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IN THE
COURT OF APPEALS OF INDIANA

National Collegiate Athletic Association,

Appellant-Defendant,

v.

Jennifer Finnerty, Individually, and as Personal Representative of the Estate of Cullen Finnerty,

Plaintiff-Appellee,

and

May 4, 2021

Court of Appeals Case No. 20A-CT-1069

Appeal from the Marion Superior Court

The Honorable Heather A. Welch, Judge

Trial Court Cause Nos.
49D01-1808-CT-33896
49D01-1901-CT-2954
49D01-1905-CT-21770

Carol Anderson, Individually, and as Personal Representative of the Estate of Neal Anderson,

Plaintiff-Appellee,

and

Maura Solonoski, Individually, and as Attorney-in-Fact for Andrew Solonoski Jr.,

Plaintiff-Appellee,

Robb, Judge.

Case Summary and Issues

[1] Cullen Finnerty, Neal Anderson, and Andrew Solonoski Jr. each played college football, albeit at different times and for different universities. Jennifer Finnerty, individually and as Personal Representative of the Estate of Cullen Finnerty ("Finnerty"); Carol Anderson, individually and as Personal Representative of the Estate of Neal Anderson ("Anderson"); and Maura Solonoski, individually and as Attorney-in-Fact for Andrew Solonoski Jr. ("Solonoski") (collectively, "Athletes"), each filed a lawsuit against the National Collegiate Athletic Association ("NCAA") alleging, broadly speaking,

that the NCAA knew about the harmful effects of concussion-related injuries, failed to warn its athletes about those effects and/or concealed from its athletes its knowledge of those effects, and failed to implement reasonable concussion-management protocols to protect its athletes.

[2] These three cases were consolidated for purposes of pre-trial discovery and the Athletes sought to take the depositions of Mark Emmert, Donald Remy, and Dr. Brian Hainline, three senior NCAA executives (collectively, "Executives"). The NCAA moved for a protective order quashing those depositions. The trial court granted the protective order in part and denied it in part. The NCAA sought to certify the order for interlocutory appeal, but the motion was deemed denied by the operation of Appellate Rule 14(B)(1)(e). Subsequently, the NCAA moved for a second protective order, which the trial court denied and immediately certified for interlocutory appeal.

[3] The NCAA raises the sole issue of whether Indiana should adopt the "apex deposition doctrine," which would bar taking the deposition of high-ranking executives absent a showing they have "unique personal knowledge" of relevant facts. Brief of Defendant-Appellant at 33. The Athletes raise the issue of whether the NCAA's second motion for protective order was a repetitive motion/motion to reconsider affecting the timeliness of this appeal. Concluding the NCAA forfeited its right to appeal the trial court's order denying in part its motion for protective order and there are no extraordinarily compelling reasons to restore that right, we dismiss.

Facts and Procedural History

[4] The NCAA, an unincorporated association, is the governing body of collegiate athletics and is headquartered in Indianapolis. Emmert is the NCAA President; Remy is its Chief Legal Officer and Chief Operating Officer or "second-in-command[,]" Br. of Appellant at 15; and Hainline is the Chief Medical Officer. As of October 2020, there were over forty individual actions (including these three) and a federal multidistrict litigation proceeding including over 500 class actions pending against the NCAA in courts across the United States regarding football-related head injuries. *See* Br. of Appellant at 14-15.

[5] Anderson played football at the University of Illinois from 1960 to 1964. While playing college football, Anderson was "knocked unconscious several times and sustained multiple serious concussions." Appendix to Brief of Defendant-Appellant ("Appellant's App."), Volume II at 130. After college, Anderson began to suffer from headaches and tinnitus, and then developed further mental, emotional, and physical problems. After his death in 2018, an examination of his brain tissue showed that Anderson suffered from chronic traumatic encephalopathy ("CTE"). Solonoski played football at North Carolina State University from 1966 to 1970. While playing college football, Solonoski suffered multiple serious concussions. After college, Solonoski's mental and physical health began to decline, and he was eventually diagnosed with "frontotemporal lobar degeneration and [CTE]." *Id.*, Vol. II at 166. And Finnerty played football at the University of Toledo in 2001 and Grand Valley State University from 2002 through 2006 and was allegedly knocked

unconscious and sustained multiple concussions during his playing career. He died at the age of thirty. A study of Finnerty's brain after his passing showed he suffered from Stage II/IV CTE. *See id.*, Vol. II at 92. Complaints filed in Marion Superior Court against the NCAA on behalf of each of the three men alleged, among other things, negligence and fraudulent concealment.[1]

