SPORTS MEDICINE and the LAW

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Resuming Play After COVID-19: Potential Liability & Best Practices for Leagues, Teams, Coaches, and Athletic Trainers

By Brian G. Remondino, Esq., and Joseph E. Samuel, Jr., Esq., of Montgomery McCracken Walker & Rhoads LLP

Sporting events and leagues across the world—from the community level to the professional level—including the Masters, Wimbledon, the Summer Olympics, the NBA, the WNBA, the NHL, the MLB, the Champions League, and all NCAA winter and spring championships, have been postponed or canceled as COVID-19 continues to spread at an alarming rate. President Donald Trump has told the commissioners of the major U.S. sports leagues that he expects their games, complete with fans in the stands, to return by August or September.[1] Others, however, including California Governor Gavin Newsom, New York Governor Andrew Cuomo, NFL Player Association Executive Director DeMaurice Smith, and Dr. Anthony Fauci are less optimistic.[2]

1 Adam Schefter and Adrian Wojnarowski, *Sources: President Donald Trump says NFL season should start on time*, ESPN (Apr. 4, 2020), available at https://www.espn.com/nfl/story/_/id/28995399/sources-trump-says-nfl-start.

2 Ken Belson and Marc Stein, *Despite Trump's Optimism, Lack of Sports Could Extend Into the Fall*, New York Times (Apr, 7, 2020), available

See RESUMING on Page 9

Navigating A New Gauntlet: Pro Sports Leagues Adapt to Marijuana Legalization

By Kelly Huff, Esq., & Elizabeth Catalano, Esq., of Montgomery McCracken Walker & Rhoads LLP

While 2020 may forever be remembered as the unprecedented "Year of No Sports," it may mark a turning point in the acceptance of professional athlete cannabis use. State governments continue to address the legality of marijuana for both recreational and medicinal purposes, and employers throughout the county are grappling with how to handle marijuana in the workplace. It comes as no surprise then that the governing bodies of American professional sports leagues likewise have been forced to re-evaluate their approaches to drug testing, especially given that athletes in many states now can legally buy and use cannabis. Some leagues also are taking steps towards evaluating whether cannabis could be used as a pain management therapy for their ailing athletes. Like the divide between states, however, other leagues are maintaining their historically harsh penalties for athlete marijuana use. With limited medical research available, and a whole lot of lobbying at every level of government, only time will reveal the direction and pace with which cannabis use by professional athletes will be officially

See NAVIGATING on Page 12

THIS ISSUE

SPORTS MEDICINE and the LAW

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Please direct editorial or subscription inquiries to Hackney Publications at: 512-716-7977 or info@hackneypublications.com.

Sports Medicine and the Law is published quarterly by Hackney Publications.

Hackney Publications

Postmaster send changes to: Hackney Publications, P.O. Box 684611, Austin, TX 78768.

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Ex-Athletic Trainer Sues Union, Citing Dismissiveness About Concussions

A former high school athletic trainer has sued the Windham Southeast Supervisory Union (WSSU), an administrative organization that provides support and services for several educational institutions in Vermont, claiming she resigned under pressure after coaches were dismissive of her measures and concerns regarding traumatic brain injuries suffered by the athletes under her care.

Jaclyn Penson, a resident of New Hampshire, filed suit March 3 in federal court in Vermont, alleging wrongful termination in violation of Vermont's public policy mandating protection of student athletes participating in school athletic programs.

The plaintiff, represented by attorney Norman E. Watts of Watts, is seeking a jury trial, judgment, and an award from her supervisory union for lost compensation and benefits as well as damages, attorney's fees and court costs.

Penson began her nearly 4-year tenure at Brattleboro Union High School in 2016. She was designated an "allied health care provider" under Vermont law. Her duties included "promoting and implementing an effective athletic training program; providing first aid, injury evaluation diagnosis and assessments, treatment, rehabilitation, and reconditioning for student athletes; and protecting student athletes from serious injuries," according to the lawsuit. She was also required "to implement, administer, supervise, and update concussion protocols for student athletes and maintain an emergency action plan." She also was responsible for supervising "the clearance on injured athletes prior to and during the sports seasons," as well as "the required training and certifications of all coaches and (coordinating) their professional development."

The complaint continued: "Although plaintiff was charged with the aforementioned responsibilities and enforcement of safety protocols for student athletes, some of defendant's athletic coaches minimized the protocols and even prevented her from performing the required functions."

In particular, Penson alleged that varsity boys' hockey coach Eric Libardoni "actively discouraged students from consulting" with her for examinations or treatments for potential injuries.

"Libardoni intimidated students and they became intimidated and leery of consulting with plaintiff about an injury or potential injury," according to the lawsuit. "Coach Libardoni's practice was disconcerting for plaintiff, especially when students had head injuries or potential head injuries."

She cited one instance when a fist fight broke out between two student athletes in a hockey game. Penson intervened, when neither coach did, and determined that one of the players suffered a concussion. She further alleged that Libardoni "verbally assaulted" her, "creating a hostile environment that made it difficult to implement concussion protocol and therefore prevent further injury to the athlete."

In addition, Penson claimed that "on at least one occasion, Libardoni refused medical examination or treatment for youngster who hit their head on the arena ice; he prevented plaintiff and another employee for defendant, the away-team athletic trainer, from examining or treating the child."

Penson added that, overall, coaches "actively discouraged" her "from implementing safety measures for student athletes, where student athletes suffered serious head and bodily injuries."

In response, Penson reported her concerns to BUHS Athletic Director Chris Sawyer, who also coached the lacrosse team, but she was "physically blocked" from access to his team. This "forced" Penson "to report the breach of protocol and seek intervention

See FORMER on Page 6

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The Arrington Settlement and Its Implications: What It Says and What It Doesn't

By Dylan F. Henry, Esq., Kacie Kergides, Esq., and Kimberly L. Sachs, Esq., of Montgomery McCracken Walker & Rhoads LLP

Recently, the NCAA and the plaintiffs in a concussion class action lawsuit reached a settlement that has major implications on how NCAA member schools structure their concussion management policies and how those policies are carried out in practice.

In 2011, Adrian Arrington, a former safety on the Eastern Illinois University football team, filed a class action lawsuit against the NCAA, alleging the NCAA negligently failed to ensure a safe environment for student-athletes. Arrington initially filed the suit on behalf of all former and current NCAA football players who suffered concussions or concussion-like symptoms while playing football at NCAA schools. The class was ultimately expanded to include "all persons who played an NCAA-sanctioned sport at an NCAA member school on or prior to July 15, 2016." The class claimed the NCAA was negligent in how it treated concussions and fraudulently concealed the long-term effects of concussions. The NCAA, however, denied all allegations of liability and wrongdoing. After multiple proposed settlement agreements, the parties ultimately reached a settlement (the "Settlement Agreement"), which benefits both former and current student-athletes and has implications for NCAA member schools and their concussion-related policies and procedures.

The Settlement

The parties first agreed on a proposed settlement in July 2014, but it wasn't until August 2019 that Judge John Lee in the United States District Court for the Northern District of Illinois approved the Agreement's terms.

