SPORTS MEDICINE and the LAW

Presented by Montgomery McCracken

Do You Even Properly Diagnose, Breaux?! Breaux Sues Saints' Former Team Doctors In Medical Malpractice Lawsuit

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

In late July 2017, professional football player Delvin Breaux, then-cornerback for the New Orleans Saints, injured his left leg during summer training camp. He sought treatment from the team doctors—two orthopedists employed by Ochsner Medical Center—who, based on multiple X-Rays and MRIs, determined Breaux had a lower leg bruise or "bone contusion." Unfortunately, Breaux had actually broken his fibula, and he continued to play on his broken leg, unbeknownst to him, until mid-August. When his pain still had not subsided, Breaux sought a second opinion at Tulane University Medical Center. That was when he learned that he had fractured his leg.

Breaux is no stranger to injuries sidelining him. In high school, he suffered a catastrophic cervical spine injury, and his doctors said it was "a miracle" he survived the injury and was still alive. He continued to play football despite this injury and received a scholarship from Louisiana State University. The LSU doctors never cleared him to play because of his spine injury, but

See BREAUX on Page 9

COVID-19 Update: Leagues, Schools Grapple With Legal Issues as New Wave of Virus Impacts Play

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

In the Spring 2020 edition of *Sports Medicine and the Law*, we discussed the potential implications of resuming athletic activity in the wake of COVID-19.[1] At that time, all major American sports leagues and most sports leagues around the world had shut down to prevent the spread of the virus. While the world deals with the dramatically increased spread of the COVID-19 pandemic this fall and winter, athletic institutions must remain vigilant and stay informed about legal issues that may arise and new formal guidance that applies now that competition, in many instances, has resumed. This article serves as an update to our earlier discussion and will analyze new issues that have arisen in

See LEAGUES on Page 10

1 *See* "Resuming Play After COVID-19: Potential Liability & Best Practices for Leagues, Teams, Coaches, and Athletic Trainers," *Sports Medicine and the Law*, Spring 2020.

IN THIS ISSUE

SPORTS MEDICINE and the LAW

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Current Treatment Period May Be Too Short to Remove Competitive Advantage of Transgender Athletes

Twelve months is period proposed by World Athletics and International Olympics Committee.

The recommended year of hormone therapy may be too short to remove competitive advantage of transgender elite athletes.

Transgender women elite athletes may need more than the recommended year of feminising hormone therapy to remove the competitive advantage conferred by testosterone, suggests research published online in the British Journal of Sports Medicine.

Twelve months of treatment to suppress testosterone is the period currently recommended by World Athletics (IAAF) and the International Olympics Committee to ensure a level playing field for all competing athletes.

But the study findings indicate that while hormone treatment was associated with changes in athletic performance, transgender women still retained a competitive advantage 2 years later.

The male hormone testosterone is known to boost muscle strength and endurance. But it's not clear what impact treatment to suppress its production has on the athletic performance of transgender women during transition.

This makes it difficult to develop guidelines for their inclusion in competitive sports, say the researchers. And the guidelines that have been written are based on limited evidence.

To explore these issues further, and bolster the evidence base, the researchers reviewed the fitness test results and medical records of 29 trans men and 46 trans women who started treatment with gender affirming hormones while serving in the United States Air Force. The average age at which they started treatment was 25 but ranged from 19 to 46.

The US Air Force requires its service men and women to have a physical fitness assessment every 6-12 months. This includes measurements of height, weight, waist circumference, number of push-ups and sit-ups performed in 1 minute each, and the time taken to run 1.5 miles.

The researchers compared the fitness test results of these service members before and while on hormone treatment, and with the average performance of all women and men under the age of 30 in the US Air Force between 2004 and 2014.

Time on feminising therapy (testosterone blocker and oestrogen) for transgender women was associated with weight gain and worsening athletic performance.

Time on testosterone had no effect on the body composition of trans gender men, but it was associated with an improvement in athletic performance.

Before starting their treatment with gender affirming hormones, trans women performed 31% more push-ups and 15% more sit-ups in 1 minute and ran 1.5 miles 21% faster than their female peers.

After 2 years of feminising therapy the differences in push-up and sit-up performance had disappeared. But trans women were still 12% faster than other women.

Trans men performed 43% fewer push-ups and ran 1.5 miles 15% slower than their male peers before starting treatment with masculinising therapy (testosterone).

After 1 year of treatment, there was no longer any difference in push-up or run time performance, but the number of sit-ups performed in 1 minute by trans men exceeded the average performance of their male peers.

See TREATMENT on Page 4

MONTGOMERY McCRACKEN
Attorneys At Law

Kacie Kergides Brings Vital Experience in Collegiate Athletics to Sports Law Practice

Kacie E. Kergides, an associate in Montgomery McCracken's Litigation Department, concentrates her practice on traumatic brain injury (TBI) and other sports injury cases, as well as institutional responses to sex and gender-based harassment and misconduct under Title IX and various employment policies.

Kergides also is a member of the firm's Catastrophic Sports Injury Defense Practice Group, where she litigates issues of negligent hiring, retention, maintenance, management, and other claims arising from significant sports-related injuries on behalf of institutions.

Finally, Kacie counsels athletes, schools, and sports organizations on sports-related injuries on minimizing risk, including the proper management of concussions and other sports-related injuries.

Not surprisingly, she has presented on minimizing risk exposure and compliance-related issues at universities across the nation to both graduate and undergraduate students, staff, and faculty, including Villanova University Charles Widger School of Law and the University of Michigan, and to sports organizations, including the Eastern Athletic Trainers' Association.

