Article-Michigan and Sports Law

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MICHIGAN AND SPORTS LAW

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The state of Michigan is the tenth most populous state in the United States with almost 10 million residents. Also known as the Mitten State, the Wolverine State and others, Michigan’s Upper and Lower Peninsulas cover Eastern and Central time zones. Centrally located in the Midwest and bordering Wisconsin, Indiana, Ohio, and Canada, Michigan boasts major professional sports teams including the Tigers (MLB), Lions (NFL), Red Wings (NHL), and Detroit Pistons (NBA). For fans of motor sport, the state houses the popular Michigan International Speedway (MIS) in Brooklyn, Michigan.

Additionally, there are fifteen state universities including the University of Michigan, Michigan State University, Wayne State University, Eastern Michigan University, Central Michigan University, Western Michigan University, Northern Michigan University, Michigan Tech, Ferris State University, and a variety of smaller private colleges such as Alma College, Kalamazoo College, and Hillsdale College, just to name a few.

The purpose of this article is to offer and explore sports law related cases, claims, and issues that have emanated from Michigan. Some examples in this article provide historically significant samples that professors, students, and practitioners could find extremely useful. The inclusion of other illustrations is meant to demonstrate the comprehensiveness that Michigan provides the reader and is meant to serve as a reference to be used for pedagogical purposes. Part I explores examples and

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5. Other state universities include Saginaw Valley State, UM-Dearborn, UM-Flint, Grand Valley State, Oakland University and Lake Superior State. Other private schools include Albion, Adrian, Calvin College, Cornerstone University, Davenport University, Hope College, and Schoolcraft College, for example.
incidents involving civil rights and discrimination. Part II addresses a variety of other areas including sports and torts, workers’ compensation, crimes, employment law and intellectual property issues, religion and how antitrust has worked its way into sports and the law in Michigan.

Given the large and diverse population, coupled with Detroit’s professional sports teams in all the major professional sports leagues, and housing some of the nation’s largest and most influential colleges and universities, it is no wonder that Michigan provides numerous sports law cases and issues, especially regarding gender and race. No doubt, the state of Michigan and its relationship to its contribution to sports law cases has been comprehensive, influential, and pioneering. In a few instances, Michigan has demonstrated a resistance to change even if it violated the law or was unpopular in the court of public opinion.

II. CIVIL RIGHTS AND DISCRIMINATION

Cases involving the discriminatory acts or practices have been addressed in Michigan at both the interscholastic and intercollegiate levels. Interscholastic issues usually involve rules and interpretations related to the private governing body in the state, referred to as the Michigan High School Athletic Association (MHSAA). The Michigan legislature authorized the MHSAA’s creation, existence, and authority as a non-profit corporation, and cases have interpreted it to be characterized as a state actor.

In Michigan, civil rights cases involve sex (gender) discrimination, equal protection, due process, and free speech, though there are an abundant amount of other rights-based issues as well, including allegations of violations of Michigan’s own powerful civil rights law known as the Elliot-Larsen Civil Rights Act

6. See MICH. HIGH SCH. ATHLETIC ASS’N, http://www.mhsaa.com/ (last visited June 15, 2017) (according to its website, “The MHSAA is a private, not-for-profit corporation of voluntary membership by nearly 1,600 public and private senior high schools and junior high/middle schools which exists to develop common rules for athletic eligibility and competition. No government funds or tax dollars support the MHSAA, which was the first such association nationally to not accept membership dues or tournament entry fees from schools.”); About the MHSAA, MICH. HIGH SCH. ATHLETIC ASS’N, https://www.mhsaa.com/About-the-MHSAA (last visited June 15, 2017); see also Breighner v. Mich. High Sch. Athletic Ass’n, 683 N.W.2d 639 (Mich. 2004) (affirming and holding that the Freedom of Information Act (FOIA) did not apply to it in that the “MHSAA, a private, nonprofit organization having a wholly voluntary membership of private and public schools, is not a ‘public body’ within the meaning of the FOIA and is therefore not subject to the FOIA’s provisions.”) Id. at 648; but see ESPN, Inc. v. Mich. State Univ., 876 N.W.2d 593 (Mich. Ct. App. 2015) (affirming the trial court decision that the privacy exemption to FOIA, M.C.L. § 15.231, et seq., did not apply and therefore 301 student-athletes names as requested by ESPN had to be revealed, stating, “On this record, we cannot conclude that the trial court abused its discretion when it balanced the public’s interest in understanding how the University’s police department handles criminal investigations involving student-athletes against the student-athletes’ privacy interests and determined that the balance favored disclosure.”) Id. at 598.

Girls and women appear to have initiated the most significant cases in this area of the law especially in the post-civil rights era beginning in the 1970s. Civil rights issues related to race and those with disabilities stand out in Michigan sports law jurisprudence as well, and will be discussed in this section.

A. Gender

i. Carolyn King and Little League Baseball

One of the most significant gender-related cases occurred in 1973 at the youth sport level and involved a girl from Ypsilanti, Michigan (located between Ann Arbor and Detroit) who wanted to play Little League baseball even though the organization was founded for boys only. After vigorous debate over whether she could play in the all-boys league in the first place, the local president allowed her to try out anyway, and the manager of the Ypsilanti Orioles team selected Carolyn King in the eighth round.

However, when Little League Baseball, Inc. officials in Williamsport, Pennsylvania (its principal office) discovered that she had been drafted, they threatened to pull the Ypsilanti American Little League’s charter if King took the field in a game. Concerned, the local Board of Directors held a special meeting on May 7, 1973, and decided to drop Carolyn from the team so as not to jeopardize the entire league of approximately 220 boys.

The next day, at another special meeting, the Ypsilanti City Council then directed the city manager to withhold use of city parks and baseball diamonds from
the local league or any “organization that practices any form of discrimination.” On May 10, King was back again on the Orioles, but, as a result, Little League then revoked the charter as promised. A lawsuit was filed by Carolyn King and the City of Ypsilanti, alleging discriminatory violations of the Equal Protection Clause of the Fourteenth Amendment.

The United States District Court for the Eastern District of Michigan dismissed the case in favor of Little League ruling that there was no state action, and the Sixth Circuit Court of Appeals affirmed on October 30, 1974. Carolyn King lost her legal battle, but not the war. Due to King’s Michigan-based challenge, in 1974 the officials in Williamsport decided to drop its no-girls rule that had been around since 1951, and girls were allowed to play Little League baseball for the first time effective the 1975 season.

**ii. Jill Lafler and Golden Gloves Boxing**

Nearly a decade after Carolyn King and Ypsilanti’s legal challenge, Jill Lafler, a 19-year-old Lansing Community College (LCC) student, wanted to be Michigan’s first female Golden Gloves boxing contestant even though there was not a women’s division for her to compete as a flyweight. Lafler attempted to register for the men’s division, and she was turned down by the organization on the basis of her gender.

In 1982, Lafler filed a lawsuit in Ingham County Circuit Court seeking an injunction and alleging that she was discriminated on the basis of sex in violation of

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13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 264–65 (affirming the lower court decision and stating that the plaintiffs had sought injunctive relief under 42 U.S.C. § 1983, to protect rights allegedly secured by the Fifth and Fourteenth Amendments, and declaratory judgment relief under 28 U.S.C. §§ 2201 and 2202. Sixth Circuit Judge Engel authored the opinion which upheld District Judge Ralph M. Freeman’s dismissal, questioning whether the courts would have jurisdiction over the subject matter in the first place stating, “It must be remembered that the only defendants are the National Little League organization and its Regional Director. If any state action is to be found in the case, it has to be in the actions of those defendants and their conduct must meet the requirements of governmental involvement.”) *Id.* at 267.


19. *Id.*
the Equal Protection Clauses of the United States and Michigan Constitutions, the federal Civil Rights Act of 1964, and Michigan’s ELCRA. 20 Though the Michigan state court issued a temporary restraining order preventing Golden Gloves from declaring a winner in the flyweight class division, Golden Gloves successfully moved the case to federal district court which ultimately ruled in their favor and against Lafler and the temporary restraining order was dissolved in Lafler v. Athletic Board of Control. 21

According to the U.S. District Court, in order for Lafler to have prevailed on her claim of discrimination, she would have had to prove that state action was involved in the denial of her application to compete. 22 Since the Golden Gloves competition was a private organization, the court held that there was not a likelihood of success of her claim. 23 This federal decision reflected similar analysis as in the King case in that both organizations (Little League and Golden Gloves) were private. 24

However, the federal court in Lafler went further and opined that allowing Lafler to participate would be irresponsible and possibly dangerous to her and other women based upon anatomical differences based upon medical evidence, 25 not to mention it appeared to be constitutionally acceptable to have separate (and exclusionary) gender divisions under federal law since boxing is a contact sport. 26 Therefore,
the court concluded that separate boxing programs would be permissible under both the Equal Protection Clause and the ELCRA.27

The court also exercised judicial restraint by not supporting an injunction that would have required a women’s boxing division at that time.28 Lafler lost in the federal court, but she was valiant in her legal fight which enhanced the national discussion of allowing women to participate in sports generally in the post-Title IX era of women’s liberation and feminism,29 and her challenge certainly brought light to the fact that there was no women’s division in Golden Gloves. Though Lafler fought her case in the 1980s, the decade after Carolyn King, this marked the second decade in a row that the state Michigan was a source of national discussion over discrimination in sports based upon gender which ultimately led to change.30

iii. Geraldine Fuhr: Hazel Park’s Girls’ and Boys’ Coach

Almost two decades after Lafler, another lawsuit involving a woman and the “boys’ club” attracted national attention, but this one involved a high school coach-employee, not a participant.31 Geraldine Fuhr was a teacher and girls varsity basketball coach for ten years in the Hazel Park School District at Hazel Park High School, just a few miles north of downtown Detroit.32 However, in October 1999, Fuhr sued the school district, alleging it had discriminated against her because of her gender, in violation of Title VII of the 1964 Civil Rights Act of 196433 and like the other two cases, Michigan’s ELCRA,34 but in this instance for failing to hire her as the head coach of the boys’ varsity basketball team in which there was a coaching vacancy [hereinafter Fuhr I].35

27. Lafler, 536 F. Supp. at 107 (offering that the ELCRA excluded single-sex, private schools from the act, citing (M.C.L. § 37.2404).

28. Id. at 108 (noting “In this day of judicial activism in which trial courts are burdened with the mountainous load of difficult and complex litigation, deprived of the charismatic pronouncements generally reserved to the executive and legislative branches of government, some courts are tempted to plunge head-long into resolving political issues after an hour long hearing, or sometimes after no hearing at all, with results that are often regretted later.”).


30. See Jeff Seidel, Flint’s Shields on 2nd Olympic gold: ‘I worked so hard to be here’. DET. FREE PRESS (Aug. 22, 2016), http://www.freep.com/story/sports/olympics/rio-2016/2016/08/21/rio-olympics-boxing-clareessa-shields/89074814/ (consider the impact, or at least the irony of Michigan ties, that King and Lafler may have had on Claressa Shields, a native of Flint, Michigan, who in 2012 and 2016 earned a gold medal in the women’s middleweight division at the London and Rio Olympics, respectively, becoming the first U.S. boxer to win back-to-back gold medals in boxing).


32. Fuhr I, 364 F.3d at 756 (offering that Hazel Park’s 1999 decision was to hire John Barnett for the vacant position of boys’ varsity basketball coach, though at the time he was a “relatively new male teacher” there and had only coached the boys” freshman basketball team for two years).


35. Fuhr I, 364 F.3d at 756.
In August 2001, a jury returned a verdict for Fuhr, awarding $245,000 in damages and $210,000 in future damages. The court went further and granted Fuhr’s request for an injunction and ordered that she be placed in that position. For the next five years, 2001-2006, she worked as the coach for both the boys’ and the girls’ varsity basketball teams. However, on June 1, 2006, Fuhr was removed as the coach of the girls’ varsity basketball team.

Fuhr filed a subsequent federal lawsuit in the U.S. District Court for the Eastern District of Michigan on April 18, 2008 [hereinafter Fuhr II] claiming discrimination and retaliation for her current and prior lawsuits under Title VII, the ELCRA, and Title IX. Fuhr alleged that she was removed from her position as the varsity girls’ basketball coach and was subjected to repeated harassment and unfair treatment by her athletic director. On September 19, 2011, the district court in Fuhr II held that the defendants were entitled to summary judgment on Fuhr’s gender discrimination and hostile environment (retaliation) claims because she did not provide any evidence suggesting that her gender had anything to do with the school’s decision to remove her as the girls’ varsity basketball coach or with any of the harassment she allegedly suffered.

In sum, Fuhr did not state a prima facie case of gender discrimination, and therefore...

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36. Id. at 757.

37. Id. (noting that the district court also granted Fuhr attorneys’ fees, and denied Hazel Park’s motion for a new trial, motion for remittitur, and renewed motion for judgment).


39. Id.

40. Id. at 678 (Fuhr also filed a charge of discrimination with the Michigan Department of Civil Rights (MDCR) in early 2007 alleging that “[s]ince I won a gender-based lawsuit against the employer, I have been harassed, a varsity girls’ basketball job has been taken away from me, my authority has been undermined, and I have not been supported[,]” and filed the second lawsuit (Fuhr II) alleging both gender discrimination and retaliation. According to the case, the EEOC issued a right to sue letter after mediation between the parties failed).

