenced in its decision that some ambiguity was present as to how the MLB develops evaluations and the criteria it utilizes to determine crew chief promotions. This claim was determined invalid as the Court was found to have applied the correct legal standard applicable to summary judgement motions. The ambiguous nature mentioned in the decision was also addressed as an outcome due to the nature of the criteria in question, and not due to any genuine disputes of material fact.

CONCLUSION

Based on the above evaluation, application, and justification, Hernandez's motion to alter, amend, or vacate the Court's original Opinion and Order was denied. The pursuit to utilize Rule 59(e) serves as an example of the checks and balances found within the legal system for those who believe a rendered verdict delivered unjustly can be reconsidered and given further evaluation. In this case, the Plaintiff failed to meet the parameters set forth to ensure that utilizing and effectively applying the purpose of Rule 59(e) is not taken advantage of simply on the grounds that one party is not happy with the outcome of a given case. As mentioned in this case, successfully applying Rule 59 is strictly enforced and considered because of the potentially negative long-term effects that could result from precedential framework deriving from inappropriate use of such legislation.

References

Hernandez v. Office of the Comm'r of Baseball, No. 18-CV-9035 JPO, 2022 U.S. Dist. WL 179770

Michael A. Ross is the Department Chair and an Assistant Professor of Sport Management at Shorter University and a PhD student at Troy University specializing in research related to youth sport studies, leadership, sport law, social media policies and procedures within athletics, and participation motivations in sport and recreation.

Jackson Lewis Names Paul Kelly as Chair of Sports Law Practice Group

Jackson Lewis has named Paul Kelly as Chair of its Sports Law Practice Group. Kelly was previously co-chair of the sports law practice group.

Kelly has deep experience advising colleges and universities facing allegations of NCAA bylaw violations by athletic coaches, staff and student-athletes. He has represented several institutions within Divisions I, II and III in such matters, including through infractions hearings before the NCAA Committee on Infractions. and on appeal before the NCAA Infractions Appeals Committee.

Kelly and others within the Jackson Lewis sports' practice assist institutions and athletic conferences with compliance reviews, advice regarding the evolving issue of "name, image and likeness," Title IX inquiries, litigation brought against as institution or its employees, and other legal challenges facing collegiate athletics departments.

Paul Kelly

A devoted "hockey guy" and former player and coach, Kelly previously served as the executive director of the National Hockey League Players Association, and later as executive director of College Hockey, Inc., representing the institutions playing NCAA Division I men's ice hockey. He currently serves on the Board of Directors of the NHL Alumni Association, and is a past Director of the Hockey Hall of Fame. Kelly has also represented several NHL players and other professional athletes in civil, criminal and administrative proceedings.

Grizzlies' Kleiman Named NBA Executive of the Year

Zach Kleiman, 33, has overseen Memphis' basketball operations for the last 3 years and becomes the youngest winner of the award.

NBA team basketball executives have selected Memphis Grizzlies Executive Vice President of Basketball Operations and General Manager Zach Kleiman as the winner of the 2021-22 NBA Basketball Executive of the Year Award.

This is the first NBA Basketball Executive of the Year Award for Kleiman, who has led Basketball Operations for Memphis for the last three years. Kleiman, 33, is the youngest recipient of the award, which has been presented annually since the 1972-73 season. He also becomes the second person to earn the honor with the Grizzlies, joining Jerry West (2003-04).

Kleiman received 16 of 29 first-place votes and earned 85 total points from a panel of team basketball executives across the NBA. Cleveland Cavaliers President of Basketball Operations Koby Altman and Chicago Bulls Executive Vice President of Basketball Operations Artūras Karnišovas tied for second place with 27 points each. Phoenix Suns General Manager James Jones and Miami Heat President Pat Riley tied for fourth place with 26 points each. Executives were awarded five points for each first-place vote, three points for each second-place vote and one point for each third-place vote.

As Memphis' lead personnel decision maker, Kleiman assembled a roster that finished with the second-best record in the NBA this season (56-26) and matched the franchise single-season record for victories. The Grizzlies secured the No. 2 playoff seed in the Western Conference, their highest seed ever.

Kleiman joined the Grizzlies in 2015 as their in-house legal counsel. He served as assistant general manager during the 2018-19 season and was promoted to his current role in April 2019. Prior to joining Memphis, Kleiman worked as an associate at the international law firm Proskauer Rose LLP.

The NFL's Houston Texans to be Named as Co-Defendant in the Watson Civil Sexual Assault Lawsuits – What It Means

By Dr. Robert J. Romano, JD, LLM, St. John's University, Senior Writer

Cleveland Browns and former Houston Texans Quarterback Deshaun Watson is currently not playing offense this off-season, but is defending himself against 24 civil lawsuits and counting wherein the various plaintiffs allege that he engaged in 'coercive and lewd sexual behavior'[12] when contracted to provide him with therapeutic massages.

Specifically, it is alleged that over a 17-month period spanning from the fall of 2019 through March 2021, Watson received massages from approximately sixty-six different female therapists, twenty-two of whom claim that during their session he engaged in sexual misconduct by exposing himself, coercing them to touch him in a sexual manner, touching them with his penis, or by shifting his body in a way that would force the therapist to touch his private areas. In the two other matters, the women claim that Watson's conduct rose to the level of a sexual assault, with one plaintiff alleging that Watson pressured her to perform oral sex, while the other claimed that he grabbed both her buttocks and vagina.[13]

Now, in an interesting development, the NFL's Houston Texans are about to become a co-defendant in the Watson civil litigation matter. Tony Buzbee, a Houston based personal injury attorney representing the women involved in the cases against Watson, announced that he will now include the franchise as a defendant after learning from both the Houston Police Department and a New York Times report that the team's management played an integral role in contributing to Watson's alleged loathsome and lewd behavior.