Under the Settlement Agreement, the NCAA agreed to a Medical Monitoring Fund of $70 million, which will provide monetary resources for the screening and medical evaluations of class members. In addition, the NCAA committed $5 million to fund research regarding the prevention, treatment, and/or effects of concussions.

In addition to the monetary contributions, the Settlement Agreement requires the NCAA to implement reporting processes and educational requirements for its member schools. The NCAA must create (1) a reporting process through which its member schools will report diagnosed concussions in student-athletes and how those concussion cases resolve; and (2) a reporting mechanism through which anyone can report concerns about concussion management issues to the NCAA. The NCAA must also provide member schools with educational materials for their faculty regarding academic accommodations for student-athletes with concussions (i.e., "return-to-learn" materials and accommodations).

The Settlement Agreement also requires the NCAA to change its policies and procedures for concussion management and return-to-play. Specifically, member schools will now have to implement the following five return-to-play guidelines into their concussion policies:

- Every student-athlete will undergo pre-season baseline testing for each sport in which they participate before practicing for or competing in that sport.
- Every student-athlete who has been diagnosed with a concussion will be prohibited from returning to play or participating in any practice or game on the same day on which the athlete sustained the concussion.
- Every student-athlete diagnosed with a concussion by medical personnel must be cleared by a physician before being permitted to return to play in practice or competition.
- NCAA member schools shall ensure that medical personnel with training in diagnosis, treatment, and management of concussion are present at all Contact Sports[1] games.
- NCAA member schools shall ensure that medical personnel with training in the diagnosis, treatment and management of concussion are available at all Contact Sports practices.

The member schools will also have to provide NCAA-approved concussion education and training to student athletes, coaches, and athletic trainers before each season.

In accordance with the Settlement Agreement, member schools must certify within six months after the Effective Date, defined as November 18, 2019, that they have put in place a concussion management plan that meets the return-to-play requirements. Member schools who certify by May 18, 2020, will be released from certain legal claims that might otherwise be brought by members of the settlement class; although, it is not mandatory for member schools to do so. It is also important to note that certification does not release member schools from all liability as student-athletes who current, specific concussion-related injuries are still able to bring claims against the NCAA and member schools.

Implications of the Settlement and Unanswered Questions

While the five return-to-play guidelines

1 Contact Sports include, whether a men's or women's team, football, lacrosse, wrestling, ice hockey, field hockey, soccer, and basketball

See THE ARRINGTON on Page 4

The Arrington Settlement and Its Implications: What It Says,What It Doesn't

Continued From Page 3

outlined in the Settlement Agreement seem quite simple on the surface, they are susceptible to multiple interpretations. Though the NCAA released answers to Frequently Asked Questions in an attempt to provide some guidance to the member schools, the NCAA has not clarified several key provisions.

For example, the guideline regarding baseline testing is ambiguous. According to the language of the Settlement Agreement, one might interpret that provision to mean that *all* student-athletes need a baseline test for *all* sports in which they participate *every* year. That could be a heavy burden on athletic trainers; under this interpretation, athletic trainers would be required to provide baseline testing *every* year for *every* student athlete, and that could increase to twice a year, every year for those student-athletes that play two sports. Putting the heavy burden aside, some athletic trainers view this frequency of baseline testing as overkill and not necessary to receive an accurate medical reading. Furthermore, the NCAA's "Interassociation Consensus: Diagnosis and Management of Sport-Related Concussion Best Practices" and Concussion Safety Protocol Checklist suggests that all student-athletes should receive a one-time, pre-participation baseline test.[2] The Settlement Agreement and the NCAA's Checklist seem to conflict on the required frequency of baseline tests, which can be problematic for member schools trying to update their concussion management policies to comply with the Settlement Agreement. Member schools should recognize that compliance with the Settlement Agreement does not necessarily mean that they are compliant with the NCAA's Protocol Checklist.

Another area of concern is the undefined terms "present" and "available" in guidelines four and five, which require member schools to ensure medical personnel are present and available at all contact sports games and practices. Most member schools have a limited number of athletic trainers for their teams, so schools with smaller athletic departments may interpret "present" and "available" differently than schools with large athletic departments and multiple athletic trainers.

Further complicating this issue is that it is also unclear how the NCAA defines "practice," leaving member schools with unanswered questions. Does "practice" include captains-led practice? Weight-lifting sessions? Summer workouts? The NCAA did not provide any guidance on how it defines these terms, and thus the member schools are left with their own interpretations, for now.

The Arrington Settlement Agreement is just another example of how the standard of care for concussion management and prevention in sport is always evolving. These changes can come from a wide range of sources (medical, legal, association rules and regulations, statutes, best practices, etc.). Here, the evolution came from a legal settlement. The NCAA has slightly altered the standard of care (not in the clearest fashion), which impacts how member schools must conduct themselves. This has a butterfly effect on how non-NCAA collegiate programs should operate, and, in turn, how high school coaches and trainers, and so on, should run their programs. Or at least that is what a plaintiff's lawyer would argue.

In an area that is already a hotbed for litigation, the inclusion of another set of concussion protocols and standards, while intended to increase the athletes' safety, will also increase the number of legal claims against coaches, trainers, and universities. One can expect that future claims will involve allegations that a school failed to conduct baseline testing before each season each year or failed to have medical personnel "present" at all Contact Sports "games" or "available" at all Contact Sports "practices."

Ultimately, member schools should review and update their concussion management policies, not only to benefit from the Settlement Agreement release terms, but also to better protect the health and safety of their student-athletes, which in turn will hopefully reduce injury and prevent the inevitable lawsuit that would follow. It would also behoove any other program that is capable of making such changes to do so. But, these schools and programs must continue to monitor updates to the standard of care, from the NCAA and beyond, and continue to review all changes with legal counsel and risk managers. ●

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2 "Interassociation Consensus: Diagnosis and Management of Sport-Related Concussion Best Practices" p. 8 http://www.ncaa.org/sites/default/files/SSI_ConcussionBestPractices_20170616.pdf; *see also* NCAA "Concussion Safety Protocol Checklist" https://ncaaorg.s3.amazonaws.com/ssi/concussion/2020_Concussion_Safety_Protocol_Checklist.pdf

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Experts Go Ten Rounds: How Competing Expert Opinions Can Push A Case to Trial, A Case Study of *Thomas v Farrago*

By Eric Chang, Esq., and Dylan F. Henry, Esq., of Montgomery McCracken Walker & Rhoads LLP

Round 1- The Facts

On November 2, 2013, heavyweight boxer, Magomed Abdusalamov, stepped into the ring at Madison Square Garden and squared off against challenger, Ismaikel Perez, to defend his USNBC Heavyweight Title in a fight regulated by the New York State Athletic Commission (SAC). When the dust settled after 10 rounds of punishing blows, Abdusalamov was heavyweight champ no more; Perez won by unanimous decision. But this loss would soon be the least of Abdusalamov's concerns.

SAC physicians, including Gerard P. Varlotta, D.O., examined Abdusalamov's bloodied and swollen face in the locker room after the bout. The physicians stitched a laceration above his eye and suspected that Abdusalamov had sustained a nasal fracture. However, the physicians noted that Abduslamov did not manifest any neurological issues and saw no symptoms suggesting brain trauma, a brain bleed, or a subdural hematoma. They administered the King-Devick (KD) test, which helps physicians quickly recognize possible concussion symptoms. Abduslamov passed both before and after the bout. Though there were ambulance on-site, the physicians did not send Abdusalamov to the hospital. Rather, they cleared him to leave the Garden and only advised him to get an x-ray once he returned home to Florida.