41. Id. at 682.

42. Id. at 681 (stating “[t]urning first to plaintiff’s gender discrimination and ‘hostile environment’ claims (Counts I, III and VI), the court finds that defendant is entitled to summary judgment because plaintiff has produced no evidence — either direct or circumstantial — suggesting that her gender had anything whatsoever to do with defendant’s decision to remove her as the girls’ varsity basketball coach or with any of the harassment she allegedly suffered.” The court continued, “[d]efendants are also entitled to summary judgment on plaintiff’s retaliation claims (Counts II, IV and VII). Plaintiff’s primary theory behind these claims appears to be that defendant removed her as the girls’ varsity basketball coach, and subjected her to various forms of harassment, in retaliation for plaintiff having prevailed in her 1999 lawsuit. Insofar as they are based on this theory, the retaliation claims fail due to the long passage of time between (a) winning that lawsuit and (b) her removal as the girls’ coach and the other alleged harassment.” The court continued, “[d]efendant removed plaintiff as the girls’ varsity coach in June 2006, nearly five years after she had been instated into the position as the boys’ coach. The instances of harassment, according to plaintiff’s first MDCR charge, did not begin until April 27, 2006, that is, immediately prior to her termination as the girls’ coach. As noted above, it is plaintiff’s burden to prove that “the protected activity and the adverse action were causally connected” and this requires ‘temporal proximity’ between the two events . . . ‘Temporal proximity’ means that the two events be ‘very close’ in time . . . A fortiori, a passage of nearly five years, by itself, suggests ‘no causality’ stemming from plaintiff prevailing in the prior lawsuit.”).
could not sustain her hostile environment claim because it was based on the gender discrimination claim.\textsuperscript{43}

Fuhr appealed the District Court decision to the Sixth Circuit Court of Appeals which affirmed the lower court’s decision.\textsuperscript{44} The Sixth Circuit recognized the powerful anti-retaliation provisions of Title VII, Title IX, and ELCRA and recognized that the same legal framework applies to all three of Fuhr’s employment-related claims.\textsuperscript{45} The court stated:

The statute provides in relevant part: ‘It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter.’ 42 U.S.C. § 2000e-3(a). A retaliation claim can be established either through direct evidence of retaliation or circumstantial evidence that would support an inference of retaliation.\textsuperscript{46}

Fuhr offered that the principal of Hazel Park High School told her in a November 2005 conversation that, “this is a good old boys network. They are doing this to you to get even, you know . . . They are doing this to you to get even because you stood up for your rights. They are doing this to you to get back at you for winning the lawsuit.”\textsuperscript{47}

The Sixth Circuit opined that the statement was ambiguous and “unclear who is a part of that network,”\textsuperscript{48} and Fuhr could not demonstrate what particular acts the principal was referring to that were retaliatory.\textsuperscript{49} The court went further by saying that Fuhr’s “fatal” flaw in her case was the multi-year gap in time in between her filing her Title IX complaint and the alleged retaliation.\textsuperscript{50} Additionally, the Sixth Circuit found that the school district articulated legitimate nondiscriminatory reasons for the actions against the plaintiff, even if Fuhr was able to clear the initial burden of the \textit{prima facie} hurdle.\textsuperscript{51} Unfortunately for Fuhr, the inferences she offered were not

\begin{itemize}
\item\textsuperscript{43} \textit{Id.} (opining “[p]laintiff has not stated a \textit{prima facie} case of gender discrimination, as the only ‘adverse employment action’ she has alleged is her removal as the girls’ basketball coach, and the claim fails because plaintiff’s replacement in that position, Jennifer Berrios, is not ‘outside the protected class.”).
\item\textsuperscript{44} \textit{Fuhr v. Hazel Park Sch. Dist.}, 710 F.3d 668 (6th Cir. 2013).
\item\textsuperscript{45} \textit{Id.} at 673.
\item\textsuperscript{46} \textit{Id.} (citing \textit{Spengler v. Worthington Cylinders}, 615 F.3d 481, 491 (6th Cir. 2010)).
\item\textsuperscript{47} \textit{Fuhr}, 710 F.3d at 674.
\item\textsuperscript{48} \textit{Id.}
\item\textsuperscript{49} \textit{Id.}
\item\textsuperscript{50} \textit{Id.} at 675–76 (stating “lack of temporal proximity alone can be fatal to an attempt to establish a causal connection.”).
\item\textsuperscript{51} \textit{Id.} at 676–77 (offering that the school district legitimately and proactively removed her as coach in 2006 in response to another contemporaneous federal case involving potential realignment of boys and girls playing seasons in Michigan to the same season and which was not made final until its litigious death in 2007, that the poor placement of an ice machine affected all non-football teams equally, that the refusal to pay for an athletic trainer and denial of access to the school gym at times affected all school teams equally, and allegations of negligent misconduct by the school’s athletic director affected all of the school teams, not just Fuhr’s, including his sporadic supervisory job evaluations).
enough or unique to her, and she lost her case. Still, her valiant and successful efforts to coach a high school boys’ basketball team were featured on ESPN’s Outside the Lines in 2001.52

iv. Communities for Equity: Title IX and Out-of-Sync Seasons

Around the same time of the Fuhr I lawsuit, one of the lengthiest, most discussed and impactful cases in Michigan sports law was being waged on the west side of the state between the MHSAA and the plaintiff-parents of two girls from Grand Rapids who alleged that the scheduling of high school sport seasons was discriminatory.53 The MHSAA is a private, non-profit corporation which governs high school and middle school levels in boys’ and girls’ sports in Michigan.

In 1998, two mothers questioned the scheduling of six girls’ sports to play in seasons which were out of sync with the boys.54 For example, at the time girls in Michigan played basketball in the fall rather than in the winter like the boys.55 This was remarkably different from most other states.56 These mothers alleged, and the district court held, that playing in a non-traditional season created significant disadvantages for the girls relative to the boys including, among other things, reduced exposure to college recruiters.57

With the help of Communities for Equity (CFE), an organization of parents and high school athletes that advocates on behalf of Title IX compliance and gender equity, a class action lawsuit was filed against MHSAA alleging discrimination under Title IX, the Equal Protection Clause, and, of course, Michigan’s ELCRA.58 After almost a decade of convoluted litigation, the Western District Court of Michigan (Kalamazoo) ultimately ordered that that boys and girls seasons be in sync, it was upheld on appeal, certiorari was denied by the United States Supreme Court, and the MHSAA lost.59

However, the litigation still did not end even after the decision in 2008 when the U.S. District Court turned its attention to a challenge to the amount of the award.

52. See Bob Ley, Outside the Lines: Women Coaching Men, ESPN (Oct. 24, 2001), https://www.espn.com/page2/tvlistings/show81transcript.html (discussing the jury verdict in Fuhr’s favor at the time and offering, “Federal Judge George Stee ordered that Geri Fuhr become the boys varsity head coach.”).


54. Id. at 1010; see also ADAM EPSTEIN, SPORTS LAW 218 (2013).


56. Id. at 506.

57. Id. at 506–07 (discussing the district court finding that forty-eight other states schedule girls basketball in the winter, unlike Michigan).

58. Id. at 507–08 (citing the District Court’s finding in its decision in Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n, 178 F. Supp. 2d 805, 813-36 (W.D. Mich. 2001) and stating “[i]t is undisputed that if Michigan girls played basketball during the winter season, they would, at the very least, be on ‘equal footing’ with Michigan boys and with girls in the rest of the country with respect to collegiate recruiting . . . ”).

59. Id. at 506.

of reasonable attorney fees and costs. Federal Judge Richard Alan Enslen began his opinion in bold, “When the game is complete, the loser should not complain about the rules.” Enslen’s impactful opinion noted that much of the plaintiff’s billable hours were the results of the defense counsel’s egregious tactics of harassment, intimidation, and rude, uncooperative, dilatory, and hostile litigation methods.

As a result of the case, Michigan girls’ volleyball switched from winter to fall, girls’ statewide basketball from fall to winter, girls’ tennis and boys’ golf from fall to spring, girls’ golf and boys’ tennis from spring to fall. Upper Peninsula girls’ soccer changed from spring to fall, and boys’ soccer from fall to spring. Also, the court awarded the class $4,429,117.13 in attorney fees and $131,144.80 in costs, for a total award of $4,560,261.93 with post-judgment interest calculated as well, a hefty price to pay for a decade of litigation.

Unfortunately for the state of Michigan, the decades-long legal battle over the lack of synchronous seasons demonstrated that the state can be stubborn to change, at times, as it was one of the last states to get in line with Title IX regarding playing seasons at the high school level nationwide.

v. Brooke Heike: Allegations of Discrimination and Mistreatment for Sexual Preference?

Brooke Heike competed on the Central Michigan University (CMU) women’s basketball team in Mount Pleasant during the 2006-2007 season, having

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62. *Id.* at 3.

63. *Id.* at 51–54; see also Julie Mack, *Federal Judge Richard Enslen Remembered for Impact on Title IX, Desegregation and Prison Rights*, MLIVE (Feb. 18, 2015), http://www.mlive.com/news/kalamazoo/index.ssf/2015/02/federal_judge_richard_enslen_r.html (discussing Enslen’s career including the impact his Title IX decision involving the MHSAA).


65. *Cmty's for Equity*, 459 F.3d 676.

66. See MHSAA, *Local Litigation Now National Issue*, MHSAA, https://www.mhsaa.com/mhsaa_archive/news/equity.html (“[T]he high schools of Michigan conduct girls basketball in the fall and girls volleyball in the winter, which is opposite intercollegiate seasons and all other states and Canadian provinces except Montana, North Dakota, South Dakota, the smaller high schools of Virginia and the province of Ontario.”).
been recruited from Romeo High School by CMU’s then head coach Eileen Kleinfelter.\(^67\) Immediately after that season, however, Kleinfelter was removed as the coach and Sue Guevara was hired.\(^68\)

Heike alleged that in April 2007, before the next season, that she met with Coach Guevara who told her that she did not want Heike to wear make-up and that she was not her type of person, meaning a heterosexual and one who wore make-up.\(^69\) Additionally, Heike alleged that she was kicked out of a practice and was so upset that she could not eat and vomited.\(^70\) Heike was then examined by a medical doctor who instructed by note that Heike not attend practice on December 15, 2007 because of her illness which were a direct result of emotional distress.\(^71\) Guevara did not renew Heike’s scholarship at the end of that season on the basis of her lack of skills and motivation.\(^72\)

In the 2009 decision *Heike v. Guevara*, Heike sued the Central Michigan University Board of Trustees (the Board) and CMU in the Eastern District of Michigan claiming that she was discriminated against based on race\(^73\) and sexual preference.\(^74\) Heike also claimed repeated unwelcomed harassment and discipline during the 2006-2007 season by Guevara.\(^75\) A CMU appeals committee hearing was held on the matter, which ruled in favor of CMU, and the District Court essentially dismissed all of the claims by Heike.\(^76\)

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\(^67\) *Heike v. Guevara*, 654 F. Supp. 2d 658, 663–64 (E.D. Mich. 2009) [hereinafter *Heike I*] (“Plaintiff won a “Most Valuable Player” (“MVP”) award and was co-captain of the team her senior year. Plaintiff was also named MVP of the MAC Blue All-League Team, member of the first tier MAC All-Conference team, member of the first tier All Metro East team, member of the second tier All Metro East team, and received honorable mention on the All-State team. Several colleges and universities recruited Plaintiff to join their women’s basketball programs and offered her athletic scholarships, including CMU and several other NCAA Division I schools.”); see also *Heike v. Cent. Mich. Univ. Bd. of Trs.*, No. 10-11373-BC, 2011 U.S. Dist. LEXIS 71456 (E.D. Mich. 2011) [hereinafter *Heike II*].

\(^68\) *Heike I* 654 F. Supp. 2d at 664.

\(^69\) *Heike I*.

\(^70\) *Heike I* at 665.

\(^71\) *Heike I*.

\(^72\) *Heike I* at 665–66. (“Over the course of the season, it was communicated to Brooke that she was not meeting expectations when she: [m]issed box outs . . . [c]ould not defend post players[,] [c]ould not compete at the same level of other players in our program. Her skills were significantly deficient in each and every measurable category. Missed sprint times causing the entire team to have additional sprints, which was indicative of lack of effective conditioning.”).

\(^73\) *Heike I* at 663 (“Heike is . . . of Caucasian and Native American descent.”).

\(^74\) *Heike*, 654 F. Supp. 2d at 663 (Heike listed federal claims pursuant to 42 U.S.C.S. § 1983 and a host of state law claims including “(1) violations of due process pursuant to the Fourteenth Amendment to the U.S. Constitution; (2) violations of the Equal Protection Clause to the U.S. Constitution; (3) breach of contract or implied contract; (4) defamation; (5) tortious interference with a contract or advantageous business relationship or expectancy against the individual Defendants; (6) intentional infliction of emotional distress; (7) violations of certain provisions of the Michigan Elliott-Larsen Civil Rights Act (“ELCRA”), MICH. COMP. LAWS §§ 37.2101, et seq.; (8) negligent hiring of Coach Guevara against CMU and AD Heeke; and (9) negligent supervision of Coach Guevara against CMU and AD Heeke.”).

\(^75\) *Heike I* at 664.

\(^76\) *Heike I* at 674, 676–77 (permitting Heike to provide a supplemental brief to support her claims for negligent hiring and supervision, the court needed to determine whether the employees were immune
In 2013, after Heike’s appeal, the Sixth Circuit Court of Appeals addressed the case and again ruled in favor of CMU citing insufficient evidence to support Heike’s allegations of discrimination based upon race or sexual preference.\textsuperscript{77} Heike, in fact, alleged that Guevara wanted thug-like players who were tough, and Heike and another student-athlete Beth Brown both lost their athletic scholarships because they were too girly and also happened to be white.\textsuperscript{78} The Court of Appeals affirmed the District Court decision and opined, “A coach’s decisions about who plays, how much playing time each player gets and whether a player remains part of the team at the end of a season are, by their nature, ‘based on a vast array of subjective, individualized assessments.’”\textsuperscript{79} The Court of Appeals went further, stating, “. . . disappointment and frustration with a coach’s conduct do not, without more, entitle a player to legal relief.”\textsuperscript{80}

In the end, Heike’s request for help from the judicial system did not succeed. Heike attempted to demonstrate that her athletic scholarship was not renewed for reasons other than her skills. She felt compelled to reach out to the federal courts to expose allegations of discrimination and perceived injustice of unfair and discriminatory practices related to race and sexual preference, whether they were legitimate or not.\textsuperscript{81}

From the legal battles waged by Carolyn King, to Jill Lafler, to Geraldine Fuhr, to the parents of Grand Rapids girls, to Brooke Heike, it becomes clear that Michigan has had prominent decisions addressing legal issues related to girls and women in sports at many levels. Though King and Lafler lost their cases in the courts, the respective governing bodies eventually changed their rules to incorporate girls and women participants.\textsuperscript{82} As for Heike, it is likely the case may not have occurred today given that NCAA Division I policies generally prohibit revocation of an athletic scholarship based upon performance alone, representing a wave of change for decades in which coaches held power over student-athletes to not renew an athletic scholarship for any reason whatsoever.\textsuperscript{83}

\textsuperscript{77} Heike v. Guevara, No. 10–1728, 519 F. App’x 911, 914 (6th Cir. 2013) (the court recognized that the Heike’s scholarship was, in fact, renewed for one season after Kleinfelter).

\textsuperscript{78} Id. at 914.

\textsuperscript{79} Id. at 922 (quoting Engquist v. Or. Dep’t of Agric., 553 U.S. 591, 603 (2008)).

\textsuperscript{80} Id. at 925.

\textsuperscript{81} Id. at 914 (alleging that Guevara was critical of Heike not for her skills but her looks such as for “tanning, wearing tight pants, and wearing makeup”).

\textsuperscript{82} See, e.g., John Balazar, Striking a Blow for Equality: Dallas Malloy has Won Her Fight to be America’s First Sanctioned Female Amateur Boxer. The Scrappy 16-year-old Knows the Rewards of Blood, Sweat and a Killer Instinct, L.A. TIMES (Oct. 18, 1993), http://articles.latimes.com/1993-10-18/news/mn-47225_1_amateur-boxer (discussing how Dallas Malloy became the first female boxer to participate in amateur boxing as a result of legal action supported by the American Civil Liberties Union which won a temporary injunction against USA Boxing).

\textsuperscript{83} See Ben Strauss, Colleges’ Shift on Four-Year Scholarships Reflects Players’ Growing Power, N.Y. TIMES (Oct. 28, 2014), https://mobile.nytimes.com/2014/10/29/sports/colleges-shift-on-four-year-scholarships-reflects-players-growing-power.html (offering that “. . . the Big Ten announced that it would become the first conference to guarantee its athletic scholarships for four years, a change from the widely followed practice of offering a single-year scholarship that can be renewed. Effective immediately, the Big Ten will ensure that none of its recruited athletes — in any sport — can lose their financial
The impact of the MHSAA’s case has had a profound effect on Michigan high school athletes in the name of Title IX compliance, despite its resistance to synchronize high school playing seasons in the first place. In this regard, Michigan trailed the rest of the country in Title IX compliance at the interscholastic level and one could argue that the litigation to maintain the “separate but equal” status quo was an egg on the face of the Mitten State, or at least the MHSAA, which remained obtinate to the very end. Still, there is no reason to suspect that Michigan will not continue to face challenges and address gender-related issues (including sexual preference) in sport, whether through the legal system or otherwise, including social media and the court of public opinion.

