SPORTS MEDICINE and the LAW

Presented by Montgomery McCracken

Potential Expansion of Athletic Programs' Duty of Care and New Limitations to Waivers of Liability

Lessons Learned from Feleccia v. Lackawanna *College*

By Brian G. Remondino, Esq., Dylan F. Henry, Esq., and Kimberly L. Sachs, Esq.

A recent Pennsylvania Supreme Court decision has the possibility of expanding athletic programs' duty of care to student-athletes and limiting the protection provided by waivers of liability. In *Feleccia v. Lackawanna College*, student-athletes injured during a football practice sued Lackawanna College because the two individuals who were hired to serve as athletic trainers did not have the required state licenses. 2019 WL 3917069 (Pa. 2019). This article highlights three major takeaways from *Feleccia* that schools, athletic programs, and their attorneys should keep in mind when navigating the duties of care they owe to their student-athletes.

Lackawanna Hires Unlicensed "Athletic Trainers"

In the past, Lackawanna Junior College employed two athletic trainers to support its football program. However, in summer 2009, both athletic trainers resigned. Kaitlin

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Insurance Is Not Killing Football, Other Contact Sports—It's Making Them Safer

By Joseph Samuel, Esq., Dylan F. Henry, Esq., and Kimberly L. Sachs, Esq.

In January, ESPN's Outside the Lines reported that the insurance market for football and other high-contact sports was diminishing, placing these sports' very existence in danger.[1] One insurance executive stated, "If you're football, hockey, or soccer the insurance business doesn't want you." The article suggested that insurance companies were no longer willing to cover brain injuries due to the high litigation exposure they pose and the difficulty in calculating risk, and it provided case studies on specific teams and programs that have been affected by brain injury insurance issues.

This was not the first time ESPN released an article contemplating the end of football

1 Steve Fainaru and Mark Fainaru-Wada, "For the NFL and all of football, a new threat: an evaporating insurance market," **ESPN.com** (Jan. 17, 2019), https://www.espn.com/espn/story/_/id/25776964/insurance-market-football-evaporating-causing-major-threat-nfl-pop-warner-colleges-espn/.

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THIS ISSUE

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Exercise As Punishment? Drop And Give Me 20 . . . Hundred Thousand Dollars

The consequences of punitive exercise in collegiate sports on display in Lee v. LA Board of Trustees

By Elizabeth Catalano, Esq., Dylan F. Henry, Esq., and Kimberly L. Sachs, Esq.

Earlier this year, a Louisiana Court of Appeals upheld a $659,227.50 jury verdict awarded to a student-athlete who suffered permanent, career-ending injuries after the coaches at Grambling State University ("GSU") ordered him to run more than four miles in forty minutes as punishment for arriving late for basketball training.[1] This article summarizes the case of *Lee v. LA Board of Trustees* and discusses the physical and legal risks associated with punitive exercise in intercollegiate sports.

GSU Basketball's Deadly "Tiger Mix"

Jacobee Lee ("Lee") first arrived on campus at GSU on August 12, 2009, making him three days late for Head Coach Rick Duckett's required reporting date for basketball players. Despite the late arrival, after attending a team meeting on August 14, Lee and the rest of the team reported to the gym for an hour-long unofficial weight-lifting session. Just a half hour after the session ended, Assistant Basketball Coach Stephen Portland told Lee and several others that they had forty minutes to run four and a half miles around campus as a consequence of arriving late to start the semester. If the student-athletes did not finish in time, they would be required to complete the run again on another day. This notorious disciplinary run was called the "Tiger Mix."

During the Tiger Mix, Coach Portland followed the players in a golf cart. He provided no water or other fluids to them, even though the temperature outside was ninety five degrees—GSU's football program cancelled practice that day due to the extreme heat. No athletic trainers or other medical personnel were present during the run, let alone made aware that it was even happening.

After barely completing the Tiger Mix and arriving back at the gym, a GSU player, Henry White, passed out and became unresponsive. Lee also passed out after finishing the run. An assistant coach called the team's athletic trainer to inform her of White's and Lee's condition. The athletic trainer put ice on White and called for EMS, who transported him to the hospital. The athletic trainer also sent Lee to the hospital in an ambulance after noticing he too was having difficulty breathing while teammates were putting ice on him. At the hospital, Lee and White shared a room, separated only by a curtain so that Lee could hear White's continued difficulty breathing. Lee was experiencing elevated creatine phosphokinase (CPK) levels and majorly dehydrated due to heat exposure. He was diagnosed with heat exhaustion and mild rhabdomyolysis (the breaking down of skeletal muscle that can be caused by extreme physical activity), and remained in the hospital for two days before he was released.

White, on the other hand, was not as fortunate. He died on August 26, 2009; with his death attributed to the complications associated with the severe heatstroke he suffered during the Tiger Mix.[2]

1 *Lee v. Louisiana Bd. of Trustees for State Colleges*, 2019 WL 1198551 (La. App. 1 Cir. 3/13/19).

2 White's death was the subject of a wrongful death suit against GSU (https://aerochug.com/family-files-wrongful-death-lawsuit-against-grambling/), as well as a two-month "Outside the Lines" investigation by ESPN. *See* Mark

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MONTGOMERY McCRACKEN
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The Cover-Up Is Always Worse Than The Concussion –

Central Michigan's Head Gymnastics Coach Fired for Inducing Athletes to Hide Injuries

By Kacie E. Kergides, Esq., Dylan F. Henry, Esq., and Kimberly L. Sachs, Esq

In a time where sport-related concussions are such a hot topic and much is known about their potential short-term and long-term effects, coaches should not be advising their student-athletes to hide their concussion symptoms and lie to the medical staff. Yet, this is exactly what Central Michigan University ("CMU") head gymnastics coach Jerry Reighard ("Reighard") allegedly did in the beginning of 2019. In discussing the scandal surrounding Reighard, this article highlights the need for universities to not only incorporate independent medical monitoring systems, but also enforce those systems in order to protect their student-athletes.

Revealing The Truth Behind Reighard's Program

Reighard has been the head coach of CMU's women's gymnastics program since 1984 but in February 2019, CMU placed him on administrative leave after allegations arose that he attempted "to induce an athlete to lie about or cover up concussion symptoms."[1]

Following the allegations, CMU began an internal investigation that led to Reighard's termination in April 2019.[2] The investigation involved "over two dozen interviews" with current team members and medical and athletics staff, and ultimately resulted in a 121-page report that cited to "egregious misconduct" by Reighard.[3] CMU also interviewed Reighard in connection with the investigation and, upon concluding the investigation, CMU provided Reighard with its investigatory report. Reighard responded, and despite receiving and reviewing his response, CMU still chose to terminate his employment.[4]

Though the 121-page report was not released to the public, CMU's official statement gave some insight into the results of the investigation. The report stated that Reighard attempted to undermine the university's concussion management plan by continuously disregarding the medical staff and their independent role in assessing injuries.[5] In addition, the report confirmed that Reighard "created a hostile atmosphere contradictory to CMU's independent medical model which gives team physicians and athletic trainers authority to determine the management of injuries without interference from coaches."[6]

In a press release, Associate Vice President and Director of Athletics, Michael Alford, stated that "[o]ur student-athletes and their families trust us to protect our students. We will not tolerate a callous disregard of safety. We will not tolerate actions that put students in the way of significant and even life-threatening injuries. Student safety at Central Michigan University is an absolute priority, always."[7] In addition, CMU recognized that Reighard's transgressions could lead to NCAA violations and stated they will fully-cooperate with the NCAA by self-reporting the matter.[8]