Shortly after leaving the Garden that night, Abdusalamov became increasingly unsteady and nauseous and began to manifest signs of neurological distress. Abdusalamov was rushed to Roosevelt Hospital by taxi where he was diagnosed with a subdural hematoma and cerebral herniation. Soon, Abdusalamov underwent emergency brain surgery, suffered multiple strokes, and was placed in a medicallyinduced coma. With the exception of a brief moment to remove his respirator, Abdusalamov remained in a coma for over a month. When he was eventually discharged from the hospital, Abdusalamov was paralyzed on his right side, unable to walk, and his speech was mostly limited to mumbling.

Round 2— The Lawsuit and Partial Settlement

In January 2014, Abdusalamov and his family sued the State of New York, the SAC, the three SAC ringside physicians, and the referee. Plaintiffs alleged that defendants failed to provide adequate medical and neurological examination and evaluation to determine Abdusalamov's physical and neurological condition during and after the fight, and that the defendants further failed to recognize, diagnose, or appreciate the significance of the blood found in "Abdusalamov's urine, along with signs, symptoms and complaints of progressive nausea, vomiting, headache, malaise, facial fracture(s), hand fractures, disorientation, compromised coordination, alteration of speech pattern, lethargy and vertigo indicative of a closed traumatic brain injury." The allegations also claimed the defendants "failed to provide timely and appropriate medical transport via ambulance to a nearby qualified hospital facility[.]" In 2017, the State of New York and the SAC agreed to pay $22 million in settlement. The medical malpractice suit against the ringside physicians and the referee remained.

Rounds 3 and 4—Summary Judgment, and Summary Judgment Redux

Prior to trial, the ringside physicians moved for summary judgment. The defendants argued that Abdusalamov showed no signs of neurological distress during the fight or during the postbout medical examination and further claimed they did not deviate from the applicable standard of care because there was no cause for sending Abdusalamov immediately to the hospital emergency room. The court agreed and initially granted summary judgment with respect to Dr. Varlotta.

Plaintiff requested reargument, and the court changed its mind after reconsideration. Plaintiff pointed out that the court had overlooked plaintiff's expert who opined that, even in the absence of overt signs of neurological distress, Abdusalamov should have been held for further observation or immediately transferred to a hospital for a CT scan of his brain. Plaintiff contended that the competing expert opinions, *i.e.*, a "battle of the experts," should have led the court to deny the motion for summary judgment and send the case to trial.

The court again concluded that plaintiff did not offer competent expert evidence that Dr. Varlotta missed signs of neurological distress. The court recognized that defendants' experts opined that (1) Dr. Varlotta did not deviate from the accepted standards of care because Abdusalamov "showed no signs of neurological distress during or after the bout or during Varlotta's examination, so that Dr. Varlotta could not have reasonably anticipated that Abdusalamov would develop signs and symptoms of neurological distress later on"[1]; (2) that Abdusalamov did not manifest any signs or symptoms of possible neurological injury until after he left MSG, one hour after the fight ended; and (3) that brain bleeds are a rare occurrence resulting from a boxing match. Furthermore, plaintiff's own expert conceded that Abdusalamov first exhibited signs of neurological distress only after Dr. Varlotta completed his examination.

1 *Thomas v. Farrago*, 2019 N.Y. Misc. LEXIS 598, at *5 (Sup. Ct. Kings Cty. 2019).

See HOW COMPETING on Page 6

How Competing Expert Opinions Can Push A Case to Trial

Continued From Page 5

Nevertheless, the court acknowledged the plaintiff's expert's opinion that even in the absence of overt signs of neurological distress, the defendant doctors departed from the standards of accepted medical care when they released Abdusalamov less than 30 minutes after the end of the bout, with knowledge that he had sustained a head trauma. The court specifically focused on plaintiff's expert's opinion that "there can be no debate that when over threehundred head blows [are inflicted] in the span of thirtynine minutes, by a heavy weight opponent, hospitalization is indicated and warranted."[2]

The conflicting expert opinions presented a credibility question which required a jury's resolution. Accordingly, the court denied Dr. Varlotta's motion for summary judgment. The denial of the summary judgment motion moved the case onward toward trial. On September 2019, however, the day jury selection was scheduled to begin, the remaining defendants, including Dr. Varlotta, settled the case with Abdusalamov for an undisclosed amount.

Round 5—Takeaways

The case study of *Thomas v. Farrago* is important because it not only demonstrates how vital expert opinions are to both parties in these types of cases, but it also shows how a plaintiff can preserve its case for trial and defend at the summary judgment stage even if the facts are not in plaintiff's favor as long as there is a legitimate "battle of the experts" that creates a question of fact for the fact finder (e.g., the jury) to decide. Even though the court recognized that there were no observable symptoms of a brain injury, the fact that Abdusalamov participated in a brutal and one-sided boxing fight alone seemed to be enough for the court to punt to a jury the question of whether the SAC physicians breached their standard of care. The holding opened the door for a requirement that physicians examining boxers post-fight to either continually reassess and examine a fighter beyond the initial assessment, or to send the fighter to a hospital for further testing; even in the absence of overt symptoms that would raise red flags as to the fighter's physical or mental condition.

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It does not take much of an imagination to extend the court's analysis in *Thomas v. Farrago* to similar litigation resulting from injuries in other sports, and the case raises a lot of important questions: Is the mere fact that a football player took a seemingly-brutal hit, or a cheerleader sustained a seemingly-nasty fall, even in the absence of any signs or symptoms upon examination, enough for a case to proceed to trial as to whether a medical professional breached the standard of care? Is either continued monitoring or hospital admission of an athlete required for a medical professional to meet the standard of care even if the athlete is cleared on initial examination? What is the "golden hour" of observation (e.g., required period of time) after a suspected brain injury and when can a medical provider safely assume that no further observation is required (and thus, the medical provider's legal "responsibility" for the athlete ends)? These questions remain unanswered, but *Thomas v. Farrago* suggests that coaches, trainers, and physicians need to be hypervigilant, perhaps to the point of over-vigilant, when it comes to athlete care. This is especially true in circumstances involving repeated blows to the head.

As we often advise clients, the standard of care for concussion and traumatic brain injury management is ever evolving, and changes can come from a host of places. As the sporting and legal worlds alike continue to recognize the devastating effects of traumatic brain injuries and continue to adopt measures to protect the athletes, it is important to stay up to date as the courts concurrently evaluate whether these measures are legally adequate and when they prove wanting. ●

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2 *Id.*

Former Athletic Trainer Sues Union

Continued From Page 2

from the school principal."

Ultimately, Penson reported the actions to the Vermont Agency of Education and the supervisory union. But before action could be taken, the "defendant revealed her complaints to various individuals, and they became common knowledge."

When Penson "finally realized that school authorities had no intention of curtailing Libardoni's threats and abuse towards students or his intimidation towards her, she resigned," according to the complaint.