"What has become clear is that the Houston Texans organization and their contracting 'massage therapy company' facilitated Deshaun Watson's conduct. In many of these cases, the Texans provided the opportunity for this conduct to occur," Buzbee stated. "We believe the Texans organization was well aware of Watson's issues, but failed to act. They knew or certainly should have known."[14]

As reported by the Times, Watson's conduct was enabled, knowingly or not, by the Texans when members of the organization scheduled massage appointments on his behalf, provided him with hotel rooms at the Houstonian for the message sessions to take place, and, most interestingly from a legal perspective, by drafting a nondisclosure agreement (NDA) for him after one of the alleged victims threatened to expose his behavior.[15]

It is assumed that counsel for the 24 plaintiffs is relying on the legal concept of 'Respondeat Superior' as a way to include the Texans as a defendant in the lawsuit. Respondeat superior, when translated means 'let the superior make answer', is a legal doctrine holding an employer liable for an employee's wrongful acts committed within the scope of employment.[16] Therefore, an employer, in this case the Houston Texans, could possibly be liable for the acts or omissions of its employee, Watson, if his actions were within the course and scope of employment.[17]

In order to prevail on a respondeat superior claim, the injured plaintiffs must prove that at the time of the conduct, the employer's worker (1) falls within the legal definition of "employee" and (2) the employee was acting in the course and scope of his or her employment.[18] A worker is legally considered an employee in the state of Texas when his or her employer has "the overall right to control the progress, details, and methods of operations of the work."[19] In addition, an employee acts within the course and scope of his or her employment when performing tasks generally assigned to him or her in furtherance of the employer's business (a) with the employer's authority and (b) for the employer's benefit.[20]

The question of whether or not Watson was an employee of the Houston Texans is easily answered by the fact that the young quarterback signed a four-year, $177.5 million contract extension before the 2020 season with the Texans organization to keep him with the Houston team at least through the 2025 season.[21]

The second question – whether Watson's, as described, 'coercive and lewd sexual behavior' can be considered acts or omissions within the course and scope of his employment with the Texans may be somewhat more difficult, but not impossible to prove. Were the 'tasks' in furtherance of the employer's business? Arguably yes – a hale and hearty, physically healthy quarterback is indeed beneficial to the Texans' business of winning football games. Were his acts under the authority of the Texans and for its benefit? The fact that, according to the New York Times, those associated with the organization helped in providing Watson with access to the messages and that the Texans, specifically its director of security, Brent Naccara, provided him with the NDA which he began taking to appointments for the therapists to sign, may be enough to prove to a trier of fact that such acts were within the 'employer's authority and for its benefit'. In fact, Watson testified at a deposition that he began taking the NDAs to massages that same week that Naccara provided it to him, giving one to a 'woman in Manvel, who signed it, and another to a woman who said in her lawsuit that she ended the session after he suggested a sexual act. Watson

told her she had to sign in order for him to pay, so she did.'[22]

As fans it will be interesting to watch as this civil case plays out over the next several months, if not years. But in the interim, although two state of Texas grand juries declined to pursue criminal charges against Watson for his conduct associated with the twenty-four plaintiffs, and the Cleveland Browns thought it was prudent to trade for Watson and sign him to a guaranteed $230 million dollar contract, isn't it time for the NFL and Commissioner Roger Goodell to step up their investigate and decide whether or not Watson's 'coercive and lewd sexual behavior' is in violation of the League's Personal Conduct Policy?

Hogan Lovells Helps USA Rugby in Its Successful Effort to Bring the World Rugby Cup to U.S.

The World Rugby Council has unanimously voted to officially select the United States as the host nation of the 2031 Men's Rugby World Cup and the 2033 Women's Rugby World Cup.

Hogan Lovells partner Michael Kuh, who has a market-leading sports event acquisition practice at Hogan Lovells, was the lead outside counsel for the successful bid. Steve Argeris, a D.C. and New York-based counsel at the firm, is member of the board of directors for USA Rugby and was involved in the bid committee.

The moment marks a pivotal turning point for the sport of rugby in the United States and around the world. This will be the first time a Men's Rugby World Cup has been held in North or South America, as a new hosting concept is put in place as the U.S. stages consecutive Men's and Women's events within the same organizational structure. The unparalleled growth made possible by bringing the world's third-largest sports event and the fastest growing women's event to the world's largest sports market cannot be overstated.

See RESEARCHERS on Page 12

Blackhawks Name Greenberg Associate General Manager

Chicago Blackhawks General Manager Kyle Davidson has announced Jeff Greenberg has been hired as Associate General Manager, overseeing the strategic systems and processes that will fuel the entire Hockey Operations group. The hiring completes the executive team within Hockey Operations, with Greenberg joining Davidson and fellow Associate General Manager Norm Maciver as the core brain trust that will continue to build out its senior leadership team this offseason.

"Our journey is just beginning as we build a next-generation foundation for this team, and that starts with a focus on modernizing and improving the Hockey Operations infrastructure in our front office," said Blackhawks General Manager Kyle Davidson. "We will only get back to being best-in-class on the ice if we are working with best-in-class information and ideas behind the scenes. Together, this executive leadership team is looking forward to developing great talent throughout all levels of our organization and adding the tools we need across scouting, analytics, player development, coaching and more to return to competitive hockey."

Greenberg officially begins his role with the club on Monday, May 9 where he will work alongside all Hockey Operations functions (including scouting, development, coaching and operations) to establish and optimize a modern, continually evolving approach using systems, technology, data and talent. As a strategic partner to the entire organization, Greenberg's team will help foster a culture focused on exponential growth and delivering long-term, sustainable competitive advantages.

"Jeff will be both an architect and connector of the hockey operations group, ensuring that we're always at the forefront of professional sports," added Davidson. "He reached out to congratulate me after I was named General Manager, and we connected instantly over our parallel paths, shared love for hockey and vision for this sport's future. I'm excited for our fans to see what he, alongside Norm, can bring as key voices at the table -- a table that will continue to grow with other leaders we will add to the team."

