

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE 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
NO. L20-333

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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DEFENDANT-APPELLANT

v.

CASE NO. 2023-IA-00282-SCT

BARNEY LEE FARRAR

PLAINTIFF-APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case.

These representations are made so the justices of this Court may evaluate possible disqualification or recusal.

National Collegiate Athletic Association

Defendant-Appellant

Barney Lee Farrar

Plaintiff-Appellee

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Honorable Kent E. Smith

County

Circuit Court Judge for Lafayette

This, the 17th day of January 2024.

/s/ Kate M. Embry

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TABLE OF CONTENTS

Certificate of Interested Persons..... i

Table of Contents ii

Table of Authorities..... iv

Statement Regarding Oral Argument 2

Statement of Issues 2

Statement of Assignment 2

Statement of the Case 2

 A. Nature of the Case 2

 B. Statement of Facts 3

 (i) NCAA Membership, Bylaws, Enforcement, and Appeal 3

 (ii) Investigation, Farrar Allegations, and COI Findings 7

 C. Procedural Background and Current Status 10

Summary of the Argument 12

Standard of Review 13

Argument 14

 (A) Due Process 14

 1. Because the NCAA was *not* a state actor or quasi-state actor in connection with its enforcement process, the trial court should have granted the NCAA summary judgment on Farrar’s due process theory 14

 2. Farrar’s due process theory fails because Mississippi does not provide a private right of action against the state for a violation of the Mississippi Constitution 18

 (B) Malicious Interference with Prospective Business Relations 19

Conclusion.....	23
Certificate of Service	25

TABLE OF AUTHORITIES

CASES:

<i>ACI Chems., Inc. v. Metaplex, Inc.</i> , 615 So.2d 1192 (Miss. 1993)	22
<i>Americans for Prosperity Found. v. Bonta</i> , 141 S. Ct. 2373 (2021).....	20
<i>Bd. of Trustees of Ark. Tech Univ. v. NCAA</i> , No. 4:17-cv-00493, 2018 U.S. Dist. LEXIS 86123 (E.D. Ark. May 23, 2018).....	15,16
<i>Boy Scouts of America v. Dale</i> , 530 U.S. 640 (2000)	20
<i>Brentwood Academy v. Tenn. Sec. Sch. Ath. Ass’n</i> , 531 U.S. 288 (2001).....	17
<i>Brown v. Blue Cane Cowart Tippo Water Ass’n</i> , 309 So. 3d 478 (Miss. Ct. App. 2019)	15
<i>Christensen v. Michigan State Youth Soccer Ass’n</i> , 553 N.W.2d 638 (Michigan Ct. App. 1996).....	20
<i>City of Jackson v. Sutton</i> , 797 So. 2d 977 (Miss. 2001)	19
<i>Cohane v. NCAA</i> , 215 Fed. Appx. 13 (2 nd Cir. 2007)	17
<i>Cohane v. NCAA</i> , 612 Fed. Appx. 41 (2 nd Cir. 2015)	18
<i>Collier v. NCAA</i> , 783 F. Supp. 1576 (D. R.I. 1992)	16
<i>Diamondhead Country Club & Prop. Owners Ass’n v. Montjoy</i> , 820 So. 2d 676 (Miss. Ct. App. 2000)	14
<i>Estate of Manus v. Webster County</i> , 2014 U.S. Dist. LEXIS 43536 (N.D. Miss. Mar. 31, 2014).....	19
<i>Evanish v. Berry</i> , 536 So.2d 7 (Miss. 1988)	19
<i>Faul v. Perlman</i> , 104 So.3d 148 (Miss. Ct. App. 2012)	13
<i>Flood v. NCAA</i> , No. 1:15-cv-890, 2015 U.S. Dist. LEXIS 134016 (M.D. Penn. Aug. 26, 2015).....	17
<i>Jacox v. Circus Circus Miss., Inc.</i> , 908 So.2d 181 (Miss. Ct. App. 2005)	13
<i>Jones v. Alcorn State Univ.</i> , 337 So.3d 1062 (Miss. 2022).....	13
<i>Matthews v. NCAA</i> , 79 F. Supp. 2d 1199 (E.D. Wash. 1999)	16

<i>Minor v. Miss. Dep't of Pub. Safety</i> , No. 3:19CV155, 2020 U.S. Dist. LEXIS 66310 (N.D. Miss. Ap. 15, 2020)	19
<i>Miss. High Sch. Activ. Ass'n v. Coleman</i> , 631 So. 2d 768 (Miss. 1994)	1, 15, 17
<i>Miss. Power Co. v. Goudy</i> , 459 So. 2d 257 (Miss. 1984).....	15
<i>NCAA v. Miller</i> , 10 F.3d 633 (9th Cir. 1993)	16
<i>Palmer v. Biloxi Reg'l Med. Ctr</i> , 564 So. 2d 1346 (Miss. 1990).....	18
<i>RGH Enters v. Ghafarianpoor</i> , 329 So.3d 447 (Miss. 2021).....	13
<i>Richardson v. Grand Casinos of Miss., Inc.-Gulfport, LLC</i> , 935 So.2d 1146 (Miss. Ct. App. 2006)	13
<i>Spirit Lake Sioux Tribe of Indians v. NCAA</i> , 2012 U.S. Dist. LEXIS 199405 (D. N.D. May 1, 2012)	15-16
<i>Stringer v. Lowe</i> , 955 So. 2d 381 (Miss. Ct. App. 2006)	15
<i>Tarkanian v. NCAA</i> , 488 U.S. 179 (1988).....	1, 15-17
<i>Tunica Co. v. Town of Tunica</i> , 227 So. 3d 1007 (Miss. 2017)	15
<i>Wong v. Stripling</i> , 700 So. 2d 296 (Miss. 1997)	15
OTHER:	
MISS. CODE ANN. § 37-7-301 (1972)	17
MISS. R. CIV. P. 56.....	13

The NCAA is a private, unincorporated association of colleges and universities. In 1988, the United States Supreme Court in *Tarkanian v. NCAA* made clear that the NCAA does not act as the state when enforcing its bylaws.¹ As recognized by this Court, universities do not “delegate[] governmental powers to the [NCAA].”² Instead, just as members of other private organizations, such as churches, hunting clubs, and other voluntary membership associations, adopt rules of self-governance to serve their purposes, the NCAA’s members adopt rules and processes to govern themselves consistent with the NCAA’s goals. The NCAA’s bylaws state these rules applicable to member institutions and their employees.

