MISSISSIPPI SUPREME COURT

NO. 2023-IA-00282-SCT

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

Defendant-Appellant

V.

BARNEY LEE FARRAR

Plaintiff-Appellee

INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI
CAUSE NO. l20-333

BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

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MISSISSIPPI SUPREME COURT

NO. 2023-IA-00282-SCT

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION **DEFENDANT-APPELLANT**

VS.

BARNEY LEE FARRAR **PLAINTIFF-APPELLEE**

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. National Collegiate Athletic Association, Appellant;
2. J. Cal Mayo, Jr., Attorney for Appellant;
3. Kate Mauldin Embry, Attorney for Appellant;
4. Mayo Mallette, PLLC, Attorneys for Appellant;
5. Barney Lee Farrar, Appellee;
6. Jim Waide, Attorney for Appellee;
7. Waide & Associates, P.A., Attorneys for Appellee;
9. John "Bruse" Bruster Loyd, Attorney for Appellee;
10. Jones, Gillaspia & Loyd, LLP, Attorneys for Appellee; and
11. Honorable Kent E. Smith, Lafayette County Circuit Court Judge.

CERTIFIED, on this the 21st day of March, 2024.

/s/ Jim Waide
JIM WAIDE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES:

FEDERAL CASES:

STATUTES AND RULES:

MISCELLANEOUS:

STATEMENT OF THE ISSUES

1. Whether there are issues of material fact as to whether the NCAA acted jointly with the State.

2. Whether the Mississippi Constitution's Due Process clause (Article 4, Section 14), requires state action.

3. Whether the NCAA's status as a private membership organization immunizes it against claims of violations of the United States Constitution, the Mississippi Constitution, and state tort law.

4. Whether there are issues of material fact as to whether the NCAA acted with malice, so as to subject the NCAA to a suit for intentional interference with business relations.

STATEMENT REGARDING ORAL ARGUMENT

This case is of immense importance to coaches and staff members employed at NCAA regulated universities. The case presents the issue of whether courts have authority to require fundamental fairness (due process) by the NCAA, when the NCAA affects the ability of coaches and staff members to earn a livelihood.

STATEMENT OF ASSIGNMENT

Because the issue of whether the NCAA's status as a "private association" places it beyond the reach of federal and state law is an important one, the Mississippi Supreme Court should retain this case.

STATEMENT OF THE CASE

This case is before the Court on the interlocutory appeal of Appellant/Defendant National Collegiate Athletic Association ("NCAA") from denial, in part, of the NCAA's Motion for Summary Judgment. Circuit Judge Kent Smith held that the NCAA is not entitled to summary judgment on Farrar's claim of violation of due process, nor on Farrar's claim of intentional interference with business relationships. Appellant's RE 3.

Plaintiff/Appellee Barney Lee Farrar ("Farrar") is a former University of Mississippi assistant athletic director for football. The NCAA's Committee on Infractions (COI) describes Farrar as follows:

> [T]he assistant athletic director [Farrar] came to the institution as an original member of the head coach's [Hugh Freeze] staff. Because of the relationships he had built with Mississippi high school football coaches through the years, his main duties included setting up unofficial visits to campus and interacting with high school coaches, prospects and prospects' families on the visits. He worked previously at a number of member institutions and had an earlier stint at Mississippi under a different head coach. The institution placed the assistant athletic director on administrative leave in November 2016 and terminated his employment the following month.

R. 779; Appellant's RE 7, p. 5.

The NCAA is an association of colleges and universities. The organization has a monopoly on regulating Division I sports. *See Nat'l Collegiate Athletic Ass'n v. Alston*, 549 U.S. 69 (2021) (quoting district court finding that "the NCAA enjoys 'near complete dominance of, and exercise[s]

monopoly power in, the relevant market'. . . ."). In order to participate in Division I sports at the intercollegiate level, a university is required to be a member of the NCAA. Deposition of Michael Sheridan[1], pp. 19-20, R. 1160-1161.

The NCAA has enacted a detailed "infractions program" which provides procedures for bringing charges and leveling penalties against those whom the NCAA alleges have violated its rules. The infractions programs does not contain any rules of evidence, but does provide for an adjudication process, whereby the Committee on Infractions adjudicates charges made by the NCAA's enforcement staff. *See* Appellant's RE 6.

The NCAA's enforcement staff investigates alleged rule violations, prosecutes those alleged violations, prepares confidential investigative reports, files those reports at the NCAA headquarters, and then acts as both prosecutors and witnesses before the NCAA adjudicators, the "Committee on Infractions." *See* Appellant's RE 6.

When the NCAA's enforcement staff has completed its confidential investigation, it brings formal charges through a document called a "Notice of Allegations." The NCAA combines multiple charges against multiple defendants into a single "Notice of Allegations," upon which a single hearing, normally lasting one or two (2) days, is then held. *See* Expert Opinion of Dr. David Ridpath, p. 10, R. 1292.

In the present case, the NCAA enforcement staff charged, and the NCAA Committee on Infractions found, the University of Mississippi coaches and staff (including Farrar) guilty of "Level I" and "Level II" infractions, the most serious of NCAA infractions. The NCAA imposed harsh

[1] Michael Sheridan was the chief investigator/prosecutor for the NCAA at the hearing, which is the subject of this appeal.

penalties on these coaches and staff, as well as requiring disassociation of approximately twelve (12) boosters of the University of Mississippi who were not parties to the proceedings. *See* Appellant's RE 7. The NCAA levied only minor penalties on the University of Mississippi head coach, Hugh Freeze. Appellant's RE 7, pp. 56-58. The NCAA did, however, level substantial penalties against the University of Mississippi itself. *See* Appellant's RE 7, pp. 56-58.

