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SPORTS MEDICINE and the LAW

Presented by Montgomery McCracken

Wani v. George Fox University – Handling Student-Athlete Complaints on the Field and In the Locker Room

Dylan Henry and Kim Sachs

In the following article, we summarize the case of *Wani v. George Fox University*, and we discuss two takeaways from this case that universities and its employees should consider in order to minimize potential liability stemming from alleged physical and non-physical harm to a student-athlete both on the field and online.

In 2017, Samuel Wani ("Wani"), a former football player at George Fox University ("GFU"), filed a federal lawsuit in Oregon against GFU, nine GFU employees, and a former teammate seeking over $70 million in damages. He alleged that the Defendants were negligent and discriminatory in handling an injury to his thumb and that they improperly handled his complaint of racial harassment by a former teammate. His complaint alleged six causes of action: cyberbullying, negligence, medical fraud, racial discrimination, HIPAA violations, and breach of contract. After a series of motions, the Court dismissed all of Wani's claims except for his personal injury action, which is the only claim that remains

See HANDLING on Page 6

Attorney Who Defends Athletic Trainers in Concussion Cases Offers Insights

(Editor's Note: Steven Pachman is a partner in Montgomery McCracken's Litigation Department and a member of the firm's management committee. He concentrates his practice on the defense of traumatic brain injury (TBI) cases, and regularly represents individuals and school systems in catastrophic sports injury matters arising out of alleged premature return-to-play decisions and other negligence theories in the sports' context. His past and ongoing representations include a number of high-profile, nationally-publicized concussion and other TBI cases against NCAA member colleges and universities, high schools, other academic institutions, and various school personnel, including athletic trainers, coaches, physicians, and nurse practitioners. These cases involve catastrophically-injured football players and other athletes who allegedly sustained prior concussions and Second Impact Syndrome as well as players diagnosed with chronic traumatic encephalopathy (CTE) following a post-mortem autopsy of the brain. Pachman also regularly advises school officials and attorneys, risk managers, coaches, athletic trainers, athletic departments, physicians, and other health care professionals on institutional liability issues concerning sport-related concussions, Second Impact Syndrome, and

See ATTORNEY on Page 9

THIS ISSUE

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Court Says On-site AED Not Required; Employees Were Protected under Good Samaritan Law

A New York state court judge has ruled for a basketball facility in Yonkers, New York, which was sued by the estate of a 31-year-old man who collapsed while playing basketball.

The decedent joined a group of friends at the basketball court at Hooperstown for a pickup game.

During the course of the game, the decedent suddenly collapsed.

While Hooperstown was not a health club, it had automated external defibrillators (AEDs) on-site, and its employees were trained on their use. When the employees responded to the emergency, they observed that the decedent was still breathing, thus, not requiring the use of the AED. Employees called 911, and City Emergency Medical Services personnel responded to the call. As EMS was transporting the decedent to the hospital, he went into cardiac arrest.

The family of the young man commenced a suit against Hooperstown arguing that it was obligated under New York General Business Law (GBL) 627-a(1) to maintain and use an AED in the event of a cardiac emergency. However, GBL §627-a(1) applies to health clubs that have a membership of at least 500 people. It mandates that these health clubs have at least one AED on-site and have in attendance, at all times during staffed business hours, at least one individual employee who holds a valid certification of completion of a course in the study of AED operation and a valid CPR certification. The plaintiff further argued that Hooperstown was liable under the Good Samaritan Law [Public Health Law (PHL) 3000-a(1)] for failing to come to the decedent's aid and use the AED.

In support of a motion for summary judgment, Hooperstown supplied admissible evidence that it was not a health club, that it did not offer memberships or have members and that, while the club had AEDs on-site, it had an employee on-site who was trained in the use of an AED, and its employees were CPR certified. It also presented evidence that the employees who responded to the incident confirmed that the decedent was breathing prior to the arrival of medical personnel. Thus, the use of an AED was not warranted.

In deciding the motion in favor of Hooperstown, the court relied on the decisions rendered by the Court of Appeals in Miglino v. Bally Total Fitness of Greater New York, 20 N.Y.3d 342, 985 N.E.2d 128, 961 N.Y.S.2d 364 (2013), and Parvi v. City of Kingston, 41 N.Y.2d 553 (1977), and held that while GBL 627-a(1) requires a health club to have an AED on-site, it does not require the AED to be used (emphasis added).

