

Erie County Common Pleas Court

Andrew A. Oliver

Case No. 2008 CV 762

v.

National Collegiate Athletic Association

Decided February 12, 2009

Richard G. Johnson, for plaintiff.

Linda J. Salfrank and Kimberly W. Herlihy, for defendant.

TONE, Judge.

{¶ 1} On January 12, 2009, the court convened a bench trial in the above-captioned case. Present at trial were the plaintiff, Andrew Oliver, represented by his attorney, Richard G. Johnson, and the defendant, the National Collegiate Athletic Association, represented by Linda J. Salfrank and Kimberly W. Herlihy. The plaintiff's evidence included direct examination testimony of the plaintiff, Andrew Oliver the plaintiff's father, David Oliver, and Michael Murman, Richard Karcher, and Marc Esenberg. The defendant, the National Collegiate Athletic Association, presented direct examination of Rachel Newman Baker, John Shukie, Jennifer Henderson, Carol Iwaoka, Kevin Lennon, and Alvin Mathews Jr. In addition to the direct examination above, the evidence also included trial depositions presented for examination and numerous exhibits.

This matter was before the court to determine Count Three, which sought a declaratory judgment, and Count Four, which sought a permanent injunction of the plaintiff's amended complaint. After thorough review of all pleadings, the testimony at trial, the depositions, and exhibits entered into evidence, the court grants the relief requested in Counts Three and Four of the plaintiff's first amended complaint.

FACTS

{¶ 2} The plaintiff, Andrew Oliver, is a resident of Vermilion, Erie County, Ohio. In 2006, the plaintiff graduated from Vermilion High School, where he was the primary pitcher for its baseball team. The plaintiff is currently in his junior year of college at Oklahoma State University ("OSU"). Since August 2006, the plaintiff has pitched for the baseball team at OSU.

{¶ 3} The defendant, the National Collegiate Athletic Association ("NCAA"), is an unincorporated business association having its principal place of business in Marion County, Indiana; it has member institutions not only in Oklahoma but also in Ohio. OSU is a member institution of the defendant; the NCAA association regulates the student-athlete activities at OSU.

{¶ 4} The plaintiff, in February 2006, retained the services of Robert M. Baratta, Tim Baratta, and Icon Sports Group, d.b.a. Icon Law Group, as his sports advisors and attorneys. In June of the same year, the Minnesota Twins of Major League Baseball drafted the plaintiff in the 17th round of the draft. At the end of the summer, the Minnesota Twins met with the plaintiff and his father at

the Oliver family home in Vermilion before the plaintiff left for his freshman year of college. Tim Baratta also attended the meeting, at his own request, at the Oliver home. During the meeting the Minnesota Twins offered the plaintiff \$390,000 to join their organization. After heeding the advice of his father, the plaintiff rejected the offer and chose to attend OSU in the fall on a full scholarship for which he had already signed a letter of intent in the fall of 2005.

{¶ 5} As a result of deciding to go to OSU and accepting amateur status, the plaintiff would not be eligible for the draft again until his junior year of college in June 2009. The plaintiff played his freshman and sophomore years for OSU, and during that period he never received any invoices requesting payment for any services rendered by his advisors. In fact, the plaintiff avers that the advisors provided nothing of value to him.

{¶ 6} In March 2008, plaintiff decided to terminate the Barattas and Icon Sports and retain the Boras Corporation. The plaintiff communicated his intentions of termination to Robert Baratta. At that time, Robert Baratta attempted to reconnect with the plaintiff and his father, but to no avail. In April 2008, the plaintiff received a letter and an invoice from the Barattas for \$113,750 for legal services. The invoice did not contain any detail of services rendered or time entries. The plaintiff took the invoice to the OSU baseball team coach, the OSU Athletic Compliance Office, and the Boras Corporation. Subsequently, the plaintiff retained attorney Michael Quiat to assist him with the matter. Quiat requested the time records supporting Baratta's invoice. In May,

in response to the request, the Barattas sent a letter dated February 8, 2006, and a contract dated February 8, 2006, to Quiat. The letter listed six items of assistance rendered by them on behalf of the plaintiff. The plaintiff has argued that the contract is fictitious and the assistance stated in it was in fact never performed.

{¶ 7} On May 19, 2008, the previous attorneys mailed, faxed, and e-mailed a letter to the defendant complaining about the plaintiff and reporting alleged violations by the plaintiff, i.e. the meeting at the Olivers' home that Tim Baratta had attended. As a result of the allegations, OSU and the defendant investigated the alleged violations in relationship to the plaintiff's amateur status. In May 2008, the plaintiff was indefinitely suspended from playing baseball and was informed by OSU staff that he had violated NCAA Bylaw 12.3.1 by (1) allowing his previous attorneys to contact the Minnesota Twins by telephone and (2) by allowing Tim Baratta to be present in his home when a representative from the Minnesota Twins tendered an offer to him.