Prior to joining Montgomery McCracken, Kacie was a Legal Extern in the compliance office at the University of Pennsylvania Athletics Department and a Legal Intern for the NBA Coaches Association. During law school, Kacie was a legal fellow for the Jeffrey S. Moorad Center for the Study of Sports Law. Kacie received her A.B. degree in Politics from Princeton University where she was a member of the Women's Soccer team.

Question: *What led to your interest in sports law?*

Answer: As a lifelong athlete, I've always known that I ultimately would pursue a sports-related career, even if I wasn't actually playing. Sports have played such a substantial role in my life that I never wanted to give them up even after my varsity soccer career at Princeton was over. After completing a number of sports-related internships and then hearing my colleague Steve Pachman present to Villanova's Sports Law Society when I was a first-year law student, I was immediately interested in this practice area. I unfortunately spent a great deal of time in the athletic training room during my college career, which has led to my personal connection to Sports Medicine Law.

As a lifelong athlete, I've always known that I ultimately would pursue a sports-related career, even if I wasn't actually playing.

—Kacie Kergides

Q: *Who have been your mentors along the way in your legal career?*

A: I am very fortunate to have worked and continue to work with great mentors and colleagues.

Nancy Chemtob, from Chemtob, Moss, Forman, & Beyda, for whom I worked in New York City for two years before law school, solidified my choice to attend law school in the first place. Witnessing her successfully run her own firm while also zealously representing her clients, showed me what it takes to succeed in this demanding industry.

Once at Villanova Law School, as a legal fellow for the Jeffrey S. Moorad Center for the Study of Sports Law, I worked closely with Andrew Brandt (a former NFL agent and Green Bay Packers executive). With his extensive experience in the sports industry, Andrew helped guide my understanding of the legal and business aspects of professional sports.

Steve Pachman, the head of our Catastrophic Sports Injury practice group, was a positive influence early in my career in the sports law field and has afforded me with some great opportunities and experiences as a young associate, including working with the US Soccer Federation and working with him on several traumatic brain injury cases in the sports context. He continues to help me navigate my legal career as I work to develop this niche practice.

Margot Putukian, the Director of Athletic Medicine at Princeton University, was my team doctor during my time at Princeton. Dr. Putukian exemplifies

See KACIE on Page 4

Kacie Kergides Brings Vital Experience to Sports Law Practice

Continued From Page 3

the gold standard of conduct for athletic trainers, and having seen her work firsthand in college now helps me speak to Athletic Trainers on best practices.

I would also be remiss if I did not mention my college coach, Julie Shackford, who still to this day continues to serve as a role model and mentor for me.

Q: *What was your experience like as a legal extern in the compliance office at the University of Pennsylvania Athletics Department?*

A: I truly enjoyed my experience as a legal extern at the University of Pennsylvania as it exposed me to the inner workings of college athletics. During my time in college, I truly thought the Compliance Office did nothing besides give athletes "the talk" at the beginning of the season about not breaking any NCAA rules. However, I quickly learned during my externship that that is absolutely not the case. Working for Rachel Hiller and BJ Merriam, I saw the constant communication that is needed between the coaches and the Compliance Office and how intricate the NCAA rules can be. I realized that everything we were able to do as college athletes was because of the work of the Compliance Office. I am grateful for that experience because now that my practice focuses on representing and counseling universities, I am able to appreciate and recognize how the Athletic Departments function and the challenges they face.

My experience from this externship also helps in my Title IX practice. I learned a lot about how the core values of a institution impact its various departments, including rule compliance and investigations. NCAA rules and Department of Education rules are similarly strict and both guided by a greater sense of how an institution should work to both prevent and properly investigate misconduct. I also had the great benefit of seeing how well-run and thoughtful investigations can serve to make an entire institution better – something of the utmost importance in Title IX investigating, advising and adjudicating.

Q: *What do you like most about your sports law career?*

A: The positive cause. From my colleagues, to our clients and our medical experts, every single person has the same mindset–advocating and raising awareness to better protect the health and safety of athletes. Plus, it doesn't hurt to be able to talk about sports for a majority of the workday.

Q: *Do you see legal issues around sports concussions continuing to be a big issue in the coming years and why?*

A: Yes, unfortunately I think we are still only in the early stages of sports-related concussion and traumatic brain injury litigation and the development of legal precedent and guiding jurisprudence. The risk of head injuries exists in almost all sports, yet the science behind what causes those injuries and the short-term and long-term effects caused by those injuries is continuing to evolve every day. I also find that a concussion is an injury that athletes can "hide" more easily from their athletic trainers, which potentially leads to further harm and injury. As a former player, I have first-hand experience with the dilemma of whether to report a head injury or not, appreciating that a disclosure likely means reduced playing time or worse sitting on the bench for an extended period. Additionally, there really hasn't been a "breakthrough" lawsuit yet to set the precedent in these cases, especially in the CTE (chronic traumatic encephalopathy) cases. While CTE has become a household term, the science behind CTE is still developing. But that is not preventing lawsuits from being filed every day. Due to the facts and legal issues surrounding these lawsuits, most cases settle before they reach a jury verdict. We continue to see an increase in the number of lawsuits and class actions filed regarding concussions and traumatic brain injuries. ●

Treatment Period May Be Too Short to Remove Competitive Advantage

Continued From Page 2

The researchers acknowledge that their study doesn't account for changes in exercise behaviours over time, and more research is needed to clarify the impact of gender transition on the performance of elite athletes, they say.

But they nevertheless conclude: "This study suggests that more than 12 months of testosterone suppression may be needed to ensure that transgender women do not have an unfair competitive advantage when participating in elite level athletic competition."

