Abused in the Pursuit of a Dream: How USA Gymnastics Failed to Protect Its Gymnasts

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INTRODUCTION

As “more than 250 women and girls” came forward to testify at the sentencing hearing of Dr. Larry Nassar, the former team doctor for USA Gymnastics (hereinafter “USAG”), many were left wondering, how did this happen? The sheer number of gymnasts molested by Nassar, who testified to the systematic abuse, raises many questions about those who were in charge of Nassar. As athlete after athlete recounted the horrors she faced at the hands of someone who was supposed to heal her, it became abundantly clear to everyone who paid attention that Nassar is not and should not be the only one held responsible. Nassar’s abuse was considered by many as one of the largest sexual assault scandals in “American sports and college history.” The abuse was ongoing and hardly a secret amongst those in the shadows of the gymnastics community. Nassar’s abuse was a result of his own abhorrent behavior, however, USAG should shoulder liability for neglecting to protect its gymnasts and for favoring their own reputation over athlete safety.

Despite having multiple opportunities to stop Nassar in his tracks, USAG failed to protect its gymnasts. USAG’s countless mistakes created a dangerous culture for gymnasts in this community. The athletes who trusted Nassar and other adults in positions of power at USAG were left with no one to turn to. USAG met concerns about sexual misconduct

2. See id. (“Michigan State has come under intense criticism . . . for their role in allowing the abuse to continue.”).
3. Id.
4. Id.
5. Id.
6. Id.
7. Id.
with resistance instead of compassion.\textsuperscript{8} Instead of being encouraged to speak up, the victims of sexual abuse were persuaded to keep quiet and protect the image of USAG.\textsuperscript{9} The expansion of liability is necessary to incentivize USAG and organizations like it to take every necessary precaution.

This note will address the significant issues with USAG as an organization. Section I introduces the sport of gymnastics to the United States and the origin of USAG.\textsuperscript{10} The next four sections – II, III, IV, and V, explain many of the ways USAG made poor choices and outlines past events that led us to this point.\textsuperscript{11} Section VI breaks down the attempts USAG has made to remedy the faults within its organization. This section also explains why those attempts have been unsuccessful and fall short.\textsuperscript{12} Respondeat Superior is introduced in section VII, this note explains the legal doctrine and applies it to USAG.\textsuperscript{13} The events that transpired at Michigan State are reviewed in section VIII in addition to an application of negligent supervision.\textsuperscript{14}

Section IX provides the solution to prevent USAG from avoiding legal liability for the part it played in this sex abuse scandal.\textsuperscript{15} This note argues that the non-delegable duty doctrine should be extended to include the events that took place at Karolyi Ranch, the former training site for USAG. The following section explains how expanding this duty will help prevent this kind of systemic abuse from repeating itself in the future. Section XI lays out what’s left of USAG in the aftermath of the scandal and in light of the numerous lawsuits facing the failing organization.\textsuperscript{16} This note only scrapes the surface of the pain and trauma endured by those only attempting to pursue their love for the sport of gymnastics. The purpose of this note is to tackle an abhorrent sex abuse scandal and shine a light on the numerous ways USAG should have done more to stop Nassar and others like him.


\textsuperscript{9} Id.

\textsuperscript{10} See infra Section I.

\textsuperscript{11} See infra Sections II-V.

\textsuperscript{12} See infra Section VI.

\textsuperscript{13} See infra Section VII.

\textsuperscript{14} See infra Section VIII.

\textsuperscript{15} See infra Section IX.

\textsuperscript{16} See infra Section XI.
I. HISTORICAL BACKGROUND

Gymnastics was introduced into U.S. schools “in the 1830s.” In 1883, “the Amateur Athletic Union assumed control of gymnastics” in the United States. In 1924, the modern form of gymnastics was “firmly established” for men; women joined the Olympic Games in 1928. In 1970, the United States Gymnastics Federation “became the national governing body” for gymnastics. The United States Gymnastics Federation has since become USAG.

USAG is the national governing body in the United States for gymnastics, based in Indianapolis, Indiana. The United States Olympic Committee and the International Gymnastics Federation gave USAG this title. The organization, based in Indianapolis, sets the rules and policies governing gymnastics, including selecting the members of the National Team for the World Championship and for the Olympics. USAG has over “200,000 athletes, professionals, and clubs” as members of its organization, and it sanctions around 4,000 competitions throughout the United States annually. Each member of USAG is subject to the organization’s rules and policies regarding conduct.

II. USAG’S HISTORY OF EMPLOYING SEXUAL PREDATORS

The sexual abuse scandal surrounding Nassar was not the first incident where USAG has been accused of mishandling sexual assault claims. The Indianapolis Star (hereinafter “IndyStar”) began investigating Nassar in 2016 and discovered a shocking trend within USAG. IndyStar discovered that USAG has a history of ignoring or mishandling claims of sexual assault and tracked down four individual cases where
USAG was informed about suspected abuse but did not report the suspected individual to the proper authorities.\textsuperscript{29}

Each of those four cases are alarming in their own way, however, the specific details surrounding former USAG coach William McCabe raises many red flags. What took place sets the tone for how USAG handles complaints about sex misconduct within its organization. McCabe’s severe misconduct was a precursor of what was to come with Nassar. USAG’s treatment of McCabe emphasizes how recklessly dysfunctional USAG performs in regard to complaints of sexual assault.\textsuperscript{30}

The first concern regarding McCabe was in 1996 when McCabe was fired from a USAG member gym.\textsuperscript{31} McCabe lost his job because he had been bragging to another coach about his attempts to persuade a 15-year-old cheerleader into having sex with him.\textsuperscript{32} From 1997 to 1998 McCabe was fired from several USAG gyms and had an order of protection taken out against him.\textsuperscript{33} On October 30, 1998 a letter was written to Loree Galimore, a Club Services Director at USAG, by a gym owner detailing the reasons for previous terminations of McCabe’s employment and included three pages detailing the sexual misconduct allegations.\textsuperscript{34} A separate letter was written to USAG from Dan Dickey, the owner of a different USAG member gym.\textsuperscript{35} Dickey’s letter was similar to the one that came before, the contents warned USAG about McCabe’s predatory behavior, with specific examples.\textsuperscript{36} Following the letter, Dickey was informed that an investigation would begin once there was an official complaint filed by a parent or athlete.\textsuperscript{37} USAG had two separate letters in its possession.

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\textsuperscript{29} Kwiatkowski et al., supra note 8. USAG received numerous complaints about coaches James Bell, Marvin Sharp, William McCabe, and Mark Schiefelbein. \textit{Id.} Each of these coaches had a sexual misconduct file with USAG. \textit{Id.} However, none of these coaches were reported to the authorities or placed on USAG’s “permanently banned” list until after authorities were involved. \textit{Id.} USAG themselves did not report these individuals to police authorities. \textit{Id.}
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\textsuperscript{30} \textit{Id.}
\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} Letter from Jan Giunipero, Owner of Tallahassee Gym, to Loree Galimore, Director of USAG (Oct. 20, 1998) (available at https://www.documentcloud.org/documents/3001047-Fax-From-Jan-to-USAG.html).
\textsuperscript{34} \textit{Id.}
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Id.}
\end{flushright}
explaining why McCabe was fired from USAG gyms.38 However, it did not take any action regarding the concerning content of those letters.39

Despite the information USAG already had about McCabe’s multiple terminations and the reasons behind them, his professional membership with USAG was renewed in December 1999.40 From 2002 until McCabe’s arrest in March of 2006, McCabe continued to coach at numerous USAG member gyms.41 McCabe’s affiliation with USAG ended only after the parent of a twelve-year-old gymnast contacted the FBI.42 The gymnast’s mother was alarmed after finding nude photos on her daughter’s computer from McCabe.43 It wasn’t until the FBI specifically requested information from USAG about McCabe that the authorities were presented with the information USAG had accumulated.44 Finally, USAG turned over the file it started in 1998.45 USAG told the FBI: “[t]he majority of this complaint was third hand information and we did not receive a complaint from an athlete member of our organization or a parent on behalf of an underage athlete member, so we were unable to go forward with an investigation.”46 USAG writes that it was “unable to go forward,” but this policy is one of its own creation.47 This incident, along with several others with a similar history, highlights how USAG was consistently reluctant to turn over information to the proper authorities.