Plaintiff Barney Farrar, former University of Mississippi assistant athletics director for football, has demanded money damages against the NCAA based on his general dislike of the infractions program the NCAA’s members adopted to govern themselves. His claim arose from his subjective views about the general fairness or unfairness of the NCAA’s self-governance rules and not the application of the bylaws to him specifically. Without dispute: (1) Farrar violated NCAA bylaws on multiple occasions while on the University’s football staff, and (2) the NCAA’s Committee on Infractions (“COI”) followed the NCAA bylaws in its enforcement and infractions process involving the University, which resulted in penalties against the University and a five-year “show cause” condition to a member institution hiring Farrar to perform athletics recruiting duties. Farrar asked the trial court to second-guess and interfere with the NCAA’s enforcement process. His action attacked the NCAA members’ fundamental right to associate and to adopt rules to govern themselves consistent with their shared goals.³

¹ 488 U.S. 179 (1988).

² *Miss. High Sch. Activ. Ass’n v. Coleman*, 631 So. 2d 768, 774 n.3 (Miss. 1994) (citing *Tarkanian*).

³ Farrar’s legal counsel has filed an identical Complaint for David Saunders attacking the NCAA members’ self-governance rights. See Saunders Complaint [ROA 609-632 (Sealed Vol. 5)]. At

STATEMENT REGARDING ORAL ARGUMENT

The NCAA does not request oral argument. The record and legal issues presented are straightforward, and oral argument would not materially assist the Court.

STATEMENT OF THE ISSUES

- A. Is the NCAA a state actor or quasi-state actor for purposes of the Mississippi Constitution's due process provision?
- B. Does the Mississippi Constitution provide a private right of action against state actors for alleged Constitutional violations?
- C. Does Farrar's claim that the NCAA maliciously interfered with his prospective business relations by prescribing a show cause penalty connected to his violations of NCAA bylaws fail as a matter of law when (1) the NCAA, a private association, has a right to adopt and enforce its rules and infractions process without judicial interference or second-guessing, and (2) the COI prescribed a show cause penalty consistent with the NCAA bylaws?

STATEMENT OF ASSIGNMENT

This Court should retain this appeal under Miss. R. App. P. 16.

STATEMENT OF THE CASE

A. Nature of the Case

In his Complaint, Farrar alleged the NCAA negligently adopted certain bylaws, maliciously interfered with his prospective business relations, violated his due process rights under the Mississippi Constitution, and usurped judicial authority with its hearing process.⁴ The NCAA moved the trial court for summary judgment on Farrar's claims.⁵ Acknowledging the NCAA as a private membership association entitled to interpret and apply its own rules without

plaintiff's request, the trial court stayed the *Saunders* action pending resolution of this appeal. See Motion and Order (Appendix "1").

⁴ Compl. (Jul. 23, 2020) [ROA 2-14 (Vol. 1)].

⁵ Sum. J. Mtn. [ROA 592-95 (Sealed Vol. 5)] and Brf. [ROA 496-521 (Sealed Vol. 2)].

judicial interference or second-guessing, the trial court correctly granted summary judgment on Farrar's negligence and usurpation of judicial process claims.⁶ However, the trial court denied summary judgment on Farrar's due process and malicious interference with prospective business relations claims.⁷ These rulings were erroneous because:

(1) Due Process

- a. Like the federal constitution, the Mississippi Constitution requires state action for a due process violation, and Mississippi has not delegated governmental powers to the NCAA; and
- b. No direct action exists for a due process violation under the Mississippi Constitution.

(2) Malicious Interference with Prospective Business Relations

- a. The non-interference doctrine applicable to private associations and the right to association under the First Amendment bar Farrar's claim; and
- b. The NCAA followed its member-adopted policies in connection with its infractions process and did not act with malice against Farrar.

B. Facts

(i) NCAA Membership, Bylaws, Enforcement, and Appeal

The NCAA, a private member association comprised of public and private colleges, universities and conferences, administers intercollegiate athletics for its members.⁸ The NCAA members adopt bylaws that fulfill the NCAA's purpose and govern their activities, including health and welfare of student-athletes, academic integrity, admissions, and recruiting.⁹ NCAA

⁶ Sum. J. Order at pp. 1, 2, 4 (¶¶ 1, 4) [RE 3; ROA 442-44].

⁷ *Id.* at pp. 2-3 (¶¶ 2-3).

⁸ J. Duncan Aff. at p. 1, ¶12 [RE4; ROA 633].

⁹ *Id.* at pp. 1-2, ¶¶ 3-5 [RE 4; ROA 633-34].

members agree to follow and enforce the NCAA bylaws and to ensure compliance by their staff, student-athletes, and others representing the member's athletics interests.¹⁰

To ensure NCAA members comply with the rules, the members have adopted an enforcement process to review conduct by a member as potentially violating NCAA bylaws:

It is the mission of the NCAA infractions program to uphold integrity and fair play among the NCAA membership, and to proscribe appropriate and fair penalties if violations occur. One of the fundamental principles of the infractions program is to ensure that those institutions and student-athletes abiding by the NCAA constitution and bylaws are not disadvantaged by their commitment to compliance. The program is committed to fairness of procedures and timely resolution of infractions cases. The ability to investigate allegations and penalize infractions is critical to the common interests of the Association's membership and the preservation of its enduring values.¹¹

Under these bylaws, the NCAA membership authorizes the NCAA's enforcement staff to investigate alleged violations of NCAA bylaws by members.¹² Members and their employees must cooperate with the enforcement staff in this process.¹³ If the enforcement staff concludes sufficient information supports potential bylaw violations, the enforcement staff delivers to the member and any member employee placed at risk a Notice of Allegations ("NOA") outlining the alleged NCAA rules violations and supporting information.¹⁴ The member and employee then have an opportunity to review the NCAA investigative materials, to gather additional information, and to respond to the NOA.¹⁵

¹⁰ *Id.* at p. 2, ¶ 6 [RE 4; ROA 634]; Div. I Man. at Const. Art. 2.8 (Principle of Rules Compliance) [RE 5; ROA 653].

¹¹ J. Duncan Aff. at pp. 2-3, ¶¶ 6-10 [RE 4; ROA 634-35]; Div. I Man. at Bylaw Art. 19.01.1 [RE 5; ROA 693].

¹² J. Duncan Aff. at p. 3, ¶ 8 [RE 4; ROA 635].

¹³ *Id.* at p. 3, ¶ 9; Div. I Man. at Bylaw Art. 19.2.3 [RE 5; ROA 695].

¹⁴ J. Duncan Aff. at p. 3, ¶ 8 [RE 4; ROA 635]; Div. I Man. at Bylaw Art. 19.7 [RE 5; ROA 701-03].