Uncovering Reighard's Personnel File

In early 2019, Central Michigan Life, the CMU's student-run campus media company, submitted a Freedom of Information Act request in an attempt to access Reighard's personnel file.[9] After receiving the file, Central Michigan Life published pages from it in a story on March 28, 2019.[10] While the file contained both positive and negative reviews of Reighard dating back to when he first started at CMU, it revealed multiple incidents in which Reighard was reported to have mishandled medical situations.[11] A team

1 *Gymnastics coach Reighard terminated for cause*, **CMU Chippewas**, Apr. 18, 2019, https://cmuchippewas.com/news/2019/4/18/gymnastics-coach-reighard-terminated-for-cause.aspx; Tony Paul, CMU fires gymnastics coach for urging athlete to lie about concussion, **The Detroit News**, Apr. 18, 2019, https://www.detroitnews.com/story/sports/college/2019/04/18/cmu-fires-gymnastics-coach-urging-athlete-lie-concussion/3506720002/

2 *Gymnastics coach Reighard terminated for cause*, **CMU Chippewas**, Apr. 18, 2019, https://cmuchippewas.com/news/2019/4/18/gymnastics-coach-reighard-terminated-for-cause.aspx

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Gymnastics coach Reighard terminated for cause*, **CMU Chippewas**, Apr. 18, 2019, https://cmuchippewas.com/news/2019/4/18/gymnastics-coach-reighard-terminated-for-cause.aspx

8 *Id.*

9 Evan Petzold, *Breaking: University investigates Jerry Reighard for asking gymnast to lie about injuries*, **Central Michigan Life**, Mar. 27, 2019, http://www.cm-life.com/article/2019/03/central-michigan-gymnastics-jerry-reighard-alleged-misconduct-suspended-internal-investigation-michael-alford-chippewas-story

10 Evan Petzgold, *'They're Afraid of Jerry': Deep dive into past of gymnastics coach Jerry Reighard*, **Central Michigan Life**, Mar. 28, 2019, http://www.cm-life.com/article/2019/03/jerry-reighard-central-michigan-gymnastics-coach-suspended-investigation-deep-dive-past-student-athletes-chippewas-story

11 Tony Paul, *CMU fires gymnastics coach for urg-*

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The Cover-Up Is Always Worse Than The Concussion

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physician wrote a letter to Reighard last year expressing concerns about Reighard referring athletes to outside doctors and bringing in outside doctors to campus.[12] There were several notes in the file citing to multiple instances, one as recently as 2018, of Reighard engaging in this type of activity.[13]

In addition to the letter from the team physician, there were multiple letters from parents and gymnasts voicing their disdain and complaints about Reighard.[14] One parent specifically wrote about how Reighard completely mishandled her daughter's injury, stating "[s]he called me in tears because her ankle was so swollen and hurt so much she hadn't slept in 3 nights."[15] It continued on to accuse Reighard of verbally abusing her, alleging that he told her she was "babying herself and her ankle, not having heart to work through her injury."[16] In addition to complaints about the mismanagement of injuries, the file also contained at least six citations that Reighard received for going over the weekly practice-time limits set by the NCAA.[17]

Takeaways from the Incident

Many articles have come out recently discussing the need for Division 1 athletic programs to change their reporting structures as they pertain to student-athletes' injuries. This incident further highlights the need for that change. Too many reports have surfaced of head coaches influencing their medical staff's decisions and autonomy, with some of most recent incidents coming from the University of North Carolina's women's basketball team and the University of Maryland's football team. Further, a National Athletic Trainers' Association ("NATA") survey released on June 25, 2019, revealed that nineteen percent of athletic trainers said that college coaches have played an athlete who was "medically out of participation," and fifty-eight percent of athletic trainers felt pressure from a coach or administrator to make a decision that was "not in the best interest of a student-athlete's health."

In a high pressure environment where a coach's job depends on wins, head coaches have a strong interest in making sure their star players suit up for the games, which can lead to them interfering with medical decisions. Decisions revolving around student-athletes' injuries need to be completely separated from not only head coaches, but the entire coaching staff. Schools such as University of Maryland and University of Kansas have recently adopted a medical model reporting structure, but maybe it is time the NCAA mandates independent medical care in order to avoid endangering the health and safety of student-athletes.

Despite the fact that CMU claimed to have an independent medical model, Reighard was able to maneuver around the system. Universities and their athletic departments not only need an independent medical staff and reporting structure, but, they also need to audit, monitor, and enforce those structures. As CMU stated, these school have a duty to protect the health and safety of their student-athletes, and that begins with supervising their head coaches, and removing them from the medical decision making process.

Scott Anderson, head athletic trainer for the University of Oklahoma's football team, points out that at the end of the day, "it comes down to an institutional solution." Schools can have medical reporting lines, Anderson explained, but "if coaches still hold authority and there is no accountability from the athletic departments, the reporting lines do not matter;" these issues are going to continue unless someone has the courage to say something but most, according to Anderson, are fearful of losing their positions, scholarships, and jobs.

This incident also demonstrates that universities and their athletic departments all need to review their coaches' personnel files and investigate any complaints that have been made against their coaches. From Reighard's file, it is clear that there were many incidents over the course of many years that should have raised red flags. Hopefully now, as another head coach is exposed, universities will understand the importance of independent medical reporting structure and continued monitoring of their coaches and staff.

ing athlete to lie about concussion, **The Detroit News**, Apr. 18, 2019, https://www.detroitnews.com/story/sports/college/2019/04/18/cmu-fires-gymnastics-coach-urging-athlete-lie-concussion/3506720002/

12 *Id.*

13 *Id.*

14 Tony Paul, *CMU gymnastics coach accused of urging athletes to lie about injuries*, **The Detroit News**, Mar. 28, 2019, https://www.detroitnews.com/story/sports/college/2019/03/28/central-michigan-gymnastics-coach-jerry-reighard-accused-urging-athletes-lie-injuries/3300331002/

15 *Id.*

16 *Id.*

17 *Id.*

Sports Medicine and Sports Law Serve as the Foundation of Tulane's Center of Sport and Its Unique Educational Model

When Tulane University created the Center for Sport, it set out to create a unique program that was truly interdisciplinary in nature. The founders already had a head start, given that the Tulane University's School of Medicine, Institute of Sports Medicine and the highly respected Sports Law Program would be the initial partners. The Center has gone on to create additional ties with the business school, sociology and other schools at Tulane, making it a great candidate for a deeper look. An interview with Gregory Stewart, MD, Center for Sport co-founder and chief of physical medicine and rehabilitation at the School of Medicine, follows.

Question: *How has the focus of the Center for Sport (https://centerforsport.tulane.edu/) changed in recent years as it relates to sports medicine?*

Answer: All along we've dealt with issues of current athletes, high school, collegiate athletes, weekend warriors, and active individuals. In more recent years, we have really begun to look at former professional athletes, especially from the NFL. We've been looking at them from a medical standpoint and what adaptations has the body made in order to be able to perform at that higher level and what does that mean long term. Do those changes persist? If they persist, is that a good thing or a bad thing? What does that mean? As well as the whole issue surrounding concussion, such as CTE, which we're beginning to think is way more complex than it's often portrayed.

Q: *Can you elaborate?*

A: I don't think that anyone's going to say that banging your head over and over again is a good thing. But, one of the things that we're finding with our former NFL guys is that a majority of the issues they are experiencing are related to their transition into retirement and mental health. Those are the bigger immediate issues. The long-term issues we're finding include higher rates of hypertension, diabetes, pre-diabetes, sleep apnea, and elevated cholesterol, to name a few.