The case involved twenty-one (21) allegations of NCAA rules violations extending over a five (5) year period. Appellant's RE 7, p. 1. The NCAA Committee on Infractions based its decision on both "53,000 pages of [confidential] information" generated by the enforcement staff, and on the two (2) day confidential hearing, where the enforcement staff summarizes its evidence to the Committee on Infractions. R. 775. In this case, this two (2) day confidential hearing was held on September 11 and 12, 2017 in Kentucky. R. 5-6, 778; Appellant's RE 7, pp. 1, 4; Appellee's RE 1, R. 5-6.

At the NCAA hearing, only the Committee on Infractions (analogous to judges in court cases) may ask questions. Deposition of Michael Sheridan, p. 25, R. 1166. The accused coaches and staff are not permitted to cross-examine witnesses, nor are they allowed to call witnesses. Deposition of Michael Sheridan, pp. 30-32, R. 1171-1173.

Witnesses who have personal knowledge of the charges are not permitted at the NCAA hearing. Deposition of Michael Sheridan, p. 50, R. 1191. The enforcement staff serve as witnesses against the accused coaches, staff, and boosters at the hearing, although they are not sworn. The enforcement staff also act as prosecutors. The enforcement staff summarizes to the Committee on Infractions the information the enforcement staff has gathered against the accused. Deposition of Michael Sheridan, pp. 32, 50, R. 1173, 1191.

The unsworn statements the enforcement staff make at the infractions hearing and the thousands of pages of confidential reports gathered by the enforcement staff and on file at NCAA headquarters form the basis for the factfinding ultimately made by the infractions committee in its unsigned and unsworn infractions committee report. Appellant's RE 7.

The allegations against Farrar may be summarized as follows:

A. NCAA Allegation 9: That Farrar had arranged free merchandise for University of Mississippi football recruits [including Leo Lewis] from Rebel Rags, a University of Mississippi booster;

B. NCAA Allegation 14: That Farrar had arranged for boosters to provide transportation and hotel lodging so that the University of Mississippi recruits [including Lewis] could visit the University of Mississippi;

C. NCAA Allegation 16: That Farrar had arranged for two (2) boosters to make cash payments . . . to the University of Mississippi recruit Leo Lewis; and

D. NCAA Allegation 17: That Farrar had been guilty of unethical conduct because he denied the charges.

R. 8; Appellee's RE Tab 1.

In addition to these charges, the enforcement staff made various other minor charges which are listed by Farrar and denied in his initial response. R. 895-918; Appellee's RE Tab 2.

Over the course of its investigation, the NCAA enforcement staff repeatedly interviewed Leo Lewis, then a Mississippi State linebacker, who had been highly recruited by the University of Mississippi, and many other universities. Lewis claimed serious NCAA violations by the University of Mississippi and its staff, including Farrar, when he was being recruited. In the course of interviewing Lewis, the NCAA enforcement staff learned that Lewis had, in fact, been paid by a booster of Mississippi State University to attend Mississippi State. Deposition of Michael Sheridan, pp. 39-41, 65-66, R. 1180-1182, 1206-1207.

NCAA procedures did not permit giving this exculpatory information to the University of Mississippi nor its coaches and staff prior to the NCAA hearing. According to Sheridan, exculpatory information may not be given to a defendant university or its coaches and staff if the exculpatory information incriminates some other institution. The defendants learned about the Mississippi State booster payments only when Lewis mentioned those payments at the NCAA hearing. Deposition of Michael Sheridan, pp. 39-40, R. 1180-1181.

According to lead enforcement staff investigator, Sheridan, the "heart" of the allegations against Farrar involved Leo Lewis. Deposition of Michael Sheridan, pp. 44-45, R. 1185-1186.

Contrary to usual NCAA procedures, where no witnesses with personal knowledge are permitted, the NCAA enforcement staff brought Lewis to the NCAA hearing in Kentucky where Lewis was questioned by the Committee on Infractions. Deposition of Michael Sheridan, p. 42, R. 1183. Lewis told the Committee on Infractions that he had been paid large amounts of money by University of Mississippi Booster Attorney R. Allen Smith and by Smith's paralegal. The NCAA's enforcement staff charged, and the NCAA Committee on Infractions found, that Farrar had arranged for Smith to pay Lewis. Deposition of Michael Sheridan, p. 65, R. 1206. Farrar denied any involvement in paying Leo Lewis, testifying that the allegation is "bull," and something he would not "touch [] with a 10-foot pole." Deposition of Barney Farrar, pp. 127, 148, R. 1268-1269.

Bruse Loyd, Farrar's former football teammate at Northeast Community College and his attorney at the NCAA hearing, tried to corroborate Farrar's denials of paying Lewis by offering into evidence a tape recording of Farrar's talking with Lewis' mother about offers from other schools. On the tape recording, Farrar warns Lewis' mother that neither she nor Lewis should accept any money from anyone. Deposition of Bruse Loyd, p. 61, R. 1062.

Just as he denied being involved in payments of any money to Lewis, Farrar also denied helping recruits obtain free merchandise from University of Mississippi Booster, Rebel Rags. According to Farrar, Terry Warren, the owner of Rebel Rags, "would not give you anything free." Farrar testified that the "Rebel Rags deal [is] a farce. . . ." Deposition of Barney Farrar, pp. 184-185, R. 1062.

Rebel Rags has sued Lewis, the NCAA, and several others in Lafayette County Circuit Court. *See* R. 397-405; Appellee's RE Tab 3. The contents of that Lafayette County Circuit Court file, pursuant to the NCAA's motion, are sealed, and the Complaint in the record which Farrar has obtained is the only accessible record of the proceedings.[2]

Farrar's denials are found at "Initial Response of Barney Farrar to NCAA Notice of Allegations." R. 895-923; Appellee's RE Tab 2.