¹⁵ *Id.*

The Committee on Infractions (“COI”), comprised of persons who are not NCAA employees, administers the infractions hearing process upon completion of the investigation and receipt of the NOA and other written submissions from the enforcement staff, member, and involved individuals.¹⁶ At the hearing and subject to the COI’s procedures, “the parties or their legal counsel may deliver opening and closing statements, present factual information, make arguments, explain the alleged violations and answer questions from panel members.”¹⁷ The COI, as a private membership committee, conducts the hearing according to the NCAA’s member-adopted procedures and has no power to issue subpoenas or to legally compel a witness to appear or give sworn testimony.¹⁸

After the hearing, the COI makes factual findings and determines if violations of the NCAA bylaws occurred.¹⁹ Violations are structured under the bylaws as “Level I” – severe breach of conduct, “Level II” – significant breach of conduct, and “Level III” – breach of conduct that is isolated or limited in nature.²⁰ If it concludes a violation occurred, the COI may prescribe an appropriate penalty or recommend to the Board of Directors suspension or termination of membership in an appropriate case.²¹

Among the penalties the COI may direct in appropriate circumstances under the NCAA bylaws is a “show-cause order”, which may require a member to “show cause” why the COI should not impose penalties on the member if the member fails to sufficiently discipline or take

¹⁶ J. Duncan Aff. at p. 3, ¶9 [RE 4; ROA 635]; Div. I Man. at Bylaw Art. 19.3 [RE 5; ROA 696-97].

¹⁷ Div. I Man. at Bylaw Art. 19.7.7.3 (Information Presented at Hearings) [RE 5; ROA 702].

¹⁸ *Id.*

¹⁹ Div. I Man. at Bylaw Art. 19.3.6 (Authority and Duties of Committee) and 19.7.7 (Committee Hearings) [RE 5; ROA 696-670, 702].

²⁰ Div. I Man. at Bylaw Art. 19.1 (Violation Structure) [RE 5; ROA 694-95].

²¹ J. Duncan Aff. at pp. 3-4, ¶ 10 [RE 4; ROA 635-36]; Div. I Man. at Bylaw 19.7.8.4 (Calculation of Penalty) and 19.3.6(c) (Authorities and Duties of Committee) [RE 5; ROA 696-70, 703].

appropriate corrective action against an employee found to have violated NCAA bylaws.²² The bylaws define a show-cause order as follows:

A show-cause order is an order that requires a member institution to demonstrate to the satisfaction of the [COI] why it should not be subject to a penalty or additional penalty for not taking appropriate disciplinary or corrective action with regard to an institutional staff member or representative of the institution’s athletics interests found by the committee as having been involved in a violation of the NCAA constitution and bylaws.²³

The COI’s member-adopted internal operating procedures provide:

Show-Cause Orders. Show-cause orders may be general in nature or have specific conditions attached to them. Show-cause orders run to the individual’s conduct that violated NCAA legislation while on staff at a member institution.

...

Specific Show-Cause Orders. Bylaw 19.9.5.4 and Figure 19-1 contemplate show-cause orders with specific conditions. ... Show-cause orders with specific conditions are prescribed consistent with the ranges identified in Figure 19-1. Restrictions include, but are not limited to, recruiting activity, practice and game suspensions. Specific show-cause orders function similarly to a traditional penalty. If there is non-compliance with a specific show-cause penalty, additional penalties may be prescribed.²⁴

The Bylaws include the following penalty guidelines for show-cause orders:²⁵

Violation Level I	Violation Level II	Show-Cause Order	Restrictions	
Aggravation		3 to 10 years	All athletically related duties	
Standard	Aggravation	2 to 5 years	All or partial coaching and recruiting duties (including game suspensions)	
Mitigation	Standard	0 to 2 years	All or partial coaching and recruiting duties (including game suspensions)	

²² *Id.*

²³ Div. I Man. at Bylaw Art. 19.02.3 [RE 5; ROA 694].

²⁴ COI Internal Operating Procedures at 5-15-3 [RE 6; ROA 756].

²⁵ Div. I Man. at Bylaw Art. 19-1 [RE 5; ROA 713].

	Mitigation	0 to 1 years	All or partial coaching and recruiting duties (including game suspensions)	
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NCAA members and employees may appeal the COI’s findings, conclusions, penalties, and/or corrective actions to the NCAA’s Infractions Appeals Committee (“IAC”), which is comprised of individuals on or previously on the staff of an active member institution or conference and at least one individual not connected with a member institution or conference.²⁶ The IAC considers appeals from COI decisions involving Level I and Level II violations and may affirm, reverse, or vacate and/or remand the COI’s findings, conclusions, penalties, corrective actions, requirements, and/or other conditions and obligations of membership prescribed for violations of NCAA bylaws.²⁷

(ii) Investigation, Farrar Allegations, and COI Findings

The University of Mississippi employed Farrar as an assistant athletics director for football at the University from 2012 until December 2016, when the University terminated his employment.²⁸ Farrar’s employment contract required Farrar to comply with NCAA rules, and Farrar understood that compliance was part of his employment responsibilities at the University.²⁹ Farrar admits he violated NCAA bylaws while on the University’s football staff.³⁰

²⁶ Div. I Man. at Bylaw Art 19.4.1 [RE 5; ROA 697-68].

²⁷ *Id.* at Art. 19.4.5.

²⁸ Compl., ¶17 [ROA 7 (Vol. 1)].

²⁹ Farrar Dep., 39:15-40:8 [ROA 873-74 (Sealed Vol. 7)].

³⁰ Farrar Resp. to Notice of Allegations at pp. 11-16 [ROA 905-10 (Sealed Vol. 7)]; Farrar Ltr. to Sheridan (Jan. 19, 2017) [ROA 924-30 (Sealed Vol. 8)]; Farrar Dep., 95:24-98:24 and 115:25-122:3 [ROA 875-86 (Sealed Vol. 7)].