"What I've learned about the Blackhawks is they're serious about using this rebuilding period to not only set this franchise up to be the best in hockey, but the best in all of sports moving forward," said Greenberg. "There couldn't be a more exciting time to get in on the ground floor of this journey and pursue every possible solution to put this team back on the path to winning hockey."

Greenberg joins the Blackhawks after 11 seasons in baseball operations with the Chicago Cubs, most recently serving as Assistant General Manager. He previously held roles as Director of Pro Scouting and Baseball operations, Director of Baseball Operations and Assistant to the General Manager. As he worked his way up within the organization, he was instrumental in creating the systems and strategies that help the Cubs scout and develop talent and worked closely with team management during a rebuild that eventually led the team to winning the 2016 World Series in addition to four other postseason appearances.

"Jeff is simply one of the best teammates I have worked with in baseball," said Cubs President of Baseball Operations Jed Hoyer. "He has done so much to the make the Cubs a better organization over the last 10 seasons with his powerful combination of intelligence, work ethic, leadership and integrity. He was critically involved in forward-looking decisions as we built the core of a world champion."

"As the Blackhawks look to build their next championship team, Jeff is an ideal hire," added Hoyer. "While I am sad to lose such a terrific employee and friend, I am thrilled that his future success will continue to benefit the city of Chicago."

Prior to his time with the Cubs, Greenberg worked in the Arizona Diamondbacks and Pittsburgh Pirates front offices as well as for Major League Baseball in labor relations. He graduated from University of Pennsylvania in 2008 and Columbia Law School in 2011.

Gruden Survives the NFL's Motion to Dismiss, But It is a Long Way to the End Zone

By Robert J. Romano, JD, LLM, St. John's University, Senior Writer

In October of 2021, Jon Gruden stepped down as the head football coach of the Las Vegas Raiders after a series of homophobic, misogynistic, and racist emails he penned targeting Commissioner Roger Goodell, NFL Players Association executive director DeMaurice Smith, former NFL openly gay player Michael Sam, together with a number of other NFL owners, coaches, and media personalities, were published in both The Wall Street Journal and The New York Times. On October 11, 2021, Gruden publicly apologized stating, "I have resigned as Head Coach of the Las Vegas Raiders. I love the Raiders and

do not want to be a distraction. Thank you to all the players, coaches, staff and fans of Raider Nation. I'm sorry, I never meant to hurt anyone."[1] Soon after resigning, Gruden, who returned to coaching in 2018 after agreeing to a 10-year, $100 million contract, reached an undisclosed 'buy-out' settlement of the remaining balance owed to him by the Raider organization.

Subsequently, on November 11, 2021, Gruden filed a federal lawsuit against the NFL and Commissioner Goodell in the United States District Court in Clark County, Nevada, wherein he alleged the following causes of action: Intentional Interference with Contractual Relations, Tortious Interference with Prospective Economic Advantage, Negligence, Negligent Hiring, Negligent Supervision, Civil Conspiracy, and Aiding and Abetting. Gruden's claims were based on what he described as a malicious and orchestrated campaign by the Commissioner to destroy both his career and reputation.[2] As asserted by his legal team, "the defendants (NFL and Goodell) selectively leaked Gruden's private correspondence to the Wall Street Journal and New York Times in order to harm Gruden's reputation and force him out of his job. There is no explanation or justification for why Gruden's emails were the only ones made public out of the 650,000 emails collected in the NFL's investigation of the Washington Football Team or for why the emails were held for months before being released in the middle of the Raiders' season."[3]

In January of 2022, the NFL responded by filing both a motion to dismiss and a motion to compel arbitration. As for the motion to dismiss, the NFL argued that it was not responsible for leaking the emails and therefore Gruden's complaint is nothing but "a baseless attempt to blame the NFL and its Commissioner for the fallout from the publication of racist, misogynistic and homophobic emails that Gruden wrote and broadly circulated."[4] The NFL highlighted the fact that Gruden does not dispute that he wrote the emails, nor does he allege that they were altered in any form or manner by a third-party. "Despite the clear risk that his emails would be forwarded, downloaded, printed, or otherwise monitored by any recipient workplace domain ... Gruden proceeded to send profane, misogynistic, homophobic, and racist emails out to a group of individuals, including a WFT-hosted email address. As such, Gruden primarily assumed the risk that his emails could be

1 Case No: A-1-844043-B Department 27, page 3, paragraph 9, and https://www.sportingnews.com/us/nfl/news/jon-gruden-emails-resigns-raiders-coach/1f7nbdnxccjat1momv1xkg9bpp.

2 Case No: A-1-844043-B Department 27, page 1, paragraph 1.

3 https://www.yardbarker.com/nfl/articles/judge_denies_nfls_motion_to_dismiss_jon_gruden_lawsuit/s1_13132_37533532

4 https://www.nfl.com/news/nfl-files-motion-to-dismiss-jon-gruden-lawsuit-compel-arbitration

circulated beyond the original recipient group, and possessed and distributed by the WFT, NFL and others."[5] Therefore, the NFL contends that since Gruden has "no one to blame but himself,"[6] his complaint should be dismissed in its entirety.

The District Court, however, based on procedural considerations, denied the NFL's motion. The Court's decision was grounded on the fact that Nevada is a 'notice pleading' state wherein pleadings are used as a way to notify adverse parties of general issues in a case. This allows parties to state their claims in general terms without alleging detailed facts to support each claim and without worrying about hyper technical details.[7] Therefore, since the District Court believed that Gruden's complaint met the procedural requirements associated with such a standard, it had no alternative but to deny the NFL's request.

Regarding its motion to compel arbitration, the NFL argued that "under the clear terms of Gruden's employment contract and the NFL's Constitution and Bylaws to which Gruden is bound," arbitration is the proper forum for resolution and an order should be issued to stay the action.[8] Gruden's legal team countered by claiming that the arbitration clause in his contract does not apply because his lawsuit was filed after he had resigned from his position as the Raiders' coach.[9] It was also noted that in league arbitration cases, Goodell himself could be the arbitrator, creating a clear conflict of interest in this case because he is named as a defendant.[10]

The District Court, agreeing with Gruden's argument, stated that it was, "concerned with the commissioner having the sole power to determine any employee disputes,"[11] and denied the NFL's motion to compel arbitration. Note, however, that the court's denial of the two motions is not determinative of the merits of Gruden's lawsuit and the case, barring an appeal, will now proceed to the discovery phase.

