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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

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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The trial court erred in denying the NCAA's summary judgment motion on Barney Farrar's due process and tortious interference claims as no genuine issues of material fact exist. Whether considering these claims as described in Farrar's Complaint or as continuously remodeled even through his responsive brief, the law and the undisputed material facts satisfy Rule 56. This Court should reverse the trial court and render judgment in favor of the NCAA.

Settled authorities have clearly determined that the NCAA is not a state actor for due process purposes. No evidence suggests the NCAA's enforcement staff colluded with the University of Mississippi during the investigation of the University's football program. Unlike the situation with state high school athletics associations, neither Mississippi nor the federal government has bestowed the NCAA with authority to regulate the University of Mississippi or other NCAA members. Instead, the NCAA exists as a private volunteer membership association comprised of more than one thousand private and public colleges and universities from across the country. The NCAA is not the government, lacks governmental powers, and has no due process obligations to Farrar under Article 3, Section 14 of the Mississippi Constitution.

Even if the State (directly or through the University) had anointed the NCAA as an arm of the State with constitutional obligations, Farrar could not pursue a legal claim for money damages against the NCAA under the Mississippi Constitution. Unlike with certain other constitutional provisions, this Court has refused to find Section 14 is self-executing. Instead, as this Court has continuously recognized, the Mississippi Tort Claims Act provides the sole remedy for pursuing money damages against the State and its agencies. Farrar has not sought any relief against the NCAA under the MTCA.

As for Farrar's tortious interference claim, the NCAA has never suggested that it operates "beyond the reach of federal and state law".[1] However, as a private membership organization, the NCAA's rules and internal operations deserve the same deference as other private membership organizations. Here, without dispute, the Committee on Infractions followed procedure in making findings and imposing sanctions (*e.g.*, show cause order[2]) authorized by the NCAA bylaws. No evidence indicates the NCAA participated in the University's decision to terminate Farrar's employment as an athletics department administrator, prohibited a member institution from employing Farrar as an athletics administrator or coach, or interfered with Farrar's ability to obtain an unrestricted coaching position with any professional, non-member college or university, junior college, or high school football program.

While employed at the University as an athletics administrator, Farrar knowingly violated NCAA rules, provided false information to the NCAA enforcement staff despite an obligation to cooperate and provide truthful information, received notice of the allegations against the University which involved his alleged misconduct, and participated in the NCAA's normal hearing process. The NCAA did not violate any duty owed to Farrar. The trial court should have granted judgment in favor of the NCAA as a matter of law. This Court should reverse the trial court's denial and render judgment in favor of the NCAA.

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[1] Appellee Brf. at 1.

[2] The show cause order restricting Farrar from employment in a recruiting position expired October 31, 2023. *See* IAC Decision at 6, n. 1 [NCAA RE 8].

I. Due Process

The trial court denied the NCAA's summary judgment motion on Farrar's claim that the NCAA's enforcement process against the University deprived Farrar of due process rights under Article 3, Section 14 of the Mississippi Constitution. 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; (2) neither the State nor the University (i) delegated any governmental power to the NCAA in connection with its enforcement process or (ii) acted jointly with the NCAA, and (3) even if the NCAA had governmental power, Mississippi authorizes no private cause of action for money damages against the state for due process violations under the Mississippi Constitution.

A. The Mississippi Constitution requires state action for due process violations under Section 14.

Farrar asks the Court to remove the state action requirement and extend to private parties the Mississippi Constitution's due process obligations.[3] But legal precedent makes clear that due process claims require government action. To prove a due process violation, Farrar must show that the state deprived him of a liberty or property interest.[4]

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[3] Appellee Brf. at 19-22.

[4] *See Diamondhead Country Club & Prop. Owners Ass'n v. Montjoy*, 820 So. 2d 676, 681-82 (Miss. Ct. App. 2000) ("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. … "[S]tate 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…." (citing *Am. Mfgs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 143 L. Ed. 130, 50 (1999))); *Miss. High Sch. Activities Ass'n v. Coleman*, 631 So.2d 768, 773 (Miss. 1994) ("Without state action, there can be no valid claim of unconstitutionality." (citing *Rendell-Baker v. Khon*, 457 U.S. 830, 837 (1982)); *Brown v. Blue Cane Cowart Tippo Water Ass'n,* 309 So. 3d 478, 487 (Miss. Ct. App. 2019) ("Denial of due

To support his contention that Mississippi's due process protections apply to private parties who's actions cannot be attributed to the government, Farrar relies solely on the use of passive voice: "[n]o person shall be deprived of life, liberty, or property except by due process of law."[5] However, 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.[6] As it should be. Like the federal constitution, Article 3 (the Mississippi Constitution's Bill of Rights) does not establish duties between private citizens but instead sets limitations on the powers and authority of the state government.

