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A newsletter brought to you by the Sports Law Group at Proskauer

Welcome to *Three Point Shot*, a newsletter brought to you by the Sports Law Group at Proskauer. *Three Point Shot* brings you the latest in sports law-related news and provides you with links to related materials. In this double issue designed to get you through the dog days of summer, we feature contributions from our talented group of summer associates. Thanks to Jennifer C. Ok, Sabrina Palazzolo, Candice L. Johnson, Sofia M. Kurtz, Tyana J. Glaze, and Justin Tyler Necaise for their hard work on these articles.

Your feedback, thoughts and comments on the content of any issue are encouraged and welcome. We hope you enjoy this and future issues.

Edited by **Robert E. Freeman**

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Supreme Court Hauls in Coach's First Amendment Hail Mary

Some of you may recall *Three Point Shot's* coverage in March 2018 of a public high school football coach in Washington state who was put on paid administrative leave in 2015 for continuing his practice of kneeling at midfield and bowing his head for a postgame prayer that others might voluntarily join. At that time, we reported on the Ninth Circuit's denial of the suspended coach Joseph Kennedy's ("Kennedy") bid for an *en banc* rehearing following the appeals court's affirmance of the dismissal of his First Amendment claims and the denial of his injunction request to restore him to his coaching position. As we hinted then, Kennedy, in fact, pushed his case into overtime and threw a Hail Mary pass to the Supreme Court. On June 27, 2022, Justice Neil Gorsuch caught the pass in the end zone and wrote the opinion that reversed the Ninth Circuit ruling in a 6-3 vote. In short, the Gorsuch opinion concluded that the public school district had violated the coach's First Amendment rights when it censored his religious observance. (*Kennedy v. Bremerton Sch. Dist.*, 597 U.S. ___, No. 21-418 (June 27, 2022)).

There is nothing quite like high school football. For well over a century, the sport has been a feel-good staple in American culture, inspiring nationally beloved films like Remember the Titans, Friday Night Lights, and Varsity Blues. What makes it so special goes well beyond the X's and O's. The real charm comes from its unrefined simplicity – not just during the games but also in the hours that come before and after – that usually is not replicable in a big-time college or professional setting. Yet to be exposed to the pressures of scholarships, salaries, and sponsorships, high school football is about school and community pride, and a motley team comprised of stars and supporting players.. It is about playing alongside friends and classmates, many of whom have known each other since kindergarten. It is about getting that varsity letter and competing against rival townships in front of the locals.

The field at the conclusion of each game is a hodgepodge of unhindered emotions (e.g., student-athletes and coaches coming together to celebrate their victory or commiserate their defeat), mixed with a jumble of other personal engagements (e.g., greeting friends and families in the stands, making dinner plans, and checking emails). The question at hand in the Kennedy case was whether a coach's private midfield prayer – sometimes surrounded by players and other members of the community – was an appropriate part of this beloved collage. Legally speaking, the case highlighted a tension in the First Amendment between a public school coach's Free Exercise right to religious expression and the school's right to restrict that expression when it believed the coach's conduct was an endorsement of religion by the District and a violation of the Establishment Clause. Are the two clauses in conflict? Which constitutional clause should prevail? In the instance of a public high school football coach reciting postgame prayers on the field (with no evidence of any coercion forcing students to participate), the Supreme Court confirmed that the Establishment Clause must give way to the Free Exercise and Free Speech Clauses.

Joseph Kennedy, a practicing Christian and former Marine, was a junior varsity head coach and varsity assistant coach at Bremerton High School from 2008 to 2015. Bremerton High School is a public high school in the Bremerton School District (the "District") of Kitsap County, Washington. During his tenure, Kennedy began a ritual of his own wherein he knelt in the center of the field for approximately 30 seconds immediately after each game to give thanks for the student-athletes' accomplishments. According to news reports, his prayers would sound something like "Lord, I thank you for these kids and the blessing you've given me with them. We believe in the game, we believe in competition and we can come into it as rivals and leave as brothers." Early on, his practice was eventually joined by the majority of his football team – although participation was not expressly compelled – and sometimes evolved into motivational speeches that involved religious themes.

