

ORAL ARGUMENT — 12/8/98
98-0253
NCAA V. JONES

LAFFERTY: The NCAA is a voluntary unincorporated association of approximately 1,200 members consisting of colleges and universities, associations' and conferences, and other educational institutions. Texas Tech is a member of the NCAA, and Joel Casey Jones was recruited and given a scholarship as a student athlete to play football at Texas Tech University.

ABBOTT: Explain to me what's the effect of the fact that Mr. Jones is now gone?

LAFFERTY: I understand that Mr. Jones' counsel has filed a motion to withdraw as counsel, but I think you're referring to the fact that he's -

GONZALEZ: No longer in school! He's no longer a player!

LAFFERTY: That's been addressed by several courts in other jurisdictions. And those courts have held that so long as restitution action remains available, and the the NCAA in this case has an operated bylaw 19.8, which provides that: If an ineligible student athlete is allowed to compete by way of an injunction that is later reversed, vacated or otherwise found to have been improperly granted, then a number of specified actions can be taken out of restitution in the interest of fairness towards those competing institutions of student athletes that had to compete against this ineligible student.

HANKINSON: Now TT was a party in the TC, but they were not a party in the CA, and they are not a party here. What happened to TT along the way?

LAFFERTY: TT is still a party to the suit. They chose not to appeal the decision of the DC.

PHILLIPS: You brought suit against Jones and TT both, did you not?

LAFFERTY: No, that's not correct.

PHILLIPS: Jones' brought the suit against...

LAFFERTY: Jones brought suit against TTU and the NCAA.

PHILLIPS: And you've never filed any claim against TT?

LAFFERTY: That's correct.

PHILLIPS: But any penalties that you assess against Jones, would they go purely against

him, or would they also impact the school?

LAFFERTY: There are some that may be overlapping. For example: it's within the discretion of the court to require forfeiture of games in which Jones' competed.

PHILLIPS: Why then wouldn't you have to make sure that Tech was a party to a legal proceeding before you would have the right to take such a step _____ Texas Tech?

LAFFERTY: As a member of the NCAA, TT has agreed to adhere and conform to the regulations and bylaws of the NCAA, including their own conduct, the conduct of their own student athletes, the conduct of boosters, the conduct of their coaches...

GONZALEZ: But they are already on probation. What more do you want from TT?

LAFFERTY: We would simply like the opportunity for the NCAA council to have an opportunity to determine whether they should take restitution _____.

GONZALEZ: What does that mean?

LAFFERTY: Under rule 19.8, there's a number of specified actions, which is within the discretion...

GONZALEZ: What is it that you're asking this court to do?

LAFFERTY: We're asking that this court hold that the issue is not moot, the NCAA's appeal is not moot and find that the temporary injunction was invalid to be granted.

HANKINSON: Isn't the only question before us is whether or not the CAs had jurisdiction to decide this?

LAFFERTY: That's the primary question.

HANKINSON: And if we decide that the CA had jurisdiction, shouldn't we remand it to the CA for the CA to determine the validity of the injunction?

LAFFERTY: Certainly under *Bay v. Macon* that would appear to be a justifiable remedy, and we think that would certainly be appropriate. There are some exceptions to that that this court has previously found that in one instance where the appellate court had indicated how it would rule. This court found in the interest of judicial economy to go ahead and rule on the question.

BAKER: And we don't know how they would rule isn't that right in this case?

LAFFERTY: But we believe that this question presents a question of law on whether or not the TC abused its discretion based on the established merits so that..

HANKINSON: But do you have any cases in the context of the review of a temporary injunction in which this court has gone on ahead in the first instance and looked at the validity of the temporary injunction in the absence of a determination by the CA?

LAFFERTY: I'm not aware of any case going either way.

ENOCH: It seems to me this is a contract case where the NCAA is arguing that they breached a contract with us. That is, we had a temporary injunction levied against us to permit a player to play who was otherwise ineligible. And under our contract, we can impose sanctions if there is a determination that that injunction was improperly granted. It's not a state law or any of our rules that permit this. It's your NCAA rule that Tech agreed to that in the event there's a wrongfully issued temporary injunction, you have the right to levy sanctions, right? That's what this is all about?

LAFFERTY: That's right.

ENOCH: Is this court compelled to conclude that a legal issue that is not moot based on an NCAA rule that permits restitution if there's a determination that an injunction was wrongfully issued?

LAFFERTY: I think so. I think that this court in other types of cases, while this is a very unique case, but say for example in a *Stowers* doctrine case. There you have a party where you've got an injured party suing an insured, and then there can be a whole other lawsuit that arises out of that due to contractual relations.

