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Utah and Sports Law

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UTAH AND SPORTS LAW

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I. INTRODUCTION

The purpose of this article is to explore cases, statutes and incidents related to sports and the law that have emanated from the state of Utah. The article reviews a variety of areas and is divided to provide Utah-based examples involving interscholastic, intercollegiate and Olympic sport. In particular, the article offers how criminal law and tort law have been prominently utilized when addressing circumstances involving sports and the law. It also explores a few unique sport-related rules and statutes related to Utah.

Sitting in the Tenth Circuit,¹ along with Colorado, Kansas, New Mexico, Oklahoma and Wyoming, the state of Utah has a comprehensive relationship to sports law with much more than just ski-related cases and statutes. Also known as the *Beehive State*,² Utah is recognized as one of the most charitable states.³ The population is ranked thirty-first in the nation, with just under three

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1. *General Information*, THE TENTH CIRCUIT COURT OF APPEALS, <https://www.ca10.uscourts.gov/clerk> (noting also that its jurisdiction encompasses those states “plus those portions of the Yellowstone National Park extending into Montana and Idaho”).

2. *See Utah*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Utah> (last visited Dec. 14, 2017); *see also* UTAH CODE ANN. § 63G-1-601(7) (LexisNexis 2017) mandating that the state’s emblem is the beehive.

3. *See, e.g.*, JaNae Francis, *Utah Ranked as Top Charitable State*, STANDARD-EXAM’R, Dec. 8, 2015, <http://www.standard.net/Volunteers/2015/12/08/Utah-ranked-as-top-charitable-state> (noting that it was also the most charitable state in 2014 as well). It is also a prominent participant with re-

million people according to the 2015 census.⁴ In fact, Utah is the least populous U.S. state to have a major professional sports team.⁵ Interestingly, in 2001 Utah became the first state to adopt the Uniform Athlete Agents Act (UAAA).⁶

Utah is the home of some significant universities relative to its population. In fact, Utah has six universities that compete in Division I of the National Collegiate Athletic Association (NCAA).⁷ It is important to recognize that an exploration of sports law related issues in Utah does not always directly result in criminal or civil litigation but may involve violations and interpretations of NCAA bylaws, rules and policies. Three of the six Utah schools have football programs that participate in the Football Bowl Subdivision (FBS): the University of Utah (Pacific-12 Conference), Utah State University (Western Athletic Conference), and Brigham Young University as an independent in football.⁸ Two schools participate in the Football Championship Subdivision (FCS): Weber State University (WSU) and Southern Utah University, both in the Big Sky Conference.⁹ Utah Valley University, which has no football program, is a member of the Western Athletic Conference.¹⁰ Much of the discussion involv-

gard to multi-level marketing (MLM) companies. See, e.g., Alice Hines, *How Utah Became a Bizarre, Blissful Epicenter for Get-Rich-Quick Schemes*, TALKING POINTS MEMO (June 9, 2015), <http://talkingpointsmemo.com/theslice/mormon-utah-valley-multilevel-marketing-thrive-doterra>.

4. See *Utah*, *supra* note 2.

5. *Id.* The article references that the Utah Jazz of the National Basketball Association moved from New Orleans in 1979. Further, Salt Lake City had the Utah Stars of the American Basketball Association (ABA) from 1970–1976 and the Utah Starzz of the WNBA from 1997–2003. See also Real Salt Lake of Major League Soccer (MLS) was founded in 2005 and plays at Rio Tinto Stadium in Sandy, Utah. The state also has several minor league baseball teams including the Salt Lake Bees, a AAA team in the Pacific Coast League; see also Richard Obert, *Rattlers leaving Arena Football League for Indoor Football League*, AZCENTRAL, Oct. 18, 2016, <http://www.azcentral.com/story/sports/arena/rattlers/2016/10/17/rattlers-leaving-arena-football-league-indoor-football-league/92293766/?hootPostID=5f363a16facb4c26e84e84011353f41f> (offering that an indoor football team based in Salt Lake City will join the Indoor Football League (IFL) in 2017).

6. See ADAM EPSTEIN, SPORTS LAW 11 (2013); see also UTAH CODE ANN. § 15-9-101 et seq. (LexisNexis 2017).

7. See *Utah*, *supra* note 2.

8. See *id.* The football team remains an independent though other varsity sports are members of the West Coast Conference since 2011, a Division I conference that does not sponsor football among its schools, though both BYU and the University of San Diego have football. Other schools in the conference of ten include Saint Mary's, Gonzaga, Pepperdine, San Francisco, Santa Clara, Loyola Marymount, Portland and Pacific. See *West Coast Conference*, WIKIPEDIA, https://en.wikipedia.org/wiki/West_Coast_Conference (last visited Dec. 14, 2017).

9. See *Utah*, *supra* note 2.

10. See *id.* The school changed its name from Utah Valley State College (UVSC) beginning July 1, 2008. See *History of the University*, UTAH VALLEY UNIVERSITY,

ing sports law relates to issues that have occurred at these schools.

II. OLYMPIC SPORT

When considering exploration of Utah and its relationship to sports and law, it is natural to begin with the totality of the scandals of what happened in and around Salt Lake City, the venue that hosted the 2002 Winter Olympics.¹¹ Though in hindsight the Olympics were considered a success,¹² at the time they were marked with serious financial struggles and several scandals that tainted its legacy.¹³ Simply put, it was revealed that Olympic officials were bribed to secure votes for the right to host the Games in the first place.¹⁴ Gifts given to International Olympic Committee (IOC) members included all-expenses-paid ski trips, cash, Super Bowl tickets, college scholarships and plastic surgery.¹⁵

Charges were brought by the Department of Justice (DOJ) against Tom Welch, president of the Salt Lake City Olympic Committee (SLOC), and Dave Johnson, vice-president of the SLOC, who faced fifteen charges overall which included fraud, conspiracy, racketeering, and corruption.¹⁶ U.S. District Court Judge David Sam, citing insufficient evidence, ultimately dismissed the charges in 2003, with strong language.¹⁷

<https://www.uvu.edu/visitors/aboutuvu/history.html> (last visited Dec. 14, 2017).

11. See, e.g., Lex Hemphill, *OLYMPICS; Acquittals End Bid Scandal That Dogged Winter Games*, N.Y. TIMES, Dec. 6, 2003, <http://www.nytimes.com/2003/12/06/sports/olympics-acquittals-end-bid-scandal-that-dogged-winter-games.html>.

12. See Jasen Lee, *Economic Impact of 2002 Olympics Still Felt*, KSL, Feb. 8, 2012, <https://www.ksl.com/?sid=19155597>.

13. See Amy Shipley, *10 Years After Salt Lake City Olympics, Questions About Romney's Contributions*, WASH. POST, Feb. 12, 2012, https://www.washingtonpost.com/sports/10-years-after-salt-lake-city-olympics-questions-about-romneys-contributions/2012/02/01/gIQABnCX9Q_story.html.

14. Hemphill, *supra* note 11 (“The bid committee’s ethics board, the United States Olympic Committee and the I.O.C. all issued investigative reports on the scandal in early 1999. Ten I.O.C. members either resigned or were expelled because of it.”).

15. See Matthew D. LaPlante, *The Myth of Mitt*, SLMAG, Apr. 19, 2012, <http://slmag.com/blog/2012/04/19/the-myth-of-mitt-1/?t=147432997756>.

16. Hemphill, *supra* note 11 (offering that four of the violations involved violations of the Travel Act).

17. *Id.* Hemphill states, “dismissed the case in 2001,” just months before the Olympics, but the United States Court of Appeals for the 10th Circuit reversed him in April 2003. Hemphill adds, about and then quoting Judge Sam:

... that in his 40 years of working in the criminal justice system, he had never seen a case so devoid of “criminal intent or evil purpose.” He added that the evidence did not meet the legal standard for bribery and that his sense of justice was offended by the bringing of felony charges against Welch and Johnson while the rest of Utah enjoyed the fruits of

Further, acts of bribery were uncovered among ice skating judges during the Games involving Russian and French judges.¹⁸ Russian skaters Elena Be-rezhnaya and Anton Sikharulidze won the skating pairs gold medal by one vote over Canadians Jamie Sale and David Pelletier in a highly controversial decision which is sometimes referred to as *Skategate*.¹⁹ However, after an investigation by the International Skating Union (ISU), the decision was made to actually share the gold medals, an unprecedented move.²⁰ The ISU changed its scoring system after the Salt Lake City Olympic Games in order to prevent fixing and provide less subjectivity.²¹

III. INTERCOLLEGIATE SPORT

A. Brigham Young University and the “BYU Rule”

Brigham Young University, a Mormon institution sponsored by the Church of Jesus Christ of Latter-day Saints (LDS) and based in Provo, main-tains a policy against Sunday sports competition in accordance with religious beliefs.²² BYU takes this competition principle very seriously and remains

their Olympic efforts.

See United States v. Welch, 327 F.3d 1081 (10th Cir. 2003) (reversing and remanding the first district court decision in 2001, which had originally dismissed the indictments. However, Sam’s decision in 2003 actually acquitted Welch and Johnson thereby putting an end to the saga).

18. EPSTEIN, *supra* note 6, at 325.

19. *Id.* *See* Philip Hersh, *Full Skategate Story Remains a Mystery*, CHI. TRIB., Jan. 31, 2006, http://articles.chicagotribune.com/2006-01-31/sports/0601310210_1_sale-and-pelletier-canadian-pairs-french-couple-marina-anissina. For further discussion of this Skategate incident, *see* *2002 Winter Olympics Figure Skating Scandal*, WIKIPEDIA, https://en.wikipedia.org/wiki/2002_Winter_Olympics_figure_skating_scandal (last visited Dec. 14, 2017).

20. *2002 Winter Olympics Figure Skating Scandal*, *supra* note 19.

21. *Id.* In 2002, Alimzhan Tokhtakhounov, an alleged Russian international mob figure, was arrested in Italy on U.S. federal charges that he fixed two of the four events in the Salt Lake City’s figure skating events. *See, e.g.*, John Barr & William Weinbaum, *Wanted Man: ‘Little Taiwanese’ and His Big Role in an Olympics Scandal*, ESPN (Apr. 18, 2008), <http://www.espn.com/espn/print?id=3352977&type=story>.

22. *See* EPSTEIN, *supra* note 6, at 137–41; *see also* Lee Benson, *About Utah: BYU is Lone Hold-out for Not Playing on Sundays*, DESERET NEWS, Jul. 6, 2010, <http://www.deseretnews.com/article/700046058/BYU-is-lone-holdout-for-not-playing-on-Sundays.html> (noting that other private institutions run by Christian churches such as Southern Methodist, Texas Christian, St. Joseph’s, and Notre Dame do not have a similar policy); *see also* *Church Educational System Honor Code*, BRIGHAM YOUNG UNIV. POLICIES (Nov. 9, 2015), <https://policy.byu.edu/view/index.php?p=26> (mandating, inter alia, that the school and its several campuses “exist to provide an education in an atmosphere consistent with the ideals and principles of The Church of Jesus Christ of Latter-day Saints. That atmosphere is created and preserved through

true to its rules and principles by not competing on Sundays.²³

Often referred to as the *BYU Rule*, though it is not the only school in the nation with this mandate, this means that an NCAA member institution is not required to participate in athletic competitions held on particular days of the week, in this case Sundays, as long as there is a written institutional policy.²⁴ Further, schools must formally register their refusal to play on certain days with the NCAA before the beginning of each academic year to provide the Indianapolis-based NCAA and other schools notice in order to allow for appropriate scheduling of events.²⁵ BYU cites the fourth of the Ten Commandments (“Remember the Sabbath Day, to keep it holy”) in explaining its Sunday ban on sports competition.²⁶ The 2016-2017 NCAA Division I Manual states in its bylaws:

commitment to conduct that reflects those ideals and principles.”).