The court went further to find that the employees provided emergency medical treatment by immediately calling for medical assistance. They could only be held liable for acts of gross negligence under PHL 3000-a(1), which was not displayed in this instance. The court also went on to dismiss the plaintiff's argument that Hooperstown owed a special duty to the decedent by reiterating that the statutory obligation to have emergency medical equipment on-site does not correspond to a duty to use the equipment citing to Miglino.

Notably, while the court did not specifically address the issue of whether Hooperstown was obligated under GBL 267-a to have an AED on-site, we believe the court likely determined that the question was moot as Hooperstown, even though it did not have an obligation, was in compliance. Therefore, even if the statute did apply, which we do not believe to be the case, Hooperstown met the statutory requirement.

When faced with a claim arising from a cardiac emergency in a health club and/or recreational facility, it is essential to immediately confirm the identity of the personnel on-site, the available emergency equipment and the training of those present. Armed with this information, defense counsel will be well positioned to file a motion for summary judgment.

Mohammed v. Hooperstown LLC; Supreme Court, Bronx County; Index No. 25899/2015; April 3, 2018

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Ruling Sends Illinois Cheerleader's Concussion Case to Trial

An Illinois state appeals court has reversed, in part, the ruling of a lower court, which granted summary judgment to a school district and other individual defendants in a case in which they were sued by a cheerleader after she suffered multiple falls during a cheerleading practice, which led to severe post-concussion syndrome.

In so ruling, the appeals court found that factual issues remained about whether the defendants actually had knowledge of plaintiff Kelli Swanson's injuries and whether the defendants engaged "in willful and wanton conduct."

The falls occurred during the 2010-2011 school year, when the plaintiff was a freshman at Huntley High School, which is part of defendant Consolidated School District 158 in Illinois. Freshman cheerleading coach Kimberlee Hoffman, a co-defendant, was the freshman cheerleading coach. Other co-defendants were cheerleading coaches Juliann Brunken (sophomore) and Nathan Schmitt (varsity).

Swanson had been a cheerleader since sixth grade. Prior to the cheerleading season at Huntley, she attended a cheerleading camp at the school in July 2010. During the camp, she was provided instruction on how to execute various cheers and stunts. The camp included coaches and cheerleaders from the University of Kentucky.

From Nov.18, 2010 to Dec. 10, 2010, the plaintiff sustained three falls, according to the court. The court went to deep lengths to explain the circumstances of the falls and how both parties staked out their positions regarding the level of awareness and care that was provided to the plaintiff.

On Nov. 18, 2011, Swanson sued the defendants, alleging negligence and willful and wanton conduct. The defendants raised sections 6-105 and 6-106 of the Tort Immunity Act as an affirmative defense. They also asserted that neither the plaintiff nor her family or physicians informed the defendants that plaintiff suffered a concussion or concussion-like symptoms during the freshman cheerleading season. Further, they allegedly did not observe such symptoms. Accordingly, the defendants argued that they could not be held liable for failing to properly assess or for failing to determine that the plaintiff suffered from a concussion. On Jan. 12, 2017, the defendants moved for summary judgment, arguing that: (1) the plaintiff's claims were barred by section 6-105 and 6-106(a) of the Tort Immunity Act; and (2) the plaintiff failed to allege/demonstrate that defendants acted with willful and wanton conduct.

On April 27, 2017, the trial court granted the defendants' motion for summary judgment, leading to the appeal. The plaintiff challenged the finding of immunity from liability under sections 6-105 and 6-106(a) of the Tort Immunity Act; and (2) argued that whether the defendants engaged in willful and wanton conduct presents a triable issue.

Regarding the Tort Immunity Act, the plaintiff argued that it was inapplicable because the defendants "undertook a duty to provide care."

Swanson "argues that her allegations involve more than merely failing to diagnose a concussion. She claims that she alleged that the defendants undertook a duty based on the school's concussion protocol (including the NFHS rules and the IHSA's return-to-play policy) to remove a student athlete from play when the athlete exhibits symptoms consistent with a concussion. However, they failed to follow this policy on three occasions. Thus, in her view, they are not immune under the Tort Immunity Act."