{¶ 8} On August 18, 2008, the plaintiff was reinstated as a result of a temporary restraining order issued by this court. However, in October 2008, OSU filed for reinstatement of the plaintiff with the NCAA even though the temporary restraining order had reinstated the plaintiff. Subsequently, in December 2008, the plaintiff was suspended for one year and charged a year of eligibility by the defendant. The penalty was subsequently reduced to 70 percent of the original suspension and no loss of eligibility for the plaintiff.

ARGUMENTS

{¶ 9} The plaintiff requests that this court enter a declaratory judgment and injunctive relief enjoining the NCAA Bylaw 12.3.2.1 as unenforceable because the plaintiff retained legal counsel (the Barattas) to represent him and that legal counsel is subject to the exclusive regulation of the Ohio Supreme Court. Therefore, the defendant has no authority to promulgate a rule that would prevent a lawyer from competently representing his client. As such, the plaintiff maintains that, NCAA Bylaw 12.3.2.1 is void because it is against the public policy of the state of Ohio.

{¶ 10} Furthermore, the plaintiff argues that NCAA Bylaw 12.3.2.1 is arbitrary and capricious because, it does not impact a player's amateur status but instead limits the player's ability to effectively negotiate a contract that the player or a player's parent could negotiate. In that regard, the plaintiff contends that he was the victim of unethical attorneys who, under the laws of the state of Ohio, had a duty to protect him, but instead the defendant punished him even though he bore no fault. Thus, according to the plaintiff, the defendant should vacate the findings that were the foundation of the plaintiff's suspension and reinstate him immediately with no further punishment.

{¶ 11} Finally, the plaintiff requests that this court also enter a declaratory judgment and permanent injunction enjoining the defendant from enforcing NCAA Bylaw 19.7. The plaintiff argues that the bylaw interferes with the Ohio Constitution's delegation of all judicial power to the courts of this state and,

consistent with that premise, exists solely to coerce or direct its agents and members to ignore court orders that are binding upon member institutions of the defendant.

{¶ 12} Contrarily, the defendant argues that the plaintiff did not overcome the presumption that its bylaws and decisions as a voluntary association are valid. As such, the defendant contends that it has the right to manage its affairs and apply its bylaws, within legal limits, without interference from the judiciary and since the plaintiff has failed to prove that its bylaws are illegal, arbitrary or fraudulent, the defendant's internal affairs are presumptively correct.

{¶ 13} The defendant argues that the plaintiff must prove by clear and convincing evidence that any decision made by the defendant was arbitrary or capricious. The defendant also argues that the plaintiff has failed to sustain such proof. The decision made to reinstate the plaintiff's eligibility, even though a penalty was imposed, was based on admitted and objective evidence obtained by the defendant and this court should not substitute its judgment for that of the defendant's.

{¶ 14} Furthermore, the defendant argues that it is not in contract with the plaintiff and that such a relationship must be proven in order to support an entry of a permanent injunction. Likewise, the defendant maintains that since there is no underlying contract claim, there can be no independent basis for granting declaratory relief. The defendant argues that it did not owe a contractual duty of good faith and fair dealing since there can be no implied duty

where there is no underlying contract. The defendant supports its contention by stating that Oklahoma's law does not allow this court to imply terms in a contract that the parties did not bargain for, nor does it allow the court to disregard the plaintiff's violation.

{¶ 15} The defendant also argues that the plaintiff waived any contractual benefits by his prior breaches, namely, violation of NCAA bylaws and concealing his agent relationship. In accordance with this argument, the defendant declares that these prior breaches bar recovery of any equitable relief since the plaintiff has failed to come to court with clean hands. Similarly, the defendant professes that even if the plaintiff had proven liability on a contract claim, the remedy, according to the defendant, is not immediate reinstatement or revisions to the "agent rule." The defendant states that what the plaintiff is seeking is overreaching and the remedy sought is dramatic and improper.

{¶ 16} The defendant further contends that it in no way tortiously interfered with any contract of the plaintiff. Consequently, the evidence cannot support a finding by clear and convincing evidence that the defendant took actions against the plaintiff for the purpose of inducing any party to breach a contractual obligation to the plaintiff. The defendant asserts that the plaintiff has failed to prove any harm which cannot be compensated at law. As such, the defendant argues that a student-athlete has no legally protected interest in participating in intercollegiate athletics nor does he have a protected interest in performing in Major League Baseball.