23. EPSTEIN, *supra* note 6, at 137–41. See Matthew Piper, *The History of BYU’s Honor Code: From ‘An Institution Practically without Rules’ to One that Exterminates ‘Beetles, Beatniks or Buz-zards,’ and Beyond*, SALT LAKE TRIB., Oct. 31, 2016, <http://www.sltrib.com/news/3854493-155/the-history-of-byus-honor-code> (offering that BYU’s student conduct standards have evolved over time and provided a timeline of that history as well, including sport-related examples of non-compliance with the standards by student-athletes and subsequent punishments for such violations).

24. See, e.g., Scott C. Idleman, *Religious Freedom and the Interscholastic Athlete*, 12 MARQ. SPORTS L. REV. 295, 328–329 (2001); see also Adam Epstein, *Religion and Sports in the Undergraduate Classroom: A Surefire Way to Spark Student Interest*, 21 SO. L. J. 133, 139–40 (2011) (discussing BYU and the “BYU Rule”); Kevin J. Worthen, *The NCAA and Religion: Insights About Non-State Governance from Sunday Play and End Zone Celebrations*, 2010 UTAH L. REV. 123, 127–30 (2010) (discussing a history of the BYU beginning in 1958 when BYU’s baseball team refused to play on Sunday and forfeited their chance to play in the College World Series as a result).

25. See 2016–17 NCAA DIVISION I MANUAL art. 31.1.4.1 (2016) [hereinafter NCAA MANUAL], example provided further, *infra*. This provision also requires advance notice for the NCAA to accommodate possible scheduling conflicts during the academic year for relevant NCAA championships. See NCAA MANUAL art. 31.1.4.2.

26. See *Exodus* 20:8. Many, but not all, Mormons take this anti-Sunday competition rule quite seriously. For example, in 1995, BYU lineman Eli Herring told NFL teams he would not play as a professional player on Sundays. The Oakland Raiders drafted him anyway in the sixth round, and Herring did not sign with the Raiders. See Epstein, *supra* note 24, at 139; see also Mark Kram, *Ex BYU-Star Puts Sabbath Above NFL*, SEATTLE TIMES, Oct. 15, 1995, <http://community.seattletimes.nwsourc.com/archive/?date=19951015&slug=2146889> (noting, however, that former BYU athletes and practicing Mormons Steve Young, San Francisco 49ers quarterback, and Shawn Bradley, Philadelphia 76ers center, participated in Sunday games on a regular basis). It should also be noted that the BYU football game against the University of Utah is known as the “Holy War” game. See Lindsay Schnell, *Return of the Holy War: What the Renewal of the Utah-BYU Football Rivalry Means for the Utes, Cougars*, SPORTS ILLUSTRATED, Sept. 9, 2016, <https://www.si.com/college-football/2016/09/09/utah-byu-rivalry-return-holy-war> (offering that for decades the game was played as the last game of the season, but that no longer occurs since they are in the same conference. Schnell also offers that many LDS students in fact play for the Utes, and therefore it is not a “Mormons vs. the World” event, and therefore somewhat of a misnomer). Currently, the University of Utah (Pac-12) and BYU (Independent) are not in the same football conference, however.

31.1.4.1 Institutional Policy. If a participating institution has a written policy against competition on a particular day for religious reasons, it shall submit its written policy to the governing sports committee on or before September 1 of each academic year in order for it or one of its student-athletes to be excused from competing on that day. The championship schedule shall be adjusted to accommodate that institution.

31.1.4.2 Individual Championships. In individual championships, an athlete must compete according to the institution's policy regarding Sunday competition (if the institution has no policy against Sunday competition, the athlete shall compete on Sunday if required by the schedule).²⁷

The BYU policy has presented challenges for the school and those who compete against it. For example, in 2010, BYU diver Brandon Watson earned All-American status in the one-meter and three-meter diving events, but he did not participate in the Sunday platform event due to a scheduling change by the NCAA during the Division I Men's Swimming and Diving Championships after participants from various schools including Arizona, Texas, and Stanford suffered a viral infection on an airplane prior to the event.²⁸ Watson was offered the chance to dive alone Saturday night, but declined.²⁹

B. *BYU and Wyoming's "Black 14"*

Controversy related to BYU has not been isolated to its principle of no competition on Sundays. For example, on October 17, 1969 at the University of Wyoming, fourteen of the football team's black players were expelled from the team because they wanted to wear armbands in a game scheduled against BYU in protest to the racial discrimination at BYU and within the Mormon

27. See NCAA MANUAL, *supra* note 25. Note that a relevant and additional bylaw states, "31.1.4.3 Rescheduling. If an emergency develops that causes postponement of an NCAA championship, or if the competitive situation dictates a more expeditious completion of the meet or tournament, Sunday competition may be permitted, provided the competing institutions are agreeable and advance approval is obtained from the Council."

28. See Epstein, *supra* note 24, at 139.

29. *Id.* See also Doug Bean, *Watson, BYU Have No Bitterness*, NCAA (Dec. 15, 2010), <http://www.ncaa.com/news/swimming-men/article/2010-12-12/watson-byu-have-no-bitterness>.

Church generally.³⁰ The Wyoming Cowboys were undefeated and ranked twelfth in the U.S. at the time.³¹

The players, who referred to themselves as the *Black 14*, were dismissed the night before the home game in Laramie, Wyoming and later unsuccessfully sued their head coach Lloyd Eaton in federal court for \$1.1 million.³² Eaton believed that his football team was heavily influenced by the Black Student Alliance on campus due to a rule against demonstrations.³³ Similarly, when BYU was scheduled to play football against San Jose State on October 25, 1969, the San Jose State players wore black armbands in support of Wyoming's Black 14.³⁴

Interestingly, in 1978, the Mormon Church ultimately changed the racially based policy against blacks—the policy that the Wyoming football players had protested.³⁵ Ironically, in November 2015, more than thirty African American football players at the University of Missouri refused to play against BYU unless University of Missouri President Timothy Wolfe resigned, which he did two days later.³⁶ While, it was not directly related to BYU, the ironic timing

30. 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, 86–88 (2016) (discussing the history of student-athlete activism generally and offering that BYU and the Mormon Church generally denied leadership positions to African-Americans based upon the assertion that dark skin was “the mark of the curse of Ham”).

31. *Id.*

32. *Id.* citing *Williams v. Eaton*, 310 F. Supp. 1342 (D. Wyo. 1970), *aff'd in part and vacated in part* by *Williams v. Eaton*, 443 F.2d 422 (10th Cir. 1971), *aff'd by Williams v. Eaton*, 468 F.2d 1079 (10th Cir. 1972) (upholding the suspension of the football players in that it was “a reasonable regulation” of [speech-related] expression under the [sic] circumstances involved”); see also James E. Barrett, *The Black 14*, UWYO, http://www.uwyo.edu/robertshistory/barrett_black_14.htm (last visited Dec. 14, 2017) (noting that Barrett was part of the case and retired as a Senior Judge on the United States Circuit Court of Appeals, Tenth Circuit).

33. *Id.* See Pat Putnam, *No Defeats, Loads of Trouble*, SPORTS ILLUSTRATED, Nov. 3, 1969, <http://www.si.com/vault/1969/11/03/611044/no-defeats-loads-of-trouble> (writing that head football coach “Eaton insists that his players act as individuals and not as factions, which he feels splits the team, and he became incensed when the Negro players appeared before him that morning as a group”).

34. *Id.* Even though Wyoming beat BYU 40-7 the previous week and San Jose State without the suspended players, Wyoming lost its final four games that season in 1969. After then going 1-9 the next year, Wyoming fired Eaton. See *1969 Wyoming Cowboys Football Team*, WIKIPEDIA, https://en.wikipedia.org/wiki/1969_Wyoming_Cowboys_football_team (last visited Dec. 14, 2017).

35. *Id.* citing Dave Zirin, *Hidden History of Strikes and Other Protests in College Sports*, ZINN EDUCATION PROJECT (Oct. 29, 2013), <https://zinnedproject.org/2013/10/hidden-history-of-strikes-protests-college-sports/>; see John Henderson, *Spirit of the Black 14*, DENVER POST, Nov. 7, 2009, http://www.denverpost.com/ci_13739558 (offering that the Mormon Church did not allow African-Americans into the priesthood, but that a year after the game, the first African-American played for BYU and then in 1978, the Mormon Church dropped its policy regarding blacks and priesthood).

36. *Id.* See Marc Tracy & Ashley Southall, *Black Football Players Lend Heft to Protests at Mis-*

of the protest with respect to Missouri's opponent that day. The football game was indeed played as scheduled on Saturday, November 15, 2015 with Missouri winning the game 20-16.³⁷

C. Native American Mascot Concerns

In 2005, the NCAA issued a ban on the use of American-Indian mascots by sports teams during its postseason tournaments at eighteen schools, but would not outright prohibit them.³⁸ Still, the NCAA took a strong position that nicknames or mascots deemed by the association to be "hostile or abusive" are inappropriate, and such schools would not be able to participate in an NCAA post-season tournament after February 1 of that year.³⁹

However, several schools, including the University of Utah, won appeals of the policy.⁴⁰ Michael K. King, President of the University of Utah at the time, stated that the leaders of the Northern Ute Indian Tribal Business Committee were "proud of the Ute name and the culture it represents. Indeed, the Ute name and culture are the predicates of our State's name: Utah."⁴¹

Before 1972, the University of Utah used the *Redskins* interchangeably with *Utes*.⁴² In 2013, Dr. Chris Hill, Utah's Athletics Director, posted a YouTube video asking Ute fans to become more sensitive to Native American issues when attending sports competitions.⁴³ Hill requested that fans be aware that painting their faces, wearing headdresses, and bringing faux tomahawks to games is likely to offend sacred and religious traditions of Native Americans around the country and to leave those items at home.⁴⁴

souri, N.Y. TIMES, Nov. 8, 2015, <http://www.nytimes.com/2015/11/09/us/missouri-football-players-boycott-in-protest-of-university-president.html>.

37. *Id.* See Associated Press, *Missouri Caps Tumultuous Week with 20-16 Victory over BYU*, ESPN (Nov. 15, 2015), <http://espn.go.com/college-football/recap?gameId=400785063>.

38. See ESPN.com News Services, *NCAA American Indian Mascot Ban Will Begin Feb. 1*, ESPN (Aug. 12, 2005), <http://www.espn.com/espn/print?id=2125735>.

39. *Id.*

40. See, e.g., Doug Lederman, *Two More Universities Off NCAA's Mascot List*, INSIDE HIGHER ED (Sept. 6, 2005), <https://www.insidehighered.com/news/2005/09/06/mascot> (offering that other schools that won appeals included Central Michigan University and Florida State University).

41. *Id.*

42. See *Utah Traditions*, UNIV. OF UTAH ATHLETICS, <http://www.utahutes.com/sports/2016/6/10/trads-ute-trads-general-html.aspx> (last visited Dec. 14, 2017).