And they go on to say that the findings: "suggest that governing bodies for sporting competition should require more than 1 year of testosterone suppression prior to competition when creating guidelines for inclusion of trans women in women's elite athletics." ●

Journal Reference: Timothy A Roberts, Joshua Smalley, Dale Ahrendt. Effect of gender affirming hormones on athletic performance in transwomen and transmen: implications for sporting organisations and legislators. British Journal of Sports Medicine, 2020; bjsports-2020-102329 DOI: 10.1136/bjsports-2020-102329

District Court Sanctions DNA Sports Performance Lab

By Jeff Birren, Senior Writer

DNA Sports Performance Lab, Inc. and its owner, Neiman Nix, (collectively "DNA Sports") have been battling Major League Baseball ("MLB") for its ban of products that contain IGH-1, a performance enhancing substance. These pages looked at the on-going litigation in "Sports Performance Lab Underperforms in Court Battle with MLB" (*SLA*, V. 17, #18 (9-25-2)). The U.S. District Court in San Francisco had just dismissed the claims brought against the MLB Players Association ("MLBPA") and scheduled a similar motion brought by MLB. The Court ended with the statement that "[O]nce the pleadings are settled (or abandoned), a further order will address sanctions" (Id.).

Three days later, DNA Sports filed a notice of voluntary dismissal against the defendants. MLB then filed a motion for sanctions, seeking $33,407.17 to cover the cost of a single attorney performing 39.5 hours of work from April 2020 through July 2020. MLBPA moved to recover attorneys' fees of $104,039.08 for 162.5 hours of work from January 2020 through August 2020. The Court held the hearing on those motions on September 24, 2020 "telephonically due to COVID-19." The Court ruled on October 27, 2020 and it was not a happy occasion for DNA Sports (*DNA Sports Performance Lab, Inc, and Neiman Nix v. Major League Baseball; MLB Advanced Media LP; Major League Baseball Players Association; and Major League Baseball Enterprises, Inc.,* N.D. Cal, Case No. 20-00546 WHA, Order Granting Motion For Attorney's Fees (10-27-20)).

The Order stated that on "a Rule 11 motion, we consider all of the circumstances, not just the allegations of the complaint" (Id. at 2). What followed was "DNA Sports' Harassment of the Baseball League." The Court recounted the history of DNA Sports prior cases against MLB, filed in various federal and state courts. The Court then reviewed what it called "DNA Sports' Pursuit of the Baseball Union." Next came the Court's review of the "Present Suit. Only on page nine did the "Analysis" begin.

The motions sought monetary sanctions against DNA Sports' counsel, Lance Reich, under Rule 11 and against DNA Sports pursuant to the Court's inherent authority, seeking to hold those two "jointly and severally liable for fees and expenses" (Id. at 9). The Court found "DNA Sports' complaint baseless. That, along with finding Reich failed to conduct an adequate investigation, supports Rule 11 sanctions. And, such baselessness in addition to bad faith, supports inherent sanction of DBA Sports itself" (Id. at 10).

To allege a valid Lanham Act claim, a plaintiff must show that the defendants "made a false statement of fact in a commercial advertisement" whether of its product or that of a competitor; that the false statement "actually and materially deceived its audience" and that the plaintiff had been injured by the statement. The state law false advertising claim "requires a showing that the defendants participated in or had control over the untrue or misleading advertisements" (Id.). However, DNA Sports "admit that their product contain(s) naturally-occurring IGF-1. They concede that the league and the union have banned IGF-1" and that an independent company did the testing. Thus, they brought with claim "without ensuring that they sued the right defendants" (Id.). "Such baselessness supports an inference of improper motive" (Id. at 11).

The Court further stated that MLB's prior motion for sanctions would also have been granted. The complaint had "recapitulated the misdeeds of the league's" "prior investigations that inspired" two of DNA Sports' earlier lawsuits which were previously dismissed "by prior rulings." Although the plaintiffs claimed that the public statement "essentially banned" them from ever working again in a "league-related capacity" they had previously admitted that they had "'*never sold its supplements to league players* on account of a non-competition agreement'" (Id., emphasis in the original). DNA Sports claimed a loss of good will compared to league-licensed products yet "failed to show how the targeted products" compete with the plaintiffs or if they "contain a banded substance." They also failed to show how the use of these logos "the alleged commercial speech here—diverted sales from DNA Sports to these specific products and how this speech was false. Without these elements, their allegations against the league are baseless" (Id.).

The second point was that the Court "finds that Attorney Reich failed to reasonably investigate these claims" (Id.). Reich and DNA Sports alleged that they "consulted with several experts" as to whether the league-endorsed products contained natural IGF-1, but they "did not test these products for IGF-1 but instead relied on what it and its experts deemed 'common sense'" (Id. at 12). Even "a cursory investigation into the Lanham Act, false advertising, and unfair competition claims" would have either revealed the missing elements, thus saving "DNA Sports' complaint, or at least, save the league and the union the trouble of motion practice. Attorney Reich failed in this regard" (Id.).

Finally, the Court "finds DNA Sports filed its complaint to harass the league and the union. DNA Sports' history of litigation demonstrates both that this suit is brought in bad faith to vex and that dismissal alone will not dissuade DNA Sports from trying again." This was "the *sixth* suit arising out of the *same original circumstances* against the league" and "prior dismissals and sanctions have not tempered DNA Sports' vendetta against the league" (Id., emphasis in the

See DISTRICT on Page 8

FEI Mandates Protective Headgear

By John T. Wendt

We have all seen the results of a dangerous concussion in football, hockey, soccer, and other sports. Now imagine that you are riding and falling off of a 1400-pound horse onto the ground, and the only thing protecting your head is a top hat. Would you be safer with a helmet? Should a helmet be required? That is the debate that is going on right now in Equestrian Dressage.

