

CONCUSSION DEFENSE

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REPORTER

Concussion Litigation Roundup – the Year in Review

By Anthony Corleto, of Wilson Elser

The past year yielded a few decisions that provide guidance and insight for the defense of sports concussion cases.

NFL Class Action

For those who need a recap—former players claimed that the NFL mismanaged and hid what it knew about the long term effects of concussions, “sub-concussive blows” and Chronic Traumatic Encephalopathy (CTE). The Eastern District of Pennsylvania approved class certification for settlement purposes in 2015 (*In re NFL Players Concussion Injury Litig.*, 307 F.R.D. 351) and the Third Circuit Court of Appeals affirmed in 2016 (821 F.3d 410). The court’s key findings starkly illustrate the state of scientific knowledge in this area: (1) the study of

CTE is nascent, and the symptoms of the disease, if any, are unknown; (2) medical research has not reliably determined which events make a person more likely to develop CTE; and (3) research has not determined what symptoms individuals with CTE typically suffer from while they are alive. *In re NFL Players Concussion Injury Litig.* 821 F.3d at 441. Based on the lack of scientific proof, District Court carefully observed that without certification and settlement, many former players would get nothing for their claims.

Since then, there’s been continued litigation about settlement administration, attorney’s fees and opt-out rights. We highlight some recent developments.

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Inappropriate Diagnoses – Study Points to the Fallacies of Diagnosing CTE

Autopsy exam is the only way to diagnose CTE, yet a number of former NFL players report being told they have the degenerative brain disease.

A small but concerning number of former NFL players report receiving clinical diagnoses of chronic traumatic encephalopathy (CTE), according to new research.

A definitive diagnosis of the neurodegenerative brain disease, thought to be caused by repeated blows to the head, can be done only on autopsy and cannot be made based on clinical exam or brain imaging.

Although based on player self-reports

rather than on medical records, the study findings raise concerns of inappropriate diagnosis and possible overlooking of other, more treatable, conditions.

Players who reported diagnosis of CTE were more likely to have sleep apnea, heart disease, high blood pressure and depression, each of which can cause cognitive symptoms linked to CTE.

Clinicians caring for former football players should ensure they are not overlooking conditions that may be treatable and exercise caution and clarity in discussing CTE.

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Biomarkers May Help Us Understand Recovery Time After Concussion

A blood test may help researchers understand which people may take years to recover from concussion, according to a study published in the May 27, 2020 online issue of *Neurology*[®], the medical journal of the American Academy of Neurology. The study looked at a biomarker called neurofilament light chain, a nerve protein that can be detected in the blood when nerve cells are injured or die.

Researchers found that, years later, people with a history of three or more concussions were more likely to have high levels of the biomarker than people who had not had a concussion. High levels of the biomarker were also associated with more severe symptoms such as post-traumatic stress disorder and depression years after the concussions occurred.

“While most people with mild concussions recover completely, some never get their lives back fully because of chronic disability,” said study author Kimbra L. Kenney, M.D., of the National Intrepid Center of Excellence, Walter Reed National Military Medical Center, Bethesda, Md., and a Fellow of the American Academy of Neurology. “These people may benefit greatly from a test that could predict those disabilities years ahead of time. Our study found there’s great potential for this protein to predict the problems people with concussions may experience years after their injuries.”

The study involved 195 military veterans with an average age of 38; 85 percent were male. Participants were divided into three groups: 45 people with no history of concussions, 94 people with one or two concussions, and 56 people with three or more concussions. It had been at least seven years since the last concussion for the participants. They were also tested to confirm whether they had symptoms of post-traumatic stress disorder, depression or post-concussive syndrome, which

refers to lingering symptoms like mood changes, memory problems and headaches after a concussion.

Blood samples were taken to determine levels of the protein in participants. Then they measured levels of protein in the blood overall as well as in the exosomes found in the blood. Exosomes are like tiny bubbles that carry protein and other information between cells. The average blood levels of neurofilament light were 33% higher in those with three or more concussions than those who had never had a concussion. Exosomal levels were similarly 34% higher in those with multiple concussions. Two other proteins associated with inflammation were also increased in those with multiple concussions.

“The main finding in the study is that people with multiple concussions have more of these proteins in their blood, even years after the last injury,” said Kenney. “Additionally, these proteins may help predict who will experience more severe symptoms such as PTSD and depression. That’s exciting because we may be able to intervene earlier to help lessen the overall effects of concussions over time.”

Kenney said a limitation of the study was the relatively small number of people involved and the need to verify these results in a much larger, separate group of people.

The study was supported by the Department of Defense, Department of Veterans Affairs and National Institutes of Health. ●

Court Rules for NCAA and American University in Concussion Case Involving Field Hockey Player

A federal judge from the District of Columbia has granted the summary judgment motions of the NCAA and American University (AU) in a case in which one of the school's student athletes claimed the two aforementioned defendants, and other defendants, were negligent in their handling of a field hockey-related concussion she suffered in September 2011.

In the same opinion, the court denied the U.S. Federal Government's motion for summary judgment.