Imposing due process obligations on private individuals and entities in Mississippi conflicts with the fundamental rights of private parties to associate and contract, as well as Mississippi's at-will employment doctrine.[7] A due process violation under Section 14 does not exist without state action.

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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))).

[5] Miss. Const. Art. 3, Section 14.

[6] *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)); *NCAA v. Gillard*, 352 So. 2d 1072, 1081 (Miss. 1977) ("Article 3, Section 14 [is] 'essentially identical' to its federal counterpart."); *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 state action under state constitution's due process provision when federal court had already determined state action did not exist under federal constitution).

[7] *See Gillard*, 352 So.2d at 103; *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); *Rotenberry v. Hooker*, 864 S. 2d 266, 277 (Miss. 2003) ("It is fundamental that the right to make contracts pertaining to business is one of the rights guaranteed by the law of the land, and especially the fourteenth amendment to the Constitution of the United States." (quoting *Jones v. Miss. Farms Co.*, 76 So. 880, 883 (Miss. 1917)); *HeartSouth, PLLC v. Boyd*, 865 So.2d 1095, 1108 (¶39) (Miss. 2003) (Mississippi follows "employment at will" doctrine, under which an employer, absent an employment contract expressly providing for the contrary, may terminate an employee "for good reason, bad reason,

B. The NCAA is not a state actor.

For state action to exist, "the party charged with the deprivation must be a person who may fairly be said to be a state actor."[8] Absent state action, "there can be no valid claim of unconstitutionality."[9] The United States Supreme Court in *Tarkanian v. NCAA* made clear that the NCAA does not act as the state when enforcing its bylaws.[10] Since *Tarkanian*, state and federal courts across the country have similarly concluded that the NCAA does not act with governmental power during its enforcement process.[11]

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or no reason at all, excepting only reasons independently declared legally impermissible." (quoting *McArn v. Allied Bruce-Terminix Co.*, 626 So.2d 603, 606 (Miss. 1993)).

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

[9] *Coleman*, 631 So.2d at 773 (citing *Rendell-Baker v. Khon*, 457 U.S. 830, 837 (1982)); *Brown v. Blue Cane Cowart Tippo 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).

[10] 488 U.S. 179 (1988).

[11] *See 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) (holding NCAA is not a state actor and dismissing university's section 1983 claim and stating, *Tarkanian* "foreclosed any claim … that the NCAA is a state actor."); *Spirit Lake Sioux Tribe of Indians*, 2012 U.S. Dist. LEXIS 199405, *22-23 (D. N.D. May 1, 2012) (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) "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 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*)).

1. The State and the University did not delegate state powers to the NCAA.

In his Brief,[12] Farrar asks this Court to ignore *Tarkanian* and its extensive progeny to find the State or the University made the NCAA a state actor by delegating government power to the NCAA, as discussed in the United States Supreme Court's decision in *Brentwood Academy v. Tennessee Secondary School Athletic Association*[13] and this Court's decision in *Coleman*.[14] But neither *Brentwood* nor *Coleman* supports Farrar's argument that the NCAA acted as the State in connection with its enforcement process against the University, *as expressed in both opinions*.

Brentwood involved an association of (mostly public) Tennessee high schools that delegated to the association their statutory authority to regulate interscholastic sports among Tennessee high schools.[15] Brentwood Academy, a member school the association penalized for violating a recruiting rule, sued the association under 42 U.S.C. §1983, claiming the association's enforcement of the rule was state action that violated federal due process.[16] Finding that the association's regulatory activity constituted state action based on the pervasive entwinement of Tennessee school officials in the association, the Supreme Court distinguished *Tarkanian*:

> [T]he NCAA's policies were shaped not by the University of Nevada alone, but by several hundred member institutions, most of them having no connection with Nevada, and exhibiting no color of Nevada law. Since it was difficult to see the NCAA, not as a collective membership, but as surrogate for the one State, we held the organization's connection with Nevada too insubstantial to ground a state action claim.
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> But dictum in *Tarkanian* pointed to a contrary result on facts like ours, with an organization whose member public schools are all within a single State. 'The