The NCAA's enforcement staff investigated the University's football program, including alleged bylaws violations by Farrar.³¹ Following its investigation and after the University had already terminated Farrar's employment in December 2016, the NCAA enforcement staff delivered a NOA in January 2017, which included allegations of violations by Farrar.³² After receiving written responses from the University, Farrar, and others involved in the infractions process, the COI conducted a two-day hearing in September 2017 to discuss the allegations and materials with NCAA enforcement staff representatives, University representatives, and the involved individuals, including Farrar and his legal counsel.³³

Farrar and his legal counsel, Bruse Loyd, attended the two-day COI hearing. According to Loyd, the COI members were professional and engaged from start to finish of the COI hearing.³⁴ In fact, after the appeals process, Loyd sent a note thanking individuals involved in the COI hearing and appeals process for their professionalism, courtesy, and patience.³⁵ Loyd described Mike Sheridan, the NCAA enforcement staff member who led the investigation and who presented the allegations to the COI, as professional, courteous, prompt, and responsive.³⁶ Farrar also spoke positively about Sheridan.³⁷

After the hearing, the COI made findings concerning the allegations, including findings of violations resulting in penalties to the University arising, in part, from Farrar's violations of NCAA bylaws.³⁸ The COI found Farrar committed multiple violations of NCAA bylaws relating to

³¹ J. Duncan Aff. at p. 4, ¶13 [RE 4; ROA 636].

³² See COI Decision at pp. 3-4 [RE 7; ROA 777-78].

³³ *Id.*

³⁴ Loyd Dep., 80:2-81:15 [ROA 934-35 (Sealed Vol. 8)].

³⁵ *Id.* at 80:19-81:6 [ROA 934-35 (Sealed Vol. 8)].

³⁶ *Id.* at 79:6-80:1 [ROA 933-34 (Sealed Vol. 8)].

³⁷ Farrar Dep., 161:23-162:2 [ROA 887-89 (Sealed Vol. 7)].

³⁸ COI Decision [RE 7; ROA 775-859].

provision of impermissible recruiting inducements to prospective student athletes and their friends and family, including: arranging gifts of clothing and merchandise;³⁹ cost-free lodging, meals, and transportation;⁴⁰ and cash payments of between \$13,000 and \$15,600 to a prospective student athlete.⁴¹ The COI also found Farrar violated NCAA ethical conduct bylaws by providing false information to the enforcement staff during its investigation.⁴²

Consistent with its bylaws, the COI considered penalties and weighed aggravating and mitigating factors, finding as to Farrar:

Aggravating Factors for the Assistant Athletic Director

19.9.3-(a): Multiple Level I violations;

19.9.3-(e): Unethical conduct, compromising the integrity of the investigation, failing to cooperate during the investigation or refusing to provide all relevant or requested information;

19.9.3-(f): The violations were premeditated, deliberate or committed after substantial planning; and

19.9.3(m): The violations were intentional, willful and demonstrated blatant disregard for the NCAA constitution and bylaws.

Mitigating Factors for the Assistant Athletic Director

19.9.4-(h): The absence of prior conclusions of Level I, Level II major violations.⁴³

The COI prescribed a “show-cause order” which placed conditions on a member institution’s hiring of Farrar in recruiting activities for a five-year period:

The assistant athletic director referred two prospects to the retail establishment, where they received free merchandise. He arranged impermissible lodging, meals, and transportation for visiting prospects and maintained a second phone that he used for recruiting activities in violation of institutional policy. When student-athlete 1 expressed a desire to be paid for his commitment to attend Mississippi, the assistant athletic director referred him to boosters 9 and 10, who provided student-athlete 1 with thousands of dollars. During the investigation, he provided false information to the enforcement staff. Therefore, the assistant

³⁹ *Id.* at pp. 32-35 [RE 7; ROA 806-09].

⁴⁰ *Id.* at pp.36-38 [RE 7; ROA 810-12].

⁴¹ *Id.* at pp. 39 [RE 7; ROA 813].

⁴² *Id.* at pp. 41-42 [RE 7; ROA 815-16].

⁴³ *Id.* at p. 56 [RE 7; ROA 830].

athletic director will be informed in writing that the panel prescribes a five-year show-cause order pursuant to Bylaw 19-9-5-4. The show-cause period shall run from December 1, 2017, through November 30, 2022. Any NCAA member institution employing the assistant athletic director during the five-year period shall prohibit him from all recruiting duties, both on- and off-campus. The five-year show-cause order is consistent with those prescribed in other cases. See *Southern Methodist* (prescribing a five-year show-cause order for the Level I-Aggravated violations of a men's golf coach who provided impermissible recruiting inducements to multiple prospects and gave false or misleading information during the investigation).⁴⁴

Farrar appealed to the IAC on some of the COI's findings of violations by him and the show-cause penalty connected to his conduct.⁴⁵ In November 2018, the IAC found the COI's five-year show-cause penalty for Farrar's conduct within its discretion and upheld the COI's factual findings, conclusions, and show-cause penalty.⁴⁶

C. Procedural Background and Current Status

In his Complaint, Farrar alleged the NCAA was negligent, tortiously interfered with prospective business relations, violated due process under Section 14 of the Mississippi Constitution, and "usurp[ed] [the] judicial function of the State", in connection with its infractions process involving the University, which resulted in the December 1, 2017 COI decision.⁴⁷ The NCAA moved for summary judgment on Farrar's claims. After a summary judgment hearing, the trial court granted in part and denied in part the NCAA's Motion by Order filed February 21, 2023.⁴⁸

The trial court granted summary judgment to the NCAA on Farrar's negligence and usurpation of judicial function theories, acknowledging that the NCAA is a private membership

⁴⁴ *Id.* at p. 60 [RE 7; ROA 834]

⁴⁵ Farrar Notice of Appeal to IAC [ROA 860-63 (Sealed Vol. 7)].

⁴⁶ IAC Decision [RE 8ROA 864-70 (Sealed Vol. 7)].

⁴⁷ Compl. [ROA 9-13 (Vol. 1)].

⁴⁸ Sum. J. Order [RE 3; ROA 442-44].

association entitled to interpret and apply its member-adopted self-governance rules and citing “the generally accepted rule that courts will not undertake to inquire into the regularity of the procedures adopted and pursued by an association in deciding its own affairs”.⁴⁹

Despite this finding, the trial court erroneously denied summary judgment on Farrar’s due process violation theory under the Mississippi Constitution, stating:

The Mississippi Constitution states that ‘No person shall be deprived of life, liberty, or property except by due process of law.’ Further, the Mississippi Constitution does not require state action by an entity (the NCAA) to which the state has delegated enforcement responsibility. This delegation is enough to invoke due process. Plaintiff asserts the NCAA’s unfair procedures violated Plaintiff’s constitutional due process rights by taking away his liberty and property right of practicing his profession without an opportunity to be heard. The United States Supreme Court has ‘frequently recognized the severity of depriving a person of the means of livelihood.’ ... Due Process requires [the] right to be heard ‘in a meaningful manner.’ ... The rights to confront and cross-examine and to call witnesses on one’s own behalf have long been recognized as essential to due process.’ ... Accordingly, the Court finds that genuine issues of material fact exist.⁵⁰

The trial court also wrongly denied summary judgment on Farrar’s malicious interference with prospective employment claim, finding that “subjecting [Farrar] to a five-year show cause order” raised a genuine issue of material fact as to malicious interference with his future employment.⁵¹

⁴⁹ *Id.* at ¶1 (negligence) (“[T]he NCAA is a private membership association and as such is entitled to the interpretation and application of its rules), and ¶4 (usurpation of judicial function) (“As noted above in *Gillard and Berry*, this Court finds the NCAA is a private organization entitled to promulgate its own rules.”).

