SPORTS MEDICINE and the LAW

Presented by Montgomery McCracken

The Proof is in the Poliquin: The Yin and Yang (R-ALA) of Brandon Copeland's Battle Against Supplement Maker's Fraudulent Practices

By Coley Howard, Elizabeth Catalano, and Dylan Henry

In April 2019, Brandon Copeland, linebacker for the New York Jets, failed a random NFL drug test. Unbeknownst to Copeland, a dietary supplement called "Yang R-ALA" that he used contained a banned substance called Ostarine. After the NFL suspended him, Copeland sued the supplement manufacturer, Poliquin Performance, for breach of implied warranty, breach of express warranty and alleged express or affirmative misrepresentations—"deceptive, fraudulent, misleading, and other unconscionable commercial practices." *Copeland v. Poliquin Performance Center 2, LLC,* No. 3:19-cv-20278-ZNQ-LHG (D.N.J. 2019). After some procedural setbacks in the courts, Copeland's claims are still moving forward.

Ostarine Free . . . Psych!

Copeland first consumed Yang R-ALA on April 1, 2019, after thorough research and consultation with nutritionists. Yang R-ALA was advertised as a high-quality

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All Pain, No Gain? Pryce v. Town Sports Int'l, LLC

By Jacqueline Borrelli, Kacie Kergides, and Dylan Henry

On June 28, 2018, Simone Pryce and her husband sued New York Sports Club (NYSC) (an exercise gym) and its owners for negligence. This suit originates from a shoulder injury Mrs. Pryce suffered on July 2, 2015, at NYSC while performing an exercise when left unsupervised by her personal trainer.

Background

Mrs. Pryce worked for a publishing company that provided a discount for an NYSC facility, which she capitalized on by joining the gym. The gym's membership agreement, which Mrs. Pryce signed, discussed certain risks associated with any gym equipment and detailed that the facility cannot guarantee that the use of equipment is entirely void of accidents. As she began frequenting the gym, Mrs. Pryce signed up for twelve personal training sessions with NYSC's certified trainer of six years, Jonathan Reyes.

During Mrs. Pryce's final personal training session, Mr. Reyes demonstrated and instructed her to perform an ab exercise using a medicine ball. When she began replicating the exercise, Mr. Reyes observed

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Small Study Shows Post-COVID-19 Heart Damage Uncommon in College Athletes

Research Highlights:

- In a small study, 82% of the college athletes with COVID-19 had symptoms, of which the majority were mild and did not require treatment.
- Further screening via cardiac MRI of the 4% of athletes identified with heart abnormalities found no heart damage or inflammation.
- All athletes resumed regular training and competition without difficulty after recovering from COVID-19.

In a small study, researchers found college athletes who contracted COVID-19 rarely had cardiac complications. Most had mild COVID symptoms that did not require treatment, and in a small percentage of those with abnormal cardiac testing, there was no evidence of heart damage on special imaging tests. All athletes returned to sports without any health concerns, according to new research published today in the American Heart Association's flagship journal **Circulation**.

In spring 2020, concerns about heart damage, especially inflammation, among athletes with COVID-19 led to recommendations for cardiac screening based on symptom severity before resuming training and competition. The preferred diagnostic test for heart inflammation is an MRI of the heart, or cardiac magnetic resonance imaging. The American College of Cardiology's Sports & Exercise Cardiology Council's standard recommendations, issued in May 2020, do not advise cardiac MRI as an initial screening test based on COVID symptoms alone, so researchers investigated if symptom severity was associated with heart inflammation or poor recovery after COVID-19.

"Our study results support an approach to cardiac screening guided by patient symptoms and severity of COVID illness in line with current recommendations from sports-cardiology groups before resuming exercise or sports," said senior study author Ranjit R. Philip, M.D., pediatric cardiologist at Le Bonheur Children's Hospital and assistant professor in pediatric cardiology at the University of Tennessee Health Science Center in Memphis.

From July 9, 2020 to October 21, 2020, researchers at the University of Tennessee Health Sciences Center reviewed health records to identify 137 college athletes (average age of 20, 68% male) who were referred for cardiac screening to return to play after testing positive for COVID-19. On average, the athletes were evaluated 16 days after testing positive for the COVID-19 virus. Nearly half of the participants were African American students, nearly half were white students, and 7% were Hispanic students. Of the 11 sports represented at three universities, more than a third of the athletes were football players, followed by dance, basketball, baseball, softball, tennis, soccer, cheer, track, volleyball and golf athletes.

Most (82%) of the athletes had COVID-19 symptoms; the symptoms were mild for the majority (68%); and none required treatment or hospitalization. The most frequent symptoms were the loss of smell/taste (58%), fever (less than 2 days, 42%), headache (41%) and fatigue (40%). Less frequently reported symptoms were shortness of breath (12%) and chest pain/tightness (11%). African American and Hispanic athletes were more often symptomatic compared to white athletes (86% and 100% vs. 75%, respectively). No differences in symptoms or severity were found based on gender or sport.

All of the athletes underwent initial heart imaging tests, including ultrasound of the heart and electrocardiogram to screen for possible heart damage, and received a blood

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MONTGOMERY McCRACKEN
Attorneys At Law

Ashley Lynam Brings Extensive Experience as Co-Chair of Sexual Misconduct Liability Practice Group

A partner in Montgomery McCracken's Litigation Department, **Ashley R. Lynam** is ideally suited to chair the firm's Sexual Misconduct Liability Practice, especially as it relates to the sports industry and higher education.

To that end, Lynam has experience representing sports organizations and teams as well as colleges and universities as they defend claims involving third party criminal acts and other complicated areas, which require precision and skill to successfully navigate, advise upon and defend.

A former senior rape prosecutor with the Philadelphia District Attorney's Office and head of that office's Human Trafficking Division, we sought her out for our regular interview feature. The interview follows.

Question: *Tell us about your Sexual Misconduct Liability Practice Group?*

Answer: Our Sexual Misconduct Liability Practice Group offers comprehensive crisis management services to a variety of clients facing allegations of sexual misconduct, including high-profile commercial organizations, sports teams, colleges and universities, transportation companies, hotels, care facilities, and more. As Chair of the group, I draw on my experience as a former rape prosecutor to offer immediate, informed, and thoughtful responses to these damaging and often dangerous accusations.

We provide wrap-around crisis management services for our clients beginning with risk assessment training, the drafting and editing of employee handbooks and sexual misconduct policies and procedures, implementation of these procedures, proactive liability audits to prevent potential claims and protracted litigation, and coordinating public response when appropriate. I also oversee investigations to ensure compliance with state and federal regulations and to assure best practices are being followed, bringing both credibility and candor when they matter the most.

