

**IN THE COURT OF APPEALS OF TENNESSEE  
MIDDLE SECTION AT NASHVILLE**

CASON D. McINTURFF,	)	
	)	
Plaintiff/Appellant,	)	
	)	
v.	)	Appeal No. M2009-00504
	)	
BATTLE GROUND ACADEMY OF	)	From the Circuit Court of
FRANKLIN, TENNESSEE,	)	Davidson County, Tennessee
	)	Trial Court No. 06C3128
Defendant,	)	
	)	
TENNESSEE SECONDARY SCHOOL	)	
ATHLETIC ASSOCIATION,	)	
	)	
Defendant/Appellee.	)	

**BRIEF OF DEFENDANT/APPELLEE**  
**TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION**

**INTRODUCTION**

The Defendant/Appellee, the Tennessee Secondary Athletic Association (“TSSAA”), submits this brief in accordance with Tenn. R. App. P. 27 and 29. The Plaintiff/Appellant Cason D. McInturff (“McInturff”) filed this action on November 29, 2006, almost a year after his 18<sup>th</sup> birthday, to recover for injuries he allegedly suffered in April 2005 when he was struck in the head by a foul ball during a high school baseball game. At the time of the April 2005 baseball game, McInturff was a junior in high school. He attended school at Battle Ground Academy (“BGA”) and was a member of the BGA baseball team. He was an experienced baseball player, having played organized baseball for more than ten years. McInturff also had experienced a severe head injury in another sporting accident a couple of years earlier. Nonetheless, McInturff risked his

own safety at the April 2005 baseball game by electing to sit on a bucket just outside the dugout door, in an area where he might be struck by a foul ball, while wearing no helmet or other protective head gear.

Rather than accept the reality that foul balls and being struck by the ball are part of the game of baseball, and the truth that injuries occur in sports, McInturff sued his school BGA and the TSSAA.<sup>1</sup> The Davidson County Circuit Court, the Hon. Randy Kennedy, granted summary judgment to the TSSAA, concluding in a judgment made final under Tenn. R. Civ. P. 54.02 that there were no genuine issues of material fact and that the TSSAA was entitled to judgment as a matter of law on McInturff's claims. This appeal followed. For the reasons explained herein, the Trial Court was correct to grant summary judgment to the TSSAA, and its judgment should be affirmed.

### **ISSUES PRESENTED FOR REVIEW**

The TSSAA restates the issues on appeal as follows:

1. Did the Trial Court properly conclude that the game officials were independent contractors for whose negligence, if any, the TSSAA was not liable?
2. Did the Trial Court properly conclude that the TSSAA owed no duty to Plaintiff with respect to the occurrence that led to his injury?

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<sup>1</sup> While nothing in this statement is intended to minimize the severity of the injury McInturff allegedly sustained, liability is based on concepts of duty and breach of duty and not on the severity of the injury.

## STATEMENT OF THE CASE

McInturff filed this action on November 29, 2006. [R. Vol.1, pp. 1-4.]<sup>2</sup> McInturff sued BGA, the TSSAA, and John Doe Umpires 1-3 individually and as agents of the TSSAA. Id. The actions giving rise to the Complaint occurred at a baseball game on April 18, 2005, between BGA and Father Ryan High School (“Father Ryan”). [R. Vol. 1, p.2 and p. 11.] At the time of the accident, McInturff was seventeen years old. [M. McInturff Depo., p. 291].<sup>3</sup> McInturff turned eighteen in December of 2005.

McInturff filed a Motion to Amend the Complaint on or around May 8, 2007, and a hearing date of May 18, 2007, was set. [R. Vol. 1 pp. 18-20]. Apparently McInturff had learned by then who the “John Doe” umpires were and sought to add claims against them. However, apparently recognizing that the new claims against named individuals were barred by the statute of limitations and not saved by relation back since the original action against “John Doe” defendants gave no notice to the newly named individuals, McInturff has never had his Motion to Amend heard.

On December 12, 2008, TSSAA filed a Motion for Summary Judgment and supporting documents asserting that TSSAA owed no duty to McInturff and that game officials are independent contractors and not agents or employees of TSSAA. [R. Vol. 1-2 pp. 39-106]. McInturff filed his response to TSSAA’s Motion for Summary Judgment along with supporting documents [R. Vol. 2, pp. 167-193]. McInturff filed a supplemental response as well on January 16, 2009. [R. Vol. II, pp. 266-27]. By Order entered on February 13, 2009, Judge Kennedy granted TSSAA’s Motion for Summary

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<sup>2</sup> Citations to the official record will be: [R. Vol. \_\_, pp. \_\_.]

<sup>3</sup> Citations to deposition transcripts will be identified as [\_\_\_\_ Depo., p. \_\_\_\_].

Judgment. [R. Vol. III, pp. 302-305]. A copy of the transcript of the proceedings is included in the record [R. Vol. IV].

On March 4, 2009, McInturff filed his Notice of Appeal. [R. Vol. III p. 306].

### **STATEMENT OF THE FACTS**

#### **A. The Parties.**

McInturff is from Williamson County, Franklin, Tennessee. [R. Vol. I, p. 1]. He currently attends college in Texas at Abilene Christian University. As of April 18, 2005, the date he was injured, McInturff was a highly accomplished and experienced amateur baseball player. McInturff began playing baseball when he was five years old. [M. McInturff Depo, p. 24.]. By April 2005, McInturff had played in hundreds if not thousands of organized and competitive baseball games, and he was familiar with the rules of the game. [McInturff Depo. p. 462-63; M. McInturff Depo. p. 292-94].

TSSAA is a Tennessee corporation with its principal place of business located at 3333 Lebanon Road, Hermitage, Tennessee, 37076. TSSAA is a voluntary organization of member schools, organized for the purpose of stimulating and regulating athletic relations of secondary schools in Tennessee. [R. Vol. I, pp. 100-101].<sup>4</sup> *Tennessee Secondary School Athletic Association v. Cox*, 425 S.W.2d 597, 599 (Tenn. 1968). While a large number of public, private, and parochial schools in Tennessee are members of TSSAA, membership remains voluntary. [R. Vol. I, pp. 100-101]. A number of schools

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<sup>4</sup> Throughout his brief here as in the Trial Court, McInturff repeatedly refers to baseball umpires as “member umpires.” With this repeated inappropriate use of the word “member,” McInturff apparently hopes to subtly suggest a relationship between the TSSAA and umpires that is qualitatively different from reality. The TSSAA is an association of schools. Only schools are members of the TSSAA. Neither officials, coaches, student-athletes, nor any other individuals are members of the TSSAA [R. Vol. III, p. 291, ¶ 3].

in the State of Tennessee field interscholastic athletic teams without being members of TSSAA. [*Id.*]. The Supreme Court of Tennessee has recognized that TSSAA is a voluntary association. *Tennessee Secondary School Athletic Association v. Cox, supra*; see also, *Wingad v. Tennessee Secondary School Athletic Association*, 1992 Tenn. App. LEXIS 776 (Tenn. Ct. App. 1992) (unpublished, copy attached).

Because the TSSAA is a voluntary association, the Courts generally lack jurisdiction to intervene in the TSSAA's internal affairs. See, *Tennessee Secondary School Athletic Association v. Cox, supra*.