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[12] Appellee Brf. at 16-17.
[13] 531 U.S. 288 (2001).
[14] 631 So.2d 768 (Miss. 1994).
[15] 531 U.S. at 291.
[16] *Id.*

> situation would, of course, be different if the [Association's] membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign.'[17]

Similarly, *Coleman* involved an association of Mississippi public and private schools which delegated to the association certain governmental authority under state law to regulate athletics programs.[18] The plaintiff alleged the association's application of its eligibility rules which disqualified her son from playing basketball at a Mississippi high school violated the due process clause.[19] Because the association's actions flowed from the statutory authority assigned to it by the Mississippi school boards, this Court found the association was a state actor.[20] This Court specifically distinguished the association of Mississippi schools from the NCAA and its holding from *Tarkanian,* noting the same analysis does not apply to the NCAA because public universities did not delegate governmental power to it.[21]

Unlike the state athletics associations in *Brentwood* and *Coleman*, the NCAA's members are spread across the country.[22] The University's role in the NCAA's governance does not exceed the role of those other members with no connection to Mississippi's government and which form the bulk of the NCAA's membership. The University did not delegate to the NCAA any of the State of Mississippi's governmental power. Rather, the University voluntarily joined the association and consented to the NCAA's rules and processes adopted by the NCAA's members.

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[17] *Id.* at 297-98.
[18] 631 So.2d at 774 ("The power to regulate athletic programs is conferred upon the local school boards by the Mississippi Legislature. MISS. CODE. ANN. § 37-3-301(q) (1972). The school boards, in turn, delegated this authority over to the Association.").
[19] *Id.*
[20] *Id.*
[21] *Id.* at n. 3.
[22]*See See* J. Duncan Aff. at p. 1, ¶2 [NCAA RE4; ROA 633]; NCAA Membership Directory at https://web3.ncaa.org/directory/memberList?type=1 (Appendix "A").

The NCAA's Committee on Infractions acted under authority of the NCAA's bylaws.[23] The State did not employ the individuals involved in the investigation or resolution, and those involved exercised no State authority. No regulatory entwinement exists between the State and the NCAA.[24]

Farrar asks this Court to disregard the Ninth Circuit's opinion in *NCAA v. Miller*, holding that a Nevada statute imposing certain minimum due process procedural standards on the NCAA's enforcement process violated the Commerce Clause under Article 1 Section 8 of the United State Constitution.[25] *Miller* demonstrates the distinction between the NCAA, a country-wide association of members engaged in interstate commerce, and the single-state school member associations in the opinions Farrar cites imposing due process obligations.[26]

2. The University and the NCAA did not act jointly.

To support his "joint action" theory (which the trial court did not reference in its Order), Farrar relies on a federal appellate decision *Cohane v. NCAA*,[27] on appeal from denial of a Rule 12(b)(6) motion to dismiss and not a Rule 56 summary judgment motion.[28] The Second Circuit

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[23] The NCAA does not employ the members of the COI or the Infractions Appeals Committee. Instead, they are employees of member institutions or come from the private sector, such as practicing attorneys and retired judges. J. Duncan Aff. at p. 3, ¶9 [NCAA RE 4]; Div. I Man. at p. 331, Bylaw Art. 19.3 [NCAA RE 5]. Div. I Man. at Bylaw Art 19.4.1 [NCAA RE 5; ROA 697-68].
[24] As evidence of delegation, Farrar points to his University contract requiring Farrar to comply with NCAA rules as a condition of his University employment. Appellee Brf. at 17. However, the NCAA was not a party to Farrar's University contract, and the contract does not delegate governmental power to the NCAA. *See* Farrar Contract [NCAA RE 9].
[25] 10 F.3d 633, 638-40 (9th Cir. 1993).
[26] *Id.*; Appellee Brf. at 18.
[27] 215 Fed. App'x 13 (2nd Cir. 2007).
[28] *Id.* at 14. Farrar cites *Adickes v. S.H. Kress Co.*, 398 U.S. 144 (1970), which found a fact issue as to whether a restaurant acted under compulsion of a state-enforced racial segregation custom in violation of plaintiff's Fourteenth Amendment rights when the restaurant refused to serve

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.[29] However, at 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 …"[30]

Here, no material difference exists between the NCAA's enforcement proceedings involving the University of Mississippi and those at issue in *Tarkanian* and other cases refusing to find the NCAA a state actor. The record does not support Farrar's attempts to characterize the NCAA and the University as working jointly to penalize him and to protect the University and its head football coach. Farrar has nothing more than baseless speculation.