USAG’s policy prevented it from reporting incidents of sexual assault, regardless of the numerous complaints it had received, when the information came to it from coaches and gym owners, rather than from the athletes or their parents.48 USAG did not want to act upon information received from third parties.49 It decided not to provide the information it had about possible predators to law enforcement for fear of putting the

40. Id.
41. Id.
42. Id.
43. Id.
44. Id.
45. Id.
46. Julie Novkov, Law, Policy, and Sexual Abuse in the #MeToo Movement: USA Gymnastics and the Agency of Minor Athletes, 40 J. WOMEN POL. POL’Y 42, 49 (2019) (internal citations omitted)
47. Kwiatkowski et al., supra note 8.
48. Id.
49. Id.
organization into a negative spotlight.\textsuperscript{50} USAG adopted a policy of protecting its coaches and its own reputation rather than the safety of the gymnasts.\textsuperscript{51}

III. USAG’S BELOW PAR PREVENTIVE POLICIES

USAG’s policy to protect its athletes includes a list of banned coaches.\textsuperscript{52} The purpose of a list of banned coaches is to warn gym owners and parents about dangerous coaches.\textsuperscript{53} USAG stated in its response to \textit{IndyStar}’s report on its mishandling of sexual assault claims that it has always been committed to the safety of its athletes.\textsuperscript{54} Steve Penny is the former president of USAG who has since resigned because of his role in the sex abuse scandal.\textsuperscript{55} Penny wrote the organization’s response in the wake of the scandal.\textsuperscript{56} Penny proudly stated that USAG was among the first to institute a banned coaches policy.\textsuperscript{57} Contrary to Penny’s optimistic view of the banned list, it leaves much to be desired.

This list, used by USAG member gyms and any other fully independent gyms looking to hire a new coach, is anything but exhaustive.\textsuperscript{58} There are many instances of coaches not being placed on the banned list until years after they had already been convicted of a sexual assault crime.\textsuperscript{59} Neil Frederick, a coach at a USAG member gym, was convicted in 2002 of a third degree sex offense after fondling five girls between the ages of nine and ten.\textsuperscript{60} Despite joining Maryland’s sex offender registry in 2002, he was not put on USAG’s banned coaches list until 2016.\textsuperscript{61} Likewise, Vincent Pozzuoli, another USAG coach, molested a young boy at a

\textsuperscript{50} Kwiatkowski et al., \textit{supra} note 8 ("Katherine Starr . . . who has followed USA Gymnastics’ practices for years, said that when it comes to its own handling of allegations, USA Gymnastics, ‘errs on the side of the institution.’").

\textsuperscript{51} Id.


\textsuperscript{53} Id.


\textsuperscript{56} See \textit{USA Gymnastics’ response to Indianapolis Star’s report, supra} note 54.

\textsuperscript{57} Id.

\textsuperscript{58} Alesia et al., \textit{supra} note 52.

\textsuperscript{59} Id.

\textsuperscript{60} Id.

\textsuperscript{61} Id.
gymnastics camp. In 1994, Pozzuoli was arrested and convicted for what he had done to the child, but he continued coaching for USAG until 2011. Pozzuoli stopped coaching after he was convicted of the same offense against another child. He was added to Connecticut's sex offender registry in 2011, but did not find himself on USAG's banned coaches list until 2016, more than 20 years after his initial conviction for a sexual assault crime. USAG may have been one of the first to implement a new policy that, in theory, could do a great deal to protect gyms from hiring sexual predators. However, that goal cannot realistically be achieved when the list doesn't even name the most obvious sexual predators who are a part of sexual predator registries.

Additionally, once a coach is placed on USAG's banned coaches list, USAG does not notify gyms or its owners when a coach is suspended for alleged misconduct, pending an investigation. Former national team coach Terry Gray continued to work in a USAG gym in California after he had been suspended both by USAG and SafeSport. This latest disappointment was revealed in July 2018, after the club was notified by individuals within the gymnastics world that Gray was now on USAG's banned coaches list. The directors at Gray's gym, SCEGA, were not notified that Gray had been suspended and was under investigation. SCEGA had to contact USAG to find out information on Gray's suspension, where they were not given any information other than what it says on USAG's website. This information is significant because despite what ex-President Penny believes about its policy, it falls short of being effective if gyms are not notified when a coach they've hired is placed on the banned coaches list because of behavior stemming from his or her past employment.

Aside from the banned list policy, USAG also institutes national background checks to prevent any known sexual predators from obtaining

62. Alesia et al., supra note 52.
63. Id.
64. Id.
65. Id.
66. Id.
68. Id.
69. Id.
70. Id.
71. Id.
72. Id.
employment at USAG gyms. The background checks only go back seven years and only apply to professional and instructor members. The problem here is that half the staff at USAG member gyms are not subject to any kind of criminal back-ground check. The United States Association of Independent Gymnastics Clubs (hereinafter “USAIGC”), a gymnastics organization separate from USAG, requires background checks for all employees. USAIGC runs background checks for every individual working in one of its gyms, including owners. All employees working in any capacity, paid or unpaid, must complete a background check. Although Penny uses USAG’s im-plementation of a national background check to support its policy that gymnast safety is paramount, standard practice by other organizations shows a more thorough and exhaustive approach. Additionally, the background check policy raises some concerns considering the coaches who were on state sexual predator registries. USAG continued to employ coaches who were registered sex offenders. Vincent Pozzuoli and Neil Frederick, two coaches on the banned coaches list, continued to work with USAG despite having been convicted of sexual assault crimes. The significance of USAG’s history regarding its hiring and handling of sexual predators within the organization is the lack of adequate effort. Basic safeguards were not utilized to prevent predators from acquiring positions of authority over vulnerable gymnasts. Nassar’s abuse was lengthy, repetitive, and thinly veiled. More significantly, his behavior was not an isolated fluke. USAG, unfortunately, was set up to fail in this very specific way when it did not do enough to protect its own.

73. Alesia et al., supra note 52.
74. Id.
76. Id.
77. Id.
78. USA Gymnastics’ response to Indianapolis Star’s report, supra note 54; Alesia et al., supra note 52.
79. Alesia et al., supra note 52.
80. Id.
81. Id.
82. Id.
83. Id.
85. Id.
86. Alesia et al., supra note 52.
IV. USAG’S COVER UP

Once USAG began its delayed investigation into Nassar in 2015, it chose to take part in a coverup.87 Nassar and one of USAG’s attorneys, Scott D. Himsel, agreed to propagate a cover up story for Nassar.88 The story disseminated was that Nassar was too sick to attend important pre-Olympic events.89 Nassar and USAG decided to continue to explain Nassar’s absence from subsequent important USAG events by using the excuse that Nassar was stepping down from USAG involvement so he could turn his attention to his private practice.90 A string of emails show that Nassar and USAG decided on this cover up story together.91 But why was USAG more concerned with Nassar’s reputation than the safety of its own athletes and athletes at other gyms?

After USAG reported Nassar to the FBI, Nassar’s reputation remained in pristine condition for the following fourteen months.92 Nassar was not added to USAG’s list of people it had banned from the sport and Nassar was free to continue to work in at least one of USAG’s member gyms in Michigan and continue to work at Michigan State University.93 Nassar proceeded to assault at least fourteen more women during the fourteen month period when USAG failed to notify its members and colleagues in the sport that Nassar was under investigation for several sexual assault allegations.94

Fourteen women endured sexual abuse that could have possibly been avoided.95 USAG didn’t want to expose Nassar or its inability to stop him during his lengthy career.96 As a result, its own athletes suffered.97 Subsequently, in October 2018, Penny, ex-President of USAG, was arrested on an evidence tampering charge.98 Penny was charged with third degree felony evidence tampering after he “ordered the removal of documents

88. Id.
89. Id.
90. Id.
91. Id.
92. Id.
93. Id.
94. Id.
95. Id.
96. Reid, supra note 55.
97. Id.
98. Id.
from the Karolyi Ranch,” the former training site for USAG.99 The arrest took place after Penny ordered the documents be delivered to USAG headquarters in Indiana after learning of the investigation into Nassar, the authorities have been unable to recover the missing documents.100

Penny also offered a top security position at the United States Olympic Committee to Jay Abbott, an FBI agent investigating Nassar.101 Throughout the FBI investigation Penny attempted to cultivate friendships with those in charge of the case, including asking advice on how to phrase press releases.102 The “discussion about the security job points to the aggressive efforts Mr. Penny made to develop close relations with investigators and preserve the image of an organization as it drowned in scandal.”103 Emails between Penny and the FBI request help with “cover.”104 Penny, as the President of USAG, waited five weeks after the first documented instance of learning about Nassar’s abuse to report him to the FBI.105 Even after making the report he continued to misguidedly protect USAG’s image above all else.

USAG claims on its website, under the page explaining how it combats sexual misconduct, that it is proud to be “recognized as a leader among the U.S. national governing bodies in dealing with sexual misconduct.”106 It is not stated within that page who recognizes USAG as a leader in combatting sexual misconduct. If an athlete who was sexually abused during his or her time with USAG was asked about USAG’s policies it is unlikely he or she would’ve agreed to this sentiment.