B. Race

Michigan has played an important role regarding race and its relationship to sports, society, and the law. This should not be surprising, however. Michigan played a vital role as part of the Underground Railroad during the Civil War era becoming a prime resting place for slaves to escape to Canada from the injustices of the American

84 See Dacey, supra note 64 (offering that in the short run since the MHSAA decision, in fact girls participation in high school sports has actually dropped in Michigan in several sports, most notably in girls’ basketball offering. “During the 2013-2014 school year, participation in girls basketball fell for the eighth straight season to 16,329, marking its lowest total since records were first kept in 1991-1992, according to a press release from the MHSAA. Since girls basketball was moved to the winter, participation has decreased 14.7 percent.” Dacey also notes that volleyball participation has decreased 13.6 percent since the last time it was played winter, but Dacey also notes that Michigan was the only state in which girls’ volleyball was a winter sport prior to the mandated change).

85 See, e.g., Terry Foster, Ron English Focused, Wants to Coach Again, DET. NEWS (Dec. 29, 2014), http://www.detroitnews.com/story/sports/college/university-michigan/2014/12/29/ron-english-refocused-wants-coach/21032307/ (offering that English’s “90-second profanity and homophobic-laced tirade” led to his firing as Eastern Michigan University’s head football coach in 2013). Certainly, it did not help that English’s record was 1-8 at that time that year, and 11-46 over five years beginning in 2009. See also Cam Smith, Star Black Female Kicker Mocked in Racist Instagram Post that Includes Gorilla Suit, USA TODAY HIGH SCH. SPORTS (Oct. 25, 2016), http://usatodayhs.com/2016/star-african-american-female-placekicker-mocked-by-teen-in-gorilla-suit-in-racist-instagram-post (discussing the mockery on social media based upon gender and race of the female varsity football player for Midland’s Dow High School).
South. Michigan’s largest city Detroit, however, was also a center for race riots emanating from the civil rights era of the 1960s. Still, the state of Michigan has become an agent for change regarding sports and the law, and the open discussion and expression involving issues of race and sport in general. Michigan universities have played a significant role among racial issues in sports law, though some examples did not involve the courts or the American legal system, per se.

i. Willis Ward and Gerald Ford: Dispute at the Big House

In 1934, a football game between the University of Michigan and Georgia Tech led to a race-based protest that revealed racial bias at that time in the U.S. The football game took place in Ann Arbor at Michigan Stadium (the Big House), but one of Michigan’s players, Willis Ward, a future federal judge, could not participate because he was black. Georgia Tech threatened to forfeit the game if Ward played, and Michigan eventually agreed to play under those conditions.

Initially in response to this agreement, future President Gerald Ford, a teammate of Ward at the time, and other Michigan players protested the suspension of Ward’s participation in the game and initiated a protest, refusing to play in the game and threatening to quit the team. Ward, however, encouraged Ford to play while the sole African-American Wolverine spent the day listening to the game from the confines of his fraternity house rather than sitting in the stadium.

In 2012, Ward, Ford, and this historic event were recognized at the Big House.

86. See, e.g., Grace Shackman, The Underground Railroad in Ann Arbor, ANN ARBOR OBSERVER (Feb. 18, 2009), http://aaobserver.aadl.org/aaobserver/15566 (discussing the role of abolitionists in Michigan).
89. See BLACK AND BLUE- THE STORY OF GERALD FORD, WILLIS WARD AND THE 1934 MICHIGAN-GEORGIA TECH GAME (Stunt3 Multimedia 2011). Michigan won 9-2, though it was their only victory that entire season in which they went 1-7 overall.
90. Id.
91. Id.
92. Id.
93. Id.
94. Id.
examples of a student-athlete protest. This incident did not involve the courts, but the issue of race in intercollegiate sport did draw considerable attention to Michigan at that time and also demonstrated that student-athletes could mobilize over issues that mattered to them, in this case involving race and a teammate’s outrage, a fellow student-athlete who would become the President of the United States.

ii. Michigan State: the 1960s and Integration in East Lansing

Almost thirty years later in 1963, a basketball game at MSU in East Lansing, an hour to the northwest from Ann Arbor, marked a huge milestone in college sports at MSU’s Jenison Field House which was the site for the 1963 NCAA Mideast Regional tournament semi-final game. MSU’s all-white basketball team was scheduled to play the Ramblers of Loyola University (Chicago) who had four African-Americans on their roster as starters.

A historically segregated state, it was uncertain whether the game would be played at all given the anti-integration policies and racism in the south, including Mississippi. Governor Ross Barnett and Mississippi State’s university board attempted to prevent the Starkville school from playing in the NCAA tournament because teams had black players. Defiant, Mississippi State’s team got on a plane and headed to East Lansing, avoiding an injunction sought for by Mississippi state senator Billy Mits that would have prohibited its coach and school president from leaving Mississippi for the game. Hinds County Chancellor L.B. Porter, whom the previous fall had issued an order preventing James Meredith’s enrollment at the University of Mississippi, granted the injunction recognizing that there was a Mississippi


96. See Mike Lopresti, Michigan to Honor Back Player Benched 78 Years Ago, USA TODAY (Oct. 19, 2012), http://www.usatoday.com/story/sports/ncaa/2012/10/19/michigan-wolverines-football-willis-ward-gerald-ford/1643247/ (noting that Willis Ward, who died in 1983, had beaten Jesse Owens in a race). For further discussion of racial issues and protests and mobilizations in intercollegiate sport generally, see Adam Epstein & Kathryn Kisska-Schulze, Northwestern University, The University of Missouri and the “Student-Athlete”: Mobilization Efforts and the Future, 26 J. LEGAL ASPECTS OF SPORT 71, 83–84 (2016) (“The fact that Ford and other players initiated a verbose protest against benching an African-American teammate based on race represented one of the earliest examples of student-athlete mobilization efforts, though such efforts did not ultimately lead to Ward’s participation in the game.”).


98. Id. (noting that due largely to the 2006 movie GLORY ROAD, Texas Western’s meeting with the University of Kentucky overshadows the game in East Lansing in which five African-American starters for Texas Western beat Kentucky’s all-white team for the national championship in 1966).

99. Id. (offering that Loyola had already received less than welcome receptions in both New Orleans and Houston).

100. Id. (noting, however, that “Mississippi State President Dean Colvard vowed to let his team play”).

101. Id.
statute that prevented participation against integrated teams.\textsuperscript{102} Loyola beat Mississippi State 61-51 and won the national championship in Chicago eight days later against the University of Cincinnati.\textsuperscript{103}

In addition to that game, MSU has played a significant role in creating opportunities for black athletes particularly at the crossroads of the civil rights era.\textsuperscript{104} For example, head football coach Clarence “Biggie” Munn recruited various non-whites in the 1950s, one of whom was Willie Thrower who became the Big Ten Conference’s first African-American quarterback.\textsuperscript{105} Then, subsequent head football coach Duffy Daugherty, in the 1950s and 1960s, made a common practice of recruiting black players and reaching out to black coaches from the South for clinics because of the segregationist policies at the time.\textsuperscript{106} Munn and Daugherty won numerous national championships during the era of change and subsequent social uprising.\textsuperscript{107}

\textit{iii. Coach Keith Dambrot: Controversial Race-Related Speech}

As demonstrated, Michigan schools have played a huge role in advancing the discussion of race and creating opportunities for non-whites. However, a case emanating from a men’s basketball locker room incident at CMU brought to light some serious concerns related to race and speech.

In \textit{Dambrot v. Central Michigan University}, the Sixth Circuit ultimately supported the decision by CMU to terminate its head men’s basketball coach Keith Dambrot for his choice of words in a locker room incident.\textsuperscript{108} Dambrot used the word \textit{nigger} while addressing the players of his team in the locker room in January 1993 against Miami University of Ohio.\textsuperscript{109}

According to Dambrot, he admitted that he used the word but used it in a positive manner to his team.\textsuperscript{110} Some players reported that they were not offended but one former player, Shannon Norris, complained to the university’s affirmative action officer about the use of the word.\textsuperscript{111} An investigation revealed that Dambrot

\begin{itemize}
  \item \textsuperscript{102} \textit{Id.}; see also \textit{E-Five, The 50th Anniversary of Loyola University’s NCAA Men’s Basketball Championship, How They Play} (June 6, 2016), \url{https://howtheyplay.com/team-sports/The-50th-Anniversary-of-Loyola-Universitys-Mens-Basketball-Championship-Season} (offering that Mississippi State “had to secretly leave the state under cover of darkness” in order to avoid being served with the injunction).
  \item \textsuperscript{103} \textit{O’Neil, supra} note 97.
  \item \textsuperscript{104} See, e.g., \textit{Steve Grinczel, Michigan State Welcomes 1965-66 Teams Back to Campus for 50-Year Reunion}, MSUSPARTANS (Oct. 2, 2015), \url{http://www.msuspartans.com/sports/m-footbl/spec-rel/100215aac.html}.
  \item \textsuperscript{105} \textit{Steve Grinczel, Biggie, Duffy and the Golden Age of Spartan Football}, MSUSPARTANS (Oct. 12, 2012), \url{http://www.msuspartans.com/sports/m-footbl/spec-rel/101212aab.html}.
  \item \textsuperscript{106} \textit{Id.} (interviewing former player Gene Washington, recruited from Texas, who said that he did not believe that either Munn or Daugherty overtly took a stand against discrimination, but that their inclusive efforts “spoke volumes”).
  \item \textsuperscript{107} \textit{Id.} Munn won two National Championships (1951, 1952) while Daugherty won four National Championships (1955, 1957, 1965, 1966).
  \item \textsuperscript{108} \textit{Dambrot v. Cent. Mich. Univ.}, 55 F.3d 1177 (6th Cir. 1995).
  \item \textsuperscript{109} \textit{Id.} at 1180 (offering that the word was used either during halftime or at the end of the game).
  \item \textsuperscript{110} \textit{Id.} at 1181.
  \item \textsuperscript{111} \textit{Id.}.
\end{itemize}
told his players not to behave like niggers in the classroom prior to the January incident as well.112 As a result, the CMU officer interpreted Dambrot’s use of the term as a violation of CMU’s harassment policy and Dambrot accepted a five-day suspension without pay.113 Then, on April 12, 1993, the university informed Dambrot that he would not be retained as the basketball head coach for the following season.114

Dambrot brought suit in the United States District Court for the Eastern District of Michigan alleging that he was terminated in violation of his First Amendment rights as a public employee.115 The District Court analyzed whether there was a violation of Dambrot’s free speech rights as a public employee in the “very specific stepby-step analysis” which requires the employee to show: “(1) that his speech was on a matter of public concern, (2) that if it was, then it was entitled to protection (after a balancing test is applied), and (3) that any first amendment violation was a substantial factor in termination.”116

The District Court considered the above and proffered that “one way to evaluate the possibility of the ‘public concern’ component in questioned speech is to imagine it being discussed in public.”117 The court envisioned disputes being hashed out on town soapboxes in the public square as examples of public concern, but did not envision that Dambrot would grab a microphone and state publicly that he wanted his players to play like niggers.118 Thus, because Dambrot’s speech was made to players in the locker room, the speech was not a matter of public concern.119 However, the District Court also held that CMU’s policy was overbroad and vague, thereby being facially unconstitutional even though his termination was not wrongful.120

The Sixth Circuit Court of Appeals entirely affirmed the District Court decision, including holding that the CMU policy was void for vagueness because it did

112. *Id.* (“In November, Dambrot apparently addressed the team after a practice and said he wanted the players to ‘play like niggers on the court’ and wished he had more niggers on the basketball court. He then said he did not want the team to act like niggers in the classroom.”).

113. *Id.* CMU’s policy defined racial and ethnic harassment as: any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by . . . c) demeaning or slurring individuals through . . . written literature because of their racial or ethnic affiliation; or (d) using symbols, [epithets] or slogans that infer negative connotations about the individual’s racial or ethnic affiliation. *Id.* at 1182 (emphasis added). However, the court found the policy impermissibly vague because it required “one [to] make a subjective reference” and because “different people find different things offensive.” *Id.* at 1184.

114. *Dambrot*, 55 F.3d at 1181.


117. *Id.* at 488.

118. *Id.*

119. *Id.* at 490 (“There is no conclusion available from the evidence other than that a coach’s disappointment with team play, and his attendant use of assertedly motivating language, was of private concern only to him and perhaps to his players. It was not speech on a matter of public concern.”).

120. *Id.*
not provide fair notice nor did it define what was offensive, leaving that determination solely delegated to university officials.\textsuperscript{121} The Sixth Circuit also concluded that Dambrot’s speech was not protected because it was neither a matter of public concern, a part of the marketplace of ideas, nor within the realm of academic freedom.\textsuperscript{122} Put differently, Dambrot’s locker room speech contained no relevant social or political message to the community.\textsuperscript{123} The Court of Appeals stated:

\begin{quote}
Unlike the classroom teacher whose primary role is to guide students through the discussion and debate of various viewpoints in a particular discipline, Dambrot’s role as a coach is to train his student athletes how to win on the court. The plays and strategies are seldom up for debate. Execution of the coach’s will is paramount. Moreover, the coach controls who plays and for how long, placing a disincentive on any debate with the coach’s ideas which might have taken place.\textsuperscript{124}
\end{quote}

Interestingly, Dambrot had a successful career after leaving CMU. In 1998 he became the head coach at St. Vincent–St. Mary High School in Akron serving as the coach of future NBA All-Star LeBron James.\textsuperscript{125} He subsequently returned to college coaching when he accepted a position at the University of Akron where he eventually became the head coach of the Zips.\textsuperscript{126}

\section*{C. Disabilities}

The state of Michigan has had some prominent interscholastic cases related to students who have disabilities who attempt to play for their high school even though their state high school athletic association, in this case the MHSAA, had an unwavering restriction on participation based upon whether or not the student turns age 19 before September 1 of that academic year.\textsuperscript{127} Until recently, as demonstrated below, Michigan followed the majority of states that disallowed any exceptions to the age 19 rule.\textsuperscript{128}

\begin{itemize}
\item \textsuperscript{121} Cent. Mich. Univ., 55 F.3d at 1183–84.
\item \textsuperscript{122} Id. at 1188–89.
\item \textsuperscript{123} Id. at 1187–88.
\item \textsuperscript{124} Id. at 1190.
\item \textsuperscript{126} Id. (in 2017, Dambrot accepted the position of Head Coach at Duquesne University after 13 seasons at Akron University. See Elton Alexander, \textit{Keith Dambrot leaves Akron for Duquesne}, CLEVELAND (Mar. 27, 2017), http://www.cleveland.com/sports/college/index.ssf/2017/03/keith_dambrot_reportedly_leave.html).
\item \textsuperscript{127} Epstein, \textit{supra} note 54, at 251–54.
\item \textsuperscript{128} Id. at 253 (offering that the majority rule was unwavering for three reasons: “1. [T]o ensure the safety of younger athletes; 2. [T]o reduce the competitive advantage to teams using older athletes; and 3. [T]o discourage students and coaches from intentionally delaying education for athletic purposes.”).
\end{itemize}
In Sandison v. Michigan High Sch. Athletic Ass’n, plaintiffs Ronald Sandison (Rochester Adams High School) and Craig Stanley (Grosse Pointe North), both cross-country and track runners who had learning disabilities, sought an injunction to prevent the MHSAA from enforcing its age limitation to them for participating in athletics on the grounds that it amounted to unlawful disability discrimination. On August 18, 1994, the plaintiffs sued the Rochester and Grosse Pointe school systems and the MHSAA, under §504 of the Rehabilitation Act of 1973, Titles II and III of the Americans with Disabilities Act (ADA), the U.S. Constitution, and the Michigan Handicappers’ Civil Rights Act.

