

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIRST JUDICIAL CIRCUIT
COUNTY OF ORANGEBURG	)	
	)	
ROBERT GEATHERS and	)	
DEBRA GEATHERS, h/w	)	Civil Action No. 2019-CP-38-00550
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
NATIONAL COLLEGIATE	)	
ATHLETIC ASSOCIATION	)	
	)	
Defendant.	)	
_____	)	
	)	
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FOURTH JUDICIAL CIRCUIT
COUNTY OF DARLINGTON	)	
	)	
MICHAEL HAMLIN and	)	
TAYLOR KRANK HAMLIN, h/w,	)	
	)	
Plaintiffs,	)	Civil Action No. 2019-CP-16-00516
	)	
v.	)	
	)	
NATIONAL COLLEGIATE	)	
ATHLETIC ASSOCIATION	)	
	)	
Defendant.	)	
_____	)	

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SC Court of Appeals

MEMORANDUM OPINION AND ORDER

This matter came before the Court on Plaintiffs’ Motion for Spoliation Instruction and Sanctions and Defendant’s Motion for Partial Summary Judgment. Plaintiffs were represented by David Langfitt and John Kassel. Defendant was represented by Andrew Fletcher, David Moreno, John Cuttino, and C. Brad Hutto. The Court conducted an evidentiary hearing on the pending motions on September 7 and 21, 2023. Having reviewed the motions, briefs, and exhibits

presented by the parties – both at the evidentiary hearing and filed as exhibits to the various briefs filed on these motions, the Court finds as follows.

I. Procedural Background

Defendant NCAA filed a Motion for Partial Summary Judgment on June 24, 2022. The Motion seeks to have the Court apply the Statutory Limitation of 501(c)(3) Liability required by the South Carolina Solicitation of Charitable Funds Act (the “Charitable Funds Act”), and specifically S.C. Code Ann. § 33–56–180(A).

Plaintiffs filed an Opposition to the NCAA’s Motion for Partial Summary Judgment on October 6, 2022. Plaintiffs also filed, on August 2, 2022, a Motion and Memorandum for a Jury Instruction Regarding Spoliation of Evidence and For Sanctions (the “Spoliation Motion”).

The parties filed extensive briefing on Plaintiffs’ Spoliation Motion. The NCAA filed opposition briefs with supporting exhibits on October 6, 2022 and July 14, 2023. Plaintiffs filed supplemental briefs with supporting exhibits on October 28, 2022 and May 15, 2023. In addition, pursuant to orders of this Court, Plaintiffs conducted a forensic examination of the NCAA Library’s electronic catalog system.

On September 7 and 21, 2023, this Court held an evidentiary hearing on the pending motions. At these hearings, Plaintiffs offered testimony from their computer forensic expert, Mr. Caruso, and their history of medicine expert, Dr. Casper. Plaintiffs also offered into evidence exhibits P-1 through P-38. The NCAA offered the testimony of its computer forensic expert, Mr. Yavarosky, and offered into exhibits D-1 through D-11. Defendants also presented a demonstrative exhibit, which was received by the Court. The parties submitted closing argument briefs on October 2, 2023.

II. Plaintiffs' Spoliation Motion

A. Findings of Fact

1. The "Sports Injuries Handbooks"

Plaintiffs assert that the NCAA lost or destroyed "Sports Injuries handbooks, 1933-1961." To support this allegation, Plaintiffs largely rely on the 2021 deposition testimony of Lisa Greer-Douglas, a former NCAA librarian, regarding a shelf list she prepared in 2003 (the "2003 Shelf List"). Plaintiffs also offered into evidence NCAA Yearbooks reflecting royalty payments for "Handbook on Injuries" from 1939-1946 to support their allegation. The Court notes that the royalty payments presented by Plaintiffs steadily declined over the years and reached nearly \$0 after a Dr. Thorndike begins to publish independent sports injury handbooks.

By contrast, the NCAA submitted evidence showing that the only NCAA handbook related to sports injuries published between 1933 and 1961 was the 1933 Handbook on the Prevention and Care of Athletic Injuries (the "1933 Handbook"). *See* Ex. P-14. The NCAA introduced a compilation exhibit from the NCAA Yearbooks from 1933 to 1961, which supports the conclusion that the 1933 Handbook was the only handbook relating to athletic injuries published by the NCAA between 1933 and 1961. *See* Ex. D-3. This is further supported by evidence showing that the 1933 Handbook is the only sports injuries handbook that the NCAA registered a copyright from 1933-1961. *See* Ex. D-4. The NCAA also introduced uncontested evidence that, as part of its discovery efforts in this litigation, it searched libraries nationwide, and the only handbook located relating to sports injuries published by the NCAA between 1933 and 1961 was the 1933 Handbook.