Concerned about these religious observances' potential infringement of the Establishment Clause separating church and state, in September 2015 the District wrote to Kennedy and requested that he discontinue the practice to protect the school from an Establishment Clause lawsuit. Kennedy eventually stopped his postgame prayers (and certain other activities that included pregame prayer in the locker room). Soon after, however, in October 2015, feeling conflicted about his faith and the values he fought for as a Marine, the coach resumed his postgame midfield prayers. In response, the District pulled Kennedy from his coaching duties and placed him on paid administrative leave until the expiration of his contract, and thereafter declined to rehire him.

In his 2016 complaint, Kennedy brought claims against the District for, among others, violation of his constitutional rights under the First Amendment. He argued that the municipality unlawfully stifled his constitutional rights to religious exercise and free speech as a private citizen. When he moved for a preliminary injunction, which would have reinstated him to his former position and allowed him to continue his on-field postgame prayers, both the district court and the appeals court rejected his claims.

Upon further fact-finding, the Washington district court finally awarded summary judgment in favor of the District in 2020. First, the court confirmed that Kennedy spoke as a public employee, and not as a private citizen, when giving his postgame prayers. As the court explained, a public school teacher necessarily acts as a public employee when 1) at school or a school function; 2) in the general presence of students; 3) in a capacity one might reasonably view as official. The district court found Kennedy's conduct to easily meet all three of these conditions, as his religious observance was done on the "expressive focal point," the 50-yard line of the school football field, which is comparable to the front of a classroom, in plain view of students and parents, immediately after the games of the team he coaches. Second, the lower court found the suspension of the praying coach to be adequately justified. Sans the suspension, the District would not have been able to avoid the "appearance of government sponsorship of religion." The lower court decision was again upheld by the Ninth Circuit in 2021. Just as in 2018, the District had maintained its lead.

In his desperate final attempt for a comeback, Kennedy threw his Hail Mary and, to the surprise of some, the

Court, in a 6-3 opinion written by Justice Gorsuch, received the last-second pass, and overturned the Ninth Circuit ruling. The high court concluded that the public school coach's prayer at the completion of school sports activities was a constitutionally protected exercise and did not violate the Establishment Clause. As an initial matter, the Court looked at whether the postgame prayers were speech pursuant to the coach's official duties, or merely private speech by a citizen. According to the majority, the postgame period when Kennedy knelt for his prayers was effectively a brief pause in his duties during which he was free to engage in all manner of private speech and activities – "everything from checking sports scores on [his] phone to greeting friends and family in the stands." Because there was no expectation of the coach to fulfill his official responsibilities during this period, the majority held that Kennedy spoke as a private citizen rather than a public employee acting within the scope of his duties when the prayers took place. Thus, he was "free to engage in all manner of private speech." In rejecting the District's argument that Kennedy's suspension was necessary to avoid an Establishment Clause violation, the Court stressed that Kennedy's "private religious exercise did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion," as there was no evidence that students were directly coerced into participating. The majority also noted that the Free Exercise and Establishment Clauses have "complementary purposes, not warring ones," and, in this instance, the Establishment Clause did not compel the government to "purge from the public sphere" the postgame religious behavior. The Court noted that even if onlookers witnessed the coach's prayers, "learning how to tolerate speech or prayers of all kinds is 'part of learning how to live in a pluralistic society'…."

If this dispute were the high school football state championships, it would have received record-smashing attention. After six years of courtroom drama, the game clock has finally run out with Coach Kennedy, perhaps surprisingly, on top.

Not Enough Horses to Generate the Power Results in Class Action Settlement

The race is over. In June, an Ohio judge finalized a settlement in a class action suit against fitness equipment company Nautilus Inc., in which lead plaintiff, Robert Walker ("Walker"), alleged that the Bowflex treadmill he purchased in 2019 did not perform at the continuous horsepower marketed by Nautilus. (*Walker v. Nautilus, Inc.*, No. 20-3414 (S.D. Ohio Jun. 27, 2022)).

To get you up to speed, Nautilus is a global fitness solutions company, and sells products under widely-recognized brand names in the fitness industry. Treadmills are one of the company's most popular products. In July 2020, Walker filed a lawsuit, claiming that Nautilus sold its treadmills to consumers with horsepower that performed weaker than advertised when used in a home setting. Walker alleged that he had purchased a Nautilus treadmill in March 2019 to use in his home in Ohio. A year later, Walker filed a putative class action complaint claiming that the treadmill, when used in a common household 120 volt power outlet setting in normal household exercise use, could not feasibly reach or maintain its advertised 3.75 continuous horsepower (CHP) standards.