5 Id.
6 https://www.nfl.com/news/nfl-files-motion-to-dismiss-jon-gruden-lawsuit-compel-arbitration
7 https://www.law.cornell.edu/wex/notice_pleading
8 https://www.nfl.com/news/nfl-files-motion-to-dismiss-jon-gruden-lawsuit-compel-arbitration
9 https://www.espn.com/nfl/story/_/id/33983514/judge-denies-nfl-motions-dismiss-jon-gruden-lawsuit-move-arbitration
10 https://www.nfl.com/news/nfl-files-motion-to-dismiss-jon-gruden-lawsuit-compel-arbitration
11 https://www.espn.com/nfl/story/_/id/33983514/judge-denies-nfl-motions-dismiss-jon-gruden-lawsuit-move-arbitration

Examining Non-Binary and Transgender Advancements from the Perspective of a Non-Binary Athlete and Activist

What follows is an interview conducted by Carla Varriale-Barker (she/her/hers), the chair of Segal McCambridge's sports practice group, of Lauren Lubin April (they, them), a non-binary athlete and activist who has been on the forefront of non-binary and transgender advancements in sports and health, academia, film and media, public policy and more for over a decade.

In 2016, Lauren became the first-ever openly non-binary runner to compete in the New York City Marathon, and repeated history in 2019 at the Boston Marathon.

Lauren is the Executive Producer of We Exist: Beyond the Binary, an award-winning documentary that has been part of the curriculum of over 50,000 students in more than 70 countries and is the first full-length feature to explore the life of individuals who exist outside of the gender binary.

Most recently, Lauren founded April Haus, Inc., a consulting company that specializes in building innovative, integrative, and sustainable sport systems beyond the gender binary.

Question: How did you become an athlete/activist advocating on behalf of inclusion of non-binary persons in sports?

Answer: At the beginning and many years ago, my activism spawned from being a frustrated athlete who no longer was willing to wait for the world to "let me in." I started to make small changes locally and in 2015 founded New York City's first non-binary running group, dedicated to meeting the specific needs of non-binary athletes and providing a space for us to participate. The group garnered over 100 participants in the first year alone. Shortly thereafter, I started the "WE RUN" campaign, which advocated for equal space and recognition for non-binary athletes in sports and gained national headlines. This was the turning point of people really taking notice.

Today, my initial frustrations have turned into inspiration as I see the sports world shifting in powerful ways, and congruently my advocacy goals have transformed from the local level to the global stage. I now work with industry leaders across various verticals on building more expansive, integrative, and sustainable sports models and systems for athletes of all gender identities.

Q: What are some of the unique challenges to inclusion for non-binary people in sports?

A: The most obvious challenge non-binary people face is the current binary sports model and subsequent sport systems. By default, this model is designed to exclude non-binary athletes entirely from the get go, making it the core issue we face in sports and society at large. As a result, the current sports model

perpetuates a myriad of other unique challenges for non-binary folks who are trying to participate in and navigate an industry not designed for us in the first place; or retrofitted to fit us as an afterthought. Challenges can range from fundamental barriers, such as the lack of entry and/or access to sports in accordance to our gender identity, to more nuanced exclusions such as the lack of proper policies, facilities, and/or safety measures in place to support full participation.

To give a specific example, I will share an experience that is uniquely guaranteed to all non-binary athletes trying to engage with a binary industry and world. Before participation even begins, non-binary athletes are faced with the very real, personal, and vulnerable ultimatum of how and/or if participation will occur. The how — enroll as one of two gender options you are not, thus forcing problematic and unnatural conformity as a requirement for admission — or do not participate, which is the if. Both options are difficult to maneuver, potentially detrimental in either direction, and categorically alienating; especially when asked upon a child which, statically, is when most people enter sports. It is important to recognize that when non-binary people do enter sports, they are often doing so as the most vulnerable group yet discernibly the most courageous.

Q: What are some examples stakeholders can implement to foster a truly inclusive environment for non-binary people?

A: Invest in education - I talk more about this later, but education is the most important step, and should be the first step, in fostering a truly inclusive environment.

Mentality before motion - Sustainable inclusion is a mindset above anything else, and starts with developing integrative thinking before implementing action. One key to shifting the mentality is to embed inclusivity as a core value of "who we are," which automatically centralizes inclusivity as "how we operate." Again, approaching inclusivity from beginning rather than retrofitting.

Community Engagement - Actively seek and/or strengthen your relationships with the gender diverse community, and the community at large. Many clients are surprised to learn of thriving gender diverse clubs, groups, teams, etc. already existing within their community waiting to be tapped. Reach out to these groups to let them know your inclusivity efforts, invite them to participate in your events, and connect with them to learn about best practices and how to better serve.

Diversify your stakeholders - Have non-binary representation in your leadership, especially when it comes to critical decision-making that will impact the non-binary community. Diversity not only showcases that your environment truly is inclusive from the top down, but also counteracts any propensities to Affinity Bias and Confirmation Bias.

Provide gender neutral facilities and/or spaces - This enables

and assures people of all gender identities with the ability to occupy spaces equally, and subsequently fosters an overall sense of safety and belonging for people of all gender identities.

Develop nondiscrimination policies and guidelines - This can range from implementing more inclusive HR and hiring practices, to incorporating protective measures around proper pronoun usage and gender identity, to developing more inclusive communication (both internal and external facing), to having clear guidelines on safety and confidentiality.

Q: Why does this sort of attention to creating an inclusive environment for non-binary athletes matter in the sports industry?