Notwithstanding that Farrar denied the most serious allegations (those involving Lewis and those involving Rebel Rags), Farrar admitted other NCAA rule violations.

During several interviews conducted by the NCAA enforcement staff, Farrar denied having a "burner" cell phone. A "burner" cell phone is a phone used by coaches to contact recruits, thereby exceeding the minimum number of contacts permitted by NCAA rules. Deposition of Farrar, p. 72, R. 1130. Despite his earlier denials, Farrar later admitted in an interview with NCAA enforcement staff that he did, in fact, have a burner phone which he had used to contact recruits. Deposition of Farrar, p. 90, R. 1131.

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[2] There is pending before the Circuit Court of Lafayette County, No. L18-069, a motion to unseal the Rebel Rags' case against the NCAA, Lewis, and various representatives of Mississippi State University. Appellee's RE 2.

At his deposition, Farrar testified that the restrictions on the number of times recruits may be contacted (only one call per week during a limited time period) make it "absolutely impossible" to recruit. Deposition of Farrar, p. 96, R. 1132. According to Farrar, contacting recruits more than the minimum amount allowed by NCAA rules is a job requirement. Deposition of Farrar, p. 97, R. 1133.

Although the NCAA disregarded its normal procedures by bringing Lewis to give his statement to the NCAA infractions committee, it did not allow any cross-examination of Lewis. According to Bruse Loyd, Farrar's attorney at the NCAA hearing, cross-examination is the "life of a case." Deposition of Bruse Loyd, pp. 86-87, R. 1087-1088. Because he was not allowed to cross-examine Lewis, Loyd requested that a member of the Committee on Infractions ask Lewis certain questions which Loyd was prepared to provide. The NCAA Committee on Infractions refused Loyd's request. Deposition of Bruse Loyd, p. 88, R. 1089. This denial of any cross-examination was a denial of due process. "[D]ue process . . . requires 'some opportunity for real-time cross-examination. . . .'" *Walsh v. Hodge*, 975 F.3d 475, 485 (5th Cir. 2020).

Dr. David Ridpath, who has both participated in NCAA investigations and testified before Congress about the unfairness of the NCAA procedures, swore that it is "irrational to believe that someone can present a case and prepare a rebuttal without seeing all of the evidence against them and the ability to confront their accusers." Expert Opinion of B. David Ridpath, p. 13, R. 1295.

"[C]ramming all of this information and several individuals into a compressed hearing almost predisposes the COI to believe what the enforcement staff is telling them. . . ." Expert Opinion of B. David Ridpath, p. 14, R. 1296. The "COI is . . . not able to read through and fully understand all of the materials in a major infractions case," since the "materials . . . can number in the thousands

of pages and would require weeks of sole focus to fully digest and understand." Expert Opinion of B. David Ridpath, p. 15, R. 1297.

"It is too much to believe this committee [on infractions] can read the materials from one case much less multiple. . . ." cases against various individuals. Expert Opinion of B. David Ridpath, p. 15, R. 1297.

Given the inability to combat the charges with cross-examination, given the inability to call one's own witnesses, given the sheer volume of the information covered against multiple individuals over a compressed, two (2) day time period, and given the inability to know what "confidential information" the Committee on Infractions had taken from the thousands of pages of information on file, it is not surprising that the NCAA Committee on Infractions found Farrar guilty. Committee on Infractions Enforcement Decision, Exhibit D-3, Appellant's RE 7.

In Farrar's case, no NCAA member institution may hire Farrar for any position involving recruiting without showing "cause" to the NCAA. Appellant's RE 7, p. 3.

The show cause order issued against Farrar prohibits him from coaching at any NCAA university in football because "[y]ou're not going to apply for a job if you can't recruit." Deposition of Barney Farrar, p. 52, R. 1127.

STANDARD OF REVIEW

This case is before the Court on interlocutory appeal by the NCAA of Circuit Judge Kent Smith's partial denial of summary judgment.

In deciding a motion for summary judgment, the trial court must find that there are no genuine issues of material fact. *Holliday v. Pizza Inn, Inc.*, 659 So. 2d 860 (Miss. 1995). In determining whether genuine issues of material fact exist, the trial court must review the evidence

in a light most favorable to a non-movant. *See Westbrook v. City of Jackson*, 665 So. 2d 833, 836 (Miss. 1995); *Smith v. Sanders*, 485 So. 2d 1051, 1054 (Miss. 1986).

> Issues of material fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says to the opposite. In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is, the non-movant should be given the benefit of any doubt.

Harris v. Mississippi Valley State University, 873 So. 2d 970, 979 (Miss. 2004) (citing *Heigle v. Heigle*, 771 So. 2d 341, 345 (Miss. 2000), *McCullough v. Cook*, 679 So. 2d 627, 630 (Miss. 1996)).

Summary judgment should be granted only when it is shown, beyond a reasonable doubt, that the non-movant would be unable to prove any facts to support his or her claim. *Downs v. Choo*, 656 So. 2d 84, 85-86 (Miss. 1995); *Bourn v. Tomlinson Interest, Inc.*, 456 So. 2d 747, 749 (Miss. 1984); *Brown v. Credit Center, Inc.*, 444 So. 2d 358, 364 (Miss. 1983). Motions for summary judgment are viewed with a skeptical eye, and if a trial court should err, it is better to err on the side of denying the motion. *Aetna Cas. and Sur. Co. v. Berry*, 669 So. 2d 56, 70 (Miss. 1996).