In brief, horsepower is a unit of measurement that quantifies the mechanical power output of a motor; with regard to the treadmill ratings, Walker's complaint explained that CHP generally measures a motor's ability to maintain and continuously produce power over the course of a workout without exceeding the current rating of the motor. Step by step, Walker's complaint alleged that the relevant CHP ratings "defy the laws of physics and allow Defendant's Treadmills to output more continuous horsepower than is actually capable of being input from a common household outlet." The complaint claimed that Nautilus's CHP claims were "inflated" and misrepresented the capabilities of the treadmill during normal household exercise use and that, but for the 3.75 CHP rating, Walker would not have purchased the treadmill or would have paid a lot less than the $1,500 price for the machine. Walker's complaint included claims for breach of express warranty, breach of implied warranty, violation of the Ohio Consumer Sales Practices Act, and negligent misrepresentation. He sought damages and equitable relief on behalf of himself and the other members of the class.

Seeking to keep pace with Walker, in September 2020 Nautilus moved to dismiss and compel arbitration based on the link to the terms of use on Nautilus's website and the terms governing Nautilus's "Max Intelligence" fitness app that Walker had previously downloaded with regard to a prior Bowflex treadmill purchased in 2017. Both sets of terms include an arbitration provision. However, the court was not convinced by Nautilus's arguments and, in May 2021, denied Nautilus's motion to compel arbitration. The court found that Walker did not have actual or constructive knowledge of the terms, which were presented as a browsewrap (i.e., where terms of use are posted on the website as a hyperlink at the bottom of the screen). The court noted that the link to the website terms displayed in "small, faint gray letters" was "inconspicuous" and not easily accessible to the reasonable user, and therefore Walker did not assent to the terms or agree to arbitrate. With respect to the Max Intelligence app terms, the court found them both procedurally and substantively unconscionable. In finding procedural unconscionability, it stated that the "non-negotiable" terms "buried" the arbitration provision, and that the arbitration provision was unreasonably favorable to Nautilus since it would require arbitration not just for app-related claims, but for all claims related to any of Nautilus's products and services (the finding was despite the fact that the arbitration provision contained a sixty-day opt-out window). Additionally, the court found the provision substantively unconscionable because, among other things, it was enforceable in perpetuity against any future purchases of Nautilus products even if the app was discontinued. The court also found that the arbitration clause would deny Walker an "adequate remedy," as he would be responsible for his own expenses, required to split any costs and fees, and required to travel to Clark County, Washington to arbitrate his claims (expenses, in total, which the court noted would exceed the cost of a $2,000 treadmill).

Following a mediation conference, the parties avoided a potential marathon of future motions and pleadings, and reached a settlement agreement in November 2021. It includes a $4.25 million common fund (less certain costs and expenses) from which pro rata settlement payments will be made to class members who have submitted a valid claim. Class members are defined as "All Persons within the United States and its territories who: (a) purchased a Bowflex, Nautilus, or Schwinn treadmill from July 7, 2016 through [November 16, 2021]." The settlement also includes a one-year subscription to Nautilus's JRNY fitness application for class members. Additionally, the settlement features injunctive relief, with Nautilus agreeing to cease use of the CHP representations at issue and include a disclaimer to accompany any horsepower representation published in connection with Defendant's future sale or marketing of its treadmills.

In November 2021, the Ohio district court granted its preliminary approval of the settlement, finding the terms were "fair, reasonable, and adequate." The official cool down of the litigation occurred in late June 2022 when the district court granted its final approval of the settlement. This case is a reminder for companies to reexamine advertised product specifications to avoid the risk that consumers could come running back with lawsuits in hand.

Drug Manufacturer Can't Outrun Amended Products Liability Suit over Horse's Death

In another case involving a horse (but this time a real one), all bets are off for drug manufacturer and distributor Zoetis, Inc. ("Zoetis") after a federal judge denied Zoetis's motion to dismiss and ruled that it cannot exit, in the backstretch, a negligence and breach of warranty suit related to the death of a racehorse that received a dose of its equine antibiotic drug Excede. (*Foge, McKeever LLC v. Zoetis, Inc.*, No. 20-01462 (W.D. Pa. June 6, 2022)).