⁵⁰ *Id.* at ¶3.

⁵¹ *Id.* at ¶2 (“[T]he Court finds genuine issues of material fact exist as to whether [the NCAA’s] subjecting Farrar to a five-year show cause restriction maliciously interfered with Farrar’s future employment”).

The NCAA timely petitioned this Court for Interlocutory Appeal from the February 21, 2023 Order, and this Court granted the appeal on August 1, 2023. The NCAA has no knowledge of any similar appeal pending before this Court or the Mississippi Court of Appeals.

SUMMARY OF THE ARGUMENT

Though properly determining that the NCAA is a private association entitled to adopt and enforce its own rules, the trial court erroneously found “genuine issues of material fact” concerning the due process claim and denied summary judgment. The trial court’s ruling contradicted clear binding precedent. The United States Supreme Court determined in 1988 that the NCAA is not a state actor for purposes of federal due process claims, and this Court has long acknowledged that Mississippi’s due process clause mirrors the due process clause of the Fourteenth Amendment to the United States Constitution, *i.e.*, the Mississippi due process clause requires state action. The NCAA was not a state actor or quasi-state actor in connection with its enforcement process involving the University, as the University delegated no governmental powers to the NCAA. No genuine material fact issue existed, and the trial court erred in denying summary judgment to the NCAA.

Farrar’s malicious interference with prospective business relations theory arose from the COI’s show-cause penalty imposed for Farrar’s violations. Without dispute, the NCAA’s members adopted an enforcement process that (1) directs the COI to prescribe penalties appropriate under the bylaws if it finds one or more violation, and (2) includes a “show cause” penalty by which the COI may impose a show-cause condition on a member institution’s employment of an individual found to have violated NCAA bylaws. The COI, following an infractions hearing, found Farrar committed multiple Level I violations of NCAA bylaws and imposed a five-year “show cause” penalty, placing a condition on a member institution’s hiring

of Farrar in a recruiting position for a five-year period. As the NCAA had a right to adopt and enforce its bylaws without judicial interference and the COI prescribed the show-cause penalty consistent with the member-adopted process, the non-interference doctrine bars Farrar’s malicious interference with prospective business relations allegation. Further, because it imposed the “show cause” penalty under the authority of the NCAA bylaws, the COI’s imposition of the penalty could not possibly create a genuine material fact issue that the NCAA “maliciously interfered with [Farrar’s] future employment.” The trial court erred in denying summary judgment to the NCAA.

STANDARD OF REVIEW

This Court “review[s] a trial court’s grant or denial of summary judgment de novo.”⁵² Summary judgment must be granted if the Court, in viewing the evidence in the light most favorable to the non-movant, determines no genuine issue of material fact exists and the movant is entitled to a judgment as a matter of law.⁵³ To survive summary judgment, a non-movant must show specific facts demonstrating a genuine issue of material fact.⁵⁴ “[T]he nonmoving party must produce significant probative evidence of a genuine issue for trial.”⁵⁵ Unsupported, conclusory allegations cannot defeat a summary judgment motion.⁵⁶

⁵² *Jones v. Alcorn State Univ.*, 337 So.3d 1062, 1066 (¶10) (Miss. 2022) (citing *Capiah Cnty. V. Oliver*, 51 So.3d 205, 207 (Miss. 2011)).

⁵³ Miss. R. Civ. P. 56; *RGH Enters v. Ghafarianpoor*, 329 So.3d 447, (Miss. 2021).

⁵⁴ *Richardson v. Grand Casinos of Miss., Inc.-Gulfport, LLC*, 935 So.2d 1146, 1147 (Miss. Ct. App. 2006).

⁵⁵ *Faul v. Perlman*, 104 So.3d 148, 152 (¶11) (Miss. Ct. App. 2012).

⁵⁶ *See Jacox v. Circus Circus Miss., Inc.*, 908 So.2d 181, 184 (Miss. Ct. App. 2005).

ARGUMENT

A. Due Process

Farrar alleged the NCAA's enforcement process against the University deprived Farrar of due process rights under Article 3, Section 14 of the Mississippi Constitution.⁵⁷ While correctly holding the NCAA is a private membership organization entitled to adopt, interpret, and apply its own rules without judicial interference or second-guessing, the trial court erred in finding (based merely on Farrar's "assertions" and "allegations") that genuine issues of material fact exist as to whether the NCAA was a state actor or quasi-state actor during its enforcement process and allowing Farrar's due process claim to proceed.

The trial court erred in denying summary judgment in favor of the NCAA because (1) like the federal constitution, the Mississippi Constitution requires state action for a due process violation, and the University delegated no governmental power to the NCAA in connection with its enforcement process, and (2) even if the NCAA had governmental power, Mississippi has no private cause of action against the state for violations of the Mississippi Constitution.

1. Because the NCAA was *not* a state actor or quasi-state actor in connection with its enforcement process, the trial court should have granted the NCAA summary judgment on Farrar's due process theory.

"The threshold requirement of any due process claim, be it substantive or procedural, is a showing that the government deprived a plaintiff of a liberty or property interest."⁵⁸ "[S]tate

⁵⁷ Under Article 3, Section 14 of the Mississippi Constitution, "[n]o person shall be deprived of life, liberty, or property except by due process of law." While Farrar has argued no state action is required under Mississippi's due process clause, he cited no authority to support his argument. To the contrary, the Mississippi Constitution does not extend due process requirements to private parties.