A: It matters because we matter. Put simply, we exist and exclusion is no longer the solution. Everyone deserves a right to play but non-binary athletes cannot play as themselves in an industry that has not changed for generations. The binary sports model is outdated and does not support modern times nor the next generation of gender diverse athletes who will be occupying sports and ultimately become key stakeholders. If unwilling to change, then at best the industry falls behind, and at worst perpetuates a dangerous environment for anyone who challenges the status quo.

It honestly boils down to if you do or do not believe that we exist; that we deserve our rights. It is that simple. And given the current socio-political climate, the time for individual and collective action has never been greater.

Q: Why now? Is there a "zeitgeist" moment whereby, legally and culturally, LGTBQIA+ athletes seem to have become such a focus?

A: As we know, LGBTQIA+ athletes have been advocating for equal rights, representation, and inclusion for decades. I, myself, have been advocating specifically for non-binary inclusion for over a decade — the majority of those years have fallen on deaf ears. It is only in the past few years that our culture and society have taken extra interest and stock in what LGBTQIA+ athletes have been fighting for all this time. On both sides of the coin may I add.

At this moment, we have absolutely reached a legal and political zeitgeist. The intense political and legal focus on LGBTQIA+ athletes is a direct mirror of the recent rise of LGBTQIA+ people and activism into mainstream culture and society, as well as the collective power of our community and allies. It is no mystery. As a result of LBGTQIA+ progress, we are seeing transgender and non-binary rights being used as political wedge juxtaposed to progressive societal and cultural shifts beyond the binary.

No matter which way you slice it, we have surpassed the point of "if" we exist to now "how" do we exist; the most significant question in my opinion.

Q: Can you highlight some inclusion success stories with organizations and stakeholders you have worked with?

A: Working alongside stakeholders, there are now over 1,500 running races nationwide that offer non-binary registration and participation; with more and more races extending their efforts to build out equal prize money, top finisher awards, and other integrative offerings. This is a truly remarkable success considering that just a few years ago there were zero races offering non-binary participation. There is a massive groundswell and appetite for inclusion in the running world specifically.

I am particularly proud of my partnership with New York Road Runners (NYRR), and the organization's commitment to full-scale non-binary inclusion. For the past year, we have been working together on the implementation of a non-binary gender identification division for all NYRR races, including the New York City Marathon—making it the first major marathon to enact a non-binary division all the way up to the elite level. This work is not only leaving an imprint on the sports landscape but is also setting the gold standard for others to follow.

Q: How are non-binary athletes impacted by the wave of anti-trans legislation we have seen proliferating in the U.S.?

A: Sports are a microcosm of a much larger societal paradigm that is happening and, to be clear, the wave of anti-trans bills in youth sports is not just about sports; for instance, the numerous proposed and/or passed laws banning transgender youth from access to life-saving healthcare. Sports are the Trojan horse for certain lawmakers' attempt to systemically disenfranchise and/or criminalize all non-cisgender people (and in some cases families, doctors, and allies too) through unconstitutional legislation far beyond the playing field. As non-binary athletes who fall into the non-cisgender umbrella, we are deeply and directly impacted by the implications of these bills on and off the field.

Q: How important a role does education play-can you suggest some resources?

A: Education is the first and most important step to driving integrative and sustainable inclusion. I would go so far as saying that without a foundation of basic education, well-intended inclusivity efforts will collapse at some point. Invest in education because it will empower you, inform the work, and illuminate long term solutions.

Education can take many forms. You can bring on an expert like myself and/or participate in topic-based training sessions. Here are a few good resources to explore:

Athlete Ally
transathlete.com
Lambda Legal
Human Rights Campaign

Profile: Lacey Mencl, Associate Attorney for the National Women's Soccer League

By Darby Daly, Co-President of the Buffalo Sports & Entertainment Law Society

As a young associate attorney for the National Women's Soccer League (NWSL), Lacey Mencl has proven that she is already a force to be reckoned with in the sports industry. Mencl entered law school with the goal of becoming a sports law attorney, and now, just two years out of law school, Mencl has already been immensely successful in achieving her goal.

Prior to attending law school, Mencl grew up as an athlete – she participated in a variety of sports over the years, but soccer had always been her primary focus. Mencl continued to play soccer through her freshman year of college, where she played for Lake Erie's DII women's team before transferring to Kent State to finish her undergraduate degree in Sports Administration with a minor in Business. Once Mencl learned that working in the sports industry was a career path, she was sold and did everything she could to pursue that dream. Mencl explained that she has "always loved sports, the camaraderie, and how [sports] connected people."

Mencl kicked off her career in sports by working for the

Lacey Mencl

football recruiting office at Kent State and working on various tasks for the athletic department. Upon graduating from Kent State, Mencl's success in the sports world continued as she took a job in the Cavaliers' sourcing department. Although she was unsure of what working in the sourcing department would entail, Mencl knew that it would be a great way to get her foot in the door and make strong connections within the sports world. Little did Mencl know that it was here she would actually be exposed to the sports law realm.

Since Mencl's time at the Cavaliers occurred long before the pandemic and working from home, she befriended the team's associate legal counsel, whose cubicle was located right next to hers. Through this relationship, Mencl found herself becoming more interested in the legal work being done for the Cavaliers. As soon as she had the opportunity to shadow her work colleague and experienced his daily responsibilities as an attorney, she knew that's what she wanted to do, prompting her to begin her law school journey.

Mencl began law school at Cleveland Marshall with "the full intent of staying true to sports." Though this proved to be difficult at times, Mencl stayed true to her goals as she held various athletic related externships and served as the President of her law school's sports and entertainment law society. Mencl also stayed true to her origins with the Cavaliers, as she continued to work part time with the team throughout her legal education and was even brought on as the team's legal assistant during her 3L year.

While her goal was ultimately to end up in sports, Mencl made sure to become a well-rounded attorney by gaining experience in both family law and corporate law. Although she enjoyed these experiences outside of sports, she still knew that she saw herself in the sports world. Once she had finished law school and passed the bar exam, Mencl kicked off her legal career as a corporate lawyer; however, as soon as she saw the job opening at the National Women's Soccer League for a paralegal, Mencl jumped at the opportunity.