Ashley Lynam

In addition to our proactive work, our team aggressively investigates and defends sexual misconduct suits, which often involve third party criminal acts, children and the elderly, and other complicated and correlated areas of law. Our attorneys have considerable experience in the investigation and preparation of corporate representatives, current and former employees, and other witnesses for deposition and trial. We draw on our well-developed and long-standing relationships with law enforcement, private investigators, security experts, psychologists, psychiatrists, and other physicians to aid in the defense and reduce damages calculations in these often high-exposure claims.

We understand the wide-ranging and long-lasting impact that sexual misconduct claims have on our clients' businesses, including the possibility of tort litigation. We have tried several sexual misconduct cases to jury and resolved many others without trial, all while carefully managing clients' important privacy, public interest, and policy concerns.

Q: *How has that practice area grown?*

A: Sexual misconduct, unfortunately, is not a new or unique phenomenon, but how we respond to it as a society is rapidly evolving. Most recently, the #MeToo movement forced the American public to confront painfully shared stories of sexual assault. Legislatures across the country are extending or eliminating statutes of limitations on sexually-based offenses. Thirty-eight states have enacted "revenge porn" laws by criminalizing the distribution of sexually explicit images or videos without the individual's consent. And, most importantly to our practice group, companies are increasingly being held accountable, both in the public eye and on verdict sheets, for their roles in, and responses to, sexual misconduct. As the demand for accountability increases across industries, so has the need for our group's trauma-informed services.

Q: *How does your sexual misconduct practice intersect with athletic trainers?*

A: In May of 2020, the Department of Education released new Title IX regulations which dramatically changed multiple key components of the law's implementation. Those changes include, for example, what conduct triggers a Title IX investigation, whether schools have jurisdiction to investigate conduct that occurs off-campus, the parties opportunities to review evidence, and the requirement of live hearings with cross-examination of all witnesses. Athletic trainers may have a primary purpose in managing and preventing injuries, but they often find themselves filling the role of friend and confidant. In those moments of trust, athletic trainers often find themselves in a position to receive information required to be reported to a Title IX office. Our practice group offers training, counseling, and advice to Title IX offices across the country specific to athletic trainers, directors, and the needs of athletic departments to both fulfill their roles as trusted advisors to student athletes while also ensuring compliance and best practices are followed under the full scope

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Lynam Brings Experience to Sexual Misconduct Liability Practice Group

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of Title IX.

Q: *What is the most important thing a defendant should do when faced with an allegation of sexual misconduct?*

A: Don't delay! When a company is facing allegations of sexual misconduct, early intervention can make all the difference. Engaging with counsel early helps to control the legal, regulatory, and reputational fallout and prevent delayed responses provided under stress. Our Sexual Misconduct Liability Group provides structural, firm-wide support to control both the short and long-term ramifications and allegations of sexual misconduct. We provide our clients with unique access to a trauma-trained attorney via our Rapid Response 1-800 number, where a team of experts is ready to assist in coordinating media management, public appearances, and official responses in times of crisis.

Before a crisis occurs, consider consulting to prepare for and avoid these crises. Our team works with in-house counsel, C-suite executives, public relations specialists, and human relations departments to create emergency resources, capture institutional values and norms in company mission statements, policies, and procedures. We also conduct internal investigation with interim protection measures including conducting interviews, collecting information and evidence, and preparing advisory opinions related to alleged conduct.

Q: *If you weren't a lawyer, what would you be doing?*

A: *At the risk of sounding cliché, there is truly nothing else I'd rather be! Life as a lawyer requires constant self-reflection, a desire to learn, and gives you space to lead. I think it is a rare profession that combines intellect, grit, and an entrepreneurial spirit, and I am very happy with my career decision.*

Q: *What's the best thing about working at the firm?*

A: *Montgomery McCracken's leadership has formed a team-based approach that I find to be fulfilling, efficient, and fun. Rather than focusing on hierarchal relationships between partners and associates, as many firms do, we treat our colleagues at all levels as integral members of a team, constantly working towards a common goal and shared purpose. We are a competitive group, with a significant number of our attorneys having played college sports, and find that focusing on working together as a team helps us build a competitive advantage externally towards other firms, rather than internally at one another.* ●

Small Study Shows Post-COVID-19 Heart Damage Uncommon

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test (troponin level). Troponin is a protein that is released in the blood and found in the muscles of the heart when there is heart damage. Only participants who had abnormal test results received a cardiac MRI.

Researchers found:

- Less than 4% (5) of the 137 athletes showed heart abnormalities on initial screening tests.
- Further screening via cardiac MRI of the 5 athletes identified found no heart damage or inflammation.
- After COVID-19 recovery, all athletes were able to resume their full training and competition regimens without any complications.

"We were encouraged to find so few abnormal tests in these athletes as well as negative cardiac MRIs in those who did have an abnormal test during the initial screening, and no athlete had any problems after returning to exercise and sport," said Benjamin S. Hendrickson, M.D., co-author and pediatric and congenital cardiologist with Le Bonheur Children's Hospital and assistant professor of pediatrics (cardiology) at the University of Tennessee Health Science Center.

"Our findings may offer reassurance to high school athletes, coaches and parents where resources for testing can be limited," Philip added.

Limitations that could have affected the study's results include the lack of a control group without COVID-19 and the use of a regular as opposed to the high-sensitivity troponin test.

The new study by Dr. Philip and colleagues also confirms recent research published April 17 in Circulation, that found no adverse cardiac events related to SARS-CoV-2 infections observed among more than 3,000 collegiate athletes during short-term clinical surveillance. Findings also suggested a safe return-to-play without cardiac testing for asymptomatic or mildly symptomatic athletes.

Other efforts to track how COVID-19 impacts college athletes includes an initiative from the American Heart Association and the American Medical Society for Sports Medicine (AMSSM) to accelerate a critical new research initiative studying cardiac conditions in athletes. The collaborative data registry, started in January 2021, aids research on COVID-19 and, long-term, it will develop a deep knowledge base on cardiac disease in athletes beyond the pandemic.

Other co-authors are Ryan E. Stephens, NP-C, M.B.A.; James V. Chang, M.D.; Jacob M. Amburn, M.S.; Lindsey L. Pierotti, R.D.; Jessica L. Johnson, R.N.; John C. Hyden, M.D.; and Jason N. Johnson, M.D., M.H.S. Author disclosures are listed in the manuscript. ●