Foge, McKeever LLC, Todd M. Rooney and Eldon S. Thompson ("Plaintiffs" or "Owners") owned Saratoga Gia, a three-year-old Standardbred filly who was stabled at the Meadows Racetrack in Washington County, Pennsylvania. On April 7, 2020, to treat a minor puncture wound Saratoga Gia received an injection of Excede, an extended-release equine antibiotic marketed as a "two dose, one solution" treatment that was easier and less stressful on ill horses than traditional treatments that might require a 10-day course of non-extended release antibiotics. On April 11th, a veterinarian administered a second dose of the drug, and subsequently, Saratoga Gia suffered a severe reaction; despite emergency care, she died at a university equine center on April 15th.

In September 2020, the Owners filed a ten-count complaint that included negligence, warranty, product liability and misrepresentation claims (and later amended it in December 2020), citing that the cost of care, income losses, and other expenses related to the incident allegedly amounted to over $1.8 million dollars. They claimed that Excede caused Saratoga Gia's death, and Zoetis's negligent design of Excede and its failure to warn about the dangers of the drug made them liable. Plaintiffs alleged that Zoetis knew about the dangers of Excede because, among other things, it received numerous reports of fatal outcomes and serious adverse reactions to the injection of Excede in horses between 2012 and 2020, and the company filed hundreds of adverse reaction reports to the Federal Drug Administration for Excede during that period. Despite these signs, Plaintiffs claimed that Zoetis failed to adequately warn of Excede's danger to horses and seemingly put on blinkers in refusing, prior to the time of Saratoga Gia's treatment, to revise its warning labels and prescribing information inserts to warn veterinarians about the potential negative effects and possibility of death from the use of Excede. Saratoga Gia's veterinarians asserted that they relied on these representations in their decision to administer Excede, which ultimately led to the racehorse's death.

Zoetis filed their first motion to dismiss on December 23, 2020 and found initial success on a favorable track. In September 2021, the Pennsylvania district court agreed that Plaintiffs "failed to allege the facts with sufficient plausibility" and granted Zoetis's motion to dismiss, but gave Plaintiffs leave to amend their negligence, breach of express warranty, fraudulent misrepresentation, and negligent misrepresentation causes of action. As the court stated, Plaintiffs' complaint failed to mention specific advertisements or warranties that they relied on to support their claims, state what was inadequate about existing drug warnings, or explain why the design was flawed (or allege any plausible facts that suggested the drug was negligently manufactured). The court also agreed that strict liability and breach of implied warranty of merchantability claims could not be applied in the "prescription drug arena" and dismissed those claims, with prejudice.

Plaintiffs got back on the horse and filed a second amended complaint in October 2021.This time around, they emphasized what they perceived as deficiencies in Zoetis's warning label, and made specific allegations about the allegedly negligent design of the drug, drawing important comparisons between Excede and another drug manufactured by Zoetis known as Naxcel. Briefly, Plaintiffs argued that Naxcel is a non-extended release injectable equine antibiotic that has not caused severe reactions. The difference, according to Plaintiffs, is that the extended release delivery system in Excede utilizes caprylic acid and a cottonseed oil-based suspension, which Plaintiffs claim is not regularly used in equine medications and can be dangerous for horses, if improperly refined. Plaintiffs claimed that they would have used a different medication if they knew about the potential adverse effects of the cottonseed suspension. The Owners winnowed the field of claims in their complaint to six causes of action: negligence (including failure to warn, defective design, manufacturing defect), strict liability (including failure to warn, defective design, and manufacturing defect), breach of express warranty, and misrepresentation (both fraudulent and negligent).

In response to the amended complaint, Zoetis saddled up again and filed another motion to dismiss on November 5, 2021. In their motion, Zoetis made similar arguments that Plaintiffs failed to plausibly show that Zoetis failed to exercise reasonable care in the design of the drug and did not meet the heightened pleading requirement in its fraudulent misrepresentation claim. This time around, however, Zoetis was not in the money and the district court ruled that Plaintiffs' claims could go forward.

The district court held that Plaintiffs' negligent design and negligent manufacturing claims were satisfactory because they sufficiently alleged why Excede's design, which purportedly included the use of cottonseed oil, was flawed, and that a better alternative was possibly available. Based on similar logic, the court allowed the negligent manufacturing claim to go forward.

