

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2011

PHILADELPHIA, TUESDAY, MAY 3, 2016

An **ALM** Publication

## NCAA Brought Back Into Suit Over Student's Death

**BY MAX MITCHELL**

*Of the Legal staff*

The Pennsylvania Superior Court has pulled the NCAA back into a lawsuit over claims that it failed to perform proper medical testing of a student-athlete who died during a late-night basketball practice.

A three-judge panel of the court ruled Tuesday afternoon in *Hill v. Slippery Rock University* that, under the Restatement (Second) of Torts, the National Collegiate Athletic Association can be held liable for failing to test Jack Hill Jr. for sickle cell anemia. Hill, a 21-year-old enrolled at Slippery Rock University, died from a sickle cell attack in September 2011.

The split decision overturned a ruling from the Butler County Court of Common Pleas, which had said the athletic association could only be held liable for acts it undertook, as opposed to any alleged failure to act.

Superior Court Judge Jacqueline O. Shogan, who wrote the court's precedential opinion, disagreed with the lower court's interpretation and said the lower court had incorrectly dismissed the NCAA at the preliminary objections stage.

"Had the NCAA's protocols tested for sickle cell trait at Division II schools, Mr. Hill may not have suffered the event that caused his death," Shogan said. "Thus, appellants claimed that the inadequate pre-participation physical, which allowed Mr. Hill to play basketball, increased his risk of harm."

Shogan was joined by Judge Kate Ford Elliott. Judge John Bender noted his dissent but filed no accompanying opinion.

**Kline & Specter attorney Chip Becker** said the court's decision explicitly stated that Section 323 of the restatement -applies both to a defendant's affirmative acts and also to a defendant's failure to act. He noted that Pennsylvania cases have applied the section to a defendant's failure to act in the medical malpractice context, but had not explicitly addressed the issue in other contexts.

Although other jurisdictions, including the Ohio Court of Appeals, have limited Section 323 solely to a defendant's affirmative acts, Becker said Pennsylvania law is more faithful to what the restatement says.

"The opinion reflects and clarifies where Pennsylvania law has been for a long time and what the Restatement of Torts already states," Becker said.

Lewis Schlossberg of Blank Rome, who represented the NCAA, did not return a call for comment Tuesday afternoon.

According to Shogan, after Hill collapsed during a high-intensity basketball practice and died a short time later, Jack and Cheryl Hill sued Slippery Rock, a nurse employed by the university and the NCAA, alleging negligence. The plaintiffs contended the NCAA owed Hill a duty to ensure his safety, and was negligent for failing to require Division II schools, including Slippery Rock, to screen athletes for sickle cell trait.

The trial court dismissed the NCAA after preliminary objections were made, finding that, while the plaintiffs sufficiently alleged the NCAA assumed a duty, the plaintiffs failed to show that the NCAA increased Hill's risk of harm, as required under Section 323 of the restatement.

The lower court cited a 1992 case from the Ohio Court of Appeals, *Wissel v. Ohio High School Athletic Association*, which said a defendant's negligent performance must "put the plaintiff in a worse situation than if the defendant had never begun the performance." The Ohio court's ruling further said plaintiffs can only prevail by

demonstrating "sins of commission rather than omission."

The lower court in Hill said the plaintiffs' allegations showed only "sins of omission, rather than commission."

Shogan said the lower court's reliance on Wissel as indicating that increased risk of harm can only be established through "sins of commission" was incorrect. In Pennsylvania, she said, an increased risk of harm can come from both actions and the failure to act. To further support her position, she cited the state Supreme Court's interpretation of the restatement in its 1978 ruling in *Hamil v. Bashline*.

Shogan also noted that a 2007 NCAA consensus statement had recommended testing for sickle cell trait in all student athletes,

"The incomplete medical clearance may have led Mr. Hill to believe that he was physically fit for basketball," she said. "Therefore, appellants sufficiently alleged that the initiation of medical and physical evaluations, which did not include sickle cell trait testing for Division II schools, increased Mr. Hill's risk of harm."