⁵⁸ *Diamondhead Country Club & Prop. Owners Ass'n v. Montjoy*, 820 So. 2d 676, 681 (Miss. Ct. App. 2000).

action requires both an alleged constitutional deprivation caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the state is responsible, and ... the party charged with the deprivation must be a person who may fairly be said to be a state actor.”⁵⁹ “Without state action, there can be no valid claim of unconstitutionality.”⁶⁰ While Farrar argues state action is not required under Mississippi’s due process clause, this Court has long recognized that “[t]he due process required by the federal constitution is the same ‘due process of law’ which is required by Article 3, Section 14” of the Mississippi Constitution.⁶¹

The United States Supreme Court in *Tarkanian v. NCAA* “foreclosed any claim ... that the NCAA is a state actor.”⁶² In *Tarkanian*, the Supreme Court rejected the plaintiff’s arguments that the NCAA acted as the government in connection with its investigation and enforcement functions and found the NCAA is not a state actor and did not act under the force of state law.⁶³

⁵⁹ *Montjoy*, 820 So.2d at 682 (citing *American Mfgs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 143 L. Ed. 130, 50 (1999)).

⁶⁰ *Miss. High Sch. Activities Ass’n v. Coleman*, 631 So.2d 768, 773 (Miss. 1994) (citing *Rendell-Baker v. Khon*, 457 U.S. 830, 837 (1982)); *Brown v. Blue Cane Cowart Tipppo Water Ass’n*, 309 So. 3d 478, 487 (Miss. Ct. App. 2019) (“Denial of due process by a private party, without some form of state action, involves no constitutional violation.” (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982))); *Stringer v. Lowe*, 955 So. 2d 381, 383 (Miss. Ct. App. 2006).

⁶¹ *Tunica Co. v. Town of Tunica*, 227 So. 3d 1007, 1016-17 (¶¶16-17) (Miss. 2017) (quoting *Walters v. Blackledge*, 71 So. 2d 433, 515 (Miss. 1954) and *Gillard*, 352 So. 2d at 1081) (“Article 3, Section 14 [is] ‘essentially identical’ to its federal counterpart.” (quoting *Gillard* 352 So. 2d at 1081); *Miss. Power Co. v. Goudy*, 459 So. 2d 257, 261 (Miss. 1984) (same); see *Wong v. Stripling*, 700 So. 2d 296, 304 (Miss. 1997) (physician collaterally estopped from relitigating issue of whether hospital’s termination of his surgical privileges was state action for purpose of State Constitution due process clause where federal court had already determined hospital’s actions were not state action for purpose of Federal Constitution).

⁶² *Bd. of Trustees of Ark. Tech Univ. v. NCAA*, No. 4:17-cv-00493, 2018 U.S. Dist. LEXIS 86123 at *4-5 (E.D. Ark. May 23, 2018) (quoting *Spirit Lake Sioux Tribe of Indians v. NCAA*, No. 2:11-cv-95, 2012 U.S. Dist. LEXIS 199405 at *22-23 (D. N.D. May 1, 2012)) (holding NCAA is not a state actor and dismissing university’s section 1983 claim); see also *infra* at n. 67.

⁶³ 488 U.S. 179, 188-99 (1988).

The Supreme Court specifically rejected Tarkanian’s argument that the NCAA was a state actor because his public university employer delegated to the NCAA oversight of its athletics programs and enforcement rules, finding “[the] NCAA is properly viewed as a *private* actor at odds with the State when it represents the interests of the entire membership in an investigation of one public university”.⁶⁴ The Supreme Court further stated:

The NCAA enjoyed no governmental powers to facilitate its investigation. It had no power to subpoena witnesses, to impose contempt sanctions, or to assert sovereign authority over any individual. Its greatest authority was to threaten sanctions against [the university], with the ultimate sanction being expulsion of the university from membership.⁶⁵

The Supreme Court concluded that the NCAA imposed sanctions against members under the authority of the private association and not under any force of state law.⁶⁶

Since *Tarkanian*, state and federal courts across the country have held the NCAA is not the government in connection with its enforcement process.⁶⁷ Notably, while this Court has

⁶⁴ *Id.* at 191-92, 197 (emphasis added).

⁶⁵ *Id.* In *NCAA v. Miller*, the NCAA challenged under the Commerce Clause a Nevada statute imposing certain minimum due process procedural standards on the NCAA’s enforcement process. 10 F.3d 633 (9th Cir. 1993). The Ninth Circuit found that the statute restricted the NCAA from establishing uniform rules to govern and enforce practices associated with intercollegiate athletics and that applying such due process requirements to the NCAA’s enforcement procedures violated the Commerce Clause. *Id.* at 638-40.

⁶⁶ *Tarkanian*, 488 U.S. at 199.

⁶⁷ See *Bd. of Trustees of Ark. Tech Univ.*, No. 4:17-cv-00493, 2018 U.S. Dist. LEXIS 86123 at *4-5 (holding NCAA is not a state actor and dismissing university’s section 1983 claim); *Spirit Lake Sioux Tribe of Indians*, 2012 U.S. Dist. LEXIS 199405 at *22-23 (stating: (1) “*Tarkanian* foreclosed any claim that [the University] may have that the NCAA is a state actor, and the plaintiffs, who have absolutely no privity with the NCAA at all, have a position that is even more attenuated”; and (2) “The NCAA’s choice to adopt a policy that includes sanctions for use of specified nicknames and imagery – however provident or improvident that policy may be – is merely a directive by a voluntary association to its membership. As *Tarkanian* demonstrates, such governance cannot rise to the level of state action.”); *Matthews v. NCAA*, 79 F. Supp. 2d 1199, 1207 (E.D. Wash. 1999) (NCAA not state actor for purposes of assessing student-athlete’s due process claim contesting eligibility determination); *Collier v. NCAA*, 783 F. Supp. 1576, 1578 (D. R.I. 1992) (“Absent [state action], the due process requirement of the Constitution is not

held the Mississippi High School Activities Association can be a state actor for due process purposes because local school boards delegated certain governmental authority under state law,⁶⁸ the Court has also noted the same analysis does not apply to the NCAA because public universities did not delegate governmental power to it.⁶⁹

Farrar has attempted to distinguish *Tarkanian*, citing a single 2007 decision from the Second Circuit Court of Appeals, *Cohane v. NCAA*.⁷⁰ However, the 2007 *Cohane* opinion involved the appeal of a denial of a Rule 12(b)(6) motion to dismiss, not the denial of a Rule 56 summary judgment motion.⁷¹ The Second Circuit initially found the plaintiff plead sufficient facts to survive dismissal at the 12(b)(6) stage when alleging the NCAA willfully participated in “joint action” with the state university to violate the plaintiff’s rights.⁷² The appellate court specifically distinguished *Tarkanian* because the *Cohane* district court did not find in the complaint the same facts upon which the Supreme Court relied in *Tarkanian*.⁷³ In contrast, at

implicated. The NCAA is not a state actor; plaintiff’s constitutional claim must fail.”); *Flood v. NCAA*, No. 1:15-cv-890, 2015 U.S. Dist. LEXIS 134016 at *20-21 (M.D. Penn. Aug. 26, 2015) (“[T]he United States Supreme Court has held that the NCAA is not a state actor for purposes of liability under § 1983. ... Therefore, NCAA disciplinary proceedings simply do not create civil rights liability under [Section 1983]” (citing *Tarkanian*)).