43. See Dré Cummings, *American Indian Mascot Sensitivity at the University of Utah*, SPORTS LAW BLOG (Aug. 28, 2012), <http://sports-law.blogspot.com/2012/08/ready-american-indian-mascot.html> (providing a link to the video).

44. *Id.* With regard to racial issues and Utah, it could be noted that in 2015, the Orem Owlz, a Utah-based affiliate of the Los Angeles Angels, canceled a minor league promotion called "Caucasian

D. Other Intercollegiate Issues

Though it never resulted in a definitive legal decision, one should contemplate that in 2008, under a defunct yet controversial system known as the Bowl Championship Series (BCS), the University of Utah football team was not crowned the national champion despite being undefeated.⁴⁵ In fact, a one-loss University of Florida team played against a one-loss University of Oklahoma for the national championship (Florida won), and Utah Attorney General Mark Shurtleff considered taking legal action on antitrust grounds.⁴⁶

The BCS system was replaced with the current College Football Playoff, a modified plan to crown a national champion in football, and Shurtleff gave up the fight in 2012.⁴⁷ In fact, the University of Utah left the Mountain West Conference and joined the Pac-12 Conference (formerly known as the Pac-10 when it joined in 2011), and therefore Utah became an “automatic qualifier” for a national championship under that BCS system.⁴⁸ What follows are a few other examples of issues that have presented themselves in the context of intercollegiate sports and legal issues in Utah.

Heritage Night.” Outrage ensued, including a phone call from the lieutenant governor of Utah, an apology followed, and the director of media and communications responsible for the event quit as a result. See Vincent Peña, *Utah Rookie Baseball Team Cancels ‘Caucasian Heritage Night,’ Communication Director Resigns*, SALT LAKE TRIB., July 7, 2015, <http://www.sltrib.com/home/2644709-155/oremwz-set-to-have-caucasian>.

45. See, e.g., Terry Massey, *BC-MESS: College Football's Biggest Farce*, MYRTLE BEACH ONLINE, Jan. 6, 2011, <http://www.myrtlebeachonline.com/latest-news/article16611494.html> (offering that the same thing happened to undefeated Texas Christian University (TCU) in 2010 and Boise State University in 2009).

46. See Ben Winslow, *Shurtleff Considers Probe of the BCS*, DESERET NEWS, Jan. 6, 2009, <http://www.deseretnews.com/article/705275478/Shurtleff-considers-probe-of-the-BCS.html?pg=all>; see also Allyson Brown, *The BCS and Antitrust Law*, JETLAW (Jan. 11, 2009), <http://www.jetlaw.org/2009/01/11/the-bcs-and-antitrust-law/>.

47. See Jeff Finley, *Utah A.G. Drops Antitrust Investigation of College Football's BCS System for Now*, DESERET NEWS, Oct. 27, 2012, <http://www.deseretnews.com/article/865565434/Utah-AG-drops-antitrust-investigation-of-college-footballs-BCS-system--for-now.html?pg=all>.

48. *Id.* See also Nick Traverse, *Will the B.C.S. Bust?*, NEW YORKER, Nov. 24, 2010, <http://www.newyorker.com/news/sporting-scene/will-the-b-c-s-bust> (criticizing the BCS and stating,

Since the inception of the B.C.S. in 1998, a handful of at-large teams like Utah have managed to pull off undefeated seasons and crash the B.C.S. party. Utah (2004, 2008) and Boise State (2006, 2009) have each done it twice. Hawaii (2007) and Texas Christian University (2009) also made it [...], though, none of these teams managed to make it to the National Championship Game.

1. University of Utah's Fight Song

In recent years, the state of Utah has become quite progressive with regard to antidiscrimination laws, particularly those involving gender-related issues.⁴⁹ Naturally, then, the University of Utah offered in 2014 an alternative to the official fight song "Utah Man"⁵⁰ after some students and faculty felt that it should be more inclusive offering that the lyrics were sexist.⁵¹ A university task force involving alumni and employees recommended that the lyrics "our coeds are the fairest" be changed to "our students are the finest."⁵² Similarly, the phrase "no other gang of college men" could be sung as "no rival band of college fans."⁵³ Still, the newer and suggested alternative does not formally or officially replace the lyrics "I'm a Utah man" to "I'm a Utah fan."⁵⁴

2. Social Media Monitoring Policies

In 2013, Utah passed legislation that bans schools from requiring students to verify their social media user names and passwords.⁵⁵ Formerly, student-

49. See Dennis Romboy, *Utah Businesses Trying to Understand State's New Anti-Discrimination, Religious Rights Law*, DESERET NEWS, May 10, 2015, <http://www.deseretnews.com/article/865628333/Utah-businesses-trying-to-understand-states-new-anti-discrimination-religious-rights-law.html?pg=all> (discussing the law which "adds sexual orientation and gender identity to the list of protected classes in the state's anti-discrimination laws for housing and employment," applying to businesses with fifteen or more workers and landlords with four or more units. The law also "allows companies to set dress and grooming standards, and designate men's and women's restrooms, provided they make 'reasonable' accommodations for transgender workers," superseding local non-discrimination laws); see also Lindsey Bever, *Utah—Yes, Utah Passes Landmark LGBT Rights Bill*, WASH. POST, Mar. 12, 2015, <https://www.washingtonpost.com/news/morning-mix/wp/2015/03/12/utah-legislature-passes-landmark-lgbt-anti-discrimination-bill-backed-by-mormon-church/>; see also UTAH CODE ANN. § 34A-5-106 (LexisNexis 2017) (the 2015 amendment to the "Utah Antidiscrimination Act," effective May 12, 2015, added sexual orientation and gender identity to the lists of protected classes in employment); UTAH CODE ANN. § 57-21-5 (LexisNexis 2017) (the 2015 amendment, effective May 12, 2015, added "sexual orientation, or gender identity" in the introductory language).

50. See, *Utah Man*, UNIV. OF UTAH ATHLETICS, <http://www.utahutes.com/sports/2016/6/10/trads-ute-trads-songs-html.aspx?id=27> (last visited Dec. 14, 2017).

51. See Annie Knox, *University of Utah Tweaks Fight Song Called Sexist*, BOSTON GLOBE, July 3, 2014, <https://www.bostonglobe.com/news/nation/2014/07/02/university-utah-tweaks-fight-song-called-sexist/laKJ9dKgWBnVRgQIU8DYRP/story.html> (noting Utah's fight song was actually modified in 1904 and that in 2004 the U.S. Naval Academy replaced "sailor men" in its anthem with just "sailors").

52. *Id.*

53. *Id.*

54. *Id.*

55. See Bradley Shear, *Utah Bans Student-Athlete Social Media Monitoring Firms*, SHEAR LAW (Apr. 10, 2013), <http://www.shearlaw.com/utah-bans-student-athlete-social-media-monitoring-firms/> (offering that Utah joined Delaware, California, Michigan, and New Jersey).

athletes at Utah State University in Logan, for example, were required to sign a social media policy release that stated, “[t]o the extent that any federal, state, or local law that prohibits the Athletic Department from accessing my social networking accounts, I hereby waive any and all such rights and protections.”⁵⁶ Utah’s *Internet Postsecondary Institution Privacy Act* now prohibits postsecondary institutions from asking for personal, non-institution-provided student social media account information⁵⁷ or punishing them for failing to do so.⁵⁸ Of course, this Act does not prevent them from accessing an electronic account or service provided by the institution, or viewing, accessing or using social media posts found in the public domain.⁵⁹

3. Academic Fraud

In recent years, as in years’ past, NCAA member schools have committed egregious violations of NCAA rules including various instances of academic fraud or other academic-related misconduct.⁶⁰ In particular, schools such as

56. *Id.* See also Sean Gregory, *Jock Police*, TIME, Oct. 22, 2012, <http://content.time.com/time/subscriber/article/0,33009,2126662-1,00.html>.

57. UTAH CODE ANN. § 53B-25-201 (LexisNexis 2017). The statute took effect on May 14, 2013, and states,

A postsecondary institution may not do any of the following: (1) request a student or prospective student to disclose a username and password, or a password that allows access to the student’s or prospective student’s personal Internet account; or (2) expel, discipline, fail to admit, or otherwise penalize a student or prospective student for failure to disclose information specified in Subsection (1).

58. *Id.*

59. UTAH CODE ANN. § 53B-25-202 (LexisNexis 2017),

(1) This chapter does not prohibit a postsecondary institution from requesting or requiring a student to disclose a username or password to gain access to or operate the following: (a) an electronic communications device supplied by or paid for in whole or in part by the postsecondary institution; or (b) an account or service provided by the postsecondary institution that is either obtained by virtue of the student’s admission to the postsecondary institution or used by the student for educational purposes. (2) This chapter does not prohibit or restrict a postsecondary institution from viewing, accessing, or using information about a student or prospective student that can be obtained without the information described in Subsection 53B-25-201(1) or that is available in the public domain.

60. See B. David Ridpath, *Irish, Tigers and Tar Heels-Oh My! More Academic Shenanigans in College Sports!*, FORBES, Nov. 23, 2016, <http://www.forbes.com/sites/bdavidridpath/2016/11/23/irish-tigers-and-tar-heels-oh-my-more-academic-shenanigans-in-college-sports/#31b39b9b692a> (offering, “. . . there seems to be no shortage of these stories. . .” and characterizing the academic misconduct situation at the University of North

the University of North Carolina, the University of Notre Dame and the University of Missouri offer examples of “shenanigans” with regard to the *student* part of the student-athlete.⁶¹ In 2014, Weber State University (“WSU”) in Ogden paid the price for violations of NCAA rules related to academic fraud.⁶²

The NCAA Committee on Infractions (“Committee”) agreed that WSU committed violations of NCAA rules constituting academic fraud resulting in penalties including three years of probation and the loss of nine scholarships.⁶³ In sum, a former developmental math instructor committed violations in the spring of 2013 in which the instructor completed online quizzes, tests and exams for five student-athletes who gave her their user names and passwords.⁶⁴

Unfortunately for WSU, the Committee felt that WSU, by way of the math instructor, committed Level I⁶⁵ violations of NCAA bylaws 10.1 and 10.1(b)⁶⁶ dealing with unethical conduct by the university because the student-athletes received fraudulent academic credit.⁶⁷ Bylaw 10.1 and 10.1(b) stated, at that time:

10.1 Unethical Conduct. Unethical conduct by a prospective or enrolled student-athlete or a current or former institutional staff member, which includes any individual who performs work for the institution or the athletics department even if he or she does not receive compensation for such work, may include, but is not limited to, the following: ... (b) Knowing in-

Carolina as “never ending”).

61. *Id.*

62. See Steve Luhm, *Weber State Football Put on NCAA Probation, Loses Scholarships*, SALT LAKE TRIB., Nov. 19, 2014, <http://www.sltrib.com/sports/1845841-155/academic-ncaa-state-weber-football-fraud>.

63. *Id.* (noting that Weber State did self-report the “academic irregularities” and quoting Weber State president Charles A. Wright, “[w]e take full responsibility for the incident,” and “[w]hile we regret that it occurred, it is reassuring to know the systems we have in place quickly detected these unethical activities. We must remain vigilant going forward.”).