Exertional Rhabdomyolysis – a Legal Analysis

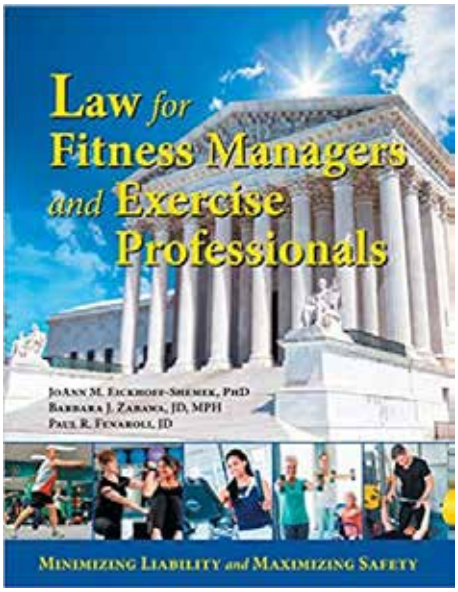
By JoAnn M. Eickhoff-Shemek, PhD, FACSM

This article is an excerpt from the new, ground-breaking textbook—***Law for Fitness Managers and Exercise Professionals*** by JoAnn M. Eickhoff-Shemek, PhD, Barbara J. Zabawa, JD, MPH, and Paul R. Fenaroli, JD. This excerpt, edited for this newsletter, is from Chapter 8. This chapter focuses on negligent instruction and supervision and describes many lawsuits that have occurred in fitness programs including (a) personal training, (b) group exercise, (c) youth exercise, (d) strength and conditioning, (e) clinical exercise, and (f) first responder/military. For more information about the textbook, educational courses, and authors' bios, visit the Fitness Law Academy, LLC website (www.fitnesslawacademy.com). The textbook is sold on Amazon-Click Here.

Exertional rhabdomyolysis (ER) occurs from strenuous exercise that leads to a breakdown of skeletal muscle resulting in a protein (myoglobin) being released into the bloodstream (1). Excess myoglobin can lead to kidney damage and, in severe cases, kidney failure. Severe muscle damage can also lead to **compartment syndrome** – a swelling of the affected muscle tissue that can cause muscle necrosis (death). Early signs and symptoms include excessive muscle soreness and dark brown urine. To diagnose ER, a urine analysis is needed along with a blood test to determine levels of creatine phosphokinase (CPK) – an enzyme associated with muscle damage.

Exertional Rhabdomyolysis: A Historical Perspective

A 1989 case, *Turner v. Rush Medical College* (2), was one of the first negligence lawsuits involving an ER injury. A 23-year-old medical student suffered many serious injuries including "extreme exertional rhabdomyolysis" after he was required to run an 8-minute mile as a class experiment.



Since 1989, additional lawsuits have occurred involving ER injuries in personal training, indoor cycling, collegiate strength and conditioning, and military fitness programs (3). Cases involving student-athletes are described below. From these cases, it is evident that any type of exercise program (e.g., body weight/resistance activities, cardiovascular, or various combinations) that are high intensity may lead to ER.

In 2005, CrossFit expressly acknowledged the risk of ER associated with its high intensity exercise programs in two published articles (4). One of these articles described five reported cases of ER resulting from CrossFit workouts (5). A warning, confirming the link between CrossFit and ER, was included in the article about this potentially lethal risk. The rapid growth of CrossFit worldwide in the 2000s and beyond created a hot topic of debate among exercise professionals and the CrossFit community. Although this debate focused on safety concerns with CrossFit training, it also increased the awareness among exercise professionals and the lay public regarding the connection between extreme exercise programs and ER. During this time, CrossFit and other extreme conditioning programs (ECPs) such as P90X and Insanity became increasingly popular among military and athletic conditioning programs.

Given the rising popularity of ECPs in military and civilian communities, the authors of a 2011 article (6) stated injuries from ECPs including ER are reportedly occurring at increasing rates. They stated that these programs appear to violate accepted standards for safety and that solutions to reduce these injury risks are of paramount importance. One recommendation of the many listed in this article was to "introduce ECPs to new participants gradually with a specific progression (acclimation) to exercise intensity, duration, and advanced exercises" (6, p. 387). Regarding the increases in the frequency of ER among collegiate athletes, the authors of a 2012 article (7) stated that "workouts that are too novel, too much, too soon, or too intense (or a combination of these) have a strong connection to exertional rhabdomyolysis. Introducing full-intensity workouts too quickly is especially high risk" (p. 478). This article, prepared by authors representing 12 different organizations, provided a list of several recommendations. The first two recommendations focus on the prevention of ER: acclimatize progressively for utmost safety, and introduce new conditioning activities gradually (7).

The major purpose of these two articles was to increase awareness of this potentially life-threatening condition and provide recommendations for exercise professionals on how to prevent the serious risks associated with high intensity or extreme conditioning programs (ECPs). Additional articles to increase the awareness of ER were also published in various journals between 2003 and 2013 such as *Medicine & Science in Sports & Exercise* (8), *Strength and Conditioning Journal* (9), *Journal of Physical Education, Recreation & Dance* (10), and *IDEA Fitness Journal* (11). This topic

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Exertional Rhabdomyolysis – a Legal Analysis

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of ECPs has also been presented at various professional conferences. For example, the lead author of the 2011 paper (6), Dr. Michael Bergeron, gave a presentation titled: Extreme Conditioning Programs – Are They Worth the Risk? at the ACSM Health & Fitness Summit in 2013 (12).

By 2013, there was ample published scientific evidence that high intensity exercise programs or ECPs can lead to ER. Although numerous efforts have been made to help ensure that exercise professionals were well-informed of this clearly "foreseeable" risk, individuals are still being diagnosed with ER after participation in various high intensity exercise programs led by exercise professionals. Why? There may be several reasons, but the likely ones are: (a) some exercise professionals leading these programs lack adequate knowledge and skills to design/deliver a program incorporating important safety principles of exercise such as progression, and (b) some fitness/athletic managers are not making a concerted effort to help ensure their employees possess the necessary knowledge and practical skills to properly teach, train, and/or coach. Exercise professionals that instruct a low-fit person, a beginner, or even an elite athlete to perform a high intensity workout on their first day of exercise or training are, clearly, failing to meet the standard of care of a reasonable, prudent, exercise professional.

Exertional Rhabdomyolysis Cases–Student Athletes

Even well after the 2012 publication (7) regarding collegiate conditioning programs, student-athletes continue to be diagnosed with ER. For example, in 2019, 12 collegiate women soccer players were diagnosed with ER after participation in an extreme conditioning program led by the strength and conditioning coach, Minor Bowens, at the University of Houston (13). Bowens was fired following the incident (13). Additional ER cases include:

a. University of Iowa – 13 football players, 2011 (14)
b. Ohio State University – 6 women's lacrosse players, 2013 (15)
c. University of Oregon – 3 football players, 2017 (16)
d. University of Nebraska – 2 football players, 2018 (17)

When serious, preventable injuries or deaths occur, there is often an investigation conducted by the university/college. These unfortunate events create a great deal of media attention and reflect negatively upon the athletic program and the institution. The investigations and policy changes that are made, based on the investigative reports, are costly. For example, the policy changes established at the University of Houston are expected to exceed $1 million (18). But the costs do not end there. Although most student-athletes fully recover from ER, some do not and, thus, have filed negligence lawsuits, such as one of the 13 football players at the University of Iowa and two of three players at the University of Oregon.