Dressage is considered the most artistic of the equestrian sports testing the ability of horse and athlete to display both athletic prowess and supreme elegance by evaluating, for example, an athlete's ability to make their horse move quickly from side to side, transition into a gallop or rapidly change direction, using subtle commands.[1] It is steeped in tradition and history. Dressage tradition also requires riders to wear elegant formal dressage show attire with a top hat.

Courtney King-Dye is an American Olympian and competed in not only the 2008 Olympic Games but also the 2007 and 2008 World Cups, the pinnacle of success.[2] In 2010 while practicing, her horse tripped and King-Dye, who was not wearing a helmet, fell and suffered a traumatic brain injury. It was an accident.

But her accident sent shockwaves through the sport. Equestrian federations from the United States, Canada, and Great Britain all instituted rules changes mandating protective headgear in practice. The equestrian international governing body Fédération Équestre Internationale (FEI) "strongly recommended" that all riders wear helmets in training and pre-competition warm-ups at all international Dressage shows. But riders in the competition arena still had a choice of wearing a helmet or the traditional top hat.3

At the 2016 Olympic Games in Rio some riders wore helmets others top hats. Edward Gal of the Netherlands said, "I always wear the top hat. I think with dressage it looks nicer. My face isn't made for a helmet. With the young horses at home I wear the helmet. I don't think I will fall off in an arena with (his horse) Voice." While Kasey Perry-Glass of the United States said, "I've always worn my helmet. I've never been a big advocate for not wearing a helmet. I wanted to wear my helmet here. It's very important, and I want to stay healthy. Anything can happen at any time. Dublet is a pretty sensitive horse—you just never know. I use one on any horse, at home too. It's very important."[4]

At their November 2019 General Assembly, based on a recommendation from the FEI Medical Committee, the FEI approved Article 140 of the General Regulations mandating protective headgear as of January 1, 2021 for all dressage riders any time that they are mounted, inside and outside the competition arena. Riders may remove the protective headgear during ceremonies, when accepting prizes and during the playing of National Anthems.[5] Frank Kemperman, Chair of the FEI Dressage Committee said, "Tradition is important in our sport, but it's difficult to not follow the medical community's advice…There's no really strong argument against the use of protective headgear in dressage, except that it's a tradition."[6]

150 of the leading dressage riders petitioned the FEI to reverse the decision and give senior riders the option of wearing helmets or top hats. And that list includes some of the greatest riders in the world including Isabell Werth of Germany who is regarded as the Queen of Olympic Dressage with a record 10 medals, six of them gold over five Olympic Games. The petition was sent to the FEI for consideration at the 2020 FEI General Assembly to be held online in November 2020. In the petition the riders state, "There has never been a serious accident at an International Dressage competition, and the riders believe there is no reason to change that for Senior competitors at CDI4*/5*, Games and Championships on GP level. The top hat is an essential part of the identity of dressage. The dresscode makes us unique and we feel very strongly that the top hat remain as optional to use, but only at the highest level of competition…"[7]

In contrast a group of more than 170 physicians calling themselves "Physician Women Equestrians" sent a letter to the FEI to maintain the mandate for protective headgear. The group said, "We, the undersigned, are an international group

1 Tokyo 2020, Equestrian, Tokyo 2020 (2020), https://tokyo2020.org/en/sports/equestrian/ (last visited Oct 30, 2020).Eventing and Jumping, with men and women competing on equal terms.","container-title":"Tokyo 2020","language":"en-US","title":"Equestrian","URL":"https://tokyo2020.org/en/sports/equestrian/","author":[{"family":"Tokyo 2020","given":""}],"accessed":{"date-parts":[["2020",10,30]]},"issued":{"date-parts":[["2020"]]}}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}

2 Courtney Dye-King, Ckd Dressage, Ckd Dressage (2020), http://ckddressage.com/ (last visited Oct 29, 2020).

3 Fédération Équestre Internationale, Safety Helmets Strongly Recommended By Dressage Committee, FEI (2010), https://inside.fei.org/news/safety-helmets-strongly-recommended-dressage-committee (last visited Oct 30, 2020).

4 Molly Bailey, Top Hat Or Helmet? (2016), http://www.chronofhorse.com/article/top-hat-or-helmet (last visited Oct 29, 2020).

5 Fédération Équestre Internationale, FEI General Regulations, 24th edition (2020), https://inside.fei.org/sites/default/files/FEI%20General%20Regulations%20effective%201%20January%202020%20-%20Final%20Version%20for%20Website%20-%20Clean.pdf.

6 Eurodressage, Top Riders Sign Petition to Retain the Choice for a Top Hat in Grand Prix Competition, Eurodressage (2020), https://www.eurodressage.com/2020/10/26/top-riders-sign-petition-retain-choice-top-hat-grand-prix-competition (last visited Oct 29, 2020).

7 Id.

See FEI on Page 8

NAU Researchers Publish New Report, Recommendations to Increase Concussion Disclosure in Athletics

A recent report provides recommendations for increasing concussion symptom disclosure in collegiate athletic departments and military service academies. The report was recently published in the British Journal of Sports Medicine (BJSM).

The report was co-authored by Heidi Wayment, chair of the Department of Psychological Sciences at Northern Arizona University. It was the result of a three-year research project started in 2016 and funded by the NCAA-Department of Defense Mind Matters Research Challenge.