Q: *How do you interact with Dr. Gabe Feldman at the Center, since you are co-directors?*

A: Gabe and I both realized that we needed to have a global look at sport. One example we use a lot is Monday Night Football in New Orleans. Take Saints quarterback Drew Brees. He has a contract, he has an agent, he has a personal trainer, and the Saints have a facility that is designed to take care of him. Somehow Drew and everyone has to get to the stadium. There's traffic. There are city implications. There's financial implications for the city because it shuts down early on a Monday afternoon. What does that mean? You've got the security aspect of the Dome. You've got the game. You've got the journalism. You've got the medical. All of the things that go into a Monday Night Football game are all the kinds of things that the Center studies.

All along we've dealt with issues of current athletes, high school, collegiate athletes, weekend warriors, and active individuals. In more recent years, we have really begun to look at former professional athletes, especially from the NFL.

Q: *Is this approach unique in higher education?*

A: A number of institutions have individual schools or deal with specific issues. What separates us from other institutions is that most places have a single area of expertise that they do. We are the only academic institution that has both a sports medicine and a sports law program. We're saying to professors, "We don't want you to change what you're doing. We just want you to have a sports emphasis on what you're teaching."

Sociology of sport is a good example. We're not asking to go from teaching sociology to teaching anatomy. We just want you to teach sociology of sport. Other areas might be the history of sport or sports in politics. That's really what we're trying to accomplish, having a single institution that studies the implications of sport.

Q: *What are some of the other sports medicine specific initiatives that are on the horizon?*

A: We're actually starting a brain bank. We just piloted, with the NFL's permission, some research looking more closely at mental health issues with former players.

We're already doing cardiovascular and metabolic measures, but now we're beginning to examine the long term effects of sport on mental health.

We are also developing a master's program in sports studies that have certificates in medicine and mental health. These are only a few of the things that are exciting to us.

Q: *What is the most rewarding part of your job?*

A: Everything we do is fun. We travel around the country and do screenings, and former professional athletes come to New Orleans to see us. The most rewarding aspect is how appreciative the guys are of the care that we provide. To find various ways to help them and truly make a difference in their lives is truly an honor and a privilege.

Court: School District Shielded by Immunity in Concussion Case

A federal judge from the Southern District of Georgia has found that a school district is entitled to immunity in a lawsuit in which it was sued by a high school football player who suffered a concussion in a 2016 game and then remained in the game, suffering additional "blows to the head." While the legal victory was absolute for the district, the court delivered a mixed ruling to the coach, who was also named in the suit, finding that while he was entitled to qualified immunity for the § 1983 claim against him that he is not entitled to official immunity on the state law claims brought against him in his individual capacity.

The impetus for the lawsuit were the injuries sustained by plaintiff Tyler Bowen as a member of Telfair County High School's football team. While playing in a football game on Sept. 9, 2016, Tyler suffered a concussion. The football team's coach and Telfair County High School employee, Matthew Burleson, allowed Tyler to continue playing after Tyler exhibited symptoms of a concussion, according to the complaint. Tyler then suffered more blows to the head during the game. A doctor later diagnosed Tyler with a concussion, his symptoms including cognitive impairment, memory alteration, mood swings, diminished academic ability, and reduced ability to complete everyday activities.

Bowen sued in state court naming Matthew Burleson and Telfair County School District (TCSD) as two defendants among others. The plaintiff alleged negligence and intentional tort claims in addition to a 42 U.S.C. § 1983 claim. The case was removed to the federal court on Oct. 31, 2018. Defendants Matthew Burleson and TCSD subsequently moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c).

The court noted that the defendants' motion is based on three arguments: 1) Matthew Burleson has qualified immunity for the § 1983 claim against him; 2) TCSD has sovereign immunity under the Georgia Constitution for the state law claims against it; and 3) Burleson has official immunity under the Georgia Constitution for the state law claims against him in his individual capacity.

"Qualified immunity offers complete protection to government officials acting in their discretionary capacity when sued in their individual capacities so long as their conduct does not violate clearly established law," wrote the court, citing Harlow v. Fitzgerald, 457 U.S. 800, 815-18, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). "An official act within his or her discretionary authority when the 'objective circumstances . . . compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority.' Courson v. McMillian, 939 F.2d 1479, 1487 (11th Cir. 1991). Burleson was acting within his discretionary authority here; there is nothing in the complaint alleging that Burleson was acting outside his authority, and the plaintiff alleges Burleson was an employee of TCSD acting within the scope of his employment at the time of the alleged injury.

"To overcome qualified immunity a plaintiff must demonstrate: (1) that the official's conduct violated a statutory or constitutional right and (2) the right was clearly established at the time of the challenged conduct. Randall v. Scott, 610 F.3d 701, 715 (11th Cir. 2010); see also Pearson v. Callahan, 555 U.S. 223, 232-36, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (holding that courts have discretion to conduct the two-part analysis in whichever order is appropriate given the situation).

"(The plaintiff) incorrectly assert that Pearson no longer requires a plaintiff to satisfy both parts of the analysis. Instead, Pearson does away only with the Saucier rule, which was the requirement that courts conduct their analysis of the two parts in order. Pearson, 555 U.S. at 236-42 (explaining why the ordering requirement in Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) is sometimes cumbersome when applied at the trial level). Therefore, if the plaintiff has not pleaded facts to satisfy both parts of the analysis, his § 1983 claim will fail."

With this hurdle in mind, the plaintiff set out to show his "substantive due process rights to physical safety, bodily integrity, and freedom from unreasonable risk of harm under the Fourteenth Amendment."

The court relied heavily on Davis v. Carter, 555 F.3d 979, 982 (11th Cir. 2009), which held that "conduct by a government actor will rise to the level of a substantive due process violation only if the act can be characterized as arbitrary or conscience-shocking in a constitutional sense."

It added that in Davis v. Carter, "the Eleventh Circuit considered whether a football coach's conduct at a training session constituted a violation of a student's substantive due process rights. 555 F.3d at 980-81. There, the defendant coach failed to provide water to the student, ignored the student's complaints that he was dehydrated, and continued to subject the student to drills even though he had collapsed. Id. The student died the morning following the training session, allegedly as a result of the coach's conduct. Id. at 981. In reversing the district court and granting the coach's motion to dismiss, the Eleventh Circuit ruled that the coach's deliberate indifference to the student did not shock the conscience. Id. at 984."

In the instant case, (the plaintiff alleges in his complaint) that "defendants Burleson and TCSD were negligent and, in the

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Court: School District Shielded by Immunity in Concussion Case

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alternative, acted intentionally with 'actual malice' to injure the plaintiff. The factual underpinnings for these claims are essentially that Burleson knew or should have known that Tyler Bowen was concussed and prevented him from reentering the game. (Id.) The plaintiff also adds-without elaboration that Burleson 'acted with actual malice and intent to cause injury to Tyler Bowen.' (Id. at ¶¶ 32-33.)

"… To conclude, (the plaintiff's) well-pleaded facts set forth at most a negligence claim which does not constitute a conscience-shocking violation of his substantive due process rights. Accordingly, defendant Burleson is entitled to qualified immunity as to the § 1983 claim against him. See Davis, 555 F.3d at 984."