[6] In July 2019, at the Athletes' request and with the NCAA's agreement, the trial court consolidated the three actions for purposes of pretrial discovery. The Athletes then noticed the depositions of the Executives. In October 2019, the NCAA filed a motion for a protective order seeking to quash those depositions. The NCAA asserted that the depositions of three of the NCAA's most senior executives "are not designed to obtain information from individuals with firsthand knowledge of the underlying facts but are part of a discovery strategy designed to harass, inconvenience, and increase expenses." *Id.*, Vol. II at 199. The NCAA argued the depositions should be barred by the "apex deposition doctrine," pursuant to which some courts – although not yet courts in Indiana – have barred depositions of high level or "apex" officials unless the party seeking the depositions shows that: 1) the officials have unique personal knowledge of the facts and 2) the information sought cannot be obtained through less intrusive means. The NCAA asserted the apex deposition doctrine is consistent

[1] Anderson's complaint was filed in January 2019; Solonoski's in May 2019; and Finnerty's in August 2018. Appellant's App., Vol. II at 110, 145, and 73.

with Indiana Trial Rule 26's prohibition on unduly burdensome discovery and should be applied in Indiana.

[7] With respect to the Executives' personal knowledge of the facts, the NCAA noted that they each joined the NCAA years after the Athletes played college football.[2] The Executives submitted affidavits supporting the motion for protective order that the NCAA characterized as showing that they lack *any* knowledge, let alone unique personal knowledge, regarding:

> (a) Plaintiffs or their time as a student athletes . . .; (b) documents or information regarding the causes or long-term effects of traumatic brain injuries that the NCAA may have generated, collected, or relied on [during their playing years]; (c) the NCAA's actions related to the prevention and treatment of traumatic brain injuries [during those years]; or (d) any communications between the NCAA and the [Athletes' respective colleges] regarding [the Athletes] or any other topic [during the relevant years].

Id., Vol. II at 202-03. The NCAA also argued that Remy's knowledge is "protected by the attorney-client and work-product privileges and is therefore not discoverable." *Id.*, Vol. II at 204. The NCAA contended that "whatever *general* knowledge [the Executives] may possess regarding the NCAA's *current* policies is insufficient to warrant the expense and burden of a deposition." *Id.* The NCAA also argued that the Athletes had failed to exhaust less intrusive

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[2] Emmert joined the NCAA in 2010, Remy in 2011, and Hainline in 2013. Finnerty, who had most recently been a college athlete, last played in 2006.

discovery methods, as they had not yet taken any Rule 30(B)(6) depositions and had deposed only one NCAA employee.

[8] In response, the Athletes asserted that to prove their claims,

> they must gather evidence pertaining to the NCAA's degree of control over its member schools and athletes (duty, policies), its historical and current knowledge about concussions (notice and knowledge, polices, concealment), and the historical and current state of medical science (general causation, policies, concealment).

Id., Vol. III at 5. And they argued that each of the Executives, "in his own right, has critical knowledge about one or more of these topics." *Id.* Further, the Athletes noted that not all of Remy's knowledge is related to his position as Chief Legal Officer. In addition to being a lawyer, Remy is Hainline's direct supervisor, oversees the Sports Science Institute, and regularly communicates with Hainline about important health and safety matters and concussion safety policies. The Athletes argued they were entitled to take the Executives' depositions under Indiana's liberal discovery rules because the NCAA had failed to show good cause to quash the depositions and no less intrusive or alternate means were available to the Athletes to obtain the Executives' "highly relevant information." *Id.*, Vol. III at 4.

[9] On December 9, 2019, following a hearing, the trial court denied in part and granted in part the NCAA's motion for a protective order. The trial court noted that it had already determined that requests for documents from 1942 through the present were reasonably calculated to lead to the discovery of admissible

evidence. Appellant's App., Vol. IV at 32. The trial court declined to follow the apex deposition doctrine and instead imposed the Trial Rule 26 standard. The order included the relevant factual background, the standard for granting a protective order, and a discussion of how that standard applied to each proposed deponent in finding: (1) Hainline possessed unique, specialized, or personal knowledge that is relevant and discoverable and denied the NCAA's motion for a protective order regarding Hainline's deposition; (2) Emmert could be deposed "regarding any public statements made by Emmert on NCAA's duty to its athletes or pertinent medical information regarding concussions or head trauma[,]" but "any other topics which other NCAA employees have knowledge of" could not be addressed during his deposition; and (3) although Remy could not be required to testify regarding attorney-client matters, he could be deposed regarding "any regular meetings where in [sic] Remy and Hainline had conversations about non-privileged matters wherein they discussed: issues that are important to athletes and relate to their health and safety, which include discussions about medical research as to concussions and head trauma, concussions safety policies, and other discussions which relate to concussions and head trauma[.]" *Id.*, Vol. IV at 35-36 (internal quotation marks omitted).

[10] On January 8, 2020, the NCAA moved to certify the trial court's order for interlocutory appeal pursuant to Indiana Appellate Rule 14(B). The trial court neither ruled on the motion to certify nor set the motion for a hearing within

thirty days and the motion was therefore deemed denied on February 7, 2020 pursuant to Indiana Appellate Rule 14(B)(1)(e).