"This Court does not try issues on a Rule 56 motion, but only determines whether there are issues to be tried." *Murphree v. Federal Ins. Co.*, 707 So. 2d 523, 529 (Miss. 1997); *Mississippi Ins. Guar. Assoc. v. Byars*, 614 So. 2d 959, 963 (Miss. 1993). "In reaching this determination, the Court examines affidavits and other evidence to determine whether a triable issue exists, rather than for the purpose of resolving that issue." *Murphree,* 707 So. 2d at 529; *Federal Sav. & Loan Ins. v. Kralj*, 968 F.2d 500, 503 (5th Cir. 1992); FED. R. CIV. P. 56.

SUMMARY OF THE ARGUMENTS

Nathaniel Richards in *The Judge, Jury, and Executioner: A Comparative Analysis of the NCAA Committee on Infractions Decisions*, 70 ALA. L. REV. 1115, 1116 (2019), writes a stinging indictment of NCAA proceedings:

> There is a common scene in popular culture where the story's antagonist tells the protagonist, "I am the judge, the jury, and the executioner." The antagonist intends to convey that he has absolute power over the entire process, while the protagonist can do nothing but submit to the antagonist's will. The National Collegiate Athletic Association (NCAA) epitomizes this statement. The NCAA investigates a case and proposes initial penalties through its enforcement staff, hears the case and levies penalties through the Committee on Infractions (Committee), and presides over all appeals through the Infractions Appeals Committee (IAC). Thus, the NCAA has absolute power in prescribing penalties--as the judge, jury, and executioner. . . .

This absolute power of the NCAA to affect the livelihood of coaches and staff without affording the right to cross-examination, the right to call witnesses, and without providing any reliable method to determine whether NCAA violations occurred, violates both the due process clause of the United States Constitution and the due process clause of the Mississippi Constitution.

There are issues of material fact as to whether the NCAA was a joint actor, along with the University Mississippi, in its attacks upon Farrar. Thus, the circuit judge correctly denied summary judgment on the federal due process claim.

The Mississippi Constitution requires no "state action" in order to invoke its protections. It is enough that the University of Mississippi had delegated to a private association, the NCAA, the authority over discipline of athletes of the university. The Mississippi Constitution requires no "state action" in order to invoke its protections. No Court has authority to modify the Mississippi Constitution.

The fact that the NCAA is a private organization does not immunize it for violations of federal or state law. The Mississippi tort of intentional interference with economic relations applies against the NCAA just as it would against anyone else.

There were issues of material fact as to whether the NCAA acted without right or just cause, when it imposed sanctions which affected Farrar's livelihood, without any competent evidence that the allegations were correct, and without affording any fair hearing to determine whether the serious charges were true, and whether the less serious charge (involving a burner phone necessary to do his job) warranted prohibiting Farrar from doing the only job for which he was qualified for five years.

ARGUMENTS

I. TAKING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE NON-MOVANT, FARRAR, THE CIRCUIT JUDGE CORRECTLY FOUND THERE ARE ISSUES OF MATERIAL FACT AS TO WHETHER THE NCAA ACTED JOINTLY WITH THE UNIVERSITY OF MISSISSIPPI IN ADVERSELY AFFECTING THE EMPLOYMENT OF FARRAR.

The Due Process Clause of the United States Constitution Amendment Fourteen reads, in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. AMEND. 14.

The NCAA has never denied that the right to earn a living as a coach or assistant athletic director is a "liberty" and "property right" within the meaning of United States Constitution Amendment 14.

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [14th] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41 (1915).

According to *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923), "the right of the individual to contract, to engage in any of the common occupations of life . . . [is] essential to the orderly pursuit of happiness by free men."

Rather than denying that the NCAA's actions deprive Farrar of "liberty and property," or by claiming that due process was given, the NCAA argues only that the circuit court erred in denying summary judgment "[b]ecause the NCAA was *not* a state actor or quasi-state actor. . . ." Brief of Appellant, p. 14 (emphasis in original).

In so arguing, the NCAA relies almost exclusively upon *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988). Brief of Appellant, p. 15. By a five (5) to four (4) vote, the Supreme Court in *Tarkanian* held that the NCAA had not acted jointly with the University of Nevada, Las Vegas ("UNLV"), so as to make the NCAA a state actor, when the NCAA took employment actions against UNLV head basketball coach, Tarkanian.

Tarkanian is different from the present case. In *Tarkanian*, UNLV vigorously defended Coach Tarkanian against the NCAA's allegations. The Supreme Court in *Tarkanian* noted:

> It is quite obvious that UNLV used its best efforts to retain its winning coach [Tarkanian]-a goal diametrically opposed to the NCAA's interest in ascertaining the truth of its investigators' reports. During the several years that the NCAA investigated the alleged violations, the NCAA and UNLV acted much more like adversaries than like partners engaged in a dispassionate search for the truth. . . .

Tarkanian, 488 U.S. at 196.

The court in *Tarkanian* concluded that it "would be ironic indeed to conclude that the NCAA's imposition of sanctions against UNLV-sanctions that UNLV and its counsel, including the Attorney General of Nevada, steadfastly opposed . . . is fairly attributable to the State of Nevada." *Tarkanian*, 488 U.S. at 199.

Contrasting with the state's (UNLV's) vigorous defense of Coach Tarkanian, the University of Mississippi joined in the NCAA's attack on Farrar. The NCAA Committee on Infractions wrote: "At the [NCAA] hearing, Mississippi characterized the actions of the assistant athletic director [Farrar] . . . as 'disturbingly questionable.' The panel [NCAA Committee on Infractions] agrees." Appellant's RE 7, p. 19.

The NCAA described the University of Mississippi's "corrective actions" as follows: "The former assistant athletic director's [Farrar's] employment was put on administrative leave on November 8, 2016. On December 8, 2016, his employment with Mississippi ended after it was determined that he had committed serious infractions. . . ." Appellant's RE 7, Appendix 1, p. 1. These actions by the University of Mississippi were made before the NCAA ever held its September 11-12, 2017 hearing, and could have been made only because the NCAA had launched an investigation of Farrar.