For most people, working as a paralegal is a position that is held prior to law school and often encourages many to pursue a career as an attorney. Mencl, on the other hand, took a step back from her role as an attorney because she knew that getting her foot in the door with the NWSL as a paralegal could be extremely beneficial to her personal and professional goals. Turns out, she was right. Though it took some convincing to get the NWSL to take a licensed attorney as a paralegal, she pleaded her case and showed the League that she is exactly who they needed for the job. Mencl explained that she began the paralegal role with the caveat that it could turn into a junior staff role sooner rather than later, which ended up happening even quicker than expected.

Not only did Mencl take a step back in regard to her roles and responsibilities, but she also had to make the decision to make the move from her hometown in Ohio to Chicago in order to join the NWSL. Knowing that this would be a critical point in her career, Mencl trusted her gut and made the career decision that would ultimately see her become in-house counsel to a professional sports league just two years after graduating from law school (a feat that is not commonly heard of).

Now having some experience as an attorney for a professional sports league under her belt, Mencl said that her daily routine consists of a wide variety of responsibilities and tasks. As an NWSL attorney, Mencl is responsible for answering any legal questions asked by teams within the league, onboarding new coaches, handling immigration paperwork for players, reviewing penalties given during games, working on contracts, and much more. Mencl noted that working on the league's new (and first) collective bargaining agreement has been one of the more rewarding parts of her job. She also enjoys hearing the players' input and seeing her contributions to various contracts come to fruition.

Having gone through the process herself, Mencl is very aware of the difficulties that arise when pursuing a career in the sports industry and particularly in sports law. This has prompted Mencl to share her own story and provide advice to aspiring sports lawyers on TikTok, where her most viewed post consisted of her explaining what she does as an attorney for a professional sports league and received 30,000 views. Though humble when ask her TikTok account, Mencl's use of this platform to discuss her career has encouraged viewers (such as myself) to reach out to her and feel more confident in their own goals in the sports industry.

While she has already accomplished a significant amount in her short legal career, Mencl still has some "moonshot goals," which she will likely be able to reach at the rate at which she's succeeding. Mencl explained that she would love to be a commissioner or president of a team one day – but her next step is to become general counsel, wherever that may be. Mencl explained that she "would ultimately love to see a significant change in women's sports and how they're respected," and she hopes to be able to take advantage of the interesting point we are at as a culture. Although Mencl would have happily accepted a job in any league, the NWSL appears to be the perfect placement – and what better way to make a difference than working in-house for a women's professional sports league.

NBA sees rise in acts of symbolic violence

A new analysis of NBA basketball broadcasts from 1998 to 2018 reveals a decline in acts of physical violence, such as pushing and elbowing, and a rise in acts of symbolic violence, such as shouting, trash talking, and menacing displays. Assaf Lev from the Department of Sports Therapy at Ono Academic College in Kiryat Ono, Israel, and colleagues present these findings in the open-access journal PLOS ONE on May 18.

During an NBA game, players may occasionally engage in acts of physical or symbolic violence. At the beginning of the millennium, under the leadership of then-commissioner David Stern, the NBA implemented stricter regulations against acts of physical violence by players. These regulations were, in part, meant to enhance the image of the NBA among the general public. Prior research has also shown that sports commentators play a major role in shaping viewers' perceptions of games.

To examine acts of violence in the NBA, and how commentators frame them, Lev and colleagues analyzed a random selection of 36 NBA finals from 1998 to 2018. They noted the incidence of physical and symbolic violence and analyzed commentators' reactions to them.

The analysis showed that, while acts of physical violence have declined, they were still widespread in NBA games even in 2018. Meanwhile, acts of symbolic violence began to rise in 2014, ultimately becoming more frequent than acts of physical violence. Additionally, NBA commentators were more likely to react to physical violence with encouraging or supportive statements, while more often framing symbolic violence as harmless.

A basketball flying through the air.
Credit: Markus Spiske, Unsplash, CC0 (https://creativecommons.org/publicdomain/zero/1.0/)

On the basis of these new findings—and in light of prior research findings demonstrating the influence of players' behaviors on viewers' own behaviors—the study authors suggest that symbolic violence may be increasingly prevalent in fans' lives and in amateur games, with the potential for psychological harm.

Further research could explore patterns of physical and symbolic violence in other sports, in women's leagues, and in other countries and cultures.

The authors add: "The study indicates that incidents of symbolic violence (SV) during NBA games have increased over the past several years, whereas physical violence (PV) has decreased. In this reality, it is evident that NBA commentators support and encourage PV, whereas SV tends to be perceived as harmless and therefore permissible to ignore."

https://journals.plos.org/plosone/

Citation: Lev A, Tenenbaum G, Eldadi O, Broitman T, Friedland J, Sharabany M, et al. (2022) "In your face": The transition from physical to symbolic violence among NBA players. PLoS ONE 17(5): e0266875.
https://doi.org/10.1371/journal.pone.0266875

Lengthy Minor League Wage Case

Continued From Page 1

July 11, 2022, date for filing a motion for preliminary approval of the settlement agreement.

After years of both sides clashing over the certification of an appropriate class and the impact of Congress passing the Save America's Pastime Act on the federal claim in the action, the settlement was triggered by Chief Magistrate Judge Joseph C. Spero's March 15, 2022, 181-page order covering eight specific motions. (Case 3:14-cv-00608-JCS Document 1071 Filed 03/15/22 ("Spero Order")). Judge Spero key determination was "that Plaintiffs are entitled to summary judgment in their favor on the threshold question of whether the members of the FLSA collective and the Rule 23 classes meet the definition of 'employee' under the FLSA and the relevant state laws. Conversely, the Court finds that Defendants are not entitled to summary judgment that outside of the Championship Season the class and collective members are not 'employees.'" (Spero Order, 51) Spero's finding of the players' employment status was critical in pushing Major League Baseball to offer favorable settlement terms while also minimizing any additional damage to their positions that a trial would produce. Judge Spero also addressed several specific issues raised by the Save America's Pastime Act including its impact on the Florida law claims, four motions involving multiple experts' testimony, and other technical issues.