Football player William Lowe at the University of Iowa filed a lawsuit that was eventually settled (19). He claimed he suffered acute renal failure and elevated creatine levels due to his ER diagnosis and continued to experience various mental and physical problems and mounting medical expenses. Interesting in this case were the findings in an internal, official report submitted to the Iowa State Board of Regents. It stated that the strength and conditioning coaches had no knowledge of ER (14). The report cleared all coaches, physicians, and trainers of any wrongdoing and provided recommendations including discontinuing the intense, high-volume squat-lifting workout (14). Several questions arise regarding the knowledge/skills of the strength and conditioning coaches in this case. It is likely, in a Division I football program such as the University of Iowa, the strength and conditioning coaches possessed degrees and professional certifications in strength and conditioning. By 2011, they should all have known about ER and how to prevent it. At a minimum, they should have known about the signs and symptoms of overexertion through their educational and certification preparation programs. So why did they have the players perform another mandatory intense workout the day after the first intense workout? After the first workout, many players complained of substantial leg pain and stiffness and dark urine prior to the workout on the second day. Why did they not have the players seek medical care given their signs and symptoms?

University of Oregon football players, Doug Brenner and Sam Poutasi, filed lawsuits in 2019 (two years after their ER injuries) against the University, head coach Willie Taggart, and former strength coach Irele Oderinde seeking $11.5 million and $5 million in damages, respectively (16, 20). In his lawsuit, Brenner claimed the individual defendants imposed and carried out the workouts in a negligent manner and the institutional defendants were negligent in failing to regulate and supervise the individuals leading the workouts (16). In the other lawsuit, Poutasi claimed he suffered injuries in addition to ER such as muscle aches, kidney damage and the loss of use of his arms (20). These lawsuits are pending. Oderinde was suspended for one month without pay, but a year later left Oregon for Florida State University (13).

NCAA Response to Help Prevent Exertional Rhabdomyolysis

In 2018, the NCAA Chief Medical Officer prepared an exertional rhabdomyolysis

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message that included five guiding principles regarding the prevention of ER (21). The fifth guiding principle specified that all strength and conditioning workouts should (a) "be documented in writing, (b) reflect the progression, technique, and intentional increases in volume, intensity, mode, and duration of the physical activity, and (c) be available for review by athletic departments" (21, p. 2). This message is available at: NCAA Addresses Exertional Rhabdomyolysis | NATA. ●

JoAnn Eickhoff-Shemek *(Professor Emeritus, Exercise Science at the University of South Florida and President of the Fitness Law Academy, LLC), has served as an expert witness in two ER cases. The plaintiffs suffered permanent injuries resulting from high intensity exercise after their first workouts, one involving an indoor cycling class and the other, a personal training session.*

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DNA Sports Performance Lab and MLB: The Story Continues

By Jeff Birren, Senior Writer

These pages have chronicled the never-ending dispute between Major League Baseball and DNA Sports Performance Lab, Inc., and its owner, Neiman Nix. DNA Sports makes a substance that that contains the banned substance IGH-1. One story discussed DNA Sports' latest unsuccessful civil case against MLB and the MLBPA, ("Sports Performance Labs Underperforms in Court Battle with MLB" (9-25-2021)). November continued the saga, with "District Court Sanctions DNA Sports Performance Lab" (11-20-20). The U.S. District Court had just hammered DNA Sports with substantial attorneys' fees for filing a frivolous case, one of many lawsuits DNA Sports initiated as it fought to keep its product available to athletes. The story continues.

November: MLB Seeks an Injunction

Nix had sued MLB in various courts, including New York Federal Court. In the fall of 2020, MLB sought "a permanent" to enjoin Nix and DNA Sports "from litigating" the Florida State Court case, (*Nix et al v. Office of the Commissioner of Baseball, d/b/a Major League Baseball, et al,*) S.D. N.Y., Case No. 17-1241(RJS) at 1, (11-4-20)). The Court noted the parties "extensive history of litigation, which includes numerous suits in both Florida and New York." MLB sought the injunction under the All Writs Act, 28 U.S.C. §2283, to prevent Nix from relitigating decided issues.

The Court determined that a prior case "did not actually decide" the pending claim (Id. at 3). Rather, the underlying court had dismissed the case with prejudice but this "does not mean the claim was actually decided for purposes" of the relitigation exception of the All Writs Act. Although the "Court's 2017 dismissal may have res judicata implications, it does not allow the Court to issue an injunction" (Id.). The Court recognized "Defendants' frustration with Plaintiffs' vexatious litigation" but that "cannot justify" their motion for an injunction (Id. at 4).

December: New York State Court

December brought another opinion. Nix and DNA Sports had also sued MLB in New York State Court, alleging, *inter alia* claims for tortious interference and defamation. They asserted that MLB had hacked their PayPal account, and brought interference claims based on the "alleged hacking of their social media accounts" (*Nix v. MLB,* NY Slip Op 07505, at 2, (12-15-20)). This Court was not impressed. The "tortious interference claims are precluded by the dismissal of the 2014 action asserting those claims in a Florida state court" and "the subsequent dismissal of their federal action the Southern District of New York based on the same claims."

The plaintiffs' "defamation claims were also appropriately dismissed." The statements that plaintiffs "admit[ted] to selling products purportedly containing at least one banned performance-enhancing substance (IGF-1) was true, and the truth of the statement provides a complete defense to the defamation claims." Finally, the Court ruled that "plaintiffs' motion for reargument was intended to prolong the resolution of the action and/or harass defendants, considering the circumstances under which it was made, and is therefore sanctionable" (Id.). The prior ruling dismissing the case and awarding sanctions was affirmed.

February: The Shortest Month Brings Two More Losses

The California Federal Court noted that DNA Sports and Nix had failed "to pay an award of fees, post a bond, or move for a stay." The defendants sought an order to show cause regarding civil contempt. DNA Sports and Nix's counsel had "moved to withdraw." The Court held DNA Sports and Nix in civil contempt and ruled the defendants' "prior motion for attorney's fees" would now also be "against Attorney Reich" (*DNA Sports Performance Labs, Inc., and Neiman Nix v. MLB et all*, U.S. N.D. Cal., Case No. C 20-00564WHA, ("*DNA Sports*") Omnibus Order re Sealing, Civil Contempt, and Attorney's Fees, (2-4-21)).

Nix and DNA Sports had been ordered to turn over financial information as a possible basis for paying off the previous awards. Some of that information had been withheld, and the plaintiffs sought an order sealing the information. Most of that was denied by the Court (Id. at 2). Next came the issue of contempt of court. Nix and DNA Sports had also been ordered to pay MLB and the MLBPA $237,446.25 in attorney's fees, and that was due on November 20, 2020. "The date has passed. Plaintiffs have paid nothing. Absent justification, contempt is warranted." They could have appealed and requested a stay, but they did not. Rather, they "now argue their incapacity to pass the award" but this came after the "payment deadline had passed" (Id. at 3).