As the court stated, to plead a breach of express warranty claim, a plaintiff must show that the seller made "an affirmation or fact or promise to the buyer that is related to the goods and part of the basis of the bargain." Here, the court found that Plaintiffs put forth a plausible warranty claim because the Plaintiffs' veterinarians allegedly relied on Zoetis's statements about Excede's efficacy, yet the drug purportedly caused serious harm to Saratoga Gia.

Finally, the Court evaluated whether the fraud claims met the heightened pleading requirements. Here, the court found Plaintiffs' amended complaint met this standard by sufficiently detailing how Zoetis purportedly concealed the known risks and dangers of Excede to horses.

With the race on, Zoetis filed its [Answer] on June 21, 2022. While it admitted that cottonseed oil is used in Excede, Zoetis primarily denied most of Plaintiffs' allegations and asserted that the drug label was "adequate." Zoetis claimed that, despite receiving reports of adverse events, it does not believe that these events indicate proof of causation; the company also denied that any of those prior events "were substantially similar to this alleged incident" with Saratoga Gia. It intends to rely on several affirmative defenses, including that Plaintiffs were sophisticated users of Excede, and that it is in compliance with all federal obligations pertaining to its FDA-approved drug Excede.

This litigation looks to be a competitive horse race, and we'll be sure to stay tuned to see whose arguments can go the distance.

Nittany Lions Roar to Victory in Action to Protect Marks

Chances are you have owned a sports jersey or some other merchandise from your favorite sports team, or maybe even surfed online for themed products bearing your college name or team nickname. Some consumers may not be too concerned over whether such products are officially licensed, but it's a fair bet the team or trademark owner with a successful licensing or merchandising program will take the field to protect its IP. The Penn State University's ("Penn State") recent lawsuit against Paul Parshall ("Parshall" or "Defendant") demonstrates a few ways that people or businesses could be using federally registered trademarks in an infringing and confusing manner, specifically ones related to popular college sports teams. If you're a victim of this violation, join the Nittany Lion Club and learn how you can get down into the nitty gritty to protect your trademarks.

Based on a review of the relevant pleadings, Parshall, under his business entity, Sports Beer Brewing Company, apparently held himself out as "an intellectual property holding company consisting of a portfolio of sports trademarks." As such, Parshall's website offered for sale different products (e.g., craft beer, cigars, t-shirts) using variations of professional and college sports teams names, or otherwise presented trademark licensing opportunities to athletic venues, bars, brewing companies, and grocery stores. In this case, Parshall's website offered Penn State-related products such as "Penn State Nittany Brewing Co" and "Penn State Nittany Beer." In doing so, Parshall's website attested that he had obtained state trademark registrations for various sports teams "complying with the Secretary of State regulations." According to Penn State, there was one major flaw with respect to offering such branded products, namely, that Penn State owns a family of federally registered, famous NITTANY LION and PENN STATE marks and Parshall had unlawfully obtained state trademark registrations for marks that are confusingly similar to the Penn State marks (and had never taken steps to obtain permission to use such marks in any way). As per the complaint, it seems that Parshall's strategy, in this instance, was to obtain Penn State-related trademark registrations in Pennsylvania and Illinois to project the veneer that he obtained valid trademark rights to offer his products for sale, because, as Penn State alleged, there was no process by which Penn State would have been notified of such state registrations and such infringement might never be noticed.

When Penn State eventually discovered Parshall's unauthorized use of their federally registered trademarks, it sent cease and desist letters. In response, Parshall attempted to sell the state trademark rights and an internet domain he had registered called <pennstatenittanybeer.com> back to Penn State;

Parshall even applied to register the trademarks on the Federal Register (note: Penn State stated in its papers that the USPTO rejected Parshall's application to register PENN STATE NITTANY BEER). Penn State filed its original complaint on July 26, 2019 (and an amended complaint on September 24, 2019) against Parshall, asserting 17 causes of action including trademark infringement under the Lanham Act, federal unfair competition and false designation of origin, and cybersquatting. In response, Parshall filed a motion to dismiss and a motion to change the venue from Pennsylvania to Florida.

In May 2020, a Pennsylvania district court denied Parshall's motions to dismiss on several grounds, rejecting Parshall's primary argument that the complaint should be dismissed because Parshall owns state trademark registrations and Penn State had never used nor filed for the mark PENN STATE NITTANY BEER or related names. (*The Pennsylvania State University v. Parshall*, No. 19-01299 (M.D. Pa. May 7, 2020)). In general, the court found that Penn State's complaint contained plausible allegations and valid claims for relief and that Penn State sufficiently alleged ownership of a family of famous marks. The court also denied Parshall's motion to change the venue, keeping the home field advantage for Penn State.