The Court finds that Plaintiffs did not carry their burden to show that the NCAA drafted or published any documents titled "Sports Injuries handbooks" between 1933 and 1961.

2. The Football Rules Committee Documents

Plaintiffs assert that numerous copies of Football Rules Committee minutes are missing, that the NCAA lost or destroyed Football Rules Committee “binders,” and that archives maintained at the University of Delaware (the “Nelson Archives”) contain Football Rules Committee documents not produced by the NCAA in this litigation.

In support of these allegations, Plaintiffs offered into evidence numerous documents from the Nelson Archives that were authored by or addressed to Football Rules Committee Members. The documents produced did not exist in the NCAA records. Additionally, Plaintiffs presented the testimony of Dr. Casper who visited the NCAA Library. During Dr. Casper’s visit, he was not provided access to Football Rules Committee records, but noted in his testimony that he saw organized binders of other committee records.

With regard to Football Rules Committee minutes, the Court finds that at most, only two or three years of minutes have not been located either in the NCAA’s records or the Nelson Archives. With regard to Football Rules Committee “binders,” the evidence establishes that the way Football Rules Committee minutes were organized (and whether any supplemental material was stored with them) varied over time. Plaintiffs have presented no evidence that the NCAA maintained Football Rule Committee “binders” of the type Plaintiffs describes. The only evidence presented to support the allegation is the testimony of Dr. Casper, who stated he saw other binders maintained by NCAA. The Court finds that Plaintiffs have failed to show that the NCAA organized the Football Rule Committee records in a similar fashion to other committees.

With regard to documents maintained in the Nelson Archives, the Court finds that Dr. David Nelson was the Athletic Director and Head Football Coach at the University of Delaware and served on the NCAA Football Rules Committee from 1946 until his death in 1991. From 1962-1991, Dr. Nelson served as the Secretary-Editor of the Football Rules Committee.

Defendant presented an index of documents contained in the Nelson Archives, including numerous papers Dr. Nelson collected over the course of his life and career. This index summarizes voluminous documents maintained in the Nelson Archives relating to Dr. Nelson's work with the NCAA, including his work on the Football Rules Committee. *See* Ex. D-9. Plaintiffs have introduced no evidence to demonstrate that the documents maintained by Dr. Nelson at the University of Delaware, which are now preserved in the Nelson Archives, were once also maintained by the NCAA. The Court finds that Plaintiffs did not establish that the NCAA failed to maintain any Football Rules Committee documents at a time when it had a duty to preserve such documents, or that the NCAA lost or destroyed any Football Rules Committee documents.

3. Additional Allegations By Plaintiffs

Plaintiffs allege that the NCAA destroyed from its electronic library catalog references to "Sports Injuries Handbooks" or Football Rules Committee documents. In support of their allegation, Plaintiff's presented evidence that the NCAA changed the inventory of the NCAA Library and Archives from 2011 and 2016. Additionally, Plaintiffs presented evidence that the NCAA authorized the transfer of 5300 cubic feet of documents for storage or destruction to Iron Mountain between 2008 and 2019. However, Plaintiffs failed to offer proof of the existence of any documents which would be detrimental to the NCAA's case and were destroyed at the direction of NCAA. The Court finds that the evidence presented by Plaintiffs' do not support the allegation that the NCAA intentionally destroyed documents it had a duty to preserve in response to litigation.

Plaintiff's also allege that the NCAA's Chief Medical Officer, Dr. Hainline, maintained documents in his office at the NCAA national headquarters that have not been produced in this

litigation. The record evidence establishes that Dr. Hainline's office at the NCAA national headquarters is located adjacent to the NCAA library and filing rooms, all of which were searched by Plaintiffs' counsel and expert witnesses in the *Finnerty* action. The record evidence establishes that all documents that plaintiffs' counsel marked for copying and production as a result of this search have been produced in this action. Plaintiffs presented evidence of Dr. Hainline's *Finnerty* trial testimony where he claimed to have documents in his office showing that the Football Rules Committee discussed the issues in the 1933 Handbook. Plaintiffs also presented the documents referenced by Dr. Hainline, which did not show the Football Rules Committee actually did discuss those issues. The Court finds that the evidence does not support Plaintiffs' allegation that the NCAA and Dr. Hainline intentionally did not produce these documents, nor intentionally provided misleading testimony about the substance of those documents.