In late August 1994, the U.S. District Court for the Eastern District of Michigan granted the plaintiffs a temporary restraining order permitting the students to run in upcoming interscholastic cross-country races. Both were 19 year old seniors and were two years behind their age group due to their learning disabilities. The MHSAA, like many high school athletic associations, had an “age 19” rule that held that if a senior turns 19 before September 1 of the current school year that they, then, are ineligible for interscholastic athletics that year. Specifically, MHSAA Regulation I § 2 forbade students over 19 years old from playing interscholastic sports, stating:

A student who competes in any interscholastic athletic contests must be under nineteen (19) years of age, except that a student whose nineteenth (19th) birthday occurs on or after September 1 of a current school year is eligible for the balance of that school year. Any student

130. Id. (citing 29 U.S.C. § 794 (a) (West 2016) “No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).
131. Id. (citing 42 U.S.C.A §§ 12101-12213 (West 1990), specifically §§ 12132 (West 1990) and §§ 12182 (West 1990)).
132. Id. (citing 42 U.S.C. § 1983 (West 1996)).
133. Id. (citing MICH. COMP. LAWS ANN. §§ 37.1101-1607 (West 2017)).
134. Sandison, 64 F.3d at 1029 (offering that the district court reasoned that two titles of the ADA, as well as the Rehabilitation Act, applied against the MHSAA and that by managing interscholastic athletic events, the MHSAA operated “places of education” and “places of entertainment” under title III of the ADA, §§ 12181-89, which prohibits disability discrimination in places of “public accommodation.” It relied on Michigan law and the MHSAA’s membership concluding that the MHSAA was a “public entity” under title II of the ADA, §§ 12131-34. Finally, the court held that the MHSAA indirectly received federal financial assistance under the Rehabilitation Act, § 794).
135. Id. at 1028–29 (“When he was four years old, Ronald Sandison was placed in a special preschool program for learning disabled children because he had difficulty processing speech and language. Sandison started ungraded kindergarten at age six, rather than at the usual age of five, and it was not until age seven that Sandison was considered a student in graded kindergarten.” Sandison turned nineteen years old in May 1994, a few months before starting his senior year. “Due to a learning disability in mathematics, Craig Stanley repeated kindergarten and then spent five years in a special education classroom. Stanley made the transition into regular classrooms by entering the fourth grade, rather than the fifth grade, after those five years in special education. Accordingly, Stanley is two school grades behind his age group.” Stanley also turned nineteen in May 1994 before starting his senior year).
136. Id. at 1029; see also Epstein, supra note 54, at 252–55.
born before September 1, 1975, is ineligible for interscholastic athletics in Michigan. No waiver of the age requirement is permitted. MHSAA Handbook, Art. VII, § 4E.137

The District Court held that the plaintiffs were disabled, “otherwise qualified,” and discriminated against solely on the basis of their disabilities, and Sandison and Stanley could run cross country that season as a result of the restraining order.138 The MHSAA appealed the decision, but neither high school appealed and, in fact, supported Sandison and Stanley.139

On September 12, 1995, however, the Sixth Circuit Court of Appeals reversed the District Court decision and ruled in favor of the MHSAA, but only after Sandison and Stanley had already graduated.140 The Court of Appeals concluded that the boys did not meet the age requirement because of their birth dates, not because of their learning disability.141 It also opined that the students would not have succeeded on their ADA claims against the MHSAA and held that the MHSAA is not covered by Title II142 or Title III of the ADA.143

ii. Dion McPherson and the MHSAA’s Eight-Semester Rule

Two years later, in McPherson v. Michigan High Sch. Athletic Ass’n, Inc., the Sixth Circuit Court of Appeals addressed whether or not the denial of a waiver of the “eight-semester” rule which limited participation in MHSAA sports violated the ADA or §504 of the Rehabilitation Act.144 Huron High School (Ann Arbor) basketball player Dion McPherson sought to play basketball in what amounted to his ninth semester and asked the U.S. District Court for the Eastern District of Michigan to grant him a preliminary injunction, which it did, to allow him to play.145 The Sixth

137. Id.
138. Id.
139. Id. at 1029.
140. Sandison, 64 F.3d at 1028.
141. Id. at 1033 (“The plaintiffs’ respective learning disability does not prevent the two students from meeting the age requirement; the passage of time does. We hold that, under section 504, the plaintiffs cannot meet the age requirement ‘solely by reason of’ their dates of birth, not ‘solely by reason of [disability].’”).
142. Id. at 1036–37.
143. Id. at 1036 (“Title III protects disabled individuals from unequal enjoyment of ‘places of public accommodation.’ § 12182(a) (emphasis added). And §§ 12181(7) and § 36.104 make clear that public accommodations are operated by private entities, not public entities. The plaintiffs complain that the MHSAA age eligibility rule precludes them from equally participating in track events held on public school grounds or, presumably for cross-country events, in public parks. Public school grounds and public parks are of course operated by public entities, and thus cannot constitute public accommodations under title III. Accordingly, we conclude that no ‘place of public accommodation’ is implicated here and title III does not apply.”).
145. Id. at 455.
Circuit Court of Appeals, just like in *Sandison*, reversed the District Court’s injunction and denied the waiver request by McPherson to participate for a ninth semester, though by the time of the decision he, too, had already graduated from high school.\(^\text{146}\)

McPherson was not eligible to participate in high school sports for academic reasons.\(^\text{147}\) Then, McPherson repeated the eleventh grade, his grades improved and he participated on the varsity basketball team though that meant he participated in his seventh and eighth semesters of high school, thereby exhausting his complete high school eligibility under MHSAA rules.\(^\text{148}\)

Heading into the fall of his senior year academically, his ninth semester, he was diagnosed as having Attention Deficit Disorder a learning disability which is covered under §504 of the Rehabilitation Act.\(^\text{149}\) McPherson filed a petition with the MHSAA and requested that it waive its eight-semester rule so he could play, thereby granting him a reasonable accommodation, but the MHSAA did not budge and its Executive Committee argued that granting a waiver would “establish an unfavorable precedent that could tend to the establishment of unfair competitive advantages and undermine the confidence of the MHSAA membership.”\(^\text{151}\)

McPherson then successfully persuaded the District Court to grant him an injunction, just like in *Sandison*.\(^\text{152}\) The MHSAA appealed to the Sixth Court of Appeals and it argued that the rule was “essential to preserving the philosophy that students attend school primarily for the classroom education and only secondarily to participate in interscholastic athletics.”\(^\text{153}\)

McPherson argued that the eight-semester rule was fundamentally different from the age 19 rule in *Sandison* for which the MHSAA simply did not grant waivers at all.\(^\text{154}\) The Court of Appeals disagreed and concluded that requiring a waiver of the

\(^{146}\) *Id.*

\(^{147}\) *Id.* at 456–57.

\(^{148}\) *Id.*

\(^{149}\) *Id.* at 456.

\(^{150}\) *McPherson*, 119 F.3d at 456 (“The MHSAA Handbook makes any student who has completed eight semesters of high school ineligible for interscholastic sports competition: A student shall not compete in any branch of athletics who has been enrolled in grades nine to twelve, inclusive, for more than eight semesters. Regulation I, § 4. The Constitution of the MHSAA provides, however, that the so-called eight-semester rule may be waived: Except for the eligibility rule in regard to age, the Executive Committee shall have the authority to set aside the effect of any regulation governing eligibility of students or the competition between schools when in its opinion the rule fails to accomplish the purpose for which it is intended, or when the rule works an undue hardship upon the student or school. MHSAA Constitution, Art. VII, § 4(E) (emphasis added).”).

\(^{151}\) *Id.* at 457.

\(^{152}\) *Sandison v. Mich. High Sch. Athletic Ass’n*, 64 F.3d 1026 (6th Cir. 1995).

\(^{153}\) See *McPherson* 119 F.3d at 456 (quoting the testimony of the assistant director of the MHSAA); see also *Cardinal Mooney High Sch. v. Mich. High Sch. Athletic Ass’n*, 467 N.W.2d 21, 22 (Mich. 1991) (opining that the maximum age rule was reasonable and despite the fact that John McClellan, an emotionally troubled senior during the 1987-88 school year, was ineligible to participate in interscholastic athletics because he turned nineteen prior to September 1, 1987, “...we find that the interests of uniformity and predictability justify evenhanded application of rule 3(D) in this case. In light of the unique issues of competitive equity in the area of eligibility rules for athletic contests, we find rule 3(D) to be a valid regulation which neither infringes the authority of the courts nor improperly restricts access to the judicial system”).

\(^{154}\) *McPherson*, 119 F.3d at 461.
eight-semester rule would impose an immense financial and administrative burden on the MHSAA.\textsuperscript{155} The Court of Appeals stated:

The plaintiff would have us require waivers for all learning-disabled students who remain in school more than eight semesters. That, of course, would have the potential of opening floodgates for waivers, while until now, there have been only a handful of cases deemed appropriate for waivers. Assessing one or two students pales in comparison to the task of assessing a large number of students; an increase in number will both increase the cost of making the assessments, as well as increase the importance of doing so correctly. Having one student who is unfairly advantaged may be problematic, but having increasing numbers of such students obviously runs the risk of irrevocably altering the nature of high-school sports.\textsuperscript{156}

The MHSAA would be forced into an untenable situation, stating that accommodating McPherson would be an unreasonable burden on the MHSAA and “work a fundamental alteration in Michigan high school sports programs.”\textsuperscript{157}

Dion McPherson, like both Ronald Sandison and Craig Stanley, lost his legal battle in the courts. In the Sandison and McPherson cases, both received preliminary injunctions by the District Court, both decisions were also-just a few years apart-overruled by the Sixth Circuit Court of Appeals. It became apparent that Michigan’s age 19 and eight-semester rules stood on solid legal ground when challenged through the courts.\textsuperscript{158}

\subsection*{iii. Eric Dompierre and Change in MHSAA’s Age 19 Policy}

In 2012, MHSAA was again faced with a disability waiver request, and though the MHSAA, a decade later, still maintained that it should prevent anyone who turned 19 before September 1 from playing on a MHSAA-member high school team, this particular case that emanated from the Upper Peninsula of Michigan (U.P.) was different.\textsuperscript{159} Parent Dean Dompierre, from Ishpeming, Michigan, was convinced

\begin{itemize}
  \item[155.] Id. at 462.
  \item[156.] Id. at 462–63.
  \item[157.] Id. at 462.
  \item[158.] See, e.g., Cardinal Mooney High Sch. v. Mich. High Sch. Athletic Ass’n, 437 Mich. 75, 76 (N.W. 1991) (noting that while the court did not necessarily approve of the MHSAA not granting a waiver, the maximum age rule was reasonable and declared despite the fact that John McClellan, an emotionally troubled nineteen year old senior at Cardinal Mooney High School during the 1987-88 school year, was ineligible to participate in interscholastic athletics as he turned nineteen prior to September 1, 1987, stating, “... we find that the interests of uniformity and predictability justify evenhanded application of rule 3 (D) in this case. In light of the unique issues of competitive equity in the area of eligibility rules for athletic contests, we find rule 3(D) to be a valid regulation which neither infringes the authority of the courts nor improperly restricts access to the judicial system”).
that the rule should not apply to his 19-year-old son Eric, who has Down Syndrome. Dompierre wanted to allow Eric, and others similarly situated, to have one additional year to keep playing on his high school’s football and basketball teams despite his age, and he created an online petition advocating for change in the MHSAA rule. Dompierre and his son Eric spoke to the Michigan State Legislature at a Senate Committee hearing to convince the MHSAA, too. By the end of the month, after a formal vote among its members, ninety-four percent of those who voted supported a change in the age 19 policy, under certain conditions.

Specifically, prior to the waiver request by a member of an MHSAA school, the student’s educational progress must have been delayed prior to initial enrollment in the ninth grade solely because of a medically documented disability under the federal Americans with Disabilities Act (ADA) or Michigan’s Persons with Disabilities Civil Rights Act (PDCRA). Also, at the time of the waiver request, the student must have a defined disability documented to diminish both physical and either intellectual or emotional capabilities, does not create a health or safety risk to participants, and does not create a competitive advantage for the team. The burden of proof rests with the member school seeking the waiver, and the maximum age rule could be extended one year, but the four-year maximum enrollment limit would still apply. As a result of the change due to Dompierre’s campaign, Michigan became the 24th state to allow waivers to maximum age (age 19) rule, demonstrating again that the state could change its policies as demonstrated in the Sandison and McPherson decisions to reflect changing times and opinions and in the name of common sense.

iv. The Big House “Alteration” and the ADA

The University of Michigan (UM) settled a lawsuit in 2008 in federal court related to the monstrous remodeling of its football stadium, the Big House, to include 329 permanent wheelchair-accessible seats. The lawsuit filed by Michigan Paralyzed Veterans of America in 2007 against UM in the Eastern District of Michigan,
challenged the accessibility for individuals with mobility disabilities. The U.S. Department of Justice (DOJ) intervened in the lawsuit and alleged that the university and its Board of Regents violated §504 of the Rehabilitation Act of 1973 and the ADA by illegally discriminating against persons with disabilities by failing to make its football stadium accessible. UM planned $226 million in renovations which included luxury boxes.

Michigan Stadium was built in 1927, over sixty years before the ADA went into effect. Originally the university had planned to add only 76 wheelchair-accessible seats to the stadium which was insufficient under the ADA. The Department of Education (DOE) had already criticized the access for disabled attendees involving the stadium facilities including bathrooms, concessions, souvenir shops, and parking lots. The settlement involved both the DOE and the DOJ in the form of a Consent Decree.

As demonstrated from the cases and examples above, the state of Michigan is clearly at the center of civil rights-related legal battles. Michigan has a history of being directly involved in battles over the fight for equality and against discriminatory practices in non-sports law related debates as well, especially ones related to affirmative action policies yet often having to appeal to the courts for assistance. It is not surprising that that presidents of UM, MSU, and EMU (Eastern Michigan University) have been women in recent years. Additionally, female athletic directors at NCAA Division I programs in Michigan, Heather Lyke at EMU in Ypsilanti

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170. Id.


173. Id. (offering that ADA rules require that alterations to public venues like Michigan Stadium must make 1 percent of seats wheelchair-accessible and disperse those seats throughout the venue, though repairs—which UM lawyers argued do not apply under the ADA).

174. Dept. of Justice, supra note 169.

175. Nelson, supra note 168.

176. See, e.g., Grutter v. Bollinger, 123 S. Ct. 2325, 2327 (U.S. 2003) (upholding the UM Law School’s use of race as a flexible admissions factor in a holistic, individualized review of applicants); see also Gratz v. Bollinger, 123 S.Ct. 2411, 2413 (U.S. 2003) (striking down UM’s use of race as a rigid, mechanical admissions factor without individualized review in its undergraduate admissions violated the Equal Protection Clause of the Fourteenth Amendment). Lee Bollinger was the president of UM.

177. See, e.g., Obergefell v. Hodges, 135 S. Ct. 2584, 2588 (U.S. 2015) (holding in a 5–4 that states may not deny to same-sex couples the fundamental right to marry). The Michigan part of the Sixth Circuit’s consolidated array of cases in Obergefell consisted of DeBoer v. Snyder, 772 F.3d 388, 391 (6th Cir. 2014). Rick Snyder is the Governor of Michigan; see also Grutter v. Bollinger, 123 S.Ct. 2325, 2327 (U.S. 2003) (upholding the UM Law School’s use of race as a flexible admissions factor in a holistic, individualized review of applicants); see also Gratz v. Bollinger, 123 S.Ct. 2411, 2413 (U.S. 2003) (striking down UM’s use of race as a rigid, mechanical admissions factor without individualized review in its undergraduate admissions violated the Equal Protection Clause of the Fourteenth Amendment). Lee Bollinger was the president of UM at the time).