Subsequently, in 2020 Parshall registered several Penn State-themed domain names; in response, Penn State brought UDRP actions, and was able to obtain orders (see here and here) mandating the transfer of such confusingly similar domains to Penn State. Eventually, the district court considered both parties' motions for summary judgment and on December 14, 2021 the case was referred to a magistrate judge to rule on the pending motions. In a February 17, 2022 Report and Recommendation, the magistrate ruled in favor of Penn State, finding that "Parshall has created an Internet-based counterfeiting scheme in which he is profiting from the deliberate misappropriation of Penn State's trademark rights."

The magistrate outlined several factors that led to the decision to grant Penn State's motion for summary judgment. The magistrate divided Penn State's claims into two main categories: Trademark claims related to infringement and unfair competition (Part A) and Trademark Counterfeit claims including cybersquatting (Part B).

In the discussion for Part A, the magistrate easily concluded that Parshall willfully infringed Penn State's federally protected registered trademarks in violation of the Lanham Act and also was liable for trademark dilution in that Parshall selected the infringing marks with the intention of making consumers believe he and his business were affiliated with Penn State.

In Part B, the magistrate also ruled that Parshall's state trademark registrations should be canceled because the infringing marks were confusingly similar or improperly registered. The court also recommended that Penn State be granted summary judgment on its federal claim under the Anti-Cybersquatting Consumer Protection Act, given that the "undisputed material facts" demonstrate Parshall's bad faith intent to profit from Penn State's goodwill in registered domain names confusingly similar to the Penn State marks.

On March 31, 2022, a Pennsylvania district court adopted the magistrate judge's ruling recommending that Penn State's motion for summary judgment be granted. Among other things, the court permanently enjoined Parshall from using, selling, or creating any Penn State-related trademarks, ordered the cancellation of certain Penn State-themed state trademark registrations and the transfer to Penn State of any and all domain names that include any portion of Penn State's marks (as well as Parshall's main Sports Beer Brewing domain so Penn State could cease operation of that website).

Pursuant to the court's order, Penn State filed a motion for attorney's fees on April 28, 2022. Subsequently, the parties filed a joint motion to stay the proceedings, and according to a June 2022 status report, the parties are nearing a settlement of the remaining issues in the case. It seems it's best to think twice before messing with the Lions!

Shot Clock Resets for Basketball Recruit after Appellate Court Revives Injury Suit

Typically, official recruitment visits are a reward for athletic achievements and a badge that student-athletes wear with pride. During an official visit, prospective student-athletes participate in predictable activities and events such as touring college campuses, speaking with team officials about the program and the coaching philosophy, attending home games for free, and even indulging in social events. However, in a case involving a junior college basketball recruit, the official visit turned into a fiasco when he was seriously injured during workout drills. This ill-fated workout led to years of litigation, culminating in a recent Oregon Appellate Court decision reviving his negligence lawsuit. (*Clark v. University of Oregon*, 319 Or. App. 712 (2022)).

In 2015, Crisshawn Clark ("Clark"), a sophomore at Canada College, was offered a scholarship to join the University of Oregon's ("UO") basketball team and invited to make an official visit to the campus. At dinner on the first night, Clark contended that assistant coach, Mike Mennenga ("Coach Mennenga") asked if Clark ever had any surgeries, to which Clark responded that he had both his knees "scoped" after his previous season. During the second day of his visit, Coach Mennenga instructed Clark to conduct various basketball drills. Before beginning the drills, Clark allegedly informed the head coach, Dana Altman ("Coach Altman"), of the workouts, but it was alleged that Coach Altman didn't object or interfere.

During the first drill, assistant coach, Tony Stubblefield ("Coach Stubblefield") and the Director of Basketball Operations, Josh Jamieson ("Jamieson"), sat on the sidelines to watch Clark perform the workout drills. Clark completed the first and second drills with ease. However, for the third drill, Clark claimed that he was instructed to "drive the ball toward the basket, collide with Coach Mennenga, continue driving through opposition, and lay the ball in the basket." On Clark's fourth attempt at the drill, Coach Mennenga switched things up, and according to the complaint, "unexpectedly gave [Clark] a hard chest bump [when he drove to the basket], which threw [Clark] off his stride," and caused Clark to land incorrectly and feel a snap in his knee. The worst was confirmed after Clark found out he tore his left ACL.