B. Conclusions of Law

"The spoliation of evidence is the intentional, reckless, or negligent withholding, hiding, altering, fabricating, or destroying of evidence relevant to a current or reasonably anticipated legal proceeding." *See Hopper v. Air & Liquid Sys. Corp.*, No. 2019-CP-40-00076, 2019 S.C. C.P. LEXIS 5488, at *10 (Richland Ct. Com. Pl. Oct. 31, 2019). "A party bringing a motion for sanctions based on spoliation bears the burden of establishing three (3) independent elements before the Court may determine which sanction, if any, is appropriate." *See id.* at *11.

Specifically, a moving party must prove:

- (1) that the party having control over the evidence had a duty to preserve it at the time it was destroyed;
- (2) that the evidence was destroyed with a culpable state of mind; and
- (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Id. (citing *Hawkins v. Coll. of Charleston*, No. 2:12-cv-384-DCN, 2013 U.S. Dist. LEXIS 162714, at *5 (D.S.C. Nov. 15, 2013)).

Here, Plaintiffs have failed to prove any of the elements of spoliation for any of the alleged missing materials. With respect to Plaintiffs' claims about the "1933 to 1961 Sports Injuries Handbooks," there is no evidence that the NCAA ever drafted or published any documents titled "Sports Injuries Handbooks" from 1933 to 1961. There is also no evidence that NCAA's electronic library catalog ever contained information regarding "Sports Injuries Handbooks." There is also no evidence that the NCAA deleted or destroyed Football Rules Committee records in the electronic library catalog. There is also no evidence to support the existence of Football Rules Committee "binders" that the Plaintiff's describe. Plaintiffs cannot meet their burden to prove any of the elements of spoliation when they cannot demonstrate that the allegedly missing materials ever existed.

With respect to Football Rules Committee minutes, there is no evidence showing why two or three years of minutes have not been located. As such, Plaintiffs cannot meet their burden to establish that the NCAA: (1) "controlled" any such minutes; (2) had a duty to preserve these minutes at the time they went missing; (3) intentionally or negligently destroyed them; or (4) that these minutes contained any relevant information relating to the underlying claims or defenses.

Further, even if Plaintiffs could establish that the two or three years of Football Rules Committee minutes that have not been located were relevant to this action, Plaintiffs failed to demonstrate that they are prejudiced by not having copies of these minutes. The evidence establishes that the information contained in Football Rules Committee minutes is also contained in the NCAA official football rules and rules guides, as well as in NCAA yearbooks or annual reports which include detailed reports each year from the Football Rules Committee regarding

the committee's work. All of these documents have been produced by the NCAA; the information in the Football Rules Committee minutes is therefore cumulative of the information contained in other documents produced in this action. *See Wilson v. S.C. Dep't of Corr.*, No. 1:17-3032-RMG, 2020 U.S. Dist. LEXIS 172492, at *7 (D.S.C. Sept. 21, 2020) (quoting *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 526 (D. Md. 2010)) (Spoliation "causes no prejudice [if] the evidence destroyed was not relevant, or as merely cumulative to readily available evidence, or [if] the same evidence could be obtained from other sources.").¹

The fact that certain Football Rules Committee materials are located in the Nelson Archives, and not at the NCAA, does not give rise to a spoliation claim. To establish spoliation, Plaintiffs must first establish that "that the party having control over the evidence had a duty to preserve it at the time it was destroyed." *Hopper*, 2019 S.C. C.P. LEXIS 5488, at *11. There is no evidence that the NCAA national office ever had control over the documents in the Nelson Archives. Further, the information in the Nelson Archives has been carefully preserved and is available to Plaintiffs for review and copying. This Court cannot make a spoliation finding based on the fact that material is located at the Nelson Archives rather than at the NCAA.

Accordingly, the Court denies Plaintiffs' Spoliation Motion and denies all of the relief requested on this motion.

III. NCAA's Motion for Partial Summary Judgment

A. Findings of Fact

¹ Similarly, "prejudice is less acute when there are sources from which at least some of the allegedly spoliated evidence can be obtained . . . [and] when the party seeking discovery can obtain extrinsic evidence of the content of at least some of the deleted information from other documents, deposition testimony, or circumstantial evidence." *See Wilson*, 2020 U.S. Dist. LEXIS 172492, at *7-8 (quoting *In re Ethicon, Inc. Pelvic Repair Sys. Prod. Liab. Litig.*, 299 F.R.D. 502, 523 (S.D.W.Va. Feb. 4, 2014)).