V. USAG’S PRACTICE OF SILENCING VICTIMS

McKayla Maroney, a gold and silver Olympic medalist, believes USAG tried to silence her from speaking out about the abuse she endured at the hands of Nassar.107 In a lawsuit Maroney filed against USAG she

99. Reid, supra note 55.
100. Id.
102. Id.
103. Id.
104. Id.
105. Id.
alleges a non-disclosure agreement was forced upon her during a financial settlement signed in December 2016.\textsuperscript{108} Following Nassar’s arrest, law enforcement began to encourage victims of Nassar’s abuse to come forward with their stories.\textsuperscript{109} However, USAG took a different approach. Maroney’s settlement was signed a few months after the allegations against Nassar became public.\textsuperscript{110} The nature of the non-disclosure agreement, written by USAG’s lawyers, was so severe her attorney states she was not even able to speak to her friends or family about what she had been through without the threat of facing a lawsuit.\textsuperscript{111} Maroney’s attorney states she agreed to this settlement because she needed financial support to pay for psychological treatment due to the abuse and was desperate for help.\textsuperscript{112} USAG states that the confidentiality clause was actually proposed by Maroney’s attorney.\textsuperscript{113} Maroney’s attorney believes that is a “misleading” characterization of the events.\textsuperscript{114} Although neither side has commented further on the origin of the non-disclosure agreement, Maroney’s story falls in line with a series of prior attempts by USAG to favor silence and discretion even after Nassar was under investigation by the FBI.

Aly Raisman, another top Olympian who was abused by Nassar, also believes USAG places discretion and reputation above athlete safety.\textsuperscript{115} Raisman met with a consultant USAG hired to interview Nassar’s victims.\textsuperscript{116} After the meeting Raisman texted Steve Penny, former USAG president.\textsuperscript{117} Raisman wanted an additional meeting in order to further discuss Nassar’s abuse, to which Penny replied, “[t]here are very few people in the loop on this. Very, very few . . . most important is to address the issue with privacy and confidentiality in mind. I will be working through next steps as soon as I get the game plan in order.”\textsuperscript{118} Penny’s first reply to Raisman’s desire to share additional information pertinent to this sexual predator was to prioritize privacy and confidentiality.\textsuperscript{119} Raisman was also offered a settlement that would include a non-disclosure agreement

\begin{thebibliography}{11}
\item 108. Fitzpatrick & Connor, \emph{supra} note 107.
\item 109. \textit{Id}.
\item 110. \textit{Id}.
\item 111. \textit{Id}.
\item 112. \textit{Id}.
\item 113. \textit{Id}.
\item 114. \textit{Id}.
\item 116. \textit{Id}.
\item 117. \textit{Id}.
\item 118. \textit{Id}.
\item 119. \textit{Id}.
\end{thebibliography}
but Raisman refused to accept the settlement due to her desire to speak out about what Nassar had done to herself and her fellow athletes.\textsuperscript{120}

A third national team member, Maggie Nichols, was informed of the absolute priority of keeping the entire matter quiet.\textsuperscript{121} After Nichols’ coach overheard Nichols and Raisman discussing the abuse in 2015, she reported the matter to Nichols’ mother and to a USAG executive.\textsuperscript{122} Nichols’ mother, Gina, spoke to Penny on the phone who told her, “[w]e’ll have to look into this, but this is very private. This is very personal. And you cannot tell anybody.”\textsuperscript{123} Gina advocated contacting the police and child protection services, but it was made clear to her that USAG wanted to handle the matter internally.\textsuperscript{124}

One of the largest concerns following Nassar’s trial was that USAG contacted the FBI in the summer of 2015, five weeks after learning of the situation, but the abuse did not become public until over a year later.\textsuperscript{125} Throughout the months between the notification to the FBI and the public awareness of Nassar, victims and their families were routinely told not to speak out publicly about Nassar because they would ruin the FBI investigation.\textsuperscript{126} Penny and other USAG officials told the families of Raisman, Nichols, and Maroney, that they could not speak about the matter to anybody.\textsuperscript{127} They were told by USAG that the FBI had specifically requested silence and discretion, because that’s how investigations work and to discuss it would jeopardize the FBI’s case.\textsuperscript{128} By the time the FBI got in touch with Nichols, in June 2016, the agent told Maggie and her mother, Gina, that they had always been free to discuss the matter with anybody, that it wasn’t a secret.\textsuperscript{129}

The significance of the secrecy surrounding the handling of Nassar by USAG is that it raises questions regarding USAG’s priorities. USAG demonstrated through its actions that the reputations of Nassar and its own organization was the paramount concern.\textsuperscript{130} The gymnasts and their families who were eager and willing to discuss Nassar were stopped from doing so and because of that Nassar was successfully able to claim he was

\begin{thebibliography}{99}
\bibitem{120} Connor et al., \textit{supra} note 115.
\bibitem{121} \textit{Id.}
\bibitem{122} \textit{Id.}
\bibitem{123} \textit{Id.}
\bibitem{124} \textit{Id.}
\bibitem{125} \textit{Id.}
\bibitem{126} \textit{Id.}
\bibitem{127} \textit{Id.}
\bibitem{128} \textit{Id.}
\bibitem{129} \textit{Id.}
\bibitem{130} \textit{Id.}
\end{thebibliography}
retiring to focus on his own practice.131 USAG was complicit in propagating that story, and because of that, Nassar was free to continue sexually abusing gymnasts at Michigan State University after he had stopped working for USAG.132

VI. HOW IS USAG GOING TO PREVENT SOMETHING LIKE THIS FROM CONTINUING TO HAPPEN?

The only positive outcome about the sheer number of sexual assault victims coming forwarding following Nassar’s arrest is it forces USAG to make a change. USAG’s previous weak half-hearted attempts to stop sexual predators from gaining employment within its organization and access to athletes has done little to protect gymnasts. The alarming number of athletes who were assaulted by the same man show that systemic changes are necessary for the safety of all athletes moving forward. Although USAG acknowledged that it needed to make widespread systemic changes to its organization and practices, it was Congress who stepped in and put a plan into motion.133

The United States Center for SafeSport is an independent body created to adjudicate claims of sexual assault within the Olympic community.134 Congress passed an act, titled Protecting Young Victims From Sexual Abuse and Safe Sport Authorization Act of 2017.135 This Act contains a mandatory reporting element, a civil remedy for personal injuries, and created the independent body SafeSport which will have jurisdiction over any kind of abuse allegation.136 SafeSport, an independent body, would also be responsible for developing and implementing policies and procedures that would protect athletes and seek to stop abuse before it occurs.137

SafeSport’s goal is to end all kinds of abuse within sport, including bullying, harassment, hazing, physical abuse, emotional abuse, and of course, sexual abuse.138 Its mission is to focus on “its highest priority, the safety and well-being of the athletes” and that it will promote “a safe, empowered and positive training environment.”139 SafeSport emphasizes

131. Connor et al., supra note 115.
132. Id.
134. Id.
135. Id.
136. Id.
137. Id.
138. About USA Gymnastics, supra note 22.
139. Id.
education and outreach as the main way to create safe sporting environments. SafeSport's budget includes $3.1 million from the USOC and a $2.3 million, three-year federal grant that can only be used for prevention and education.

Although SafeSport seems like a positive step in the right direction, it may not be enough. There are already concerns that USAG is not properly cooperating with SafeSport. In addition to the numerous lawsuits USAG is facing from athletes who were sexually abused by Nassar, USAG is also confronted with a suit arising out of an incident that occurred in 1979. "Marcia Frederick, the first U.S. woman to win a world title, alleged that her coach, Richard Carlson, had sexually abused her in 1979 and 1980." Frederick was sixteen at the time and her case was submitted to USAG in September of 2015, a little over a year before SafeSport was opened. After Frederick submitted her case, she was told by the former president of USAG, Steve Penny, that the case would hopefully be resolved within ninety days. This response came three months after her initial formal complaint was submitted. Frederick was only interviewed twice regarding the sexual abuse. When she would email USAG to ask for updates on the case her emails would remain unanswered for weeks. More than two years have passed since Frederick filed a formal complaint against her coach, Richard Carlson. Contrary to the initial promise of a resolution within or around the ballpark of ninety days, Frederick’s case was not resolved until June of 2018.