By way of background, plaintiff Jennifer Bradley claimed she "was hit in the head during a field hockey game between AU and Richmond University." Subsequent to that hit, she allegedly began experiencing symptoms of a concussion arising from previous head injuries. Yet, she continued participating in field hockey practices and games based on the alleged advice of the team physician, until she suffered the aforementioned blow that ended her career.

She subsequently sued the NCAA, the Patriot League, the Government, AU, and others in Superior Court of the District of Columbia. The litigation was consolidated into federal court in the District of Columbia.

In the ruling, the district court found the plaintiff failed to show that the NCAA was the proximate cause of her injury, thus dismissing the negligence claim. Specifically, it wrote that "there is nothing of a factual nature in the record to support the plaintiff's conclusory allegation that the NCAA did anything that was the proximate cause of her injuries."

As for AU, the court wrote that the plaintiff's negligence and medical malpractice claims can't go forward against the university because she signed a waiver, acknowledging the risk.

Elaborating, it agreed with the university that "because the Acknowledgement of Risk form signed by the plaintiff applies to

injuries arising from inherent risks of the sport, such as concussions, as well as the subsequent treatment of such injuries, the university (is) entitled to summary judgment as a matter of law," Univ. Defs.' Mem. at 20, and "concludes that the District of Columbia would apply its normal rule enforcing waivers that are clear and unambiguous," Jaffe I, 276 F. Supp. 2d at 110. Because the waiver signed by the plaintiff "meets these criteria, the plaintiff's claims of negligence and medical malpractice claims against the University defendants are therefore barred."

Lastly, it turned to the Government's motion for summary judgment, rebutting the claims of negligent infliction of emotional distress and medical malpractice.

The Government argued that because the team physician "was the borrowed servant" of a private practice, vicarious liability arising from his alleged negligent diagnosis "falls squarely" on him and his practice. The court disagreed, noting that it previously addressed the argument earlier in the litigation. It reasoned that because "whether one party is the 'sole master to whom liability can attach . . . is usually a question of fact, generally to be decided by the jury,' *Chang v. United States*, Civ. Action Nos. 02-2010 (EGS), 02-2283 (EGS), 2007 U.S. Dist.

LEXIS 49405, 2007 WL 2007335, at *12 (D.D.C. July 10, 2007) (quoting *Dellums v. Powell*, 566 F.2d 216, 220, 184 U.S. App. D.C. 324 (D.C. Cir. 1977)), the court must deny the Government's motion for summary judgment." ●

Bradley v. National Collegiate Athletic Association et al.; D.D.C.; Civil Action No. 16-346 (RBW); 5/29/20

Attorneys of Record: (for plaintiff) Matthew Andrew Naci, PAULSON & NACE, PLLC. (for defendant NCAA) J. Christian Word, LATHAM & WATKINS LLP, Kevin Andrew Chambers, LATHAM & WATKINS LLP & Sarah M. Gragert, LATHAM & WATKINS LLP; (for defendant PATRIOT LEAGUE) Daniel C. Costello, WHARTON, LEVIN, EHRMANTRAUT & KLEIN, P.A. & Michelle R. Mitchell, WHARTON, LEVIN, EHRMANTRAUT & KLEIN, P.A. (for defendant AMERICAN UNIVERSITY) Christine Frazier Hein & John J. Murphy, III, WALKER, MURPHY & NELSON, LLP. (for defendant MARYLAND SPORTS MEDICINE CENTER) H. Kenneth Armstrong, ARMSTRONG, DONOHUE, CEPPOS, VAUGHAN & RHOADES, CHARTERED & Mary Kathleen Fallon, ARMSTRONG, DONOHUE, CEPPOS, VAUGHAN & RHOADES, CHARTERED (for defendant UNITED STATES OF AMERICA) Derrick Wayne Grace, U.S. ATTORNEY'S OFFICE FOR THE DISTRICT OF COLUMBIA.

Concussion Evaluation Rule Approved in Softball

The NCAA Playing Rules Oversight Panel approved a new rule in softball allowing any player who is removed for a concussion evaluation to return to the game if cleared by medical personnel. This rule is effective for the 2020-21 academic year.

The NCAA Softball Rules Committee supported the proposal, which came from the Committee on Competitive Safeguards and Medical Aspects of Sports.

Under the rule, the player undergoing concussion evaluation, whether a starter or a substitute, could be replaced by any eligible

player who has not participated in the game.

If the injured player is cleared to resume participation, she may reenter in her original lineup position. The temporary replacement player may again participate in the game, but only in the same lineup spot, provided she is not otherwise ineligible (withdrawn substitute or a reentered starter). Should a team have no remaining eligible players, a starter or substitute who has previously participated in the game may replace the player removed for a concussion evaluation.

Does Football Early in Life Affect Concussion Recovery Later?

A new study of NCAA football players has found that the age they first started playing tackle football may not affect their recovery after a concussion. The study is published in the online issue of *Neurology*[®], the medical journal of the American Academy of Neurology.

Evidence from previous research on the effect of early exposure to tackle football and long-term brain health has been mixed, with some studies showing worse performance on neuropsychological tests or changes in the brain, while other studies show no effect of playing football at a younger age.