178. See Beata Mostafavi, University of Michigan-Flint Chancellor Joins a Growing Number of Women Heading Michigan Colleges, MLIVE (July 28, 2009), http://blog.mlive.com/higher-education/2009/07/university_of_michiganflint_ch.html (noting Ruth Person joined the ranks of other women
and Kathy Beauregard at WMU (Western Michigan University) in Kalamazoo, have represented only a handful of female athletic directors nationwide of the 128 Football Bowl Subdivision (FBS) schools dominated by white males. In 2016, UM named Warde Manuel as its twelfth athletic director, a former UM football player and the second African-American in the university’s rich history, the same school that football player Willis Ward could not play for against Georgia Tech decades ago simply because of his race.

III. OTHER SUBJECT AREAS AND SPORTS LAW

Michigan provides the inquisitive mind with examples of cases, laws, and incidents related to many other areas related to sports and the law as well. This part explores some of the major examples involving various traditional categories of the law and how they have intersected with sports law and Michigan. Some of the examples reflect similar cases and decisions from other states and, therefore, should not necessarily be considered unique in nature though it does demonstrate the comprehensiveness of Michigan decisions related to sports law.

A. Torts

Like many states, Michigan has a significant share of personal injury-related issues litigation related to sports and torts and the exploration of whether or not there was an intentional act or a breach of the duty of care for negligent acts thereby creating liability. The amount of sports-related tort cases is not surprising given the

leaders of prominent college and universities in Michigan including Mary Sue Coleman, UM; Lou Anna Simon, MSU; Jean Goodnow, of Delta College; and Susan Martin, EMU).

179. See AM. SPORTS NETWORK, (Apr. 27, 2016), http://americansportsnet.com/ncaa-race-gender-report-highlights-c-usas-judy-macleod/ (it should be noted that Merrily Dean Baker ran Michigan State’s sports programs from 1992–95 becoming the first woman to be named athletics director at a Big Ten university and only the second at a Division I football-playing institution at the time); see Merrily Dean Baker Inducted into NACDA Hall of Fame, MSU SPARTANS (June 23, 2006), http://www.msuspartans.com/genrel/062306aaa.html.

180. See Brendan F. Quinn, Warde Manuel’s Race an Afterthought, but Michigan’s AD Still Among National Minority, MOLVE (Jan. 30, 2016), http://www.mlive.com/wolverines/index.ssf/2016/01/warde_manual_race.html (offering that Manuel had already served as athletic director at the Buffalo and Connecticut, but that Manuel actually is the second African-American to serve in that position. In September 1997, Tom Goss was introduced by UM President Lee Bollinger as the first African-American athletic director in UM history).

181. See, e.g., Overall v. Kadella, 361 N.W.2d 352 (Mich. 1984) (affirming judgment against defendant during a post-game hockey fight which was an intentional act causing injury); Higgins v. Pfeiffer, 546 N.W.2d 645 (Mich. Ct. App. 1996) (errant baseball throw by pitcher to catcher during warmups, striking plaintiff in the eye, did not rise to a level of negligence since a participant in a sporting activity consents to the risk of injury inherent in the contest); Ritchie-Gamesster v. City of Berkley, 597 N.W.2d 517 (Mich. 1999) (concluding that co-participants in recreational activities owe each other a duty not to act recklessly, in this case involving a collision at an ice rink when the defendant was skating backwards); Harris v. Univ. of Michigan Bd. of Regents, 558 N.W.2d 225 (Mich. Ct. App. 1996) (affirming summary disposition decision to defendants since plaintiff, a member of men’s gymnastics team, could not demonstrate gross negligence on the part of the coach or university during a sledging accident while on a trip to Colorado. The court also concluded that intercollegiate athletics should properly be regarded as a governmental function for governmental immunity purposes and outlined that there are, however, five major statutory exceptions to the broad sweep of governmental immunity, in particular M.C.L. § 691.1413
state’s top-ten population, large universities, and having a major league team in each of the Big Four professional sports leagues. Surrounded by the Great Lakes, Michigan has opportunities for sport and recreation on land, in the water and, of course, in the snow as well. The following cases represent some of the more prominent Michigan decisions in tort law in the context of sport and involve interesting claims of negligence involving foul balls, waivers, wrongful death, and concerns over concussions involving youth and recreational sports.

i. Alyssa Benejam and the Limited Duty “Baseball” Rule

In Benejam v. Detroit Tigers, Inc., Michigan formally adopted the limited duty rule, also known as the baseball rule, in which spectators must know from (proprietary function exception), and “Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees.” The court rejected the attempt to characterize intercollegiate athletics as proprietary function, however, either; Ward v. Michigan State Univ., 782 N.W.2d 514 (Mich. Ct. App. 2010) (referencing Harris as precedent and despite plaintiff being struck by a hockey puck allegedly due to the lack of Plexiglas, and requiring an ambulance and medical treatment while attending a college hockey game at MSU’s Munn Ice Arena, stating “Harris requires us to hold that defendant’s operation of its ice hockey program did not constitute a proprietary function. Further, regardless of Harris, plaintiffs have failed to show that defendant operated its ice hockey program primarily to generate a profit.”). Id. at 86.

182. See, e.g., Anderson v. Boyne USA, Inc., 2012 Mich. App. LEXIS 1725 (Mich. Ct. App. Sept. 11, 2012) (affirming the decision of the Charlevoix Circuit Court and holding in an unpublished decision that there should be no liability to the defendant when the plaintiff was paralyzed as the result of a snowboarding accident involving a jump in the terrain park at Boyne Mountain Ski Resort because under Michigan’s SKI AREA SAFETY ACT (SASA), MCL § 408.341 et seq., plaintiff could not sue because the jump was an “inherent, obvious, and necessary danger of snowboarding.” citing Anderson v. Pine Knob Ski Resort, Inc., 664 N.W.2d 756, 759 (Mich. 2003) (applying the doctrine of ejusdem generis and “conclude[d] that the commonality in the hazards is that they all inhere in the sport of skiing and, as long as they are obvious and necessary to the sport, there is immunity from suit”). The first lawsuit involved Patrick N. Anderson, whereas the second involved Robert R. and Christine M. Anderson, individually and as next friends of Robert C. Anderson, a minor.

183. See, e.g., Tarlea v. Crabtree, 687 N.W.2d 333 (Mich. Ct. App. 2004) (reversing the order Washtenaw Circuit Court, entering judgment in favor of the coaches, and dismissing the parents’ claims against football coaches who organized a three-day, summer football camp in compliance with MHSAA rules in August, 2000, in which high school player Jeremy Tarlea attended and died of heat stroke coupled with a bacterial infection. The Court of Appeals held that the coaches were, in fact, immune from suit, for the unexpected and tragic death of the 15-year-old because under Michigan law, the coaches were governmental employees and entitled to governmental immunity by reason of the Governmental Tort Liability Act (GTLA), Mich. COMP. LAWS § 691.1401 et seq. and given the facts, “no reasonable person could have concluded that the coaches acted in substantial disregard for the safety of the students.”) Id. at 336; see also David Feingold, Note: Who Takes the Heat? Criminal Liability for Heat-related Deaths in High School Athletics, 17 CARDozo J.L. & GENDER 359 (2011) (discussing the Tarlea case among others).

184. Benejam v. Detroit Tigers, Inc., 635 N.W.2d 219, 220 (Mich. Ct. App. 2001) (“Under that rule, a baseball stadium owner is not liable for injuries to spectators that result from projectiles leaving the
common knowledge that they assume certain risks by attending baseball games.\textsuperscript{185} Still, many spectators attend baseball games to be close to the field of play and, in some instances, specifically for the chance to catch a foul ball or home run, and they bring their gloves accordingly.\textsuperscript{186} This limited duty rule has been around since the early days of baseball and has protected owners and operators of stadiums frequently.\textsuperscript{187} It has been adopted by the majority of states that have addressed the issue of duty of care owed to spectators injured by balls and other flying objects inherent to the game.\textsuperscript{188}

In this case, Alyssia Benejam, a minor, attended a Detroit Tigers baseball game, seated close to the playing field along the third base line.\textsuperscript{189} The stadium had a net behind home plate, extending part of the way down the first and third base lines.\textsuperscript{190} Alyssia was behind the net, but she was injured when a player’s bat broke and a fragment of it curved around the net.\textsuperscript{191} Her parents sued the Detroit Tigers alleging that the net was insufficiently long and that warnings about the possibility of projectiles leaving the field were inadequate.\textsuperscript{192} Alyssia suffered crushed fingers as a result of the accident and a jury awarded her and her parents noneconomic damages (past and future) totaling $917,000, lost earning capacity of $56,700, and $35,000 for past and future medical expenses.\textsuperscript{193}

The Tigers appealed, and the Michigan Supreme Court reversed and remanded the case.\textsuperscript{194} The court held that in this case, the Tigers did not breach any duty to provide screening and was under no duty to provide a warning to plaintiffs regarding the risk of injury from objects leaving the field.\textsuperscript{195} The Supreme Court looked to other states for precedential guidance, stating:

\begin{quote}
field during play if safety screening has been provided behind home plate and there are a sufficient number of protected seats to meet ordinary demand. We conclude that the limited duty doctrine should be adopted as a matter of Michigan law and that there was no evidence presented at trial that defendants failed to meet that duty. Further, we conclude that there is no duty to warn spectators at a baseball game of the well-known possibility that a bat or ball might leave the field.
\end{quote}

185. \textit{Id.} at 221 (citing \textit{Blakeley v. White Star Line}, 118 N.W. 482 (Mich. 1908)) (discussing, with regard to the game of baseball, “It is knowledge common to all that in these games hard balls are thrown and batted with great swiftness; that they are liable to be muffed or batted or thrown outside the lines of the diamond, and visitors standing in position that may be reached by such balls have voluntarily placed themselves there with knowledge of the situation, and may be held to assume the risk. They can watch the ball, and may usually avoid being struck”).

186. \textit{Id.} at 223 (“... baseball fans attend games knowing that, as a natural result of play, objects may leave the field with the potential of causing injury in the stands. It is equally clear that most spectators, nonetheless, prefer to be as “close to the play” as possible, without an insulating and obstructive screen between them and the action.”); \textit{see also} Epstein, supra note 54, at 120.

187. Epstein, \textit{supra} note 54, at 120.


189. \textit{Benejam, 635 N.W.2d} at 220.

190. \textit{Id.}

191. \textit{Id.}

192. \textit{Id.}

193. \textit{Id.}

194. \textit{Id.} at 227.

195. \textit{Benejam, 635 N.W.2d} at 227.
other jurisdictions have balanced the safety benefits of providing a protective screen against the fact that such screening detracts from the allure of attending a live baseball game by placing an obstacle or insulation between fans and the playing field. The rule that emerges in these cases is that a stadium proprietor cannot be liable for spectator injuries if it has satisfied a “limited duty”-to erect a screen that will protect the most dangerous area of the spectator stands, behind home plate, and to provide a number of seats in this area sufficient to meet the ordinary demand for protected seats.\(^{196}\)

The court held that “a baseball stadium owner that provides screening behind home plate sufficient to meet ordinary demand for protected seating has fulfilled its duty with respect to screening and cannot be subjected to liability for injuries resulting to a spectator by an object leaving the playing field.”\(^{197}\)

With the Supreme Court’s official adoption of the limited duty (baseball) rule in Michigan, the Benejams did not prevail in their action against the Tigers. In recent years, however, this rule has become increasingly controversial at the national level and subject to criticism and debate particularly due to the number of serious, and in some cases, gruesome injuries suffered by spectators at professional baseball games being hit by flying objects emanating from the field.\(^{198}\) Some states have outright rejected this rule.\(^{199}\) It will be interesting to see if Major League Baseball changes its rules regarding protective screening standards for spectators.\(^{200}\)

\(^{196}\) Id. at 221.

\(^{197}\) Id. at 225 (stating also, however, “We do not today hold that a baseball stadium operator that does not provide this level of protection can be held liable.”).


\(^{199}\) *Rountree v. Boise Baseball, LLC*, 296 P.3d 373 (Idaho 2013) (rejecting baseball limited duty rule in favor of comparative negligence approach); *but see Edward C. v. City of Albuquerque*, 241 P.3d 1086, 1098 (N.M. 2010) (reversing the New Mexico Court of Appeals which had rejected a limited-duty rule, and thereby holding and adopting a limited-duty rule that applies to owner/occupants of a commercial baseball facility, and that “spectators must exercise ordinary care to protect themselves from the inherent risk of being hit by a projectile that leaves the field of play and the owner/occupant must exercise ordinary care not to increase that inherent risk”).

\(^{200}\) *See, e.g.*, Matthew J. Ludden, *Take Me Out to the Ballgame . . . But Bring a Helmet: Reforming the “Baseball Rule” in Light of Recent Fan Injuries at Baseball Stadiums*, 24 MARQ. SPORTS L. REV. 123 (2013); *see also Steve Wulf, Net Result: New Protective Screens Put Fan Safety First*, ESPN (Mar. 30, 2016), http://espn.go.com/mlb/story/_/page/seasonpreview_netting/new-expanded-protective-screens-make-fan-safety-priority (discussing the recommendation made to the 30 franchises by MLB Commissioner Rob Manfred in December, 2015: “Clubs are encouraged to implement or maintain netting . . . that shields from line drive foul balls all field-level seats that are located between the near ends of both dugouts . . . and within 70 feet of home plate.”).
liability) which relieve a defendant for liability in tort law (negligence). One might explore *Xu v. Gay*, in which the Michigan Court of Appeals considered whether language at the top of a fitness center’s sign-in sheet could constitute a release from ordinary negligence. The plaintiff, Junyi Xu, as personal representative for the estate of decedent Ning Yan, appealed the Oakland Circuit Court’s granting of summary disposition in favor of defendant Hiedi (sic) Gay, doing business as Vital Power Fitness Center. Xu’s complaint alleged wrongful death of Yan who used a complimentary one-week pass to the gym. Each time Yan visited, he was required to sign in on a sheet that stated:

I understand that Vital Power Fitness Center reserves the right to revoke my membership for failure to respect the center’s rules and policies. I also understand that Vital Power Fitness Center assumes no responsibility for any injuries and/or sicknesses incurred to me . . . as a result of entering the premises and/or using any of the facilities. I additionally understand that I am not entitled to a refund on my membership fee or daily visit. MEMBERSHIP AND DAILY FEES ARE NEITHER REFUNDABLE NOR TRANSFERABLE.

While using a treadmill, Yan fell off and hit his head, dying just three weeks later. There was considerable disagreement as to whether he was thrown from the treadmill and hit his head backwards against the wall or window ledge 2 ½ feet behind him, or whether he fell on the floor itself due to feeling ill. Unfortunately, no one actually saw the incident.

The Michigan Court of Appeals dealt with the issue of whether the sign-in sheet constituted a valid release from ordinary negligence. The Court of Appeals found that the waiver was not valid because it did not inform the reader that he is solely responsible for injuries incurred, or that he waived the fitness center’s liability by relinquishing his right to sue, nor did it contain the words “waiver,” “disclaim,” or similar language. According to the Court of Appeals, Michigan waivers require the reader to understand not just the intent of the waiver but the effect of the release.