The fact that the NCAA was acting jointly with the University of Mississippi against Farrar is also indicated by the fact that the University Mississippi agreed with the NCAA to "publically identify the boosters who committed the violations. . . ." Appellant's RE 7, Appendix 1, p. 3. The claims against Farrar are that he had acted jointly with boosters to bribe Lewis and to get free merchandise from Rebel Rags for recruiting athletes, including Lewis.

Before the NCAA conducted its hearing, the University of Mississippi also reprimanded two (2) other assistant coaches and disassociated several "boosters" from the University of Mississippi. Appellant's RE 7, Appendix 1, p. 1. The NCAA commended the University of Mississippi's "cooperation" with it by listing its cooperation as a "mitigating factor" in assessing punishment against the University of Mississippi. Appellant's RE, 7, p. 34.

The circuit court properly denied summary judgment since the circumstantial evidence is at least as strong as that relied upon by the Supreme Court in denying summary judgment in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970), which held, "To act 'under color of law' does not require that the accused be an officer of the State. It is enough that he is a wilful participant in a joint activity with the State or its agents . . .". (quoting *United States v. Price*, 383 U.S. 787, 794 (1966)).

In *Adickes*, a white person had been arrested immediately upon leaving the S. H. Kress & Co. Restaurant where she had attempted to eat with black persons. The Supreme Court held the fact that a policeman was in the restaurant, that the restaurant had denied the plaintiff and her black companions service, and that the plaintiff was immediately arrested when she left the store, was circumstantial evidence from which a factfinder could find that there was an agreement between the store and the state agent (the policeman) to cause plaintiff's arrest. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 150-151.

There is similar circumstantial evidence in this case. The fact that the University attacked Farrar to the NCAA by claiming his actions were "disturbing," and the fact that it fired Farrar before any hearing whatsoever, after it learned of NCAA charges, and the fact that the NCAA commended the University Mississippi for its "cooperation" and listed its "cooperation" as being a "mitigating factor" is circumstantial evidence from which the circuit judge reasonably found there were issues of material fact as to whether the NCAA and the University of Mississippi were acting jointly against Farrar. The University of Mississippi had an incentive to protect its head coach, Freeze, by blaming a subordinate for any violations of NCAA rules; thus, the University of Mississippi and the NCAA shared the goal of harming Farrar.

Farrar's expert, Dr. Ridpath, explained that universities, such as the University Mississippi, often join in NCAA actions against their own employees in the belief that this cooperation will cause the NCAA to dole out only light punishment against the university or against a winning head coach. Dr. Ridpath wrote:

> It is vital to highlight that the NCAA enforcement process is stated to be a cooperative process between the institution and the NCAA. The institution will typically take all measures to protect itself including sacrificing coaches and staff members it deems expendable to curry favor with the enforcement investigators and the Committee on Infractions to lessen penalties.

Expert Opinion of B. David Ridpath, p. 11, R. 1293.

To prove joint action between the University Mississippi and the NCAA against Farrar, it is not necessary for there to be any admission or confession of joint action. "Circumstantial evidence is not only sufficient, but also may be more certain, satisfying and persuasive than direct evidence." *Roop v. Southern Pharmaceuticals Corp.*, 188 So. 3d 1179, 1189 (Miss. 2016) (quoting *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003)).

The Second Circuit has distinguished *Tarkanian* because "the complaint alleges that the University forced Cohane's resignation immediately upon learning of the charges in an attempt to placate the NCAA. . . ." *Cohane v. Nat'l Collegiate Athletic Ass'n ex rel. Brand*, 215 F. App'x 13, 15 (2d Cir. 2007).

The NCAA incorrectly argues that the later decision in *Cohane v. Nat'l Collegiate Athletic Ass'n*, 612 F. App'x 41 (2d Cir. 2015) discredits the earlier *Cohane v. Nat'l Collegiate Athletic Ass'n*, 215 F. App'x 13 (2d Cir. 2007). *See* Appellant's Brief, p. 18, n. 74. In fact, the later appeal, reported at 612 F. App'x 41, mostly addresses the narrow issue of whether inclusion of a coach's name in the

NCAA personnel records is enough of an effect on one's employment to constitute a deprivation of a "liberty" interest. The first appeal is the more relevant appeal. That appeal states:

> We hold that the District Court erred in concluding that Cohane could prove no set of facts showing that the NCAA was a "willful participant in joint activity with the State," *see Brentwood Academy v. Tenn. Secondary Sch. Athletic Assoc.*, 531 U.S. 288, 295, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001) . . . .

Cohane, 215 F. App'x at 15.

What's more, even in the absence of joint action, it is unlikely that the 5-4 result in *Tarkanian* would be followed today.

Terri Peretti in, *What If the NCAA Was A State Actor? Here, There, and Beyond*, 20 ROGER WILLIAMS U. L. REV. 292, 308 (2015), writes that "[s]cholarly reaction to the Supreme Court's *Tarkanian* decision has been overwhelmingly and properly negative." The author cites the "unsustainable dichotomy" between *Tarkanian* and *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), which held that a Tennessee high school athletic association is "a state actor" because it carries out functions of the state. *What If the NCAA Was A State Actor? Here, There, and Beyond*, 20 ROGER WILLIAMS U. L. REV. at 314.

Professor Peretti points out that, "there is no convincing basis to distinguish between high school athletic associations and the NCAA for state actor purposes" and that, "*Brentwood* leads the way for a finding that the NCAA, too, should be a state actor." *What If the NCAA Was A State Actor? Here, There, and Beyond*, 20 ROGER WILLIAMS U. L. REV. at 318.