“Because football is a very physical game, and concussions can occur, it has been hypothesized that playing at an early age may interfere with neurodevelopmental growth and increase a person’s vulnerability to neurological problems later in life,” said study author Thomas A. Buckley, Ed.D. A.T.C., of the University of Delaware in Newark, Del., and a member of the American Academy of Neurology. “Our study in NCAA football players, some who started playing tackle football as early as age 5, found no

link between playing football earlier in life and worse recovery from concussion.”

The study involved 621 NCAA football players from 30 schools as part of the NCAA-Department of Defense Concussion Assessment, Research and Education (CARE) Consortium. Athletes reported that they started playing tackle football at an average age of 10.

All athletes in the study experienced a recent concussion and all had baseline testing prior to their concussion and evaluations within six hours of the concussion. Of the group, 294 were evaluated for symptom severity one to two days after concussion, and 327 were evaluated once their symptoms resolved.

Approximately 46 percent of the athletes had experienced prior concussions.

Testing included common assessments for concussion severity and recovery including measures of memory, reaction time and speed of eye movements, a balance test, and a survey where athletes rank the severity of their symptoms.

Researchers found no evidence that

athletes who started playing tackle football at an earlier age had longer recovery times, worse performance on thinking and memory tests, worse balance, or greater psychological problems.

“It’s encouraging that our study found no link between earlier exposure to playing tackle football in childhood and adolescence and worse outcomes after concussion while still in college,” said Buckley. “Our results may be reassuring for players and parents, but it is important to note that we were looking at one concussion at one point in time and current testing may not be sensitive enough to detect subtle changes. Larger studies are needed to evaluate recovery from multiple concussions when people get older.”

Limitations of the study include that the athletes relied on memory to report at what age they first started playing football. It was also assumed that they played football every year thereafter, which may not have been true for all athletes. Participation in sports other than football was also not accounted for. ●

Safe Tackling, Padded Helmets Lower Youth Head Injuries

Middle school football players greatly reduce the chance of head injuries if they wear padded helmets and use safe tackling and blocking techniques, according to Rutgers researchers.

The study was published in the journal *Neurosurgery*.

With youth players representing 70 percent of all amateur and professional football participants, attention is turning to the safety of the sport for younger players. Concussions and other head injuries in football and other contact sports among older athletes have been linked to cognitive problems, including dementia, depression and chronic traumatic encephalopathy, a degenerative brain disease.

“Parents are understandably concerned

that their young football players are putting themselves at risk for the same long-term brain or nervous system injuries that are reported in older players,” said Robert Heary, director of the Center for Spine Surgery and Mobility at Rutgers New Jersey Medical School. “Although concussions causing readily observable signs and symptoms are of great concern to physicians examining football players during and after games, the effects of other head trauma with fewer symptoms also can result in long-term damage.”

The researchers monitored 20 members of a youth football team in New Jersey who wore helmets equipped with a system that tracked the number and severity of impacts that each player sustained during

their 20-practice, seven-game season. A tackling coach taught players and coaches safe methods for blocking, defeating blocks and tackling that reduced head contact for both offensive and defensive players. During practices, the players wore Guardian Caps, which are helmets fitted with a padded cover that lessen the number of high-energy head impacts.

There were 817 recorded impacts during the season — an average of 41 impacts per player and about 20 minutes of full contact per practice — but no concussions.

“The use of Guardian Caps, safe tackling techniques and the age of participants may have contributed to the very low number of impacts recorded and the complete lack of injuries,” said Heary. ●

Concussion Webinar on December 1 Examines a ‘New Understanding’ about CTE

The litigation may have slowed when it comes to concussions. But certainly not the debate about chronic traumatic encephalopathy (CTE).

Just a couple years ago, those who questioned the threat of CTE in contact sports were considered to be in denial. That has changed, however, thanks to a better understanding in the medical community and the courts, who have reconsidered the prevalence of CTE as well as the assumption that it is a progressive, degenerative disease.

That debate over CTE will take center stage at 1 p.m. EST on December 1 when experts gather for a 1-hour webinar sponsored by Wilson Elser and *Concussion Defense Reporter*.

Presenters in the webinar include:

- Tannahill Glen, PsyD, ABPP (<https://www.tannahillglen.com/>)
- Rudy Castellani, MD (<https://medicine.hsc.wvu.edu/neuroscience/faculty-labs/rudolph-j-castellani-md/>)
- Anthony Corleto, Partner, Wil-

son Elser

- Anthony Strasius, Partner, Wilson Elser

Wilson Elser has been at the forefront of sports concussion law, representing clients nationwide, who are under assault by plaintiffs’ attorneys who are relying on the science around CTE in an effort to prove their claims.

For more information, visit [here](#). ●



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CTE & Sports – A New Understanding WEBINAR

December 1, 2020 – 1:00 p.m. - 2:00 p.m.

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Court Dismisses Negligence Claim Against 2 Coaches in Concussion Case, Other Defendants Remain

A Utah state court has dismissed two coaches from a concussion lawsuit brought by a former high school football player. The remaining defendants in the litigation are the Cache County School District and the Utah High School Activities Association (UHSAA).