ENOCH: Has the NCAA sued TT to impose a sanction on them for a wrongfully issued injunction?

LAFFERTY: No, that's entirely within the discretion...

ENOCH: Has the NCAA brought a declaratory judgment action against Tech to determine whether or not the NCAA has the right under its contract to impose a sanction based on a wrongfully issued injunction?

LAFFERTY: There has been no declaratory judgment action.

ENOCH: Without any sort of live claim before this court asserting a right of the NCAA to impose a sanction for a wrongfully issued injunction, can this court use an NCAA rule to determine the issues in the case are not moot?

LAFFERTY: I believe so. That's what's happened with other jurisdictions, and we would urge this court to follow those jurisdictions: *McPherson*; *Pottgen*; *Wiley*; and *Crane* cases. In those cases, the school was not a party to the appeal. And those courts held due to the restitution action, that they could go ahead and address the issue, and it was a live controversy.

ENOCH: In those courts there was no restitution action pending at the time. They just said, Because the NCAA rule permitted that at some point, they had to decide whether it was valid.

LAFFERTY: Due to the potential, yes. Due to the potential restitution action. I might note that in the *Crane*, *Pottgen* and *Wiley* suits, the school was not even a party to the suit. And the Michigan SC, and this is what I meant to get to a little bit earlier in the *Cardinal Mooney* case, it in a footnote distinguished the North Dakota SC case, *Crandle v. North Dakota High School Activity Association*, and it said, In that suit, the high school was not a party to the lawsuit and was not in a position to take appropriate action to modify or set aside the judicial order. And in this case, TT is a party to the suit, and the record will reflect that they did not file an answer prior to the temporary injunction hearing, they did not submit any briefing, they did not put on any witnesses, they did not appeal the TC's decision. At best, they were in an inactive participant in the TC. And we believe in those circumstances TT did have an opportunity to participate; and, therefore, this is a live appeal. Because they did not choose to participate it should not be a problem in preventing this court from reviewing the issues in this case.

PHILLIPS: Does the strict Texas provision against deciding matters that are not a live case in controversy distinguish this case from the precedent you brought from other states? Part of the briefing said that it didn't matter what other states have done, because Texas is different. All the times that appellate courts have strained to find that there is no true case or controversy, and that if you took those cases and applied them to this situation, there would not be a live controversy, Rule 19.8 would not apply here, and therefore, the CA was correct, there was no jurisdiction?

LAFFERTY: Texas is not unique with respect to the issue of mootness. And if you look at these other cases that are cited, several of the cases go into the fact and address mootness and cite the same general propositions that Texas holds, that you've got to have a live controversy in order for a case not to be moot. But they state: under these facts, and this is an issue of first impression in the State of Texas, that the issue is not moot when you've got potential restitution action available. So I believe that Texas, as far as the mootness issue, is not unique, that it's not different from the other courts that have addressed this issue, but they've found that it's extremely important towards the integrity for the NCAA to be able to challenge injunctions even after the relevant season has been completed in order that it can maintain the integrity of its rules and be able to function as a voluntary association without interference by the TC.

ENOCH: What bothers me here though, the NCAA has not asserted any right to impose a sanction. And Tech hasn't asserted any opposition to the right to pose sanctions because of the lack of a final ruling on the injunction. So we have no controversy here. It would be like an insurance

company coming in for declaratory judgment action that they don't have coverage when nobody is asserting that they've got coverage. It seems to me - you know there hasn't been an accident yet. So why isn't any sort of controversy about whether or not somebody's liable for _____?

LAFFERTY: Under that scenario, in order for that to be the case there would have to be some rule that mandated and required that potential things happen whenever an injunction is found to be improperly granted. If you will read rule 19.8 it says, the council. And the council is composed of member representatives, 64 schools all across the nation that meet periodically 4 times a year to decide matters regarding NCAA matters. The restitution reads, that the council may take any one or more of the following actions and then lists a laundry list of those actions. It's a discretionary function of the council. And so it would be impossible for me to file a declaratory judgment action until the injunction has been found improperly granted and the council has met to take those actions.