[11] At an unrelated status conference on March 2, 2020, the parties discussed the motion to certify and Appellate Rule 14(B)(1)(e). Both the trial court and counsel for the NCAA indicated they were previously unaware of the deemed denied rule for interlocutory order certification. *See* Appellant's App., Vol. XIV at 152. Although counsel for the Athletes wished to set a trial date and attendant deadlines because the time for pursuing an interlocutory appeal had passed, the NCAA indicated that it believed the motion for protective order was still "an issue for the Court of Appeal . . . they may still grant the interlocutory appeal at their level[,]" *id.* at 152, and the trial court preferred to wait to schedule a trial date "until the Court knows if the Indiana Court of Appeals will accept the Interlocutory Appeal[,]" *id.*, Vol. II at 35. The trial court granted the NCAA's motion to certify the discovery order the same day and the tenor of the conversation at the hearing was that the NCAA would be filing a motion for the Court of Appeals to accept jurisdiction.

[12] Instead of filing a motion for this court to accept jurisdiction of the interlocutory appeal, however, the NCAA filed a second motion for a protective order in the trial court on April 16, again seeking to quash the Executives' depositions. This second motion alleged "developing factual circumstances" in that the Athletes had conducted two depositions of "slightly less senior" NCAA employees since the first motion for protective order was denied. Appellant's App., Vol. XI at 76, 92. The NCAA asserted that these

depositions showed the Athletes could gather the information they sought through witnesses other than the Executives. The NCAA also alleged the Athletes "repeatedly harangued" the deponents, showing they sought to depose the Executives not as a good faith attempt to discover information but only "as a tool for harassment." *Id.*, Vol. XI at 85. And it again asserted that the Executives lacked personal knowledge of the facts and advocated for application of the apex deposition doctrine. The NCAA requested that if the trial court denied the motion, it immediately certify the denial.

[13] The Athletes responded by arguing the NCAA's motion was nothing but a repetitive motion of its October 2019 motion or a motion to reconsider the trial court's December 2019 ruling seeking to avoid its earlier procedural default by resetting the time for an interlocutory appeal. The Athletes contended that the second motion for a protective order was therefore subject to Trial Rule 53.4(A) and had been deemed denied after five days and failed to extend or revive any passed deadlines.

[14] On May 12, 2020, the trial court issued an order denying the second motion for a protective order and certifying the order for interlocutory appeal pursuant to Appellate Rule 14(B) "over the strong objection of" the Athletes. Appealed Order at 1. This court then accepted jurisdiction of the interlocutory appeal.

Discussion and Decision

I. Was the Right to Appeal Forfeited?

[15] We begin by addressing the Athletes' argument that we do not have jurisdiction to hear this interlocutory appeal. Our supreme court has held, "[A]lthough a party forfeits its right to appeal based on an untimely filing of the Notice of Appeal, this untimely filing is not a jurisdictional defect depriving the appellate courts of authority to entertain the appeal." *In re Adoption of O.R.*, 16 N.E.3d 965, 971 (Ind. 2014). "Instead, the timely filing of a Notice of Appeal is jurisdictional only in the sense that it is a Rule-required prerequisite to the initiation of an appeal in the Court of Appeals." *Id.* Therefore, although we do have jurisdiction to entertain the appeal, we first examine whether the NCAA has forfeited its right to appeal.

[16] Indiana Appellate Rule 14(B) describes the procedure for appealing an interlocutory order that is not appealable by right:

> An appeal may be taken from other interlocutory orders if the trial court certifies its order and the Court of Appeals accepts jurisdiction over the appeal.
>
> (1) Certification by the Trial Court. The trial court, in its discretion, upon motion by a party, may certify an interlocutory order to allow an immediate appeal.
>
> (a) Time for Filing Motion. A motion requesting certification of an interlocutory order must be filed in the trial court within thirty (30) days after the date the interlocutory order is noted in the Chronological Case Summary unless the trial court, for good cause, permits a belated motion. . . .

* * *

> (e) Ruling on Motion by the Trial Court. In the event the trial court fails for thirty (30) days to set the motion for hearing or fails to rule on the motion within thirty (30) days after it was heard or thirty (30) days after it was filed, if no hearing is set, the motion requesting certification of an interlocutory order shall be deemed denied.

[17] The trial court entered an order denying the NCAA's first motion for protective order in December 2019 and the NCAA filed a motion to certify that order within thirty days. The NCAA now concedes that, despite the conversation to the contrary at the March 2, 2020 hearing and the trial court's grant of the motion to certify on the same day, the motion to certify was deemed denied when the trial court did not rule on it within thirty days of filing and the trial court could not revive the motion by belatedly granting it. *See* Reply Brief of Defendant-Appellant at 8 n.2; *see also* App. R. 14(B)(1)(e); *Wise v. State*, 997 N.E.2d 411, 413 (Ind. Ct. App. 2013) (holding that a deemed denied motion to certify cannot be resuscitated by the trial court belatedly granting it). Thus, the deadline to appeal the trial court's December 2019 order on the NCAA's first motion for protective order has long since come and gone.