The Complaint does not specifically name John Doe Umpires 1 through 3. [R. Vol. I, p. 1]. Brad Sloan ("Sloan") and Ron Breedlove ("Breedlove") were deposed in connection with this case as the officials at the Game; however, neither Sloan nor Breedlove has an independent recollection of the events giving rise to this lawsuit. [Sloan Dep. p. 27-28; Breedlove Dep. p. 20].<sup>5</sup>

## **B. The Game.**

This lawsuit arises out of the events that occurred on April 18, 2005, during a regular season baseball game between Father Ryan High School and BGA at Father Ryan ("the Game.") [R. Vol. I, pp. 2 and 11]. McInturff was 17 years old during the Game on April 18, 2005. [M. McInturff Depo. p. 291]. McInturff was a pitcher for BGA. [McInturff Depo., p. 292]. McInturff was on the roster and in uniform at the Game and could have been substituted in at any point in time during the Game. [McInturff Depo. p.291-92, 325-26; M. McInturff Depo. p. 288].

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<sup>5</sup> For purposes of this appeal, TSSAA does not dispute that Sloan and Breedlove did in fact officiate the Game on April 18, 2005, between BGA and Father Ryan. The particular identities of the game officials are not material facts.

McInturff understood from his twelve years of playing baseball that if a player is inside the fence, and especially within foul territory, the player is at risk of getting hit by a baseball. [McInturff Dep. p. 464]. Yet, on April 18, 2005, McInturff chose to take that risk. While the game between BGA and Father Ryan was going on, McInturff chose to leave the dugout and instead sit on a bucket inside the fence, within foul territory, without a helmet to protect himself from possible injury. [McInturff Depo. p.306; Exhibit 11 and 11B]. He took that risk despite the fact that he had suffered a traumatic head injury just a couple of years earlier in a waterskiing accident. McInturff was not instructed by any coach to sit on the bucket during the Game. [McInturff Depo. p. 329-30; M. McInturff Depo. p. 305]. McInturff chose to sit on the bucket during the Game as he believed it to be the best seat in the house. [McInturff Depo. p. 329-30, 470].

McInturff describes himself as a responsible individual; however McInturff and his parents insist that McInturff had absolutely no responsibility for his own safety on April 18, 2005. [McInturff Dep. p. 449-51, 469; M. McInturff Depo p. 303-05; L. McInturff Depo. p. 192-93, 204]. McInturff was hit in the head with a foul ball that was hit by his teammate Taylor Erwin. [McInturff Depo. p.322-23].

The officials who were deposed in connection with this case, Brad Sloan (“Sloan”) and Ron Breedlove (“Breedlove”), have no independent recollection of the Game and have no independent memory of officiating the Game. [Sloan Dep. p. 27-28; Breedlove Dep. p. 20]. Both Sloan and Breedlove do, however, follow a “pre-game” procedure which includes a meeting with the coaches.<sup>6</sup> During the “pre-game” meetings,

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<sup>6</sup> For any contest to be undertaken, there must be “rules of the game.” *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*, 551 U.S. 291, 300 (2007)(“High school football is a game. Games have rules.”). The member schools of the TSSAA, acting through their elected representatives on the

Sloan and Breedlove both remind the coaches to instruct the players to remain in the dugout unless actively participating in the game. [Sloan Dep. p. 33-34; Breedlove Dep. p. 18].<sup>7</sup>

Brad Myers (“Coach Myers”) is the head baseball coach for BGA and was in attendance at the Game. [Myers Depo. p. 20, 25]. Coach Myers recalls the Game on April 18, 2005. Coach Myers recalls participating in the “pre-game” with the officials and being reminded that the players should be in the dugout when not out in the field. [Myers Depo. p. 38-39, 70-71].<sup>8</sup>

When officiating an athletic contest, the focus of the official is on the field of play and not on the dugout. An athlete or a coach would have to be far outside of the dugout to distract the official from the field of play. [Breedlove Dep. p. 24-26; Sloan Dep. p. 25, 31, and 45]. According to Breedlove and Sloan, the officials expect that the high school athletes will know the rules of the game and will follow the rules of the game. [Breedlove Dep. p. 28; Sloan Dep. p. 46].

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TSSAA Legislative Council, have decided that the rules of the game published by the National Federation of State High School Associations (“National Federation”) will be used by member schools in most of their sports competition. [R. Vol. I, p. 101; R. Vol. II, p. 132].

<sup>7</sup> Without citation to the record, the Plaintiff states on p. viii of its brief, “During the course of the game umpires Breedlove and Sloan never instructed any player or coach to get back in the dugout.” This statement is grossly misleading. Umpires Sloan and Breedlove have no independent memory of this game. [Breedlove Depo. p. 20; Sloan Depo. pp. 27-28]. However, both have a pre-game procedure that they follow in all games, where they meet with the coaches at home plate and remind the coaches to keep the players in the dugout. [Breedlove Depo. p. 18; Sloan Depo. pp.33-34]. Whether the umpires did or did not instruct McInturff to remain in the dugout is not a material fact.

<sup>8</sup> Numerous facts about the Game and the events occurring in the days and weeks following the Game have been fleshed out in countless depositions; however, the specific details of the Game and the weeks following are not material to the Motion for Summary Judgment and this appeal, other than to put the lawsuit in context.

No representative of TSSAA was in attendance at the Game. [R. Vol. 1, p. 104].<sup>9</sup>

**C. The Relationship Between the TSSAA and the Officials.**

The TSSAA does not assign officials to any regular season games. [R. Vol I, p. 101]. While the TSSAA rules apply to regular season competition, TSSAA does not supervise regular season games. [Id.] During baseball season, on any given day, there are likely hundreds of baseball games being played from Memphis to the Tri-Cities. [Id.] In addition to the hundreds of baseball games, on any given April day there are likely hundreds of boys' soccer games, girls' softball games, tennis matches, and track and field competitions taking place between schools throughout the state of Tennessee. [Id.] It is for this reason that the TSSAA member schools have not given the TSSAA responsibility for supervising regular season athletic contests. The schools themselves supervise their regular season athletic contests. [See R. Vol. II, p. 138].

In order to be eligible to officiate a TSSAA regular season game between member schools, officials must be registered with the TSSAA. [R. Vol. I, p. 102]]. However, that registration has no bearing on whether a particular official may be assigned to work a particular high school game. [Id.] In addition to registering with the TSSAA, officials who desire to officiate a game between competing high schools also must register with a local officials' association. [R. Vol. I, p. 102]. It is the local officials' association which in turn assigns the official to games – high school games as well as non-TSSAA games

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<sup>9</sup> On page 8-9 of Plaintiff's brief, the Plaintiff states "As pointed out by the Defendant's brief, the TSSAA did not typically send other representatives to the games. The umpire was it." TSSAA had no representative at the game. Id. The umpires were not there as representatives of the TSSAA – they were there because the participating schools had arranged for a local officials' association to assign two umpires to their games. As will be discussed below, the TSSAA did not "send" umpires to the Game or to any game; and the fact that the umpires were registered with the TSSAA to officiate high school games does not mean that they were "representatives" of the TSSAA when they officiated such games.



ranging from pee wee games up through college games. [*Id.*]. High school game assignments are made by the local officials' association as a result of contractual agreements between area schools and the local officials' association. [R. Vol. I, p. 102]. The TSSAA is not a party to those contracts.