The NCAA investigated the University's football program for several years.[31] The COI proceedings included 21 alleged violations by multiple University boosters and football staff members, including Farrar.[32] The University aggressively opposed many allegations against it, including allegations of violations by Farrar.[33] Nonetheless, Farrar ultimately admitted violating

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plaintiff, a white woman with black people, and a police officer arrested plaintiff when exiting the restaurant. Appellee Brf. at 14. *Adickes* and this case share no legal or factual similarities.

[29] 215 Fed. App'x 13 at 15-16.

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

[31] J. Duncan Aff. at p. 4, ¶11 [NCAA RE 4]; COI Decision at 3-4 [NCAA RE 7].

[32] *See* COI Decision at 1 [NCAA RE 7] (noting lengthy and at times contentious investigation).

[33] *See, e.g.*, COI Decision at 34, 39 [NCAA RE 7] (noting University disputed allegation relating to provision of improper inducements); Univ. Resp. to Notice of Allegations [ROA 44-53 (Vol. 1)].

NCAA rules on multiple occasions.[34] The COI issued a lengthy and detailed decision, finding Farrar committed multiple violations of NCAA rules, several of which the COI classified as Level I.[35] The COI imposed penalties on the University based in part on rules violations by Farrar.[36]

In his Brief, Farrar selects a note in the COI decision indicating the University characterized as "disturbingly questionable" repeated contacts between Farrar, two boosters, and a student athlete alleged to have received improper inducements.[37] However, the University disputed the related allegations that its boosters paid the student athlete and the specific allegations of Farrar's involvement in the violation.[38]

Contrary to Farrar's representation in his Brief[39] that the COI included cooperation by the University as a mitigating factor when applying its penalty guidelines, the COI instead denied the University's request to include cooperation as a mitigating factor: "[the University's] level of cooperation did not rise to the level of exemplary because an institution must do more than just meet its obligation under the bylaws to cooperate."[40]

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[34] 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)]; *see also* Appellee Brf. at 6-7.

[35] The COI found Farrar violated NCAA bylaws by providing impermissible recruiting inducements to prospective student athletes and their friends and family and by providing false information to the enforcement staff during its investigation. COI Decision at 32-42 [NCAA RE 7].

[36] *See id.* at 53-62.

[37] Appellee Brf. at 13.

[38] *See* COI Decision at 39 [NCAA RE 7] ("Mississippi and the enforcement staff substantially agreed that boosters 9 and 10 had impermissible contact with student-athlete 1, but the institution disagreed that the boosters paid him thousands of dollars."); Univ. Resp. to Notice of Allegations [ROA 44-53 (Vol. 1)].

[39] Appellee Brf. at 13.

[40] *See* COI Decision at 54-55 [NCAA RE 7].

Farrar also incorrectly suggests he lacked access to the record before the COI and characterizes the NCAA investigation and COI materials as "confidential".[41] However, Farrar had access to the COI materials. His attorney, Bruse Loyd, who represented Farrar in the COI process, indicated the NCAA provided access to the materials relating to the allegations, and he had everything needed to respond to the allegations involving Farrar.[42] The COI record included Farrar's written response to the allegations, as well as the written responses submitted by the University and others involved in the infractions process.[43]

Also, to support his "joint action" theory, Farrar identifies unilateral actions by the University: (1) the University suspended and then terminated Farrar's employment; (2) the University publicly identified boosters the COI found to have violated NCAA rules; and (3) the University reprimanded two other assistant coaches and disassociated several boosters before the COI hearing.[44] These allegations, even if true, do not relate to the state action analysis.