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203. *Id.* at 167.
204. *Id.*
205. *Id.* at 171–72.
206. *Id.* at 167. February 16, 1999 was his first visit, he hit his head on February 18, and died on March 12. *Id.*
207. *Id.*
208. *Xu*, 668 N.W.2d at 167.
209. *Id.* at 172.
210. *Id.* at 173.
as well. The Court of Appeals ruled that the trial court erred in granting summary disposition, and Xu was not barred from bringing the lawsuit.

Numerous other Michigan cases could be explored in the area of sports and torts. Some continue to focus on the determination of the validity of a waiver or release. This includes Lamp v. Reynolds, in which despite signing two liability waivers before participating in a motocross race, the Michigan Court of Appeals invalidated them and upheld the trial court decision that the motocross track owner of Baja Acres was liable when a motocross rider lost control of his bike after a jump and crashed into a tree stump that was hidden in a patch of weeds.

Even though the stump stood outside the race course, the court reasoned that the defendant engaged in willful and wanton misconduct and should have foreseen

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211. Id. (finding that the words of the release were unambiguous, and even though the words waiver and disclaim are not, per se, required to create a valid release, “we believe that, at a minimum, a release should explicitly inform the reader regarding the effect of the release”). Id. at 173–74.

212. See, e.g., Sherry v. E. Suburban Football League, 807 N.W.2d 859 (Mich. Ct. App. 2011). The mother of an injured junior varsity cheerleader Jessica Sherry, while performing for the first-time an advanced cheerleading stunt during horseplay with no supervision or coach present, successfully appealed from an order from the Macomb Circuit Court which had granted summary disposition, stating that genuine issues of material fact remained as to whether or not the defendants exercised ordinary care, and that it was error to apply a reckless misconduct analysis rather than an ordinary negligence test. The Court stated, “We find that reasonable minds could differ regarding whether an individual exercising ordinary care would foresee that a young girl without proper supervision or training would become injured in an attempt to execute an advanced cheerleading stunt with a group of high school girls on a grass football field.” Id. at 863; see also the unpublished decision in French v. Macarthur, 2011 Mich. App. LEXIS 1330 (Mich. Ct. App. July 19, 2011), in which while assisting in a youth-league softball practice drill, a parent failed to call out the word “outfield” before swinging in order to alert the players that he was swinging and where he intended to hit the ball which ended up being a line-drive that struck the plaintiff’s face when she stood on the pitcher’s mound. The parent-defendant was held to be a co-participant, and thus subject to the recreational activities doctrine, a principle which requires the demonstration of reckless misconduct in order to establish liability for injuring another co-participant during a recreational activity. The Court of Appeals rejected the claim that a reasonable juror could find reckless misconduct in that case and reversed the lower court, thereby ruling in favor of the defendant; see also Friend v. Clarkson Cnty. Sch. Dist., 2015 Mich. App. LEXIS 1282 (Mich. Ct. App. June 18, 2015), another unpublished decision, affirming summary disposition plaintiff-cheerleader’s gross negligence claim against Clarkson Community School District and junior varsity cheerleading coach where cheerleader suffered a concussion while performing the stunt-a “double twist” because plaintiff failed to demonstrate gross negligence by the defendants and in fact, the coach had provided weeks of training of the stunt prior to the injury occurring. The court stated that gross negligence suggests an “almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks. It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge.”) Id. at 9 (citing Tarlea v. Crabtree, 687 N.W.2d 333, 339-40 (Mich. Ct. App. 2004)).

213. See, e.g., Skotak v. Vic Tanny Int’l, 513 N.W.2d 428 (Mich. Ct. App. 1994) (offering that Michigan courts will allow a party to be released from its own negligence, but “To be valid, a release must be fairly and knowingly made. A release is invalid if (1) the releasor was dazed, in shock, or under the influence of drugs, (2) the nature of the instrument was misrepresented, or (3) there was other fraudulent or overreaching conduct.”) Id. at 430.

214. Lamp v. Reynolds, 645 N.W.2d 311 (Mich. Ct. App. 2002) (upholding the Tuscola Circuit Court decision in favor of the husband and wife (who sued for loss of consortium) stating, “It is well established in this jurisdiction that, although a party may contract against liability for harm caused by his ordinary negligence, a party may not insulate himself against liability for gross negligence or willful and wanton misconduct.”) Id. at 314.
the potential for a serious accident because motocross riders travel at high rates of speed and may lose control of their bikes.\textsuperscript{216} The Court opined:

In this case, the evidence showed that defendants knew about the tree stump for years, knew that the stump was located a short distance from the outside perimeter of the racetrack, and knew that motocross racing involved high rates of speed and that it was common for racers to leave the track during the race. The evidence also showed that defendants did not cut the weeds around the edges of the racetrack or around the tree stump, failed to remove the stump although they had the equipment to remove it with little effort, failed to make the stump’s presence known to the motocross racers, and admitted that a hidden tree stump near a racetrack was a dangerous condition that could cause serious injury. Consequently, we find no error in the trial court’s determination that defendants’ conduct was willful and wanton.\textsuperscript{217}

Indeed, Michigan state law prevents defendants from contracting in order to shield themselves from damages for gross negligence or willful and wanton misconduct as demonstrated in the case.\textsuperscript{218} However, recently the state of Michigan passed a law that allows parents, in some circumstances, the ability to waive the right to sue on behalf of their children for negligence, causing discussion and confusion over the validity of the statute and whether it abrogates common law.\textsuperscript{219}

\textbf{iii. Concussion Awareness and Legislation}

\textsuperscript{216} Id.
\textsuperscript{217} Id. at 314.
\textsuperscript{218} Id.
\textsuperscript{219} See Brian Frasier, Esq., \textit{New Law Allows Some Parental Waivers}, MICHIGAN LAWYERS WEEKLY (July 11, 2011), http://milawyersweekly.com/reprint/earldley-071111/ (discussing Governor Snyder’s signing into law on June 20, 2011 MCL § 700.5109, a statute stating that parents may, under certain circumstances, waive the rights of their minor child to sue for injuries sustained while participating in recreational activities, legislatively responding to the Michigan Supreme Court’s decision in \textit{Woodman v. Kera, L.L.C.}, 785 N.W. 2d 1 (2010) (holding that a preinjury waiver signed by a parent on behalf of a child who broke their leg at “Bounce Party” was unenforceable, because a parent cannot contractually bind a child at common law). The new law allows parents to release sponsors or organizers of recreational activity as well as paid or volunteer coaches or persons who assist in conducting recreational activity. The statute defines recreational activity as “active participation in an athletic or recreational sport.” Still, it only applies only to recreational activities sponsored or organized by nongovernmental, nonprofit organizations. It appears that the law benefits churches, private schools, and other nonprofit and nongovernmental organizations such as Little League Baseball and Softball. It also preserves the child’s right to sue for injury or death resulting from the negligence of any person, and a parent can only release claims for injuries resulting solely from the inherent risks of the recreational activity. In sum, a parent may now release a child’s claim for injuries resulting solely from risks inherent in recreational activity sponsored by nongovernmental, nonprofit organizations. Only time will tell to see if the law must be amended for clarity or is found to violate Michigan public policy); see also Sidney A. Klingler, \textit{New Law Allows Limited Parental Waiver of Child Injury Claims}, BOUNDARIES (June 24, 2011), https://www.secrestwardle.com/upload/publications/boundaries%20_062411.pdf.
National discussion over concussions has been a justified, popular topic in recent years at all levels of sport-related competition, particularly in the sport of football in which the number of lawsuits has exploded. The question of who is responsible for the short and long-term risk of concussions, whether it be professional or amateur sport leagues, organizations, coaches, doctors, trainers, or parents, has created considerable pause within the American legal system as to how to allocate fault, duty, and causation when concussions are involved in litigation. For example, former Grand Valley State University quarterback Cullen Finnerty died at age 30 in May 2013, and some attributed it, in part, to repeated concussions which can develop into the degenerative brain disease chronic traumatic encephalopathy (CTE).

Accordingly, as concern over sports-related concussions continues to increase, Michigan adopted a law in 2013 which protects youth athletes, becoming the thirty-ninth state to do so. In sum, a coach or another adult employed by, volunteering or otherwise acting on behalf of an entity in charge of organizing a youth sporting event to remove a participant “who is suspected of sustaining a concussion.” The law requires that when an athlete is suspected to have a concussion, that athlete must be removed immediately and can only return with a health professional’s written clearance. It also requires that coaches, employees, and other adults involved in youth sports programs complete online concussion awareness training. In 2015, Michigan began a pilot program, the first of its kind in the nation, to not only have a special sideline concussion testing program, but also to require member schools to record suspected concussions in practice and in games at middle and high schools levels of all sports in grades seven through twelve.

221. Betsy J. Grey & Gary E. Marchant, Biomarkers, Concussions, and the Duty of Care, 2015 Mich. St. L. Rev. 1911 (2016) (offering examples of various lawsuits by professional and collegiate athletes involving traumatic brain injuries, and also exploring the challenges related to the evolving duty of care owed in youth sports, stating, “Legal duties for concussive injury prevention and management trace to a mixture of legislation and common law principles.”).
222. See Greg Bishop, Pneumonia Seen as Star’s Cause of Death, N.Y. TIMES (Aug. 8, 2013), http://www.nytimes.com/2013/08/09/sports/ncaafootball/star-college-quarterback-who-went-missing-died-of-pneumonia.html?_r=0 (discussing CTE and Finnerty and noting that he had Stage 2 of the disease (labeled as moderate, but he most likely became disoriented and incapacitated, vomited and inhaled the vomit, which caused the pneumonia).
225. Id.
226. Id. § 333.9155 (2016).
Michigan has a rich history of protecting the rights of union employees and unionization, though in 2012 Michigan actually became the twenty-fourth state to become a right to work state. Still, Michigan workers, whether unionized or not, who are injured on the job are governed by the Workers’ Disability Compensation Act (WDCA). This Act was originally adopted in 1912 and not only provides compensation to workers but also protects employers’ liability. Of course, the determination of who is actually an employee, who is covered under the Act, and when the act applies can sometimes lead to litigation.

i. Student-Athlete as “Employee”?

In the classic case of Coleman v. Western Michigan University, the Michigan Court of Appeals opined that there was no employment contract between the Kalamazoo-based university and the student-athlete which would rise to the level of being eligible for workers’ compensation. On April 17, 1979, the hearing referee denied compensation to Willis Coleman, finding that he “was not an employee of defendant” but instead “a scholarship-student athlete.”

On November 4, 1981, the Workers’ Compensation Appeals Board (WCAB) agreed, and based on its application of the “economic reality” test for determining the existence of an employer-employee relationship, it found no employment relationship between the parties. The Court of Appeals affirmed the WCAB decision and rejected the assertion that intercollegiate football is integral to the university’s primary businesses of education and research, thereby disallowing workers’ compensation. The fact that Coleman did not receive a “wage” but rather a football scholarship also weighed in on the decision.

Even after the Coleman decision, student-athletes have not yet been characterized as employees in Michigan or elsewhere, and various states have specifically

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230. Id.; see also Dept. of Licensing and Regulatory Affairs, Welcome to Workers’ Compensation Agency (WCA), MICHIGAN, http://www.michigan.gov/wca/.

231. MCL § 418.161.


233. Id. at 225.

234. Id.

235. Id. at 227.

236. Id. at 228.
rejected this characterization of the student-athlete as employee. In fact, the Sixth Circuit Court of Appeals has ruled that intercollegiate student-athletes do not even have a constitutionally protected property interest or “right” to participate at all.

Thus, it does not appear that student-athletes will be considered employees or covered under workers’ compensation laws anytime soon. The paucity of cases that have found employment within the workers’ compensation context have done so because, in addition to involvement in athletics, the student-athlete was separately employed by the university which was wholly dependent upon him playing football as well.

To make matters worse for those who wish to see student-athletes be paid as employees, there seemed to be a glimmer of an opportunity that the characterization of the student-athlete as employee might emerge in Illinois after a 2014 ruling from Region 13 of the National Labor Relations Board involving a unionization attempt at Northwestern University involving its football team. Regional Director Peter Sung Ohr determined that grant-in-aid scholarship football players at Northwestern University are indeed “employees” under Section 2(3) of the National Labor Relations Act and could therefore hold a unionization election. That decision, however, was overruled and vacated the following year.


238. Awrey v. Gilbertson, 833 F. Supp. 2d 738 (E.D. Mich. 2011) (dismissing with prejudice the lawsuit by football player Tony Awrey against Saginaw Valley State University (SVSU), the university president and its athletic director after he was declared ineligible under NCAA rules by the school citing Karmanos v. Baker, 617 F. Supp. 809, 815 (E.D. Mich. 1985), aff’d 816 F.2d 258 (6th Cir. 1987); Graham v. NCAA, 804 F.2d 953, 959 n.2 (6th Cir. 1986); Hamilton v. Tennessee Secondary Sch. Athletic Ass’n, 552 F.2d 681, 682 (6th Cir. 1976); Brindisi v. Regano, 20 F. App’x 508, 510 (2001) (concluding plaintiff did not have a constitutionally protected interest in participating in her high school’s cheerleading squad); see also Awrey v. Gilbertson, 2011 U.S. Dist. LEXIS 62004 (E.D. Mich. June 9, 2011) (holding that Tony’s father and former head football coach Randy Awrey, in a separate lawsuit against SVSU and three others, was not entitled to recover damages after his contract was not renewed involving the same investigation into NCAA rules violations, even though a separate jury trial in Saginaw County Circuit Court concluded he did not violate NCAA rules but declined to award additional contract damages because his employment agreement ended and did not renew automatically).

239. See, e.g., Adam Epstein & Paul M. Anderson, The Relationship Between a Collegiate Student-Athlete and the University: An Historical and Legal Perspective, 26 MARQ. SPORTS L. REV. 287, 297 (2016) (offering “the courts have been consistent finding that student athletes are not recognized as employees under any legal standard, whether bringing claims under workers’ compensation laws, the NLRA or FLSA”).

240. Univ. of Denver v. Nemeth, 257 P. 2d. 423 (Colo. 1953); see also Van Horn v. Indus. Accident Comm’n, 219 Cal App 2d 457; 33 Cal Rptr. 169 (1963) (holding that a college football player at California Polytechnic State University, San Luis Obispo, could be the college’s “employee” for workers’ compensation purposes after the widow of a college football player killed in an airplane crash following a football game sued under California law); but see Shephard v. Loyola Marymount Univ., 125 Cal. Rptr. 2d 829 (Cal. App. 2d Dist. 2002) (referencing Van Horn and offering that as a direct result of that decision, California’s “Labor Code section 3352, subdivision (k) excludes a student athlete receiving an athletic scholarship from the term ‘employee.’”).


242. Id.

243. Northwestern Univ., 362 N.L.R.B. No. 167 (Aug. 17, 2015) (noting that even if it were to find that scholarship student-athletes were employees, “it would not effectuate the policies of the Act to assert jurisdiction,” because, due to the nature of NCAA Division I Football Bowl Subdivision (FBS) football
Almost immediately, and perhaps fearing the impact of Ohr’s ruling, Michigan and Ohio soon passed laws barring student-athletes from the right to unionize at all. On December 30, 2014, Michigan Governor Rick Snyder signed into law an amendment to the Michigan Public Employment Relations Act (PERA) to specifically exclude from the definition of “public employee” any “student participating in intercollegiate athletics on behalf of a public university in this state.”

ii. Andre Bezeau and the Detroit Vipers

In 1998, Andre Bezeau was a professional hockey player who signed a three-year contract to play for the Detroit Vipers of the now defunct International Hockey League. During the off-season in 2000 while residing in Canada, Bezeau fell off a forty-five-foot ladder while working for his father’s roofing company in New Brunswick, injuring his groin, lower back, and right thigh. During the first game of the 2000-2001 season another player hit Bezeau during a game in Rhode Island which aggravated his injuries. Thus, Bezeau was injured first in New Brunswick, then in Rhode Island, neither being in Michigan.