The Consensus Statement published in BJSM documented the extant literature on health behaviors surrounding concussion disclosure and documented 17 recommendations for improving concussion reporting that met thresholds for utility and feasibility, grouping them into five domains for discussion:

- Content of concussion education for athletes and military service cadets
- Dissemination and implementation of concussion education for athletes and military service cadets
- Other stakeholder concussion education
- Team and unit-level processes
- Organizational processes

"Within the past decade, the dangers of concussions have become more prominent in the public media and national discourse," Wayment said. "Athletic programs have instituted concussion education programs and an analysis regarding the effectiveness of those programs found over and over that education was not having enough of an impact on individuals' willingness to report potential symptoms, even though the understanding that concussions were associated with short- and long-term health risks was becoming increasingly clear."

The recommendations can serve as a basis for athletic departments and military service academies "to address behavioral health supports and institutional processes needed to increase early and honest disclosure of concussion symptoms in an effort to improve clinical care outcomes and to begin eliminating this lack of disclosure plaguing athletes."

"The lack of symptom disclosure is a problem because the science shows that when concussed players are treated, they reduce their overall long-term risk, especially the very dangerous situation of suffering another impact close in time that can be deadly," Wayment said.

Wayment is a social psychologist with expertise in health psychology and has conducted research on a variety of topics that includes risky health behaviors. Her work focuses on the utility of theoretical health models to understand health behavior in terms of social psychological constructs such as self-identity, psychological defenses and social influence.

She said some athletes do not disclose concussion symptoms because they may not recognize the symptoms, and many are influenced by a "football culture" in which they think disclosure violates the image of a tough athlete. They fear disclosure will cost them playing time, a spot on the team or the respect of coaches and other stakeholders in their playing career.

If a player has a concussion and suffers another one shortly after, they can experience "second impact syndrome," a potentially fatal condition in which the brain swells rapidly. This can be avoided by reporting initial concussion symptoms early to allow for faster recovery times and better overall outcomes to their long-term health.

Wayment said that even in the context of the NAU team's research, some of the cooperating Division I NCAA football teams were reluctant to fully participate because the topic was sensitive to stakeholders.

"We saw a range of willingness on the part of head coaches to explore this topic in the context of their football programs. Luckily, we did have some great research partners with some of the football programs we engaged."

To address ways to change "football culture," the Mind Matters Challenge—a $7 million education and research challenge that awarded eight grants to research teams—called for research projects to identify ways of changing attitudes about concussions in young adults and to provide educational programs that increase players' willingness to report concussions. The goal of Mind Matters leaders was to develop a consensus statement from the research teams useful for stakeholders to understand the best practices and issues related to increased concussion reporting in various populations by using a Delphi process.

The Delphi process drew on the wisdom of each research group and concluded a consensus was achieved among the expert groups who generated findings from their research using surveys to gather and measure the degree of consensus among one another. This took several iterations and was guided by a facilitator who helped summarize and clarify where consensus existed. The input provided by the groups was analyzed and written up by a smaller group of these researchers under the facilitator and lead author of the report, Emily Kroshus, an international expert in concussion-related risks.

"We learned a great deal about the barriers and the facilitators of this important health behavior, both in our own team's research, but especially collectively as reflected in the recently published consensus statement," Wayment said. "Another important set of findings dealt with the need to continue examining how cultural and organizational factors influence in-

See NAU on Page 8

District Court Sanctions DNA Sports Performance Lab

Continued From Page 5

original). After each dismissal, "DNA Sports has simply developed a different theory in a different court based on the same facts and continued its pursuit of the league." A prior court had imposed sanctions but as "DNA Sports' litigation history demonstrates, however, these sanctions have not fazed DNA Sports." Instead, it "has continued to sue the league, affiliated entities, and now the union, despite the outstanding monetary sanction for troublesome lawyering" and thus "dismissal alone with not deter DNA Sports from filing further baseless and harassing suits" (Id.).

Moreover, DNA Sports had turned down an offer from MLB that it would withdraw its motion for sanctions if DNA Sports would dismiss with prejudice "all outstanding litigation against MLB defendants and agree to bring no further litigation against them" (Id., at 13). DNA Sports and Reich refused to dismiss the "outstanding cases against the league, proving that DNA Sports does not intend to change its conduct." In light of DNA Sports' "persistence, it may be that no amount of sanctions will deter it from continuing its crusade. The requested amount of fees, however, will at least compensate the union for the harm done here." As this was their sixth case against MLB, "a full award is appropriate" (Id.).

The Court thus granted the motions for attorneys' fees in full, granting $104,039.08 to the MLBPA and $33,407.17 to MLB, and both are due by November 20, 2020. However, since this was "Reich's first appearance before the undersigned, and given the importance of not dissuading representation of difficult clients" the Order "will be held in abeyance to see the extent to which he engages in ongoing harassment" (Id.). Mr. Reich has some thinking to do. ●

FEI Mandates Protective Headgear

Continued From Page 6

of physicians who ride in all equestrian disciplines, at all levels of the sport…We also treat brain injuries from the emergency room to the intensive care unit, from rehabilitation to psychiatric care, and we believe this petition, if granted, is a disservice to individual riders and to the sport of dressage."[8]

While the FEI acknowledged they received the petition, a spokesperson indicated that it was sent in too late to be placed on the agenda. The FEI also noted that during the rule review period they did not receive any request to change the proposed helmet rule from the 137 National Federations or the International Dressage Riders Club.[9] It will be interesting to see if the riders bring forth their petition at the 2021 FEI General Assembly or if a helmet becomes the new tradition. ●

John T. Wendt *is a Professor Emeritus of Ethics and Business Law at the University of St. Thomas and a member of the Court of Arbitration for Sport (Lausanne).*

8 Dressage-News, Over 170 Physicians Involved in Horse Sports Appeal Against Move to Permit Top Hats for Senior Riders in High Level Competition (2020), https://dressage-news.com/2020/10/29/over-170-physicians-involved-in-horse-sports-appeal-against-move-to-permit-top-hats-for-senior-riders-in-high-level-competition/ (last visited Nov 1, 2020).