Finally, Farrar makes inaccurate factual representations that do not appear relevant to any issue before the Court. For example, Farrar complains on one hand that the COI does not permit persons with personal knowledge to attend the COI hearing and on the other hand that the COI decided to question during the hearing a student-athlete alleged to have received improper inducements.[45] The COI's decision for a student-athlete to appear at the hearing was

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[41] Farrar characterizes the COI record as "thousands of pages of confidential reports gathered by the enforcement staff and on file at NCAA headquarters". Appellee Brf. at 4.
[42] Loyd Dep. at 19:2-20-16 [ROA 988-989]; *see also* Farrar Initial Resp. to NOA [ROA 895-923] (citing to materials in COI record).
[43] *See* COI Decision at 3-4 [RE 7; ROA 777-78]; Farrar Initial Resp. to NOA [ROA 895-923]; Univ. Resp. to NOA [ROA 44-53]; Lloyd Dep. at 33:6-34:11 [ROA 1,002-1,003 (Sealed Vol. 9)]; *see also* J. Duncan Aff. at 3, ¶8.
[44] Appellee Brf. at 13.
[45] *Id.* at 3.

consistent with its processes.[46] Farrar also complains the NCAA's enforcement staff did not notify him of a violation the student athlete reported about another member institution.[47] Citing the deposition of Michael Sheridan, the NCAA's lead investigator, Farrar represents: "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."[48] However, as Sheridan explained, the bylaws only permit an institution to receive information about violations at that institution and prohibit enforcement staff from sharing information with an institution about a violation that may have occurred at another institution.[49] Sheridan also explained that he was not involved in the investigation of the other member institution related to the student athlete's report.[50]

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.[51] 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

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[46] *See* Sheridan Dep. at 49:21-50:18, 51:5-9 [ROA 1,180-1,181 (Sealed Vol. 9)].
[47] Appellee Brf. at 4.
[48] *Id.*
[49] Sheridan Dep. at 39:23-41:14 [ROA 1,180-1,182 (Sealed Vol. 9)].
[50] *Id.* at 66:13-67:8 [ROA 1,207-1,206 (Sealed Vol. 9)]. Farrar also complains that the COI did play during its hearing an audio recording of the student athlete's mother, which was in the COI record. Appellee Brf. at 5. However, Lloyd, Farrar's attorney, testified that the recording was in the COI record and available to him and the COI members. Lloyd Dep. at 108:9-109:10 [ROA 1,109-1,110 (Sealed Vol. 9)].
[51] Sum. J. Order, at p. 1 [NCAA RE 3].

trial court relied on Farrar's "allegations" and "assertions", which are insufficient to defeat summary judgment.[52] 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 Section 14 due process violation claim.

C. Mississippi does not provide a general private right of action against the state for money damages for a violation of the Mississippi Constitution.

If this Court determines that the NCAA acted under state authority when investigating and imposing sanctions on the University of Mississippi and Farrar, the Court must then determine if any remedy exists for Farrar if he proves a Section 14 due process violation. The United States Supreme Court recently noted:

> Constitutional rights do not typically come with a built-in cause of action to allow for private enforcement in courts. Instead, constitutional rights are generally invoked defensively in cases arising under other sources of law, or asserted offensively pursuant to an independent cause of action designed for that purpose, *see*, *e.g.*, 42 U.S.C. §1983.[53]

Mississippi, which has no statute comparable to Section 1983, recognizes similar limitations on bringing direct actions for constitutional violations.

In *City of Jackson v. Sutton*,[54] the plaintiffs alleged the City of Jackson denied their due process rights by violating police department investigatory and training procedures. On interlocutory appeal after the trial court denied summary judgment, this Court determined the

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[52] *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.").
[53] *Devillier v. Texas*, 144 S. Ct. 938, 943 (2024).
[54] 797 So. 2d 977, 979 (Miss. 2001), *cited in Minor v. Miss. Dep't Pub. Safety*, No. 3:19cv155, 2020 U.S. Dist. LEXIS 66310 at *7 (N.D. Miss. April 15, 2020) ("[T]he Mississippi Constitution does not provide a direct cause of action.").

Mississippi Tort Claims Act "provides the exclusive civil remedy against a governmental entity and its employees for acts or omissions which give rise to a suit."[55] This Court reversed the trial court and rendered judgment for the City of Jackson.

Farrar has cited a few exceptions where this Court has found certain constitutional provisions contain "self-executing" terms in the context of governmental taking of private property (Section 17), right of redemption from sales of real estate for non-payment of taxes (Section 79), conflict of interest (Section 109), and removal of public officer (Section 175).[56] However, in *Sutton*, this Court refused to extend this exception to Section 14 due process claims. Farrar may not pursue a direct claim against the NCAA for money damages even if the NCAA owes Farrar a duty to provide due process under Section 14.