The plaintiff staked her argument to Grant v. Board of Trustees of Valley View School District No. 365-U, 286 Ill. App. 3d 642, 647, 676 N.E.2d 705, 221 Ill. Dec. 902 (1997), "wherein a parent sued a school district after her son committed suicide. The student had told other students at his high school that he intended to kill himself, and he wrote suicide notes. Other students reported his intention to a school counselor, who questioned the student, but took no action other than contacting his mother and telling her that she should take her son to the hospital for drug overdose treatment (but did not mention his suicide threats). As relevant here, in assessing the parent's negligence count, the reviewing court noted that the complaint did not seek to impose liability for the district's failure to examine the student or diagnose his condition, but alleged that the district, with knowledge of the student's intent to commit suicide, failed to call for medical assistance, failed to inform his mother of his intention, and failed to implement a suicide

See RULING SENDS on Page 4

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Emotional Scars Increase the Risk of Sports Injury

Active top-flight athletes who have experienced sexual or physical abuse at some time in their life run a greater risk of sports-related injury. A new study has shown an association between lifetime abuse experience and injury risk in female athletes.

Active top-flight athletes who have experienced sexual or physical abuse at some time in their life run a greater risk of sports-related injury. A new study from the Athletics Research Center at Linköping University in Sweden has shown an association between lifetime abuse experience and injury risk in female athletes.

The study has been carried out on elite athletes in Sweden, and is the first of its kind to investigate the consequences of sexual and physical abuse for athletes. Earlier in 2018, the Athletics Research Center published a report commissioned by the Swedish Athletics Association that surveyed sexual abuse within Swedish athletics.

"We wanted not only to repeat our study into the presence of abuse, but also examine what it means for the athlete. How does a traumatic event influence athletic performance? We wanted to investigate whether abuse is connected to the high degree of overuse injuries that we see in competitive athletics," says Toomas Timpka, professor in the Department of Medical and Health Sciences and head of the study, which is published in the British Journal of Sports Medicine.

The study focused on the risk of injury. Does abuse increase the risk of injury related to sporting activities, or the risk of non-sports injuries? Of the 197 participants in the study, 11 % had experienced sexual abuse at some time in their life, and 18 % had experienced physical abuse. In female athletes, physical abuse brings a 12 times higher risk of sports injury. Sexual abuse involves an eight times higher high risk for non-sports injury. The correlation between abuse and an increase in the risk of injury appears most clearly in female athletes.

"Many aspects of the correlation are also seen in self-injurious behaviour. We can see in both young women and young men that they tend to blame themselves. The athletes carry the trauma inside themselves, and take risks that can eventually lead to overuse injury. At the same time, it's important to remember that not all female athletes who suffer from long-term injuries have been subject to abuse. These injuries arise in interaction between many factors, which differ from one individual to another," says Toomas Timpka.

Epidemiological studies in sport and other sport-focussed medicine have traditionally been targeted on the musculoskeletal system, while sports psychology has focussed on performance. Toomas Timpka is looking for innovative thinking in the field. He points out that several factors may explain differences in performance, and it is important to deal with emotional scars that may have been left by, for example, abuse.

"We hope that our study can pave the way for a new multidisciplinary research area within sports medicine. We can gain new insights with the aid of clinical psychologists and child psychiatrists who participate in sports medicine research."

Ruling Sends Illinois Cheerleader's Concussion Case to Trial

Continued From Page 3

prevention program. Id. at 646. Therefore, the court determined, the district was not immunized from liability by sections 6-105 and 6-106(a) of the Tort Immunity Act. Id.

"Here, the plaintiff argues that she alleged that the defendants repeatedly failed to follow their voluntary duty to remove her from participation in cheerleading, not that they failed to diagnose her condition. Her falling from 10 feet high on her head, she urges, is an obvious known risk to a known condition, as evidenced by the school's extensive head injury protocol. Her allegations, she notes, are critical of the defendants' failure to react to a known condition after she hit her head on three occasions. Recognizing concussion symptoms and when head injuries occur, the plaintiff asserts, which the defendants are trained to do under their concussion protocol, is different from identifying a disease. She contends that, while the immunities would apply if the plaintiff's only criticism was failure to diagnose a concussion, the circumstances here are different and warrant a different result."

At the very least, according to the appeals court, the plaintiff's argument should be considered at trial since "a genuine material factual issue existed as to whether defendants had sufficient knowledge to trigger the concussion protocol and, thereby, were immunized under the Tort Immunity Act."

Turning to whether the defendants engaged in willful and wanton, the court set out to "determine if the plaintiff has presented enough factual evidence to present the issue to the jury." The appeals court again sided with the plaintiff, agreeing with her position that "this is not a case where the court can conclude that there is no evidence that the defendants acted with reckless disregard for the plaintiff's safety. Not following concussion protocol … was not only dangerous, but also reckless."