[18] In April 2020, the NCAA filed another motion for protective order, again seeking to quash the depositions of the Executives because the Executives lack personal knowledge, the Athletes can glean the same information from lower-level executives, and the Athletes' purpose in seeking the Executives' depositions is harassment. The Athletes argued below and argue again on

appeal that the NCAA's second motion for a protective order is repetitive of its first motion for protective order and/or a motion to reconsider the trial court's December 2019 order and that the trial court's May 2020 order on the second motion does not reset or extend the original deadline for an interlocutory appeal of the trial court's denial of a protective order. In other words, the Athletes contend the NCAA filed the April motion in an untimely attempt to ultimately appeal the trial court's December 2019 order allowing the Executives' depositions to go forward under certain restrictions. The NCAA contends the Athletes' view "is wrong[,]" as its "notice of appeal identified only the 2020 ruling as the subject of this appeal" and it is "relying on the trial court's certification of its 2020 ruling, not its 2019 ruling." Reply Br. of Appellant at 8. The NCAA denies that its self-described "timely appeal[]" from the trial court's May 2020 order is "really a belated attempt to appeal the trial court's initial December 2019 protective-order denial." *Id*.

[19] Trial Rule 53.4(A) states that a repetitive motion or a motion to reconsider "shall not . . . extend the time for any further required or permitted action, motion, or proceedings under these rules." This rule is intended to prevent a party from delaying compliance with a trial court's order by filing repetitive motions. *Stephens v. Irvin*, 734 N.E.2d 1133, 1134 (Ind. Ct. App. 2000), *trans. denied*; *see also Peters v. Perry*, 873 N.E.2d 676, 678 (Ind. Ct. App. 2007) (noting that although Trial Rule 53.4 does not specifically mention the appellate rules, a repetitive motion to correct error would not extend the time to file a notice of appeal pursuant to Appellate Rule 9).

[20] In *State v. L.B.F.*, 132 N.E.3d 480 (Ind. Ct. App. 2019), *trans. denied*, the trial court granted a defendant's motion to suppress certain evidence in his criminal trial on July 26, 2018. The State filed a motion to reconsider on August 21, "in which it argued new bases in opposition to suppression[.]" *Id.* at 483. The trial court held a hearing on the motion to reconsider and denied it on October 10. Within thirty days of October 10, the State filed a motion to certify the trial court's orders for interlocutory appeal. The trial court certified its July 26 and October 10 orders, and this court accepted jurisdiction of the interlocutory appeal. The panel deciding the case, however, dismissed the State's appeal, concluding the trial court's certification of its orders was an abuse of discretion. *Id.* at 486. We noted that instead of filing a timely motion for certification of the July 26 suppression order, the State filed a motion to reconsider, which pursuant to Trial Rule 53.4 does not extend the time for any other action, including the filing of a motion to certify. Particularly relevant to this appeal, however, we rejected the State's contention that because it argued different grounds against suppression in its motion to reconsider, "the trial court had the authority to create a new, appealable order by ruling on that motion." *Id.* at 485. We found this argument unavailing; because the trial court did not grant the motion to reconsider, its suppression order did not change, and there was no new appealable order. *Id.*; *see also Johnson v. Estate of Brazill*, 917 N.E.2d 1235, 1240 (Ind. Ct. App. 2009) (holding that an order denying a motion to clarify and simply affirming the previous ruling does not create a new, appealable order); *cf. Gibson v. Evansville Vanderburgh Bldg. Comm'n*, 725 N.E.2d 949, 952 (Ind. Ct. App. 2000) (holding that a summary judgment motion was

not repetitive of a Trial Rule 12(B)(6) motion to dismiss because, although based on the same theories, the motions required the trial court to examine different evidence in different contexts – a Trial Rule 12(B)(6) motion looks only at the facts stated on the face of a complaint whereas a summary judgment motion allows both parties to designate evidence in support of their positions), *trans. denied*.

[21] Similar to the State in *L.B.F.*, the NCAA filed a second motion seeking the same relief in the same context but on allegedly different grounds. This second motion alleged "developing factual circumstances" in that the Athletes had conducted two depositions of lower-level NCAA employees since the first protective order was denied.[3] Appellant's App., Vol. XI at 92. The NCAA asserted that these depositions showed the Athletes could gather the information they sought through witnesses other than the Executives and alleged that the transcripts of the depositions showed the Athletes sought only to harass the NCAA. And it again asserted that the Executives lacked personal knowledge of the facts, attaching affidavits from each that were identical to the affidavits submitted with the first motion for protective order but for an additional paragraph (Emmert and Remy) or two (Hainline) purporting to refute the trial court's earlier findings otherwise. *Compare id.*, Vol. II at 215-17,

[3] The Athletes conducted a Trial Rule 30(B)(6) deposition of John Parsons, an athletic trainer and managing director of the NCAA's Sports Science Institute, which Remy oversees, in December 2019; and deposed Terri Steeb Gronau, the Vice President of the NCAA's Division II, the NCAA's Interim Vice President of Inclusion and Human Resources, and one of the seventeen members of the NCAA President's Cabinet in November 2019. *See* Appellant's App., Vol. XI at 76.