After the fact, Clark learned that these types of workouts were not authorized under NCAA rules. UO and the basketball staff eventually admitted that instructing Clark to do basketball drills during his official visit before his two-year junior college eligibility was up was a violation of the NCAA Bylaws. Clark also asserted that not only did Coach Mennenga know about Clark's previous knee injury, but the coaches also failed to obtain medical clearance for Clark to be able to perform the drills.

In October 2017, Clark filed a negligence lawsuit against UO, then-head coach, Coach Altman, various assistant coaches (including Coach Mennenga and Coach Stubblefield), and then-Director of Basketball Operations, Jamieson (collectively "Defendants"). Clark sought more than "$100,000 for pain and suffering, compensatory damages, and loss of future income." In the original complaint, Clark claimed the Defendants were negligent for, among other things, failing to take reasonable steps to avoid injuring Clark (such as performing a pre-workout medical evaluation) and organizing a basketball workout that was unreasonable under the circumstances and in violation of NCAA Bylaws.

Presenting a staunch defense, the Defendants moved for summary judgment, arguing that the contact during Clark's drill was a normal, inherent risk of basketball and not actionable as a matter of law. In January 2019, the trial court blew the whistle on the complaint and ruled in the Defendants' favor. The trial court reasoned that, as a matter of law, Clark's injury resulted solely from normal risks of basketball and that the Defendants could not be liable for an injury caused by such risks. Clark appealed the ruling.

Fast break to May 25, 2022: the Oregon Court of Appeals reversed and remanded, finding, among other things, that, when viewing the facts in a light most favorable to Clark, the Defendants' alleged conduct plausibly created an unreasonable, foreseeable risk of harm to Clark, which went beyond ordinary participation in a sports activity, and that Clark's negligence claim and the Defendants' ultimate liability should be assessed by a jury. (*Clark v. University of Oregon*, 319 Or. App. 712 (2022)). The appellate court rejected the Defendants' argument that its duty in the context of an injury that occurs during a sports activity never extends to protecting against a risk that is an element of the sport (such argument relying on the doctrine of "implied assumption of the risk"). Based on an analysis framework found in Oregon state court precedent, determining a defendant's "duty" to the plaintiff is contingent on whether the defendant's conduct "unreasonably created a foreseeable risk of harm to a protected interest of the plaintiff." Thus, as the court noted, when a plaintiff voluntarily participates in an activity that contains certain inherent hazards, the analysis focuses on whether a defendant's conduct "unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff," not on the plaintiff's supposed assumption of risk. The appellate court noted that where the defendant's conduct, viewed in the light most favorable to the plaintiff, "falls completely within the ordinary parameters of the sports activity, it may be that the defendant's conduct is not unreasonable under the specific circumstances, as a matter of law." However, the appellate court found that Plaintiff's allegations presented a "scenario different from ordinary participation in a sports activity" and given the Defendants' knowledge of Plaintiff's medical condition and NCAA rules, the basketball drills could have unreasonably created a foreseeable risk of harm, which is a question that should be reserved for a jury.

In rulings on two other points, the appellate court found that the trial court erred in denying Plaintiff's motion to amend his complaint to add an additional claim against the university and Coach Altman for negligent supervision. The Court also ruled that the lower court should have granted Plaintiff's motion for summary judgment regarding the Defendants' defense of "comparative fault/contributory negligence," given the lack of evidence to support their argument.

The ball is now in UO's court to decide if they will attempt to appeal to Oregon's Supreme Court, continue to litigate, or else meet in mid-court to discuss a possible settlement.

Canadian Broadcasters Put Pirate IPTV Streams in Penalty Box

In a cutting-edge judicial ruling, a Federal Court in Canada ruled in favor of several major media companies implementing a "dynamic" injunction against John Doe 1 and other pirate streamers as well as certain internet service providers ("ISPs"), that, if effective, will have blocked unknown individuals from streaming infringing broadcasts of live National Hockey League (NHL) games in Canada during the tail end of the 2022 season and playoffs. (*Rogers Media Inc. v. Doe*, 2022 FC 775 (May 27, 2022)). If successful, this unprecedented order will deke[1] the illegal streamers and prevent irreparable harm to the media companies' valuable sports rights, since, as the court noted, NHL games are the most watched live sporting events in Canada.