In sum, Penson alleged that conduct within the supervisory union "created an intolerable working situation," and "breached the public policy mandating protection for the health and safety of defendant's student athletes. ●

Too Hot to Handle? Heat-Related Concerns for Tokyo Games

By John T. Wendt and John J. Miller

Tokyo 2020 Olympic organizers selected the dates for the Summer Games promising an "ideal climate" for competition despite a history of notoriously hot summers (Foster, 2019, para 20). However, in the three years prior to their application to host the Games, Tokyo had 60 days of temperatures near 90 degrees Fahrenheit (Japan Today, 2013). Between 2006 and 2013 the annual number of heatstroke cases exceeded 20,000 (Yabuki, Onoue, Fukuda, & Yoshida, & Yoshida, 2013). And it was predicted that the conditions for the 2020 Games would be worse than four of the previous five Olympic Games (Hosokawa, Nagata, & Hasegawa, 2019). These temperature assessments cultivate increased likelihood that Olympic athletes participating in outdoor endurance events such as triathlons, marathons, or open-water swimming (OWS) may be subjected to extreme heat during the competitions resulting in exertional illness during the Games, which have now been rescheduled for the summer of 2021 (Bergeron, 2014).

The OWS competition is a 10-kilometer marathon event scheduled to be held in Odaiba Marine Park in Tokyo Bay. According to international federation rules the warmest temperature allowed to conduct a race is 31 degrees Celsius (Federation Internationale De Natation, 2019). In the summer of 2019, water temperatures in the Tokyo venue were consistently in the warm 29-30 degrees Celsius (84-86 degrees Fahrenheit) range and with high E. coli levels. To reduce the levels of E. coli, underwater screens and filters have been installed, but these seem to have raised water temperatures (O'Kane, 2019). Hence, if organizers open the screens in an attempt to lower water temperature, it may result in an increased presence of E. coli.

Tokyo 2020 organizers conducted a test event in Odaiba Marine Park on Aug. 11, 2019. Despite moving the starting time of the men's event from 10 a.m. (local) to 7 a.m. to coincide with the start of the women's event, and despite shortening the distance of the race from ten to five kilometers, swimmers finished in water temperatures of 30 degrees Celsius with many complaining of the heat in the water (Munatones, 2019, para. 6).

One of the catalysts for the regulation for a maximum temperature of 31 degrees Celsius was the death of United States open water swimmer Fran Crippen who died during a FINA approved race in 2010. At that event, the air temperature was nearly 100 degrees Fahrenheit , and the water temperature was about 30.5 degrees Celsius (87 Fahrenheit). These temperatures made it very difficult for athletes to dissipate heat, and the salt content of the water added greatly to the dehydration risk. Ultimately, it was reported that Crippen died from exertional heatstroke (EHS), considered the most severe type of exertional heat illness (Federation Internationale De Natation, 2011). When EHS happens, the metabolic heat production and the environment overwhelm the body's ability to thermoregulate (Lopez, Tanner, Irani, & Mularoni, 2018). As a result, multi-organ dysfunction may occur, which may result in irreversible and fatal damage (Epstein, Roberts, Golan, Heled, Sorkine, & Halpern, 2015). One of the first signs of EHS is confusion and delirium as the brain begins to dysfunction (James, 2010).

OWS competitors face a number of challenges including, but not limited to, currents, rogue waves, dangerous sea life, wind conditions, or even E. coli. However, none of these challenges represent the potential life-threatening element of the heat levels in the air and water at the time of competition.

International Olympic Committee (IOC) President Thomas Bach has stated that "Athletes' health and well-being are always at the heart of our concerns. A range of measures to protect the athletes have already been announced. The new far-reaching proposals to move the marathon and race walking events show how seriously we take such concerns" (International Olympic Committee, 2019, para. 14). While those events were moved because of weather-related conditions that could compromise athlete safety, OWS was not. As one OWS athlete surmised, there is no Plan B venue for OWS athletes to compete (Hart, 2020). Given these foreseeable issues, a question to consider is, should the OWS athletes assume the risks to compete in conditions that are potentially life-threatening when there is no alternative?

The basic concept of assumption of risk is that "A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm" *(Restatement (Second) of Torts: Assumption of Risk*, 1965, § 496A). A standard comment regarding injured athletes has been that "they knew the risk of playing a sport." Like many other Olympic athletes, OWS competitors "compete within a hierarchy where willingness to gamble with physical safety is the coin of the realm." (Horton, 2004, p. 628). This perception presents a struggle as to whether an OWS Olympian assumes a risk, especially if the full extent of that risk is unknown. Do they or can they truly understand the risks that may occur to them in a venue that can affect them physically and mentally? Further analysis should be conducted to answer this question.

The *Crippen* case illustrates that even the fittest swimmers may succumb to life-threatening heatstroke during physical exertion in open water swimming. If these athletes do not or cannot comprehend the potential risks in OWS, is there is an increased ethical and legal responsibility for FINA and the IOC to develop safer strategies and implement policies for the safety of the participants? At the time this article was written, the 2020 Olympic Games have been postponed to July 23-Aug. 8, 2021, again the warmest time of the year. As a result, FINA and the

See TOO HOT on Page 12

Athlete's Medical Malpractice Claim Can Continue

The claim of a former Central Michigan University (CMU) football player — who sued the university, its athletic officials, and the medical team for allegedly misleading him about his options when he considered taking a red-shirt season because of symptoms that could be attributed to past concussions — is still alive as a result of the ruling of a Michigan appeals court.

While the appeals court affirmed the rest of the ruling that dismissed the claim of Saylor Lavallii, the court remanded back to the Michigan Court of Claims the allegations against Dr. Matthew R. Jackson (Dr. Jackson),which included breach of professional standard of care, among other claims. Specifically, it found that the notice provision of MCL 600.6431, which the court relied upon in dismissing Lavallii's claim against Jackson, does not apply to a medical malpractice claim brought against an individual practitioner.

By way of background, Lavallii was a student at CMU, playing football for the school from 2012 through 2014. After his third year, Lavallii consulted with the former team doctor and the coaching staff about concussion-like symptoms and the possibility of taking a nonmedical "redshirt" year and not playing during the 2015 season, with the understanding that he would resume playing the following year.

The coaching staff and athletic department subsequently asked the plaintiff to take a "medical, noncount redshirt year," meaning that the plaintiff's scholarship would not count against the total number of scholarships available to the team. Lavallii agreed to this plan, but he alleged that he was not informed that this plan required him to be medically disqualified for the 2015 season and medically cleared the following year. In the meantime, Lavallii was treated with doctors not affiliated with CMU, who concluded that he was medically able to resume playing football. Lavallii alleged that, armed with this information, he met with the new team doctor, Dr. Jackson, who did not examine the plaintiff and, at the same time, refused to give plaintiff medical clearance to resume playing. The plaintiff was notified by the athletic director by e-mail dated June 17, 2016, that he remained medically disqualified from rejoining the football team on the basis of Dr. Jackson's recommendation.

On August 3, 2017, the plaintiff mailed a notice of intent to file a claim under MCL 600.2912b, addressed to CMU President George Ross, Dr. Jackson, CMU Medical Staff, and CMU Health. Lavallii then filed complaints in February 2018 in the Isabella Circuit Court and in the Court of Claims against Dr. Jackson and other CMU defendants, alleging medical malpractice against Dr. Jackson, CMU Health, CMU, and CMU Medical staff, among other counts. Dr. Jackson was the only named defendant served with the circuit court complaint, which was ultimately transferred to the Court of Claims for consolidation with the parallel case in that court.