{¶ 17} The defendant also proclaims that the balance of harm militates against the entry of injunctive relief. The defendant contends that its bylaws are rationally related to the NCAA constitution and preserving the amateur model of collegiate athletics and the bylaws, in particular Bylaw 12.3.2.1, help to retain a clear line of demarcation between collegiate and professional sports, which is a goal of its members. Consequently, the defendant argues that striking Bylaw 19.7 leaves the members without a remedy, and it admonishes the court that it should not strike a bylaw simply because the court believes the members of the institution should govern themselves in a different way.

{¶ 18} The defendant also argues that the public is not served by judicial intervention in the bylaws and decisions of a private association and the public would not be served because such injunctive relief would violate the United States Constitution's Commerce Clause and First Amendment Right of Association.

{¶ 19} Finally, the defendant asserts that injunctive relief is inappropriate in the absence of a necessary and indispensable party. The plaintiff failed to comply with this court's order (to add OSU as an indispensable party) in the December 12, 2008 judgment entry, and the defendant argues that the plaintiff's demand should be denied.

LAW AND ANALYSIS

{¶ 20} An injunction is an extraordinary remedy equitable in nature, and its issuance may not be demanded as a matter of strict right. An application for

an injunction is addressed to the sound discretion of this court, and unless there is a plain abuse of discretion on the part of this court in granting or for that matter in refusing injunctions, reviewing courts will not disturb such judgments. See *Perkins v. Quaker City* (1956), 165 Ohio St.120.

{¶ 21} To prevail on a claim for injunction, the right of the Plaintiff to relief must be shown by clear and convincing evidence. *Cincinnati Association v. Cincinnati* (1981), 2 Ohio App.3d 184, 185. The Ohio Supreme Court in discussing this heightened burden of proof has stated the following: “[C]lear and convincing evidence is that measure of degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.” See, *Merrick v. Ditzler* (1915), 91 Ohio St.256.

{¶ 22} A permanent injunction is an equitable remedy that will be granted only where the act sought to be enjoined will cause immediate and irreparable injury to the complaining party and there is no adequate remedy at law. *Lemley v. Stevenson* (1995), 104 Ohio App.3d 126, 136. An essential element of injunctive relief involves a balancing process designed to weigh the equities between the parties. *Rite Aid of Ohio, Inc. v. Marc's Variety Store, Inc.* (1994), 93 Ohio App.3d 407, 418. So why grant injunctive relief to the plaintiff?

I. CHOICE OF LAW

{¶ 23} The first issue that must be addressed is regarding the choice-of-law issue. The defendant argues that there is no dispute that Oklahoma law applies to the plaintiff's tort and contract claims because his demand is to play baseball at a university in Oklahoma and the alleged wrongdoing was an investigation and interview of the plaintiff in occurring Oklahoma. Even though the defendant asserts that there can be no dispute about which state law is applicable, the court, before engaging in any choice-of-law analysis must determine whether such analysis is necessary.

{¶ 24} It is elementary that if the competing state would use the same rule of law or would otherwise reach the same result (i.e., Ohio or Oklahoma) there is no need to make a choice-of-law determination because there is no conflict of law. Neither party has set forth an Oklahoma law, rule, or statute that would be in contradiction to that of Ohio's law. Therefore, for the purpose of expediency, the court shall determine this decision based on Ohio law. It should be noted that if there is a contradiction in a law as it relates to the analysis of the issues in this case where said contradiction would result in a different result if Oklahoma's law would be applied, the court will alert the parties to the same and the necessary procedure shall be taken to bring about a fair and just resolution based on the choice-of-law analysis.

{¶ 25} The court notes that Ohio law would be appropriate in this matter, either as it relates to a tort action or a contract action, because (1) the plaintiff

is not an out-of-state plaintiff but is a resident of Erie County and has appropriately filed his complaint in that county; (2) the defendant, as an unincorporated business association, has its principal place of business in Marion County, Indiana, but is subject to Ohio's unincorporated business association law since it has members in the state of Ohio; (3) the defendant does business within the state of Ohio and is considered a citizen of the state; (4) the meeting that was the cause of the plaintiff's alleged violation (Bylaw 12.3.2.1) took place in Vermilion, Erie County, Ohio. Without reciting each and every factor as it relates to the choice-of-law analysis, the court would be quite comfortable in holding that Ohio's law would be applicable because it has the most significant relationship to the relevance of this litigation. See, *Morgan v. Biro Mfg. Co.* (1984), 15 Ohio St.3d 339, 342. Since such a determination is unnecessary to construct, because the court has no conflicting laws before it, the analysis will proceed no further, and the court directs the parties' attention to the type of legal relationship, if any, that exist among the parties.

II. BREACH OF CONTRACT

{¶ 26} Since the inception of this case, the defendant has argued that it has no contractual relationship with the plaintiff. What is obvious is that there is a contractual relationship between the defendant and its member institution, OSU. The defendant, as an unincorporated association consisting of public and private universities and colleges, adopts rules governing member institutions'

recruiting, admissions, academic eligibility, and financial-aid standards for student athletes. The basic purpose of the NCAA is stated in Bylaw 1.3.1:

The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.