64. *Id.*

65. In 2013, the NCAA modified its violation of rules structure to move from two levels of misconduct to four levels of misconduct, with Level I being the most serious and characterized as “Severe breach of conduct.” See NCAA, *New Violation Structure*, NCAA (Aug. 1, 2013), <http://www.ncaa.org/about/resources/media-center/news/new-violation-structure>.

66. See NCAA, *Weber State Univ. Public Infractions Decision*, NCAA (Nov. 19, 2014), <https://www.ncaa.org/sites/default/files/Weber%20State%20University%20Infractions%20Decision%20PUBLIC.PDF> (stating, “Level I violations seriously undermine or threaten the integrity of the NCAA Collegiate Model and include any violation that provides or is intended to provide a substantial or extensive advantage”).

67. *Id.*

volvement in arranging for fraudulent academic credit or false transcripts for a prospective or an enrolled student athlete.⁶⁸

At least for WSU, the NCAA panel did not agree with the NCAA enforcement staff's original assertion that WSU failed to monitor the academic coursework of student-athletes because WSU did have a compliance system in place and WSU took "swift, decisive action" after discovering the violations including self-reporting to the NCAA.⁶⁹ Therefore, the Committee concluded WSU did not violate NCAA Bylaw 2.8.1 (Responsibility of Institution).⁷⁰

After looking at both aggravating and mitigating factors⁷¹ (Bylaws 19.9.3 and 19.9.4 respectively), the Committee penalized WSU under its Level I structure including primarily, but not limited to, a public reprimand and censure, three years of probation from November 19, 2014 through November 18, 2017, a financial penalty of \$5,000.00 plus two percent of WSU's football program's operating budget to the NCAA, a 14.23 percent reduction (nine equivalencies) in football financial aid awards and a five-year show-cause order for the math instructor for positions with responsibilities in a member institution's athletics department.⁷²

68. *Id.*

69. *Id.*

70. *Id.* Note that the NCAA MANUAL Bylaw 2.8.1 states,

Each institution shall comply with all applicable rules and regulations of the Association in the conduct of its intercollegiate athletics programs. It shall monitor its programs

To assure compliance and to identify and report to the Association instances in which compliance has not been

achieved. In any such instance, the institution shall cooperate fully with the Association and shall take appropriate

corrective actions. Members of an institution's staff, student-athletes, and other individuals and groups representing

the institution's athletics interests shall comply with the applicable Association rules, and the member institution

shall be responsible for such compliance.

71. *Id.*

72. *Id.* (stating, with regard to the show-cause order,

IV. CRIMINAL LAW

When it comes to sports and the criminal law in Utah, it appears the misdeeds or incidents are infrequent but do garner ignominious national attention. For example, in 2016, a spectator at a Utah Jazz NBA game in Salt Lake City was banned from all NBA arenas for one year, after shining a laser pointer during a home game against the Houston Rockets.⁷³ Rockets' player James Harden was at the free throw line when the incident occurred.⁷⁴ Security subsequently escorted the spectator from the building.⁷⁵

Also in 2016, a man was jailed after a fight broke out on a golf course in Payson, Utah.⁷⁶ Apparently a group of four golfers were playing ahead of a sixty-one-year-old Lee Johnson and his wife, and Johnson thought the group was playing too slow and wanted to play through.⁷⁷ Johnson then pulled out a pocket knife and stabbed one person and had to be wrestled to the ground.⁷⁸

A. Sports and Gambling

All gambling is illegal in Utah.⁷⁹ Gambling is considered a class B mis-

If she is [sic] secures a position with a member institution with responsibilities in the institution's athletics department during the time period of her show-cause order, upon employment she must inform that institution's athletics department that she is under a five-year show-cause order. In this circumstance, the involved institution shall be required to appear before a panel to consider whether the member institution shall be subject to the show-cause order set forth in NCAA Bylaw 19, which could limit the individual's ability to perform responsibilities in the institution's athletics department for the designated period of time.

73. See Daryl Lindsey, *Jazz Fan Banned from NBA Arenas for Shining Laser in Player's Eyes*, KUTV (Jan. 5, 2016), <http://kutv.biz/news/local/jazz-fan-banned-from-nba-arenas-for-shining-laser-in-players-eyes>.

74. *Id.*

75. *Id.* Utah has a law directly related to misuse of laser pointers, but it is specific to use against motor vehicle operators and occupants (an infraction), or law enforcement officers (a class C misdemeanor). See UTAH CODE ANN. § 76-10-2501 (LexisNexis 2017) (Unlawful use of a laser pointer).

76. See Abigail Norton, *Fight Erupts During Round of Golf, One Stabbed and Hospitalized*, KUTV (Sep. 1, 2016), <http://kutv.com/news/local/fight-erupts-during-round-of-golf-one-stabbed-and-hospitalized>.

77. *Id.*

78. *Id.* Johnson was charged with aggravated assault. See Associated Press, *Payson Man Accused of Stabbing Golfer Who Was Playing Slowly*, DAILY HERALD, Aug. 22, 2016, http://www.heraldextra.com/news/local/crime-and-courts/payson-man-accused-of-stabbing-golfer-who-was-playing-slowly/article_f2b92d72-533f-5112-a9f7-173051913eab.html.

79. UTAH CODE ANN. § 76-10-1102 (LexisNexis 2017) (Gambling [crime]) (The 2012 amendment, effective July 1, 2012, added "including any Internet or online gambling" in (1)(a)); see UTAH CODE ANN. § 76-10-1101(2) (LexisNexis 2017)

demeanor, but two or more convictions leads to a class A misdemeanor.⁸⁰ Additionally, Utah law requires the state to opt out of online gambling (i.e. Internet gambling) even if the federal government legalizes it someday, such as in the potential legalization of sports (or fantasy sports) wagering.⁸¹ Simply put, Utah is a very strict state when it comes to anti-gambling laws.⁸² So stringent, in fact, that even charitable gaming (such as a raffle or lottery) is illegal in the state.⁸³

(a) “Gambling” means risking anything of value for a return or risking anything of value upon the outcome of a contest, game, gaming scheme, or gaming device when the return or outcome: (i) is based upon an element of chance; and (ii) is in accord with an agreement or understanding that someone will receive something of value in the event of a certain outcome. (b) “Gambling” includes a lottery and fringe gambling. (c) “Gambling” does not include: (i) a lawful business transaction; or (ii) playing an amusement device that confers only an immediate and unrecorded right of replay not exchangeable for value.

80. UTAH CODE ANN. § 76-10-1102(2) (LexisNexis 2017).

81. UTAH CODE ANN. § 76-10-1102(4) and (5) (LexisNexis 2017)

(4) If any federal law is enacted that authorizes Internet gambling in the states and that federal law provides that individual states may opt out of Internet gambling, this state shall opt out of Internet gambling in the manner provided by federal law and within the time frame provided by that law. (5) Whether or not any federal law is enacted that authorizes Internet gambling in the states, this section acts as this state’s prohibition of any gambling, including Internet gambling, in this state.

82. *But see* Dennis Romboy, *Utahns Find Ways to Gamble Despite It Being Illegal in the State—But the Cost Is High*, DESERET NEWS, July 5, 2013, <http://www.deseretnews.com/article/865582732/No-casino-no-lottery-yet-gambling-pervasive-in-Utah.html?pg=all>.

83. UTAH CODE ANN. § 76-10-1101(7) (LexisNexis 2017)

“Lottery” means any scheme for the disposal or distribution of property by chance among persons who have paid or promised to pay any valuable consideration for the chance of obtaining property, or portion of it, or for any share or any interest in property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name it is known.

See also Joseph Falchetti, *Poker Laws in Utah*, POKERWEBSITES (July 24, 2017), <http://www.pokerwebsites.com/utah/#i> (writing by an individual named Savannah,

Utah is one of two states to prohibit all forms of gambling, Hawaii being the other. When Powerball fever has swept the country throughout the year, citizens of Utah have gone to neighboring states to get their lottery fix, and the state isn’t likely to get a lottery anytime soon. Federal law recognizes the right of Indian tribes to build gambling establishments

B. Hazing, Bullying and Cyber-bullying

Utah statutes address the crime of hazing in general,⁸⁴ and other similar and bothersome crimes including bullying⁸⁵ and cyber-bullying,⁸⁶ harass-

on their reservations, provided the state has some form of legal gambling. The outlook for any sort of gambling in Utah continues to look bleak.

84. UTAH CODE ANN. § 76-5-107.5 (LexisNexis 2017)

(1) A person is guilty of hazing if that person intentionally, knowingly, or recklessly commits an act or causes another to commit an act that: (a) (i) endangers the mental or physical health or safety of another; (ii) involves any brutality of a physical nature such as whipping, beating, branding, calisthenics, bruising, electric shocking, placing of a harmful substance on the body, or exposure to the elements; (iii) involves consumption of any food, alcoholic product, drug, or other substance or any other physical activity that endangers the mental or physical health and safety of an individual; or (iv) involves any activity that would subject the individual to extreme mental stress, such as sleep deprivation, extended isolation from social contact, or conduct that subjects another to extreme embarrassment, shame, or humiliation; and (b) (i) is for the purpose of initiation, admission into, affiliation with, holding office in, or as a condition for continued membership in any organization; or (ii) if the actor knew that the victim is a member of or candidate for membership with a school team or school organization to which the actor belongs or did belong within the preceding two years.

85. UTAH CODE ANN. § 53A-11a-102(2) (LexisNexis 2017)

“Bullying” means intentionally or knowingly committing an act that: (i) (A) endangers the physical health or safety of a school employee or student; (B) involves any brutality of a physical nature such as whipping, beating, branding, calisthenics, bruising, electric shocking, placing of a harmful substance on the body, or exposure to the elements; (C) involves consumption of any food, liquor, drug, or other substance; (D) involves other physical activity that endangers the physical health and safety of a school employee or student; or (E) involves physically obstructing a school employee’s or student’s freedom to move; and (ii) is done for the purpose of placing a school employee or student in fear of: (A) physical harm to the school employee or student; or (B) harm to property of the school employee or student. (b) The conduct described in Subsection (1)(a) constitutes bullying, regardless of whether the person against whom the conduct is committed directed, consented to, or acquiesced in, the conduct.

86. UTAH CODE ANN. § 53A-11a-102(4) (LexisNexis 2017)

“Cyber-bullying” means using the Internet, a cell phone, or another device to send or post text, video, or an image with the intent or knowledge, or with reckless disregard, that the text, video, or image will hurt, embarrass, or threaten an individual, regardless of whether the individual directed, consented to, or acquiesced in the conduct, or voluntarily accessed the electronic communication.

ment,⁸⁷ and hazing⁸⁸ in the context of schools and education. However, a high school football hazing incident in 1993 which resulted in almost a decade-worth of appeals and civil litigation, brought Utah and hazing into the national discourse over a shameful incident that occurred at Sky View High School in Smithfield, Utah (near Logan) on October 11, 1993.⁸⁹ As unconscionable it is by today's standards, back then there was a legal defense and loophole,⁹⁰ as it

87. UTAH CODE ANN. § 53A-11a-102 (LexisNexis 2017) “‘Harassment’ means repeatedly communicating to another individual, in an objectively demeaning or disparaging manner, statements that contribute to a hostile learning or work environment for the individual.”