In so ruling, the 1st District Court dismissed the claim against the two former Ridgeline High School football coaches, Christopher and Stuart Howell, “because Plaintiff has failed to state a claim against them for which relief can be granted.” The court found the coaches are exempt under Utah’s Governmental Immunity Act from personal liability “except under very rare situations,” which did not apply in this case.

Konnor Finn, a former player at Ridgeline High School, claimed in the lawsuit that the concussion leading to the lawsuit occurred during a practice on Oct. 11, 2017. A senior, Finn collided with another player, suffering a helmet-to-helmet hit. He reported to his coach that his head hurt, and that he thought he had symptoms of a concussion.

“Following the hit, Konnor reported to his position coach, defensive line coach Stuart ‘Senior’ Howell, that his head hurt and that he thought he had a concussion and that he had concussion symptoms from the hit,” according to the complaint. “Coach Stuart Howell told Konnor to ‘man up,’ to ‘quit being a pussy,’ and ‘get back out there’ and keep playing.”

Finn said he “felt that he could not go against his coach’s instructions.” Thus, he kept playing in games and practices for two weeks, taking more hits.

He continued playing even though another coach saw him in the training room after the initial hit and noticed that he didn’t look well, and asked if he was okay. When the plaintiff told him what happened, the coach allegedly replied that the defensive

coach had been “wrong to make Konnor continue to play.”

“As a result of the hit and especially from further impacts following the hit, Konnor has experienced pain and/or seizures so severe as to render him unconscious and necessitate several emergency calls resulting in ambulance transport to hospitals and hospital stays,” the complaint reads. He ultimately was admitted to Primary Children’s Hospital on Oct. 31, 2017.

Attorneys for Finn claimed he has continued to experience symptoms including “periods of blackout and memory loss, personality changes, depression and hospitalization,” and “will require continued medical care, pain management, and will suffer loss of a normal life due to the concussion injuries he sustained that were worsened by his coach sending him back.”

He missed “several months of school,” and the symptoms have not abated, according to the complaint. He has allegedly “experienced pain, confusion, blackouts, other concussion symptoms and need for significant medical treatment and pain management since the concussion occurred on or about Oct. 11, 2017.”

The complaint further notes that all high school coaches in Utah have been trained to recognize concussion symptoms, and are required to follow concussion protocol, which includes a student-athlete being cleared by medical personnel before returning to practices or competitions.

The lawsuit alleged the coaches breached their duties in several ways, including not following concussion protocols and “failing to act responsibly and failing to exercise ordinary care.”

They were shielded, however, by the aforementioned Act.

The Plaintiff’s Claims Against the School District

As for the defendant school district, the

plaintiff alleged that it was both negligent and negligent in its hiring, retention and its supervision of the coaches

Through “its agents, (it) had a duty to remove Konnor from practice immediately upon Konnor’s presentation of signs and symptoms of a concussion and assure he received the appropriate evaluation and that he not return to practice or play until cleared by a qualified health care provider.

“Defendant District, should have provided concussion management training and its agents, based on this training, knew or should have known the protocol to follow when an athlete presents with signs and symptoms of a concussion, including, without limitation, helmet to helmet hits, headaches and the athlete’s own suggestion of possible signs and symptoms of a concussion.”

In addition, he claimed the district “had a duty to properly train and supervise its agents and staff at Ridgeline (whether employed, contracted or volunteer) in the proper identification and treatment of concussion or suspected concussion.

“Defendant District, had a duty to ensure that all its agents and coaching staff received concussion management training and followed required protocol, particularly, including the removal from participation of a participant who experiences and/or reports concussion symptoms as Konnor did, rather than ordering Konnor to go back into practice and continue playing.

“Defendant District, had a duty to ensure that all its agents and coaching staff received concussion management training and followed required protocol, particularly, notifying the parents or guardians of a participant who experiences and/or reports concussion symptoms as Konnor did, rather than ordering Konnor to go back into practice and continue playing

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and failing to notify Konnor's parents of his injury and symptoms; especially when they knew or should have known that coaches, including Stuart Howell would instruct players to continue playing with complaints of head pain and concussion concerns."

The Plaintiff's Claims Against the UHSAA

The plaintiff also maintained that the district and UHSAA "are responsible for training the Districts' and/or UHSAA's agents involved in football at Ridgeline and such agents were under the supervision, control and authority of Defendant District and/or Defendant UHSAA regarding such training.

"Defendant District and Defendant UHSAA had a duty of reasonable care for training the Districts' and/or UHSAA's agents involved in football at Ridgeline such that their agents and employees would receive proper and adequate train-

ing to follow the laws of the State of Utah and UHSAA rules and guidelines including laws, rules and guidelines enacted to ensure the safety of student athletes, including, without limitation adherence to the concussion protocols outlined herein and/or to adequately observe and listen to student athletes participating in football to determine if they should be referred to a trainer and/or proper health care providers for concussion evaluation and treatment.

"At all times material, Defendant District and Defendant UHSAA either directly or through their agents, negligently trained or failed to adequately train the coaches and/or other personnel involved in football at Ridgeline when Defendant District and Defendant UHSAA knew or should have known that a failure to appropriately train such agents and coaches to observe and listen to student athletes, evaluate, assess and intervene in the event of a traumatic brain injury could result in injury or even death.