Turning to the TCSD's Sovereign Immunity defense, the court wrote that the Georgia Constitution as amended in 1991 to provide sovereign immunity to the 'state and all of its departments and agencies.' Ga. Const, art. 1, § 2, para. 9(e). "Plaintiffs asserting a waiver of sovereign immunity bear the burden of establishing the waiver. Bd. of Regents of Univ. Sys. of Ga. v. Daniels, 264 Ga. 328, 446 S.E.2d 735, 736 (Ga. 1996). Here, (the plaintiff bases his) waiver argument on two sections of the Georgia Code: §§ 20-2-991 and 36-33-1. (The plaintiff contends) that these sections waive Georgia school districts' immunity to the extent there is insurance available to pay out judgments against the district." The court found the argument flawed because the case cited by the plaintiff applied to a corporation, not a municipality, thus denying the waiver.

Lastly, the court considered the plaintiff's state negligence and intentional tort claims against Burleson, who claimed he is entitled to official immunity on both claims.

"Unless the General Assembly provides otherwise, state employees are subject to tort suits in only two situations: when injuries are caused by their negligent performance of ministerial duties, and when injuries flow from their official functions carried out with actual malice or actual intent to injure. Ga. Const, art. 1, § 2, para. 9(d)," according to the court. "In other words, a public officer or employee may be personally liable only for ministerial acts negligently performed or acts performed with malice or intent to injure. The rationale for this immunity is to preserve the public employee's independence . . . and prevent a review of his or her judgment in hindsight. Murphy v. Bajjani, 282 Ga. 197, 647 S.E.2d 54, 56-57 (Ga. 2007) (quoting Cameron v. Lang, 274 Ga. 122, 549 S.E.2d 341, 344 (Ga. 2001)). Thus, with respect to (the plaintiff's) negligence claim, the court must consider whether the defendant's acts were ministerial. As to (the plaintiff's) intentional tort claim, the court must consider whether the defendant acted with actual malice."

The Supreme Court of Georgia defines a ministerial act as "simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty." Murphy, 647 S.E.2d at 57. The federal judge added that "the opposite of a ministerial act is a discretionary act. A discretionary act is one that requires deliberation and judgment, an examination of facts to reach a conclusion, and action not directed by a specific duty. Id."

The plaintiff alleged that Burleson "acted negligently in five ways:

- In failing to obtain the knowledge that would prevent or minimize the risk of head injury to football players, specifically Tyler Bowen;
- In failing to implement programs, policies and procedures to prevent or minimize the risk of head injury to football players, specifically Tyler Bowen;
- In failing to recognize that Tyler Bowen had symptoms suggestive of a concussion during the Sept. 9, 2016 football game;
- In allowing Tyler Bowen to continue playing in the Sept. 9, 2016 football game despite Tyler having exhibited symptoms suggestive of a concussion; and
- In failing to perform his ministerial duties established by [TCSD] policies, Meadows policies, Georgia High School Association . . . policies, and Georgia Law in regards [sic] to concussions and preventing catastrophic injuries post-concussion.

"The conduct alleged in sub-paragraphs (a) through (d) is discretionary; these sub-paragraphs all involve an examination of facts, judgment, and action not directed by a specific duty. For this reason, the allegations in sub-paragraphs (a) through (d) cannot support a claim against Defendant Burleson because he is entitled to official immunity. The conduct in the final sub-paragraph, however, is ministerial. In Austin v. Clark, 294 Ga. 773, 755 S.E.2d 796, 799 (Ga. 2014), the Supreme Court of Georgia reversed the trial court's decision to dismiss a plaintiff's case as one alleging negligence in the course of a discretionary duty. There, the plaintiff was injured when she tripped on a school sidewalk, alleging that the defendants negligently performed ministerial duties related to maintaining the sidewalk. Id. at 798. Although the complaint contained no description of the defendants' duties, the court noted the possibility that future discovery would reveal a "detailed laundry list of discrete tasks each individual was required to perform" to ensure the sidewalk

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DeMeco Ryans and a Career-Ending Injury: On to Arbitration!

By Sean Halloran and Jeff Birren, Senior Writer

In 2005 DeMeco Ryans was a senior linebacker at Alabama. He was SEC Defensive Player of the Year and a unanimous first team All-American. He was a second round draft choice of the Houston Texans, and subsequently won AP NFL Defensive Rookie of the Year, finishing second in the NFL with 126 solo tackles. Ryans was an All-Pro in 2007 and 2009. He was traded to the Philadelphia Eagles in 2012 and continued to perform at an elite level, finishing 5th in the NFL with 102 solo tackles 2013.

On November 3, 2014 Ryans suffered a terrible injury. During a game at the Texans' NRG Stadium, Ryan intercepted a pass and then caught his foot on the turf and tore his Achilles tendon. He spent the rest of 2014 on the Injured Reserve list. Ryans returned to play in 2015 at a greatly reduced level. His 102 solo tackles in 2013 fell to 32 solo tackles in 2015. The Eagles subsequently released Ryans and he never again played in the NFL.

NRG stadium had a history of turf-related injuries. In 2010 Patriots' wide receiver Wes Welker tore his MCL and ACL there and Coach Bill Belichick told the media that the "turf down there is terrible ... I really think it's one of the worst fields that I've seen." In 2011 the Texans' own punter Brett Hartman suffered a catastrophic injury at NRG and sued Harris County Convention & Sports Corporation, along with SMG the private company hired to operate the stadium. The case was settled in 2015, and the surface of the playing field was later replaced.

In 2016 Ryans filed a premises liability case in Harris County State Court in Texas claiming that the condition of the playing surface at NRG stadium in 2014 caused his injury, thereby cutting short his career. He sued the Texans, the Harris County Convention & Sports Corporation, SMG, SrathAyr Turf Systems PTY Ltd. the company that designed the turf system at the stadium, and the NFL though he later dropped the NFL (*Houston NFL Holding, L.P. D/B/A Houston Texans, Appellant v. DeMeco Ryans*, Appellee, Texas Court of Appeals for the First District of Texas, No. 01-18-00811-CV, 8-1-19).

Ryans sought damages in excess of ten million dollars, claiming defendants breached their duty of ordinary care by negligently selecting a dangerous design, negligently maintaining condition of the field, failing to exercise reasonable care to reduce or eliminate the known risks of design construction and maintenance, and that these failures directly and proximately caused his injury but for which he would have continued playing football in the NFL. The lawsuit further claimed that the defendants were on notice due to complaints by other players.

The Texans removed the case to federal court claiming preemption via Section 301 of the Labor Management Relations Act, asserting resolution would require interpretation of the NFL Collective Bargaining Agreement ("CBA"). The federal court found that Ryans's negligence claims do "not require an interpretation of the CBA, which prompts the Court to return this matter to its proper jurisdiction" in state court since the "premises liability claim under Texas state law is not inextricably intertwined with consideration of the CBA because the plaintiff has not invoked the CBA to satisfy any of the elements of his claim." Ryan's motion to remand was thus granted.

After a year in litigation in Harris County, the Texans filed a motion to compel arbitration under the Federal Arbitration Act ("FAA") and pursuant to Article 43 of the NFL CBA. The Texans insisted that Ryans's claim "involves the interpretation and application" of the CBA, the NFL Standard Player Contract, and the NFL Rules contained therein which contain specifications for NFL playing fields. Ryans opposed the motion, arguing that his claim falls outside the scope of Article 43 because the claim is based on the common law duty of care that a premises owner owes to invitees and is thus unrelated to any provision of the CBA. The trial court denied the motion and the Texans filed an accelerated interlocutory appeal.