Kelli Swanson, Donald Swanson, and Laurie Swanson v. Consolidated School District 158 et al.;

App. Ct. Ill, 2nd Dist.; No. 2-17-0693, 2018 Ill. App. Unpub. LEXIS 1162; 7/5/18

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Magistrate Recommends Court Dismiss Claim by Referee, Who Suffered Injury After Being Intentionally Hit by Players

A magistrate judge from the Western District of Texas has recommended that a district judge grant a San Antonio school district's motion to dismiss the lawsuit of a football referee, who suffered severe injuries after a couple high school players intentionally blindsided him in a game.

In essence, the court concluded that the school district could not be held liable for a Constitution violation for the actions of the players (https://www.youtube.com/watch?v=0Q7p87ej3J4).

By way of background, plaintiff Robert Watts was refereeing a football game on September 4, 2015, in Marble Falls, Texas. The game pitted John Jay High School, which is part of Northside Independent School District (a co-defendant), and Marble Falls High School. Co-defendant Mack Edward Breed was an assistant football coach at John Jay High School and an employee of NISD. Watts was part of a referee crew from the Austin Chapter of the Texas Association of Sports Officials.

Watts claimed that, shortly before the game ended, Coach Breed, angry at some calls that he disagreed with, directed two John Jay players to hit Watts and "make him pay" for alleged bad calls and racist statements. Thereafter, two Jay players tackled Watts from behind, knocking him to the ground. Watts alleges he suffered cuts, bruises, abrasions, and a concussion from the hit.

Watts sued, pursuant to 42 U.S.C. § 1983, raising a substantive due process claim pursuant to Fourteenth Amendment to the Constitution. He claimed, specifically, that the defendants violated his right to "bodily integrity and personal security." He further alleged that Breed acted with deliberate indifference when he instructed the players to hit him.

NISD moved to dismiss Watts' claims on three grounds: "(1) the state has no constitutional duty to protect individuals from private harm; (2) NISD had no 'special relationship' with Watts; and (3) Watts has failed to identify an official policy or custom by the NISD school board, which was the moving force behind the alleged Constitutional violation."

In its analysis, the court noted that to state a claim under § 1983, a plaintiff must "(1) allege a violation of a right secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law." Doe ex rel. Magee v. Covington Cty. Sch. Dist. ex rel. Keys, 675 F.3d 849, 854-55 (5th Cir. 2012). As explained by the U.S. Supreme Court, "the Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing its power, or employing it as an instrument of oppression" and "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 195, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).

The court first examined NISD's argument that Watts cannot state a constitutional claim because the actions causing the injury were those of John Jay students, who are private actors, and not district officials.

"Thus, any alleged violation of Watts' due process rights did not occur under color of state law," wrote the court. "Watts argued that he is alleging that his injuries were caused by Breed when he encouraged the students to tackle him, and Breed, as an NISD employee, qualifies as a 'state actor.' Generally speaking, a state's failure to protect an individual from private violence does not constitute a violation of the Due Process Clause sufficient to state a claim under Section 1983. Covington, 675 F.3d at 855. The only recognized exceptions to this well-settled principle are the 'special relationship exception' and the state-created danger theory. Id."

Neither one of these applied.

In considering the "special relationship exception," the court turned to a Fifth Circuit decision – McClendon v. City of Columbia – in which that court wrote that "when the state, through the affirmative exercise of its powers, acts to restrain an individual's freedom to act on his own behalf 'through incarceration, institutionalization, or other similar restraint of personal liberty,' the state creates a 'special relationship' between the individual and the state which imposes upon the state a constitutional duty to protect that individual from dangers, including, in certain circumstances, private violence." 305 F.3d 314, 324 (5th Cir.2002)

"In this case, Watts—an adult refereeing a football game for remuneration—has not stated, and cannot state, a special relationship with the defendants," wrote the court. "His freedom to act was in no way limited by NISD or Breed. Watts was at the football game on his own volition. Watts therefore cannot state a § 1983 due process violation based on the special relationship exception."

Turning to the state-created danger exception, the court noted that the doctrine makes the state liable under § 1983 "if it created or exacerbated the danger" of private violence. Bustos v. Martini Club Inc., 599 F.3d 458, 466 (5th Cir.2010). However, the Fifth Circuit "has consistently refused to recognize a 'state-created danger' theory of § 1983 liability even where the question of the theory's viability has been squarely presented." Beltran v. City of El Paso, 367 F.3d 299, 307 (5th Cir. 2004).