220-22, and 225-27 *with id.*, Vol. XI at 97-99, 102-04, and 107-09.[4] These are the same arguments made in the October 2019 motion for protective order and rejected by the trial court in its December 2019 order and the additional paragraphs addressed to the trial court's previous findings are clearly intended to encourage the trial court to reconsider its earlier ruling. Moreover, it is not for the NCAA to say whether the Athletes have "learned much of the pertinent information from [depositions of] lower-level NCAA personnel already." *Id.*, Vol. XI at 85. Yes, the Athletes likely gleaned information about topics of interest from the depositions of NCAA employees in the period between the first and second motions for protective order, but by the deponents' very designation as "lower-level personnel," those employees are unlikely to have as much information as the top two NCAA executives or the chief medical officer for the organization. Thus, the fact that the Athletes have conducted depositions of lower-level NCAA personnel is not really "new" or "additional" evidence supporting a blanket protective order. *See infra*, ¶¶ 37, 38.

[22] In requesting the immediate certification of a denial of this second motion "for the reasons the NCAA has previously explained[,]" and "for the same reasons" the trial court certified its ruling on the initial motion for protective order, the NCAA basically conceded that it simply wanted to get "interlocutory appellate consideration of the apex doctrine" and needed a fresh order to do so as its time

[4] The affidavits attached to the second motion for protective order each contain at least one new paragraph beginning "I understand that the Court previously ruled[/found] . . . ."

to appeal the December 2019 order had passed. *Id.*, Vol. XI at 92; *see* Appendix of Appellees, Vol. 2 at 93 (trial court noting in an order denying the Athletes' motion to supplement the record on appeal that "[o]n April 16, 2020, the NCAA filed a Second Motion for Protective Order to Quash the Depositions again of Hainline, Emmert and Remy, *which was the same as the Motion filed on October 8, 2019.* On May 12, 2020, the Court Denied the [NCAA's] Motion to Quash *for the second time*[.]") (emphasis added). The trial court did not have a hearing on the NCAA's second motion, deciding the issue on the parties' briefs and exhibits alone, and simply denied the motion without elaboration or explanation, presumably leaving the earlier order unchanged. In other words, the NCAA's second motion and the trial court's May 2020 order were merely repeating the earlier process in a new timeframe.

[23] Having missed or foregone the opportunity to ask the Court of Appeals to accept jurisdiction after its first motion for protective order was denied, the NCAA's second motion is nothing more than a motion for the trial court to reconsider its earlier ruling seeking a renewed opportunity to bring this issue to the appellate courts. Pursuant to Trial Rule 53.4(A) and Appellate Rule 14(B)(1), the NCAA's time for seeking an interlocutory appeal of the trial court's ruling on its motion for protective order has long since passed, and the NCAA has forfeited its right to appeal.

II. Should the Right to Appeal Be Restored?

[24] Where the right to appeal has been forfeited by the failure to follow the appellate rules, the forfeited right may be "restored" if "extraordinarily compelling reasons" exist to consider the merits of the appeal. *O.R.*, 16 N.E.3d at 971. In *O.R.*, a father's right to appeal the adoption of his child was restored because of the constitutional dimensions of the parent-child relationship. *Id.* at 972.[5] In *Cannon v. Caldwell*, we acknowledged the "extraordinarily compelling reasons" standard is largely undefined but determined that an "obvious injustice" in a child support order in clear violation of the Child Support Guidelines warranted restoration of the right to appeal that order. 74 N.E.3d 255, 258-59 (Ind. Ct. App. 2017). The NCAA Executives do not have a right to not be deposed on the basis of their positions in the organization; even if they did, it is certainly not a right of constitutional dimension; and there is no obvious injustice in the trial court's order that they each submit to a day-long deposition in the same city as their corporate headquarters.