The Court of Appeals issued its decision on August 1, 2019. The court began with a ten-thousand-foot overview of applicable law, starting with the FAA and focusing on 9 U.S.C. § 2, stating "that a written provision in a contract ... to settle by arbitration a controversy shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

The court then stated that it faced "a single issue" of whether "the trial court abused its discretion in denying the motion to compel arbitration because Article 43 of the CBA is a valid arbitration agreement that encompasses Ryans's premises-liability claim." Previously, the trial court had found Ryans's claim were not preempted by the CBA citing the *Brown, Bush*, and *McPherson* cases. However, the appeals court distinguished those cases as only addressing plaintiffs' claims that were not preempted by the four-corners of the CBA or any accompanying documents such as the NFL Rules, which are also subject to the arbitration agreement under Article 43. Because Ryans's claim centers on the NFL Rules Playing Field Specifications ("PFS") found within the NFL Rules, the court declared *Brown, Bush,* and *McPherson* inapposite.

The court found the case law on point. In *Ellis v. Schlimmer*, 337 S.W. 3d 860, 862 (Tex. 2011) that when (1) a valid arbitration agreement is undisputed, then (2) policy requires the court to resolve any doubts as to the agreement's scope in favor of arbitration. Additionally, "a court should not deny arbitration unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which

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DeMeco Ryans and a Career-Ending Injury: On to Arbitration!

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could cover the dispute at issue" (*AT&T v. Commc'ns Workers*, 475 U.S. 643, 650 (1986)). Key terms in interpreting the scope of the agreement are "involving" and "any dispute" in correlation with an arbitration clause, which if present makes the underlying contract a broad arbitration agreement, (*FD Frontier Drilling v Didmon*, 438 S.W. 3d 688, 693 (Tex. App.)). Didmon additionally draws the line that if the factual allegations of the complaint touch matters that have a significant relationship to, are inextricably enmeshed with, or are factually intertwined with the agreement then the claim in arbitrable; but if the facts alleged in support of the claim can be maintained without reference to the agreement then the claim is not arbitrable (*Id.* at 695-696). Whether a claim falls within the scope of an arbitration agreement is a question of law, which the appellate court reviews de novo for abuse of discretion (*Id.* at 692-693).

The court's analysis on abuse of discretion began with examining the heading of Article 43, which reads "Non-Injury Grievance". On point was *Ad Vallarai v Chan*, 519 S.W.3d 132, 138 (Tex. 2017), which established that headings in contracts are permissible indicators of meaning. At first glance the court found Article 43's heading "Non-Injury Grievance" indicates Ryans's claim falls outside Article 43's scope because his claim is essentially a "grievance" for the "injury" he sustained at NRG Stadium. However, upon further review the court found the context of Article 43's heading is not meant to exclude all injury claims, rather it only differentiates the grievance procedure for injury claims asserted by a player against the club that employs him from other injury claims. Paragraph 13 of the NFL Player Contract entitled "Injury Grievance" and *Orlando Brown v NFL*, 219 F. Supp. 2d 372, 389 n.7 (S.D.N.Y. 2002) supports this, defining the term "Injury Grievance" as a specific kind of claim asserted by a player against the Club that employs him. The court also noted that the CBA itself expressly provides that its headings "are solely for the convenience of the parties, and shall not be deemed part of, or considered in construing, the agreement".

The court then analyzed the substantive text of Article 43 which states "any dispute … involving the interpretation of … any provision of the CBA… or any applicable provision of the… NFL Rules pertaining to the terms and conditions of employment of NFL players". The court found the use of the terms "involving" and "any dispute" in Article 43 is indicative of a broad arbitration agreement giving it expansive reach and making it capable of encompassing disputes having a significant relationship to the CBA itself and the NFL Rules. The Texans contended that Ryans's claim involved the interpretation of the Playing Field Specifications ("PFS")" within the NFL Rules, and the court noted that "Ryans does not dispute that the PFS pertains to the terms and conditions of employment of NFL players or that the NFL playing field is the workplace of the NFL players". The PFS also characterizes the condition of the playing field as a "player safety issue" and requires each NFL Club to maintain its playing field in accordance with its applicable safety standards.

Furthermore, *Cohen v. Landry's Inc.*, 442 S.W. 3d 818, 827 (Tex. App. 2014) allows the trier of fact to consider "whether the condition met applicable safety standards". Additionally, the court found *Del Lago Partners v. Smith*, 307 S.W. 3d 762, 767 (Tex. 2010) was on point, requiring that a claim for premises liability the invitee must prove that a condition on the premises posed an unreasonable risk of harm. The PFS requires inspections of the field prior to each game that must include an impact hardness test, a synthetic infill depth and evenness measurement, and a visual inspection for defects before every game. Similarly, Ryans's premises liability claim alleges that various conditions on the playing field in NRG Stadium posed an unreasonable risk of harm due to negligent design, installation, and maintenance of the synthetic turf field which resulted in a severely uneven playing surface, with uneven hardness, and continuity problems which caused players to land awkwardly, trip, stumble, and sink into the turf resulting in severe and even career ending injuries.

The court could not rule out that the trier of fact may consider the applicable safety standards established in NFL Rules Playing Field Specifications ("PFS"), therefore it was possible that Ryans's claim was within the scope of Article 43 because of the PFS. The court further addressed Ryans citing of three similar federal cases involving NFL players who asserted state law tort claims which fell outside Article 43's scope: *Orlando Brown v. NFL* 219 F. Supp. 2d 372, (S.D.N.Y. 2002); *Reggie Bush v. St. Louis,* No. 4:16CV250 JCH, 2016 WL 3125869 (E.D. Mo. June 3, 2016); and *McPherson v. Tenn. Football Inc.* U.S. Dist. LEXIS 39595 (M.D. Tenn. May 31, 2007). The court found these cases inapposite because they related solely to the interpretation of the four-corners of the CBA itself, whereas Ryan's claim specifically involves the interpretation of the separate NFL Rules document.

Here, Ryans' premises-liability claim involved interpretation of the PFS within the NFL Rules, which are subject to the arbitration clause under Article 43, thus it cannot be said with positive assurance that Article 43 is not susceptible of an interpretation that would cover Ryans' claim. Therefore, the trial court abused its discretion by denying the Texan's motion to compel arbitration.

Ryans' counsel hoped to avoid arbitration by simply not name the player's team. Presumably the next case will only name the stadium owner and/or operator and ignore the home team.

Lessons Learned from *Feleccia v. Lackawanna College*

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M. Coyne and Alexis D. Bonisese—recent graduates who had obtained Bachelor of Science degrees in Athletic Training—applied for the open positions. Although neither candidate was officially licensed as an athletic trainer, Lackawanna hired them both. Under Pennsylvania law, to use the title "athletic trainer," an individual must pass a national certification exam and be licensed pursuant to the Medical Practices Act.

Thereafter, Lackawanna learned that Coyne and Bonisese failed the national certification exam. Rather than terminating Coyne and Bonisese, however, Lackawanna retitled their positions from "athletic trainers" to "first responders." Despite this relabeling, Coyne and Bonisese continued to carry out the same duties, including providing medical treatment to student-athletes.

Two Student-Athletes Join the Football Team and Execute Waivers of Liability and Consent Forms

In March 2010, Augustus Feleccia and Justin T. Resch tried out for and made Lackawanna's football team. Both student-athletes signed various documents in order to play for the team, including a waiver of liability and a consent form. In pertinent part, the waiver of liability stated that

[i]n consideration for my participation in [football], I hereby release, waive, discharge and covenant not to sue Lackawanna College . . . [and its] employees from any and all liability, claims, demands, actions, and causes of action whatsoever arising out of or related to any loss, damage, or injury . . . that may be sustained by me . . . while participating in such athletic activity.