"Watts nevertheless asks the court to deny the motion to dismiss this claim, arguing that while the Fifth Circuit has not recognized the claim, it also has not chosen to affirmatively

See MAGISTRATE on Page 6

Handling Student-Athlete Complaints on the Field and In the Locker Room

Continued From Page 1

in litigation.

Refusal to Seek a Second Opinion and Racial Discrimination in Medical Treatment

Wani's issues with GFU began in the summer of 2015 when Wani transferred to GFU and joined the football team. During the first week of practice, Wani injured his thumb. Gregg Boughton ("Boughton"), GFU's head football athletic trainer, evaluated Wani's thumb and diagnosed a sprained thumb ligament, and proceeded to ice and splint Wani's thumb during down time and taped Wani's thumb for practices. Wani disagreed with the diagnosis; he insisted he fractured his thumb. Boughton regularly examined Wani's thumb over the next three days and decided to continue the ice-tape-splint regiment. Wani requested another doctor examine his thumb, but Wani claimed Boughton refused this request. Wani also claims that around this same time head coach Chris Casey ("Casey") issued an edict that players were not allowed to leave practice without approval from Casey or a head athletic trainer.

Two weeks later, Wani took it upon himself to seek a second opinion. The hospital radiologist concluded that an x-ray of Wani's thumb showed no fracture, but the attending emergency department physician nevertheless diagnosed Wani with a closed left thumb fracture. Wani had to wear a thumb splint for two weeks and then "weaned" to a wrist cast. GFU football team's volunteer doctor eventually reviewed the x-ray film of Wani's thumb and also concluded that no fracture appeared in the x-ray.

Wani contended that his thumb never fully healed, and he alleged that Casey's edict that players could not leave practice, and Boughton's refusal to let Wani leave practice, and his disregard for Wani's assertions that the thumb was broken caused further injury. The Court found that Wani's contentions sufficiently stated a claim for negligence (duty, breach, causation, and damages). Boughton, as head athletic trainer, had a duty to treat student-athletes adequately, which he breached by failing to send Wani to the doctor for evaluation. Wani alleged this breach caused further damage to his thumb and ultimately led him to undergo

See HANDLING on Page 7

Magistrate Recommends Court Dismiss Claim by Injured Referee

Continued From Page 5

reject the claim. He further notes that eight of the federal circuits have recognized the theory of liability. He also points out that, because the Fifth Circuit has not rejected the theory outright, a number of district judges in Texas have entertained the theory" at the pre-trial motion to dismiss stage.

"The court need not make a final decision on the availability of the state created danger theory here, because even if it were available, Watts has failed to state a claim under that theory. Watts lays out his theory in his response to the motion:

"Here, Coach Breed, the state actor, used his authority to create a dangerous environment for the plaintiff and acted with deliberate indifference to the plaintiff's plight. Clearly, under the admitted facts and circumstances of this matter, the plaintiff is entitled to present evidence that the defendant-state actors created a dangerous environment by deliberate indifference, thereby creating an opportunity that would not otherwise have existed as follows: Coach Breed told his players "to hit" the plaintiff; and that the plaintiff "needs to pay the price." One of the players stated on national television that Breed told the player to hit the plaintiff. Both players admitted that they knew what they did was wrong, but they did it because they trusted Coach Breed. Coach Breed later admitted that he directed the students to make the plaintiff "pay" the price. This is a clear example of Coach Breed using his authority to create an opportunity that would not otherwise have existed for the players' hit on the plaintiff to occur.

"What Watts has failed to allege, however, are facts showing that NISD was aware of a specific risk to a known victim, which is a requirement of a state created danger claim. As the Fifth Circuit noted in another case seeking to apply the theory to a school district, to state a claim under the theory a plaintiff must show 'the existence of an immediate danger to a known victim.' Doe ex rel. Magee, 675 F.3d 849, 866. Simply knowing of a general danger is not enough. Moore v. Dallas Ind. Sch. Dist., 370 Fed. App'x 455, 458 n.1 (5th Cir. 2010). The most Watts has alleged is that Breed deliberately created a dangerous situation for Watts when he instructed the players to hit Watts. He pleads no facts indicating that NISD had any reason to know that Watts was in danger at the game, or that Breed would instruct players to hit a referee, much less Watts. Thus, even if the Fifth Circuit were to recognize the state created danger theory of liability, Watts cannot state a claim under that theory in these circumstances."