The defendant has argued and this court agrees that there is no contract between the defendant and the plaintiff by way of the national letter of intent or the plaintiff's financial-aid package. However, an action for breach of contract by a third party can be brought when the parties to a contract intended to benefit the third party. *Construction Advancement Program v. A. Bentley & Sons Co.* (1975), 45 Ohio App.2d 13, 17. The Ohio Supreme Court, in *Hill v. Sonitrol of Southwestern Ohio* (1988), 36 Ohio St.3d 36, 40, addressed the difference between incidental and intended third-party beneficiaries when deciding whether a third party who lacks contractual privity is entitled to enforce the terms of the contract. The Ohio Supreme Court concluded that an intended third-party beneficiary has enforceable rights under the contract only when the contracting parties expressly intend that a third party should benefit from the contract. *Hill*. There must be evidence that the promisor assumed a duty to the third party. *TRINOVA Corp. v. Pilkington Bros., P.L.C.* (1994), 70 Ohio St.3d 271. "The mere conferring of some benefit on the supposed beneficiary by the performance of a particular promise in a contract is insufficient; rather, the performance of that

promisee must also satisfy a duty owed by the promisee to the beneficiary.” *Id.*, quoting *Norfolk & Western Co. v. United States* (C.A.6, 1980), 641 F.2d 1201, 1208.

{¶ 27} It is unquestionable that the defendant and OSU’s contractual agreement is created to confer a benefit on the student-athletes. The purpose of the NCAA, see Bylaws 1.2 and 1.3.1, and the obligation of member institutions, see Obligations of Member Institutions, Article 1.3.2, forms a contract in which the defendant promises, among many things, to initiate, stimulate and improve intercollegiate athletic programs for student athletes, see Article 1.2 (a). OSU promises to enforce the defendant’s legislation as it relates to its members and “protect and enhance the physical and educational well-being of student athletes.” See Article 1.3.2 and 2.2. The constitution of the NCAA, the operating and the administrative bylaws (the NCAA Divisional Manual) the contract between the association and its member institutions whereby student-athletes remain amateurs in an intercollegiate sport, where they are “motivated primarily by education and by the physical, mental and social benefits to be derived.” See Article 2.9. According to the principles of the agreement, “student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.” *Id.* Each entity binds itself to follow the directives of the contractual manual in order to promote an intercollegiate amateur athletic program for student-athletes.

{¶ 28} As a rudimentary matter, to enforce rights as an intended third-party beneficiary, this court is satisfied that the plaintiff has established by way of the contractual agreements within the manual that there is an underlying enforceable contract and there are duties owed by the promisee as well as the promisor to the plaintiff. The plaintiff argues that the defendant breached its duty of good faith and fair dealing to the plaintiff, thereby placing him in a tenuous position because his ignorance as to what was required became not only a menace but also an obstruction to the plaintiff's eligibility to compete as a student-athlete for OSU.

{¶ 29} To the extent that the plaintiff's claim of arbitrary and capricious action asserts a violation of the duty of good faith and fair dealing that is implied in the contractual relationship between the NCAA and its members, his position as a third-party beneficiary of that contractual relationship affords him standing to pursue his claims. See, *O'Reilly v. Physicians Mut. Ins. Co.* (1999), 992 P.2d 644, 646. Previously, Ohio law held that not every contract implicates an implied obligation to use good faith and fair dealing. See, *Sammarco v. Anthem Ins. Cos., Inc.* (1998), 131 Ohio App.3d 544, 554-555. There had to be a distinction between written terms and implied promises within a contract. Without explaining the history of the distinctions, the Sixth Appellate District of Ohio, in whose jurisdiction this court lies, holds that the parties to a contract "are bound toward one another by standards of good faith and fair-dealing." *Bolling v. Clevepak Corp.* (1984), 20 Ohio App.3d 113, 121. Ohio law now supports that

good faith is part of a contract claim. See, *Wauseon Plaza Ltd. Partnership v. Wauseon Hardware Co.*, 156 Ohio App.3d 575, 2004-Ohio-1661. Furthermore, the court in *Brown v. Otto C. Epp Mem. Hosp.* determined that “good faith is required of every contract,” and this court is in agreement with that premise. *Brown* (1987), 41 Ohio App.3d 198, 199. Thus, this court holds that a party can be found to have breached its contract if it fails to act in good faith.