Both Sloan and Breedlove were registered with the TSSAA and were registered with the local middle Tennessee officials' organization, Capital City Association ("Capital City"). [Breedlove Depo, p. 26-27; Sloan Depo, p. 38-40; R. Vol. I, p. 103]. Both Sloan and Breedlove received their assignments for all games, including regular season games between TSSAA member schools, from Doris Armstrong with Capital City. [Breedlove Dep. p. 15]. If Sloan and Breedlove were registered with the TSSAA but were not registered with Capital City, they would not be assigned any games between TSSAA member schools. [Sloan Dep. p. 48]. If Capital City assigned an official to a game between two TSSAA member schools and the game conflicted with his personal schedule, the official would have to contact Doris Armstrong at Capital City, not TSSAA, to deal with the conflict. [Breedlove Dep. p. 23].

Ron Breedlove typically officiates approximately 150 games a year, but only 50 of those games are between TSSAA member schools. Breedlove is assigned to all 150 games by Doris Armstrong through Capital City. [Breedlove Dep. p. 26]. Sloan typically officiates between 150 and 200 games per year, assigned through Capital City, but of those games only 20 to 25 are between TSSAA member schools. [Sloan Dep. p. 39-40]. Sloan has been officiating games since he was approximately 20 years old. However, he did not register with the TSSAA until he was approximately 27. In 2006-07, Sloan was registered with both the TSSAA and Capital City, but Sloan did not

officiate a single game between TSSAA member schools due to family commitments. [Sloan Dep. p. 7-9 and 13.]

The TSSAA does not pay officials for working regular season games. [R. Vol. I, p. 103]. TSSAA only pays officials at the TSSAA state tournament. [Carter Depo, p. 45; 54-55]. During the regular season, officials are paid by either the home school, or the two schools participating in the event may agree to split the official's fee. [Carter Dep. p. 54-55; R. Vol. I, p. 103]. Officials are paid by the job, regardless of how long the game lasts, and no deductions are made from the official's pay. [Id.]. The TSSAA does not enter into a contract with officials or assign officials to any game during the regular season. [Carter Depo, p. 57; R. Vol. I, p. 103]. The TSSAA does not provide officials with a uniform. [Carter Depo, p. 58; R. Vol. I. p. 103]. The TSSAA has no specific training requirements in order to register as a game official with the TSSAA. [R. Vol. I, p. 103]. Once registered, officials wishing to be assigned by the local officials' association to officiate contests between TSSAA member schools must attend one "rules meeting" every two years because a high level of skill and familiarity with the rules of the game is essential in properly officiating a game. [Id.].

If registered with the TSSAA and if assigned by the local officials' association to officiate a game between two TSSAA member schools, officials are covered as additional insureds under TSSAA's general liability policy, a benefit TSSAA chooses to provide in order to encourage registration. [R. Vol. I, p. 103-104]. Officials registering with the TSSAA pay an annual registration fee of \$55.00, and in exchange receive copies of the National Federation rule book and the insurance endorsement. [Id.]. Neither the TSSAA, BGA, nor Father Ryan had the ability to remove the officials or to force the

officials during the Game (or any game) to change a call or to act in a certain manner, as the official is the person with jurisdiction over the game and cannot be replaced during the game unless he becomes ill or is injured. [National Federation Rule Book, p. 63; R. Vol. I, p.104].

The TSSAA does not exercise any control over the conduct of an official at a contest. [Id.]. The TSSAA does not instruct the official on how he must do his job. [Id.]. The TSSAA does not enforce the rules in the National Federation rule book for each sport. [Id.]. That task is left to game officials themselves. The only rules that the TSSAA is charged by its member schools to enforce are those contained in the TSSAA Constitution and By-laws. [Carter Dep. p. 38; 71-72; 77-78; R. Vol. I, p. 104].

## **ARGUMENT**

### **A. The umpires are independent contractors, and there is no actual or apparent agency relationship.**

While the TSSAA is unaware of any cases discussing its relationship with officials in Tennessee, other states have addressed the issue in regard to equivalent high school athletic associations. The courts have overwhelmingly held that officials, referees, and umpires are independent contractors. The Courts have held that “in order to have competition, it is obvious that there must be some structure or framework within which to conduct that competition.” *Harvey v. Ouachita Parish Sch. Bd.*, 545 So.2d 1241, 1243 (La. Ct. App. 1989)(copy attached). That structure or framework is provided by the National Federation and the state high school athletic or activities

association. The National Federation is the top governing body for high school athletics, and a school's membership in the state association creates a membership with the National Federation as well. *Lynch v. Workmen's Compensation Appeal Board*, 554 A2d 159, 161 (Pa. Commw. Ct., 1989)(copy attached). The National Federation "promulgates all the rules for all high school sports," and all member high schools and the officials are to have a thorough knowledge of the rules and conduct said games in accordance with the rules. *Id.*

On pages 2 and 3 of the Appellant's brief, McInturff spent significant time citing various TSSAA's by-laws in an effort to create an issue of fact where none exist. What is missing from McInturff's account is any evidence that TSSAA controls the manner in which a game official calls the game.

It is true that the TSSAA has general control over the athletic contests in which its member schools participate and that the TSSAA has adopted the rules published by the National Federation to be used in several sports, including baseball. It is true that the TSSAA has implemented a sports calendar in an effort to allow students to participate in multiple sports rather than being forced to choose a fall sport over a spring sport. The TSSAA clearly governs the administrative process for its member schools; the TSSAA, however, does not control the member schools, the coaches, or the officials in the way that McInturff has suggested.

The TSSAA's by-laws are very clear that it is the school that is the member of the TSSAA, and no one else. [R. Vol. III, p. 291]. Specifically, Article I, Section 1 of the By-laws state that "secondary schools, (also junior high schools) in the state, which are approved by the state Department of Education, State Department approved agencies

(schools must be in category 1, 2 or 3) and/or southern association of colleges and schools, both private and public, desiring membership in TSSAA may make application to the Board of Control.” Id. The By-laws do not allow for individual coaches, athletes, or officials to be “members” of the TSSAA. Only schools are allowed to make application for membership to the TSSAA. It is only member schools that pay a membership fee. Id. Because of this, Article IV, Sections 6 and 7 of the TSSAA By-laws requires that visiting teams be accompanied by the principal or someone designated by the principal, and leaves the supervision of fans and students to the member schools. [R. Vol 2, p. 138]. The fact that the TSSAA provides a framework within which athletic competition can occur does not create the level of control that McInturff suggests.

On page 51 of the 2004-05 TSSAA Handbook, there is a question and answer section discussing officials. Question No. 4 states: “What is the policy of TSSAA toward the decisions of officials?” The answer is “The decisions of officials are accepted as final and binding.” [R. Vol. 3, p. 291; R. Vol. II, p. 157]. According to Ronnie Carter, the immediate past Executive Director of the TSSAA, in his 31 years of experience the TSSAA has never changed a call that an official made in a game. [R. Vol. 3, p. 291]. It is obvious that the TSSAA does not control the manner and means by which game officials conduct their work, officiating athletic contests, during the regular season.

As with all questions dealing with the independent contractor issue, one of the key tests to consider is the control test. “Under the control test, the most important factor in determining employment status is whether the alleged employer exercises control over the means and methods of accomplishing the contracted services.” *Brighton Sch. Dist. v. Lyons, et. al.*, 873 P.2d 26 (Colo. Ct. App., 1993). The Courts

typically look at numerous factors in determining control. *See, NLRB v. United Insurance Co.*, 390 U.S.254, 258 (1968.) The factors, which are to be assessed and weighed, with no factor being decisive include:

“the type of services rendered, the possibility of realizing additional profits through the exercise of entrepreneurial skill and the ownership and maintenance of equipment. This inquiry canvasses both the language of the contract and the practice of the parties, the skill required..., the mode of compensation for additional duties, and the methods of applying corrective and disciplinary measures.”