Robert Watts v. Northside Ind. School Dist. and Mack Edward Breed; W.D. Tex.; A-17-CV-887 LY, 2018 U.S. Dist. LEXIS 79494; 5/10/18

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Handling Student-Athlete Complaints on the Field and In the Locker Room

Continued From Page 6

reconstructive thumb surgery in November 2016.

Wani sought to hold GFU liable for negligence related to his personal injury, a common cause of action in the sports-injury world—as well as racial discrimination related to his personal injury, a claim less common in the sports-injury world. He contends the GFU coaching staff (specifically Boughton) refused to refer black football players to outside medical providers while permitting white players to obtain immediate and premium treatment, but the Court found these contentions wholly unsupported by the record.

Cyberbullying by Teammate

Around the same time that Wani was dealing with his thumb injury, he learned that his teammate Dominic Fix-Gonzalez ("Fix-Gonzalez") was bullying him on social media. According to court documents, Fix-Gonzalez posted several photos of Wani on Instagram; one of the photos depicted Wani with a "deeply blackened face," and another superimposed an image of a mop over Wani's head. Upon learning of these pictures, Casey met with the entire staff and team to discuss GFU's policies. He also met with Fix-Gonzalez individually, informing him of the seriousness of Wani's complaints. When Associate Dean of Students Dave Johnstone ("Johnstone") got wind of the situation, he also investigated the matter and forwarded his findings to Dean of Students Mark Pothoff ("Pothoff"), who ultimately stripped Fix-Gonzalez of his good standing with GFU and demanded Fix-Gonzalez issue an apology and engage in cultural sensitivity training.

Despite these actions, Wani claimed he was disappointed by GFU's handling of the cyberbullying incident. In his lawsuit, he alleged that the responses of Casey, Johnstone, and Pothoff were racially motivated, a claim that the Court ultimately dismissed.

As counsel to athletic trainers and universities, the *Wani* case presents two issues our clients commonly face: how to address requests for additional medical treatment, and how to deal with athlete-to-athlete disputes. Based on our experience in this area of law, we have analyzed *Wani* and provided effective takeaways for athletic programs and staff faced with these issues. Coaches and athletic trainers should use *Wani* as a learning tool and an opportunity to audit their own policies and practices to reduce their exposure to liability in the future. Perhaps most importantly, coaches and athletic trainers should keep informed of these issues and continue to stay up to date with important legal developments.

Takeaway # 1—Support Athletes Who Want a Second Opinion . . . and Document

The *Wani* case presents an issue athletic programs commonly face: what to do when an athlete wants a second opinion? The answer is simple: support the athlete's request. As counsel to athletic trainers and universities, we emphasize that a program should never deny an athlete the ability to seek additional medical treatment, or maintain a culture where seeking additional medical treatment is discouraged. In today's litigious society, doing so will inevitably expose the program to additional allegations that the program's actions or culture led to further harm. Supporting an athlete's request for additional medical treatment can also help mitigate the risks associated with potential misdiagnoses by the program's medical staff, while simultaneously strengthening the relationship of trust between the athlete and program.

Before the season even begins, programs should ensure that a policy is in place that prohibits denying or discouraging an athlete from obtaining additional medical treatment, and ensure that the staff and athletes are educated on the policy's prohibitions. Further, a program's medical staff should compile a list of referral resources and establish a referral procedure before an athlete makes a request for a second opinion.

Of course, schools are not prisons. An athlete is technically free to seek additional medical treatment regardless of a program's culture or coach's rule. An athlete, however, may not see it that way. Programs need to acknowledge the power imbalance (or perceived imbalance) in the athlete-program relationship that leads athletes to believe they do not have free choice and that they must do as the staff or culture dictates. Injured student-athletes already face a host of pressures that push them to continue playing while injured (lack of playing time, letting the team and staff down, loss of scholarship). The additional pressures such as going against the program's culture or coach's rule should not discourage an athlete from seeking outside medical treatment. A program should make clear to its athletes that it will assist and support an athlete in a time of injury, including seeking additional medical treatment, if necessary.

Programs must also ensure that members of its staff document their actions should they ever need to provide written proof of what they did or said. In the *Wani* case, a note from the athletic trainer stating that he discussed with Wani the options for seeking additional medical treatment, coupled with a formal policy, would have gone a long way in defeating Wani's claim that the athletic trainer or coach refused or discouraged Wani from seeking additional medical treatment. Further, documentation can help defeat claims such as Wani's claim that GFU decided which athletes got premium medical care and which athletes did not based on their race, a claim the Court found to be baseless based on GFU's documentation.