III. GOOD FAITH AND FAIR DEALING

{¶ 30} Even though the obligation of good faith exists in a contractual relationship, this is not an invitation for this court to rewrite the benefit bestowed on the parties. The court agrees with the defendant that this is not a case about whether the court agrees or disagrees with the bylaws in question. Neither is it a case about how the defendant voted at either the 1975 or 2002 membership conventions. However, since this court has determined that the agreement between the defendants has an implied covenant of good faith and fair dealing as it relates to the plaintiff, there must be in fact honesty and reasonableness in the enforcement of the contract. See, *Littlejohn v. Parrish*, 163 Ohio App.3d 456, 2005-Ohio-4850. Therefore, the defendant, and for that matter OSU, was required to deal honestly and reasonably with the plaintiff as a third-party beneficiary regarding their contractual relationship. Surely each party is entitled to the benefit of its bargain. With that stated, if this court determines that Bylaw 12.3.2.1 is void because it is against the public policy of Ohio or because it is arbitrary and capricious, and Bylaw 19.7 interferes with the delegation of judicial

power to the courts of this state, then the defendant has not dealt with the plaintiff honestly or reasonably and the defendant has breached the contract.

{¶ 31} The court continues this analysis by examining the plaintiff's argument that he retained lawyers to represent him and that those lawyers are subject to the exclusive regulation of the Ohio Supreme Court. Thus the defendant, according to the plaintiff, had no authority to promulgate Bylaw 12.3.2.1. The plaintiff asserts that the bylaw promulgated by the defendant prevented his lawyers from competently representing him. Therefore the plaintiff argues, the bylaw is void because it is against public policy. Bylaw 12.3.2.1 states:

A lawyer may not be present during discussions of a contract offer with a professional organization or have any direct contact (in person, by telephone or by mail) with a professional sports organization on behalf of the individual. A lawyer's presence during such discussions is considered representation by an agent.

{¶ 32} In contrast, the defendant argues that Bylaw 12.3.2.1 helps to retain a clear line of demarcation between collegiate and professional sports that is a fundamental goal of the member institutions. Furthermore, according to the defendant, it preserves an amateur model of collegiate athletics, and the defendant contends that this court should not intervene since the bylaw is the will of the NCAA membership.

{¶ 33} It is important to fully understand the fact pattern of what transpired and what caused the plaintiff to be pronounced ineligible. At the end of the summer of 2006, representatives from the Minnesota Twins met with the

plaintiff and his father at the Oliver home. According to the plaintiff's testimony, the plaintiff's father contacted the Barattas to inform them of the meeting. Tim Baratta told the plaintiff's father that he thought he should be there. While all the parties were at the Oliver home, the Twins offered the plaintiff a \$390,000 contract, which he rejected after seeking the advice of his father. However, Tim Baratta's presence at the Oliver home, even though no testimony ever portrayed that Mr. Baratta was involved in any of the conversations between the plaintiff and the Twin's representative, just Baratta's presence (the presence of an attorney/advisor who advised the plaintiff that he would keep his amateurism status safe) in that room, violated Bylaw 12.3.2.1 and stripped the plaintiff of his eligibility to play baseball through the entire season.

{¶ 34} Let us also remember that the rules and testimony are clear that amateurism is the bedrock and founding principle of the NCAA. And so, the court has listened to and read much about Bylaw Article 12, set forth in the NCAA division manual, which is entitled "Amateurism" and sets forth the rules governing the protection of a student-athlete's amateur status that must be maintained in order for an athlete to participate in an intercollegiate sports program.

{¶ 35} Bylaw 12.3, entitled "Use of Agents," states the general principle that a student-athlete is ineligible to participate in intercollegiate sports if he or she agrees to be represented by an agent. Hence, the "no agent rule" is as follows:

An individual shall be ineligible for participation in an intercollegiate sport if He or she ever agreed (orally or in writing) to be represented by an agent for The purpose of marketing his or her athletics ability or reputation in that sport. Further, an agency contract not specifically limited in writing to a sport or Particular sports shall be deemed applicable to all sports, and the individual shall Be ineligible to participate in any sport.

NCAA Bylaw 12.3.2.1.

{¶ 36} However, the crux of this case falls under Bylaw 12.3.2, which carves out an exception to the no agent rule by allowing a student-athlete to retain a lawyer (not even the defendant can circumvent an individual's right to counsel). Yet, the exception to the rule, i.e., NCAA Bylaw 12.3.2 which allows legal counsel for student-athletes attempts to limit an attorney's role as to that representation and, in effect, such as in the case here, puts the onus on the student-athlete. See NCAA Bylaw 12.3.2.1.

{¶ 37} The status of the no-agent rule, as firmly pointed out in the direct testimony of Kevin Lennon, vice president of membership services, is a prohibition against agents, not lawyers. Therein lies the problem.