The media company plaintiffs, which include some of the biggest names in Canadian media – namely, Bell Media Inc., Rogers Media Inc., and Groupe TVA Inc. (collectively, the "Plaintiffs") – own the rights for live broadcasts of NHL games in Canada. Back in 2019, looking to check the growth in the pirated streams of live games, the Plaintiffs successfully challenged GoldTV and received the first piracy site blocking order issued by a Canadian court. The "static" blocking listed specific URLs to be blocked and required a court order to add websites to the block list. This defensive strategy proved to be unsuccessful as GoldTV simply moved its pirated broadcasts to other domain names to avoid detection and continued offering pirated streams. Indeed, the Plaintiffs say that despite the steps they have taken thus far, rampant piracy continues, and they need more nimble solutions because the pirate sites, operating abroad, are able to hide their identities and operate in a manner that makes traditional anti-piracy legal strategies impractical. Thus, the Plaintiffs sought a dynamic blocking order that allows the Plaintiffs to follow and block unlawful streams during game times as the pirate sites move to avoid detection.

In the current case, there was a mixed response from the ISPs that were third-party respondents in the case (particularly since some of the ISPs were subsidiaries of

[1] deke (dēk): A deceptive movement or feint that induces an opponent to move out of position.

the media Plaintiffs and some were not). While none of the ISPs were accused of any wrongdoing with regard to the pirated streams and were simply conduits for the internet traffic, some of the providers still expressed concerns as to the potential costs and burdens related to complying with any dynamic blocking order in real time, as well as the potential for over-blocking and interference with lawful web content.

Ultimately, the Canadian court acknowledged that the pirated streams constituted a "significant and ongoing breach of the Plaintiffs' copyright" in the lawful NHL game broadcasts and that, since current enforcement efforts have failed to stem easily available pirated streams, the Plaintiffs would suffer irreparable harm with no injunction. At this point, the court had to perform some nifty skating to strike a balanced approach with a time-limited mandatory interlocutory injunction similar to the one we reported on in the 2021 Summer Edition of *Three Point Shot* regarding a dynamic injunction concerning Irish ISPs and certain European soccer games. For example, in an effort to avoid an overbroad injunction that goes over the red line, the court order required a number of protective measures to prevent the over-blocking of content, including: (1) limiting the time when dynamic IP blocking is active (i.e., only during defined live "game windows" (as defined in the redacted court order) and only during the remainder of the 2022 NHL season); (2) verifying that other content available on the relevant pirate streaming infrastructure also consists of unauthorized content and that there is no evidence of any substantial legitimate activity; (3) reporting to the hosting provider whenever one or more of their servers are blocked so that the hosting provider is aware of it and can advise their clients; and (4) allowing an ISP to suspend compliance to correct any over-blocking or maintain the functioning and integrity of its networks. Once these conditions were satisfied, the Plaintiffs' anti-piracy provider (who apparently has experience operating similar dynamic blocking programs for European rightsholders) would identify a number of IP addresses to be blocked (updated hourly during live games), with the ISPs then instituting the blocks either manually or via automated processes that the court found were feasible and would not impose an undue burden on the ISPs.

In addition, the court mandated independent expert monitoring and verification of the protective measures outlined above. This expert will produce three separate reports: an Initial Confidential Report, a Further Confidential Report, and a "Public" Report. The Initial Confidential Report will include IP Addresses that were blocked, dates and times when the blocking occurred, and criteria for which they were blocked. The Further Confidential Report will provide an assessment of the effectiveness of the court's Order and will include the criteria it uses to measure success. The "Public" Report will be collaborative with the parties to ensure proper redactions and wording and then must be posted on each Party's website. As the court noted, this reporting will likely be relevant in the future, as the media broadcasters will undoubtedly seek another blocking order for next season. The media company plaintiffs must also indemnify the Third Party Respondent ISPs for up to $50,000 in reasonable costs and from potential complaints resulting from complying with the ruling.

While a huge victory for the media plaintiffs, the dynamic blocking order was still a "one-timer" of sorts as it expired with the close of the 2022 Stanley Cup Playoffs. With the expert reports to follow soon, this case will most assuredly serve as a test case for years to come as efforts to combat illegal streams grow.

Proskauer has more than 50 years of experience counseling the world's premier sports organizations on their most critical and complex matters.

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