ENOCH: But if there's no ultimate conclusion that the injunction is wrongfully issued, there's nothing for anybody to do. The NCAA rule doesn't apply because there's no determination wrongfully to render an injunction, there's nothing for the council to do and we go on about our business. But now if the NCAA says, Well we don't have a finding of wrongfully issued, but we do think that it was wrongfully issued, so we're going to now impose a sanction on Tech, Tech's going to sue claiming you can't do that, ask for a declaratory judgment, they can impose a sanction because there was no finding, then it seems to me you would have a controversy that would be brought to the court to resolve. But at this point, it's hard for me to conceptualize what the controversy is that has to be resolved now. It's just a kind of, Well, by the way, we might decide to do something under our contract in the future if a future event happens and court, we would like you to determine that future event.

LAFFERTY: The NCAA right now is enjoined from taking any type of action. And so that's why we've come to this court...

HANKINSON: The injunction's been vacated by the CA and the appeal dismissed.

LAFFERTY: The courts that have addressed this, the *Wiley* court and the other courts have held that the injunction has only become moot as to the student athlete's participation, but it has not become moot as to the injunction that precludes the restitution action.

HANKINSON: But doesn't in this case the determination depend on what the CA's says in its opinion and order? And in this instance, the court declared the injunction proceeding moot, and vacated the injunction without any limitation. So why isn't the whole injunction vacated?

LAFFERTY: That's been the issue addressed in each of these cases that have gone up in the Indiana SC and the Michigan SC.

HANKINSON: I understand. But looking at this case, wouldn't we look specifically at what the CA said. And in this case, the CA said, this injunction is vacated, not in part, not just as to the athlete, but is vacated? Why wouldn't we look to what this CA said to determine whether or not there's still an injunction in place?

LAFFERTY: The CA held that it was moot, and that they couldn't reach any of the issues. And clearly, the SC authority holds that this court has jurisdiction to determine whether or not the CA had jurisdiction.

HANKINSON: I understand that. But there is no injunction in place at this point in time against the application of the restitution rule. If we were to decide that the CA was correct and that the CA had no jurisdiction, is there an injunction in place anywhere against the NCAA doing anything?

LAFFERTY: I believe there is.

HANKINSON: Where?

LAFFERTY: The temporary injunction precludes the NCAA from taking any type of restitution action.

HANKINSON: But if the CA says in its decision specifically, We conclude that the TC's temporary injunction has no present offer to the effect and it's moot; accordingly, the TC's temporary injunction is set aside as moot and this appeal is dismissed. Doesn't that sound like they've gotten rid of the whole injunction?

LAFFERTY: That may be one interpretation. I still believe that this court has jurisdiction to determine whether or not the CA could have determined that the injunction was improperly granted.

BAKER: Why not try this thing on the merits and see what happens and then come up with a full record. It seems to me there's a long line of SC cases that say, You're better off setting the case on the merits, trying it, and not appealing these temporary injunction for the very reason that we're having this long discussion this morning?

LAFFERTY: When this appeal was initiated, the NCAA sought an expedited appeal, and in fact, tried to get the CA to rule on...

BAKER: Has this case ever been set on the merits?

LAFFERTY: No, it has not.

BAKER: So did the TC issue a temporary injunction without setting the case for the merits?

LAFFERTY: The case was initially set on the merits back in Feb. 1997, but then a continuance was requested by Casey Jones, and it was never put back on the docket.

BAKER: So you haven't gone forward to ask for a hearing on the merits of the case to get a decision on whether there should be a permanent injunction or not, vis-a-vis the restitution aspect of this _____, is that right?

LAFFERTY: There has not been.

BAKER: Don't you have that right to do that before we change the rules?

LAFFERTY: Certainly I believe we could go forward.

BAKER: Well why haven't you done that?

LAFFERTY: We believe that following the appeal and the authorities we were relying on that we felt it best to go ahead and appeal the decision.

HECHT: If there is no outstanding injunction, if there isn't one, if the effect of the CA's decision was to vacate it, then is it moot?

LAFFERTY: I don't believe so. I think that the AC still held that it was without jurisdiction to consider whether the injunction was improperly granted. And this court has jurisdiction to determine whether or not the TC had jurisdiction to determine whether the temporary injunction was improperly granted.

BAKER: If we construe that order that Justice Hankinson just read as to vacating the injunction didn't you get the relief you wanted anyway? Your whole thrust was that the injunction is not any good. It needs to be vacated. Isn't that right?

LAFFERTY: No. I believe that the relief that the NCAA is seeking is a determination that the injunction was improperly granted.

BAKER: But your rule doesn't require that. All it does is say, it's vacated. So where's the beef, I guess is their question?

LAFFERTY: We just believe that the TC should have determined or that the appellate court should have determined whether or not the injunction was improperly granted, and that it had jurisdiction to do that.