{¶ 38} It is impossible to allow student-athletes to hire lawyers and attempt to control what that lawyer does for his client by Bylaws 12.3.2 or 12.3.2.1. These rules attempt to say to the student-athlete that he or she can consult with an attorney but that the attorney cannot negotiate a contract with a professional sport's team. This surely does not retain a clear line of demarcation between amateurism and professionalism. The student-athlete will never know what his attorney is doing for him or her, and quite frankly neither will the

defendant. The evidence is very clear that this rule is impossible to enforce and as a result is being enforced selectively. Further, as in this case, it allows for exploitation of the student-athlete “by professional and commercial enterprises,” in contravention of the positive intentions of the defendant.

{¶ 39} Was Barratta’s presence in that room a clear indication that the plaintiff, a teenager who had admitted at trial that he was in no position to negotiate a professional contract and whose father testified to the same, was a professional? According to Bylaw 12.3.2.1, the no-agent rule, he was. As such the following issues must be resolved: Is the no-agent rule against the public policy of Ohio? Is it arbitrary? Is it capricious?

{¶ 40} The plaintiff testified that he hired the Barattas in part because they were attorneys and they promised that they would protect his amateur status. From the testimony given at trial, the court is aware that the defendant permits student-athletes and their parents to negotiate contracts while in the presence of a sports representative but to have an attorney present in the room would in some way smear the line of demarcation between what is amateurism and what is professionalism. An attorney’s duty, in Ohio, in Oklahoma, in all 50 states, is to represent his client competently. Perhaps another term is used, other than that of “competently” within each state’s professional code of conduct, but it all boils down to the attorney being skilled and proficient and simply having the know-how to represent the best interests of his client.

{¶ 41} For a student-athlete to be permitted to have an attorney and then to tell that student-athlete that his attorney cannot be present during the discussion of an offer from a professional organization is akin to a patient hiring a doctor, but the doctor is told by the hospital board and the insurance company that he cannot be present when the patient meets with a surgeon because the conference may improve his patient's decision-making power. Bylaw 12.3.2.1 is unreliable (capricious) and illogical (arbitrary) and indeed stifles what attorneys are trained and retained to do.

{¶ 42} The process advanced by the NCAA hinders representation by legal counsel, creating an atmosphere fraught with ethical dilemmas and pitfalls that an attorney consulting a student-athlete must encounter. Will the attorney be able to advance what is best for the client or will a neutral party, the NCAA, tie his hands? What harm could possibly befall the student-athlete if such a rule were not found? What occurs if the parents of a student are attorneys or for that matter sport agents? What would have happened if Tim Baratta had been in the kitchen or outside or on the patio instead of in the same room as his client when the offer from the Minnesota Twins was made to the plaintiff?

{¶ 43} This court appreciates that a fundamental goal of the member institutions and the defendant is to preserve the clear line of demarcation between amateurism and professionalism. However, to suggest that Bylaw 12.3.2.1 accomplishes that purpose by instructing a student-athlete that his attorney cannot do what he or she was hired to do is simply illogical. An

example of a clear line of demarcation between amateurism and professionalism is indeed drawn within the bylaws and is done so in Bylaw 12.02.3:

A professional athlete is one who receives any kind of payment, directly or indirectly, for athletics participation except as permitted by the governing legislation of the Association.

If the membership and the NCAA decide that Bylaw 12.02.3 does not accomplish that purpose, so be it. But no entity, other than that one designated by the state, can dictate to an attorney where, what, how, or when he should represent his client. With all due respect, surely that decision should not be determined by the NCAA and its member institutions, no matter what the defendant claims is the purpose of the rule. If the defendant intends to deal with this athlete or any athlete in good faith, the student-athlete should have the opportunity to have the tools present (in this case an attorney) that would allow him to make a wise decision without automatically being deemed a professional, especially when such contractual negotiations can be overwhelming even to those who are skilled in their implementation.

IV. ARBITRARY AND CAPRICIOUS

{¶ 44} With that stated, the court now addresses the issue of whether Bylaw 19.7 is arbitrary and capricious. Bylaw 19.7 states:

If a student athlete who is ineligible under the terms of the constitution, bylaws or other legislation of the Association is permitted to participate in intercollegiate competition contrary to such NCAA legislation but in accordance with the terms of a court restraining order or injunction operative against the institution attended by such student-athlete or against the Association, or both, and said injunction is voluntarily vacated, stayed or reversed

or it is finally determined by the courts that injunctive relief is not or was not justified, the Board of Directors may take any one or more of the following actions against such institution in the interest of restitution and fairness to competing institutions: (a) through (e).

Following the above-mentioned paragraph, subsections (a) through (e) list penalties that impinge on institutions, student-athletes, or team records for following the dictates of a court order that may later be overturned by a higher court. The plaintiff would ask: "How could any entity punish an individual for accessing their right to Court?" The defendant argues that the member institutions agreed that it was improper to allow an institution to reap the benefits of playing a student-athlete who was finally adjudicated to be ineligible. Just because member institutions agree to a rule or bylaw does not mean that the bylaw is sacrosanct or that it is not arbitrary or capricious.