II. Malicious Interference with Prospective Business Relations[57]

The trial court denied the NCAA's summary judgment motion finding "genuine issues of material fact . . . as to whether [the NCAA's] subjecting Plaintiff to a five-year show cause order maliciously interfered with Plaintiff's future employment."[58] The trial court erred, and Farrar throws the kitchen sink at the wall to salvage this claim. None of his arguments stick.

"[I]n a summary judgment proceeding, the plaintiff must rebut the defendant's claims (i.e., that no genuine issue of material fact exists) by producing supportive evidence of

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[55] *Id.* at 980.
[56] Appellee Brf. at 21-22.
[57] If this Court determines that the NCAA acted as an arm of the State during its enforcement process, the MTCA bars recovery against the NCAA for any employee's malicious conduct. *See* MISS. CODE ANN. § 11-46-5(2) and 11-46-7(2); *see also Univ. of Miss. Med. Ctr. v. Oliver*, 235 So.3d 75, 77 (¶¶ 2, 25) (Miss. 2017) ("As a matter of law, malice-based torts do not fall under the Mississippi Tort Claims Act's sovereign-immunity waiver.").
[58] Sum. J. Order at ¶2 [NCAA RE 3].

significant and *probative* value…"[59] The non-movant must show specific facts demonstrating a genuine issue of material fact, and the claims must be supported by more than a mere scintilla of evidence.[60] Unsupported, conclusory allegations are insufficient to defeat a motion for summary judgment, nor will pleadings which simply allege or deny a material fact.[61]

First, addressing the trial court's determination, no evidence suggests the COI acted with malice in imposing a five-year show cause order to prevent a member institution from employing Farrar with recruiting responsibilities. Farrar has submitted no testimony from any members of the COI or anyone else indicating any involved person acted with malice. He identifies no documents suggesting anyone acted with malice. Instead, the COI considered the information presented, engaged in a lengthy two-day hearing, deliberated, and made collective findings as to the enforcement staff's allegations, including those involving Farrar.[62]

For the facts supporting the COI's decision, Farrar ultimately admitted many of the violations after denying any misconduct during several interviews with NCAA enforcement staff investigators.[63] As outlined in its findings, the COI had significant information connecting Farrar to those allegations he continued to deny.[64] The COI had grounds to doubt Farrar's statements and to reject his version of events due to his deception and lack of candor.[65] Based on the

[59] *Palmer*, 564 So.2d at 1356 (emphasis in original).
[60] *See Richardson v. Grand Casinos of Miss., Inc.-Gulfport, LLC*, 953 So.2d 1146, 1147 (Miss. Ct. App. 2006).
[61] *Dorman v. Trustmark Nat'l Bank*, 281 So. 3d 1016, 1022 (Miss. Ct. App. 2019).
[62] COI Decision [NCAA RE 7].
[63] Farrar Resp. to Notice of Allegations at 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)]; *see also* Appellee Brf. at 6-7.
[64] *See* COI Decision at 11-22, 32-43 [NCAA RE 7].
[65] *Id.*

information available in September 2017, the COI had justifiable support for its conclusions. Farrar has failed to identify evidence to the contrary.[66]

For the imposed penalty, because the COI determined Farrar had committed recruiting violations, the COI narrowly tailored the sanction limiting member institutions from employing Farrar in a recruiting role.[67] The COI did not prevent Farrar from working for a member in an administrative position such as his position at the University before the University terminated his employment. The COI did not prevent Farrar from accepting a coaching position at a member institution.[68] Farrar remained open to accept a football administrative or coaching position with professional teams (NFL, XFL, USFL, etc.), college teams (including NCAA and NAIA), junior/community college teams, and high school teams. The sanction merely limited his recruiting responsibilities at a member institution and complied with the NCAA's guidelines adopted by its members to enforce the NCAA's rules.