"Despite this knowledge, Defendant District and Defendant UHSAA failed to train or failed to exercise reasonable care in training the coaches and/or other personnel involved in football at Ridgeline and involved in communicating with and evaluating Konnor on the day of the Hit and after the Hit until he was properly evaluated and diagnosed with a concussion. Defendants' breaches of their duties were the legal and direct and proximate cause of Mr. Finn's injuries, suffering and damages and general and special damages he incurred and continues to suffer and incur as described herein and resulting second impact syndrome, pain and suffering, physical inconvenience and discomfort, loss of time, mental anguish, expenses incurred due to the medical treatment, loss of enjoyment of life. His losses are permanent and continuing and he will suffer losses in the future." ●

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Spousal Opt-Out Rights: No Tag-a-Long

Martin v. Kan. City Chiefs Football Club, LLC (In re Nat'l Football League Players' Concussion Injury Litig.), 2019 U.S. Dist. LEXIS 652, 2*, No. 2:12-md-02323-AB (E.D. Pa. Jan. 3, 2019)

From 1988 to 1993, Christopher Martin played for the Kansas City Chiefs. He was married to Anita Martin from 1986 to 2006. In January 2014, Anita sued the Chiefs in Missouri state court for loss of consortium, claiming that their issues arose from post-concussion syndrome CTE and other issues related to multiple concussions Christopher suffered as a linebacker.

The Chiefs timely removed Martin's

lawsuit to the Western District of Missouri, and it was then consolidated with an action brought by other retired Chiefs, including Christopher. The consolidated case was transferred to the Eastern District of Pennsylvania and became part of the NFL Concussion MDL. The Chiefs moved to dismiss Anita's Complaint because she is a member of the concussion class settlement and did not opt out. Anita argued that she "informally opted out". Alternatively, she now moves to opt out.

The Court noted that although Christopher timely opted out of the Settlement, Anita did not, and she made no effort to opt out until the Chiefs moved to dismiss. Further, In 2017, three years after the opt-out period ended, Anita's attorney partici-

pated in an opt-out organizational meeting, Martin responded to the Court's Order for opt-outs to file a short form complaint, along with a motion to join the remand filed by her ex-husband and other plaintiffs.

The Court dismissed Anita's suit, finding that she was a class member who did not effectively opt out of the Settlement. Her participation in the opt-out meeting 3 years after the opt-out period was not a "reasonable indication of a party's intent to opt out". *In re Linerboard Antitrust Litig.*, 223 F.R.D. 357, 365 (E.D. Pa. 2004) (quoting *In re Four Seasons Secs. Laws Litig.*, 493 F.2d 1288, 1291 (10th Cir. 1974)). "In order for a party to give a 'reasonable indication' of its intent to opt out, the party must perform

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some action that is unambiguously inconsistent with an intention to participate in the settlement.” *In re Processed Egg Prods. Antitrust Litig.*, 130 F. Supp. 3d 945, 952 (E.D. Pa. 2015). This action must take place during the opt-out period. *See In re Deepwater Horizon*, 819 F.3d 190, 196 (5th Cir. 2016) (refusing to consider post-opt-out period conduct in determining whether a class member had informally opted out).

Significantly, the Court observed that, although Anita’s case was consolidated with Christopher’s and he timely opted-out, the right to opt out must be exercised individually. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1024 (9th Cir. 1998). *See also William Rubenstein et al., Newberg on Class Actions* §9:49 (5th ed. 2013) (“The right to opt out in a Rule 23(b)(3) class action is considered an individual right.”); *Sloan v. Winn Dixie Raleigh, Inc.*, 25 F. App’x 197, 198 (4th Cir. 2002) (finding that a class representative could not opt out on behalf of individual class members). As such, Martin’s failure to opt-out of the Settlement was not cured by her ex-husband’s actions. The Court also found that Anita’s failure to opt-out was not due to excusable neglect.

Survivor’s Opt Out Rights: Derivative and Dependent

A.H. v. NFL (In re NFL Players’ Concussion Injury Litig.) 2019 U.S. Dist. LEXIS 24088. *2, No. 2:12-md-02323-AB (E.D. Pa. Feb 14, 2019)

A brief recap about Aaron Hernandez. After three seasons with the New England Patriots, Hernandez was released from his contract in 2013, following a grand jury indictment. In 2015 he was convicted of first-degree murder and sentenced to life in prison. In 2017, Hernandez committed suicide in prison, shortly after he was acquitted in a separate double homicide case. Later that year, the Boston University CTE lab performed a brain autopsy and diagnosed

Hernandez with CTE.

Subsequently his minor daughter sued the NFL for loss of consortium, in Massachusetts state court. NFL timely removed the case to the U.S. District Court. The case was transferred to the Eastern District of Pennsylvania, within the NFL Concussion MDL. In July, 2018, the daughter moved to remand back to Massachusetts state court. NFL responded with a motion to dismiss A.H.’s consortium claim because she is a member of the concussion class settlement and did not opt out. A.H. argued that the Court cannot decide claim preclusion (class inclusion) before addressing her motion to remand, because to do so would require a finding of fact: whether Aaron was “retired” as defined by the settlement class. In other words, when you challenge a court’s jurisdiction (the motion to remand) its power is limited.