9 Pippa Cuckson, Top Hats Set for Extinction Despite Dressage Petition, Horse Sport (2020), https://horsesport.com/horse-news/top-hats-set-extinction-despite-dressage-petition/ (last visited Oct 29, 2020).

NAU Researchers Recommend Increasing Concussion Disclosures

Continued From Page 7

dividuals' thoughts, feelings and actions. This idea permeates health-related research, but what we gained from our experience is tangible evidence that it is worth the effort to go beyond the individual in trying to understand how to mitigate risky health behavior."

The funding by Mind Matters ended a year ago, but the NAU research team, along with their colleagues and students, have published nearly a dozen studies stemming from this project with plans to continue moving forward. Natalie Cook, a certified athletic trainer and new doctoral student in interdisciplinary heath, conducted concussion-related research as part of her master's degree before attending NAU.

"Natalie has a few projects in the development stage that will be building on this research with a specific focus on how to better measure the influence of important others on athletes' concussion reporting intentions," Wayment said. "We also have some plans to use some innovative methods to examine more closely how athletes physiologically respond to concussion-injury and prevention information. These efforts could be helpful in designing more effective educational interventions for high school and collegiate athletes." ●

Breaux Sues Saints' Former Team Doctors In Medical Malpractice Lawsuit

Continued From Page 1

Breaux eventually played for teams in the Gridiron Developmental Football League, the Arena Football League, and the Canadian Football League. He joined the NFL with the Saints in 2015.

Breaux underwent surgery to fix his broken fibula. He was placed on the injured reserve list, and he not only missed the entire 2017-18 season, but he also never suited up for the Saints, or any NFL team, again. The 2017-18 season was supposed to be Breaux's comeback season, as he was sidelined from another fibula fracture and shoulder injury the year prior. Though Breaux led the Saints in interceptions in 2015, the Saints did not sign him to a new contract. As for the team doctors who "misdiagnosed" Breaux, the Saints fired them and overhauled the medical staff, but the damage was already done as far as Breaux was concerned.

On September 24, 2020, Breaux filed a lawsuit against the ex-team doctors and their employer, alleging medical malpractice. He claimed, among other things, that the doctors mismanaged his medical care, misdiagnosed him with a bone contusion, and failed to diagnose him with a fractured fibula. Because medical malpractice suits may only be brought against medical providers, Breaux did not name the Saints as defendants in his suit.

Breaux's lawsuit is still in the beginning stages, and whether he succeeds in court remains to be seen. This case, however, provides important learning lessons for medical providers faced with similar allegations of medical malpractice.

First, Breaux's lawsuit confirms that preventing litigation is nearly impossible. Under Louisiana law, medical malpractice claims must first be presented to a medical review panel before a lawsuit can be filed. Here, the panel "concluded that all defendants met the standard of care." Notwithstanding that finding, Breaux still had the right to file suit in court—and he did. A jury may very well disagree with the panel's finding and instead conclude that the team doctors misdiagnosed Breaux and mismanaged his medical care. The panel's decision is just a potential roadblock to litigation—not a stop sign.

Second, Breaux's lawsuit highlights the importance of documenting the basis for a diagnosis and keeping a clear line of communication open with athletes at all times. In this case, the doctors ideally would have told Breaux that they believed he had a bone contusion based on the medical imaging (and documented this conversation in Breaux's medical records) but informed Breaux that certain injuries, such as broken fibulas, are often unnoticeable on initial X-rays and MRIs. The doctors also should have advised Breaux to keep an eye on his pain level and told him to come back if his injury did not subside in a few days (again, documenting these conversations in Breaux's medical file). When Breaux did return a week later, the doctors should have pivoted their care protocol, recognized that the medical imaging may not be telling the whole story, and listened to Breaux's complaints to better understand what was going on with his leg. Had the doctors had an open dialogue with Breaux about his injury and pain, they may have discovered the fractured fibula before Breaux sought a second opinion at Tulane.

In interviews with the press, it was clear that the doctors' failure to clearly layout the basis to their diagnosis, and the potential for it to be wrong, lead to unnecessary tension in the locker room. Breaux discussed the tension his misdiagnosis caused between him and Saints' head coach, Sean Payton. Breaux was obviously in pain playing on a broken leg, and Payton was relying on the medical opinions from the team doctors, thinking that Breaux only had a contusion. Breaux stated that he felt a sense of betrayal towards Payton, and that they "were not on good terms . . . I was telling him something was wrong with my leg, something was bothering me, I knew something was wrong with my leg. And he just said, 'Oh the doctors say this and that' and I'm like, hey man, can we address this situation in private? Instead of humiliating me in front of my team? Because that's embarrassing." There were also reports around this time that the Saints were seeking a trade for Breaux because they were tired of the cornerback's injuries. All of this tension could have possibly been avoided, and the relationship between Breaux and the Saints maintained, had the team doctors properly diagnosed the injury in the first place, and, in the very least, kept all interested parties (the player and the coach) updated on how the diagnosis could be wrong.