The circumstances regarding Frederick’s complaint may have been less suspicious before the Nassar scandal. USAG had hired private

140. About USA Gymnastics, supra note 22.
142. Id.
144. Id.
145. Id.
146. Id.
147. Id.
148. Id.
149. Id.
150. Id.
151. See Scott M. Reid, Maria Frederick, alleging coach had sex with her, sues USA Gymnastics, USOC, ORANGE COUNTY REG. (June 20, 2018), https://www.ocregister.com/2018/06/20/maria-frederick-sues-usa-gymnastics-usoc-alleging-coach-had-sex-with-her/.
152. Armour & Axon, supra note 143.
firms and impartial third parties to investigate the matter, and although the investigation took much longer than originally anticipated, it’s understandable that the investigation may take longer when the alleged abuse took place more than thirty years ago.\textsuperscript{153} However, it’s hard to understand why USAG is choosing to hold onto this case.\textsuperscript{154} Almost all other national governing bodies within the Olympics community are turning over their athlete abuse cases to SafeSport.\textsuperscript{155} The National Governing Bodies (hereinafter “NGB”) who are subject to SafeSport are only required to turn over cases where complaints are filed after the creation date of SafeSport.\textsuperscript{156} There is no official policy concerning reports made before March of 2016, however most of the other NGBs are turning over all of their sexual misconduct complaints.\textsuperscript{157}

The USOC’s chief of Paralympic sport and NGB organizational development, Rick Adams, said that the expectation following the formation of SafeSport was that “all cases should be submitted to the center.”\textsuperscript{158} It raises a red flag that USAG hasn’t followed this trend. The four other NGBs that kept complaints prior to March 2016 did so because they were in the process of finishing their investigations and have since closed the case or the complaints had been handed over to the police.\textsuperscript{159} Not only had Frederick’s complaint been within USAG’s possession for more than two years, but USAG was also already under severe scrutiny for its mishandling of sexual abuse claims.\textsuperscript{160}

In light of the seriousness and volume of the allegations against USAG concerning its treatment of sexual misconduct within its organization, it was surprising that it held onto Frederick’s case.\textsuperscript{161} Although USAG didn’t break any SafeSport rules by keeping a case that was reported prior to SafeSport’s opening, “it raises questions about the organization’s judgment, especially given that the governing body remains under intense scrutiny and pending litigation.”\textsuperscript{162} The benefit of SafeSport is not only that they resolve cases in around 60 days, compared to the two year wait Frederick endured, but they are trained specifically to handle

\textsuperscript{153} Armour & Axon, supra note 143.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
these types of situations. SafeSport is independent of USAG and was created with the purpose of solely handling complaints of abuse within the sport world. USAG’s desire to hold onto allegations that transpired before SafeSport opened its doors points towards USAG’s continued desire to keep matters internal. This desire continues to overpower the dire need to advocate for the safety of its athletes both past and present.

VII. DOCTRINE OF RESPONDEAT SUPERIOR

There is great potential for the doctrine of respondeat superior to impose liability onto USAG because the organization employed Nassar. When an employee of an organization has committed a tort the doctrine of respondeat superior may apply. Under the doctrine of respondeat superior:

A private employer, although not liable because of its own acts, can be held liable for harm resulting from the wrongful acts of its employee committed within the scope of the employment. The doctrine rests on the theory that the employer, through its ability to control the actions of the employee, will be able to avoid accidents by requiring the employee to follow certain precautions.

This theory creates liability where it ordinarily would not exist. Indiana case law has considered sexual assault, in certain circumstances, to be within the scope of employment. Although criminal activity is not typically considering to be within the scope of employment, an “employee’s wrongful act may still fall within the scope of his employment if his purpose was, to an appreciable extent, to further the employer’s business.” The criminal act of an employee may create liability for the employer “despite the fact that the crimes were committed to benefit the employee, because the criminal acts originated in activities so closely associated with the employment relationship as to fall within its scope.”

163. Armour & Axon, supra note 143.
164. Id.
165. Id.
166. Id.
168. Id.
169. Id.
170. Id.
172. Id.
173. Id.
In *Hansen* the court held that an “employer is not always immune from vicarious liability for an employee’s sexual misconduct . . . [it becomes] a genuine issue of fact only in circumstances where the employee’s job duties involved extensive physical contact with the alleged victim.”  

In *Stropes*, a nurse who committed sexual assault bathed and dressed the child in his care as part of his job description, the assault occurred within the confines of fully authorized acts. The court in *Stropes* agree that it is easy to see how sexual assault could never be considered within the scope of one’s employment, however the test adopted requires the court to place the focus on “how the employment relates to the context in which the commission of the wrongful act arose.”  

The nurse, Griffin, was authorized to touch the child’s body and was granted full, unsupervised access to the child during that access. Because of this, the court allowed the doctrine of *respondeat superior* to be submitted to the jury to determine whether the employer was liable for Griffin’s actions.

Similarly, in *Southport Little League v. Vaughan*, the Indiana Court of Appeals affirmed after the trial court denied a motion for summary judgment on the claim of *respondeat superior*. In *Vaughan*, Kent Simmerman, a volunteer for Southport Little League, molested two young boys while he was fitting them for their baseball uniforms. Simmerman was the equipment manager and he was on the executive committee of the board of directors. Simmerman was authorized to bring boys into an equipment shed for these fittings, where he could lock the door behind him, he was often the only adult present. After Simmerman’s arrest, the parents of the children filed suit against the Little League for vicarious liability and negligence.

The Court of Appeals found that a genuine issue of material fact existed as to the claim of *respondeat superior*. The Court of Appeals held:

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175. *Stropes*, 547 N.E.2d at 249.
176. *Id*.
177. *Id*.
178. *Id*.
180. *Id* at 266-67.
181. *Id* at 266.
182. *Id*.
183. *Id* at 267.
184. *Id* at 269-70.
We have previously stated that if some of the employee’s actions were authorized, the question of whether the unauthorized acts were within the scope of employment is one for the jury. Konkle, 672 N.E.2d at 457. However, if none of the employee’s acts were authorized, the matter is a question of law. Id. Because the Vaughans’ designated materials raise the inference that some of Simmerman’s acts were authorized (such as fitting the youths’ uniforms) when he viewed J.V. and M.V.’s genitalia for his sexual gratification and when he sexually molested the youths, we hold that the trial court properly denied the Little League’s motion for summary judgment.\(^\text{185}\)

There were many factual elements of Simmerman’s actions that were significant to the Court. Simmerman wore a baseball cap and tee-shirt with the Southport Little League name on it, including the title of “Official” on his shirt.\(^\text{186}\) The Court emphasized that minors are taught to respect authority figures and the Little League afforded Simmerman the authority to instruct the children to follow him into the equipment shed on numerous occasions.\(^\text{187}\) The equipment shed was not open to the public and Simmerman was given access to this locked shed because of his position and affiliation with the Little League.\(^\text{188}\) The Little League did not, in any way, authorize Simmerman to sexual assault the boys however:

When an individual is clothed with authority by an organization in which youths are participating, such as Little League baseball, youths will typically comply with requests or commands of the adult individual in authority. Thus, the Little League, by appointing Simmerman an official, essentially authorized Simmerman to exert his authority over youths who participated in Little League baseball.\(^\text{189}\)

Although sexual assault is never within the definition of one’s job responsibilities, it can be within the scope of employment if the nature of the employment is an essential element to the success of the assault.\(^\text{190}\) The scope of employment question is not based upon the predator’s personal perverted desires, rather “the appropriate focus must be on how the employment relates to the context in which the wrongful act arose.”\(^\text{191}\) Simmerman was permitted to bring the boys into the shed without

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\(^{185}\) *Southport Little League*, 734 N.E.2d at 270.  
\(^{186}\) *Id.* at 271.  
\(^{187}\) *Id.*  
\(^{188}\) *Id.*  
\(^{189}\) *Id.* at 271-72.  
\(^{190}\) *See id.* at 272-73.  
\(^{191}\) *Id.* at 273.
supervision and assist them in dressing and undressing, the assaults took place within the context of what was permitted and therefore the claim of respondeat superior survived a summary judgment motion.\textsuperscript{192}

Nassar abused his victims while he was engaging in authorized acts that involved extensive unsupervised physical contact with his victims and therefore respondeat superior should apply.\textsuperscript{193} Nassar is a doctor of osteopathic medicine, which means he treats patients by using his hands to "move a patient's muscles and joints with techniques that include stretching, gentle pressure and resistance."\textsuperscript{194} Nassar would penetrate the gymnasts' vaginas and anuses with his ungloved hands during these medical procedures, claiming it was a part of the medical treatment.\textsuperscript{195} Similar to Stropes, the employer authorized Nassar to touch his patients and he used the authority granted by his employer to assault his patients under the guise of medical treatment.\textsuperscript{196} Although sexual assault did not further the interests of Nassar's employer, USAG, it was done alongside treatment he was permitted to conduct, satisfying the context standard laid out in Vaughan.

Nassar's actions are akin to Simmerman's in Vaughan because Nassar was given a level of authority that the gymnasts felt they had to respect.\textsuperscript{197} Similar to the authority given to Simmerman to bring the boys into the equipment shed to fit them for uniforms, Nassar was free to select the gymnasts he wanted to work with at the Karolyi Ranch.\textsuperscript{198} Nassar was the doctor who would determine whether they were healthy enough to compete.\textsuperscript{199} Many of the gymnasts who expressed their feelings about the type of treatments Nassar would perform, namely Nassar touching them in appropriate ways, were told they misunderstood his professional and effective techniques.\textsuperscript{200} USAG authorized Nassar to touch his patient's bodies and to be alone with them.\textsuperscript{201} USAG did not require any additional personnel to be in the room during these treatments.\textsuperscript{202} The gymnasts

\textsuperscript{192} Southport Little League, 734 N.E.2d at 270.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} Connor et al., supra note 115.
\textsuperscript{199} Id.
\textsuperscript{200} See id.
\textsuperscript{201} Id.
abused by Nassar were not accompanied by a nurse, coach, or parent. They were left alone with Nassar. USAG failed to implement even the most basic precautions, such as not allowing Nassar to be alone with his patients during treatments. USAG should be subject to respondeat superior liability because Nassar’s actions could be classified as within the scope of his employment. The only reason Nassar was granted such unfettered access to the women he assaulted is because USAG granted it to him.