In June 2001, Bezeau applied for workers’ compensation benefits in Michigan, and after an initial hearing that ruled against Bezeau, he appealed and the Workers’ Compensation Appellate Commission (WCAC) granted benefits to Bezeau, finding “that the incident at the October 2000 hockey game was a contributing factor, among many, to plaintiff’s disability.” The defendants appealed to the Michigan Court of Appeals which vacated the decision to grant Bezeau benefits, and eventually the case worked its way up to the Supreme Court of Michigan in 2010.

The significance of the Bezeau hockey-related decision is that while his case proceeded, the Michigan Supreme Court issued a ruling in another case, Karaczewski v Farbman Stein & Company, which had held that one could only receive workers’ compensation in Michigan if the employee was a Michigan resident at the time the injury occurred and the contract itself was signed in Michigan. The Michigan Supreme Court decided to reverse the decision of the WCAC and remand Bezeau’s case to the WCAC consistent with the law before the Karaczewski decision, however, giving it retroactive effect as if that decision had never occurred in the first place.

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and the fact that there are so few private universities who are members, “it would not promote stability in labor relations to assert jurisdiction in this case”). Id. at 7.


246. Bezeau v. Palace Sports & Entm’t, Inc., 795 N.W.2d 797 (Mich. 2010) (Bezeau was a resident of Michigan and signed the contract in Michigan as well) Id. at 798.

247. Id.

248. Id.

249. Id.

250. Id. at 798–99.


252. Bezeau, 795 N.W.2d at 798. The Bezeau court noted that the Michigan legislature amended MCL §418.845 since Karaczewski, making it clearly applicable to out-of-state injuries. Id. at 799.
Due to the change in the interpretation of the law while Bezeau was working its way through the courts, the case was remanded by the Supreme Court to the pre-Karaczewski decision which, under Michigan law, allowed for workers’ compensation laws to apply to claims for benefits even if the injured employee was not a resident of Michigan as long as the contract for hire was made in Michigan, which occurred in Bezeau’s situation.253 Thus, today employees injured out-of-state will not be able to seek workers’ compensation benefits even if the employment contract was made in Michigan.254

C. Criminal Law

Michigan has been the location of numerous examples of significant and infamous cases and incidents of misconduct by amateur and professional players, coaches, parents, and others.255 Examples abound including the 1994 U.S. Figure Skating Championship incident involving Tonya Harding and Nancy Kerrigan at Detroit’s Cobo Hall.256 In 2004, the Malice at the Palace involved a team attack on spectators led by the Indiana Pacers’ Ron Artest charging into the stands in the Palace at Auburn Hills, resulting in his suspension for the rest of the season, various suspensions for other players including Stephen Jackson and Jermaine O’Neal, while the spectator who threw a cup of beer at Artest was sentenced to 30 days in jail and two years of probation.257

Whether it be a Detroit Lions’ coach driving naked through a fast food drive-thru,258 a parent attacking his sons’ baseball coach with an aluminum bat after the

253. Karaczewski, 732 N.W. 2d at 799 (citing and overruling Boyd v. W G Wade Shows, 505 N.W.2d 544 (Mich. 1993)).


255. See, e.g., Overall v. Kedella, 361 N.W.2d 352 (Mich. Ct. App. 1984) (affirming lower court monetary damages decision in favor of plaintiff hockey player who was punched in the face and knocked unconscious after the game in which a melee broke out holding that defendant not only broke MHSAA rules which disallows fighting, but he also committed an intentional battery upon the plaintiff as the game had already ended); see also Andrew Krietz, Rockford Coach Charged with Secretly Videotaping Girls, DetroIt Free Press (July 11, 2016), http://www.freep.com/story/news/local/michigan/2016/07/11/rockford-coach-charged-secretly-videotaping-girls/86936904/; Christopher Haxel, Video Shows Arrest of Draymond Green, Who is Charged with Assault, LANSING STATE JOURNAL (July 12, 2016), http://www.lansingstatejournal.com/story/news/local/2016/07/11/east-lansing-police-current-nba-player-arrested-early-sunday/86946368/.

256. Ashley Woods, The Most Dramatic Moment in Figure Skating History Happened 20 Years Ago, HUFFINGTON POST (Jan. 23, 2014), http://www.huffingtonpost.com/2014/01/06/nancy-kerrigan-tonya-harding-20-years_n_4548682.html.

257. Jonathan Abrams, The Malice at the Palace, GRANTLAND (Mar. 20, 2012), http://grantland.com/features/an-oral-history-malice-palace/ (recounting that the spectator was convicted of misdemeanor assault and battery whereas all the players pleaded no contest to misdemeanor assault and battery charges, were all fined $250 and were sentenced to one year of community service and probation).

258. Jim Schaefer & Nicholas J. Cotsonika, Lions Assistant Joe Cullen Suspended One Game After Two Traffic Incidents, USA TODAY (Sept. 7, 2006), http://usatoday30.usatoday.com/sports/football/nfl/lions/2006-09-07-assistant-arrests_x.htm (reporting that in 2006 defensive line coach Joe Cullen was arrested and charged with indecent and obscene conduct, and he was also arrested a week later while driving and subsequently tested at .12 for blood alcohol content).
coach benched this twin sons, violent post-game high school football brawls, mishandling of sexual assault claims, operating vehicles while intoxicated, violations of NCAA rules, misrepresenting information in one’s resume and falsifying one’s driver’s license, coaches slapping high school players, causing mental and emotional abuse rising to the level of bullying by coaches, demonstrating conflicts of interests during the contract negotiation of a professional sports contract, or embezzling money from clients. Michigan has been a center of discussion at the national level for sport-related misconduct, often rising to the level of criminal misconduct. This section focuses on a few other incidents related to sports and the law coupled with a law that was established as a direct result of hazing in high school.

i. Participation Fraud

259. Associated Press, Man Gets Jail Time for Attack on HS Coach, APNEWSARCHIVE (Nov. 7, 2003), http://www.apnewsarchive.com/2003/Man-Gets-Jail-Time-for-Attack-on-HS-Coach/id-6159e0c26247152e98593d808f4f81c (reporting of his sentence to two months in jail, ordering not to attend any amateur athletic events during his three years of probation, and paying $660 in fees and fines after pleading no contest to intent to commit great bodily harm).


262. Nick Baumgardner, Michigan Associate AD Jim Minick Pleads Guilty to OWI; Gets Probation, Fine, MLIVE (June 24, 2015), http://www.mlive.com/wolverines/index.ssf/2015/06/michigan_associate_ad_jim_mini.html#incart_2box_.


267. Detroit Lions, Inc. v. Argovitz, 767 F.2d 919 (6th Cir. 1985) (concluding that defendant Jerry Argovitz breached his fiduciary duty when negotiating a contract with the Houston Gamblers of the USFL and player Billy Sims, a Heisman Trophy winner, and that the contract was otherwise tainted by fraud and misrepresentation).


James Nash moved to Mid-Michigan from Lansing, an hour to the south, and enrolled at Mount Pleasant High School during the first week of the 2012-13 school year. However, Nash falsified his name and documents and played on the varsity football team as “Javier Jones.” Nash (Jones) played four games for the team until it was discovered that he was ineligible and, in fact, twenty-one years old which clearly violated Michigan’s age 19 rule, not to mention transfer rules. In fact, Nash’s birth certificate was forged and his high school transcripts were altered. An anonymous parent from the Lansing area blew the whistle on Nash.

Nash was arraigned in Isabella Trial Court in December 2012, on one count of forging or altering a vital record, which is a misdemeanor punishable by up to one year in jail and a $1,000 fine. After he was caught, he defended his deed based upon his desire to graduate from high school and attend college. Mount Pleasant High School finished the season with a 4-5 record, but changed its 2012 record to 2-7, forfeiting the games Nash played, in accordance with MHSAA rules. This was actually the second incident in recent years to gather national attention in which a high school player turned out to be a complete phony, the other being a 22-year-old basketball player from Texas via Florida via Haiti, and receiving a three-year prison sentence.

ii. Violence Against Sports Officials

Another event that garnered national attention with a much worse outcome occurred on June 29, 2014, in which during a recreational adult league soccer game in Livonia (a suburb of Detroit), Bassel Saad punched referee John Bienewicz in the head as he was going to eject the player from the game. Bienewicz died as a result and Saad pleaded guilty to involuntary manslaughter and was sentenced to 8 to 15 years in prison.
years in prison.\textsuperscript{280} Saad was also instructed to pay $9,265 in restitution to Bie-
newicz’s family.\textsuperscript{281} Then, a wrongful death lawsuit was filed against Saad almost
immediately, but the case was confidentially settled in August 2015.\textsuperscript{282}

As a direct result of the incident, attacking a sports official would lead to
extra jail time under a Michigan bill which would make assaulting a referee a felony
punishable by up to 3 years in prison and a $10,000 fine, making it the twenty-fourth
state to have such referee-specific crimes.\textsuperscript{283} However, it appears that the bill has not
yet become a law in Michigan.\textsuperscript{284} Violence against sports officials continues to be a
serious concern at all levels of competition.\textsuperscript{285}

\section*{iii. Hazing: Garret’s Law}

Still, in 2014 Michigan became the forty-fourth state to pass anti-hazing leg-
sislation prohibiting this misconduct at educational institutions and providing penali-
ties for misbehavior thereby amending its Michigan Penal Code.\textsuperscript{286} Michigan’s la,
Garret’s Law, is named after twelve-year-old Garret Drogosch, who suffered a seri-
ously broken leg and other injuries from forced participation in “eighth-grade hit day
tradition” held on the last day of football practice at his Northville middle school.\textsuperscript{287}

\begin{itemize}
\item \textsuperscript{280} Id.; see also Jeff Seidel, Plea Deal in Soccer Ref Death: Man to Serve 8-15 Years, DETROIT
FREE PRESS (Feb. 20, 2015), http://www.freep.com/story/news/local/michigan/wayne/2015/02/20/soc-
cer-referee-punch/23728687/ (offering the 911 call and noting that Saad was involved in another assault
on a soccer field in 2005 in which he hit another player repeatedly in the head).
\item \textsuperscript{281} Thompson, supra note 279.
\item \textsuperscript{282} Elisha Anderson, Settlement Reached in Lawsuit over Soccer Referee Death, DETROIT FREE
lawsuit-soccer-referee/31293293/.
\item \textsuperscript{283} Kathleen Gray & Elisha Anderson, Bill Aims to Make It a Felony to Assault Sports Officials,
sault-become-felony/22493487/; see also AP, Michigan Referee’s Death Prompts Calls for Tougher
Laws, FOX SPORTS (Mar. 12, 2015), http://www.foxsports.com/other/story/michigan-referees-death-
prompts-calls-for-tougher-laws-031215 (noting that there could be resistance in the state legislature
against such a bill because some believe that attacks on referees should be treated no differently than
attacks on anyone, regardless of their job or profession).
\item \textsuperscript{284} Associated Press, Michigan Referee’s Death Prompts Calls for Tougher Laws, FOX SPORTS
(Mar. 12, 2015), http://www.foxsports.com/other/story/michigan-referees-death-prompts-calls-for-
tougher-laws-031215 (noting that there could be resistance in the state legislature against such a bill
because some believe that attacks on referees should be treated no differently than attacks on anyone,
regardless of their job or profession).
\item \textsuperscript{285} See, e.g., Adam Epstein, Utah and Sports Law, 28 MARQ. SPORTS L. REV. 1 (2017) (forthcom-
tional soccer league referee Ricardo Portillo who died after a punch to the head by a 17-year-old participant);
see also Zack Cox, Report: Linesman Dennis Wideman Hit Suffered Potentially Career-Ending Concus-
sion, NESN (Feb. 19, 2016), http://nesn.com/2016/02/report-linesman-dennis-wideman-hit-suffered-po-
tentially-career-ending-concussion/ (providing video of the incident in which Calgary Flames de-
fenseman Dennis Wideman cross-checked NHL Linesman Don Henderson).
\item \textsuperscript{286} M.C.L. § 750.411 (t); see also House Fiscal Agency, Garret’s Law: Anti Hazing,
\item \textsuperscript{287} Mary Ann Zehr, Michigan Lawmakers Tackle Hazing, EDUCATION WEEK (Mar. 24, 2004),
\end{itemize}
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Finally, some areas of the sport-related criminal laws in Michigan appear to be in flux, including whether ticket scalping could become legal in Michigan, though it is not yet, or whether daily fantasy sports are legal in Michigan, not yet either. Mixed-martial arts is regulated in Michigan and has been since 2004.

D. Employment Law

As demonstrated in the *Dambrot* case in Part I, coaches must be diligent as to what they say or do, particularly when trying to motivate their players and becoming passionate about their team’s effort. As demonstrated in the *Heike* case, the relationship between student-athletes and coaches has been awkward at times, and in some instances could be construed as being unlawfully discriminatory or outright hostile. The following two employment-related cases both involve terminations of college coaches from Southeast Michigan.

i. Termination of Coach Beckie Francis

Women’s basketball coach Beckie Francis was terminated for cause by Oakland University in Rochester (Oakland County) in June 2013 after complaints sur-

288. Nicole Chadwick, *Ticket Scalping Could Become Legal in Michigan*, WILX (Mar. 17, 2015), http://www.wilx.com/home/headlines/Ticket-Scalping-Could-Become-Legal-in-Michigan-29668981.html (noting that since 1931 it has been illegal in the state but Michigan is one of the last states in the country where scalping tickets is illegal); see also M.C.L. § 750.465.


291. *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995); see also Peter J. Wallner, *Ferris State: Coach Tony Annese Lost Control and Lacked Understanding of Inappropriate Behavior*, MLIVE (Dec. 5, 2013), http://www.mlive.com/smallcolleges/grandrapids/index.ssf/2013/12/ferris_state_investigation_coa.html (discussing how the Ferris State University (Big Rapids) head football coach was suspended for eight days for becoming overly emotional and passionate when attempting to motivate his college football players by hitting them on their shoulder pads during a halftime outburst against Michigan Tech).


faced about her coaching style which was characterized as being abusive to her women’s basketball players. 294 In fact, some allegations included a religious-based “pray-to-play” policy and an over-emphasis on body weight and fat measurements. 295 Francis had received numerous accolades in recent years for her coaching, for supporting the passage of Erin’s Law in Michigan, and for her team’s academic success. 296

However, her termination presented an odd set of circumstances in that it occurred the same day her husband Gary Russi, the President of Oakland University, retired. 297 Additionally, when Francis asked to see the specific reasons and specific complaints against her for her “for cause” termination, the university refused on the grounds that it would violate federal privacy laws. 298 Francis then sued and prevailed under Michigan’s Bullard-Plawecki Employee Right to Know Act for the right to see her employment records without the many redactions. 299

As a result of her lawsuit, Michigan employers and employees are reminded that one is entitled to a copy of their employee personnel report and that the context of a termination for cause cannot be shielded by state privacy laws. 300 However, Francis never got her job back.

ii. Retaliatory Discharge and the University of Detroit-Mercy

In 2015, the Sixth Circuit Court of Appeals affirmed a 2014 decision by the Eastern District of Michigan in favor of the University of Detroit-Mercy (UDM) and its athletic director Keri Gaither who were sued under federal and state law by former assistant basketball coach Carlos Briggs who claimed that they retaliated against him in violation of Title VII of the Civil Rights Act of 1964 when he reported an extra-marital affair between Gaither and an assistant coach resulting in favoritism to the


295. Id.


297. Id.


299. Jason Shinn, Employer Ordered to Pay Attorney Fees in Dispute Over Producing Employee Personnel Records, MICHIGAN EMPLOYMENT ADVISOR (Dec. 2, 2013), http://www.michiganemploymentlawadvisor.com/personnel-files/employer-ordered-to-pay-attorney-fees-in-dispute-over-producing-employee-personnel-records-1/ (noting that she was entitled to attorney fees as well); see also Martin J. Greenberg & Nicholas Ullo, Beckie Francis Sues Oakland for a Non-reddacted Investigation Report that Led to her Termination, LAW.MARQUETTE.EDU; https://law.marquette.edu/assets/sports-law/pdf/Beckie%20Francis%20Postscript%208.5.14.pdf (providing excerpts and analysis of her contract which was obtained through a FOIA request).