Finally, in the sports litigation world, there is a heightened focus on student-athlete injuries and lawsuits against high schools, colleges, and universities. This case serves as a reminder that professional athletes are also common litigants, and the stakes are often much higher in professional athlete cases. Here, Breaux is a high-dollar plaintiff; he had a $1.6 million contract with the Saints, and he received other performance-based incentives. He is likely able to afford top-notch lawyers and fight this case tooth-and-nail until the very end. Although Louisiana caps medical malpractice damages at $500,000, there is no limit to compensation for future medical expenses, and the cost of litigation may be enough to force the doctors to settle Breaux's case.

In high-risk sports such as football, injuries are inevitable. Returning to peak performance in the shortest amount of time is critical. Unfortunately, Breaux is not the first NFL athlete to suffer a career-ending injury. While not every injury is the result of malpractice, injuries, big or small, open the door to lawsuits. This case should serve as a reminder to doctors that despite maintaining the standard of care, a lawsuit is always possible. ●

Leagues, Schools Grapple With New Wave of Virus Related Legal Issues

Continued From Page 1

the latter half of 2020.

Return-to-Play Update

Since the release of our Spring 2020 article, all five major American sports leagues (the NFL, NBA, MLB, NHL, and MLS) returned with a modified version of their respective seasons. The NBA, NHL, and MLS (at least initially) competed in a "bubble" where teams were sequestered to play in specific centralized locations. The NFL and MLB allowed teams to host games at their home stadiums, although fan attendance was limited by state and local social distancing guidelines, which, in many cases, resulted in no fan attendance at all.

The bubble models were widely praised for their effectiveness—the NBA, for example, was able to complete its season and playoffs without a *single* reported positive test of COVID-19.[2] Although the MLB was able to finish its season, and the NFL season continues as this article goes to print, both leagues were and continue to be plagued with game postponements and other difficulties, as players and staff contracted and spread the virus. Of particular note, the NFL's Steelers-Ravens game scheduled for Thanksgiving night was pushed to the following Wednesday afternoon due to a virus outbreak, marking only the second Wednesday NFL game since 1950,[3] and, in the same week, the Denver Broncos became the first team to start a non-quarterback at the position since 1965 because all of the quarterbacks on their roster were disqualified from play due to the league's COVID-19 protocols.[4]

Some collegiate sports have resumed as well, including Division I football and basketball. Not all activity has resumed, however, as the NCAA's Divisions II and III canceled all of their fall 2020 championships. Other Division I sports have resumed or been canceled on a school-by-school basis. Like the MLB and NFL, collegiate sports have been plagued by postponements and cancellations, and several teams across the country have experienced major outbreaks. At least 17 student-athletes and 13 staff members for the Wisconsin Badgers, for example, tested positive for the virus in October and November, causing the team to miss several games in an already shortened Big 10 season,[5] and some of college football's biggest names—including Clemson's Trevor Lawrence, the presumptive number one pick in next year's NFL draft, and Alabama's Coach Nick Saban—have missed games after testing positive.

NCAA Guidelines

In order to support teams and schools that have resumed play, the NCAA has issued (and routinely updated) guidance documents that must be followed.[6] While these documents were initially released as nonmandatory guidance that contained permissive language such as "may" and "might," the NCAA has since clarified that they are "considered requirements for institutions that elect to continue with any competition occurring in the fall."[7]

The guidance notes that "[a]symptomatic spread of COVID-19 is of significant concern among the college sport environment because, like the broader student body, it is largely composed of younger adults (18-29 years of age). Even if these individuals remain asymptomatic or are minimally symptomatic after being infected with [the virus], they are still capable of spreading the virus that causes COVID-19."[8] The guidance goes on to describe in detail the applicable CDC guidelines. Importantly for athletic institutions, the guidance emphasizes outdoor practice where possible. "When outdoor training is not feasible, or for indoor sports, it is important to mitigate risk with masking whenever feasible, including during training."[9]

The NCAA also recommends working in "functional units" during practice or other team activities. A "functional unit" is described as two to 10 or more individuals, all members of the same team, who consistently work out and participate in activities together. "This means that if an individual from one of those units does become infected, the entire team may not be impacted, and contact tracing may be more manageable than it would be otherwise in the event of an infection."[10] The guid-

2 *See* "Lakers Win NBA Finals; No Coronavirus Cases Reported in Bubble," **NPR** (Oct. 12, 2020), https://www.npr.org/2020/10/12/923064484/lakers-win-nba-finals-no-coronavirus-cases-reported-in-bubble.

3 *See* "Ravens-Steelers game could help make NFL history by being played on a Wednesday," **CBS Sports** (Dec. 1, 2020), https://www.cbssports.com/nfl/news/ravens-steelers-game-could-help-make-nfl-history-by-being-played-on-a-wednesday/.

4 *See* "Why did the Broncos play without a quarterback? Where the NFL stands in its COVID-19 battle, what's next," **ESPN** (Nov. 30 2020), https://www.espn.com/nfl/insider/story/_/id/30417807/why-did-broncos-play-quarterback-where-nfl-stands-covid-19-battle-next.

5 *See* "Wisconsin football's COVID-19 outbreak slowing, active cases down to 14," **Wisconsin State Journal** (Nov. 8, 2020), https://madison.com/wsj/sports/college/football/wisconsin-footballs-covid-19-outbreak-slowing-active-cases-down-to-14/article_199b99db-6cab-5104-8e46-42fd237090fc.html.

6 *See* "Resocialization of Collegiate Sport: Developing Standards for Practice and Competition, Second Edition," **NCAA** (Nov. 13, 2020), https://ncaaorg.s3.amazonaws.com/ssi/COVID/SSI_ResocializationDevelopingStandardsSecondEdition.pdf.