VIII. DOES MICHIGAN STATE UNIVERSITY FACE LIABILITY?

USAG is not the only organization that should be subject to some kind of liability due to Nassar’s actions. Michigan State University (hereinafter “MSU”) has also put themselves on the chopping block. The University employed Nassar as a team physician and assistant professor in 1997. Nassar worked at MSU consistently until he was fired in 2016. MSU conducted its own investigation in 2014 after a student made a complaint to the University. The student, Amanda Thomashow, was abused by Nassar in his university office. Thomashow states that Nassar began to sexually abuse her during the appointment after he asked the female resident to leave the room. MSU did not have any safeguards in place to protect women from a doctor utilizing his position to sexually abuse patients.

205. See JOHN BOURDEAU, supra note 167 (explaining that the doctrine of respondeat superior provides for vicarious liability for employers when the employee commits a tortious act while in the scope of his employment).
208. Id.
209. Id.
210. Mencarini, supra note 206.
211. Id.
212. Id.
213. Id.
In response to Thomashow’s complaint, MSU states it conducted an investigation into Nassar and his techniques.\textsuperscript{214} The complaint was handled by Kristine Moore, an MSU employee responsible for overseeing these kinds of reports.\textsuperscript{215} Moore concluded the techniques employed by Nassar were “medically appropriate.”\textsuperscript{216} The report added that Thomashow “likely misinterpreted it as sexual assault because she wasn’t familiar with osteopathic medicine and wouldn’t know the ‘nuanced difference.’”\textsuperscript{217} This conclusion was arrived at based on the opinions of three medical specialists and an athletic trainer.\textsuperscript{218} Interestingly enough, all four of these opinions came from individuals who work for the university and have personal ties with Nassar.\textsuperscript{219} Additionally, one of the physicians who reviewed Nassar’s medical practices was recommended by Nassar himself.\textsuperscript{220} In the face of a very serious complaint of sexual misconduct, MSU allowed Nassar to handpick the professional who would evaluate his techniques.\textsuperscript{221}

Moore gave Thomashow a report at the conclusion of the investigation.\textsuperscript{222} This report included the conclusion that Nassar had not done anything medically inappropriate.\textsuperscript{223} The report Thomashow received was missing key information.\textsuperscript{224} Moore created two reports in response to Thomashow’s complaint.\textsuperscript{225} Moore submitted a different report to the university.\textsuperscript{226} The second, more detailed report, stated that Nassar’s techniques were “inflicting ‘unnecessary trauma’ on his patients and putting the university at risk.”\textsuperscript{227} The report also stated “that whether medically sound or not, the failure to adequately explain procedures such as these invasive, sensitive procedures, is opening the practice up to liability.”\textsuperscript{228}

\begin{itemize}
  \item \textsuperscript{215} Id.
  \item \textsuperscript{216} Id.
  \item \textsuperscript{217} Mencarini, \textit{supra} note 206.
  \item \textsuperscript{218} Kitchener, \textit{supra} note 214.
  \item \textsuperscript{219} Id.
  \item \textsuperscript{220} Mencarini, \textit{supra} note 206.
  \item \textsuperscript{221} Id.
  \item \textsuperscript{222} Kitchener, \textit{supra} note 214.
  \item \textsuperscript{223} Id.
  \item \textsuperscript{224} Id.
  \item \textsuperscript{225} Id.
  \item \textsuperscript{226} Id.
  \item \textsuperscript{227} Id.
\end{itemize}
Nassar's practice of skin-to-skin contact was not widely utilized and the report concluded that the patients should be given a choice to decide whether they would allow the skin-to-skin contact.\(^{229}\)

There are a few interesting points at play here. The first being that the investigation was done internally. MSU utilized its own employees to review the conduct of a colleague.\(^{230}\) There are specific requirements a university needs to fulfill to properly investigate a Title IX complaint.\(^{231}\) Because of these requirements, many colleges hire coordinators who are specifically trained to handle Title IX cases.\(^{232}\) While the Education Department encouraged schools to create internal boards to adjudicate Title IX matters, they “warned them against potential conflicts of interest. Particularly if the case involves staff members, as opposed to just students, it can be difficult to hold a fully independent investigation.”\(^{233}\)

A Title IX attorney, Brett Sokolow, has seventeen college clients who utilize his firm to address every single Title IX complaint.\(^{234}\) Sokolow believes that if there is any possibility of a conflict of interest, the school has a responsibility to utilize a neutral third-party to investigate.\(^{235}\) Universities are also more likely to hire an independent investigator if the case is “particularly sensitive or high-profile.”\(^{236}\) In 2014, when Thomashow made her complaint, Nassar was widely famous in the gymnastics world for his role with USAG.\(^{237}\) Nassar is a high-profile individual, and MSU and its students would’ve benefitted greatly from an external investigation.\(^{238}\) Erin Buzuvis, a law professor who focuses on Title IX litigation, believes it’s essential for universities to utilize external investigators if the case is likely to receive media attention.\(^{239}\) A university of MSU’s size and prestige is vulnerable to the kind of public judgment they received.

MSU should also be facing liability under \textit{respondeat superior} for the same reasons as USAG.\(^{240}\) However, Michigan law differs from Illinois law.\(^{241}\) Michigan law has a narrower definition of “scope of

\(^{229}\) Chambers, supra note 228.
\(^{230}\) Kitchener, supra note 214.
\(^{231}\) Id.
\(^{232}\) Id.
\(^{233}\) Id.
\(^{234}\) Id.
\(^{235}\) Id.
\(^{236}\) Id.
\(^{237}\) Id.
\(^{238}\) Id.
\(^{239}\) Id.
\(^{240}\) See id.
employment." There is an exception to respondeat superior that creates employer liability for an employee’s tort. This exception occurs when the "employee was aided in harming the plaintiff by the existence of the agency relationship between the employee and the employer." The court declined to adopt this exception because it is "not tied to the scope of employment but, rather, to the existence of the employment relation itself, the exception strays too far from the rule of respondeat superior employer nonliability." Despite declining to adopt the exception, the court did note that the employer may still be liable for its "negligence in hiring, training, and supervising their employees."

Here, MSU may be liable for failing to supervise Nassar. A claim of negligent supervision is always evaluated independently from vicarious liability. An employer will have violated its duty to supervise if it "knew or should have known of the existence of any special circumstances regarding [the employee] that could establish a duty of care to third persons." The plaintiff needs to articulate a "reasonably foreseeable risk of harm from which would arise an independent duty to supervise." MSU was aware of a special circumstance in relation to Nassar. Once Thomashow filed her report, MSU learned of Nassar’s proclivity to conduct himself in a way that was harmful to his patients. MSU did not believe Nassar acted inappropriately, but they did admit that his actions opened them up to potential liability. Following MSU’s internal investigation into Thomashow’s complaint, MSU outlined new protocols for Nassar to follow.