[25] Further, the NCAA's motion for this court to accept interlocutory jurisdiction argues the issue of whether to adopt the apex deposition doctrine "invariably

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[5] The court remarked, "It is this unique confluence of a fundamental liberty interest along with 'one of the most valued relationships in our culture' that has often influenced this Court as well as our Court of Appeals to decide cases on their merits rather than dismissing them on procedural grounds[,]" and concluded that the appellant's "otherwise forfeited appeal deserves a determination on the merits." *Id.* at 972; *see also Satterfield v. State*, 30 N.E.3d 1271, 1275 (Ind. Ct. App. 2015) (considering the merits of an untimely appeal from the denial of bail because of "the unique confluence of this fundamental liberty interest along with one of the most valued rights in our culture—the right to bail").

evades review as the injury . . . cannot be effectively remedied on appeal after final judgment." Motion to Accept Interlocutory Jurisdiction at 2-3. Although it is true the Executives' depositions will have been taken and that cannot be undone on appeal after a final judgment, the NCAA's purpose in seeking this interlocutory appeal—to encourage courts in Indiana to consider and adopt the apex deposition doctrine for future litigation—will still be an available issue on appeal. The NCAA's grounds for this interlocutory appeal are, essentially, a simple assertion that the "remedy by appeal is otherwise inadequate." App. R. 14(B)(1)(c)(iii). And recently, our supreme court reiterated that to overcome forfeiture, "much more is needed" than just restating one of the grounds for granting a discretionary interlocutory appeal. *Cooper's Hawk Indianapolis, LLC v. Ray*, 162 N.E.3d 1097, 1098 (Ind. 2021) (per curiam).[6]

[26] "[I]t is never error for an appellate court to dismiss an untimely appeal[.]" *Id.* Because the issues the NCAA raises in this appeal are not of a fundamental dimension and will remain available after final judgment in this case, we find

[6] We are not unsympathetic to the trial court's frustration with the time and effort required to resolve the parties' ongoing discovery disputes. *See infra*, ¶ 39. However, there is no indication in *O.R.* or the cases that have followed that the effect on the trial court's calendar is an extraordinarily compelling reason to grant relief to a party that cannot show a compelling reason on its own behalf to overlook its forfeiture. Moreover, in the same order in which the trial court indicated its wish for this court to "consider all relevant information . . . to allow [the] trial court to . . . move this case to jury trial in May of 2021," Appellee's App., Vol. II at 94, the court acknowledged the NCAA's second motion for protective order was "the same as" the first motion, *id.* at 93. An effective and efficient way to move the case to trial would have been to deny the motion to certify for interlocutory appeal as untimely because it was the "same" (i.e. a repetitive) motion for protective order.

no extraordinarily compelling reasons to restore the NCAA's forfeited right to seek interlocutory appeal of the trial court's denial of a protective order.

[27] The motion to accept jurisdiction was improvidently granted,[7] and accordingly, we dismiss this appeal.

III. Did the Trial Court Abuse Its Discretion?

[28] Although we dismiss this forfeited appeal, we briefly address the merits of the NCAA's argument that the trial court abused its discretion by denying its motion for a protective order.[8] A trial court is afforded broad discretion in ruling on issues of discovery, and we will interfere only when the appealing party can show an abuse of that discretion. *Allstate Ins. Co. v. Scroghan*, 851 N.E.2d 317, 321 (Ind. Ct. App. 2006). The interpretation of the trial rules, however, is a question of law that we review de novo. *Morrison v. Vasquez*, 124 N.E.3d 1217, 1219 (Ind. 2019).

[29] The NCAA asks that this court adopt the apex deposition doctrine and "[a]rticulat[e] a general rule" for Indiana that depositions of a company's "apex officials" are barred as excessively burdensome "unless the official has 'unique

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[7] Although we are reluctant to overrule decisions by the motions panel such as that accepting jurisdiction of the interlocutory appeal in this case, a writing panel has the "inherent authority to reconsider any [motions panel] decision while an appeal remains pending[.]" *Haggerty v. Anonymous Party I*, 998 N.E.2d 286, 293 (Ind. Ct. App. 2013).

[8] This does not represent an advisory opinion but an alternate theory for why the NCAA does not prevail in its appeal: it loses either because it forfeited its right to an interlocutory appeal *or* because it is not entitled to the relief it seeks under the Trial Rules.

personal knowledge' of the events giving rise to the suit." Br. of Appellant at 24. Because we have held the NCAA has not timely appealed the trial court's order addressing this argument, we do not express an opinion about whether Indiana should adopt the apex deposition doctrine. We will, however, address the NCAA's argument in the context of Trial Rule 26.

[30] Trial Rule 26(B)(1) allows broad discovery of "any matter . . . which is relevant to the subject-matter involved in the pending action[.]" Information may be relevant to the subject matter of a case—even if inadmissible at trial—as long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence. T.R. 26(B)(1). This liberal discovery procedure is subject to the protection provided by Trial Rule 26(C) allowing the trial court, when good cause is shown, to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]" "Trial courts ordinarily have great discretion in considering whether 'good cause' has been shown and in determining what 'justice requires' in a particular case." *Bridgestone Americas Holding, Inc. v. Mayberry*, 878 N.E.2d 189, 194 (Ind. 2007). Given the array of actions the trial court may order, *see* T.R. 26(C)(1)-(9), where a protective order may be narrowly tailored to prohibit improper areas of inquiry, it should be, rather than broadly impinging on the right to ask any questions in discovery.