*Collegiate Basketball Officials Assoc. v. NLRB*, 836 F.2D 143 (3<sup>rd</sup> Cir. 1987), quoting *United Insurance* 390 U.S. at 258. In *Collegiate Basketball Officials Assoc.*, the court held that the officials were in fact independent contractors.

Under Tennessee’s Workers’ Compensation statutes, the factors to be considered in determining whether an individual is an independent contractor include “(A) The right to control the conduct of the work; (B) The right of termination; (C) The method of payment; (D) The freedom to select and hire helpers; (E) The furnishings of tools and equipment; (F) Self scheduling of working hours; and (G) The freedom to offer services to other entities[.]” Tenn. Code Ann. § 50-6-102(11). Both in the workers’ compensation context and in common law contexts, the most important factor to consider in determining whether one is an independent contractor is whether the principal has the right to control or direct the time, place, methods and means by which the work is done. *Givens v. Mullikin*, 75 S.W.3d 383, 394 (Tenn. 2002); *Boruff v. CNA Ins. Co.*, 795 S.W.2d 125, 127 (Tenn. 1990). It is not the right to control the result that is determinative of the existence of an agency relationship, but rather the

right to control the actual conduct of the work. *Tucker v. Sierra Builders*, 180 S.W.3d 109, 120 (Tenn. Ct. App. 2005). Every contract for work to be done reserves to the principal a certain degree of control. But where the individual represents the will of the principal as to the result of the work but not as to the means or manner of accomplishment, he is an independent contractor. *Sodexo Mgmt. v. Johnson*, 174 S.W.3d 174, 178 (Tenn. Ct. App. 2004).

In *Gale v. Greater Washington Softball Umpires Assoc.*, 311 A.2d 817 (Md. Ct. App, 1973)(copy attached), an umpire was injured in a softball game. The umpire sought worker's compensation benefits. Like the TSSAA, Greater Washington Softball Association ("GW") required that officials register with the association and pay a registration fee and attend rule meetings. *Id.*, at 820. The GW, unlike the TSSAA, assigned the official his games, required a probationary period for the official who could only reach active status after officiating 20 games, required officials to officiate 25 games to maintain active status, evaluated the officials, had an appeal process to review certain calls made by the official, fined officials for missing a game, and could suspend officials for various reasons. *Id.*, at 819. The official received his schedule about a week at a time and had the right to decline a game. *Id.*, at 820. Based on these facts, the Court held:

"Applying the decisive test of right of control and supervision retained by GW we think that the court below was correct in determining as a matter of law that Gale was an independent contractor in his relationship with GW with respect to the duties performed as an umpire. We believe that both probationary and active members of GW, as umpires, were independent contractors and not employees. Aside from the other criteria to be considered, which in the

factual posture here, support the view that being a member of GW is not consistent with being its employee or servant, we see no such control of an umpire's conduct while officiating a game as to establish an employer-employee status. Although a probationary and an active member were required to work a designated number of games to remain in good standing, neither was obliged to accept a particular assignment. The conduct of the game was in the sole control of the umpire. It is true that he was to abide by the rules of softball, but these rules were not those of GW but were as promulgated by the Amateur Softball Association. GW had no right to control the way he worked the game. In calls he made requiring judgment, it was his judgment alone which governed. The fact that there was a means of appealing disputed decisions did not change the status of the umpire as an independent contractor.

*Id.*, at 820-21 (internal citations omitted.) If an official for the GW was an independent contractor, certainly an official registered with the TSSAA is an independent contractor.

In *Harvey*, the Louisiana High School Athletic Association (“LHSAA”) was sued on the theory that the referees were the employees of the LHSAA and that the negligence of the referee in failing to “conduct the game with a reasonable degree of safety” resulted in the plaintiff’s injuries. *Harvey*, 545 So.2d at 1242. Like the TSSAA, the LHSAA is a voluntary, non-profit association that is primarily concerned with athletic eligibility, preventing recruitment, and conducting state championship competitions. *Id.* Officials are paid by the individual schools, and the LHSAA – like the TSSAA – does not supervise or conduct the regular season games between its members. *Id.* Likewise, the LHSAA, like the TSSAA, registers officials, conducts an examination of the officials, hosts rule clinics, and leaves the brunt of the training and instruction to the local officials’ association. *Id.* The Court summarized *Harvey*’s argument as follows:

“The plaintiff's main argument is that the LHSAA is responsible for the actions of the referees at the game and



that the referees' failure to remove those players who were displaying excessively rough behavior led to the plaintiff's injury. The plaintiff contends that because the referees must be registered by the LHSAA and pass a rules test given by the LHSAA in order to officiate varsity football games, the LHSAA controls the referees. According to the plaintiff, the LHSAA is responsible for failing to instruct the referees to remove players who engage in excessively rough behavior.”

*Id.*, at 1243. The plaintiff's argument in *Harvey* was virtually no different than McInturff's argument.<sup>10</sup> The Court rejected Harvey's argument and held:

In order to have competition, it is obvious that there must be some structure or framework within which to conduct that competition. The LSHAA provides that structure. The organization establishes standards, minimally certifies officials for the individual schools to use, and conducts playoffs leading to championships. It is clear, at least in regular season games, that the schools themselves conduct the games and hire the officials. Thus, the officials are not the agents or servants of the LHSAA.

*Id.*

In *Lynch*, the question of whether a football referee was an employee of the Pennsylvania Interscholastic Athletic Association (“PIAA”) and/or the school district was addressed.<sup>11</sup> Under the PIAA Constitution and Bylaws, officials were required to affiliate with a local officials' association, attend six chapter meetings, pass a yearly exam, pay dues to the PIAA, and could only refuse an assignment from the local officials'

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<sup>10</sup> Harvey's argument was at least slightly more appealing since he claimed that he was injured because the game officials did not enforce the rules with respect to the conduct of other players, and those other players caused his injuries. McInturff claims that he was the violator of the rules – yet bears no responsibility for his own actions – and that the TSSAA owes him money because the game officials should have enforced the rules as to him.

<sup>11</sup> The determination that the workers compensation claimant was not an employee of the PIAA was not appealed. However, the Court's application of the law to the school district is analogous to the case at bar. *Id.*, at 159.

association for good cause. *Id.*, at 161. Officials were paid a flat fee per game by the home team. *Id.*

The Court rejected the argument that the rules promulgated by the National Federation and the PIAA's manuals rise to the level of providing the district with control over the official. *Id.* Instead, the Court phrased the question as "whether the ... assignment to officiate the District's game gave the District the right to control and supervise the *manner* and *method* by which the [referee] was to officiate the game *after* it started." *Id.* (emphasis added.) The Court answered the question in the negative "because the very essence of the officials' position during a game requires that the official be free from control by the District, the home team, or its opponent." *Id.* The Court also credited the following facts in determining that the official was an independent contractor: the official was paid a flat rate for the game, regardless of the length of the game; the officials were not on the District's payroll and no taxes were taken out of the official's pay; the official's did not receive the same benefits that other District employees were entitled; the officials purchased their own uniforms, shoes, hats, and whistles; and the officials provided their own medical insurance. *Id.* Like Lynch, officials that are assigned TSSAA games are governed by the rules promulgated by the National Federation. Likewise, the officials deposed in connection with the case at bar are members of the local officials' association, attend chapter meetings and rules meetings, pay a registration fee to the TSSAA, take an initial examination, provide their own uniforms, and are paid a flat rate by the school per game with no deduction for taxes. Unlike Lynch, Sloan and Breedlove could refuse an assignment for any reason; they simply had to notify Doris Armstrong who would scratch them from the assigned game.