{¶ 45} Throughout the history of this country many institutions and entities have agreed to bylaws that were against the notion of a fair judicial process. The regulations must be fair to the people to whom they were meant to serve, especially when it comes to the right of an individual to petition the court system. Courts of appeal have never been without remedies for cases that they overturn as it relates to the parties that are involved. Student-athletes must have their opportunity to access the court system without fear of punitive actions against themselves or the institutions and teams of which they belong. The old adage that you can put lipstick on a pig, but it is still a pig, is quite relevant here. The defendant may entitle Bylaw 19.7 "Restitution" but it is still

punitive in its achievement, and it fosters a direct attack on the constitutional right of access to courts.

{¶ 46} Bylaw 19.7 takes the rule of law as governed by the courts of this nation and gives it to an unincorporated business association. The bylaw is overreaching. For example, if a court grants a restraining order that permits a student-athlete the right to play, the institution will find itself in a real dilemma. Does the institution allow the student-athlete to play as directed by the court's ruling and in so doing face great harm should the decision be reversed on appeal? Alternatively, does the institution, in fear of Bylaw 19.7, decide that it is safer to disregard the court order and not allow the student-athlete to play, thereby finding itself in contempt of court? Such a bylaw is governed by no fixed standard except that which is self-serving for the defendant. To that extent, it is arbitrary and indeed a violation of the covenant of good faith and fair dealing implicit in its contract with the plaintiff, as the third-party beneficiary.

V. TORTIOUS INTERFERENCE WITH CONTRACT

{¶ 47} To prevail on a claim of tortious interference with contract, the plaintiff must prove (1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages.

{¶ 48} The plaintiff argues that the defendant tortiously interfered with his contracts by coercing OSU to suspend him, by illegally obtaining attorney-client

privilege information from the Barattas, and by circumventing the plaintiff's attorney, Michael Quiat.

{¶ 49} The defendant argues that the plaintiff has failed to produce any contract between himself and Quiat. Therefore, the terms of their contract were unknown to any defendant employee at the time of the investigation and at the time of trial. The defendant asserts that since knowledge of the contract is a requisite element of tortious interference with contract, the plaintiff's claim must fail. Furthermore, the defendant also contends that even if it did interfere with the plaintiff's relationship with Quiat, the remedy would not be reinstatement of the plaintiff's eligibility or removal of the bylaws from the defendant's manual.

{¶ 50} The plaintiff further argues that certain of the defendant's employees (including John Shukie) violated rules of professional responsibility. This claim is feckless because Shukie was not representing a client and even if he was subject to the canons of professional responsibility, he satisfied any obligation thereto.

{¶ 51} A voluntary association, such as the NCAA, has the right to manage its affairs and apply its bylaws. No court, including this one, has the right to reverse the defendant's policies or procedures unless they are not within legal limits or are based on fraud, arbitrariness, or collusion. Here the plaintiff is asserting that the defendant went beyond its legal limits and interfered with the plaintiff's contractual relationship with his attorney.

{¶ 52} First, let us consider the plaintiff's encounter with John Shukie. Shukie is an attorney and is employed by the defendant as an investigator. The plaintiff's argument is that Shukie violated the rules of professional conduct because Shukie spoke with the plaintiff without getting his attorney's permission, in violation of Prof.Cond.R. 4.2.

{¶ 53} It is true that under a contractual analysis, the attorney-client relationship can be formed by either an express or implied contract. An implied contract occurs when "(1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance." *Kurtenbach v. TeKippe* (1977) 260 N.W. 2d 53, 56. Here, neither an implied nor an express contract exists between Shukie and the defendant that forms an attorney-client relationship. An attorney-client relationship is essentially a contract to perform services. The determination of whether an attorney-client relationship is created turns largely on the reasonable belief of the prospective client. *Cuyahoga Cty. Bar Assn. v. Hardiman*, 100 St.3d 260, 2003-Ohio-5596. Here, the defendant's position, as well as Shukie's position, is that Shukie is employed by the defendant to perform as an investigator, not as counsel. According to the testimony of Kevin Lennon, Jennifer Henderson, and Rachel Newman-Baker, Shukie was not hired to provide legal services for the association, he did not nor does he now represent the NCAA or any institution or person as an attorney, he

has no clients and he does not carry malpractice insurance, nor is he apart of the defendant's General Counsel office.