It is "hard to align" *Tarkanian* with *Brentwood*, and "it is difficult to review these cases and determine why they should be resolved differently." Joe Nelson, *NCAA Down for the Count? New*

State Legislation Threatens Collegiate Sports As We Know It, 19 UIC REV. INTELL. PROP. L. 346, 355 (2020).

A third commentator agrees. Kadence A. Otto & Kristal S. Stippich, *Revisiting Tarkanian: The Entwinement and Interdependence of the NCAA and State Universities and Colleges 20 Years Later*, 18 J. LEGAL ASPECTS SPORT 243 (2008), writes:

> [The *Tarkanian*] decision is premised on the supposition that a member of the NCAA has a viable choice to ignore an NCAA sanction or withdraw from the NCAA. The fact is that the members of the NCAA, particularly large state-run universities and colleges, simply have no such choice. No major university could withdraw from the NCAA without seriously jeopardizing its athletic program.

Otto & Stippich, *Revisiting Tarkanian: The Entwinement and Interdependence of the NCAA and State Universities and Colleges 20 Years Later*, 18 J. LEGAL ASPECTS SPORT at 244 (footnote omitted).

The opinions of these commentators are especially probative since this Court has agreed with *Brentwood*. *Mississippi High Sch. Activities Ass'n, Inc. v. Coleman,* 631 So. 2d 768, 773-774 (Miss. 1994), like *Brentwood*, held that the Mississippi High School Activities Association is a joint actor with the state. The Court so held because the State of Mississippi delegated to Mississippi high schools the authority to regulate athletics, and the high schools had, in turn, delegated that authority to the Mississippi High School Athletic Association. The *Coleman* rationale is equally applicable to the NCAA, since the legislature has delegated control over athletic programs to the state universities and the state universities, have delegated some of the control to the NCAA. In fact, Farrar's contract with the University of Mississippi provides that the University can terminate the contract of Farrar for violating NCAA rules. *See* Employment Contract, Appellant's RE 9.

In short, even in cases, unlike this one, where there is no demonstration of cooperation between the university and the NCAA, the NCAA and the state are joint actors. The state universities have delegated regulation of athletes and coaching staff to the NCAA, and that alone is enough to make the NCAA a state actor.

In a one sentence argument, the NCAA claims that "if the NCAA is a state actor, the Mississippi Tort Claims Act provides the 'exclusive remedy' for acts and omissions giving rise to a suit." Brief of Appellant, p. 19. This claim misstates Farrar's argument. Farrar has never argued that the NCAA is the state. Rather, Farrar's argument is that the NCAA is a state actor because it engaged in "joint activity" with the University of Mississippi. *Mississippi High Sch. Activities Ass'n, Inc. v. Hattiesburg High Sch.*, 178 So. 3d 1208, 1212 (Miss. 2015), holds: "We agree with HHS that MHSAA is not a state agency."

The definition of the "state" is found in MISS. CODE ANN. § 11-46-1. The NCAA is not among those entities listed as being the "state."

Although not assigned as error in its brief, in footnote 65, p. 16, the NCAA discusses *National Collegiate Athletic Ass'n v. Miller,* 10 F.3d 633 (9th Cir. 1993). There, the Ninth Circuit held that a state statute which listed certain procedures that the NCAA must follow violates the so-called "dormant commerce clause" of the United States Constitution.

If footnote 65 in the NCAA brief is intended to raise an issue on appeal, it should be disregarded because the issue was not raised in the court below. An appellate court will "not entertain arguments made for the first time on appeal. . . ." *Coleman & Coleman Enterprises, Inc. v. Waller Funeral Home*, 106 So. 3d 309, 315 (Miss. 2012).

In any event, *Miller* does not apply to the federal due process clause, since federal due process binds the NCAA in all actions throughout the United States. Furthermore, it is likely that most, if not all, states have similar due process protections in their state constitutions. The concept of due process is a concept which the NCAA could apply uniformly throughout the country.

II. NO STATE ACTION IS REQUIRED BY THE MISSISSIPPI CONSTITUTION'S DUE PROCESS CLAUSE.

In Argument 1, Farrar has demonstrated that the circuit court's denial of summary judgment should be affirmed, since the circuit court correctly found issues of material fact as to whether the NCAA acted jointly with the University of Mississippi, so as to make its action the action of the state.

Even ruling in the NCAA's favor on this issue, however, would not put the circuit court in error. The due process clause of the Mississippi Constitution does not require state action as a condition for invocation of due process. Rather, it is enough that the University of Mississippi has delegated its functions of regulating student athletes and imposing punishment upon coaches and staff to the NCAA.

Contrasting with the United States Constitution Amendment Fourteen's prohibiting the state's depriving of one life, liberty, or property, the Mississippi Constitution of 1890, Article 3 § 14 reads: "No person shall be deprived of life, liberty, or property except by due process of law."

The framers of the Mississippi Constitution of 1890 knew that the language in the United States Constitution Amendment Fourteen differs from the language in the Mississippi Constitution. The United States Constitution was ratified in 1868, nearly three (3) decades before ratification of the Mississippi Constitution of 1890. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 228 (2022) (noting the Fourteenth Amendment was adopted in 1868).

The states are free to provide more constitutional protection for their citizens than the United States Constitution affords for citizens of the United States. *Buford v. State*, 323 So. 3d 500, 504 (Miss. 2021). Compare, for example, U.S. CONST. AMEND. 5, which requires that property owners be compensated for the "taking" of private property without payment of just compensation, with MISS. CONST. § 17, which provides more protection by requiring compensation if property is either "taken" or "damaged" for a public use.

Frazier v. State, 504 So. 2d 675, 694 (Miss. 1987), observes that the Mississippi Constitution's "words must be the sole boundary [of its meaning],. . . ." and that its meaning must be "ascertained from the plain meaning of the words and terms used within it. . . ." It is "not the function of judges to dwarf the grandeur of a Constitution by decisions which stifle any of its promises." *Frazier*, 504 So. 2d at 694.