When reading all of these cases together, the conclusion is inescapable that the officials working the Game were independent contractors for the TSSAA, BGA, and Father Ryan. Clearly, the officials had jurisdiction over the Game. The TSSAA does not have a mechanism where the calls made by the officials can be reviewed by any member of the TSSAA staff or by the Board of Control. The TSSAA does not control the manner or method by which officials conduct their actions at games. In fact, there was not even a representative of TSSAA present during the Game. Furthermore, the officials only have to attend a TSSAA sponsored rules class once every two years, whereas most of the Associations discussed above require more training classes for the officials. Officials are required to possess a certain skill in order to referee. The official is paid by the school, not the TSSAA. Neither the school nor the TSSAA deducts any taxes from the official's pay. The official receives a flat rate for every game, regardless of the length of the game. The officials provide their own uniforms and their own transportation to and from the games. Breedlove and Sloan both have regular full-time employment aside from working as a referee. [Breedlove Depo, p. 9; Sloan Depo. p. 8.]. Breedlove and Sloan only do a small percentage of their work as referees in contests between TSSAA member schools.

Although arising in the context of collective bargaining under the National Labor Relations Act, a recent decision of the United States Court of Appeals for the District of Columbia Circuit is instructive. In *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009), the D.C. Circuit held that drivers for FedEx in its Home Delivery Division were independent contractors and not employees of FedEx. In reaching this decision, the D.C. Circuit relied on the common law agency test. *Id.*, at 495-96. However, after discussing the difficulty of the "control" inquiry, the Court described a more accurate

proxy for the common law agency test to be whether the individual in question had significant entrepreneurial opportunity for gain or loss. *Id.*, at 497. The FedEx drivers in question owned their own equipment – their trucks – but affixed FedEx Home logos and markings to those trucks while running routes for FedEx. *Id.*, at 498. FedEx did not prescribe hours of work, whether or when the drivers took breaks, what routes they followed, or other details of performance. *Id.* The drivers were not subject to reprimands or other discipline. *Id.* They were free to use their vehicles for other commercial or personal purposes. *Id.* On these facts, the D.C. Circuit found the characteristics of entrepreneurial potential to be such that the drivers were independent contractors and not employees of FedEx – even though FedEx required that the drivers’ vehicles be compliant with government regulations and other safety requirements. *Id.*

The game officials in this case are analogous to the FedEx drivers. Just as FedEx required drivers to comply with various government regulations and safety requirements, the TSSAA adopts the rules of the game for the contests that its member schools play. Just as the FedEx drivers used a FedEx logo on their trucks, game officials may (but are not required by any TSSAA bylaw) wear a TSSAA logo on their uniforms. But like FedEx and the drivers, TSSAA does not prescribe their hours of work or other details of performance; does not reprimand or discipline officials; and does not restrict them from other work. In fact, Breedlove and Sloan spent far more time officiating non-TSSAA contests than they did games between TSSAA member schools.

In an effort to circumvent this conclusion, McInturff relies on an “apparent agency” theory. He points to an official’s wearing of a TSSAA patch on his uniform, or wearing a hat or carrying a bag with a TSSAA logo, as facts supporting his apparent

agency theory. In *FedEx Home Delivery*, the D.C. Circuit noted that FedEx required drivers “to wear a recognizable uniform and conform to grooming standards; vehicles of particular color (white) and within a specific size range; and vehicles to display FedEx’s logo in a way larger than that required by DOT regulations.” *Id.*, at 500. The D.C. Circuit also pointed out that FedEx required drivers to complete a driving course or have a year of commercial driving experience and conducted two customer service rides per year to audit performance. *Id.*, at 500-501. The Court concluded that these facts went to the type of service that the drivers were providing rather than to the nature of the relationship. *Id.*

The Tennessee Supreme Court has explained that “apparent agency” is agency by estoppel. *Boren ex rel. Boren v. Weeks*, 251 S.W.3d 426, 432 (Tenn. 2008). To prove apparent agency, a plaintiff must establish that the principal actually or negligently acquiesced in another party’s exercise of authority, that the plaintiff had knowledge of the facts and a good faith belief that the apparent agent possessed such authority, and that the plaintiff relied on this apparent authority to his detriment. *Id.*, at 432-33. Importantly, apparent authority must be established through the acts of the principal. Neither the acts of the agent nor the perception of the plaintiff will suffice. *Id.*, at 433; *Southern Ry. Co. v. Pickle*, 197 S.W. 675, 677 (Tenn. 1917); *Bells Banking Co. v. Jackson Ctr.*, 938 S.W.2d 421, 424 (Tenn. Ct. App. 1996).

Here, the facts that McInturff relies upon for his apparent agency theory all relate to the acts of the alleged agents, the umpires, in wearing a TSSAA patch or putting a TSSAA logo on a hat or a bag. [Plaintiff’s brief, pp. 8-9]. Neither these acts of the putative agents nor the perception of “players, parents, coaches and the public”

[Plaintiff's brief, p. 9] from these acts is sufficient to establish apparent authority on the part of game officials to act on TSSAA's behalf. There are no acts of TSSAA that McInturff can point to in order to create apparent authority. Indeed, McInturff cannot in good faith even suggest that he knew at the time of the Game that TSSAA registered officials, gave them National Federation rule books, conducted annual rules meetings, or did anything else related to these officials. There is nothing in the record to suggest that McInturff was aware of any of these facts. He has offered no evidence to establish that he knew of any acts of the TSSAA to confer apparent authority on the game officials or relied on such apparent authority to his detriment.

In *Boren* the Court ultimately held that a hospital could be liable for the acts of an independent contractor physician under an apparent agency theory, but only if the plaintiff could establish that (1) the hospital held itself out to the public as providing medical services, (2) the plaintiff looked to the hospital rather than to the individual physician to perform those services, and (3) the plaintiff accepted those services in the reasonable belief that the services were provided by the hospital or a hospital employee. *Id.*, at 436. The facts of McInturff's case fall light years away from these standards. There is no evidence that the TSSAA held itself out to the public as providing officiating services. There is no evidence that McInturff looked to the TSSAA rather than the individual umpires to perform officiating services. There is no evidence that McInturff accepted the officiating services of the umpires in the reasonable belief that the services were being provided by the TSSAA or a TSSAA employee.

The simple fact is that McInturff played high school baseball. He showed up with his team for a game. He likely gave no thought whatsoever to the TSSAA or to whether the officials were acting on behalf of the TSSAA. There is simply nothing in the record to support McInturff's apparent agency theory.

Applying the undisputed facts to the law, the Trial Court correctly concluded that the TSSAA is not the employer of any officials, including Sloan and Breedlove. The game officials were independent contractors, not agents or employees of the TSSAA. TSSAA is not liable for the acts of the game officials. *Id.*, at 432; *Givens v. Mullikin ex rel. McElwaney*, 75 S.W.3d 383, 394 (Tenn. 2002).