Farrar does not dispute that (1) he violated NCAA rules while he was employed at the University, and (2) the COI followed the NCAA's bylaws in connection with its enforcement proceedings involving the University and issued a show cause condition consistent with its bylaws. Instead, Farrar's bases his claim on his subjective opinion that the NCAA's enforcement processes are unfair.[69] He asks this Court to second-guess the NCAA's membership approved

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[66] *Id.*
[67] *Id.* at 60, ¶10.
[68] Farrar testified that there are positions in college football that do not involve recruiting, and he has held those positions. Farrar Dep. at 53:10-24 [ROA 1,128 (Sealed Vol. 7)].
[69] *See* Appellee Brf. at 24 (describing the NCAA's member-adopted infractions process as "absurd and unfair"). While Farrar complains about fairness, his legal counsel who attended the two-day COI hearing found the COI members professional and engaged from start to finish of the hearing, and, after the appeals process, thanked individuals involved in the hearing and appeals process for their professionalism, courtesy, and patience. Loyd Dep., 80:2-81:15 [ROA

enforcement and hearing process – not because the process violates any law – simply because he does not like it.[70] Courts do not interfere with internal operations of private associations.

In his Brief, Farrar introduces a new theory, not included in his Complaint or presented to the trial court,[71] contending the NCAA's allegations that Farrar violated NCAA rules by facilitating cash payments to a student athlete and by providing free merchandise to student athletes caused the University to "fire Farrar during his contract."[72] This Court should not consider this new contention.[73] Even if this Court considers this claim, Farrar has failed to offer any proof to support it. His speculation is not enough. He must present evidence beyond his personal belief as to events about which he has no personal knowledge. The undisputed facts indicate that the University terminated Farrar's employment in December 2016 before the NCAA issued its Notice of Allegations naming Farrar in January 2017.[74]

As another first-time argument, Farrar invokes antitrust law.[75] The references to anti-competitive conduct lack any relevance to the issues on appeal. Notably, however, if Farrar correctly asserts that the NCAA acted under state authority in adopting and enforcing its rules

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934-35 (Sealed Vol. 8)]. He 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. *Id.* at 79:6-80:1 [ROA 933-34 (Sealed Vol. 8)].

[70] *See* Appellant Brf. at 19-20.

[71] *See* Compl. at p 11 [ROA 12].

[72] Appellee Brf. at 22.

[73] *See Broadband Voice v. Jefferson County*, 348 So.3d 305, 308 (Miss. 2022) ("[A] question not raised in the trial court will not be considered on appeal." (quoting *Taylor v. Taylor*, 201 So.3d 420, 421 (Miss. 2016)); *Patterson v. State*, 594 So. 2d 606, 609 (Miss. 1992) ("The Supreme Court is a court of appeals, it has no original jurisdiction; it can only try questions that have been tried and passed on by the court from which the appeal is taken.").

[74] Compl. at ¶17 [ROA 7 (Vol. 1)]; Farrar Initial Resp. to Feb. 22, 2017 NOA at 1 [ROA 896 (Sealed Vol. 7)]; COI Decision at App'x 1 [NCAA RE 7; ROA 837].

[75] Appellee Brf. at 26.

to govern members, including the University, the NCAA should be immune from antitrust liability as a state actor.[76] Of course, the NCAA is not immune from antitrust laws for that very reason - - - it is not a state actor.

Farrar also argues (again for the first time) that the COI decision is inadmissible hearsay.[77] He suggests his current denials provide the only evidence on the truth or falsity of the NCAA allegations. But Farrar loses sight of his claim. His tortious interference claim does not turn on a determination about the validity of the NCAA allegations much less a determination based on information available today. Instead, as Farrar has previously contended, his claim turns on the presence of malice in the NCAA decision making or penalty imposition process in 2017.[78] The relevant evidence existed then. Farrar has offered no proof of malice.

CONCLUSION

Farrar admits he violated the NCAA's rules. He admits he lied to the NCAA's enforcement staff on multiple occasions during the investigation. In addressing the allegations of violations involving Farrar, the NCAA's COI followed the infractions process adopted by its members to further the NCAA's goals. Farrar may dislike the NCAA's infractions processes and disagree with the COI's decisions, but he cannot have the trial court change the NCAA's enforcement procedure or substitute its judgment for that of the NCAA. This Court should reverse the trial court's denial of summary judgment on Farrar's due process and malicious interference with prospective business relations claims and render final judgment in favor of the NCAA.

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[76] *See Parker v. Brown*, 317 U.S. 341 (1943), and progeny.
[77] Appellee Brf. at 24-25.
[78] *See* Compl. at 11 [ROA 12 (Vol. 1)].

THIS, the 28th day of May 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 this 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 this 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 28th day of May 2024.

/s/ Kate M. Embry
KATE M. EMBRY