88. UTAH CODE ANN. § 53A-11a-102(5) (LexisNexis 2017)

“Hazing” means intentionally or knowingly committing an act that: (i) (A) endangers the physical health or safety of a school employee or student; (B) involves any brutality of a physical nature such as whipping, beating, branding, calisthenics, bruising, electric shocking, placing of a harmful substance on the body, or exposure to the elements; (C) involves consumption of any food, liquor, drug, or other substance; (D) involves other physical activity that endangers the physical health and safety of a school employee or student; or (E) involves physically obstructing a school employee’s or student’s freedom to move; and (ii) (A) is done for the purpose of initiation or admission into, affiliation with, holding office in, or as a condition for, membership or acceptance, or continued membership or acceptance, in any school or school sponsored team, organization, program, or event; or (B) if the person committing the act against a school employee or student knew that the school employee or student is a member of, or candidate for, membership with a school, or school sponsored team, organization, program, or event to which the person committing the act belongs to or participates in. (b) The conduct described in Subsection (5)(a) constitutes hazing, regardless of whether the person against whom the conduct is committed directed, consented to, or acquiesced in, the conduct.

89. See Vaughn Roche, *Football Hazing Penalty Splits Tiny Utah Town: Student Is Threatened After His Complaint Ends His Team’s Season*, L.A. TIMES, Nov. 22, 1993, http://articles.latimes.com/1993-11-22/news/mn-59668_1_football-hazing (discussing how high school hazing victim Brian Seamons was vilified by much of his community for reporting a brutal hazing incident he suffered, along with the Cache County School Superintendent Larry Jensen’s decision thereafter to cancel the football season as a result).

90. See *Recent Case Law Developments—The Recent Legislative Developments Section Consists of Brief Expositions of Selected Statutes Enacted by the 1997 Utah Legislature*, 1997 UTAH L. REV. 1169, 1180–1181 (1997)

The definition of hazing as it existed prior to the Hazing Amendments created a number of loopholes which could be exploited by defendants in criminal cases. Highly publicized hazing incidents at Sky View High School, Hillcrest High School, and other Utah public schools have demonstrated the inadequacy of the Original Hazing Prohibition. . .

Also,

The Original Hazing Prohibition prohibited only acts done “for the purpose of initiation, admission into, affiliation with, or as a condition for continued membership in any organ-

were, that could prevent hazing from being prosecuted as a crime due to an ambiguity in the Utah statute prior to an amendment overhaul in 1997.⁹¹

In *Seamons v. Snow*,⁹² several high school football players grabbed sophomore backup quarterback Brian Seamons and taped him naked to a towel rack after a shower.⁹³ Then they brought a former girlfriend of his into the locker room to show her.⁹⁴ Seamons sued after school officials declined to act and Seamons himself—not the head coach or players—was suspended from the team.⁹⁵ It took until 2001 for a jury to eventually award him \$250,000.⁹⁶

ization.” This language gave rise to a defense that the alleged victims were already members of the organization, and that the hazing was not a condition to continued membership.

(A complete discussion of the 1997 Hazing Amendments continues through page 1185 stating, “While the Original Hazing Prohibition was almost useless, the Hazing Amendments should give the prosecution greater efficacy and make it a useful tool for prosecutors.”).

91. *Id.* See also David S. Doty, *No More Hazing: Eradication through Law and Education*, 10 UTAH B. J. 18 (1997)

In response to the continued rash of hazings in Utah, the Utah Legislature passed, and Governor Leavitt signed into law, Senate Bill 150 during the 1997 legislative session. This bill, somewhat misleadingly titled “Conduct Related to School Activities,” became a new section of Utah’s Education Code, UTAH CODE ANN. § 53A-11-908, and an amended section of the Criminal Code, UTAH CODE ANN. § 76-5-107.5.

92. 206 F.3d 1021 (10th Cir. 2000).

93. *Id.* at 1023; see Beth Anne Hahn, *Note: Student Athlete Dismissed from High School Football Team for Refusing to Apologize for Reporting a Personal Assault by Teammates to Police and School Authorities Can Seek Relief Under 42 U.S.C. § 1983*, - *Seamons v. Snow*, 206 F.3d 1021 (10th Cir. 2000), 11 SETON HALL J. SPORTS L. 397 (2001) (discussing the events of the case and characterizing the circuitous litigation as *Seamons v. Snow*, 864 F. Supp. 1111 (D. Utah 1994) [hereinafter *Seamons I*]; *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996) [hereinafter *Seamons II*]; *Seamons v. Snow*, 15 F. Supp. 2d 1150 (D. Utah 1998) [hereinafter *Seamons III*]; and *Seamons v. Snow*, 206 F.3d 1021 (10th Cir. 2000) [hereinafter *Seamons IV*]).

94. *Seamons IV*, 206 F.3d at 1023.

95. *Id.* at 1024,

The following Tuesday, Brian confronted Coach Snow in school, telling him he wasn’t going to apologize to the team and he still wanted to play football. At this point, Coach Snow told Brian that he was “sick of [his] attitude, sick of [his] father’s attitude,” and that he was off of the team.

96. See Paul Foy, *Jury Awards Hazing Victim \$250,000*, DAILY HERALD, Mar. 23, 2001, http://www.heraldextra.com/news/local/jury-awards-hazing-victim/article_5b92835b-8308-5c79-9ae4-bd84d43dce6b.html; see also Arrin Brunson, *After 7 Years, SV Hazing Case in Court*, HJNEWS, Mar. 20, 2001, http://news.hjnews.com/after-years-sv-hazing-case-in-court/article_e60eac70-44ff-588b-a4fb-fb3336c4f2d7.html (offering, “[o]ne year ago, the 10th Circuit Court of Appeals in Denver

This federal case was brought under Title IX and violations of civil rights.⁹⁷ Seamons' case centered on violations of his free speech rights under Utah law when as a sixteen-year-old he refused to apologize to the team for alerting school authorities and the local police for his teammates' wrongdoing.⁹⁸ It seems unfathomable that Seamons would have been characterized as the villain if this occurred today,⁹⁹ and forty-four states now have anti-hazing laws designed to protect victims and punish perpetrators.¹⁰⁰

C. Soccer Referee Death 2013

In a criminal case that garnered national attention, Jose Domingo Teran, a seventeen-year-old soccer player, pleaded guilty in 2013 to homicide by assault in the death of forty-six-year-old referee Ricardo Portillo during a game on April 27, 2013.¹⁰¹ After referee Portillo issued a yellow card to Teran who played goalie, for pushing an opposing player, Teran punched Portillo in the head.¹⁰² Portillo remained in critical condition in the hospital for seven days and then died.¹⁰³ The game was organized by Fut International, a Hispanic

overturned U.S. District Chief Judge Dee Bensons dismissal of the hazing lawsuit for a second time").
97. *Id.* at 1024.

Brian and his parents filed suit against Coach Snow, Principal Benson, Sky View High School, and the Cache County School District. Brian alleged numerous bases for recovery, including violation of his rights under Title IX and violations of his constitutional rights to procedural due process, substantive due process, freedom of association, freedom of speech, and equal protection.

98. Brunson, *supra* note 96 (writing that the incident "gained national attention and was featured on the Phil Donahue and Geraldo Rivera shows").

99. Apparently hazing in Utah continued for several years before the Utah High School Activities Association (UHSAA) believed it needed to intervene. *See, e.g.,* Lucinda Dillon, *Ugly, Bewildering Hazing Phase Persists in Utah Schools*, DESERET NEWS, Sept. 1, 1996, <http://www.deseretnews.com/article/510808/UGLY-BEWILDERING-HAZING-PHASE-PERSISTS-IN-UTAH-SCHOOLS.html?pg=all> (mentioning the Seamons incident, stating, "Coach Douglas Snow and many parents blamed the victim. National television magazines conducted interviews. The victim and his family received death threats.").

100. *See States with Anti-Hazing Laws*, STOPHAZING, <http://www.stophazing.org/states-with-anti-hazing-laws/> (last visited Dec. 14, 2017) (offering that the remaining states include Alaska, Montana, South Dakota, Hawaii, New Mexico and Wyoming).

101. *See* Emiley Morgan & Peter Samore, *Family of Teen Charged with Referee's Death Feels 'Horrible,'* KSL (June 14, 2013), <https://www.ksl.com/?sid=25600822>; *see also* CNN Staff, *Teen Pleads Guilty in Referee's Death*, CNN (Aug. 6, 2013), <http://www.cnn.com/2013/08/05/us/utah-soccer-death/>.

102. CNN Staff, *supra* note 101.

103. *Id.*

soccer league for children between ages five and seventeen, in Taylorsville, a suburb of Salt Lake City.¹⁰⁴

As a result of the incident, Third District Juvenile Judge Kimberly Hornak recommended a sentence of three years and ordered Teran to keep a picture of Portillo in his cell for his time in juvenile jail.¹⁰⁵ Additionally, Teran had to write weekly letters to Portillo's family members outlining the steps he was taking to return to normal life.¹⁰⁶

V. TORT LAW

Utah has its share of sports torts cases and relevant statutes. For instance, Utah has a specific statute that limits liability for hockey arena and facility liability.¹⁰⁷ The sport-specific statute states:

(1) As used in this section, "hockey facility" means a facility where hockey is customarily played or practiced and the general public is charged an admission fee to attend.

(2) The owner or operator of a hockey facility is not liable for any injury to the person or property of any person as a result of that person being hit by a hockey puck or stick unless:

(a) the person is situated completely behind a board, glass, or similar barrier and the board, glass, or barrier is defective; or

(b) the injury is caused by negligent or willful and wanton conduct in connection with the game of hockey by the owner or operator or any hockey player, coach, or manager employed by the owner or operator.¹⁰⁸

104. *Id.*

105. *Id.*

106. *Id.* See also Emiley Morgan, 'I Was Frustrated,' Says Teen Who Admits Killing Referee, DESERET NEWS, Aug. 5, 2013, <http://www.deseretnews.com/article/865584129/I-was-frustrated-says-teen-who-admits-killing-referee.html?pg=all> (offering, "The judge said that while Teran's good grades and clean history were factors in her sentence, she could not ignore the facts of the case." "What the court is (most) concerned by is that your one act of violence was without any cause or excuse or any justification," Hornak said, adding that Portillo was serving the community when he was killed. "In one moment of rage you took away his life, you changed the life of all of his daughters and you changed your life and your family's life forever.").

107. UTAH CODE ANN. § 78B-4-508 (LexisNexis 2017).

108. *Id.*

Illinois also has a similar statute.¹⁰⁹ The following subsections discuss some other areas in which Utah has dealt with sports torts.

A. Defamation and Coaches

In *O'Connor v. Burningham*,¹¹⁰ the Utah Supreme Court addressed the legal status of public high school coaches under defamation law and whether or not they are considered to be public officials.¹¹¹ The Utah Supreme Court held that they are not public officials.¹¹² Thus, the *actual malice* standard in this situation is not required by the public-coach-as-plaintiff in Utah under defamation laws as expounded by various U.S. Supreme Court decisions.¹¹³

This case involved Michael O'Connor, coach of the Lehi High School girls' basketball team, and the girls' parents who were critical of his coaching demeanor, questioned his use of money, and alleged he was a demoralizing and overbearing figure by yelling at players and giving preferential treatment to Michelle Harrison, who possessed elite-class talent, which caused team chemistry and other problems for the team and coach.¹¹⁴ The parents aired their grievances at an Alpine School District Board meeting after the school principals and administrators determined O'Connor did nothing wrong, and though the Alpine School Board did not act, the high school administration ultimately decided to dismiss O'Connor.¹¹⁵

109. 745 ILL. COMP. STAT. 52/10 (LexisNexis 2017)

The owner or operator of a hockey facility shall not be liable for any injury to the person or property of any person as a result of that person being hit by a hockey stick or puck unless: (1) the person is situated behind a screen, protective glass, or similar device at a hockey facility and the screen, protective glass, or similar device is defective (in a manner other than in width or height) because of the negligence of the owner or operator of the hockey facility; or (2) the injury is caused by willful and wanton conduct, in connection with the game of hockey, of the owner or operator or any hockey player or coach employed by the owner or operator.