Dr. Jackson subsequently moved for summary disposition under MCR 2.116(C)(7) and (C)(8), arguing in part that, in bringing his personal injury claim against an employee of a state university, the plaintiff did not comply with the notice requirement under MCL 600.6431(1). The Court of Claims granted the motion, leading to the appeal.

In its analysis, the appeals court wrote that "whether the Court of Claims has jurisdiction over the complaint is a distinct question from whether plaintiff complied with the proper notice provision. Principally, we affirm the Court of Claims' dismissal of the plaintiff's claim against Central Michigan Health. However, we agree with the plaintiff that the Court of Claims erred by dismissing his claim against Dr. Jackson on the basis that plaintiff did not comply with the notice requirement for bringing a claim against the state, MCL 600.6431.

"With respect to Dr. Jackson, we conclude that the Court of Claims erred in applying the notice provisions of MCL 600.6431 to the plaintiff's claim. MCL 600.6431 requires a claimant to give notice of a personal injury claim against the state within six months of the event underlying the claim:

(1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.

(2) Such claim or notice shall designate any department, commission, board, institution, arm or agency of the state involved in connection with such claim, and a copy of such claim or notice shall be furnished to the clerk at the time of the filing of the original for transmittal to the attorney general and to each of the departments, commissions, boards, institutions, arms or agencies designated.

(3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

"The Court of Claims erred by referring to claims against the state without acknowledging the distinction between the state and its individual employees. Unlike the statute defining the jurisdiction of the Court of Claims, MCL 600.6419, the notice provision for bringing a claim

See ATHLETE'S on Page 15

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Resuming Play After COVID-19: Potential Liability & Best Practices

Continued From Page 1

Whether most sports resume by August or not, one thing is certain: sports will resume eventually. In fact, some sports leagues around the world—including the Chinese Professional Baseball League (Taiwan) and the Korean Baseball Organization (South Korea)—have already resumed play without fans.[3] And, as some states begin to ease restrictions domestically, the NBA recently announced that it will allow teams in states and municipalities that are loosening stay-at-home orders to reopen their practice facilities as early as May 8th.[4]

The resumption of sports inevitably brings with it the possibility that players, coaches, staff, and fans may spread COVID-19, resulting in concentrated outbreaks or what some have called "biological bombs."[5] In many states—including Pennsylvania and New Jersey—people and corporations can be held liable for negligently spreading infectious diseases. Therefore, when other sports do finally resume, leagues, teams, coaches, and their staff must take precautions to protect their players and fans from harm and themselves from tort liability. Below, we discuss the relevant case law and how such case law might be used against a league, team, coach, or staff member, including an athletic trainer, if a COVID-19 outbreak occurs. Then, we offer several precautions these actors should take before and after resuming play, with a particular focus on small colleges, high school sports conferences, community leagues, and others who do not have the same resources (or economic stakes) as the major professional sports leagues.

Tort Liability for the Negligent Spread of Infectious Diseases

Pursuant to long-standing Pennsylvania Supreme Court precedent, "[t]o be stricken with disease through another's negligence is . . . no different from being struck with an automobile through another's negligence."[6] Therefore, if "a man contracted smallpox [or another disease] through another's negligence, he would have a right of action against the tort-feasor."[7] Similarly, New Jersey courts have held that physicians have a legal duty to promptly inform patients who test positive for a communicable virus and counsel the infected patients on how to avoid the transmission of the virus.[8] Third parties to whom the virus is spread may sue physicians who negligently fail to do so.

Courts in states across the country have adopted similar rules on the negligent transmission of disease, and tort plaintiffs have capitalized.[9] For example, after participating in a test-driving event hosted by a vehicle manufacturer on tracks laid out in the desert in Arizona, a vehicle dealer developed Valley Fever, a flu-like disease caused by spores found in the air when desert soil is disturbed by human activity.[10] The dealer sued the manufacturer for negligence, and a jury found in the dealer's favor. The Fifth Circuit Court of Appeals affirmed, explaining that the manufacturer had a duty to warn of and protect its business invitees from known risks, including Valley Fever. The court also held that the manufacturer breached its duty, because, among other things, it could have—but did not—provide protective masks to the dealer and other participants.

Based on these legal principles, plaintiffs have already started filing lawsuits against defendants for COVID-19-related negligence. For example, multiple plaintiffs have sued Princess Cruise Lines, alleging that it failed to take adequate steps to protect them from the coronavirus.[11] Likewise, the estate of a deceased Walmart employee has sued Walmart, alleging that lax safety and cleanliness standards at one of its Illinois stores caused the employee to be infected,

at https://www.nytimes.com/2020/04/06/sports/trump-sports-return-coronavirus.html; Jason Owens, *NFLPA's DeMaurice Smith skeptical about season starting on time: 'Football is not essential'*, Yahoo Sports (Apr. 21, 2020), available at https://sports.yahoo.com/nflp-as-de-maurice-smith-skeptical-about-season-starting-on-time-football-is-nonessential-233544519.html; Chris Bengel, *Dr. Fauci: Some sports may have to skip this year due to the coronavirus pandemic*, CBS Sports (Apr. 29, 2020), available at https://www.cbssports.com/general/news/dr-fauci-some-sports-may-have-to-skip-this-year-due-to-coronavirus-pandemic/.

3 Jorge Fitz-Gibbon, *Baseball league restarts in Taiwan with robot and mannequin 'fans' in seats*, New York Post (Apr. 13, 2020), available at https://nypost.com/2020/04/13/baseball-league-restarts-in-taiwan-with-robot-and-mannequin-fans-in-seats/; *Baseball quietly returns to South Korea as games begin without fans*, ESPN (Apr. 21, 2020), available at https://www.espn.com/mlb/story/_/id/29074958/baseball-quietly-returns-south-korea-games-begin-fans.

4 Jay Croft and Madeline Holcombe, *Most US states will begin reopening within days*, CNN (Apr. 30, 2020), available at https://www.cnn.com/2020/04/30/health/us-coronavirus-thursday/index.html; Adrian Wojnarowski, *NBA pushes back workout date amid uncertainty*, ESPN (Apr. 27, 2020), available at https://www.espn.com/nba/story/_/id/29099194/nba-reopening-team-practice-facilities-friday-where-local-restrictions-eased-sources-say.

5 Nicky Bandini, *How Atlanta's feel-good Champions League story became a 'biological bomb' for coronavirus in Italy, Spain*, ESPN (Apr. 3, 2020), available at https://www.espn.com/soccer/italian-serie-a/story/4081211/how-atalantas-feel-good-champions-league-story-became-a-biological-bomb-for-coronavirus-in-italyspain.

6 *Billo v. Allegheny Stell Co.*, 195 A. 110, 114 (Pa. 1937).

7 *Id.*; *see also Smith v. Walker*, 11 Pa. D. & C.4th 663, 664 (Pa. Com. Pl. 1991) (permitting plaintiff to bring a negligence claim against an individual for negligently spreading a sexually transmitting disease).