See HANDLING on Page 8

Handling Student-Athlete Complaints on the Field and In the Locker Room

Continued From Page 7

Takeaway # 2—Follow Your Program's Policies When Handling Athlete-to-Athlete Issues . . . and Document

The *Wani* case is also a good reminder that athletic programs need to be concerned with more than just an athlete's physical safety and wellbeing, and that an institution could be sued for maintaining an environment that permits harassment and discrimination among its athletes. In short, a school must have anti-harassment, anti-discrimination, and complaint procedure policies in place; must train and educate the staff and athletes on the policies (what they prohibit, who receives and investigates complaints, what to do when a complaint is received); and follow the policies and complaint procedures to the letter.

Immediately after Wani notified Coach Casey of the racial harassment, he held an unscheduled team and staff meeting to discuss GFU's policies, and he met privately with the alleged harasser to discuss the seriousness of Wani's complaint. It is unclear if this was in accordance with GFU's policies. Most likely, Coach Casey should have immediately reported this complaint to the proper GFU administrators, and then let the investigation run its course. A program should not maintain a culture of handling things "in house" and should strive to follow the policies at all times under all circumstances.

Dylan Henry

Kim Sachs

Ultimately, the matter was reported (by a student) to the Associate Dean and Dean of Students, who also investigated the matter and stripped the harasser of his good standing with GFU and demanded he issue an apology and engage in cultural sensitivity training.

By acting promptly, and in accordance with its policies, a school can help reduce its exposure to liability from harassment and discrimination claims. Just like with providing medical treatment to student-athletes, carefully and purposefully documenting what was said and done is crucial in these situations as well, and it can prove to be a silver bullet to the plaintiff's case in a lawsuit down the road.

Dylan Henry *and* **Kim Sachs** *are associates in Montgomery McCracken's Litigation Department and members of the firm's catastrophic sports injury defense team. The team represents universities, schools, athletic trainers, and other sports programs and staff in a variety of sports-related and head injury litigation, which include claims for negligence (e.g., failure to warn, premature return to play), products liability, breach of contract, and professional malpractice, and advises clients on complying with various rules, regulations, and laws, and maintaining policies in compliance with best practices and industry standards.*

For more on **Dylan Henry** *and* **Kim Sachs**, *please visit https://www.mmwr.com/attorney/dylan-f-henry/ and https://www.mmwr.com/attorney/kimberly-l-sachs/*

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Attorney Who Defends Athletic Trainers Offers Insights

Continued From Page 1

other sport-related injuries. Because of his background, Pachman was selected for our regular interview feature.)

Question: *How did you get into the sports law niche?*

Answer: In 2005, a longstanding university client of my firm requested that I undertake an investigation following a catastrophic brain injury to one of its football players. Two years later, a negligence lawsuit was filed against our client and several of its employees, including its head Athletic Trainer (AT), and I served as lead defense counsel. Among other allegations, the suit claimed that the AT mismanaged the student-player's earlier concussion and prematurely returned him to game play. The case ultimately settled and was regarded as a favorable result to my client in both the legal and scientific communities. Many concussion experts refer to the case as a landmark matter since it involved so many important issues of concussion safety that never had been litigated. The case also involved many of the country's leading concussion experts.

After the case settled in 2009, I co-authored a "lessons learned" article with one of the leading concussion experts in the country, Dr. Kevin Guskiewicz. The article appeared in an NATA publication. The publicity from the article led to me to receive a number of inquiries from ATs, physicians, and schools on how to minimize risk in the concussion space. I also started receiving invitations to speak before colleges with top sports' programs, Division I sports conferences, and AT organizations, such as the NATA, CATS, and EATA. I have focused my practice on both defending concussion cases and counseling in this area ever since.

Q: *How long have you been involved in TBI cases, and how has litigating these kinds of cases changed since you started?*

A: The first case I defended was in 2007.

Steven Pachman

That was a case where the plaintiff was alleged to have suffered "Second Impact Syndrome" (SIS), a controversial medical phenomenon where the brain sustains a second injury prior to resolution of the first, resulting in catastrophic outcomes. These "SIS" cases are still being filed through today and include the same allegations of negligence that they did over ten years ago, namely failure to warn, failure to educate, failure to diagnose, and premature return to play.