110. 165 P.3d 1214 (Utah 2007).

111. *Id.* at 1216; see Geoffrey Fattah, *Court: Lehi Coach Can Pursue Defamation Suit*, DESERET NEWS, July 31, 2007, <http://www.deseretnews.com/article/695196532/Court-Lehi-coach-can-pursue-defamation-suit.html?pg=all>.

112. *O'Connor* 165 P.3d at 1216.

113. *Id.* at 1217 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny).

114. *Id.* at 1216 ("Whatever the causes may have been, that all was not well in the Lehi Pioneers' locker room soon became evident and, this spelled trouble for Mr. O'Connor").

115. *Id.* at 1216–1217

Although the school board took no formal action against him, the high school administra-

As a result of the action, O'Connor sued but his case was originally dismissed under summary judgment by the district on the grounds that he was a public official and had to show *actual malice* under defamation law and was unable to meet that standard in the eyes of the Utah district court.¹¹⁶ O'Connor, however, appealed and a unanimous Utah Supreme Court reinstated his lawsuit by reversing and remanding the case.¹¹⁷ This Court ruled that he was not, in fact, a public official, and thus, O'Connor did not have to prove actual malice.¹¹⁸

The *O'Connor* case appeared to settle after the decision, which reinstated

tion dismissed Mr. O'Connor from his role as the women's basketball coach and cited as grounds for its decision his refusal to promise that he would not deny team membership and playing time to the women in retaliation against the Parents.

116. *Id.* at 1217. The Court also opined that technically there is a categorical difference under the law between a *public official* and a *public figure* but that the Court, in *Madsen v. United Television, Inc.*, 797 P.2d 1083 (Utah 1990), actually created misunderstandings as to how one becomes a public official in Utah by treating them the same back in 1990, and therefore, actually overruled *Madsen* in the O'Connor decision stating,

Although the parties have included references to the concept of public figure in their briefs, the only analysis is directed at Mr. O'Connor as a public official. We have therefore restricted our discussion to that topic as well. To avoid further misunderstanding concerning the circumstances under which a person may acquire the status of a public official, we overrule *Madsen* insofar as it purports to provide guidance on this question.

Id. at 1221.

117. *Id.* at 1216–1217.

118. The Utah Supreme Court stated,

The Court stated that “public official” status was “...limited to those persons whose scope of responsibilities are likely to influence matters of public policy in the civil, as distinguished from, the cultural, educational, or sports realms. The ‘apparent importance’ of a position in government sufficient to propel a government employee into a public official status has nothing to do with the breadth or depth of the passion or degree of interest that the government official might ignite in a segment of the public. Nor is celebrity, for good or ill, of the government employee particularly relevant. Rather, it is the nature of the government responsibility that guides our public official inquiry. The public official roster is comprised exclusively of individuals in whom the authority to make policy affecting life, liberty, or property has been vested. Likewise, only those issues that have such bearing on civil life as to fairly touch on matters that in the eyes of law concern life, liberty, or property may be traced to the actions of a public official. So viewed, high school athletics can claim no ‘apparent importance.’ The policies and actions of any high school athletic team do not affect in any material way the civic affairs of a community -- the affairs most citizens would understand to be the real work of government.”

Id. at 1219.

his defamation claim,¹¹⁹ but the issue of whether or not coaches should be considered public officials or public figures is an important one with regard to the actual malice hurdle the coach-plaintiffs must achieve in order to prove a defamation claim. The Utah Supreme Court held that O'Connor was not a public official and, therefore, he did not have to prove actual malice in his lawsuit.¹²⁰

No doubt, coaches at all levels and everywhere can be targets by parents who are unhappy with the treatment of their child (or the lack of playing time, for example), and this puts coaches in curious positions, just as it did with coach O'Connor and particularly in the social media era which can augment *helicoptering* behavior by parents.¹²¹ However, concern by parents and others can far exceed civil litigation and procedure. As authority figures, coaches and their team of assistants, trainers, and doctors might have to deal with claims by parents, athletes, student-athletes and others, including law enforcement, for allegations of inappropriate and sometimes illegal, criminal misconduct.¹²²

For example, former University of Utah Head Coach Greg Winslow was accused of physically and psychologically abusing his swimmers and divers, was suspended during the 2013 Pac-12 championships and was later fired.¹²³ Other allegations against Winslow included various acts of inappropriate and unprofessional conduct.¹²⁴ Though no criminal charges were ever filed, USA

119. See 2009–10 Sports Law Developments, https://pennstatelaw.psu.edu/sites/default/files/documents/Sports-Law/2013_Developments_WRAR_CB.pdf (“Apparently the case was then settled.”). *Id.* at 17.

120. Again, however, it must be noted that the court ruled that he was not a public official, but did not rule on whether or not he was a public figure, admitting that their decision in *Madsen v. United Television, Inc.*, 797 P.2d 1083 (Utah 1990) should be reversed and “[i]n fact, we unhelpfully conflated public officials and public figures and treated the two concepts as if no difference existed between them in the eyes of the First Amendment.” referencing *Madsen*, 797 P.2d at 1084.

121. See, e.g., Richard Obert, *High School Athlete, Parents, Coaches Seek Balance*, AZCENTRAL, July 26, 2016, <http://www.azcentral.com/story/sports/high-school/2016/07/26/high-school-athletes-parents-coaches-seek-balance/87462788/>; see also Gordie Jones, *'Helicopter Parents' Take Learning Experiences Away from High School Athletes*, ESPN (Feb. 17, 2009), <http://www.espn.com/highschool/rise/news/story?id=3905999>.

122. See, e.g., Benjamin Raven, *13 to Sue MSU over Former USA Gymnastics Doctor's Sexual Abuse Scandal*, MLIVE, Nov. 30, 2016, http://www.mlive.com/news/detroit/index.ssf/2016/11/13_women_to_sue_msu_over_forme.html; see also Matt Mencarini & Tim Evans, *Ex-USA Gymnastics Doctor Arrested on Child Porn Charges*, USA TODAY, Dec. 16, 2016, <http://www.usatoday.com/story/news/nation/2016/12/16/ex-usa-gymnastics-doctor-arrested-federal-officials-attorney-says/95534432/>.

123. See Braden Keith, *ESPN to Feature Story of Fired Utah Swim Coach Greg Winslow on Outside the Lines*, SWIM SWAM (Dec. 19, 2013), <https://swimswam.com/espn-feature-story-fired-utah-swim-coach-greg-winslow-outside-lines/>.

124. *Id.*

Swimming banned Winslow for life in 2014.¹²⁵

Misconduct Claims were also made and a police report was filed, reaching back to his prior coaching tenure at Sun Devil Aquatics, a swim club team in Arizona, and in 2015 Arizona passed a law making it a crime for such misconduct by an authority figure including for sexual abuse.¹²⁶ The University of Utah's investigation only covered the six years that he was coach at the University, however, and an independent investigation demonstrated that Winslow should have been fired by the University in 2012 for alcohol-related problems that "were corrosive to the entire team."¹²⁷

...accusations of verbally and physically abusing his assistants, abusing alcohol while on team trips, using racial slurs against a black swimmer, and even a charge that a swimmer was caught dealing drugs on a school-sponsored trip, but wasn't disciplined until after taking advantage of that swimmer represented the Utes at the Olympic Trials.

For an interesting employment law and constitutional analysis of whether or not coaches may only be terminated only "for cause." See also *Kingsford v. Salt Lake City Sch. Dist.*, 247 F.3d 1123 (10th Cir. 2001) (offering that because there was conflicting evidence on the factual question of whether there was an implied-in-fact promise to plaintiff that he would be removed as football coach only for cause, the issue could not be decided at the summary judgment stage).

125. See Morgan Priestley, *Greg Winslow Added to USA Swimming Banned for Life List*, SWIM SWAM (Feb. 14, 2014), <https://swimswam.com/greg-winslow-added-usa-swimming-banned-life-list/>.

126. See William Pitts, *Bill Closes Sexual Abuse Loophole in Arizona*, AZCENTRAL, Apr. 1, 2015, <http://www.azcentral.com/story/news/12-news/2015/04/01/12news-bill-closes-sexual-abuse-loophole/70804054/> (video discussing that at the time, Arizona law did not list swim coaches in the category of authority figures such as teachers or priests); see also Michael Kiefer, *Ex-Utah Swim Coach Won't Face Sex Assault Charges*, USA TODAY, June 13, 2013, <http://www.usatoday.com/story/sports/college/2013/06/13/utah-swimming-coach-greg-winslow-sex-assault-charges-in-arizona/2418911/>.

127. See Ceci Christy, *Christy: Utah Admits Winslow Should Have Been Fired in 2012*, SWIM SWAM (July 2, 2013), <https://swimswam.com/christy-utah-admits-winslow-should-have-been-fired-in-2012/> (writing

[t]he investigators concluded that no physical abuse or sexual activity occurred with any of Mr. Winslow's swimmers while he coached at the University. Additionally, he was cleared of any alleged racial discrimination. The investigators did not issue a position on the allegations of psychological abuse during training sessions as "training methods are subjective."

B. Physical Injury Cases

1. Waivers

In the 2001 decision *Hawkins v. Peart*,¹²⁸ the Utah Supreme Court invalidated both a waiver provision and an indemnity provision involving horse rides.¹²⁹ Eleven-year-old Jessica Hawkins was injured when she was thrown from a horse during a trail ride with her family near Duck Creek, Utah.¹³⁰ Jessica's mother had signed a release containing the waiver of liability and an indemnity provision.¹³¹ The provision stated,

Riding and handling horses can be DANGEROUS. This form must be completed and signed before you can ride. . . . By signing this form, you agree to ASSUME THE RISK of any injury, death, or loss, or damage which you or your child . . . may suffer In consideration for the rendering of trail riding . . . service by Navajo Trails . . . the undersigned on behalf of himself or for any person for whom he or she is a parent or legal guardian, does hereby indemnify (reimburse), release, and forever hold harmless, Navajo Trails . . . [for] any claims, demands, and actions or causes of action on account of death or injury or loss or damage which may occur from any cause, without regard to negligence, other than the gross negligence or willful misconduct of Navajo Trails If the undersigned is a parent or guardian, he or she further agrees to indemnify (reimburse) Navajo Trails or such persons for any damages paid by or assessed against Navajo Trails . . . as a result of injury to or death of a child¹³²

The Utah Supreme Court held that a parent may not release a minor's prospective claim for negligence.¹³³ This is consistent with the majority of courts.¹³⁴

128. 37 P.3d 1062 (Utah 2001).

129. *Id.* at 1063.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 1065 ("except where there is a strong public interest in the services provided").