8 *See C.W. v. Cooper Health Sys.*, 906 A.2d 440, 451-52 (N.J. Super. Ct. App. Div. 2006).

9 *See, e.g.*, *John B. v. Superior Court*, 137 P.3d 153, 156 (Cal. 2006); *Crim v. Int'l Harvester Co.*, 646 F.2d 161 (5th Cir. 1981); *Crowell v. Crowell*, 105 S.E. 206, 208 (N.C. 1920).

10 *Crim*, 646 F.2d 161.

11 *See, e.g.*, *Weissberger et al. v. Princess Cruise Lines Ltd.*, No. 2:20-cv-02267 (C.D. Cal.).

See RESUMING on Page 10

Resuming Play After COVID-19: Potential Liability & Best Practices

Continued From Page 9

leading to the employee's death.[12] It is foreseeable, therefore, that, if fans, players, or staff contract COVID-19 at a sporting event and can prove causation, leagues, teams, coaches, athletic trainers, and other staff may be exposed to significant liability. Did the league start too early and against the advice of medical experts, or worse, against federal and state orders or guidelines? Did an athletic trainer or team doctor screen players and staff for fevers or other COVID-19 symptoms before resuming practices or games? Did an athletic trainer or coach allow a player to play despite the presence of symptoms? Did a player hide his or her symptoms to remain on the field or court? Did the team provide masks to players, staff, and fans? These questions have already begun to arise in the wake of cancellations and disruptions caused by the virus, and they will continue to be asked as organizations consider resuming play.[13]

Best Practices

So, what should sports leagues, teams, coaches, athletic trainers, and other medical staff do going forward? In early April, the MLB proposed a plan that would require all 30 teams to play games at stadiums with no fans in the greater Phoenix area, and players, coaches, and staff would be sequestered at local hotels, where they would live in relative isolation and travel only to and from the stadium.[14] The MLB's plan was supported by Arizona Governor Doug Ducey and federal officials at the Centers for Disease Control and Prevention ("CDC") and the National Institute of Health ("NIH").[15] Originally, the plan was to start as early as May of this year, but MLB Commissioner Rob Manfred later backed away from that timeline.[16] More recent reports suggest that the MLB is considering a new three-division plan in which teams would play only within their newly formed, geography-based, ten-team divisions. Under this plan, baseball would be played in the league's existing stadiums, and the MLB predicts that it would be able to start play, albeit with no fans, in late June or early July.[17]

But what about small colleges, high school conferences, community leagues, and others that do not have the resources, teams of lawyers, or direct connections to the CDC and NIH that the major professional sports leagues have? It is unlikely that these smaller organizations can afford to (or would even want to) play out their seasons in sequester, as the professional sports leagues are considering. Below, therefore, we discuss several measures that these leagues and their teams can take before and after resuming play to minimize liability and, more importantly, to keep their players, staff, and fans safe.

Follow Federal and State Guidelines and Orders

First, and most importantly, leagues and teams should follow federal and state guidelines and orders "to the tee." Until your respective state removes applicable shutdown and shelter-in-place orders, do not resume play. Similarly, pay close attention to the social distancing guidelines issued by the CDC and your respective state that restrict the number of people who may gather in one place. Until these guidelines are mitigated to allow the requisite number of players and staff needed to play your particular sport to gather, do not resume play. Furthermore, until these guidelines are mitigated to allow large groups of people to gather, do not open your fields, gyms, or stadiums to fans or strictly limit the number of fans that may attend events.

In many jurisdictions, if a defendant has violated a state law or regulation, and the violation causes harm to the plaintiff, the defendant's conduct is considered negligent *per se*, *i.e.* the defendant's conduct is automatically considered negligent. However, even in jurisdictions that do not recognize negligence *per se*, the standard of care will likely be defined by federal andstate guidelines and regulations, and future plaintiffs will have an easy time establishing negligence if a league or team violates the CDC's or

See RESUMING on Page 11

12 *Toney Evans, Special Administrator of the Estate of Wando Evans v. Walmart Inc. et al.*, No. 2020L003938, Circuit Court of Cook County.

13 In the professional sports setting, where relationships between teams, players, and fans are largely covered by contract law, commentators have already begun to consider questions of liability raised by the virus. *See, e.g.,* Michael McCann, *Six Possible Fallouts From the Suspended NBA Season*, Sports Illustrated (Mar. 12, 2020), available at https://www.si.com/nba/2020/03/12/nba-season-suspended-coronavirus-impact (discussing duties and potential liability owed by leagues to spectators and journalists).

14 Jeff Passan, *Sources: MLB, union focused on plan that could allow season to start as early as May in Arizona*, ESPN (Apr. 7, 2020), available at https://www.espn.com/mlb/story/_/id/29004498/mlb-union-focused-plan-allow-season-start-early-arizona. The NBA is reportedly exploring a similar option to resume play based in Las Vegas or Disney World in Lake Buena Vista, Florida. Jack Baer, *NBA considering finishing season out at Disney World amid coronavirus pandemic*, YahooSports (Apr. 29, 2020), available at https://sports.yahoo.com/nba-finish-season-disney-world-coronavirus-pandemic-player-safety-020438272.html.

15 Ryan Young, *Arizona governor believes state could handle potential isolated MLB season after coronavirus*, Yahoo Sports (Apr. 14, 2020), available at https://sports.yahoo.com/arizona-governor-doug-ducey-believes-state-handle-mlb-isolated-season-phoenix-rob-manfred-coronavirus-covid19-pandemic-035128126.html.

16 Mark Townsend, *Rob Manfred: No MLB season until he's comfortable players and fans will be safe*, Yahoo Sports (Apr. 14, 2020), available at https://sports.yahoo.com/rob-manfred-no-mlb-season-until-hes-comfortable-players-and-fans-will-be-safe-001715387.html.

17 Bob Nightengale, *MLB discussing plan to start season in late June*, playing in home stadiums with realigned league, USA Today (Apr. 28, 2020), available at https://www.usatoday.com/story/sports/mlb/columnist/bob-nightengale/2020/04/28/mlb-optimistic-about-starting-season-late-june/3039275001/.

MONTGOMERY McCRACKEN
Attorneys At Law

Resuming Play After COVID-19: Potential Liability & Best Practices

Continued From Page 10

their state's guidelines. Regrettably, disagreement has already arisen between federal and state actors, and among states themselves, as to when it will be appropriate to relax guidelines.[18] Therefore, leagues, teams, and their staff must monitor and follow these guidelines closely and, as a precautionary measure against liability, the safest option is to follow the most restrictive federal or state guideline currently in effect.

Start Slowly, React Quickly

Although following federal and state guidelines is a good start, compliance with them will not necessarily shield defendants from all liability. Therefore, we recommend that leagues start slowly and react quickly if players or staff test positive for COVID-19.

Athletic trainers or other medical staff should screen players, coaches, and staff for COVID-19 symptoms, including fevers or coughs, before resuming play and before practices and games for as long as the COVID-19 remains an issue. The Korean Baseball Organization—which has already resumed pre-season games and, as of the writing of this article, is set to launch its regular season on May 5th—is taking this precaution, and teams do not let players or staff with fevers enter team facilities.[19] Athletic trainers or other staff at high schools and small colleges should be able to access thermometers relatively easily, so this is a measure that many can take. Like with head injuries, players—especially teenagers and children—may try to hide their symptoms so that they can remain on the field. Therefore, coaches and athletic trainers must remain vigilant and should consider developing protocols similar to those used for concussions. If COVID-19 testing becomes more readily available in the future, leagues and teams should test all players and staff before resuming play and test anyone who develops symptoms as play continues.