By receiving hearsay evidence from its enforcement staff, and acting upon that hearsay to affect a citizen's livelihood, the NCAA Committee on Infractions is performing a judicial function. Performing that judicial function is enough to bring the NCAA within the state's constitutional requirement for due process. Under *Mississippi High Sch. Activities Ass'n, Inc. v. Coleman,* 631 So. 2d 768 (Miss. 1994), the fact that the state has delegated a state function to the NCAA is enough to invoke due process.

The NCAA argues that the Mississippi Constitution and the United States Constitution should be interpreted similarly. The cases cited by the NCAA, however, interpret Constitutional provisions containing identical wording. For example, *Nat'l Collegiate Athletic Ass'n v. Gillard*, 352 So. 2d 1072, 1081 (Miss. 1977), discusses the terms "property" and "due process" contained in both constitutions. Neither *Gillard* nor any other case indicates that where the language of the Mississippi

Constitution is different from the language of the United States Constitution, this Court should turn a blind eye to the differences in the wording.

The NCAA claims that this Court cannot enforce the Mississippi Constitution's due process clause because the Mississippi Constitution "has no counterpart to 42 U.S.C.A. § 1983." Therefore, "Mississippi does not provide for a direct action against the NCAA for an alleged violation of the Mississippi Constitution." Brief of Appellant, p.19. Contrary to this baseless argument, "[a]ll the Reconstruction Amendments (including the due process . . . guarantees . . .) 'are self-executing,' meaning that they do not depend on legislation." *Trump v. Anderson*, 144 S. Ct. 662, 673, 2024 WL 899207, *9 (2024) (Sotomayor, J., concurring).

The due process clause of the Mississippi Constitution, like the due process clause of the United States Constitution, is self-executing. *Oktibbeha Cnty. Bd. of Educ. v. Town of Sturgis, Miss.*, 531 So. 2d 585, 588 (Miss. 1988) holds: "When a constitutional provision grants a distinct right, the provision is self-executing and requires no legislation to effectuate it."

MISS. CONST. § 17, has been held to be "mandatory and self-executing, so as to entitle owner of property damaged for public use to remedy at common law, in absence of statute providing redress. . . ." *Parker v. State Highway Comm'n*, 162 So. 162 (Miss. 1935). MISS. CONST. § 14 protects citizens from having their liberty or property taken without due process in language which is just as clear as the Mississippi Constitution's protection of a citizen's right not to have their property taken or damaged by public use without payment of just compensation. There is no reasonable basis for holding that Section17 is self-executing, but Section 14 is not self-executing.

Several other cases have held other provisions of the Mississippi Constitution are self-executing. *State ex rel. Knox v. Gulf, M. & N.R. Co.*, 104 So. 689, 692 (Miss. 1925); *Bucklew v. State*, 192 So. 2d 275, 276 (Miss. 1966); *Frazier v. State*, 504 So. 2d 675, 594 (Miss. 1987).

These cases cannot be distinguished. There is no need for a statute for this Court to enforce the due process clause of the Mississippi Constitution.

III. THE CIRCUIT COURT CORRECTLY HELD THERE ARE ISSUES OF MATERIAL FACT WITH RESPECT TO FARRAR'S CLAIM THAT THE NCAA INTENTIONALLY INTERFERED WITH HIS BUSINESS RELATIONSHIPS.

Accepting Farrar's evidence as true, the NCAA made false claims that Farrar caused cash to be paid by University of Mississippi boosters to Mississippi State linebacker Leo Lewis, and that he assisted recruiters in obtaining free merchandise from Rebel Rags. These falsehoods caused the University of Mississippi to fire Farrar during his contract. The NCAA issued a "show cause" order, which prohibited Farrar from coaching, since it eliminated his ability to recruit for five (5) years.

The circuit court held that these basic facts created a "genuine issue of material fact" as to whether the NCAA had intentionally interfered in Farrar's future employment.

The elements of a claim of intentional interference with business relationship are:

(1) The acts were intentional and willful;
(2) The acts were calculated to cause damage to the plaintiffs in their lawful business;
(3) The acts were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice);
(4) Actual damage and loss resulted.

MBF Corp. v. Sentry Bus. Communications Inc., 663 So. 2d 595, 598 (Miss. 1995).

These elements have been found satisfied in a variety of contexts. For example, *MBF Corp.* held a directed verdict should not have been granted on an intentional interference claim, when there

was evidence that the defendant "had induced certain employees of [the plaintiff] to terminate their employment with MBF and join the staff of [the defendant]." *MBF Corp.*, 663 So. 2d at 597.

Cenac v. Murray, 609 So. 2d 1257, 1268 (Miss. 1992), held there was sufficient evidence to create a jury issue on the issue of "tortious interference with business relations or sometimes referred to as interference with prospective advantage,. . . ." when defendant "unlawfully diverts prospective customers away from one's business thereby 'encouraging' customers to trade with another." *Cenac*, 609 So. 2d at 1268.

Liston v. Home Ins. Co., 659 F. Supp. 276 (S.D. Miss.1986), held an insurance company liable to a law firm, when the insurance company had settled the claim directly with the law firm's client.

Protective Service Life Ins. Co. v. Carter, 445 So. 2d 215, 217 (Miss. 1983), held an insurance agent liable where he had caused policyholders to cancel their contracts with the plaintiff, and to make contracts with a new insurance company.

The NCAA's unconstitutional findings against Farrar, resulting in a "show cause" order, which effectively prohibited Farrar from obtaining other employment from NCAA universities, is just as detrimental to Farrar's business as a coach or assistant athletic director, as the harm done in the above-discussed cases.