134. *Id.*

2. “Public Duty” and Duty of Care

In the 2014 Utah Supreme Court decision, *Cope v. Utah Valley State College*,¹³⁵ Shawna Rae Cope, a dance team member, sustained a head injury during rehearsal and sued the state-owned college for her injuries alleging that UVSC owed her a duty of care and that her coach created a special relationship with her by instructing her to do a special lift during a practice session for the ballroom dance team.¹³⁶

While practicing the lift for the third time which required her male partner to lift her to his shoulder, Cope’s partner lost his footing and dropped her, resulting in a head injury when Cope hit her partner’s knee.¹³⁷ No spotters were requested for the choreographed practice routine nor were they provided.¹³⁸

The case had been dismissed by the district court but was reversed on appeal and then granted certiorari by the Utah Supreme Court.¹³⁹ At issue was whether or not the “public duty” doctrine applied to the case.¹⁴⁰ “In other words, did Ms. Cope base her negligence claim upon an allegation that UVSC neglected to perform a public duty that it owed to the general public?”¹⁴¹ The Court further added,

[r]esolution of the question whether Ms. Cope’s lawsuit is based upon an act or an omission, however, does not depend upon the semantic framing of her negligence claim as either an allegation that UVSC failed to provide spotters or an allegation that UVSC affirmatively directed Ms. Cope to perform the dance move without spotters.¹⁴²

In the end, the Court stated,

135. 342 P.3d 243 (Utah 2014).

136. *Id.* at 246–47. The first two lifts were with the partner’s right shoulder; the final and injurious attempt was with the left shoulder at the suggestion of the instructor.

137. *Id.* at 247.

138. *Id.*

139. *Id.*

140. *Id.* at 246–48 (clarifying the public duty doctrine in Utah, retaining the public duty doctrine in Utah as part of its common law, applying the doctrine only to omissions of a governmental actor, and limiting it only to situations “where a plaintiff seeks to impose liability for a duty to protect the general public from external harms.”). The Court then went further, however, and stated, that the public duty doctrine still did “not negate UVSC’s duty of care toward student members of a ballroom dance team created and overseen by the college.” *Id.* at 247.

141. *Id.* at 254.

142. *Id.* at 255.

Ms. Cope alleged facts that would, at minimum, lead to a similar duty to act. UVSC created, funded, and supervised the ballroom dance team. The college also gave students course credit for team participation. UVSC's actions in creating and overseeing the ballroom dance team had advanced to a stage where it had a duty to act in a reasonable manner to prevent injuries caused by participation with the dance team.¹⁴³

However, the Court did hold that the public duty doctrine did not apply "because ballroom dance instruction is not a public duty 'owed to the general public at large' or, in this case, UVSC's student body and faculty."¹⁴⁴ The Court reversed the district court order that had dismissed the case and held that Cope's lawsuit was not based upon a "public duty," and therefore, the case could proceed under a negligence theory.¹⁴⁵

3. Special Relationship between Student-Athlete and University

In the 1994 federal decision in *Orr v. Brigham Young University*,¹⁴⁶ the district court applied Utah law in determining whether or not BYU owed Vernon Orr, an injured football player, an affirmative duty of care.¹⁴⁷ In August 1988, Orr felt back pain during a practice drill involving a blocking

143. *Id.*

144. *Id.* at 256

The nature of a duty to provide safe dance instruction is fundamentally different from recognized public duties such as providing police and fire protection, safeguarding the public from natural disasters, considering public safety when granting parole to prisoners, regulating financial institutions to protect depositors, and licensing motorists and doctors to promote safety.

Id.

145. *Id.*

146. 960 F. Supp. 1522 (D. Utah 1994), *aff'd without published opinion*, 108 F.3d 1388 (10th Cir. 1997). Page 6, the unpublished appellate decision states, "Orr has cited, and we have found, only one case from any jurisdiction which has directly recognized the duty he advocates. *See Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360 (3d Cir. 1993) (predicting result under Pennsylvania law). Kleinknecht relied on cases developed in the realm of high school athletics, finding that the college's active recruitment of the student-athlete balanced out the lack of custodial relationship between the student-athlete and the college. *See id.* at 1367. ("We find no indication that the Utah Supreme Court would follow Kleinknecht").

147. *Orr*, 960 F. Supp. at 1522. As offered the decision was upheld on appeal in 1997 in the unpublished decision *Orr v. Brigham Young Univ.* 108 F.3d 1388 (10th Cir. 1997).

sled.¹⁴⁸ After receiving numerous treatments, Orr did play during the 1988 season, but during spring practice in 1989 he felt back pain again.¹⁴⁹ He played during the 1989 season, but complained again of back pain during halftime of the last game of the season.¹⁵⁰ Then, two weeks later during practice, he suffered a back injury again and had surgery to repair herniated discs.¹⁵¹ Orr left BYU in 1991 and played professional football in Finland.¹⁵²

Orr filed a federal lawsuit against BYU for negligence and sought punitive damages.¹⁵³ In response, BYU argued that “except for those duties relating to claims of medical negligence or violations of medical standards of care, the long list of alleged duties owed to Orr and breached by BYU are ones that have never been identified or recognized as duties owed as a matter of law.”¹⁵⁴

The federal district court rejected Orr’s claim of “a special relationship with the university by virtue of his football player status.”¹⁵⁵ The court also rejected the football player’s claim that, “by playing football for BYU, he became in essence a ward of the university without any vestige of free will or in-

148. *Id.* at 1523 (district court decision).

149. *Id.* at 1524.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 1525–26.

154. *Id.* at 1526

Orr asserts that BYU negligently breached its duty of care owed to him in one or more of the following respects: a. engendering a win-at-all-cost mentality; b. excessively pressuring players to perform; c. using psychological pressure to increase performance at the sacrifice of his health; d. creating disincentives to report injuries or seek medical attention; e. conditioning payment for medical services on an athletic trainer's determination of medical need; f. employing unqualified persons to diagnose and treat football related injuries; g. allowing unqualified personnel to evaluate his medical fitness to play football; h. misdiagnosing his injuries; i. failure of the trainers to refer him to a team physician for diagnosis and treatment; j. failing to hire a full-time team physician responsible for diagnoses and treatment in lieu of unqualified trainers; k. approving and encouraging him to play after being injured; l. using pain killing injections to enable him to continue to play without completely diagnosing his injury; m. placing greater emphasis on winning football games than on his physical and mental health; n. losing interest in him and failing to assist him further in his education; o. failing to act to preserve his health, and to treat his injuries in his long term personal best interest, to see that his educational needs were met; and, p. engaging in the unauthorized practice of medicine.

Id.

155. *Id.* at 1529.

dependence.”¹⁵⁶ The court stated that it disagreed with Orr’s characterization of the duties owed to him as a college student and that his assertions were “fundamentally at odds with the nature of the parties’ relationship.”¹⁵⁷

Although the court found no special relationship that would create a duty to act, the court acknowledged that “when training and medical services are provided and then negligently performed, liability could result under existing theories of negligence.”¹⁵⁸ In sum, all of Orr’s claims were dismissed except “for his claim of negligence based on violations of medical standards of care”¹⁵⁹

4. Utah, Inherent Risks of Skiing Act and Ski Area Operators

Utah is packed with statutes and cases related to snow skiing.¹⁶⁰ Utah also has a comprehensive statute dealing with the skiing known as the *Inherent Risks of Skiing Act*.¹⁶¹ The statutory framework begins:

The Legislature finds that the sport of skiing is practiced by a large number of residents of Utah and attracts a large number of nonresidents, significantly contributing to the economy of this state. It further finds that few insurance carriers are willing to provide liability insurance protection to ski area operators and that the premiums charged by those carriers have ris-

156. *Id.* at 1528.

157. *Id.*

158. *Id.*

159. *Id.* at 1531. For additional cases involving special relationships or duties of care, see *Gillespie v. Southern Utah State College*, 669 P.2d 861 (Utah 1983) (denying recovery for basketball player’s amputation of leg and disallowing his wife a loss of consortium claim); *Jaeger v. Western Rivers Fly Fisher*, 855 F. Supp. 1217 (D. Utah 1994) (denying recovery for injuries suffered during a fishing trip); *Mikkelsen v. Haslam*, 764 P.2d 1384 (Utah Ct. App. 1988) (reversing and remanding for a new trial a malpractice case which was in favor of a doctor and involving hip surgery).

160. This article will not address criminal charges that could be related to skiing such as reckless skiing and boarding, however. See, e.g., Christopher Smart, *Against Utah Law: Reckless Skiing and Boarding*, SALT LAKE TRIB., Dec. 29, 2014, <http://www.sltrib.com/home/1991633-155/against-the-law-reckless-skiing-and> (discussing the consideration of whether or not Utah might consider increasing penalties, including criminalization of leaving a slope-slide scene of an accident, for reckless skiing and that such laws already exist “in Park City, as well as Summit and Salt Lake counties. Together, they encompass Deer Valley, Park City Mountain Resort, Canyons Resort, Solitude, Brighton, Snowbird and Alta.”); see also Christopher Smart, *Reckless Skiing Can Mean Jail Time*, SALT LAKE TRIB., Mar. 8, 2008, http://archive.sltrib.com/story.php?ref=/ci_8501217 (describing how Park City outlawed reckless skiing and snowboarding making “out-of-control sliding within the city limits a class B misdemeanor, punishable by a fine of up to \$1,000 and up to six months in jail”).

161. UTAH CODE ANN. § 78B-4-401 (LexisNexis 2017).

en sharply in recent years due to confusion as to whether a skier assumes the risks inherent in the sport of skiing. It is the purpose of this act, therefore, to clarify the law in relation to skiing injuries and the risks inherent in that sport, to establish as a matter of law that certain risks are inherent in that sport, and to provide that, as a matter of public policy, no person engaged in that sport shall recover from a ski operator for injuries resulting from those inherent risks.¹⁶²

Originally enacted in 1979, Utah's Act and its interpretation and application continues to evolve.¹⁶³ Given its natural surroundings, coupled with the exposure given to it by the 2002 Winter Olympics, in addition to its promotion as "The Greatest Snow on Earth," Utah's four million annual skier visits present all sorts of opportunities for mishaps, collisions, injuries, and rare fatalities which can lead to lawsuits.¹⁶⁴ However, in the preamble to Utah's *Inherent Risks of Skiing Act*, above, the state legislature clearly indicates that ski (area) operators are now essentially immune from inherent risks of skiing.¹⁶⁵

162. UTAH CODE ANN. § 78B-4-401 (LexisNexis 2017) (Public Policy).

163. See David S. Kottler, *The Slope of Utah Ski Law*, 23 UTAH B. J. 1 (2010).

164. *Id.* Kottler states,

Downhill ski/snowboard accidents typically fall into one or more of the following five categories: Collisions with other skiers/snowboarders, with immovable objects (e.g., trees), or with movable objects (e.g., runaway skis or snowboards); Ski lift accidents due to negligent design, maintenance, or operation of the lift, or due to the negligence of other skiers or passengers on the lift; Accidents caused by ski area negligence such as failure to mark a known hazard, improper slope maintenance and/or grooming, or inadequate avalanche control; Accidents caused by ski instructor negligence, such as leading ski school students into overly challenging terrain or failing to provide safety instructions; and Accidents or injuries resulting from faulty equipment, most commonly alpine bindings that fail to release properly.

Id.