Beyond these SIS cases, a new wave of litigation has surfaced–in the CTE context. The allegations of negligence in these cases include the same as in the SIS context, but in these new cases the negligence is alleged to have caused CTE and, in some cases, is said to be the cause of a plaintiff's suicide. The science around CTE is quite young and until researchers reach consensus on the cause of CTE, I expect these cases to remain prevalent. My general strategy for defending these cases has remained the same throughout and begins with a thorough preliminary investigation, including an exhaustive round of witness interviews. This is followed by promptly retaining an appropriate team of experts to provide preliminary opinions on liability-related issues and causation.

Q: *Concussions are so prevalent, why have we not seen more lawsuits?*

A: Although concussions are reported with greater frequency today, awareness has led to better management and treatment of concussions. I attribute this partly to actions by organizations like the NATA, NCAA, and American Academy of Neurology (AAN). The NATA, for example, led by the efforts of AT Steven Broglio and his team of concussion experts, recently updated its Position Statement on the Management of Sport-Related Concussions. The NCAA has hosted a number of Safety in College Football Summits, stressing proper concussion diagnosis and management best practices and the importance of independent medical care. And the AAN has hosted an annual conference three straight years that is dedicated to sports concussion. As part of the AAN's efforts, I have been asked to present at this year's conference in July on personal and institutional liability considerations that health care providers face and must balance when making decisions about concussion care. Actions such as these not only are helping to promote the health and safety of the athlete, but perhaps having the additional effect of reducing concussion lawsuits.

Q: *You have represented athletic trainers in the past. What were the circumstances?*

A: In the event of a catastrophic outcome in the sports context an AT's actions leading up to the ultimate injury are nearly always put under a microscope. In the case of a head or brain injury, an AT's prior conduct is especially scrutinized. Most of my representations arise where a player has been

See ATTORNEY on Page 10

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Attorney Who Defends Athletic Trainers Offers Insights

Continued From Page 9

diagnosed with an initial concussion (or allegedly should have been), and the player later suffers a more serious injury and long-term disability or sometimes death. Often, the theories of liability in these cases, simply put, are that the player never should have been on the field, in the rink, on the court, etc. considering the prior concussion or head injury. I have handled many of these so called "premature return-to-play" cases across the country and have done so in various sports. These can sometimes be tricky cases to defend since there's no magic test to determine whether someone has sustained a concussion or has recovered from one. In addition, the AT is largely reliant on the player to be forthcoming about symptoms after an initial injury.

Q: *What does a typical engagement look like when defending ATs and other school employees? Are they hiring you individually, or does the school district hire you?*

A: In almost all cases that I have defended in which I have represented an AT, the AT's school is also named as a defendant. In those cases, either the school's insurance covers the AT-employee or the school agrees to pay for the defense of the AT. So, it would be the rare case where an AT is retaining me directly. I still advise my AT clients to be aware of and understand any applicable insurance policies and ensure the AT is covered personally in the event the AT is named in a lawsuit.

Q: *At what point should an AT hire his or her own lawyer?*

A: Although, as noted, the school often picks up the tab for the AT, in the event of a conflict of interest between the school and AT where both are named as defendants (where the defendants' interests appear not to be aligned) the AT may have no choice but to secure separate counsel.

Q: *Are ATs on the firing line any more or any less today, and why?*

A: ATs are one of the easier if not the most obvious targets in a sports injury case. If the allegation is "premature return-to-play" following a prior concussion, the AT likely had a key role in the initial concussion assessment and/or diagnosis, taking the player through the return-to-play process, and/or the ultimate return-to-play decision. These are prime areas for plaintiffs' lawyers to engage in second-guessing after an injury and attack in a legal complaint.

Q: *Is there any risk management advice you would give ATs as they go about their job daily?*

A: My number one tip to my AT clients is that they follow their school's or organization's concussion policy to the letter. Years ago, many schools and organizations didn't have concussion policies and procedures in place. Today, most do, but I sometimes see policy non-compliance, which in the event of a bad outcome provides for an easy allegation of negligence. I also suggest to my AT clients that they stay current on the most current medical and scientific literature on concussions. This includes ensuring that their organization's concussion policy is up-to-date on at least a yearly basis. I have conducted concussion policy "audits" for many clients to ensure policies are current.

For more on **Steve Pachman**, *please visit* https://www.mmwr.com/attorney/steven-pachman/

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