Observing that dismissal on preclusion grounds is “not technically a judgment on the merits.” *Hoffman v. Nordic Nats., Inc.*, 837 F.3d 272, 277 (3d Cir. 2016) (citing *Comm’r of Internal Revenue v. Sunnen*, 333 U.S. 591, 597, 68 S. Ct. 715, 92 L. Ed. 898 (1948)), the court determined that it could decide the issue, regardless of the jurisdictional challenge (remand motion).

A plaintiff’s claim is said to be precluded when there has been: “(1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same cause of action.” *Duanev v. AG of the United States*, 621 F.3d 340, 347 (3d Cir. 2010) (internal quotation marks omitted). “It is now settled that a judgment pursuant to a class settlement can bar later claims based on the allegations underlying the claims in the settled class action. This is true even though the precluded claim was not presented, and could not have been presented, in the class action itself.” *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 366 (3d

Cir. 2001).

As a judicially approved settlement agreement, the NFL Concussion Settlement was a final judgment on the merits. *See Rein v. Providian Fin. Corp.*, 270 F.3d 895, 903 (9th Cir. 2001) Further, the NFL is a named party in the settlement.

Noting that “the crux of the issue is whether Hernandez was ‘seeking active employment’ as an NFL football player as of July 7, 2014”, the Court found that Hernandez was retired within the meaning of the settlement: Hernandez had been imprisoned—without bail—for nearly a year.

The Court found that A.H. was bound by the Settlement, as a Derivative Claimant and a Class Member regardless whether she was a named member of the class. *See Smith v. Bayer Corp.*, 564 U.S. 299, 314, 131 S. Ct. 2368, 180 L. Ed. 2d 341 (2011) (noting that “unnamed members of a class action [may] be bound, even though they are not parties to the suit”). A.H.’s action was similar to the actions brought against the NFL by class members. Distribution of the Class Notice was “reasonably calculated to apprise interested parties” and give them an opportunity to object, as such A.H. is a Class member that did not opt-out of the Settlement.

Accordingly, the Court dismissed A.H.’s claims, as derivative claimant, within the settlement class Member, and thus preclude.

NCAA Cases

The original NCAA Student Athlete Concussion Injury class action (“Arrington v NCAA”) was filed in the Northern District of Illinois September 12, 2011. The lead plaintiff, Adrian Arrington, attended Eastern Illinois University and competed on the football team. Without citing a particular injury, he claims to suffer a host of cognitive and emotional issues and seeks certification of a medical monitoring class. On December

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18, 2013, the United States Judicial Panel on Multi District Litigation consolidated Arrington with several similar actions against the NCAA, under MDL No. 2492.

The court subsequently certified three claimant classes for settlement of medical monitoring claims. The certification order enjoined further litigation by class members, “except for personal injury or bodily injury class claims on behalf of persons who allege injury resulting from their participation in a single NCAA-sanctioned sport at a single-NCAA member school.” This order set up a series of “single-sport single-school” (“SS”) sub class actions. These actions were consolidated. In re NCAA Student-Athlete Concussion Injury Litigation—Single Sport/Single School (Football), Master Docket Case No. 16-cv-08727.

In late 2016, the court stayed proceedings in the SS cases pending the outcome of class certification motions in four sample cases. The sample cases established in Case Management Order No. 8 are: Richardson v. Southeastern Conference, NCAA, 16-cv-9980; Rose v. Big Ten Conference, NCAA, 17-cv-1402; Weston v. Big Sky Conference, NCAA, 17-cv-4975; and Langston v. Mid-America Int. Athl. Assoc., NCAA, 17-cv-4978.

Preliminary decisions from the sample cases have been issued.

Jurisdictional Issues

The SS cases invariably name the NCAA and in some instances the conference along with the institution, and are brought in NCAA’s home court, the Southern District of Indiana. Each case is then transferred to the Northern District of Illinois, for handling within the consolidated MDL docket. Conferences and schools located outside Illinois and Indiana are generally interested in moving to dismiss for lack of jurisdiction, forcing plaintiff to either drop the claim against the institution or sue in

the school’s home state.

In March 2020, the Court granted Southeastern Conference’s motion to dismiss, finding that there was no personal jurisdiction in Illinois over the Alabama based organization. Richardson v. SEC, 16-cv- 9980.

Timeliness

Plaintiffs in the SS cases are generally living adults who played decades ago, outside the applicable statute of limitation or repose. Defendants are therefore interested in challenging timeliness based on allegations of symptom onset, awareness and diagnosis, in light of the applicable statute in their jurisdiction. This can be done on an early motion to dismiss or on summary judgment after discovery.

In March 2020, the Court denied two motions to dismiss for failing to satisfy statutes of limitations and repose, under Florida (Richardson, 3/30/20) and Kansas (Langston, 3/25/20) law. An earlier decision ruled similarly under Illinois law (Rose, 9/28/18). In each decision, the Court articulated that plaintiff need not plead or prove timeliness at this stage, suggesting that the court prefers to address timeliness at the summary judgment stage, after discovery is completed.