**B. The TSSAA owed no duty to McInturff.**

While the TSSAA is not entirely clear from the Complaint what specific cause of action McInturff is asserting against the TSSAA apart from *respondeat superior* liability for the actions of the game officials [See Complaint ¶9], the TSSAA assumes from the course of discovery and oral argument that McInturff attempts to hold the TSSAA responsible for his injuries because the TSSAA did not properly train the officials to follow the National Federation rules. The theory as espoused on pages 11-12 of McInturff's brief suggests the notion that the TSSAA has a duty to not only train the game officials but also be on hand for every game played to insure that the game officials properly enforce every rule every moment of every game.

McInturff's theory depends on the same flawed analysis that undermines his agency theory – while he asserts that the TSSAA “assum[es] control over every aspect of

the conduct of the athletic events of its member schools,” the evidence simply does not support such an overreaching assertion. [Plaintiff’s brief, p. 11].<sup>12</sup>

Beyond McInturff’s failure to establish the facts to support his assertion of the TSSAA’s control, his theory is not grounded in reality. The officials both testified that during a high school baseball game, the officials’ focus is on the field of play so that they can correctly call the action on the field. In order to attract the attention of the official, a player must be blatantly in violation of the dugout rule. In addition, officials make many judgment calls. If the official noticed McInturff outside the dugout, a hypothetical for which there is no evidence to support, it was within the officials’ discretion how to deal with that situation.<sup>13</sup> And McInturff himself had at least an equal responsibility to follow the rules without being instructed by an official whose task is calling the plays on the field – not in the dugout.

In *Harvey*, a football player was initially injured during a face mask tackle, and then, after the whistle was blown, several players continued to jump on the pile causing additional injuries to the athlete’s neck. *Harvey*, 545 So.2d at 1241. The school whose players made the tackle had a reputation for rough play. *Id.* The plaintiff attempted to hold the LHSAA liable on an agency theory and also on the theory that under its bylaws the LHSAA was to consider complaints of unsportsmanlike conduct and impose penalties for violations of the same. *Id.*, at 1244. The Court rejected the latter theory, concluding

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<sup>12</sup> On the contrary, as previously shown, the evidence establishes without refute that the TSSAA does not control any aspect of regular season contests like the Game. The TSSAA has various eligibility rules for student-athletes generally, and the TSSAA has bylaws that address the number of regular season games a school may play in various sports. But for any particular game, aside from establishing what set of baseball rules the schools will follow and calling for the schools to use registered officials, control is uniquely in the hands of the schools themselves and the game officials.

<sup>13</sup> There is no evidence in the record that the officials observed McInturff out of the dugout.



that “to hold that a voluntary association such as LHSAA had a duty to act where there is no assertion that it was aware or should have been aware of the offending course of conduct would be a significant leap.”

The TSSAA was not aware of the events surrounding the Game until it received the Complaint and Summons in this matter. The TSSAA was not aware of any complaints about Sloan or Breedlove. The TSSAA was not aware of any complaints about Brad Myers. [R. Vol. I, pp. 104-105]. Neither BGA, the officials, nor Father Ryan reported the incident to the TSSAA – nor were they required to since the incident had nothing to do with unsportsmanlike conduct. [*Id.*]. McInturff did not report the incident to the TSSAA. [*Id.*]. McInturff did not report to the TSSAA that BGA baseball players are routinely allowed outside the dugout. [*Id.*] The TSSAA does not know whether or not BGA players are routinely allowed outside of the dugout. [*Id.*] McInturff’s parents did not report the incident to the TSSAA. [*Id.*] McInturff’s parents did not report to the TSSAA that BGA baseball players are routinely allowed outside of the dugout. [*Id.*] No member of the TSSAA staff was in attendance at the Game. [*Id.*]

On any given day, there may be over 100,000 student-athletes participating in high school athletic contests from one end of Tennessee to the other. Under McInturff’s theory of absolute liability, the TSSAA would be inundated with lawsuits by students who have been injured when voluntarily participating in high school athletics. Neither the TSSAA’s adoption of rules of the game so that its schools will all follow the same playing rules when they compete, nor the TSSAA’s registration of officials in order to help its schools secure competent officials who do not have criminal backgrounds, justifies McInturff’s effort to impose strict and absolute liability on the TSSAA for any

injury that occurs in any game if it can be blamed on some violation of the rules of the game. If McInturff's theory were accepted, then the TSSAA would be liable anytime a player in a basketball game is fouled by another player and is injured, anytime a football player grabs a facemask and hurts another player, anytime a wrestler hurts another wrestler with an "illegal" hold, and anytime a soccer player is injured by another player's high kick.

Accidents happen on athletic fields. TSSAA is not the keeper of all Tennessee high school athletes.<sup>14</sup> There is simply nothing in this record to support McInturff's suggestion that the TSSAA owes an absolute duty to the thousands of student-athletes who compete in high school sports to protect them from injury. The TSSAA had no duty to McInturff to protect him from a foul ball during a regular season baseball game.<sup>15</sup>

### CONCLUSION

There are no material facts in dispute. The TSSAA was entitled to summary judgment as a matter of law because the TSSAA owed no duty to McInturff, and the officials are not agents or employees of the TSSAA. The Trial Court's grant of summary judgment to the TSSAA should be affirmed.

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<sup>14</sup> McInturff's likening of the TSSAA to a school bus driver [Plaintiff's brief, p. 11] is certainly a leap. McInturff was on a school baseball team, not a TSSAA baseball team. TSSAA does not regulate regular season contests. The TSSAA owes no duty of care to McInturff. Indeed, even as liability could relate to BGA, McInturff arguably was not of such "tender years" that he could not care for himself. McInturff was an experienced baseball player who knew the rules of the Game and had a duty to follow the rules without being specifically instructed by his coach, his parents, or the game officials.

<sup>15</sup> The Restatement Second of Torts' argument that is articulated on page 10 of the Appellant's brief was not raised in the lower court proceedings and should not be considered by this Court. However, if the Court is inclined to consider this argument, the TSSAA submits that the cases dealing with state high school athletic associations and referees, and the undisputed facts in the record, clearly demonstrate that the TSSAA did not have "control" over the officials during the course of the Game. Indeed, the NFHS Rules specifically state that the Official has jurisdiction of the Game and that his decisions are final.

Respectfully submitted,

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*Attorneys for Tennessee Secondary  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been placed in the United States Mail, postage prepaid to Joseph P. Bednarz, Sr., Bednarz & Bednarz, 404 James Robertson Parkway, Suite 1400, Parkway Towers, Nashville, Tennessee, 37219, and Thomas I. Carlton, Jr. and Ben M. Rose, Cornelius & Collins, LLP, Suite 1500 Nashville City Center, 511 Union Street, P.O. Box 190695, Nashville, Tennessee 37219 on this \_\_\_\_ day of August, 2009.

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Courtney L. Wilbert



1 of 100 DOCUMENTS

**CASON D. McINTURFF v. BATTLE GROUND ACADEMY OF FRANKLIN,  
TENNESSEE, ET AL.**

No. M2009-00504-COA-R3-CV

COURT OF APPEALS OF TENNESSEE, AT NASHVILLE

*2009 Tenn. App. LEXIS 862*

**November 5, 2009, Session  
December 16, 2009, Filed**

**PRIOR HISTORY:** [\*1]

*Tenn. R. App. P. 3* Appeal as of Right; Judgment of the Circuit Court Affirmed. Appeal from the Circuit Court for Davidson County. No. 06C-3128. Randy Kennedy, Judge.