Because the critical issue for Judge Spero was the determination of the scope and reach of the employment status of the players, this summary will concentrate on his conclusion that the Supreme Court's economic realities test applies instead of the primary beneficiary test and that the players are year-long employees and not trainees or creative professionals or artists.

Judge Spero began his discussion of whether plaintiffs are "employees" by noting that the "primary dispute" between parties was stated in the Court's July 21, 2016, Order as whether or not the applicable test was the primary beneficiary test announced by the Supreme Court in 1947 in Walling v. Portland Terminal Company, 330 U.S. 148 (1947), or the economic realities test established in 1985 in Tony and Susan Alamo Foundation v. Secretary of Labor (Alamo), 471 U.S. 290 (1985). (Spero Order, 50). In selecting the Alamo economic reality test, Judge Spero quoted from the earlier Order:

it cannot be denied that minor league players expect to receive – and do in fact receive – compensation in return for playing baseball for the Clubs. This basic fact distinguishes this case all of the cases discussed above that applied Walling. These are not unpaid interns, students who were receiving clinical training in connection with licensing requirements, or amateur student athletes participating in a long tradition in which no compensation had ever been paid or expected. (Spero Order, 50)

Spero turned certain statements by the Kansas City Royals in their supplemental answer against Major League Baseball and the Office of the Commissioner by determining that the Royals' statements constituted judicial admissions and conclusively resolved the employment question because those "admissions that Plaintiffs were or are 'employees' of the Clubs are binding." (Spero Order, 53).

Next Spero refused to reconsider the earlier Order determining that applicability of the Alamo economic reality test because defendants did not present a motion for reconsideration or challenge that holding. (Spero Order, 53-54) The Court also cited the common draft and the Uniform Player Contract (UPC) as determinative including section IV of the UPC that states that "players' 'duties and obligations' under the UPC are in 'full force and effect throughout the calendar year [,] UPC § VI(B)." (Spero Order, 54).

Additionally, the Court was not persuaded by defendants' arguments based on two recent cases. The Court distinguished the "unpublished" Fourth Circuit ruling in Armento v. Asheville Buncombe Cmty. Christian Ministry, Inc., 856 F. App'x 445,

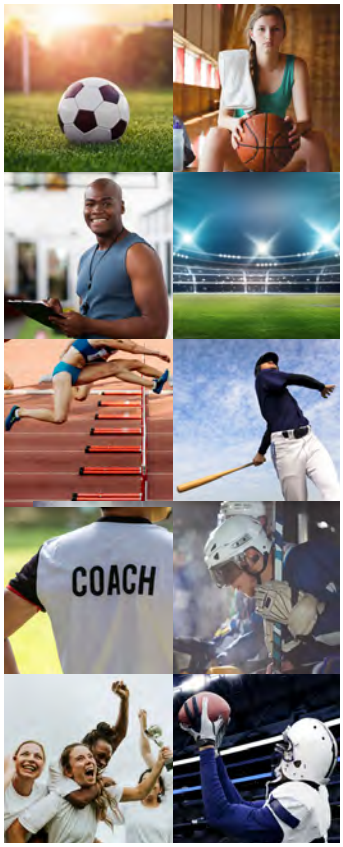
455-56 (4th Cir. 2021) regarding the correct determination of employment status, and Judge Spero found that Eberline v. Douglas J. Holdings, Inc., 982 F.3d 1006, 1016 (6th Cir. 2020), cert. denied, 141 S. Ct. 2747 (2021) did not support defendants' arguments. In Eberline, cosmetology students were found to be employees for general cleaning and janitorial work performed while part of a vocational program leading to a license. The Sixth Circuit's use of the primary-beneficiary test supported the FLSA's goal of avoiding exploitation of trainees when the additional work did not relate to the educational goals of the program. Major League Baseball's argument here would produce the opposite "zone of exploitation" result. Further, players signed a contract that "expressly requires that Plaintiffs perform service throughout the calendar year for a period of seven years." (Spero Order, 58). The seven-year term matches the long-standing term duration for a personal services contract in California. Judge Spero pressed the point by stating that:

These are not students who have enrolled in a vocation school with the understanding that they would perform services, without compensation, as part of the practical training necessary to compete (sic) the training and obtain a license. Nor are they comparable to the individuals in Walling – the seminal decision establishing the primary beneficiary test – where the plaintiffs received training before being hired with no guarantee that they would be hired at the end of the training and the trainees did not displace the company's regular employees. (Spero Order, 58).

Judge Spero next turned to the question of whether Major League Baseball was a joint employer of minor league players by examining a four-part test from the Ninth Circuit's 1983 decision in Bonnette v. California Health & Welfare Agency. The economic reality test's four Bonnette factors are the power to hire and fire, the control over work schedules or conditions of employment, the determination of the rate and method of payment, and, finally, the maintenance of employment records. After a detailed analysis of all four factors, the Court concluded that MLB was a joint employer under FLSA and all state laws in question except California. (Spero Order, 59-85). Judge Spero quickly addressed the California cases in one paragraph before granting player plaintiffs summary judgment in that state as well. (Spero Order, 85).

Judge Spero also granted players summary judgment on the question of whether or not travel time to away games during the Championship California League season was compensable to players. (Spero Order, 88-97).

The Court also considered at length the creative artist or creative professional exemption to FLSA requirements pressed vigorously by Major League Baseball. After analyzing the requirement of "invention, imagination, originality or talent in



a recognized field of artistic or creative endeavor" behind the exemption, the Court decided that "the omission of any type of professional sport in the regulation is a strong indication that professional baseball is not a 'recognized' field of artistic or creative endeavor and that professional athletes were not intended to fall under this exemption." (Spero Order, 104).