Waiver and Duty

In May 2020, in an unconsolidated case, Bradley v NCAA, 16-cv-346, the United States District Court for the District of Columbia issued an order resolving several motions for summary judgment. Bradley played Field Hockey at American University from 2009-12. After taking a head strike, which she passed off as “not more extreme” than other routine hits”, she exhibited signs and symptoms of concussion, claiming post-concussion syndrome including cognitive and emotional issues.. The federal government was sued as the employer of one of the school physicians, Aaron Williams. During

Bradley’s time at AU, Dr. Williams served as director of the U.S. Peace Corps, in the Obama administration. The court (i) denied the government’s motion for judgment on the “borrowed servant” rule, on the issue of plaintiff’s contributory negligence and on the negligent infliction of emotional distress claim; (ii) granted the University Defendants’ motion for judgment on the participant waiver, finding that the contract was not an unenforceable contract of adhesion, that there was nothing procedurally unconscionable in its procurement or substantively unconscionable in its terms; and (iii) granted NCAA’s motion for judgment on the negligence claim, finding that NCAA owed no duty and did not proximately cause plaintiff’s injuries.

Helmet Cases

Prior Disability Claim Distinct from Latent Injury Claim

Recognizing a distinction between accrual for acute injuries and latent injuries, the Illinois courts found that a former NFL player’s suit against a helmet manufacturer timely, even though it was filed years after his disability claim. Following precedent in Connecticut and Ohio, the court determined that the player’s disability claim for a severe concussion in 2013 was unique from his long-term injuries that arose as a result of “several ostensibly innocuous circumstances.” The court stated, “The knowledge of having suffered one severe concussion does not mean that the person has knowledge of all brain related injuries, including those that generally require multiple traumas to actualize.” Nakamura v. BRG Sports, LLC, 144 N.E.3d 610, 2019 Ill App. LEXIS 844 (2019).

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Accrual for Neurodegenerative Disease Claims

Giving deference to the “harsh consequence” of requiring plaintiffs to sue before the extent of their injuries is known, the Illinois appellate court considered Plaintiffs’ argument that their claims for neurodegenerative disorders did not accrue until receipt of a formal diagnosis. However, the court affirmed dismissal because plaintiffs could have brought their claims against the helmet manufacturer when they joined in the NFL class action, more than two years prior, where the exact same claims were asserted for present and future head injuries. *Butler v. BRG Sports, LLC*, 141 N.E.3d 1104, 2019 Ill App. LEXIS 841 (2019).

Accrual by Actual Knowledge of Negligence

Trying to avoid dismissal for failure to timely file, plaintiff claimed that his school medical records were wrongfully withheld for “years” after his graduation. However, the court determined that Plaintiff’s actual knowledge of the school’s tortious conduct in encouraging him to play despite his concussions and without a doctor’s release was sufficient: withholding of the records did not conceal the accrual of a claim.. *Boland v. Parkrose Sch. Dist.*, 2019 U.S. Dist. LEXIS 224149, Case No. 3: 19-cv-01049-SB (U.S. Dist. Ct. Dist. Ore.) (2019)

Criminal Defense

After a trial and conviction for first degree murder, defendant sought continuance of his sentencing so he could retaining new

counsel to assert, for the first time, a CTE defense. The court denied the request, noting that defendant already had extensive psychiatric evaluation and the only proof of CTE was the opinion of his new attorney. Reviewing the petition for writ of habeas corpus, the United States Magistrate Judge agreed that the mere claim petitioner suffered concussions playing football, without more, was insufficient to grant the continuance. *Humphries v. Sherman*, 2019 U.S. Dist. LEXIS 88116, Case No. CV 18-5748-JFW (U.S. Dist. Ct. Cent. Div. Cal.) (2019) ●

Andrea Strain, Associate, *Wilson Elser, Stamford CT* and **H. Matson Coxe**, Associate, *Wilson Elser, McLean VA* assisted with the preparation of this article.

Inappropriate Diagnoses – Study Points to the Fallacies of Diagnosing CTE

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A postmortem exam of the brain remains the gold standard for diagnosing chronic traumatic encephalopathy, or CTE, the neurodegenerative brain disease believed to arise from repeated hits to the head.

Yet a small but by no means trivial number of former professional football players say they have received a diagnosis of CTE, according to a new study from Harvard Medical School and the Harvard T.H. Chan School of Public Health published April 13 in *Annals of Neurology*. (<https://doi.org/10.1002/ana.25747>)

The research—based on a survey of nearly 4,000 former NFL players, ages 24 to 89—was conducted as part of the ongoing Football Players Health Study at Harvard University, a research initiative that encompasses a constellation of studies designed to evaluate various aspects of players’ health across the lifespan.

Even though the results are based on player self-reports rather than on documented clinical diagnoses, the researchers say their findings are alarming for a number of reasons.

First, CTE is a post-mortem diagnosis and cannot be diagnosed definitively in living individuals. Second, an erroneous, or clinically unverifiable, diagnosis of CTE could obscure the role of other treatable conditions common among former football players that could cause a cluster of cognitive and behavioral symptoms mimicking CTE. Third, delivering a verdict of an untreatable disease could render patients hopeless, discouraging them from pursuing healthy behaviors and focusing on modifiable risk factors and conditions that may give rise to symptoms attributed to CTE.