⁶⁸ See *Coleman*, 631 So. 2d at 774 (Miss. 1994) (“The power to regulate athletic programs is conferred upon the local school boards by the Mississippi Legislature. Miss. Code Ann. § 37-7-301(q) (1972). The school boards, in turn, delegated this authority to the Association. It follows that the Association’s actions, flowing as they do from statutory authority, are, as this Court and others have implicitly or explicitly found, state action for the purpose of constitutional analysis.”); see also *Brentwood Academy v. Tenn. Sec. Sch. Ath. Ass’n*, 531 U.S. 288, (2001) (“state action may be found if, though only if, there is such a ‘close nexus between the State and the challenged action’ that the seemingly private behavior ‘may fairly be treated as that of the State itself.’” (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974))).

⁶⁹ *Coleman*, 631 So. 2d at 774 n.3.

⁷⁰ 215 Fed. App’x 13 (2nd Cir. 2007); Resp. to Interloc. Pet. at 13; Sum. J. Resp. Brf., pp. 15-16 [ROA 1,555-56 (Sealed Vol. 12)].

⁷¹ 215 Fed. App’x 13 at 14.

⁷² *Id.* at 15-16.

⁷³ *Id.*

the Rule 56 stage, the Second Circuit affirmed the district court's conclusion that the NCAA was *not* a state actor and affirmed judgment for the NCAA as a matter of law, stating, "Cohane has failed to raise a genuine dispute as to whether the NCAA ... and SUNY Buffalo, a state actor, shared a common goal to violate his rights, let alone that they shared such a goal with respect to the decision to impose the show-cause order ..." ⁷⁴

The NCAA is not a state actor or quasi-state actor and took no governmental action in connection with its investigation and enforcement process involving the University. The NCAA's authority extends only to enforce its own privately adopted bylaws, which the trial court correctly noted the NCAA interprets and applies without judicial interference. ⁷⁵ Neither Farrar nor the trial court cited any Mississippi law delegating any governmental power to the NCAA or otherwise identified any governmental authority the State delegated to the NCAA. Rather, the trial court relied on Farrar's "allegations" and "assertions", which are insufficient to defeat summary judgment. ⁷⁶ Because the NCAA was not acting as the government during its enforcement process involving the University, the trial court erred in denying summary judgment in favor of the NCAA on Farrar's due process violation theory.

2. Farrar's due process theory fails because Mississippi does not provide a private right of action against the state for a violation of the Mississippi Constitution.

Even if the NCAA was a state actor or quasi-state actor in connection with its enforcement process, Farrar could still not pursue recovery for his due process theory because

⁷⁴ *Cohane v. NCAA*, 612 Fed. Appx. 41, 44 (2nd Cir. 2015).

⁷⁵ Sum. J. Order, at p. 1 [RE 3].

⁷⁶ *Palmer v. Biloxi Reg'l Med. Ctr.*, 564 So.2d 1346, 1356 (Miss. 1990) ("Mere allegation or denial of material fact is insufficient to generate a triable issue of fact and avoid an adverse rendering of summary judgment.").

the Mississippi Constitution “does not provide a direct cause of action.”⁷⁷ The Mississippi Constitution has no counterpart to 42 U.S.C. § 1983. As such, even if the NCAA acted as the government, Mississippi does not provide for a direct action against the NCAA for an alleged violation of the Mississippi Constitution. Rather, 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.⁷⁸

B. Malicious Interference with Prospective Business Relations

Farrar alleged that the NCAA “exceeded any authority it had over [Farrar]” and “committed the Mississippi law tort of malicious interference with employment” with its “show cause” order connected to Farrar’s violations of NCAA bylaws. The trial court erred by concluding that “genuine issues of material fact exist as to whether [the NCAA’s] subjecting [Farrar] to a five-year show cause order maliciously interfered” with his prospective business relations and denying summary judgment to the NCAA.

The NCAA, a private association, adopts and enforces its own rules and enforcement processes. Mississippi courts do not interfere with or second-guess the internal operations of private membership associations such as the NCAA.⁷⁹ Courts in other jurisdictions also consistently refuse to enforce or second-guess a private organization’s interpretation or application of its rules, recognizing that private membership organizations have their own

⁷⁷ *Minor v. Miss. Dep’t of Pub. Safety*, No. 3:19CV155, 2020 U.S. Dist. LEXIS 66310, *7 (N.D. Miss. Ap. 15, 2020) (citing *City of Jackson v. Sutton*, 797 So. 2d 977, 981 (Miss. 2001)).

⁷⁸ *Estate of Manus v. Webster County*, 2014 U.S. Dist. LEXIS 43536, *72-73 (N.D. Miss. Mar. 31, 2014) (dismissing claim that state defendants violated plaintiff’s rights under Mississippi Constitution); see *Sutton*, 797 So.2d at 981 (holding plaintiff could not proceed under Mississippi Constitution because “[t]he caselaw is clear that the Mississippi Tort Claims Act is the only route by which the plaintiffs could file suit against the [defendants]”).

⁷⁹ See *Gillard*, 352 So. 2d at 1073; *Evanish v. Berry*, 536 So.2d 7, 8 (Miss. 1988) (recognizing general rule that courts will not undertake to inquire into regularity of procedures adopted and pursued by association in deciding own affairs).

procedures for adjudicating disputes or changing rules.⁸⁰ Micro-management of these issues is not the concern of the judiciary.⁸¹ This general non-interference rule comports with the constitutionally-protected right to associate under the First Amendment.⁸²

Farrar’s malicious interference with prospective business relations theory arises from the authority given to the COI under the NCAA bylaws to determine appropriate penalties for rules violations, and specifically, a “show-cause order”.⁸³ Farrar alleges that the COI’s mere issuance of the show-cause order under the infractions process constitutes malicious interference with his prospective business relations: “By entering an order expressly affecting Plaintiff’s future employment, Defendant exceeded any authority it had over Plaintiff and exceeded any authority it had in any contract with Plaintiff. Defendant committed the Mississippi law tort of malicious interference with employment.”⁸⁴

⁸⁰ See Appendix “2”.