If a player or staff member tests positive, he or she, and everyone he or she has come in contact with, should be quarantined immediately, and leagues and teams should not hesitate to cancel games or suspend the season. Speaking to the necessity of a quick response, Dan Straily, a former MLB pitcher now playing for the Lotte Giants in South Korea, recently stated that: "If anybody, anybody — if the No. 1 starting pitcher to the person cleaning . . . — anybody gets sick . . ., we postpone two weeks."[20] Other international leagues, including the Nippon Professional Baseball league in Japan, have delayed scheduled re-starts after players tested positive. Leagues and teams here in the United States, including community leagues and high school conferences, should also react quickly when players or staff test positive. Sadly, this readiness to halt play must continue into the fall season, as many experts, including Dr. Fauci, predict that COVID-19 will return later this year.[21]

Take Extra Precautions

Finally, leagues, teams, and their staff should take extra precautions to prevent the spread of COVID-19. Consider requiring all players, staff, and fans to wear masks, bandannas, scarves, or other face coverings during practices, games, and around team facilities. In South Korea, umpires are wearing masks and gloves, and some coaches and team staff are wearing masks in the dugouts. Small colleges, high schools, and community leagues should encourage this preventive behavior. Similarly, leagues and teams should provide hand sanitizer and encourage players—particularly children or other potential players against which the assumption of risk defense would be less likely to be successful—to practice proper hygiene, avoid touching their faces, and practice social distancing where possible. By following these best practices, leagues, teams, athletic trainers, and medical staff can help prevent the spread of COVID-19 and reduce their risk of future liability. ●

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18 *As Trump says he "calls the shots," governors form regional groups to consider when and how to reopen*, The New York Times (Apr. 13, 2020), available at https://www.nytimes.com/2020/04/13/us/coronavirus-updates.html#link-525f113e.

19 *Baseball quietly returns to South Korea as games begin without fans*, ESPN (Apr. 21, 2020), available at https://www.espn.com/mlb/story/_/id/29074958/baseball-quietly-returns-south-korea-games-begin-fans.; Jeff Passan and Alden Gonzalez, *Can the U.S. return to sports soon? South Korea might offer clues*, ESPN (Apr. 6, 2020), available at https://www.espn.com/mlb/story/_/id/28998585/can-us-return-sports-soon-south-korea-clues.

20 *Id.*

21 Rachel Sandler, *Coronavirus Will Return in the Fall, Fauci Predicts, But the U.S. Will Be Better Prepared*, Forbes (Mar. 30, 2020), available at https://www.forbes.com/sites/rachelsandler/2020/03/30/the-coronavirus-will-return-in-the-fall-fauci-predicts-but-the-us-will-be-better-prepared/#30ebdc94e39b.

Too Hot to Handle? Heat-Related Concerns for Tokyo Games

Continued From Page 7

IOC have more time to consider a second possible venue, such as the Five Lakes area of Mount Fuji that is cleaner and cooler. FINA and the IOC must at least have a Plan B, a possible change of venue that will not compromise the health due to potential heat-related illnesses of OWS Olympians at the Tokyo Games. Lives may depend on it. ●

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Navigating a New Gauntlet: Pro Leagues Adapt to Marijuana Legalization

Continued From Page 1

accepted by their employers.

What's in a Name?

One common misconception throughout the United States is that the terms "cannabis," "marijuana," "hemp," and "cannabidiol (CBD)" all refer to the same product. Despite CBD products popping up on shelves and storefronts nationally, these terms have very specific meanings in a highly regulated industry.

The term "cannabis" refers to the whole plant species, *cannabis sativa*. Within the species, there essentially are two types of cannabis plants – hemp and marijuana – which produce distinct substances that are regulated completely differently under federal and state law. The main difference is the level of tetrahydrocannabinol (THC) in the plant. THC is the chemical compound that has psychoactive cannabinoids and creates psychological effects, commonly referred to as a "high."

Hemp is defined under federal law as *cannabis sativa* with a delta-9 THC content concentration level of less than 0.3% on a dry weight basis. On December 20, 2018, the passage of the 2018 Farm Bill removed hemp from Schedule I of the Controlled Substances Act, transforming it to a legal substance in all 50 states. Only CBD products derived from hemp with a THC level under the federal limit may be marketed and sold to consumers. CBD-infused cosmetics, lotions, and creams have become widely available.[1] It is equally important to recognize, as professional sports leagues have pointed out, that there is very limited testing or regulation of the abundant CBD products available on the market, raising many questions as to the purity, toxicity, potency and effectiveness of CBD products.

Marijuana contains higher levels of THC and still is regulated as a Schedule I substance;

1 The Food and Drug Administration does not permit the use or sale of CBD in human or pet food.

See NAVIGATING on Page 13

MONTGOMERY McCRACKEN Attorneys At Law

Navigating a New Gauntlet: Pro Leagues Adapt to Marijuana Legalization

Continued From Page 12

unlike hemp, it therefore still is illegal under federal law. However, legality varies at the state level. Recreational marijuana use currently is legal in 11 states and Washington D.C., and medical marijuana is legal in 33 states and Washington D.C. Of import to the professional sports world, this means that 101 of the 123 teams that make up the NFL, NBA, MLB, and NHL, or 82.1%, play in states where marijuana is legal in some capacity. Only 22 of these professional teams are located in the states where neither recreational nor medicinal use is legal: Texas, North Carolina, Tennessee, Georgia, Indiana and Wisconsin.

With the law now on their side, many professional athletes recently have informed their leagues that they do use cannabis products and have asked the leagues to reconsider both routine drug testing and therapeutic uses for cannabis, especially in place of highly-addictive opioids. Many retired professional athletes have readily endorsed CBD products. Very few current professional athletes are publicly promoting CBD products, but a few have emerged outside of the four major sports leagues, including U.S. Soccer star Megan Rapinoe, UFC fighter Nate Diaz, and pro-golfer Bubba Watson.

Policy Progressions in 2020

Given these recent legislative changes, leagues can no longer simply defer to the long-standing categorial prohibition on cannabis use based on federal law. As a result, there have been substantial changes to various league substance use/testing policies over the past six months.

National Football League: On March 15, 2020, the NFL announced that the Players Association (NFPLA) ratified a new, ten-year collective bargaining agreements (CBA) that significantly changes the league's drug and marijuana policy. The new policy quadruples the threshold for positive THC tests from 35 nanograms to 150 nanograms, in line with the World Anti-Doping Agency threshold, and eliminates suspensions for positive tests. The new policy also substantially reduces the testing window from four months pre-season to two weeks before the start of training camp. Keeping a focus on player safety, however, which the NFL insists is a driving force in maintaining drug testing policies, the new policy increases penalties for driving under the influence by imposing a three-game suspension.