The only element of intentional interference which the defendant contests is the element of malice. However, *MBF Corp.* and many other cases discussing the tort demonstrate that "malice" is demonstrated by showing that the acts done were with the "unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant." *MBF Corp.*, 663 So. 2d at 598. "[W]hen an intentional act occurs whose purpose is to cause injury to business *without right*

or good cause, then there is malice." *Dearman v. Stone Cnty. Sch. Dist.*, 2014 WL 1153068, *8 (S.D. Miss. 2014), quoting *Morrison v. Miss. Enterp. for Tech., Inc.*, 798 So. 2d 567, 575-76 (Miss. App. 2001) (emphasis in original).

In this case, there are issues of material fact as to whether the NCAA intentionally used absurd and unfair procedures to find Farrar guilty of serious NCAA rules violations and used its baseless findings to affect Farrar's employment. Farrar has denied these allegations under oath. Deposition of Farrar, pp. 184-185, R. 1140-1141, and through his submission to the NCAA, Appellee's RE Tab 2.

In fact, Farrar's denials, at this point, are uncontested by any competent evidence. The only factual support in the record that Farrar committed serious NCAA violations, is the findings of the committee on infractions, which is provided at Appellant's RE 7.

These NCAA findings are not competent summary judgment evidence. The NCAA infractions report, RE 7, is unsworn and unsigned. It is double hearsay, since it is based upon what the NCAA enforcement staff told the committee in unsworn statements at the hearing, and upon thousands of pages of investigative reports, which are on file with the NCAA.

MISS. R. CIV. P. 56 prohibits a Court's considering as summary judgment evidence any evidence which is not shown to be admissible at trial. According to MISS. R. CIV. P. 56(c): "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein." "[H]earsay statements that would not be admissible at trial are incompetent to support or oppose summary judgment." *Henley, Lotterhos & Henley, PLLC v. Bryant*, 361 So. 3d 621, 630 (Miss. 2023) (internal citations omitted).

"To have power to generate a genuine issue of material fact . . . depositions, answers to interrogatories, or affidavits must, first, be sworn; second, be made upon personal knowledge; and third, show that the party giving them is competent to testify." *Magee v. Transcon. Gas Pipe Line Corp*., 551 So. 2d 182, 186 (Miss. 1989). The NCAA's Committee on Infractions report does not meet a single one of these three requirements. The Committee on Infractions report is not sworn. It is not based on personal knowledge. There is no showing that the unknown person who wrote the report is "competent to testify."

At this stage, Farrar's denials that he committed any serious NCAA violations stand uncontradicted. The circuit court, therefore, was correct to deny summary judgment. The jury could infer malice from making false, baseless charges and from adopting procedures which the NCAA knew would result in unreliable findings. "The drawing of legitimate inference from the facts are jury functions, not those of a judge." *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 150 (2000). The circuit judge correctly held when he denied summary judgment.

The NCAA argues that the law of malicious interference does not apply to it because it is a "private membership association entitled to interpret and apply its own rules without judicial interference . . ." Appellant's Brief, pp. 2-3. Of course, Farrar, an employee of the University Mississippi, is not a member of the NCAA. The NCAA is composed of members who are universities and colleges. Because of the power delegated to it by these colleges and universities, the NCAA is able to affect the employment of university employees like Farrar, but Farrar is not a member of the NCAA. Farrar had no power to adopt any NCAA rules or to change NCAA procedure.

Famously, *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69 (2021), held that the NCAA's rules limiting compensation for student athletes are subject to this nation's antitrust laws. Similarly, the State of Mississippi, like over thirty other states, has enacted a statute, MISS. CODE ANN. § 99-19-17, which – despite the NCAA's claims to be the exclusive regulator of what student athletes may be paid – provides for payment for "endorsements and sponsorships." *See* Timothy Winkler, *The End of an Error: Reforming the NCAA Through Legislation*, 90 UMKC L. REV. 219, 221 (2021).

Recently, a Tennessee District Court held that the NCAA's limitation on the compensation that could be given to high school athletes before they enter college may violate the Sherman Act, to the extent that the limitations infringe upon the competitive process. *Tennessee v. National Collegiate Athletic Association*, ___ F. Supp. 3d ___, 2024 WL 464164 (E.D. Tenn. 2024).

The NCAA's rule limiting the amount of contact that a coach may have with a potential recruit by telephone has a self-evident effect of limiting competition for that recruit. Farrar has sworn that all coaches must necessarily exceed the NCAA limitation on number of contacts in order to effectively recruit. Since all recruiting coaches must necessarily exceed the NCAA's limitation as a job requirement, the NCAA's arbitrary selection of certain coaches and institutions to prosecute for such contact necessarily infringes competition, and is a likely violation of the Sherman Act, 15 U.S.C. § 1.

The NCAA's claim that it is not subject to judicial review because such review would infringe upon its alleged right to "freedom of association," is an absurd claim that the NCAA has a constitutional right to associate in order to break the law.

CONCLUSION

The circuit court correctly held there are issues of material fact both on plaintiff's due process claim and on his malicious interference claim. The order of the circuit court denying summary judgment should be affirmed.

RESPECTFULLY SUBMITTED, this the 21st day of March, 2024.

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CERTIFICATE OF SERVICE

This will certify that undersigned counsel for Plaintiff/Appellee has this day served a true and correct copy of the above and foregoing upon all counsel of record via MEC as follows:

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This will further certify that undersigned counsel for Plaintiff/Appellee has this day served a true and correct copy of the foregoing pleading or other paper, via U.S. mail, upon the following parties, who are not on the list to receive email notice/service for this case:

Honorable Kent E. Smith
Circuit Court Judge
Third Circuit Court District of Mississippi
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DATED, this the 21st day of March, 2024.

/s/ JIM WAIDE
Jim Waide