The Court determined that "plaintiffs have manufactured their poverty." Nix's "attorneys have taken at least several hundred thousand dollars in legal fees over the past several years" according to Nix's deposition. Moreover, they took the proceeds of the sale of Nix's cars and DNA Sports' equipment liquidation. "Paying one's own attorney's fees rather than court-ordered fees is a choice. On those grounds alone, plaintiffs' current incapacity to pay the ordered fees is self-induced" (Id. at 4). Nix and DNA Sports were therefore held in contempt.

The same logic applied to counsel. Reich had "been handsomely paid and has secreted away funds" so the order extended joint liability for those funds to Reich (Id. at 5). He had "not been forthright with the Court in advancing plaintiffs' incapacity defense "and as an officer of the court he owed "a duty of candor" (Id. at 6). Reich had also "continued

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to enable these frivolous lawsuits" while he "took potentially hundreds of thousands in legal fees from a man living in his truck and on charity to prosecute a case which counsel should have known would result in a significant adverse fees award" (Id. at 7). Reich's motion to withdraw was held in abeyance until an appearance by Nix's new counsel.

February also brought the hearing in MLB's motion for judgment on the pleadings in Nix's Florida State Court case. The hearing was on February 11, and twelve days later the Court granted the motion to dismiss. It found that "the pleadings are closed at this time" and relied "on everything that is contained wholly within the pleadings." In June 2014 Nix "learned of the attacking and alleged conduct in which his digital account and digital information was hacked." Judge FuIt stated that Nix had a four-year statute of limitations that began on June 14, 2014, and Nix filed the case in January 2019. MLB was thus "entitled to judgment on the pleadings on the affirmative defense of statute of limitations" (*Nix et al v. The Office of the Commissioner of Baseball et al, ("Nix et al'),* In the Circuit Court of the Eleventh Judicial Circuit in and for the Miami-Dade County, Florida, Case No. 2019-002611-CA-01, Section CA08, Order on Defendants' Motion for Judgment on the Pleadings at 1/2 (2-23-21)).

March: Reich Files for Reconsideration of the February 2021 Federal Court Order

Four weeks later Reich moved for reconsideration of the order that imposed liability on him for the October 27, 2020, fee award and held "in abeyance his motion to withdraw" (*DNA Sports,* Order Denying Reconsideration, at 1 (3-1-21)). Reich was seeking to withdraw "from what he considers his forced representation" of Nix and DNA Sports. He had focused on the "acknowledged conflict" but if granted, the withdrawal would leave "Nix alone to his self-destructive device, DNA Sports Performance Labs subject to default, and both unrepresented in the face of civil-contempt sanctions." Moreover, it remained unclear if Nix and DNA Sports "have retained counsel on appeal." "Attorney Reich brought plaintiffs to this dance and the equities favor his limited representation to our proximate conclusion."

Furthermore, Reich's "conflict does not excuse his right of candor." He had "breached that duty by advancing without clarification or correction, plaintiffs' baseless incapacity defense." Reich had "incurred no liability for his conduct after October 27 (2020)". That "order found that "Attorney Reich breached Rule 11, but held the matter 'in abeyance to see the extent to which he engages in ongoing harassment.'" The order did not "impose immediate sanctions" but "offered grace in return for good conduct. When Attorney Reich failed his part, the February 4 order imposed the earlier liability" (Id. at 2).

Four days later, the Florida State Court entered an order stating that Nix's case was "Dismissed After Hearing" (*Nix et al,* Final Disposition at 1, (3-5-21)). Once again Nix filed a motion for reconsideration (*Nix et al,* Filing #122882910, (3-10-21)). The motion had over two pages of "Procedural History" and told the Court that it "did not adhere" to the proper legal standard (Id. at 5); "erroneously relied on inapposite case law (Id. at 7); and "improperly extrapolated facts from exhibits to support its ruling" (Id. at 9). The Court dispensed with oral argument. It "reviewed said motion in Chambers" and denied his motion (*Nix et al*, Order Denying Plaintiff's Motion for Reconsideration, Filing #123163830 (3-16-21))

April: The Ninth Circuit Is Heard From

Nix and DNA Sports did not yet have counsel in the federal case appeal. Not surprisingly, he was unable to meet that Court's schedule, and filed an opposed motion to extend the time to file the appellate brief. That was granted. They must file their opening brief by July 19, 2021. The "answering brief is due August 18, 2021" and the "optional reply brief is due within 21 days after service of the answering brief." The Circuit denied the Appellees "opposed motion" to "dismiss for failure to prosecute" (*DNA Sports,* Case No. 20-17283, Order (4-12-21)). That same day, Nix and DNA Sports filed a Notice of Appeal in the Florida State Court case, (*Nix et al*, Filing #124754484 (4-12-21)).

June: Attorney Reich is Released

Reich made another motion to withdraw as counsel. Judge Alsup granted it at a "Further Case Management Conference" in June 2021. However, the Court "retains jurisdiction over Mr. Reich for the purpose of enforcing its sanctions order." The Court ordered Reich "to pay $1,000 per month pursuant to that order." If he "faithfully observes such payment for one year, the Court will consider vacating its order" as to Reich. The Court also ordered Nix "to file a declaration laying out his assets and liabilities as well as his income and expenses, in reasonable detail" (*DNA Sports,* Minute Entry, Doc. No. 114, (6-11-21)).

Nix filed the declaration. He stated that since Reich "has been removed by court order I am left without counsel to file this statement" (*DNA Sports*, Doc. No. 115, Declaration of Plaintiff Nieman Nix at 1, (6-24-21)). His personal checking account had a balance of $192, his business account had $283. Those were his sole accounts and he had less than $500 in cash. He claimed that the "MLB Defendants currently owe me and my company (DNA Sports) over $161,000, as they have failed to comply with a Court order" in the Florida case (Id.

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her for a moment and then walked twelve feet away to talk to another member at the gym. During his conversation, Mr. Reyes had his back turned away from Mrs. Pryce. As Mrs. Pryce continued performing the ab exercise, she felt a pull in her shoulder, immediately put the medicine ball down, and waited for Mr. Reyes to return to her. When he returned, he decided to end the training session.

As Mrs. Pryce continued with the rest of her day, her pain slowly became worse and did not subside for over a week, causing her to visit her primary care doctor and then an orthopedist. Her orthopedist performed an MRI and found a bicep tear requiring surgery. After the surgery, Mrs. Pryce began physical therapy and underwent some time where she struggled to perform daily tasks due to her inability to use her right hand.

Following surgery, Mrs. Pryce gained fifty pounds from her inability to exercise and had to take insulin for the first time in six years for her diabetes. Her right hand became swollen, and a hand specialist prescribed her nerve medication that ultimately did not work. She then underwent three procedures to alleviate the nerve pain in her hand. She missed ten weeks of work, did not receive twenty percent of her income, suffered a decrease in her annual bonus, and incurred about $6,000 in medical expenses. Although her hand felt better, issues in her shoulder remained, prohibiting her from participating in her normal hobbies.