Judge Spero spent over 30 pages discussing the application of the seasonal amusement or recreational establishment exemption before determining that fact questions existed that precluding a grant of summary judgment for either party. (Spero Order, 105-38).

The Court's lengthy opinion provide the plaintiff players with tremendous leverage in forcing a settlement. Judge Spero did award the plaintiffs $1,882,650 for the California Wage Statement Claim, but the total amount of damages will wait until the July 11 filings. Furthermore, there are substantial attorney's fees surrounding this lengthy litigation. Also, how will the ruling on spring training and travel time impact minor league players' salaries? Keep in mind that major league players are also not paid during spring training.

Cleveland Browns Fan Sues Goodell, Unsuccessfully

Continued From Page 1

"malicious, intentional, willful, and reckless disregard rights of plaintiff and relatives," and damages for the "harm" suffered by her because of her "relative not being allowed to play in Super Bowl LV."

Breckenridge attached eight pages of articles to her complaint. The first one discussed helmet-to-helmet collisions, and page two quoted "foxbusiness.com" that stated that each set of Super Bowl rings are valued at $5,000,000. The following pages list "Recent Supporters." The final page is a color photograph of a helmet-to-helmet collusion. Nowhere did Breckenridge identify her "relative" that was unable to play in the Super Bowl allegedly due to Goodell. Breckenridge also filed a motion for "attorney representation" and to proceed in forma pauperis.

The case was assigned to Judge Mathew F. Kennedy. Judge Kennedy granted the motion for Breckenridge to proceed in forma pauperis. The order also stated that he had "reviewed the complaint" to determine if it was "frivolous or fails to state a claim upon which relief may be granted." The answer to that was yes. "The claim has no basis and is frivolous." It noted that she "makes a reference to a relative's football-related injuries, but plaintiff herself alleges no injuries, and she lacks standing to sue for harm to someone else." The Court "directed" the Clerk of the Court to enter judgment dismissing the case with prejudice and the motion for attorney representation was terminated as moot, (Breckenridge v. Goodell, Order, (3-10-21)). The Clerk did that the very same day. Breckenridge filed a notice of appeal in April, and it was on to the Seventh Circuit.

In the Seventh Circuit

Breckenridge filed her opening brief on May 18, 2021. It is eighteen pages with less than ten pages of argument. The NFL's rule concerning blindside blocks is Appendix A. Breckenridge again included her argument concerning the Browns. She stated that the case was "filed for the protection of Cleveland Browns' Constitutional rights under amendment 15 right to property," 42. U.S.C. Section 182 and 42 U.S.C. Section 183 (Motion To Appeal Case, at 7, punctuation in the original, (5-18-21)).

Breckenridge also sought "to decrease the debilitating and deadly outcomes of helmet to helmet collisions in NFL and other professional organizations" (punctuation in the original). The "case is filed for compensation denied to Cleveland Browns due to CTE play." Furthermore, the "case is filed in honor of my late father." This time she identified her relative that was in the NFL as her father's "great-grandnephew."

Breckenridge requested "$10m for damages and pain and suffering" to her parents' "lineage for the loss of the Super Bowl LV Championship" because of the NFL's "disregard" of its rules. The claimed relative was Jedrick Willis Jr., an offensive tackle and the tenth pick in the 2020 NFL player draft (yahoo.com, "Goodell Prevails Over Anguished Browns Fan in Super Bowl Claims Suit", Michael McCann, (4-16-22)).

Five times Breckenridge filed a motion in the Circuit to extend her time to file an amended opening brief. Five times that was granted by the Circuit. Despite those five extensions, no revised brief was filed. Finally, her sixth such motion was opposed by Goodell's counsel at Proskauer, Rose, and the Circuit denied this request. Proskauer filed its brief in October 2021. Once again Breckenridge sought multiple extensions to file her reply brief, and those were again granted. That brief was filed on January 26, 2022. The docket sheet mentions possible future oral argument, but that was not to be.

The Court summarized the case in the first paragraph, stating Breckenridge "has a distant relative who played for the Cleveland Browns" in 2020-2021. She alleged that "the Browns were robbed of their 'rightful place' in the Super Bowl," and that "the NFL should do more to protect players, like her relative, from helmet-to-helmet collisions that lead to concussions."

The Seventh Circuit's Order

The Circuit's panel included Chief Judge Diane S. Sykes, and Circuit Judges Frank H. Easterbrook and Michael B. Brennan. The Order began with a footnote stating that the panel "agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court" (Breckenridge at 2, citing FED. R. APP. P. 34(a)(2)(C)).

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In its second paragraph the Circuit noted that Breckenridge "sought to file her complaint without prepaying the filing fees" and therefore the district court judge "screened the complaint" and dismissed it "as frivolous." The judge "alluded to" her "reference to her relative's football-related injuries" and stated that "Breckenridge lacked standing to sue for harm to someone else."

In its third and final paragraph, the Circuit stated that Breckenridge "generally challenges the judge's ruling" but failed to "address his reasoning or make a cogent legal argument that could provide a basis for disturbing the judgment" (citations omitted.) The Circuit did not stop there. "Regardless, her claim about the Browns' defeat is legally frivolous," citing Denton v. Hernandez, 504 U.S. 25, 31 (1992). Finally, Breckenridge "lacks standing to bring a claim on behalf of football players who have suffered injuries, see TransUnion LLC v. Ramirez," 141 S. Ct. 2190 (2021). The Circuit's Docket Sheet added that the opinion was nonprecedential and the judgment was with costs.

Conclusion

The case will now return to the District Court, and Goodell will get an order awarding him "costs" on appeal. There is no way to know at this distance whether Proskauer will try to enforce that order. Breckenridge may have been passionate about her claims that the Browns' defeat was due to officiating, but even heightened passion does not convert such beliefs into cognizable legal claims. Cheering or booing loudly on the court or stadium does not make such passions stand up in court. This may turn out to be an expensive lesson for Breckenridge, as it has for other litigant-fans in the past.