7 "Requirements for Each Division Related to the Conduct of Fall Sports and Championships: FAQs," **NCAA** (Aug. 11, 2020), http://www.ncaa.org/sport-science-institute/requirements-each-division-related-conduct-fall-sports-and-championships-faqs.

8 *See* supra note 3 at 5.

9 *Id.* at 9.

10 *Id.* at 14.

See LEAGUES on Page 11

Leagues, Schools Grapple With New Wave of Virus Related Legal Issues

Continued From Page 10

ance further suggests the use of electronic whistles or whistle covers during practice, "as a strategy to avoid the deep breath and force burst of droplet-filled air that result from the use of a traditional whistle."[11]

Interestingly, the NCAA guidance ranks each sport based on its "current transmission risk," with each sport listed as either Low, Intermediate, or High. Sports labeled as Low-risk include golf, outdoor track, and tennis, while the Intermediate category includes baseball, field hockey, and indoor track.[12] The High-risk category includes both football and basketball, yet, as discussed above, play has resumed for both of these sports, at least in Division I.

Collegiate conferences and individual schools have also developed their own COVID-19 protocols of varying degrees of strictness, which include testing, cardiac screening, return to play, quarantine, and other safety guidelines.[13]

Legal Developments Resulting from Return-to-Play

Our Spring 2020 article discussed the potential legal implications of resuming play in the wake of COVID-19, including the possibility of tort liability stemming from the spread of an infectious disease. It is true that cases asserting negligence based on the contraction of COVID-19 have been filed all across the United States, although they have tended to arise in the context of nursing homes,[14] prisons,[15] or private employers.[16] The authors of this article have yet to come across a case in which an athlete or employee has sued his or her team, school, or other institution based on a failure to properly contain the virus as athletic activity resumed.

This does not mean that litigation stemming from COVID-19 has not arisen between student-athletes and their schools. To the contrary, in one notable case, a group of Illinois high school student-athletes and their parents actually sued their local athletic association to *compel* the return of fall sports, arguing the decision did not comport with the association's own bylaws. Their request for a temporary restraining order was denied, however.[17]

Similarly, in August a group of student-athletes at the University of Nebraska sued the Big Ten Conference, alleging tortious interference and breach of contract stemming from the Big Ten's decision (at least initially) to suspend the fall 2020 football season.[18] The Big Ten later changed course and decided to begin its football season in late October,[19] seemingly mooting the Nebraska student-athletes' case.

These cases suggest that, instead of facing litigation risk stemming from alleged negligence in retuning to play too quickly or without proper COVID-19 precautions, athletic institutions, at least in the short-term, are more likely to face litigation arising from decisions *not* to engage in certain activities, either on contractual grounds, tort grounds, or in an administrative law context. Nevertheless, because the long-term impact of COVID-19 is still unknown, particularly with respect to potential heart and lung damage, the possibility remains that negligence-based return to play cases will arise in the future. *Sports Medicine and the Law* will continue to monitor any developments surrounding COVID-19's impact on professional and collegiate athletics, whether they involve litigation, new regulatory guidance, or otherwise. ●

11 *Id.*

12 *Id.* at 19.

13 *Compare,* "SEC Medical Guidance Task Force Requirements for COVID-19 Management: Fall Sports," (Nov. 18, 2020), http://a.espncdn.com/sec/media/2020/SEC%20Task%20Force%20Recommendations%20Fall.pdf, with "Everything you need to know about the Big Ten's COVID-19 protocols," (Nov. 11, 2020), https://www.nbcsports.com/washington/ncaa/everything-you-need-know-about-big-tens-covid-19-protocols.

14 *See, e.g., Parker v. St. Jude Operating Co.*, Complaint (Negligence, Negligence per se, and Statutory Elder Abuse), 2020 WL 2557150, at *1 (Or. Cir. May 19, 2020).

15 *See, e.g., Matter of Pauley*, 466 P.3d 245 (Wash. Ct. App. 2020).

16 *See, e.g., Segura v. Classic Southeast Texas, Inc.*, Plaintiff's Original Petition, 2020 WL 6787449, at *1 (Tex. Dist. July 8, 2020).

17 *See* "DuPage County judge denies parents a temporary restraining order against IHSA's Return to Play guidelines," **Chicago Sun Times** (Oct. 1, 2020, 4:33 PM), https://chicago.suntimes.com/high-school-sports/2020/10/1/21497633/ihsa-lawsuit-dupage-county-coronavirus-high-school-sports.

18 *See Snodgrass v. The Big Ten Conference, Inc.*, Complaint, 2020 WL 5076062, at *1 (Neb. Dist. Ct. Aug. 27, 2020).

19 *See* Adam Rittenberg and Heather Dinich, "Big Ten football to resume weekend of Oct. 24," **ESPN** (Sept. 16, 2020), https://www.espn.com/college-football/story/_/id/29897305/sources-big-ten-announce-october-return.

Pirates Name Freitas Head Athletic Trainer

Rafael Freitas has been named the Major League Head Athletic Trainer for the Pittsburg Pirates.

Freitas spent the last four seasons as the assistant athletic trainer with the Milwaukee Brewers. He was also a minor league athletic trainer with the St. Louis organization in 2016 and a minor league athletic trainer in the Arizona organization from 2014-15.

The native of Brazil began his professional career as an athletic trainer at the Cincinnati Reds' Dominican Republic Academy (2012-13). He has also worked with Toros Azucareros del Este in the Dominican Winter League in 2013 and was the head athletic trainer for Team Brazil during the World Baseball Classic qualifiers in 2012 and 2016.