**DISPOSITION:** Judgment of the Circuit Court Affirmed.

**COUNSEL:** Joseph P. Bednarz, Sr., Joseph P. Bednarz, Jr., and Joseph Napolitonia, Nashville, Tennessee, for the appellant, Cason D. McInturff.

Thomas I. Carlton, Jr. and Benjamin M. Rose, Nashville, Tennessee, for the appellee, Battle Ground Academy of Franklin, Tennessee; and Richard Lee Colbert and Courtney Lynch Wilbert, Franklin, Tennessee, for the appellee, Tennessee Secondary Schools Athletic Association.

**JUDGES:** ANDY D. BENNETT, J., delivered the opinion of the court, in which RICHARD H. DINKINS, J., joined. PATRICIA J. COTTRELL, P.J., M.S., filed a concurring opinion.

**OPINION BY:** ANDY D. BENNETT**OPINION**

The plaintiff ballplayer was hit by a baseball while sitting outside the dugout during a school baseball game. He sued the schools and the Tennessee Secondary School Athletic Association ("TSSAA") for failing to enforce the rules against his conduct. The trial court granted summary judgment to the TSSAA because the

umpires were not agents of the TSSAA. The plaintiff appealed and we affirm.

**OPINION**

## FACTUAL BACKGROUND

This [\*2] is one of the rare tort cases where the facts are essentially undisputed. Cason McInturff played baseball for Battle Ground Academy ("BGA"). On April 18, 2005, the BGA baseball team traveled to Father Ryan High School to play a regular-season game. During a portion of the game, McInturff sat on a bucket outside the team's dugout with one of the coaches because it was a good vantage point from which to watch the game. Unfortunately, while he was sitting outside the dugout, McInturff was struck in the head by a foul ball and severely injured.

The Tennessee Secondary School Athletic Association ("TSSAA") is a voluntary association of member schools. According to Executive Director Ronnie Carter, the TSSAA was organized to stimulate and regulate the athletic relations of Tennessee secondary schools. The TSSAA maintains eligibility rules for athletes and establishes the rules for each sport. The TSSAA has adopted a by-law which provides that the rule book published by the National Federation of State High School Associations ("NFSHSA") will be used as the game rules for baseball games between TSSAA member schools.<sup>1</sup> A statewide uniformity is thereby established for baseball games conducted [\*3] between TSSAA member schools.

<sup>1</sup> The by-laws also provide for the game rules for football, basketball, girls' softball, wrestling,

girls' soccer, track and field, cross country, and girls' volleyball.

People who wish to umpire baseball games between TSSAA schools must register with the TSSAA. They must attend a "rules meeting" every two years. In exchange for their registration, the registrants receive a rule book, insurance benefits while officiating games between TSSAA schools, and the opportunity to officiate baseball games between TSSAA schools. Registration provides only an opportunity to officiate because TSSAA does not assign officials to regular season games. To officiate games, an official must register with a local officials' association. Schools contract with the local officials' associations, which assign officials to the games. The local associations also assign officials to non-TSSAA games as well. The officials are paid by the schools, not the TSSAA, for working regular season games. The TSSAA Board of Control sets the fee amount each umpire is paid and can revoke an official's registration "for just cause." The umpires provide their own uniforms, which must conform to NFSHSA [\*4] standards, and transportation.

The umpires enforce the rules the TSSAA has adopted. By necessity, the NFSHSA rules are quite comprehensive. One such rule provides that a player shall not be outside the dugout if he is not a batter, runner, on-deck batter, in the coach's box, or playing defense. 2005 NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS BASEBALL RULES, 3-3(j), 30. Umpires are not allowed to pick and choose which rules they will enforce. An umpire who blatantly refuses to enforce the rules could be denied registration by the TSSAA and thus lose the opportunity to be chosen by the local officials' association to officiate games between TSSAA member schools. The official would still be eligible to officiate games involving non-member schools.

On November 29, 2006, Cason McInturff sued the TSSAA and others for the injuries he sustained. He alleged that the TSSAA was vicariously liable for the negligence of the umpires. On December 12, 2008, the TSSAA filed a motion for summary judgment claiming that it owed no duty to McInturff and that the officials were not agents or employees of the TSSAA. McInturff opposed the motion. On February 13, 2009, the trial court granted the [\*5] TSSAA's motion. In accordance with *Tenn. R. Civ. P. 54.02*, the trial court determined that there was no just reason for delay and expressly directed the entry of a final judgment as to the TSSAA. Cason McInturff appealed.

#### STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Tenn. R. Civ. P.*

56.04. Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we must determine whether factual disputes exist. *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993). If a factual dispute exists, we must determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Id.*; *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998). To shift the burden of production to the [\*6] nonmoving party who bears the burden of proof at trial, the moving party must negate an element of the opposing party's claim or "show that the nonmoving party cannot prove an essential element of the claim at trial." *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 8-9 (Tenn. 2008).

#### ANALYSIS

Cason argues that the umpires were either the actual agents of the TSSAA or the apparent agents of the TSSAA. Therefore, he maintains, the TSSAA is vicariously liable for the umpires' negligence. Vicarious liability is defined as:

the imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons. Indirect or imputed legal responsibility for acts of another; for example, the liability of an employer for the acts of an employee, or a principal for torts and contracts of an agent.

*Browder v. Morris*, 975 S.W.2d 308, 311 n.4 (Tenn. 1998) (quoting BLACK'S LAW DICTIONARY 1566 (6th ed. 1990)).

It has long been the view of Tennessee courts that, in its broadest sense, the term agency "includes every relation in which one person acts for or represents another." *Boren ex rel. Boren v. Weeks*, 251 S.W.3d 426, 432 (Tenn. 2008) (quoting *White v. Revco Disc. Drug Ctrs., Inc.*, 33 S.W.3d 713, 723 (Tenn. 2000)); [\*7] see also *Howard v. Haven*, 198 Tenn. 572, 281 S.W.2d 480, 485 (Tenn. 1955). An agency relationship is created by the acts of the principal rather than the acts of the agent. *Harben v. Hutton*, 739 S.W.2d 602, 606 (Tenn. Ct. App. 1987). The existence of an agency relationship is not dependent upon a contract, an explicit agreement, or an understanding between the parties." *White*, 33 S.W.3d at 723. When determining whether an agency relationship

exists, the court examines the conduct and relationship of the parties. *Id.*; *V.L. Nicholson Co. v. Transcon Inv. and Fin. Ltd., Inc.*, 595 S.W.2d 474, 483 (Tenn. 1980). "Whether an agency relationship exists 'is a question of fact under the circumstances of the particular case ....'" *White*, 33 S.W.3d at 723 (quoting *McCay v. Mitchell*, 62 Tenn. App. 424, 463 S.W.2d 710, 715 (Tenn. Ct. App. 1970)). The right to control the conduct of the agent is the essential test in determining whether an agency relationship exists. *Jack Daniel Distillery v. Jackson*, 740 S.W.2d 413, 416 (Tenn. 1987).

TSSAA maintains that the umpires are independent contractors. Usually, an employer or general contractor is not liable for the actions of an independent contractor. *Wilson v. Thompson Constr. Co.*, 86 S.W.3d 536, 541 (Tenn. Ct. App. 2001). [\*8] Several factors should be considered when assessing whether a person is an agent or an independent contractor: "(1) the right to control the conduct of the work, (2) the right of termination, (3) the method of payment, (4) the freedom to select and hire helpers, (5) the furnishing of tools and equipment, (6) the self-scheduling of work hours, and (7) the freedom to render services to other entities." *Tucker v. Sierra Builders*, 180 S.W.3d 109, 120 (Tenn. Ct. App. 2005) (citing *Beare Co. v. State*, 814 S.W.2d 715, 718 (Tenn. 1991)).