It is undisputed that the NCAA is “an unincorporated association and not-for-profit entity” which the Internal Revenue Service (“IRS”) has exempted from federal income tax under Section 501(c)(3) of the Tax Code. The NCAA’s tax-exempt status has been in place since February 1956 when the IRS issued a determination that the NCAA is an organization as described in Section 501(c)(3). The NCAA has continually maintained its tax-exempt status under Section 501(c)(3).

B. Conclusions of Law

A party seeking summary judgment is responsible for demonstrating the absence of a genuine issue of material fact. *See Richardson v. State-Record Co., Inc.*, 499 S.E.2d 822, 824-25 (Ct. App. 1998). With regard to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility “may be discharged by ‘showing’ – that is, pointing out to the [trial] court – that there is an absence of evidence to support the nonmoving party’s case.” *Id.* at 825 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). A party will not be permitted to manufacture a genuine issue of material fact to survive a motion for summary judgment. *Rohrbough v. Wyeth Labs., Inc.*, 916 F.2d 970, 975-76 (4th Cir. 1990). “It is not sufficient that one creates an inference which is not reasonable or an issue of fact that is not genuine.” *Thompkins v. Festival Centre Group, I*, 410 S.E.2d 593, 594 (Ct. App. 1991). Moreover, interpretation of a statute is a question of law that is appropriate for adjudication at summary judgment. *Ex parte State ex rel. Wilson*, 707 S.E.2d 402, 405 (2011) (citing *Catawba Indian Tribe of S.C. v. State*, 642 S.E.2d 751, 753 (2007) (“The issue of interpretation of a statute is a question of law for the court.”)).

S.C. Code Ann. §33-56-180(A) provides that “[a] person sustaining an injury or dying by reason of the tortious act of commission or omission of an employee of a charitable organization,

when the employee is acting within the scope of his employment, may recover in an action brought against the charitable organization only the actual damages he sustains in an amount not exceeding the limitations on liability imposed in the South Carolina Tort Claims Act in Chapter 78 of Title 15.” “Charitable organization” is defined by the statute to include “any organization, institution, association, society, or corporation which is exempt from taxation pursuant to Section 501(c)(3) or 501(d) of Title 26 of the United States Code, as amended.” S.C. Code Ann. § 33-56-170.

Plaintiffs argue that Section 33-56-180(A) should not apply to the NCAA due to Plaintiffs’ allegations that the NCAA has committed acts and omissions of reckless conduct, fraud, and fraudulent concealment. Plaintiffs argue that these acts are not protected under the S.C. Solicitation of Charitable Funds Act nor the S.C. Tort Claims Act. However, upon the Court’s reading of the statute, fraud and recklessness are covered under the S.C. Tort Claims Act.

The Court finds that Section 33-56-180(A) applies to the NCAA and acts as a limitation on liability to cap Plaintiffs’ damages award. The NCAA is a charitable organization for purposes of the statute because of its tax-exempt status under § 501(c)(3) of Title 26 of the US Code. *See Myat v. Tuomey Reg’l Med. Ctr.*, 832 S.E.2d 306, 311-12 (Ct. App. 2019) (“We find the statute, when read as a whole, intends for any organization that is tax exempt by the IRS pursuant to Section 501(c)(3) to be a charitable organization.”).

Accordingly, the NCAA’s Motion for Partial Summary Judgment is granted, and Plaintiffs’ damage award is to be capped in accordance with Section 33-56-180(A).

The Court leaves open for the moment the question of how many “occurrences” may be involved in this case. Further, at the trial of this matter, the Court will not instruct the jury on the

applicability of the charitable cap. In this way, should the Court be in error in its understanding of the law, and should Plaintiffs receive an award in excess of the cap, the matter can be addressed on appeal.

IT IS SO ORDERED.

Frank R. Addy, Jr.
Frank R. Addy, Jr.
Circuit Court Judge by Special Appointment

November 21, 2023
Greenwood, South Carolina



Orangeburg Common Pleas

Case Caption: Robert Geathers , plaintiff, et al VS National Collegiate Athletic Association
Case Number: 2019CP3800550
Type: Order/Other

So Ordered

S/ Frank R. Addy, Jr.