Researchers emphasize that any cognitive and behavioral symptoms should be

investigated thoroughly, and CTE concerns should never be dismissed.

“Former football players are rightfully worried about brain health and CTE concerns should not be overlooked, yet in the absence of validated clinical criteria and diagnostic methods for CTE, the fact that former players report being told they have the disease is highly concerning,” said study lead author Rachel Grashow, a researcher at the Harvard T.H. Chan School of Public Health. “A diagnosis of CTE could downplay the effects of other conditions and discourage the pursuit of alternative explanations, while creating a sense of despair among those who believe they might have an untreatable brain condition.”

Nearly 3 percent of the players in the current study (108 out of 3,913) reported they had received a diagnosis of CTE from

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Inappropriate Diagnoses – Study Points to the Fallacies of Diagnosing CTE

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a physician or another clinician. Those older than 60 were more likely to report a CTE diagnosis than younger players (3.7 percent, compared with 2.3 percent).

Symptoms of cognitive impairment—difficulty concentrating, forgetfulness, mood changes—were notably more common among former players who reported CTE diagnoses, regardless of age. Those who reported a CTE diagnosis were also more likely to report sleep apnea, heart disease, hypertension, stroke, depression, high cholesterol, obesity, use of prescription pain medication and low testosterone.

All of these are relatively common in former football players and can cause certain cognitive symptoms, which could be fueling clinical suspicion for CTE among some physicians, the researchers said. Given that safe and effective interventions exist for many of these conditions, it is critical that these patients are evaluated and treated before cognitive problems are prematurely or wrongly attributed to CTE.

Former players who self-identified as Black had higher percentages of CTE diagnoses, the study found. Researchers said the higher prevalence of conditions such as high blood pressure, diabetes and cardiovascular disease among Black men may explain the higher rate of CTE diagnoses in this group.

The current study was not designed to determine why or how the CTE diagnoses were made. The researchers, however, say a number of factors could be at play.

For example, some clinicians may suspect the presence of CTE because past studies have identified a link between neuropsychiatric symptoms in the decade preceding an athlete's death and subsequent postmortem CTE diagnosis. Also, clinicians may be seeing certain behavioral and cognitive changes as markers of brain degeneration, propelling them to consider a CTE diagnosis, while downplaying or not fully exploring alternative explanations for the symptoms, such

as sleep apnea, heart disease or depression. Clinicians may also be more likely to consider—and suggest—CTE to players who spent their careers in more high impact positions, the researchers said.

Lack of clarity about symptoms and possible causes might leave patients prone to over-interpretation and set the stage for misunderstanding, the researchers said.

“Given the high visibility and intense media coverage of CTE, former football players may be highly sensitive to any hints or suggestions of CTE and assume a connection between their symptoms and this rather high-profile, but not necessarily accurate or appropriate, diagnosis,” Grashow said. “Either way, it is incumbent upon the physicians who care for former athletes to ensure that such clarity is achieved.”

None of this is to say that some former players may not, in fact, have CTE. “CTE is real, and it probably plays a role in the cognitive or behavioral symptoms experienced by some former players, yet many of these symptoms could also arise from a number of other, more treatable, conditions,” said study senior author Ross Zafonte, head of the Department of Physical Medicine and Rehabilitation at Spaulding Rehabilitation Hospital and Harvard Medical School.

Zafonte cautioned that a grim diagnosis like CTE could magnify symptoms, a psychological phenomenon known as the nocebo effect. It could also discourage people from engaging in healthy behaviors and pursuing critical treatments for other conditions responsible for the symptoms, added Zafonte, who is also principal investigator of the Football Players Health Study.

First described in the 1920s as boxers' dementia or “punch-drunk syndrome,” CTE gained public attention over the last 20 years after a series of reports identified the hallmarks of the disease—abnormal protein clumps in certain parts of the brain—in postmortem exams of former football play-

ers, many of whom had shown cognitive, emotional and behavioral symptoms for more than a decade prior to their postmortem exams. CTE develops predominantly in people who sustain repeated blows to the head, including athletes in contact sports such as boxing, football, hockey and rugby, in military personnel who sustain head trauma and in victims of domestic violence.

The research was funded by the National Football League Players Association (NFLPA). Other investigators involved in the study include Marc Weisskopf, Aaron Bagish, Frank Speizer, Alicia Whittington, Lee Nadler, Ann Connor, Robyn Keske, Herman Taylor and Alvaro Pascual-Leone. ●

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About the Football Players Health Study at Harvard University: Launched in 2014, the Football Players Health Study at Harvard University is composed of select studies and research initiatives addressing the whole player over the course of his entire life. The study is funded pursuant to an agreement with the NFLPA, utilizing shared resources across supporting institutions at Harvard University. With more than 4,100 participants, it is the largest study of living former players. Several smaller studies supporting novel research and promising treatments are currently underway across the University. The research is independent and not directed by the NFL, NFLPA, or any other stakeholder. These organizations exercise no control over the findings or recommendations.