⁸¹ *Id.*

⁸² *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021) (“Implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate.”); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000) (“[I]mplicit in the right to engage in activities protected by the First Amendment’ is ‘a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.’ ... Government actions that may unconstitutionally burden this freedom may take many forms, one of which is ‘intrusion into the internal structure or affairs of an association’ like a ‘regulation that forces the group to accept members it does not desire.’” (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622-23 (1984))); see also *Christensen v. Mich. St. Youth Soccer Ass’n*, 553 N.W.2d 638, 641 (Mich. Ct. App. 1996) (“It is at the heart of the American libertarian tradition that the individual be given wide rein in structuring his relationships with other individuals, if only because the alternative of close government control threatens liberty itself.” (internal quotations omitted)).

⁸³ Compl. at p. 11 (Count II) [ROA 12 (Vol. 1)].

⁸⁴ *Id.*

Under the NCAA’s rules, the COI prescribes penalties for violations of the NCAA’s bylaws, subject to review by the IAC.⁸⁵ The NCAA’s infractions process includes a “show-cause” penalty, which the COI may use when appropriate under the bylaws.⁸⁶ This member-adopted enforcement mechanism is not unique to Farrar or the infractions process involving the University. Rather, the bylaws apply to member institutions across the country and, by extension, to the employees and representatives of the member institutions.

The NCAA followed and enforced its Bylaws, as adopted by its members, in connection with the enforcement and infractions process involving the University. Following an infractions hearing, the COI concluded Farrar committed multiple Level I violations of NCAA bylaws relating to athletics recruiting and violated the NCAA’s ethical conduct rules by providing false and incomplete information to the NCAA’s enforcement staff during its investigation of the University.⁸⁷ Having found violations, the COI then prescribed penalties, consistent with the bylaws. The COI considered aggravating and mitigating factors affecting penalties and found Farrar’s violations to be aggravated.⁸⁸ The COI imposed a five-year show cause condition to a member institution’s employment of Farrar in a recruiting position consistent with the NCAA bylaws and penalty guidelines.⁸⁹

⁸⁵ J. Duncan Aff. pp. 3-4, ¶ 10 [RE 4; ROA 635-36]; Div. I Man. at Bylaw Art. 19.7.8.4 (Calculation of Penalty), 19.3.6(c) (Authorities and Duties of Committee), 19.01.4 (Penalty Structure) [RE 5; ROA 694-703]; *see supra* pp. 5-7.

⁸⁶ *Id.*

⁸⁷ COI Decision at pp. 32-42 [RE 7; ROA 806-16].

⁸⁸ *Id.* at p. 56 [ROA 830]; Div. I Man. at Bylaw Art. 19.9.2 (Factors Affecting Penalties) [RE 5; ROA 704].

⁸⁹ COI Decision at p. 60 [ROA 834 (Sealed Vol. 7)]; Div. I Man. at Bylaw Figure 19-1 (Penalty Guidelines) [ROA 712 (Sealed Vol. 6)].

By adopting and enforcing its bylaws, the NCAA did not engage in intentional and willful acts calculated to cause damage to Farrar in his lawful business and with the unlawful purpose of causing damage and loss to Farrar, without right or justifiable purpose, which caused actual damage and loss to Farrar, as required to prove malicious interference with prospective business relations.⁹⁰ Rather, the NCAA's members adopted and the COI enforced the bylaws in furtherance of the NCAA mission to "uphold integrity and fair play among the NCAA membership, and to proscribe appropriate and fair penalties if violations occur" and "ensure that those institutions and student-athletes abiding by the NCAA constitution and bylaws are not disadvantaged by their commitment to compliance."⁹¹ This Court recognizes the NCAA's right to do so without interference or second guessing by the judiciary.⁹²

Further, according to Farrar's legal counsel, Bruse Loyd, who attended the two-day COI hearing, the COI members were professional and engaged from start to finish of hearing.⁹³ In fact, after the appeals process, Loyd sent a note thanking individuals involved in the COI hearing and appeals process for their professionalism, courtesy, and patience.⁹⁴ Loyd described Mike Sheridan, the NCAA enforcement staff member who led the investigation and who presented the allegations to the COI, as professional, courteous, prompt, and responsive.⁹⁵

The trial court granted summary judgment to the NCAA on Farrar's negligence and usurpation of judicial process claims, acknowledging the NCAA is a private membership

⁹⁰ See *ACI Chems., Inc. v. Metaplex, Inc.*, 615 So.2d 1192, 1200-01(Miss. 1993) (stating elements of malicious interference with prospective business relationship).

⁹¹ J. Duncan Aff. at pp. 2-3, ¶¶ 6-10 [RE 4; ROA 633-637]; Div. I Man. at Bylaw Art. 19.01.1 [RE 5; ROA 693].

⁹² See *supra* at fn. 79 and App'x "2".

⁹³ Loyd Dep., 80:2-81:15 [ROA 934-35 (Sealed Vol. 8)].

⁹⁴ *Id.* at 80:19-81:6 [ROA 934-35 (Sealed Vol. 8)].

⁹⁵ *Id.* at 79:6-80:1 [ROA 933-34 (Sealed Vol. 8)].

association entitled to promulgate, interpret, and apply its rules and processes without judicial interference or second guessing. The trial court should have granted the NCAA summary judgment for malicious interference with prospective business relations for the same reasons. Farrar submitted no evidence that the COI acted with malice toward Farrar. Instead, the COI followed the NCAA's member-adopted self-governance process applicable to member institutions across the country when it directed a show cause order connected to Farrar's violations. No genuine issue of material fact exists. The trial court should have granted summary judgment in favor of the NCAA.

CONCLUSION

Farrar may dislike the enforcement processes adopted by the NCAA membership and disagree with the decisions made by the COI, but he is not entitled to have the trial court change the NCAA's enforcement processes or substitute its judgment for that of the NCAA. This Court should reverse the trial court's denial of summary judgment in favor of the NCAA on Farrar's due process and malicious interference with prospective business relations theories and render final judgment in favor of the NCAA.

THIS, the 17th day of January 2024.

Respectfully submitted,

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

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CERTIFICATE OF SERVICE

I, Kate M. Embry, one of the attorneys for Defendant-Appellant National Collegiate Athletic Association, certify that I have this day filed the above and foregoing document with the Clerk of the Court using the Court's MEC filing system, which sent notice of such filing to all attorneys of record. I further certify that I have served a true and correct copy of the above and foregoing document via U.S. mail, postage prepaid, to the following:

Honorable Kent E. Smith
Lafayette County Circuit Court
P.O. Box 670
Holly Springs, MS 38635
Circuit Court Judge

This, the 17th day of January 2024.

/s/ Kate M. Embry
KATE M. EMBRY