[31] Our liberal discovery rules are not to be interpreted so broadly as to allow a "fishing expedition." *See Dahlin v. Amoco Oil Corp.*, 567 N.E.2d 806, 814 (Ind. Ct. App. 1991) ("Although discovery under the trial rules has a broad scope,

Rule 26(C) protects an individual from 'fishing expeditions' into irrelevant or privileged material."), *trans. denied*. But that is not what the Athletes are proposing—or are being allowed—to do here. The purpose of Indiana's discovery rules is to provide litigants "with information essential to the litigation of all relevant issues, eliminate surprise and to promote settlement." *Doherty v. Purdue Props. I, LLC*, 153 N.E.3d 228, 235 (Ind. Ct. App. 2020) (citation omitted), *trans. denied*. Yes, the Athletes could conduct multiple depositions of lower-level NCAA officers and employees and gather isolated pieces of information from each person's department or area of responsibility in hopes of synthesizing those nuggets into something larger, or they could depose those few whose positions within the organization already give them the larger view, historical and contemporaneous, of the organization's structure, knowledge, and response, and whose access to a multitude of documents and individuals could lead the Athletes more directly to essential information and personnel. Throwing a broad discovery net over the entire organization in an attempt to obtain bits of information would be more of a fishing expedition than casting a line directly to those with an organizational overview. The Executives may not have been with the NCAA at the times the Athletes participated in NCAA sports, but they are in positions to have access to information from that time, so simply asserting they were not there and therefore do not know anything of relevance is not sufficient to show good cause for a protective order.

[32] Further, the trial court carefully considered what information each Executive might have that could reasonably lead to the discovery of admissible information and specifically tailored an order limiting the scope of discovery to the extent of each deponent's likely personal knowledge. The trial court found Hainline possessed unique, specialized, or personal knowledge that is relevant and discoverable and the Athletes would be allowed to depose Hainline without restriction; Emmert could be deposed "regarding any public statements [he] made . . . on NCAA's duty to its athletes or pertinent medical information regarding concussions or head trauma[,]" but other topics were off limits; and Remy could be deposed regarding "any regular meetings where in [sic] Remy and Hainline had conversations about non-privileged matters wherein they discussed: issues that are important to athletes and relate to their health and safety, which include discussions about medical research as to concussions and head trauma, concussions safety policies, and other discussions which relate to concussions and head trauma[.]" Appellant's App., Vol. IV at 35-36 (internal quotation marks omitted). This, too, prevents the depositions from becoming a fishing expedition. And as to the alleged undue burden on the Executives of sitting for a deposition, the trial court noted the relative convenience of depositions conducted in the same town as the corporate headquarters. *See id.*, Vol. IV at 36. We would not say that the trial court abused its discretion in determining pursuant to Trial Rule 26(C) that the NCAA has not shown good cause for a broader protective order in this case or that justice requires such.

Conclusion

[33] The NCAA's repetitive motion for a protective order/motion to reconsider did not extend the time for an interlocutory appeal of the trial court's denial and this appeal is therefore untimely. Finding no extraordinarily compelling reasons to consider the merits of the appeal, we dismiss.

[34] Dismissed.

Bailey, J., concurs.

Tavitas, J., dissents with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

National Collegiate Athletic Association,

Appellant-Defendant,

v.

Jennifer Finnerty, Individually, and as Personal Representative of the Estate of Cullen Finnerty,

Plaintiff-Appellee,

and

Carol Anderson, Individually, and as Personal Representative of the Estate of Neal Anderson,

Plaintiff-Appellee,

and

Maura Solonoski, Individually, and as Attorney-in-Fact for Andrew Solonoski Jr.,

Plaintiff-Appellee.

Court of Appeals Case No. 20A-CT-1069

Tavitas, Judge, dissenting.

[35] I respectfully dissent. I conclude that the NCAA's interlocutory appeal was proper, and I would not dismiss. Accordingly, I would address whether the trial court abused its discretion by denying the NCAA's second motion for a protective order.

[36] Our Supreme Court has held that, "although a party forfeits its right to appeal based on an untimely filing of the Notice of Appeal, this untimely filing is not a jurisdictional defect depriving the appellate courts of authority to entertain the appeal." *In re Adoption of O.R.*, 16 N.E.3d 965, 971 (Ind. 2014). "Instead, the timely filing of a Notice of Appeal is jurisdictional only in the sense that it is a Rule-required prerequisite to the initiation of an appeal in the Court of Appeals." *Id.* Even where the right to appeal has "been forfeited" by the failure to follow the appellate rules, the forfeited right may be "restored" where "extraordinarily compelling reasons" exist. *Id.*