Battle of the Experts

During the bench trial in February 2021, both sides called experts to testify. The Pryces' expert, an orthopedic surgeon, testified that it was "more likely than not" that performing the ab exercise caused Mrs. Pryce's initial injury. On the other hand, NYSC's expert, an orthopedic surgeon with a subspecialty in sports medicine, testified that it was not an isolated incident (e.g., the ab exercise) that caused the injury, but rather it was the "wear and tear" of aging that was the substantial factor causing the injury. NYSC further retained an expert in neurology who performed a neurological evaluation on Mrs. Pryce. He ultimately found that although she had some minor restrictions in range of motion of activity in her right arm, her motor activity was not atypical. The Court found both parties' experts credible, but it ultimately found that the evidence at trial better supported NYSC's expert testimony.

Analysis

In New York, for a plaintiff to prevail on a negligence claim, the plaintiff must show that: (1) the defendant owed the plaintiff a duty of care; (2) the duty was breached; and (3) that breach proximately caused the plaintiff's injuries.

Focusing on the first element, whether NYSC or Mr. Reyes owed Mrs. Pryce a duty of care, NYSC argued that Mrs. Pryce assumed the risk of injury when she voluntarily exercised at the gym. The assumption of risk doctrine helps measure a defendant's duty of care and is not an absolute defense. In New York, the doctrine states that anyone who voluntarily participates "in a sporting or recreational activity consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation." Notably, the doctrine does not protect from concealed or unreasonable risks.

Though both sides presented previous decisions that weighed in their favor at trial, the Court ultimately held that the assumption of risk doctrine barred Mrs. Pryce's negligence action. It reasoned that she understood the risk, the exercise was not inherently dangerous, she failed to prove precisely how she was injured, there was no evidence of improper form, and it could not be determined if Mr. Reyes could have prevented the injury if he had been next to her for the duration of the exercise.

Takeaway

In its holding, the Court left some wiggle room for potential future plaintiffs in similar situations. Had Mrs. Pryce presented evidence that Mr. Reyes allowed her to perform the exercise with bad form or gave her the improper weighted medicine ball, then the outcome of this case may have been different. Moreover, the same could be said if she could prove that her injury could have been prevented if he remained nearby while she did the exercise.

It appears as though it is hard to protect yourself from injuries that may occur at the gym. As demonstrated from this case, if a potential plaintiff truly believes one specific exercise caused an injury, the potential plaintiff must have evidence to back up his or her claim. Otherwise, gyms and their owners should be able to successfully rely on the assumption of the risk doctrine to protect their interests. ●

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An Examination of State High School Concussion Protocols: Investigating Consistent Inconsistencies

By Nicholas Swim, Ehren Green, & Anthony Montanaro, from the University of Louisville

The number of youth sport participants who continue to experience concussions during sports participation is staggering. According to the University of Pittsburgh Medical Center (UPMC) the number of reported youth concussions ranges between 1.7 and 3 million annually. Additionally, it is estimated that half of concussions are unreported or undetected (UPMC, n.d.). Thus, the Center for Disease Control (CDC) now recognizes Traumatic Brain Injuries (TBIs) and concussions as a national public health issue (CDC, 2019). Specifically, youth athletes hold a greater risk for concussions in comparison to adults and may require longer recovery time due to their fragile and developing brain (Grady, 2010). Equally as troublesome, a recent study found youth athletes are one-and-a-half times more likely to sustain a second concussion when compared to adults (Brody, 2015). This issue has garnered national media attention (Drake, 2018) and is the subject of numerous lawsuits against sport governing associations such as Pop Warner Football (*Archie v. Pop Warner*), High School Athletic Associations (*Bukal v. Illinois High School Ass'n*), and the National Collegiate Athletic Association (*NCAA Student-Athlete Concussion Litigation*). In professional sports, the National Football League (NFL) settled a concussion litigation suit with former players worth upward of one billion dollars (*NFL Players' Concussion Injury Litigation,* 2020). The combination of health and financial importance of concussion management within sport at all levels is evident (Carter, 2018). Acknowledging this crisis, sport and state leadership have acted, introducing significant changes to youth sport concussion education and management at the state level. To better understand these new changes and the legal considerations of the changes, we sought to explore how concussion management protocols were articulated in the handbooks of the state high school athletic associations.

State Concussion Legislation

At the federal level, concussion legislation to protect youth athletes has been proposed but to date has yet to be enacted (see, *Youth Sport Concussion Act*, 2014, S. 1014). This lack of federal protection, thrusts the responsibility of youth sport concussion management to the state level. Washington state was the first state to introduce a youth sport concussion legislation in 2009, with the Zackery Lystedt law (RCW 28A.600.190, 2009). This law, the first of its kind, addressed specific concussion management and protocol language for youth sport and focused on three key components, 1) education for athletes, coaches, and parents; 2) removal of play policies, with no return on same day; and 3) return-to-play restrictions, requiring clearance from a licensed healthcare provider (The Sport Institute, n.d.). Since 2009, all fifty states have adopted concussion legislation, using the Zackery Lystedt Law as a precedent. Howard (2019) highlights the importance of these state mandates and attributes the growth in education and awareness of concussions to a potential mitigation of concussion risks. However, each state's adopted youth sport concussion legislation currently holds varying degrees of policies, procedures, and policing for their respected concussion protocols, leading to inconsistent standards of care (Kim et al., 2017; Swim et al., 2020).

In 2017, Kim et al. investigated each states legislation addressing youth sport concussions, with findings suggesting inconsistencies across states. For example, the results indicated state legislative requirements for education and training, removal of play, and return-to-play (RTP) varied significantly amongst the states. The variation among state legislative requirements may also lead to inconsistent standards of care to protect youth athletes from concussions. Furthermore, more recent findings from Swim et al. (2020) also highlight significant discrepancies in state legislation language related to requirements for return-to-academics (RTA) and parent notifications. Additionally, results discovered over half of the state's high school associations (n=27) were mentioned in the state legislation to help develop, implement, and update their states youth concussion protocols. Thus, highlighting to the importance of understanding concussion management protocols and procedures at the state high school association level (Coxe et al., 2018; Yoanna, 2019).

High School & Concussion Protocols

To investigate state high school associations' concussion protocols, in 2019, Yoanna analyzed specific school districts concussion protocols in the state of Colorado, with findings demonstrating similar inconsistencies to those found at the state legislation level. For example, the individual school districts had no concussion reporting system in-place, a vital step in developing rules, updating, and assessing current concussion protocols. Similarly, Coxe et al. (2018) investigated individual high schools across 26 states to determine if concussion protocols being implemented were consistent amongst language usage. Their findings indicated considerable variation amongst specific language in each protocol, potentially leading to differences in standard of care for athletes between home or away games. Therefore, state laws may just be acting as a proverbial buffer for school districts, schools, coaches, and athletic trainers to mitigate their risk of liability, rather than protecting their respective athletes (Coxe et al., 2018).