Nassar was told that he is not allowed to treat patients alone and to avoid skin-to-skin contact. However, these recommendations were not enforced. In fact, Nassar’s supervisor at MSU, William Strampel, is

242. Zsigo, 716 N.W.2d at 221.
243. Id.
244. Id. at 224.
245. Id. at 226.
246. Id.
247. Id.
250. Id. at 26.
252. Id.
253. Id.
254. Id.
255. Id.
facing his own accusations.\textsuperscript{256} Strampel stepped down from his position as dean of the university’s College of Osteopathic Medicine for “medical reasons.”\textsuperscript{257} Shortly after he stepped down from his position, Strampel was arrested for criminal sexual conduct and willful neglect of duty.\textsuperscript{258} MSU learned through an anonymous survey in 2015 that Strampel acted inappropriately towards students.\textsuperscript{259} Strampel’s subsequent arrest for criminal sexual misconduct and the fact that MSU learned of his inappropriate behavior are key facts.\textsuperscript{260} MSU’s failures became even more apparent when they entrusted Nassar’s supervision to a colleague who is suspected of carrying out the same behavior.\textsuperscript{261} Nassar acted in an inappropriate way that MSU was alerted of and they failed to supervise when they did not enforce new protocols.\textsuperscript{262} This decision was compounded when MSU entrusted Nassar’s supervision to an individual who also had a history of sexual misconduct.\textsuperscript{263}

IX. \textbf{EXTENDING NON-DELEGABLE DUTY AT THE KAROLYI RANCH}

In Indiana, the doctrine of \textit{respondeat superior} may not apply because the tortious act was not committed during the scope of employment.\textsuperscript{264} If this is the case, there is an exception for non-delegable duties.\textsuperscript{265} “A nondelegable duty is one that public policy holds to be so important that one party should not be permitted to transfer the duty, and its resultant liability, to another party.”\textsuperscript{266} Liability under the non-delegable duty doctrine encompasses activity that would be excluded from \textit{respondeat superior} because the actions were not considered to be within

\begin{itemize}
  \item \textsuperscript{257} Id.
  \item \textsuperscript{258} Id.
  \item \textsuperscript{259} Tracy Connor, \textit{Michigan State admits it was warned about Dean William Strampel in 2015}, NBC NEWS (May 2, 2018), https://www.nbcnews.com/news/us-news/michigan-state-admits-it-was-warned-about-dean-william-strampel-n870616.
  \item \textsuperscript{260} See Wong, supra note 256 (explaining “that a lack of accountability at MSU is largely to blame, and the allegations against Strampel offer the latest clue as to exactly how accountability crumbled when it came to punishing Nassar”).
  \item \textsuperscript{261} See id.
  \item \textsuperscript{262} See id.
  \item \textsuperscript{263} See id.
  \item \textsuperscript{264} Stropes v. Heritage House Childrens Ctr., Inc., 547 N.E.2d 244, 247 (Ind. Ct. App. 1990).
  \item \textsuperscript{265} Id.
  \item \textsuperscript{266} JOHN BOURDEAU, supra note 167, § 136.
\end{itemize}
the scope of employment. 267 This is known as the common carrier exception, which is typically applied to railroads, airlines, innkeepers, theatre managers, merchants, etc. 268 The Dickson court ruled that an “enterprise which has induced an individual to give over the control of his personal comfort and safety to its care assumes a special duty to protect him from injury, particularly from its own employees.” 269 Indiana’s case law has expanded the definition of “common carrier” to extend past what is typically considered a non-delegable duty, thus allowing for greater liability for employers. 270

The court in Stropes permitted a resident of a residential children’s center to sue the facility he was living in after being sexually assaulted by a nurse’s aide. 271 The child, David Stropes, was fourteen and suffered from cerebral palsy and mental difficulties. 272 The nurse who assaulted Stropes was “expected to feed, bathe, and change the bedding and clothing of residents, including David Stropes, as well as to monitor their comfort and safety.” 273 It was essential for the court’s ruling that the nurse was permitted to “touch and handle” the bodies of the patients. 274 Under the question of respondeat superior, the court permitted the question to go to trial because the nurse’s nefarious behavior was very closely linked with the authorized behavior. 275

The court also found that there was a “contract of passage” between Stropes and the residential facility, which led to a non-delegable duty. 276 The residential center could be found liable regardless of whether the assaults were considered within the scope of employment, as would be needed for the doctrine of respondeat superior. 277 The court pointed out that the “control and autonomy surrendered by the passenger to the carrier for the period of accommodation” applies to this situation just as it would for an airline passenger. 278 The “imposition of liability . . . is premised on the control and autonomy surrendered” to the one by the other. 279 The court held that:

267. JOHN BOURDEAU, supra note 167, § 136.
268. Stropes, 547 N.E.2d at 250.
269. Id. at 252.
270. Id. at 247.
271. Id. at 254.
272. Id. at 245.
273. Id.
274. Id.
275. Id. at 249.
276. Id. at 252.
277. Id.
278. Id.
279. Id.
Liability is predicated on the passenger’s surrender and the carrier’s assumption of the responsibility for the passenger’s safety, the ability to control his environment, and his personal autonomy in terms of protecting himself from harm; therefore, the employer can be held responsible for any violation by its employee of the carrier’s non-delegable duty to protect the passenger, regardless of whether the act is within the scope of employment.280

Interim Healthcare of Fort Wayne, Inc. v. Moyer involved a home health aide employed by Interim Healthcare.281 The aide was not authorized to administer any medication but did so and injured the child.282 The child’s parents sued Interim Healthcare arguing it was liable for its employee’s actions.283 The non-delegable duty exception was applied to this scenario as well.284 Interim argued that “it ‘never contracted for, nor agreed to assume, the entire responsibility for [the child’s] comfort and safety.’ Rather, ‘Interim’s role in providing home health aides was merely to assist [the child] with personal care activities.’”285 However, the court was not persuaded.286 Given “the degree of [the child’s] dependence on [the aide] for her care, and the degree of [the aide’s] control over [the child] while in the [family’s] home, [the court] conclude[d] that Interim assumed a non-delegable duty to provide for [the child’s] care and safety.”287 The important element here, as in Stropes, was the control exerted over the child and the child’s inability to defend herself from unwanted situations.288

Contrary to Stropes, the Supreme Court of Indiana did not extend the non-delegable duty exception to the Evansville Police Department.289 Officer Montgomery sexually assaulted Jennifer Cox after he was called to a scene where she was drunkenly arguing with a friend.290 Officer Montgomery assaulted Cox in her apartment after he brought her home.291 The court allowed the suit Cox filed against the police department to continue as to respondeat superior but did not find that there was enough to support

280. Stropes, 547 N.E.2d at 253.
282. Id.
283. Id.
284. Id. at 435.
285. Id. at 434.
286. Id. at 435.
287. Id.
288. Id. at 434.
290. Id. at 457.
291. Id.
the common carrier exception.  

The court specifically looked at the relationship between Cox and the Evansville Police Department, rather than just the relationship between Cox and Officer Montgomery.  

Cox did not enter into a contract of passage with Evansville.  

This fundamental feature was missing from the relationship.  

The common carrier relationship is found when an individual accepts an invitation to be a patron or guest and the "carrier assumes a special, contractual duty of protection."  

The court needed to see that kind of invitation and acceptance regarding Cox and Evansville.  

The relationship between a police department and an individual that one of its officers had taken into custody lacks the components of a common carrier and does not permit the non-delegable duty doctrine to apply.

If the doctrine of respondeat superior does not apply to USAG, the Indiana courts should apply the non-delegable duty doctrine to USAG for Nassar’s abuse.  

The Karolyi Ranch, owned by Martha and Bela Karolyi, is the national training center for USAG tucked away in the Sam Houston National Forest.  

Those in attendance are gymnasts who are likely to reach the highest levels of competitive gymnastics, including those with hopes of competing in the Olympics.  

The gymnasts who attend come from gyms all over the country and are invited to the camp once a month, chaperoned only by their coach.  

The ranch is owned by the Karolyis, but USAG leased the property and operated the training camps.  

Nassar worked at the Ranch but was not under the direct supervision or control of the Karolyis; he was employed by USAG.

Before engaging in discussion as to applying the non-delegable duty doctrine, it’s essential to understand the conditions at the Karolyi Ranch.

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292.  Cox, 107 N.E.3d at 467.
293.  Id.
294.  Id.
295.  Id. at 466 (explaining that a contract of passage is a fundamental feature).
296.  Id.
297.  See id. at 467 (“The same is true of the relationships here.”).
298.  See id. (declining to extend the non-delegable duty doctrine to “outside relationships formed by a ‘contract of passage’”).
299.  See supra Section VII.
300.  Adams, supra note 204.
301.  Id.
303.  Connor et al., supra note 115.
304.  Id.
and how it functions.\textsuperscript{305} Although former USAG President Steve Penny stated that the women were treated well at the Ranch, even receiving spa days, Olympic Medalist Aly Raisman denies any kind of pampering.\textsuperscript{306} Raisman, a survivor of Nassar’s abuse, stated that the conditions at the Ranch were not only unclean, but created an ideal environment for Nassar to abuse his victims.\textsuperscript{307} The Ranch does not have cellphone service, and in the event of an emergency, a helicopter would be needed to transport an individual to a hospital.\textsuperscript{308} Mattie Larson, a former gymnast, described the eerie feeling she had when entering the Ranch, as she felt removed from civilization.\textsuperscript{309} Further, she believes the isolated nature of the Ranch was exactly what the Karolyis wanted their athletes to feel.\textsuperscript{310}

The Karolyi Ranch has been credited with pumping out the world’s best Olympic athletes.\textsuperscript{311} It has also been the site of numerous counts of sexual assault committed by Nassar. Many of the minors who attend training sessions at the Karolyi Ranch do so unaccompanied by their parents.\textsuperscript{312} In addition to attending camp alone, the Karolyis are known to use intimidation to push the gymnasts to perform better.\textsuperscript{313} During Larson’s testimony at Nassar’s sentencing hearing, Larson described what she endured at the camp.\textsuperscript{314} Larson faced diet restrictions and was forced to train through painful injuries.\textsuperscript{315} Larson explained how Nassar would bring her food when she was hungry, which was a welcomed change from the diet the Karolyis forced upon the girls.\textsuperscript{316} Larson believes Nassar was grooming her for the sexual abuse that would eventually come.\textsuperscript{317}

\textsuperscript{305} See generally Adams, supra note 204 (describing the conditions of the Karolyi Ranch from the perspective of a past participant).