The consent form stated that "I do hereby off[er] my voluntary consent to receive emergency medical services in the event of an injury during an athletic event provided by the **athletic trainer**, team physician or hospital staff." (emphasis added).

Student-Athletes Suffer Injuries, Sue for Negligence

On the first day of spring football practice, both student-athletes suffered injuries while participating in a tackling drill. Resch suffered a T-7 vertebral fracture. Coyne attended to him before he was transported to the hospital in an ambulance. Later that day, Feleccia suffered a "stinger" in his right shoulder, experiencing numbness, tingling, and a loss of mobility. Bonisese attended to him and cleared him to continue practice "if he was feeling better." Feleccia returned to practice, and while attempting to make another tackle with his right shoulder, he suffered a traumatic injury to his brachial plexus.

Thereafter, Feleccia and Resch filed suit against Lackawanna, its athletic director, Coyne, and Bonisese, among others, asserting claims for damages caused by negligence. The complaint also sought punitive damages, alleging that the defendants acted "willfully, wantonly and/or recklessly."

The Trial Court Rules in Favor of Lackawanna

The defendants asked the court to dismiss the case as a matter of law, relying primarily on the waivers of liability that Feleccia and Resch signed. The trial court granted defendants' motion for summary judgment, ruling that the waivers of liability protected the defendants from negligence claims. The trial court also ruled—with little discussion—that the claims for punitive damages failed.

The Superior Court Reverses

On appeal, the Superior Court reversed.[1] Among other things, the Superior Court held that Lackawanna's waiver of liability was not specific enough to protect Lackawanna from general negligence claims because it did not use the term "negligence." The rule under Pennsylvania law before *Feleccia* was that liability waivers cannot waive liability for reckless conduct. In *Feleccia*, the Superior Court added to that rule, and held that liability waivers cannot preclude liability for "grossly negligent" conduct as well. Finally, the Superior Court held that, as part of athletic programs' general duties of care to student-athletes, they are "required to have qualified medical personnel available" at athletic events.

The Pennsylvania Supreme Court Refines the Ruling

To the extent it created a new common law duty of care requiring athletic programs to have qualified medical personnel available at every practice and every game, the Pennsylvania Supreme Court reversed the Superior Court decision. The Supreme Court did so because the Superior Court did not analyze the factors necessary for creating a new common law duty of care.[2]

The Supreme Court held that it did not need to create a new duty of care. This case involves duties of care that already exist under the law, e.g., the defendants put the student-athletes at risk through their own affirmative conduct. The Court explained that the defendants' conduct of requiring the student-athletes to sign the consent to treatment by an "**athletic trainer**, team

1 *Feleccia v. Lackawanna College*, 156 A.3d 1200 (Pa. Super. Ct. 2017).

2 *Feleccia*, 2019 WL 3917069, at *7–8 (citing *Althaus ex rel. Althaus v. Cohen*, 756 A.2d 1166, 1169 (Pa. 2000)). The *Althaus* factors include: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution." 756 A.2d at 1169.

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Lessons Learned from *Feleccia v. Lackawanna College*

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physician or hospital staff" and holding Coyne and Bonisese out as athletic trainers despite knowledge that they lacked the statutorily required licenses created a "special relationship" with the student-athletes and increased the risk of harm posed to them. Because of this, the defendants had a duty to exercise reasonable care to protect them, including to provide qualified medical care.

As for the waivers of liability, the Court held that the waivers signed by the student-athletes were valid and sufficiently clear to bar claims of ordinary negligence even though the term "negligence" did not appear in the language. The Court affirmed, however, the Superior Court's ruling that releases can never waive claims for "gross negligence." The Court explained that "allowing a release of gross negligence claims would incentivize conduct that jeopardizes the signer's health, safety and welfare to an unacceptable degree."

The Supreme Court sent the case back to the trial court so that it could determine whether the defendants actually breached their duty to provide qualified medical care, whether such a breach constituted gross negligence or recklessness beyond the scope of the waivers of liability, and whether such a breach caused the student-athletes' injuries.

The Takeaways

So what does *Feleccia* mean for schools and their athletic programs going forward?

First, schools may take some comfort in the fact that the Supreme Court did not outright create a new general duty of care requiring them to have licensed athletic trainers available at every practice and every game. However, although the majority kicked the question down the field for another day, one justice, in his opinion argued that the Supreme Court should have created such a general duty of care, and laid the groundwork for any plaintiff who may rely on this legal theory in the future. Therefore, schools in Pennsylvania should be prepared to face such an argument and should take note that a general duty of care requiring qualified medical personnel at every sporting event may soon be enforced as the norm.

Second, as pointed out by the Chief Justice, "gross negligence" is an "amorphous concept" that is difficult to define. The majority attempted to bat away the Chief Justice's concerns, defining gross negligence as "an extreme departure from the standard of care, beyond that required to establish ordinary negligence[.]" However, what constitutes "extreme?" What goes beyond "ordinary negligence?" Going forward, negligence plaintiffs faced with a waiver defense can be expected to argue that they are entitled to have a jury decide whether the defendant's negligence was, in fact, "gross." Until litigants and trial courts receive thorough and detailed guidance as to the types of facts that must be pled to allege gross negligence, schools and their athletic programs are likely to see an uptick in litigation, and they may be surprised to learn that waivers of liability signed by their student-athletes do not protect them as much as they once thought.

Finally, although not a new concept, this case serves as a reminder that a school's own affirmative conduct can expose it to additional liability. The Supreme Court used the consent form Lackawanna required its student-athletes to sign—which included a specific reference to "athletic trainers"—as part of its analysis in determining that Lackawanna had an affirmative duty to provide qualified medical personnel at all athletic events. This form—which Lackawanna used in an attempt to limit liability—ended up being the source of it. Thus, it demonstrates the attention and care schools must give when crafting their legal documents.

Court: School District Shielded by Immunity in Concussion Case

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was properly maintained. Id. at 799. It did not matter that plaintiff's complaint lacked reference to any procedures regarding sidewalk maintenance; dismissal at the pleading stage was not appropriate. Id."

In the instant case, the plaintiff alleged that "Defendant Burleson failed to perform ministerial duties specified in policies for concussion prevention and care. This meets the 'facial plausibility' pleading standard set out in Iqbal; there is sufficient factual content to allow the court to 'draw the reasonable inference that the defendant is liable for the misconduct alleged.' 556 U.S. at 678 (citing Twombly, 550 U.S. at 556, 570). In other words, the plaintiff's complaint pleads enough facts for the court to make the reasonable inference that Burleson did not follow a set of specific policies for the prevention and treatment of concussions. Accordingly, to the extent that (the plaintiff states) a claim of negligence in failing to follow specific policies, Defendant Burleson is not entitled to official immunity."

Jeffrey Bowen et al. v. Telfair County School District et al.; S.D. Ga.; CV 618-112; 9/17/19

Insurance Is Not Killing Contact Sports—It's Making Them Safer*

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or other contact sports. In 2012, Grantland (an ESPN blog) ran a piece titled, "What Would the End of Football Look Like?"[2] It suggested that an evaporating insurance market could bring football on a 10 to 15 year "slow death march."