300. Mike Martindale, Judge: Fired Oakland University coach can see more of her personnel report, DETROIT NEWS (Nov. 15, 2013), https://www.oakland.edu/upload/docs/Clips/2013/131115%20-%20Francis-DN.pdf.
other coach, Derek Thomas. However, the judicial decision determined that Briggs failed to establish a *prima facie* case of retaliation under Title VII of the Civil Rights Act of 1964 (42 U.S.C.S. § 2000e-3) because he did not reasonably believe that he was engaging in protected activity when he reported an affair between a university athletic director and an assistant coach or when he complained of favoritism resulting from the affair.

Briggs began working at UDM in 2007 and discovered the affair in August 2009 during a team exhibition trip to Spain. Once Briggs felt that the affair “started affecting the basketball team, (his) job, and things like that,” he reported the situation to the head coach in 2010 and again in 2011. Then, on August 26, 2012, Briggs utilized UDM’s anonymous reporter system via UDM’s web-based whistleblower tool. Briggs stated:

I am [an] Assistant Men’s Basketball Coach, one of three on our staff. We report to the Head Coach who reports to the Athletic Director [("AD"). The Athletic Director has been having sexual relations with my fellow assistant [coach] Derek Thomas since our team trip to Spain in the summer of 2009. I know because Derek and I have been roommates on the road the whole time. Whenever the AD travels with the team I have the room to myself. The favoritism the AD shows Derek has caused a lot of difficulty and drag on our growth as a basketball program. The AD’s resentment for me because she knows I know about their affair and because she resents my ability to recruit and do other work functions better than her lover threatens my job status. She has consistently acted to undermine me during the past year.

The university administration acknowledged the whistleblower report and wanted more details, and Briggs agreed to meet with Steve Nelson, UDM’s Associate Vice-President for Human Resources, at a restaurant on September 7, 2012 to discuss the matter.

Briggs then alleged that his anonymous complaint was breached and revealed to Gaither, the athletic director, which then (he claimed) resulted in “(1) increased hostility and harassment by Gaither, and (2) Gaither falsely accusing Briggs

302. *Id. at* 870–72 (“The district court properly articulated...the elements of a prima facie case of Title VII retaliation: a showing that the ‘(1) [plaintiff] engaged in activity protected by Title VII; (2) this exercise of protected rights was known to the defendant; (3) the defendant thereafter took an adverse employment action against the plaintiff; and (4) there was a causal connection between the protected activity and the adverse employment action.’ *Martin v. Toledo Cardiology Consultants, Inc.*, 548 F.3d 405, 412 (6th Cir. 2008)”).
303. *Id. at* 866.
304. *Id.*
305. *Id. at* 867.
306. *Id. at* 866–67.
of misconduct on the job.” 308 UDM conducted an investigation, Gaither and Thomas denied a sexual relationship, and on September 15, 2012, told Briggs that “appropriate action has been taken.” 309

However, Briggs was unsatisfied with the result and persisted his complaint, emailing Nelson and UDM’s president as well. 310 Unfortunately for Briggs, the court noted that he had his own workplace conduct issues as well, unrelated to this complaint including threats to Mort Meisner, head of UDM’s public relations contracting firm, and his daughter, and interfering with other job prospects by other UDM coaches, including head womens’ basketball coach Autumn Rademacher. 311

Still, during the athletic department investigation, text messages were discovered that revealed the affair between Gaither and Thomas, and UDM informed them on October 31, 2012, that their employment would be terminated, though Gaither decided to voluntarily retire. 312 The next day, UDM terminated Briggs’ employment, stating, “[t]he grounds for the termination are that [Briggs] acted in a threatening manner toward Mort Meisner and his daughter on the evening of October 12, 2012 at Calihan Hall, and that [Briggs] attempted to interfere in an employment opportunity that Autumn Rademacher had at Eastern Michigan University.” 313

Briggs’ lost his case at the District Court which centered on whether he “had a reasonable and good faith belief that he was reporting conduct that was unlawful under Title VII when he reported the affair and its alleged impact.” 314 The Sixth Circuit Court of Appeals stated, “Briggs admitted that he did not tell anyone about Gaither and Thomas’ affair initially because the conduct only affected them and, although Briggs did not approve of the affair, he did not consider himself to be the “morality police.” In other words, Briggs recognized that an affair, while perhaps morally questionable, was not itself in violation of Title VII.” 315 The Court continued, “Briggs never argued before the district court that he believed that complaining of favoritism for a paramour was protected activity under Title VII, much less that such a belief would be reasonable.” 316

The above two cases involved coaches at two high profile universities. In a non-coaching yet important employment law case, one might explore Adams v. Detroit Tigers, 317 a case filed by batboys against the Tigers alleging they were not paid overtime and minimum wage for their work, thereby violating state and federal law. The team won summary judgment in this federal case, successfully arguing that the batboys were exempt from the Fair Labor Standards Act (FLSA) of 1983, 29 U.S.C.

308. Id.
309. Id.
310. Id.
311. Id. at 868. The court also noted that Briggs’ workplace behavior was addressed in a document performance improvement plan (PIP). Id. at 867-88.
312. Id. at 868.
314. Id. at 871.
315. Id. at 871-72.
316. Id. at 872.
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§§ 206, 207, and the Michigan Minimum Wage Law.318 The Tigers successfully argued that they were an amusement or recreational establishment that either operated for not more than seven months in a calendar year, or had average receipts for any six months of a calendar year which are less than 33 1/3 percent of average receipts for the remaining months of that year, thereby meeting the wage-hour exemptions.319

E. Intellectual Property

i. Native American Mascots and Imagery

Several Michigan schools have been involved in controversial issues related to the use of Native American nicknames, logos and mascots. In 1988, the Michigan State Civil Rights Commission denounced their use by educational institutions, and in 2003 the Michigan State Board of Education called for an end to Native American “mascots, nicknames, logos, fight songs, insignias, antics and team descriptors.”320 Not unique to Michigan, in 2005, the NCAA required over 30 colleges around the country to explain the necessity of the use of Native American tribes as mascots or nicknames.321 Among this list was the CMU Chippewas.322 The NCAA threatened to prevent a member institution school from hosting post-season championship events or wearing those logos on their jerseys and uniforms during such contests.323 However, CMU is supported by the local Saginaw Chippewa Indian tribe for the use of the name, but not of a mascot. Thus, CMU does not presently have a mascot.324

Interestingly, in 1991 EMU long ago changed its nickname from the Hurons to the Eagles.325 However, there had been recent discussion of resurrecting the Huron logo (but not the nickname).326 This was so controversial that officials from the DOJ visited EMU to meet with former EMU President Susan Martin and a Native American student group over the use of the Huron logo which has the painted face of a Native American with feathers, and had been used on a flap on the marching band’s uniforms.327 EMU became the Hurons in 1929.328 EMU said its resurrected use in

318. Id. at 177 (referenced as M.S.A. § 17.255(1) et seq.).
319. Id.
321. Id.
322. Epstein, supra note 54, at 390.
323. Id.
324. Id.; see also Jordyn Hermani, Athletics Department has No Plans to Create Mascot, CM-LIFE (Apr. 8, 2016), http://www.cm-life.com/article/2016/04/athletics-department-has-no-plans-to-create-mascot.
326. Id.
327. Id.
328. Id.
this regard is “strictly a historic tribute.” On June 17, 2015 at EMU’s Board of Regents meeting, members of the Native American community at EMU asked Martin to eliminate the use. Finally, on August 11, 2015, EMU decided to drop the use of the old Huron logo altogether.

In 2013, the Michigan Department of Civil Rights (MDCR) named 35 Michigan local K-12 school districts as being “responsible for the alleged discrimination” by using the mascots, and asked the U.S. Department of Education’s Office of Civil Rights to ban their use. However, that effort failed as the MDCR was subsequently notified that their complaints to the DOJ would be dismissed altogether. Still, the discussion over whether the use of Native American nicknames or mascots continue in Michigan, as high schools such as Paw Paw High School near Kalamazoo engaged in public discussion in 2017 over whether or not to change their nickname from the Redskins to something less controversial.

F. Religion

Michigan, as a melting pot of American culture, has had a history of religious issues interwoven into sports, particularly for the adherence for observing religious holidays which could conflict with sport participation. For example, in 1934, MLB player and future hall-of-fame member Hank Greenberg sought advice from local rabbis whether or not to play on Rosh Hashanah, the Jewish New Year. The Detroit News ran a headline announcing the decision, stating “Talmud Clears Greenberg for

330. Jesse, supra note 325.
335. Epstein, supra note 54, at 440.
Holiday Play.” Greenberg skipped batting practice, but chose to play and hit two home runs in the Detroit Tigers 2-1 victory over the New York Yankees.

In 2010, a public high school, Fordson High School in Dearborn, decided to hold pre-season football practices between 11 p.m. and 4 a.m. in order to accommodate the celebration of Ramadan for its predominately Muslim squad. The community rallied to accommodate the practices, garnering national attention.

i. Homeschooling

In a 2004 homeschooling case, Reid v. Kenowa Hills Public Schools, the plaintiff-homeschooling parents sued because defendants barred their children’s participation in extracurricular sports. MHSAA rules required anyone participating in sports to be enrolled in a public school for at least twenty hours a week.

The trial court ruled in favor of the defendants despite the claim by their parents who alleged that barring their children from participating violated their statutory and constitutional rights. The parents claimed that the MHSAA rules essentially denied their children from an equal opportunity to receive collegiate athletic scholarships, thereby violating equal protection under the law. The plaintiffs also alleged that the MHSAA rules interfered with the free exercise of their religious beliefs.

The Michigan Court of Appeals stated, “Because the regulations set forth by the MHSAA constitute state action, we analyze plaintiffs’ claim that the statute violates their religious freedom under Const 1963, art. 1, § 4 using the compelling state interest test…” The Court continued:

“The test has five elements: (1) whether a defendant’s belief, or conduct motivated by belief, is sincerely held; (2) whether a defendant’s belief, or conduct motivated by belief, is religious in nature; (3) whether a state regulation imposes a burden on the exercise of such belief or conduct; (4) whether a compelling state interest justifies the burden imposed upon a defendant’s belief or conduct; and (5)

337. Id.
341. Id. at 65.
342. Id.
343. Id.
344. Id.
345. Id. at 68.
346. Reid, 680 N.W.2d at 68.
whether there is a less obtrusive form of regulation available to the state.”  

Though the Court of Appeals agreed that the plaintiffs proved the first two elements of the compelling state interest test, they failed on the third element because they did not prove that the MHSAA enrollment requirement imposed a burden on the exercising of their religious beliefs. The court stated, “...the MHSAA enrollment requirement is neutral on its face. It applies equally to everyone. The requirement does not single out any person on the basis of the person’s membership in a particular class or the person’s religious beliefs.”

As a result, the Court of Appeals shifted its review to a rational basis standard stating, “Under that standard, a statute will not be struck down if the classification scheme it creates is rationally related to a legitimate governmental purpose.” The Court of Appeals held that the rule was neutral on its face and applied to everyone, thereby satisfying the rational basis standard which was designed to prevent recruiting players, also known as “ringers.” The decision stood.

G. Antitrust

The Sixth Circuit Court of Appeals has dealt with cases involving sports emanating from Michigan. For example, in Warrior Sports, Inc. v. NCAA, the Sixth Circuit Court of Appeals held that the NCAA did not violate federal antitrust law under the Sherman Act or tortuously interfere with the business of Warrior Sports, Inc., a lacrosse stick manufacturer and distributor, by changing its own rules governing dimensions of lacrosse stick heads. Warrior Sports had argued that the NCAA’s decision to change the allowable dimensions of lacrosse sticks had damaged the company’s business.

In 2010, The Sixth Circuit Court of Appeals opined that the rule change affected all companies similarly under either the per se rule or rule of reason analysis.

347. Id. at 68–69.
348. Id. at 70 (stating “...we cannot find a nexus between the plaintiffs’ right of freedom of religion and the MHSAA’s enrollment requirement”).
349. Id. at 71.
350. Id. at 70.
352. See, e.g., McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979) (vacating an injunction by the Eastern District of Michigan thereby ruling in favor of the defendants that the NHL reserve system rule in effect and legal at that time was in fact incorporated into the collective bargaining agreement as a result of good faith, arm’s-length bargaining, thereby entitling defendants to a labor exemption from antitrust).
353. Warrior Sports, Inc. v. NCAA, 623 F.3d 281 (6th Cir. 2010). The Court noted that the 2006 Rule Change was intended to go into effect on January 1, 2009 and that would have rendered the vast majority of all men’s stick head models marketed by Warrior to be in violation of NCAA rules. Warrior filed a lawsuit in the Eastern District of Michigan challenging the 2006 Rule Change, but dismissed the action after the NCAA agreed to reconsider the proposed rules change. Id. at 283.
354. Id.
finding that “the challenged rule does not harm competition and, consequently, does not unreasonably restrain trade or commerce. Warrior’s Sherman Act claim thus fails as a matter of law.” 355 The appellate court also affirmed the District Court decision that Warrior Sports was unable to prove tortious interference on the part of the NCAA or that it was done “with a malicious and unlawful purpose” because it failed to provide specific actions on the part of the NCAA to cause harm to Warrior Sports, and the rule change applied “equally to all lacrosse stick manufacturers.” 356

IV. CONCLUSION

This article reviewed decades of some of the major sports law cases, issues, and incidents in Michigan’s rich history. From the Willis Ward situation in Ann Arbor in the 1930s, to the battles for equal opportunity by Carolyn King in the 1970s and Jill Lafler in the 1980s, to the legitimate claim of gender discrimination by the parents from Grand Rapids in the 1990s, to the challenge for change in MHSAA age 19 rules by Eric Dompierre and his family just a few years ago, Michigan reflects a broad spectrum of social and legal issues interwoven into this Midwestern melting pot surrounded by the Great Lakes. Thus, Michigan has been particularly active in sports law related to allegations of discrimination by or among coaches and participants.

Michigan cases have involved prominent state and federal decisions, running the gamut of sports law subjects from torts, to crimes, to other subjects, including employment-related cases, the use of ethnic nicknames or mascots, religious-based participation concerns, and antitrust issues. In many instances, the issues emanating from Michigan have received national attention especially those found in Part I related to gender, racial, and disability discrimination. This article, particularly Part II, can serve as a springboard for further research and exploration by students, professors and practitioners. Given its top-ten population coupled with its array of professional and intercollegiate sports teams and prominent universities, it is highly likely that the *Mitten State* will remain relevant in terms of sport and its relationship to the law regardless of decade, regardless of Peninsula.

355. *Id.* at 285–86.
356. *Id.* at 286–87.