The extent of the right of control is the most significant difference between an agent and an independent contractor although it is not always determinative. *Sodexo Mgmt. Inc. v. Johnson*, 174 S.W.3d 174, 181 (Tenn. Ct. App. 2004). "Where the agent represents the will of the principal as to the result of the work but not as to the means or manner of accomplishing the work, it is an independent contractor." *Id.* As the Tennessee Supreme Court observed long ago, "[a]n independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to control of his employer, except [\*9] as to the result of his work." *Powell v. Va. Constr. Co.*, 88 Tenn. 692, 13 S.W. 691, 692 (Tenn. 1890).

TSSAA provides registered umpires with some instruction via rules meetings, a rule book, insurance benefits while officiating a game between TSSAA schools, and the opportunity to officiate baseball games between TSSAA schools. In return, the umpires agree to officiate according to the rule book when they are assigned to a TSSAA game by a local officials' association. In other words, the umpires agree to abide by, and ensure the participants abide by, the regulatory framework (rules) established by the NFSHSA for baseball games played between TSSAA member schools.

The TSSAA deals with umpires to achieve a result -- uniform rules for all baseball games played between

TSSAA member schools. The TSSAA does not supervise regular season games. It does not tell an official how to conduct the game beyond the framework established by the rules. The TSSAA does not, in the vernacular of the case law, control the means and method by which the umpires work.

In addition, other factors point to the umpires being independent contractors. The officials are paid by the schools for officiating regular season games. The [\*10] fact that the TSSAA Board of Control sets the per game fee amount each umpire is paid is merely part of the officiating framework which keeps umpires independent -- no TSSAA school pays an umpire more than any other TSSAA school. The umpires provide their own uniforms. They are free to work for schools and organizations not affiliated with the TSSAA.

In view of the totality of the undisputed facts, we agree with the trial court that these officials are not agents of the TSSAA.

The officials are not apparent agents of the TSSAA either. The plaintiff contends that merely showing up to officiate a game between TSSAA schools wearing a shirt and a ball bag with a TSSAA logo gives the umpire the apparent authority of the TSSAA. However, apparent authority must be established by the acts of the principal, not the acts of the purported agent or the perception of a third party. *Boren*, 251 S.W.3d at 433. The plaintiff's logic would mean that someone sitting in the crowd watching the game wearing a New York Yankees cap would have the apparent authority to act as a scout for the World Champions. An organization's patch or logo by itself cannot confer authority. That can only be done by the principal. [\*11] There is no evidence that the TSSAA intended to confer its authority to the officials by giving them a patch.

Finally, McInturff maintains that "TSSAA owed a duty to take reasonable steps to protect students from the inherent risks associated with high school athletics" by "assuming control over every aspect of the conduct of the athletic events of its member schools." The existence of a duty is a question of law. *Hurd v. Flores*, 221 S.W.3d 14, 22 (Tenn. Ct. App. 2006). The Tennessee Supreme Court has said that a "'risk is unreasonable and gives rise to a duty to act with due care if the foreseeable probability and gravity of harm posed by defendant's conduct outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm.'" *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000) (quoting *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn.1995)) (emphasis added). As has already been demonstrated, TSSAA did not assume control over every aspect of the conduct of the athletic events of its member schools. The officials ran the game. The TSSAA en-

gaged in no activity regarding the baseball game except provide a framework for the conduct of athletic contests [\*12] conducted by member schools. This is the "general control over all athletic contests" to which the TSSAA by-laws refer. The TSSAA owed no duty to Cason McInturff in this regard.

#### CONCLUSION

The trial court is affirmed. Costs of appeal are assessed against the appellant, Cason McInturff, for which execution may issue if necessary.

/s/ Andy D. Bennett

ANDY D. BENNETT, JUDGE

**CONCUR BY: PATRICIA J. COTTRELL**

#### CONCUR

PATRICIA J. COTTRELL, P.J., M.S., concurring.

I concur in the affirmance of the trial court's grant of summary judgment to TSSAA. I write separately to say that I do not believe that the umpires are either employees or independent contractors. Even the term independent contractors implies a relationship involving one party performing some work or a task for the other. That is simply not the situation here. TSSAA does not hire or provide umpires to officiate at games. I agree that the umpires are not agents of TSSAA in any way.

/s/ Patricia J. Cottrell

PATRICIA J. COTTRELL, P.J., M.S.

IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

CASON D. McINTURFF,

Plaintiff,

v.

BATTLE GROUND ACADEMY OF  
FRANKLIN, TENNESSEE; TENNESSEE  
SECONDARY SCHOOL ATHLETIC  
ASSOCIATION; and JOHN DOE UMPIRES 1  
THROUGH 3, INDIVIDUALLY AND AS  
AGENTS OF TENNESSEE SECONDARY  
SCHOOL ATHLETIC ASSOCIATION,

Defendants.

Case No. 06C3128

JURY DEMAND

**TSSAA’S MOTION FOR SUMMARY JUDGMENT**

In accordance with Rule 56 of the Tennessee Rules of Civil Procedure, the Defendant Tennessee Secondary School Athletic Association (“TSSAA”) moves the Court to enter judgment as a matter of law in its favor, dismissing the original complaint against the TSSAA on the grounds that there exist no genuine issues of material fact, and the TSSAA is entitled to judgment as a matter of law. Filed in support of this Motion are the following:

1. Statement of Undisputed Facts;
2. Memorandum in Support of TSSAA’s Motion for Summary Judgment;
3. Deposition of Brad Sloan;
4. Deposition of Ron Breedlove;
5. Deposition of Ronnie Carter;
6. Excerpts of Deposition of Cason McInturff;
7. Deposition of Brad Myers;



8. Affidavit of Ronnie Carter;
9. Excerpts of Deposition of Monty McInturff;
10. Excerpts of Deposition of Lisa McInturff;
11. Copy of TSSAA Constitution Bylaws & Handbook; and
12. TSSAA's Responses to Plaintiff's First Requests for Admissions.

Respectfully submitted,

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Courtney L. Wilbert, No. 23089  
COLBERT & WILBERT, PLLC  
108 Fourth Avenue South  
Suite 209  
Franklin, TN 37064  
(615) 790-6610

*Attorneys for Tennessee Secondary  
School Athletic Association*

**THIS MOTION WILL BE HEARD ON THE \_\_\_\_ DAY OF \_\_\_\_\_, 2009, AT 9:00  
A.M. IF NO RESPONSE IS TIMELY FILED AND SERVED THE MOTION SHALL BE  
GRANTED AND COUNSEL NEED NOT APPEAR IN COURT AT THE TIME AND  
DATE SCHEDULED FOR THE HEARING.**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing TSSAA's Motion for Summary Judgment has been placed in the United States Mail, postage prepaid to Joseph P. Bednarz, Sr., Bednarz & Bednarz, 404 James Robertson Parkway, Suite 1400, Parkway Towers, Nashville, Tennessee, 37219, and Thomas I. Carlton, Jr. and Ben M. Rose, Cornelius & Collins, LLP, Suite 1500 Nashville City Center, 511 Union Street, P.O. Box 190695, Nashville, Tennessee 37219 on this \_\_\_\_ day of December, 2008.

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Courtney L. Wilbert