This policy change comes on the heels of a novel pain management forum held by the NFL-NFLPA Pain Management Committee in January 2020. The league announced that the committee had "invited manufacturers of CBD products to share their research today so the Committee may hear and consider the possible scientific evidence base for CBD use as a pain management alternative. The meeting was an educational and scientific exercise and does not impact the jointly administered Policy and Program on Substances of Abuse."[2] For now, the NFL maintains that there is insufficient medical research on humans to make a formal determination on the use of CBD to treat acute and chronic pain. The NFL stated: "There are small clinical studies that suggest that it may be effective for treating neuropathic pain. Due to the fact that the majority of CBD products are purchased from unregulated sources, it is hard to know the purity and potency of these products."[3] Recognizing that "CBD is a promising compound" for pain management, however, this meeting signifies a major step towards the possibility of future therapeutic uses of CBD products in the league.

Major League Baseball: On December 12, 2019, the MLB took a major step in revising its drug policy when it removed marijuana from its list of banned substances. Before this change, players who tested positive for THC were referred to mandatory treatment, with failure to comply carrying up to a $35,000 fine. Starting with the 2020 season, the MLB teams will treat marijuana the same as it does alcohol, and like the NFL, there will no longer be suspensions due to marijuana use. Players do not have free reign to use marijuana at work, however, as players remain subject to discipline for use or possession, especially if they were to appear at practice or a game while high. The MLB commissioner wrote that players who "appear under the influence of marijuana or any other cannabinoid during any of the Club's games, practices, workouts, meetings or otherwise during the course and within the scope of their employment" will undergo a "mandatory evaluation" and will possible be subject to mandatory treatment programs or unidentified discipline.[4]

The MLB also announced it will be requiring all players and league personnel to undergo training on the "dangers of opioid pain medications and practical approaches to marijuana", making it the first professional sports league to mandate this type of player education relating to cannabis use.

Similar to the NFL, the MLB has not committed to any therapeutic use of cannabis products. Team doctors are forbidden from prescribing medical marijuana or providing CBD products to players, or keeping such products on club premises, because "clubs are

2 Judy Battista, NFL, NFLPA hold forum on CBD use for pain management, NFL News, http://www.nfl.com/news/story/0ap3000001096643/article/nfl-nflpa-hold-forum-on-cbd-use-for-pain-management (Jan. 14, 2020).

3 NFL, "Summaries from the NFL/NFLPA Committee on Pain Management," *available at* https://www.playsmartplaysafe.com/wp-content/uploads/2020/01/alt-o-and-cannabinoids-medical-staff.pdf (last accessed Apr. 14, 2020).

4 *MLB, MLBPA agree to changes to joint drug program*, MLB News, https://www.mlb.com/press-release/press-release-mlb-mlbpa-agree-to-changes-to-joint-drug-program (Dec. 12, 2019).

See NAVIGATING on Page 14

Navigating a New Gauntlet: Pro Leagues Adapt to Marijuana Legalization

Continued From Page 13

required to comply with all DEA regulations that apply to controlled substances." Players are also prohibited from investing in or being sponsored by the cannabis industry, despite any legality.[5]

National Hockey League: The NHL historically has the most progressive approach to athlete marijuana use, testing players' THC levels but not implementing any punishments for positive tests. The League generally follows the World Anti-Doping Agency guidelines for prohibited substances while taking a more lenient approach towards recreational drug use. If an NHL player is found to have "abnormally high levels" of THC, the team treats it as a health care issue, like it treats alcoholism, rather than mandating punishments. The league's CBA does not disclose the level of THC required to be deemed "abnormally high".

National Basketball Association: At the other end of the spectrum, the NBA continues to have the strictest policy regarding cannabis use in professional sports, having kept marijuana on its list of banned substances for 2020 and continuing to test and fine players for use. The NBA uses a very low threshold of 15 nanograms of THC for its testing threshold, however, so this is not a zero-tolerance policy. Players are subject to four random tests during the regular season and two during the off-season. Punishment can escalate from entering a drug program after a first positive test, to a $25,000 fine for a second positive, to a five to ten game suspension for third and fourth positives. The NBA agreed to stop drug testing players during the 2020 season shutdown due to COVID-19, and it remains to be seen whether the NBA will follow other leagues in its relaxation of the testing threshold and punitive actions for positive tests.

A Hazy Future?

Recent policy changes show that, at minimum, leagues are recognizing they must be flexible and progressive towards the substance that has become increasingly socially accepted, as well as legal, in many states. While these changes show progress, additional clarity likely will be needed as the policies are implemented. For example, the leagues largely continue to overlook the critical distinctions between hemp-based CBD and marijuana. Because these products are regulated differently, their use should be treated differently amongst athletes. The NFL appears to be the only league actively reviewing the research behind CBD and its effect on human health and pain, with the other leagues focusing only on the THC levels in their testing protocols. This measured approach is understandable, as the leagues are correct that, despite legality, the medical research on marijuana's and CBD's effects on human health is still very limited.

League policies also are silent as to whether testing thresholds will be enforced the same way against players who use medical marijuana, even if they have a medical registration card and prescription from non-league doctors. This creates a significant grey area in enforcement and has been a growing area of employment litigation in other workplace settings based on anti-discrimination laws. In May 2018, for example, the NFL rejected player Mike James' request for a therapeutic exemption to use marijuana. Now in 2020, leagues will need to figure out whether and if they should prohibit players from using medically-prescribed marijuana in the 33 states that have legalized it.

Additionally, only the MLB has formally addressed brand awareness issues by prohibiting their players from being sponsored by cannabis companies. This is somewhat surprising because all of the leagues have acknowledged that they are mindful of the messaging concerns to America's youth regarding cannabis use, as many professional athletes serve as role models in modern society. This is likely due to a combination of concerns over conflicting league policies, misunderstanding of the difference between CBD and marijuana, and the lack of quality control in some CBD products. As leagues relax their cannabis policies and more studies on CBD become available, these sponsorships could become more commonplace in the near future.

Other key questions that remain are whether these policy changes will alter the rates of cannabis product use by professional athletes, increase rates of positive testing, or create other athlete performance issues. We just may have to wait until the 2021 seasons to find out. ●

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5 Ben Adlin, *Baseball Players Can Smoke Marijuana But Can't Be Sponsored By Cannabis Companies, MLB Says*, Marijuana Moment, https://www.marijuanamoment.net/baseball-players-can-smoke-marijuana-but-cant-be-sponsored-by-cannabis-companies-mlb-says/ (March 3, 2020).

Athlete's Medical Malpractice Claim Can Continue

Continued From Page 8

against the state does not refer to individual employees of the state, but to claims brought 'against the state or any of its departments, commissions, boards, institutions, arms or agencies,' MCL 600.6431(1).

"This Court recently held in Pike v Northern Mich Univ, 327 Mich App 683, 694-696; 935 NW2d 86 (2019), that this provision does not apply 'to officers, employees, members, volunteers, or other individuals,' nor did it incorporate the definition of 'the state or any of its departments or officers' used in the Court of Claims jurisdictional statute, MCL 600.6419(7). Thus, in this case, because Dr. Jackson is an individual, MCL 600.6431 does not apply."

Saylor Lavallii v. Central Michigan University et al.; Ct. App. Mich.; No. 346803, No. 346804; 2/11/20 ●