Currently, the National Federation of

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State High School Association's (NFHS) mission statement states, "providing leadership for the administration of education-based high school athletics and activities through the writing of playing rules that emphasize health and safety, educational programs that develop leaders, and administrative support to increase opportunities and promote sportsmanship" (NFHS, n.d., para. 1), demonstrating the importance of health and wellness for their membership group. However, the past findings of Coxe et al. (2018) and Yoanna (2019) may shed light on inconsistencies across states in their concussion management protocols at the state high school association level. Expanding on Coxe et al. (2018) and Swim et al. (2020), the purpose of this study is to identify common or shared language and to address gaps in the state high school athletic association's handbooks. Additionally, recommendations to improve concussion protocols within the high school athletics governance structure are provided.

Methods

A content analysis was conducted on each of the 50 states' high school athletic associations' handbooks (excluding Hawaii; including District of Columbia). Using similar variables identified in past studies regarding concussion protocols (Coxe et al., 2018; Kim et al., 2017; Swim et al., 2020) the researchers conducted a review of state high school athletic association handbooks, focusing on verbiage related to concussion protocol and management. Some of the variables addressed in the coding included, designated party for removal of athlete, return-to-play and return-to-academics, education and training, and concussion information sheet, while also including new variables of addressing liability, base-line testing, and penalties for non-compliance.

Findings

The initial findings revealed significant inconsistencies in concussion protocols in state high school association constitutions and bylaws. In total, 38 states contained language addressing concussion protocols. Of these states that included concussion information, the language varied significantly, for example, 7 of the 38 states only provided information regarding referee and coach training. However, the results also found some states with robust concussion protocol information. For example, the Florida High School Athletic Association (FHSAA) includes an entire section that thoroughly discusses concussion management including, removal of athlete, return-to-play, and education and training requirements (FHSAA, 2020). The results from this study also indicated 12 states with no specific language addressing concussions. For example, researchers were unable to locate any concussion information in the high school athletic association handbook in the state of Texas, even though the state legislation specifically identified the governing body of schools/recreation organizations as the responsible party for developing, implementing, and evaluating concussion protocols (Swim et al., 2020).

Education/Training & Designated Party for Removal

The most identified common language across the content analysis was the education and training of coaches. In total, we found 34 states require coaches to participate in concussion management education and 33 require subsequent concussion management training. However, in comparison to the state concussion legislation, the results here represent variability in education and training for other key stakeholder groups, including, athletes, parents/guardians, referees/officials, and health care providers (Swim et al., 2020). Furthermore, inconsistencies were identified in the designated party for removal of athletes. For example, the results in this study found the designated party for removal most identified was coaches which was included in 12 states handbooks, however, Swim et al. (2020) results indicated 25 state legislations included coaches as the designated party for removal. The inconsistency in designated party for removal also ties back to the education/training finding, as when there is no designated party for removal, all individual stakeholders have a responsibility to remove athletes, but these individuals are not required to be educated/trained on concussion management based on the findings from state high school association handbooks.

Penalties for Non-Compliance

The results from this study also indicated inconsistencies in penalties for non-compliance of concussion protocols. In total, only six states (n=6) provided any information on potential sanctions or penalties. As mentioned earlier, the FHSAA held strong concussion management information in their handbook, including non-compliance penalties (FHSAA, 2020). According to article *40.7 (Sanctions on Coaches)* of the state's athletic association handbook, any coach found in violation of the identified concussion management protocol will be sanctioned to a suspension. These suspensions held at three levels, with varying discipline at each level, Level I (two game suspension), Level II (six-week suspension), and Level III (1-year suspension). Since coaches in public schools are considered government employees, they may be subjected to immunity in case regarding concussions, unless they act in a grossly negligent or reckless manner, which gives families minimum options legally after poor concussion management. Therefore, the introduction of penalties for non-compliance of concussion management protocols, similar to other aspects in the state high school athletic association handbooks (e.g. recruiting penalties), may provide an extra layer of protection for youth athletes.

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Recommendations

These results demonstrate a lack of commitment from state high school athletic associations to their youth athletes in providing proper concussion management protocols. We found high school associations handbooks are not providing the bare minimum language from their own state's legislation on youth sport concussions. Therefore, the authors suggest that each high school association provide, at least, the state specific law on youth sport concussion management in their handbook. The adoption of such language in these governing documents will provide state high school associations the opportunity to align their mission of health and wellness to their actual practices in regards to concussion management. ●

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at 3). He gave a fair amount of detail concerning the discovery dispute but failed to mention that Court had dismissed his case with prejudice in February.

July: Federal Court Orders Another Hearing

Judge Alsup ordered a "Continuing Motion Hearing" for Sanctions and for an Order Requiring Plaintiff to Order Transcripts." That will be via a conference line on 7-22-21 (*DNA Sports*, Clerk's Notice (7-1-21)).

Conclusion

Nix is now on the clock for his appeals of his California federal case and his Florida case. He must prepare two appellate briefs and participate in Judge Alsop's conference call hearing in July. This is far from over, but his costs are formidable. Heads must be constantly shaking at MLB. ●

Copeland's Battle Against Supplement Maker's Fraudulent Practices

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dietary supplement designed to enhance glucose transport, which allows nutrients to get to muscles faster, and is a potent antioxidant which supports growth of lean mass.[1] Both the label on the bottle and Poliquin's description of the supplement on its website stated that it did not contain Ostarine. Two nutritionists verified this for Copeland and approved his consumption of Yang R-ALA for training purposes.

On April 15, 2019, after his compliance with the regular NFL drug testing policy, Copeland's urine sample came back positive for Ostarine. In his eight years in the NFL, this was Copeland's first and only failed drug test for any banned substance, and he continues to purport that he never knowingly ingested any banned substances. He stopped taking Yang R-ALA immediately after being notified of his test results.

After the failed drug test, Copeland also took the remaining supplements to AEGIS, an accredited anti-doping laboratory, and each one was found to be conclusively positive for Ostarine. To further verify the source of Ostarine, AEGIS purchased sealed bottles of Yang R-ALA straight from Poliquin and reported that every sample was again conclusively positive for Ostarine.

NFL Drug Testing Policy and Consequences

The 2018 NFL Performance Enhancing Substances Policy (the "Policy") at issue in this case listed Ostarine as a prohibited brand-name Selective Androgen Receptor (SARM) on the policy's "Prohibited Substances List." The policy described Ostarine as illegal and unapproved for human consumption in the United States, as well as everywhere else. SARMs like Ostarine are banned not only because of the performance enhancing aspect, but also for the increased risk of liver toxicity, heart attack, and stroke.

Pursuant to the Policy, Copeland received a five-week suspension,[2] was banned from using team training facilities and participating in team meetings, had to forfeit any Forfeitable Salary Allocations on a weekly basis, and needed approval from an independent administrator before coming off of suspension.