\textsuperscript{306} Id.

\textsuperscript{307} Id.


\textsuperscript{310} Yan, supra note 308.

\textsuperscript{311} Adams, supra note 204.

\textsuperscript{312} Howard, supra note 202.

\textsuperscript{313} Yan, supra note 308. The Karolyis are facing their own civil lawsuit after many gymnasts reported physical and verbal abuse during their time at the Ranch. Id.

\textsuperscript{314} Id.

\textsuperscript{315} LeBlanc, supra note 309.

\textsuperscript{316} Id.

\textsuperscript{317} Id.
The conditions were so poor at the Ranch that Larson attempted to give herself a concussion to get out of attending camp.\textsuperscript{318} Larson purposefully hit her head on her bathroom tile floor in an act of desperation.\textsuperscript{319} Although Larson escaped the abuse she’d likely endure that summer, Larson reported that at camp the following year, Marta Karolyi told her another gymnast had fallen out of her bunk and hit her head but still made it to practice the next day.\textsuperscript{320} The abuse Larson endured from the Karolyis was bad enough on its own.\textsuperscript{321} The abuse also had the impact of making Larson and other gymnasts feel like there was no one they could turn to for help once Nassar turned his attention onto them.\textsuperscript{322}

Raisman believes the culture at the Ranch made the gymnasts vulnerable and created the perfect environment for Nassar to abuse his victims.\textsuperscript{323} Raisman explained how after a long day of training, the coaches would leave, and the gymnasts would be left in their rooms for the night.\textsuperscript{324} The coaches were the only individuals responsible for the particular athletes and once they went home for the day, the minors were left at the Ranch without any kind of supervision.\textsuperscript{325} Nassar would go into their dorm rooms and treat the gymnasts while they were in their beds.\textsuperscript{326} Raisman, an elite athlete who has received attention from doctors many times over the course of her career, described how incredibly inappropriate it was to receive medical treatment in her bed at night, rather than on a table in a proper room.\textsuperscript{327} Raisman believes this alone was a glaring red flag that USAG turned a blind eye to.\textsuperscript{328}

The extended nondelegable duty doctrine is appropriate in this circumstance.\textsuperscript{329} The athletes who were at Karolyi Ranch, the official training center for USAG, were under the complete control of the Karolyis and Nassar.\textsuperscript{330} Analogies can be drawn to the children at residential facilities,
such as in Stropes, who were abused by employees of the facility.\(^{331}\) While at the Ranch the
gymnasts do not have cell phone service and they are invited to the camp unaccompanied by their parents or guardian.\(^{332}\) Gymnasts like Larson testified to the isolated feeling that came over her as she entered the site, as the girls felt very much alone and unprotected, especially at night when their individual coaches would leave, not returning until the next day.\(^{333}\)

Similar to Stropes, the athletes surrender their autonomy and control when they begin training at the camp.\(^{334}\) After a long day of training, the athletes, most of whom are minors, are left unsupervised in the hands of Nassar.\(^{335}\) The gymnasts are hungry, unclean, and forced to train through injuries that should have been treated with rest.\(^{336}\) Larson testified that she dislocated both ankles but was forced to continue training after Nassar said she would be fine, injuring herself to the point where she was “literally left crawling the rest of the camp.”\(^{337}\) These circumstances created an environment where the gymnasts did not feel as though they had free will.\(^{338}\)

Under the criteria discussed in Stropes the conditions at the Karolyi Ranch allow for an expansion of the nondelegable duty doctrine.\(^{339}\) One of the factors set out by the test in Stropes is the patrons “ability to control [their] environment, and [their] personal autonomy in terms of protecting [themselves] from harm.”\(^{340}\) At the Karolyi Ranch the gymnasts are in a regimented program without the opportunity to control how they are treated.\(^{341}\) Aside from the lack of cell service, access to food, and physical abuse from the Karolyi’s, the gymnasts feared what would happen if they were to speak up about the abuse.

\(^{331}\) Stropes, 547 N.E.2d at 245; LeBlanc, supra note 309.

\(^{332}\) See Yan, supra note 308 (“The complete detachment from the outside world, on top of careless and neglectful adults, made the ranch the perfect environment for abusers and molesters to thrive.”).

\(^{333}\) Id.

\(^{334}\) See LeBlanc, supra note 309 (describing the conditions the athletes dealt with during their time at the Ranch).

\(^{335}\) See id. (describing how Nassar would treat their injuries after a day of practice).

\(^{336}\) Id.

\(^{337}\) Id.

\(^{338}\) See Yan, supra note 308 (stating that the Karolyis provided no supervision of Nassar to allow their “regime of fear” to thrive).

\(^{339}\) See Stropes v. Heritage House Childrens Ctr., Inc., 547 N.E.2d 244, 244 (Ind. Ct. App. 1990) (expanding the applicability of the nondelegable duty doctrine).

\(^{340}\) Id. at 253.

\(^{341}\) See LeBlanc, supra note 309 (describing how the athletes trusted Nassar as their caregiver and feared their coaches).
When McKayla Maroney was abused for the first time by Nassar, it was at the ranch, at the age of thirteen.\textsuperscript{342} Maroney was told to come to her treatment wearing shorts and no underwear.\textsuperscript{343} Like many gymnasts, Maroney went to Nassar for help with injuries, but instead she was abused during the checkup.\textsuperscript{344} Sensing her unease, Nassar told Maroney she shouldn’t mention the technique to anyone because “nobody would understand this and the sacrifice that it takes to get to the Olympics.”\textsuperscript{345} Maroney’s Olympic dream was used as a bargaining chip; in order to get to the Olympics she would have to keep quiet.\textsuperscript{346}

Maroney and other gymnasts understood that if they were a “problem” at the Ranch it would have a negative impact on their ability to achieve their dreams.\textsuperscript{347} Additionally, if Nassar didn’t clear them medically, they wouldn’t be allowed to compete.\textsuperscript{348} Maroney remembers an occasion where Nassar cleared her to compete in the Olympics although she had an injury that should have put her on the sidelines.\textsuperscript{349} Maroney understood that Nassar had lied so she could stay on the team, she also understood that her silence regarding his treatment was what afforded her that lie.\textsuperscript{350}

Maroney was groomed in preparation for the abuse; Nassar utilized the conditions at the camp to gain unfettered access to Maroney and earn her silence.\textsuperscript{351} Maroney explained how Nassar brought her a loaf of bread when she was starving at camp, how she had relied on these kind gestures to carry her through the rigorous training.\textsuperscript{352} Maroney believes she was a favorite of Nassar’s, and other gymnasts agree he appeared particularly focused upon her.\textsuperscript{353} Maroney recounted how her name was always the last one on the list of girls to receive treatments from Nassar.\textsuperscript{354} By the time Maroney was seen all the other athletes and faculty were already back in their rooms, she was completely alone without supervision or

\textsuperscript{343} \textit{Id.}
\textsuperscript{344} \textit{Id.}
\textsuperscript{345} \textit{Id.}
\textsuperscript{346} \textit{See id.}
\textsuperscript{347} \textit{See id.}
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protections. Maroney remembers how she would cry through the entire treatment with no one around to hear her. At one point Maroney said out loud in a car with three teammates and a USAG coach that she was being sexually abused by Nassar.

John Geddert, the coach who overheard this statement, did not act upon the alarming confession Maroney bravely professed in the car. More significantly, he has since been suspended by USAG for physically and verbally abusing gymnasts. Geddert is now the subject of a criminal investigation in Michigan because of his alleged abusive behavior. It’s important to note that Geddert and Nassar are known to defend each other. Geddert supported Nassar once the accusations became public and over the years Nassar persuaded parents not to file charges against Geddert for his own abusive behavior. The significance of the overlap between the tandem abuse that took place within the USAG organization is that it amplifies the gymnasts’ feelings that there was no one who would protect them. The gymnasts began to learn that no matter where they turned, the bullies would protect each other. They did not have control over the situation.