{¶ 54} Furthermore, Shukie asserts that he had knowledge that Quiat represented the plaintiff only in connection with a fee dispute with the Barattas and in that regard he had no knowledge that he was to represent the plaintiff in the matter of the investigation. Prof.Cond.R. 4.2 is unambiguous that "in representing a client, a lawyer shall not communicate *about the subject of the representation* with a person the lawyer knows to be represented by another lawyer in the matter * * *." (Emphasis added.) At trial, no evidence was produced contrary to that rule or the defendant's assertion. Therefore, the court rules that the interference-of-contract claim involving the contract between the plaintiff and his attorney, Quiat, by Shukie, must indeed fail.

ATTORNEY-CLIENT PRIVILEGE VIOLATIONS

{¶ 55} The attorney-client privilege applies to communications made by clients to their attorneys with the intent that the communications remain confidential. Only the client can waive the attorney-client privilege. *State v. Today's Bookstore, Inc.* (1993), 86 Ohio App.3d 810, 818. The moment confidence ceases, the privilege ceases; this much is universally conceded. One of the circumstances by which it is commonly apparent that the communication is not confidential is the presence of a third person, not the agent of either client or attorney. If the client chooses to make or receive his communication in the presence of third persons, it ceases to be confidential and is not entitled to the

protection afforded by the attorney-client privilege. *See*, 28 Ruling Case Law, 561, 562, Section 151.

{¶ 56} The plaintiff alleges that the defendant knew or should have known that the information that it received from the Barattas was attorney-client information and that any further solicitation of such was totally inappropriate, illegally obtained, and used to initiate an investigation of the plaintiff that would not have otherwise occurred. Furthermore, the defendant knew or should have known that an attorney may not publicize a fee dispute against a client and that such action is prohibited by Ohio, Oklahoma, New Jersey, and New York's rules of professional conduct.

{¶ 57} Prof.Cond.R. 4.4 deals with Respect for Rights of Third Persons and states in part that a lawyer shall not "use methods of obtaining evidence that violate the legal rights of such a person." Robert Baratta provided a letter dated May 19, 2008, that was a chronology of events that involved the plaintiff but that also spoke of conversations that he and the plaintiff had in February and March of 2008. He explicitly states that his law firm advised and counseled the plaintiff, thereby denoting an attorney-client relationship, prior to and during the 2006 Major League Baseball amateur draft. Here we have an attorney, (*See* letterhead of letter sent to the Defendant-Exhibit 6) Robert Baratta, explicitly telling the defendant (via Rachel Newman Baker and Steve Mallonee) the exact conversations that he had with his former client (the plaintiff) that occurred at least two months prior to the writing of the letter. Baratta specifically states that

he spoke with the plaintiff and quoted the plaintiff in the letter. He also made reference in the same paragraph of the letter that the conversation with the plaintiff was done without the father's presence, stating that he informed the plaintiff's father in separate conversations of certain matters. This only bolsters the supposition that the conversation between the Barattas and the plaintiff was not destroyed by the presence of any third party. Such a scenario leads this court to surmise that this was indeed a conversation that was understood to be confidential between his client (the plaintiff) and himself (Robert Baratta) and that such conversation was indeed privileged.

{¶ 58} That information assisted in the investigation against the the plaintiff. These are the same attorneys who should have advised the plaintiff that they would not be appearing at his home while the representative of the Minnesota Twins was there, but who instead, at their request, came to the Oliver home. Concerning the action of the defendant, as it relates to tortious interference, the court finds that the plaintiff has successfully shaped the elements for a prima-facie case. Here we have a contractual relationship between the plaintiff and the defendant's agent. The plaintiff had signed his letter of intent with the college, received his financial aid package, and was set to begin his academic year with the university. The defendant knew of the contract with the plaintiff and, in addition to its own liability, the defendant is liable for any tortious conduct committed by OSU toward the the plaintiff. To be precise, since OSU was acting as the defendant's agent in its enforcement of

its Division I Manual, which governs student-athletes, the defendant is liable for any tortious interference of the contract. Keep in mind that all the witnesses of the defendant testified that they were acting under the defendant's rules and regulations and that the investigation of the plaintiff, as well as the resulting finding of ineligibility, was consummated under their rules.

{¶ 59} After this court has engaged in a balancing process that was designed to weigh the equities between the parties, the court determines by clear and convincing evidence that the plaintiff would suffer immediate and irreparable injury, loss, or damage if injunctive relief is not granted. If an injunction is not granted, the plaintiff would suffer loss of his college baseball experience, impairment or loss of his future baseball professional career, loss in being available for the upcoming draft because he is less likely to be seen, and ongoing damage to the plaintiff's reputation and baseball career.

{¶ 60} In comparison, the defendant's witnesses stated that if relief were granted, it would be confusing as to which institutions would have to follow this court's ruling. Would it be Ohio members, Oklahoma members, all institutions? However, since this court has personam jurisdiction, this argument is not as persuasive as the plaintiff's and the scales of justice have tilted in the plaintiff's favor.

Judgment accordingly.