In addition to these NFL-enforced consequences, Copeland also faced several personal career setbacks following the failed drug test. He lost income from the four games he missed and was ineligible for player incentives and bonuses which would have otherwise been available to him. Personally, his character and integrity were called into question, resulting in his continued loss of speaking engagements and endorsement opportunities.

Copeland unsuccessfully appealed his suspension through the NFL appellate and arbitration procedure, where he made no argument against the NFL—opting only to express his frustration with the situation which Poliquin Performance put him in by not labeling Yang R-ALA as containing Ostarine, the banned substance. The NFL denied his appeal based on the conclusively positive drug test for Ostarine.

Copeland Seeks Redemption Through Suit

Copeland had already completed the terms of his suspension by the time he sued Poliquin in November 2019 in New Jersey state court.[3] Poliquin removed the matter to the United States District Court for the District of New Jersey and then moved to dismiss Copeland's case, arguing that Copeland's first three counts were subsumed by the New Jersey Products Liability Act (PLA).[4] The Court agreed, and threw Copeland's case out, holding that Copeland's claims were subsumed by the PLA.[5] The PLA covers harm caused to consumers by defective products and imposes liability on the seller or manufacturer for manufacturing defects, warning defects, and design defects. This meant that Copeland's claims, which he brought under New Jersey's Consumer Fraud Act ("CFA"), N.J.S.A. § 56:8-1, along with separate claims for breach of implied warranty and express warranty, were all dismissed.

In August 2020, Copeland asked the court to reconsider its ruling. In Copeland's motion for reconsideration, he argued that his claims for misrepresentation and false advertisement should be considered under the CFA, which is construed more liberally in favor of the consumer and has a broader scope of protecting against unconscionable business practices. He also pointed to recent precedent permitting a CFA claim alleging misrepresentation and fraudulent practices to proceed in separate counts, without a PLA claim.[6]

Copeland Gets a Second Shot

Nearly a year later, in March 2021, the Court revived Copeland's claims against

1 EJ Henriksen, In: Antioxidants in Diabetes Management 303-318 (2000).

2 Copeland was suspended for the first four games but because the Jets had a bye week, this resulted in a five-week suspension during which he could not train with the team or play.

3 Dennis Wasak, *Jets' Copeland Finishes Suspension, Suing Supplement Company*, The Associated Press, Oct. 9, 2019 (https://abcnews.go.com/Health/wireStory/jets-copeland-finishes-suspension-suing-supplement-company-66171908).

4 *Copeland v. Poliquin Performance Center 2, LLC*, No. 3:19-cv-20278-ZNQ-LHG (D.N.J. March 30, 2021) (https://www.leagle.com/decision/infdco20210405b01)

5 N.J. Stat. Ann. §2A-58c-1.

6 *See Sun Chemical Corporation v. Fike Corporation*, 234 N.J. 319 (2020)

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Poliquin for fraudulent practices and misrepresentation. In granting Copeland's motion for reconsideration, the Court is allowing Copeland to continue his lawsuit under the New Jersey Consumer Fraud Act—finding that bringing claims under one body of law (products liability) does not preclude claims under another (consumer fraud).

The Court vacated its prior dismissal order and permitted Copeland to refile an amended claim under the CFA and permitting the claim for breach of implied warranty to proceed. The court reasoned that Copeland's reliance on the inaccurate label and misrepresentations by Poliquin constituted an express or affirmative misrepresentation.[7] This result allows Copeland a second-go at seeking justice for himself and his image. Copeland's suit against Poliquin remains a potential avenue for professional and personal redemption. The Court's recent greenlight in Copeland's suit may allow him to seek damages from Poliquin and perhaps even have positive implications for the formerly rising star's muddied public image. Pre-suspension, during the 2018 season, Copeland had a career-high five sacks and was expected to be a starter at outside linebacker.

Future Issues with NFL Drug Testing

Back in 2013, years before Copeland was suspended, former NFL player Ryan Riddle wrote an opinion column for Bleacher Report criticizing the inconsistencies of NFL drug testing and how it sometimes fails. According to NFL Senior Vice President Adolpho Birch, the NFL would test around 350 players per week from pre-season to the Super Bowl, including 10 players from each team and some who are under "reasonable suspicion." Each player could be tested a maximum of six times in the offseason. Despite this policy, Riddle had never been randomly tested for steroids in his three years in the NFL, while others, like Richard Sherman and Bruce Irvin, were not as lucky and, as a result, faced suspensions.[8]

Copeland is one of many "unlucky" NFL players who have faced the consequences of the NFL's drug testing policy as well as resultant public scrutiny, which often cost the players brand deals and endorsements. Another recent example is Buffalo Bills' defensive lineman Corey Liuget's situation with his trainer. In 2020, Liuget sued his trainer, Ian Danny, for injecting him with banned substances, causing Liuget to fail his random NFL drug test and face a four-game suspension for the 2019 season. Danny purported that these injections were to help Liuget recover from foot injections and that he used natural substances imported from Australia, not the "drug cocktail" that Liuget claimed. Liuget alleged that this setback caused him $15 million in decreased pay and loss of leverage in contract negotiations. The parties ultimately settled. Liuget, like Copeland, had never previously tested positive for banned substances in his nine years in the NFL, despite having been tested over 80 times.[9]

After Copeland's suspension, in March 2020, the NFL and NFL Players Association entered into a new collective bargaining agreement (CBA).[10] The new CBA eliminated the four-month testing period that the 2018 Policy required, shortening it to two weeks focused on the NFL season as opposed to random testing. Additionally, the NFL no longer tests or invokes penalties for marijuana. For players like Copeland, this is a welcome change and positive shift away from random testing that can have harsh unintended consequences. As for Copeland's suit against Poliquin, the outcome remains to be seen. ●

7 This interpretation of *Sun. Chem.,* 243 N.J. 319 (2020) has received positive treatment in *Palmieri v. Intervet Inc.,* 2021 U.S. Dist. LEXIS 103581 (D.N.J. May 28, 2021), where a motion to dismiss an implied warranty claim for a flea and tick medicine was partially rejected on the basis that the plaintiff relied on the label.

8 Ryan Riddle, *Insider's Perspective on NFL Drug Tests*, Bleacher Report, June 11, 2013 (https://bleacherreport.com/articles/1668902-insiders-perspective-on-nfl-drug-tests).

9 Brent Schrotenboer, *NFL Player Settles Drug Case vs. His Ex-Personal Trainer Just Weeks Before Trial*, USA Today, Jan. 21. 2020 (https://www.usatoday.com/story/sports/2020/01/21/nfl-player-settles-doping-case-vs-trainer-just-weeks-before-trial/4527628002/).

10 Gary Coffey, *Is the NFL Removing Suspension for Positive Drug Tests?*, Sports Casting, May 26, 2020 (https://www.sportscasting.com/is-the-nfl-removing-suspensions-for-positive-drug-tests/).

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