The relationship between the gymnasts who attended camp at the Ranch and USAG is not like the relationship between a police department and an individual in police custody, such as in Cox. There is an understanding between USAG and its athletes. The girls who attend the camp have to be formally invited to attend. This creates a close relationship between the two parties. They do not have parents with them. They arrive at the camp with only their coaches, who leave the Ranch at the end of the training day. USAG owns and operates the training camp, supervised by the Karolyis. This relationship is closer to the one of patient at a

356. Id.
357. Id.
358. Id.
359. Id.
360. Id.
361. Id.
362. De Puy Kamp, supra note 84.
363. Id.
364. See generally id. (explaining that Geddert and Nassar would protect each other and that many girls sought “emotional comfort with Nassar” after Geddert would ignore their injuries and verbally abuse them).
366. Connor et al., supra note 115.
residential center, rather than the one between an individual and their police department. USAG has assumed a duty of protection for the minor athletes under its care, the nature of which makes them a common carrier.367

The test utilized to extend the non-delegable duty to the Karolyi Ranch is appropriate here. The athletes in attendance at these monthly camps are those who compete at the highest level, those with Olympic dreams.368 Nassar was an essential part in gaining access to those dreams.369 The athletes were underfed, overworked, physically, and verbally abused, all rounded off with sexual abuse by the doctor who had the power to make or break their careers. USAG did not implement adequate safeguards to protect the women at the Ranch after assuming a duty to do so.370 Nassar had unlimited unsupervised access to the gymnasts and the gymnasts were not encouraged to speak up about any of the conditions at the Ranch.

X. HOW WOULD EXTENDING THE NON-DELEGABLE DUTY DOCTRINE HELP?

The purpose of an extended non-delegable duty is to impose a strict liability on employers under specific circumstances. Those circumstances lawmakers seek to protect are represented here. The sheer number of women who were abused strongly indicate that it’s not just Nassar who is responsible. The presence of many other sexual predators within USAG’s staff strongly indicate that the abusers themselves are not solely responsible. The glaring systemic problems within USAG cannot be remedied simply by hoping it will try harder in the future. Liability is necessary to promote safety. The benefits of imposing a heavier liability on USAG under these circumstances are numerous.

First, USAG would have no choice but to start enforcing genuine attempts to safeguard against known sexual predators from gaining any kind of employment within a USAG gym. This would be done by instituting background checks for every individual who has contact with its

368. See id. (explaining that a special relationship is necessary between the “patron passengers” and “common carriers” for them to “assume a nondelegable duty to exercise heightened, extraordinary care”).
370. Id.
gymnasts, not just head coaches and instructors. USAG would be wise to continuously update these background checks. USAG had coaches working in its member gyms despite joining state sex offender registries. Those individuals would not be able to have continued contact with gymnasts if USAG has a heavier incentive to pay closer attention to obvious red flags.

USAG would also need to put a workable system in place to bring to its attention any instances of a coach’s history as a sexual predator. For example, USAG could create an online database connecting all of the USAG gyms. This would be a very helpful place for gyms to communicate with one another about a coach’s behavior. Each coach could have a file and complaints about misconduct can be explained and verified. As mentioned earlier, coaches would bounce from gym to gym without the new gym learning of the coach’s reason for termination. A database would alleviate some of that lack of communication and connection between the various gyms.

Secondly, fear of heightened liability would encourage USAG to take any complaint of sexual assault extremely seriously. In the past, USAG would only pass on reports to law enforcement if the complaint came directly from an alleged victim or the victim’s parents. USAG did not act upon information that came from other gym personnel or other athletes and their parents. USAG should be forwarding all future complaints immediately to SafeSport, as required by legislation. Additionally, USAG would also hopefully pass along any past complaints of sexual assault. Considering USAG has proved time and time again that it is not equipped to handle these kinds of investigations properly, utilizing SafeSport properly would be another step in the right direction.

Thirdly, USAG would implement stricter policies regarding the access its employees have to gymnasts. Nassar had unlimited access to these young athletes. As the team doctor, Nassar was allowed to prescribe his treatments to any girl he wished without any kind of secondary review. Going forward, USAG needs an independent third party to review the work of its doctors who have substantial access to the athletes. Nassar was also able to perform his treatment, which included the sexual assaults, without any other adult present in the room. If USAG operated with the fear of facing sizable lawsuits with a likelihood of liability due to the actions of its employees, it would be much less likely to allow anyone to have such extensive unsupervised contact with the athletes. A fear of huge liability combined with such an easy solution would’ve protected many of the gymnasts who were harmed by Nassar. Specifically, the girls who were left alone at Karolyi Ranch as Nassar came into their bedrooms and molested them while they were in their beds.
XI. WHAT IS LEFT OF USAG?

The impact of the sex abuse scandal has been far-reaching. Nassar was sentenced to up to 175 years in prison. Many survivors sighed in relief knowing that he is no longer a threat to the gymnastics community or any unsuspecting girl. In the wake of Nassar’s conviction and the arrest of USAG’s former CEO, two additional CEO’s have come and gone. The entire board of directors resigned. USAG lost the support of P&G and Kellogg’s, two of its biggest sponsors. Despite USAG’s efforts to get back on track, they are struggling to find adequate leadership. The survivors of Nassar’s abuse have frequently taken to Twitter and other social media platforms to criticize USAG and have been instrumental in holding USAG accountable. USAG filed for bankruptcy protection in December. The decision by USAG to file for bankruptcy has been viewed negatively. It is seen as “a shrewd and deeply cynical restructuring move that would allow the USAG to retain power” rather than “the death knell of an irredeemably diseased entity.” USAG is immersed in “a staggering 100 lawsuits by 350 plaintiffs, calling for an estimated $150 million in damages.” Survivors have been critical of this move considering USAG’s former-CEO Steve Penny received a $1 million severance package and former-CEO Kerry Perry received a “$425,000 severance package when she left after less than a year on the job.”

Additionally, in December 2018 the United States Olympic Committee began the process to attempt to decertify USAG as the National

372. Id.
373. Id.
374. Schuman, supra note 369.
376. See Hoffmeyer et al., supra note 371.
377. Id.
378. See Schuman, supra note 369.
379. Id.
380. Id.
381. Id.
382. Hoffmeyer et al., supra note 371.
Governing Body for gymnastics in this country.\textsuperscript{383} The CEO of USOC, Sarah Hirshland, explained that this decision came about because of USAG’s failure “to change its culture, to rebuild its leadership and to effectively serve its membership.”\textsuperscript{384} Hirshland and the USOC believe that the “challenges facing [USA Gymnastics] are simply more than it is capable of overcoming in its current form.”\textsuperscript{385} USOC has only revoked National Governing Body status for three organizations in the past.\textsuperscript{386}

USAG wrote a letter in response to USOC’s move to decertify the organization.\textsuperscript{387} The letter was released by USAG’s Board of Directors.\textsuperscript{388} The letter explained how the Board would be working to determine the best path forward and that they’re committed to the health and safety of their members.\textsuperscript{389} The Board also made sure to note that they were only appointed to their positions in June 2018.\textsuperscript{390} The letter mentioned that the Board had “inherited an organization in crisis with significant challenges that were years in the making.”\textsuperscript{391} It is not surprising to see USAG continuing to shy away from responsibility and blame. They also wrote that they will continue to do their best “to resolve the ongoing litigation as quickly as possible.”\textsuperscript{392}

**CONCLUSION**

Sexual assault is prevalent in our society and pervades into every dark corner. In the midst of the #MeToo movement\textsuperscript{393} and the exposure of misconduct in the Catholic Church,\textsuperscript{394} it is more important than ever to

\textsuperscript{383} See Schuman, supra note 369.


\textsuperscript{385} Id.

\textsuperscript{386} See id.

\textsuperscript{387} See USA Gymnastics Board of Directors message to the USA Gymnastics membership, USA GYMNASTICS (Nov. 5, 2018), https://usagym.org/pages/post.html?PostID=22880.

\textsuperscript{388} Id.

\textsuperscript{389} Id.

\textsuperscript{390} Id.

\textsuperscript{391} Id.

\textsuperscript{392} Id.

\textsuperscript{393} See Cat Lafuente, *Who is the woman behind the #MeToo movement?*, THE LIST (Feb. 19, 2018), https://www.thelist.com/110186/woman-behind-metoo-movement/ (stating that the #MeToo movement began as a social media phenomenon where survivors of sexual abuse began to post about what they had experienced).

\textsuperscript{394} See Peter Steinfels, *The Church’s Sex-Abuse Crisis*, COMMONWEAL (Apr. 19, 2002), https://www.commonwealmagazine.org/churchs-sex-abuse-crisis (“[R]evolutions about Catholic priests sexually preying on minors and the failure of Catholic officials to expose these outrages.”).
take every possible precaution to prevent such atrocities from continuing. USA Gymnastics has made a number of poor judgment calls, miscalculations, and taken part in cover ups. USAG cannot shield itself from culpability by pushing all of the blame onto Nassar or by hiding in bankruptcy. The imposition of a stricter liability will serve two purposes. The athletes who suffered because of USAG’s many mistakes will receive proper compensation and USAG will be incentivized to take every possible precaution to prevent something like this from happening again. This problem may seem insurmountable, but with adequate legislation and proper safeguards in place, we can step into a world where a sex abuse scandal is a rare horror, rather than a common place reality.

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