165. *Id.* Kottler recalls the original 1979 Utah Act which was "passed in 1979 at the behest of ski-industry lobbyists" following the "seminal case" and quoting *Sunday v. Stratton Corp.*, 390 A.2d 398, 403 (Vt. 1978) (holding ski area operator liable for injuries sustained by a novice skier who tripped on an obscured piece of undergrowth: "What [the plaintiff] 'assumes' is not the risk of injury, but the use of reasonable care on the part of the [ski area operator]."); but see *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991), that the Skiing Act "does not purport to grant ski area operators complete immunity from all negligence claims initiated by skiers." *Id.* at 1044. Rather, the Skiing Act only protects ski area operators from liability in cases where one or more of the enumerated dangers that caused the injury is an "integral aspect [] of the sport of skiing." *Id.*

Indeed, Utah even has a special *Passenger Ropeway Systems Act*¹⁶⁶ for those on ski lifts which states:

(1) In order to safeguard the life, health, property, and welfare of citizens while using passenger ropeways, it is the policy of the state to:

(a) protect citizens and visitors from unnecessary mechanical hazards in the design, construction, and operation of passenger ropeways, but not from the hazards inherent in the sports of mountaineering, skiing, snowboarding, mountain biking, and hiking, or from the hazards of the area served by passenger ropeways, all of which hazards are assumed by the sportsman; and

(b) require periodic inspections of passenger ropeways to ensure that each passenger ropeway meets “The United States of America Standard Institute Safety Code for Aerial Passenger Tramways,” or an equivalent standard established by rule under Section 72-11-210.¹⁶⁷

Certainly, not all snow-related statutes can cover all situations. For example, David S. Kottler postures that Utah courts might have to address whether a ski instructor be held liable for negligent supervision of a child ski student who falls off a chair after loading the lift without any adult supervision? He continues with questioning what standard of care are ski patrollers and ski-area operators bound to follow in marking and eliminating the risks of an in-bounds avalanche? And, finally, he posits whether a ski patroller be held liable for negligently allowing a reckless skier to continue skiing when the reckless skier subsequently collides with another skier?¹⁶⁸

There are numerous ski-related cases that one could explore, but one of the most significant is the 1991 decision in *Clover v. Snowbird Ski Resort*,¹⁶⁹ in which the Utah Supreme Court held that the Utah Inherent Risk statute granted only limited immunity and “does not purport to grant ski area opera-

166. UTAH CODE ANN. § 72-11-101 (LexisNexis 2017).

167. UTAH CODE ANN. § 72-11-201 (LexisNexis 2017).

168. Kottler, *supra* note 163.

169. *Clover*, 808 P.2d at 1037 (reversing summary judgment and remanding and offering that the inherent risks of skiing listed in the statute were “nonexclusive.” *Clover* involved a ski area employee who jumped off a steep crest and hit a *Clover* at the bottom resulting in a severely injured head. As a result, Snowbird Ski Resort was sued for negligent design and maintenance).

tors complete immunity from all negligence claims initiated by skiers.”¹⁷⁰ The Utah Supreme Court continued, “Indeed, the list of dangers [. . .] is expressly nonexclusive. The statute, therefore, contemplates that the determination of whether a risk is inherent be made on a case-by-case basis, using the entire statute, not solely the list”¹⁷¹ However, that decision was well before Utah updated and clarified its statute in 2006 (renumbered in 2008), which today defines inherent risks of skiing as follows, today:

- (1) “Inherent risks of skiing” means those dangers or conditions which are an integral part of the sport of recreational, competitive, or professional skiing, including, but not limited to:
- (a) changing weather conditions;
 - (b) snow or ice conditions as they exist or may change, such as hard pack, powder, packed powder, wind pack, corn, crust, slush, cut-up snow, or machine-made snow;
 - (c) surface or subsurface conditions such as bare spots, forest growth, rocks, stumps, streambeds, cliffs, trees, and other natural objects;
 - (d) variations or steepness in terrain, whether natural or as a result of slope design, snowmaking or grooming operations, and other terrain modifications such as terrain parks, and terrain features such as jumps, rails, fun boxes, and all other constructed and natural features such as half pipes, quarter pipes, or freestyle-bump terrain;
 - (e) impact with lift towers and other structures and their components such as signs, posts, fences or enclosures, hydrants, or water pipes;
 - (f) collisions with other skiers;
 - (g) participation in, or practicing or training for, competitions or special events; and
 - (h) the failure of a skier to ski within the skier’s own ability.¹⁷²

As mentioned previously, the specificity of “inherent risks” stems from

170. *Id.* at 1044.

171. *Id.* at 1044–1045.

172. UTAH CODE ANN. § 78B-4-402 (LexisNexis 2017).

the high cost insurance carrier premiums for ski-related injuries.¹⁷³ Other cases worth exploring include *White v. Deseelhorst*,¹⁷⁴ *Berry v. Greater Park City Co.*,¹⁷⁵ and *Rothstein v. Snowbird Corp.*¹⁷⁶

It is important to remember, however, that the current version of the Act (and the statutory enumeration) is different than previous decisions such as in *Clover* and *White* and others. For example, in these decisions, the expression “variations or steepness in terrain” was simply listed among the list of various inherent risks, whereas today it states:

variations or steepness in terrain, whether natural or as a result of slope design, snowmaking or grooming operations, and other terrain modifications such as terrain parks, and terrain features such as jumps, rails, fun boxes, and all other constructed and natural features such as half pipes, quarter pipes, or freestyle-bump terrain.¹⁷⁷

The statute is quite strong in support of protection for ski area operators in that today “no skier may make any claim against, or recover from, any ski area operator for injury resulting from any of the inherent risks of skiing,”¹⁷⁸ but still “[s]ki area operators shall post trail boards at one or more prominent locations within each ski area which shall include a list of the inherent risks of skiing, and the limitations on liability of ski area operators, as defined in this

173. UTAH CODE ANN. § 78B-4-401 (LexisNexis 2017) (“... few insurance carriers are willing to provide liability insurance protection to ski area operators and that the premiums charged by those carriers have risen sharply in recent years due to confusion as to whether a skier assumes the risks inherent in the sport of skiing.”).

174. 879 P.2d 1371 (Utah 1994) (summary judgment inappropriate for a negligence action related to an unmarked cat track).

175. 171 P.3d 442 (Utah 2007) (remanding case involving skiercross racer who fell, injured his neck resulting in paralysis, and that his claim for gross negligence should have proceeded).

176. 175 P.3d 560 (Utah 2007) (vacating summary judgment, remanding and offering that Utah’s statute was not intended as a complete bar to recovery against ski area operators under negligence or gross negligence, but rather to clarify the “inherent risks” so that ski resort operators could purchase insurance for protection for risks that are not inherent to skiing); see *Ghionis v. Deer Valley Resort Co., Ltd.*, 839 F.Supp. 789 (D. Utah 1993) (holding that a release signed by renter Ghionis was ambiguous related to incompatibility between ski bindings and boots, and therefore not a bar to recovery for a claim of negligent instruction and stating “legitimate claims of negligence against ski resorts are not prohibited by the Skiing Act.”) *Id.* at 796 (citing *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991)).

177. UTAH CODE ANN. § 78B-4-402(1)(d) (LexisNexis 2017).

178. UTAH CODE ANN. § 78B-4-403 (LexisNexis 2017) (Bar against claim or recovery from operator for injury from risks inherent in sport).

part.”¹⁷⁹ The key is whether the claim against a ski area operator by the plaintiff involves an inherent risk of skiing or not.

5. Concussion Law

Finally, in March 2011 Utah enacted the state’s *Protection of Athletes with Head Injuries Act* into law.¹⁸⁰ The act requires amateur sports organizations¹⁸¹ to adopt and enforce a concussion and head injury policy that describes the nature and risk of concussions.¹⁸² This also includes the danger of continuing to play after sustaining a concussion.¹⁸³ Indeed, coaches (i.e. “agents”) must be familiar with and have a copy of the policy.¹⁸⁴

Coaches are not required to complete an annual concussion education course, but parents must be given a written copy of the concussion policy and provide written consent before a child is permitted to participate in sports.¹⁸⁵ In the event a child is suspected of having a concussion, they must be immediately removed from play and cannot return until and evaluation by a qualified health care provider.¹⁸⁶

VI. CONCLUSION

As demonstrated in this article, the state of Utah has addressed sports law issues across a broad spectrum and far more than just ski-related litigation and concerns. Cases, coupled with sport-specific statutes, show that even a state with a relatively small population might still have to deal with legal issues that

179. UTAH CODE ANN. § 78B-4-404 (LexisNexis 2017).

180. *See* UTAH CODE ANN. § 26-53-101 (LexisNexis 2017); *see also* Lindsey Barton Straus, JD, *Youth Sports Concussion Safety Laws: Utah*, MOMSTEAM (Mar. 31, 2011), <http://www.momsteam.com/youth-sports-concussion-safety-laws-utah#ixzz3cV97YOoM>.

181. UTAH CODE ANN. § 26-53-102(2)(a) (LexisNexis 2017)

“Amateur sports organization” means, except as provided in Subsection (2)(b): (i) a sports team; (ii) a public or private school; (iii) a public or private sports league; (iv) a public or private sports camp; or (v) any other public or private organization that organizes, manages, or sponsors a sporting event for its members, enrollees, or attendees. (b) “Amateur sports organization” does not include a professional: (i) team; (ii) league; or (iii) sporting event.

182. UTAH CODE ANN. § 26-53-201 (LexisNexis 2017).

183. *Id.*

184. *Id.* Note that § 26-53-102 (LexisNexis 2017) defines “agent” as a coach, teacher, employee, representative, or volunteer.

185. UTAH CODE ANN. § 26-53-201 (LexisNexis 2017).

186. *Id.*

intersect sport and law. Indeed, it is the least populous state to have a major professional sports team, but that has not meant that the state has not had to address major sports law issues.

While the advent of the 2002 Winter Olympics in Salt Lake City was an exciting time for the state and, in the end, became a huge international success, along with it came accusations of criminal misconduct to get it there in the first place. Indeed, misconduct involving the judging of pairs figure skating at the Games caused permanent change within that sport.

Given the host of Division I NCAA colleges and universities within the state, it is natural that many sports law cases and issues would manifest themselves. In particular, the University of Utah and its Native American mascot concerns, coupled with Brigham Young University and its policy against Sunday competition, seem to be the most prominent players related to NCAA rules, though clearly they are not alone in the state.

It will be interesting to see if Utah's rigid stance on gambling, including Internet gambling and fantasy sports, might become more flexible, or whether gamblers will take their business to surrounding states where various forms of gambling are legal. Utah has gained unwanted national attention for civil and criminal misdeeds involving hazing and violence related to sport, including the death of a soccer referee. Issues related to helicoptering parents are not unique to the state. At the same time, however, the state has a statutory framework that addresses hazing, bullying and cyberbullying and should be complimented for that.

Utah's several sport-specific statutes are admirable and unique. For example, it is only one of the only states that has a sport-specific statute that limits hockey arena and facility liability. Additionally, its recently updated *Inherent Risks of Skiing Act* certainly updates decades of case law which has had to interpret the true meaning of that statute and what an "inherent risk" in skiing really means. Finally, the enactment of its *Protection of Athletes with Head Injuries Act* in 2011 demonstrates that Utah remains current and relevant in sports law circles far beyond Sundays and the slopes.