While this kind of rhetoric can be effective at casting light on an important issue, it overlooks the fact that coverage for brain injury is still widely available to schools and recreational organizations that wish to provide contact sport programs. It is true that some insurance companies over the past years have written brain injury exclusions into their policies, but many insurers offer these exclusions as an option to lower premiums rather than as a flat out requirement.

The existence of these policies and the freedom of customization they offer are an indication of the sports insurance and risk management industry's ability to adapt, not a sign of the impending demise of contact sports. This article discusses the trends regarding brain injury coverage and how industry experts have reacted to these trends.

Are Football and Other Contact Sports Really in Danger?

The Outside the Lines report likened the threat of brain injury (e.g., concussion) and brain disease (e.g., CTE) litigation to another behemoth that dramatically altered the litigation landscape: asbestos. It suggested that an evaporating insurance market could be the death knell of not only football but potentially "all of youth sports."[3] Numerous industry executives were quoted as saying the risk of litigation and payouts related to brain injuries was a "sleeping giant" with the potential to result in a "free-for-all nightmare." The report also noted that the NFL no longer has coverage for brain injuries, and that Pop Warner had to switch carriers when a subsidiary of AIG refused to insure the youth football organization without a brain injury exclusion.

Similar claims were made elsewhere in the wake of the Outside the Lines report, with one commentator contending that there was a "consensus" by insurers to either drop football entirely or write brain trauma exclusions into their policies, leading to the end of youth football itself. "Without youth and other feeder leagues to develop and nurture the NFL stars of the future, the outlook for the future of American football is dark and cloudy"[4]

In the era of hot-takes and click-baiting, sweeping claims like these are sure to gain attention. What they do not mention is that many insurers continue to have sufficient appetite for taking on the risks of contact sports and that they will continue to cover brain injuries in their policies.

Brain Trauma Exclusions Offered By Sports Insurers Not Sign of Doom, But of Industry's Ability to Adapt

There is no doubt that brain injury exclusions have become more commonplace in recent years. But this exclusion is most often a way to provide a choice to the insured, not a way of pulling coverage out from under them.

Many carriers who insure sports and recreation organizations have begun to offer the *option* to exclude brain injuries from coverage, allowing the organization to pay a lower premium. The exclusion is most often tied to a policy insuring tackle football, but it can also be elected as part of a policy covering other high-risk, high-contact sports such as soccer, hockey, and lacrosse. When the policyholder does not elect to exclude brain injuries, they will be covered, although the policy limits for such a claim may be lower than the limits for other types of injuries.

Take, for example, a policy offered by the National Recreation and Park Association ("NRPA") [administered by K&K Insurance Group]. The 2019 policy offers coverage with the option to exclude brain injuries in football, soccer, hockey, and lacrosse.[5] The 2015 policy, however, did not contain such an exclusion.[6] But, importantly, the exclusion is not mandatory—customers can opt into coverage for brain injuries in exchange for a slightly higher premium. This is true even for tackle football.[7] For sports

2 Kevin Grier and Tyler Cowen, "What Would the End of Football Look Like?", **Grantland** (Feb. 13, 2012), http://grantland.com/features/cte-concussion-crisis-economic-look-end-football/.

3 The full quote, from the executive director of Pop Warner football, was as follows: "Certainly, if insurance goes away, it's not going to be just football. It's going to be all of youth sports. I think it would be the proverbial domino effect." *See* Fainaru, *supra* note 1.

4 Brendan Gooley, "Will Insurance be the Death of Football? Market Constricts Amid Brain Injury Concerns," **Property Casualty Focus** (Jan. 30, 2019), https://propertycasualtyfocus.com/will-insurance-be-the-death-of-football-market-constricts-amid-brain-injury-concerns/.

5 *See* "Applications and Brochures," **National Recreation and Park Association**, ttp://www.nrpainsurance.com/sites/nrpa/Pages/ApplicationsandBrochures.aspx (last visited Oct. 13, 2019).

6 *See* "2015 NRPA-sponsored coverage—a win-win for everyone!", **NRPA**, http://www.nrpainsurance.com/sites/nrpa/Documents/PDF/1927-B%20NRPA-Football-6-19.pdf (last visited Oct. 13, 2019).

7 Brain injuries do have lower policy limits, at $1,000,000 per occurrence and $1,000,000 aggregated. Injuries other than brain trauma have a $5,000,000 aggregate limit. "Brain injury" is defined as "concussion, chronic traumatic encephalopathy or any other injury to the brain and any symptoms, conditions, disorders and diseases, including death, resulting therefrom but only if such injury occurs as a result of specific events

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other than football, soccer, hockey, and lacrosse, brain injuries are fully covered.

In contrast with the picture painted by the Outside the Lines report and others, the NRPA's policy is just one example of how the insurance market is reacting to shifting trends. Exclusions for brain injuries are available if an organization wants to pay a lower premium, but the coverage is nevertheless available to those who need it and are willing to pay higher premiums for it.

This is the view taken by many in the industry. In an interview with the California Youth Football Alliance, John Sadler of Sadler Sports Insurance expressed his disagreement with the Outside the Lines report and shared his thoughts on where insurance for youth sports was headed.[8]

"Despite what you may have heard in the media, there are still a number of insurance carriers willing to write General Liability including brain injury coverage. It is true that some carriers, such as Philadelphia and AIG, were hit with heavy losses in high-risk concussion sports, such as soccer and football, and decided to exclude all brain injury coverage in these sports," Sadler said.

"But, there are five or more carriers freely writing the coverage with brain injury for youth tackle football, including Scottsdale, National Casualty, Atlantic Specialty and HCC, among others. Just do a Google search for youth tackle football insurance and you will get a lot of hits. And my agency will insure youth tackle football including brain injury all day long."

How Can Insurance Make Sports Safer?

Insurance companies have a unique opportunity to encourage programs to have sound policies and practices in place related to handling sports-related concussions. Sadler explained that insurance carriers require that, in exchange for coverage, their insureds maintain detailed concussion-management policies, which can mitigate the risk of head trauma. "These programs should key in on training for staff, parents, and players on the basics of concussions; how to recognize a concussion, mandatory removal from play, mandatory treatment, and gradual return-to-play protocols," Sadler said.

This, of course, is part of a much larger movement towards increased player safety throughout the youth sports community. The increased awareness about the risks associated with brain trauma and the long-term effects of repetitive concussive and sub-concussive blows has changed the way we view sports, from the professional level all the way down to the local rec leagues. These risks have had a profound impact on the way leagues, teams, and schools conduct their operations, as they work to update concussion-management and return-to-learn and return-to-play protocols.

In fact, Sadler indicated that concussion claims are trending downwards. "I recently had a discussion with a senior manager at one of the carriers that continues to write the coverage, and he said that they have no plans on pulling back and that they have not seen an uptick in brain injury claims over the past three years," he said.

By taking steps to require their insureds promote player safety, insurance companies that issue policies covering brain injuries are not turning their back on football, and other high-risk, high-contact sports. Instead, they are using their leverage (insurance coverage for brain injuries) to ensure that those organizations are being proactive in preventing injuries from occurring in the first place and, in doing so, mitigating their risks. Outside of legislative mandates, insurance companies may have the most power to influence change at all levels so that these sports can continue to become safer, ensuring their existence (and the host of benefits they provide) well into the future. The reality is this: insurance is not killing football, it is keeping it alive.