[37] First, I am not convinced that the second motion for a protective order was repetitive in the context of Trial Rule 53.4(A). After the first motion was denied, the trial court failed to certify the order for interlocutory appeal in a timely manner, and the motion for certification was therefore deemed denied. Discovery proceeded, and the Athletes conducted depositions of lower-level NCAA employees. The second motion cited new evidence and additional grounds for quashing the depositions. The NCAA noted that, since the ruling on the first motion for protective order:

> Plaintiffs have deposed slightly less senior NCAA personnel. In particular, Plaintiffs held a two-day 30(B)(6) deposition of John

> Parsons, an athletic trainer who is the managing director of the NCAA's Sports Science Institute; as well as a full-day deposition of Terri Steeb Gronau, the Vice President of the NCAA's Division II, the NCAA's Interim Vice President of Inclusion and Human Resources, and one of the 17 members of the NCAA President's Cabinet.

Appellant's App. Vol. XI p. 76. The NCAA argued that the recent depositions confirmed that lower-level deponents could testify on the topics; that in the recent depositions, Athletes' counsel "repeatedly harangued" Parsons and Gronau; and that depositions of the NCAA executives, who did not have personal knowledge, would amount to further harassment. *Id.* at 85. The NCAA also again discussed the relationship between Trial Rule 26 and the apex doctrine and argued that "these new facts warrant embracing this interpretation of Rule 26, applying the apex doctrine, and concluding that the depositions of the three NCAA executives should not proceed." *Id.* at 91.

[38] Although both motions requested that the same three depositions be quashed, the second motion included additional evidence and arguments not included in the first motion. *See, e.g., Gibson v. Evansville Vanderburgh Bldg. Comm'n*, 725 N.E.2d 949, 952 (Ind. Ct. App. 2000) (holding that the motions at issue were not repetitive because, "although based on the same theories, [the motions] required the trial court to examine different evidence in order to make the determination as to whether the defendants were entitled to judgment as a matter of law"), *trans. denied*; *cf. Walters v. Austin*, 968 N.E.2d 233, 235 (Ind. Ct. App. 2012) (dismissing an appeal where an amended motion to correct error

did not extend the filing deadline because the "amended motion to correct error was nearly identical to the original motion to correct error, amending only non-substantive, typographical and grammatical errors in the original motion"), *trans. denied*. As discovery proceeds in a case, additional evidence is revealed. Where additional evidence is later discovered, a party should not be prohibited from filing a new motion for a protective order. Under these circumstances, I conclude that Trial Rule 53.4(A) is inapplicable here, and the NCAA has not forfeited its right to appeal.

[39] Moreover, even if the NCAA's second motion for a protective order was repetitive, our Supreme Court has held that the forfeited right may be "restored" where "extraordinarily compelling reasons" exist. *O.R.*, 16 N.E.3d at 971; *see also State v. L.B.F.*, 132 N.E.3d 480, 486 (Ind. Ct. App. 2019) ("Although the failure to initiate a timely interlocutory appeal does not deprive this court of jurisdiction, it results in forfeiture of the right to appeal absent 'extraordinarily compelling reasons.'") (quoting *Snyder v. Snyder*, 62 N.E.3d 455, 458 (Ind. Ct. App. 2016)), *trans. denied*. The trial court recognized the unique, "extraordinary," and challenging aspects of the discovery issues in this case. In denying the Athletes' request to supplement the record on appeal, the trial court stated:

> This Court has been working diligently to bring this action to trial since the filing of the complaint in 2018 and has a jury trial scheduled on the Finnerty matter for May 10, 2021 for 3 weeks. Under Indiana Trial Rules which address discovery, parties are supposed to be [sic] complete discovery with little intervention from the trial court but that has not [been] the case in this

> litigation. This Court has spent hundreds of hours addressing disagreements on discovery between the parties. In addition, due to the substantial amount of disagreement between the parties, they agreed to the appointment of a special master, Retired Judge Terry Shewmaker, to review thousands of documents for attorney client privilege. In light of the substantial time this Court has had to utilize to resolve the many time[-]consuming discovery disputes, this Court strongly hopes that the Indiana Court of Appeals will consider all relevant information on the NCAA's Second Motion to Quash to allow this trial court to effective[ly] and efficien[tly] move this case to jury trial in May of 2021.

Appellee's App. Vol. II p. 94. This is an unusual case that is consuming an extraordinary amount of the trial court's time and resources, and it is important to resolve these discovery issues in a timely manner. Under these extraordinarily compelling circumstances, I would address the NCAA's interlocutory appeal even if the second motion for a protective order was repetitive under Trial Rule 53.4(A).

[40] I would not dismiss this interlocutory appeal and would, instead, address the NCAA's argument that the trial court abused its discretion by denying the NCAA's second motion for a protective order. The majority dismisses the appeal but addresses the merits in dicta. In light of the majority's dismissal of this appeal, I decline to issue an advisory opinion on the merits. For the foregoing reasons, I respectfully dissent.