This article is dedicated to Steve Henne, a beloved friend of the editors and authors of Sports Medicine and the Law. Steve was the Vice President of Claims and Shareholder Initiatives at The National Catholic Risk Retention Group, a role he served in for nearly 14 years. It couldn't be any clearer what an esteemed and admired figure he was at National Catholic and within the insurance and risk management industry, and we have him and his family in our thoughts and prayers.

occurring during the policy period." *See supra* note 5.

8 John M. Sadler, "Despite ESPN Article Claims, Insurance Will Not End Youth Football," **Sadler Sports & Recreation Insurance**, https://www.sadlersports.com/blog/is-football-insurance-dying-youth-tackle-football (last visited Oct. 13, 2019).

Exercise As Punishment? Drop And Give Me 20 . . .

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An Abruptly-Ended Athletic Career

For several months after running the Tiger Mix, Lee was unable to return to competitive basketball at GSU because his CPK levels would rise upon physical exertion. Although he remained at school after the incident, Lee failed four of his classes during the fall semester and later withdrew from GSU. In January 2010, he enrolled at Southern University in Shreveport where he was physically cleared to play basketball. He played only three games before being benched for academic and disciplinary reasons.

In February 2010, Lee was hospitalized for a second time after playing in an independent basketball tournament. He presented with a fever, a skin disorder, and a UTI, as well as elevated CPK levels, which resulted in a week-long stay in the hospital. Dr. Robert Goodman, a rheumatologist, found the existing elevated CPK level was caused by his exertion in the basketball game, and that his persistent elevated CPK level was caused by the heatstroke he suffered after running the Tiger Mix in August. It was Dr. Goodman's opinion that the Tiger Mix-induced heatstroke resulted in permanent, irreversible physical damage to Lee and permanent exercise intolerance. This condition effectively ruled out Lee's future playing college basketball, any potential future in professional basketball, and any non-sports career options involving physical exertion, manual labor, or joining the military.

GSU's Negligence on Trial in *Lee v. LA Board of Trustees*

Lee filed a suit against the Louisiana Board of Trustees for State Colleges and GSU in August 2010 for the personal injuries and damages suffered as a result of the defendants' negligence. The parties disputed at length Lee's potential future earnings based on competing projections of his basketball career. Seven years later, in 2016, the case went to trial where the jury awarded Lee $2.5 million in damages. Because of Louisiana's cap on general damages against the state, the award was reduced to $660,000.

On appeal, GSU argued that the trial court erred in allowing Lee's high school coach Errol Pipkins to testify to Lee's future basketball potential and earning capacity, and in allowing GSU's strength and conditioning coach Thomas Stallworth to testify as an expert. Stallworth testified that he believed the Tiger Mix was "a blatant disregard for athletic rules and regulations and NCAA policies." GSU further argued that the damages awarded were excessive. Lee also appealed the trial court's decision to vacate the jury award for future economic losses as being subject to the cap on general damages.

Earlier this year, the Louisiana appellate court upheld the $660,000 verdict.

Never Use Exercise As Punishment

In 2009, ESPN's Outside the Lines published a report outlining its investigation into the Tiger Mix and White's death. It revealed GSU violated several NCAA rules and its own school protocol, including the fact that the team's athletic trainer had yet to clear the team to work out, and she was not aware of the run taking place.[3]

In addition to these violations, the more important concept underlying White's death and Lee's permanent physical harm is this: physical activity should ***never*** be used for punitive purposes. This was recently highlighted by the NCAA Sports Science Institute in its Interassociation Recommendations: *Preventing Catastrophic Injury and Death in Collegiate Sports*.[4] The practice of exercise as punishment "invariably abandons sound physiologic principles and elevates risk above any reasonable performance reward."[5] Essentially, the minimum expectation is that all strength and conditioning sessions should be "evidence-or consensus-based; sport-specific; intentionally administered; appropriately monitored, regardless of the phase of training; and not punitive in nature."

Similarly, the National Athletic Trainer's' Association previously recommended that "Physical activity should not be used as retribution, for coercion, or as discipline for unsatisfactory athletic or academic performance or unacceptable behavior. No additional physical burden that would increase the risk of injury or sudden death should be placed on the athlete under any circumstance."[6] The NCAA report also suggests that all athletics personnel, sport and strength and conditioning professionals, and primary athletics health care providers, should intervene if they suspect that physical activity is being used as punishment.[7]

Fainaru-Wada, *Questions linger for Grambling State*, ESPN (Nov. 27, 2009) https://www.espn.com/espn/otl/news/story?id=4693697.

3 *See* Fainaru-Wada, *supra*.

4 *See* NCAA Sports Science Institute, *Interassociation Recommendations: Preventing Catastrophic Injury and Death in Collegiate Athletes*, at 10 (July 2019) https://ncaaorg.s3.amazonaws.com/ssi/injury_prev/SSI_PreventingCatastrophicInjuryBooklet.pdf (emphasis added).

5 *Id.*

6 Douglas A. Casa et al., *The Inter-Association Task Force for Preventing Sudden Death in Collegiate Conditioning Sessions: Best Practices Recommendations,* Journal of Athletic Training Vol. 47, No. 4, 477-480 (July/Aug. 2012) https://natajournals.org/doi/abs/10.4085/1062-6050-47.4.08.

7 *Id.* (Recommendation 5: Responsibilities of Athletics Personnel).

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Letting "Common Sense Prevail"

So, what exactly constitutes exercise as punishment? The NCAA does not provide a formal definition, but the FAQ document associated with the report describes punishment workouts as "more than just extra exercise."[8] They are workouts motivated by anger or frustration and may include a volume and intensity of exercise corresponding to that anger and frustration, (although intent may be difficult to establish later). The volume and intensity of a punitive workout are not part of a planned workout or based on principles of exercise science and physiology, but rather are used to make athletes "tougher" or to create a team culture of "accountability."[9]

Scott Anderson, head athletic trainer for the University of Oklahoma's football team, noted that ad lib punishment workouts commonly occur immediately after a regular, planned workout as something extra and punitive. The NCAA similarly described them as "unplanned, spontaneous, are inconsistent with the conditioning level of the athlete or team, are not logically progressive in intensity, and are not sport-specific in their nature."[10] The Tiger Mix should be the dictionary example for punitive exercise: it is a non-sport specific, high intensity run, ordered in response to anger over athletes' conduct, where dangerous weather conditions were not accounted for (or worse, were accounted for and ignored), the athletic training and medical personnel staff were kept in the dark, and which resulted in the death and permanent injury of two student-athletes.

According to Scott Anderson, the suggested "never" policy for punitive exercise is not popular with coaches, and many will "absolutely not" abide by it. For coaches and other team personnel, when it comes to certain conditioning sessions or exercises, the question of "Why are you doing what you're doing?" should be asked, and "If you can't answer that question, you shouldn't be doing it," says Anderson. Despite possible push back from coaches, in evaluating whether conditioning or exercise is considered punitive, "common sense should prevail."[11]

Therefore, in keeping with the NCAA's most recent recommendations to avoid catastrophic results like the Tiger Mix and to avoid crossing the line into punitive exercise, any training or conditioning sessions or extra sessions desired by coaches should be planned in advance, conducted with competent athletic trainers and personnel present, and be clearly unrelated to any punitive purpose.

8 *See* NCAA Sports Science Institute, *Interassociation Recommendations: Preventing Catastrophic Injury and Death in Collegiate Athletes – Frequently Asked Questions*, at 6 (July 2019) https://ncaaorg.s3.amazonaws.com/ssi/injury_prev/SSI_CatastrophicInjuryPreventionFAQs.pdf

9 *Id.*

10 *Id.*

11 *Id.*

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