CONCUSSION DEFENSE REPORTER

Presented by GORDON & REES

How Would Dershowitz Litigate a Concussion Claim? *Martin v. Hermiston*

By Lorraine M. Girolamo, of Gordon Rees Scully Mansukhani, LLP

When we think of Section 1983 lawsuits, although they can certainly involve personal injuries, we typically envision cases involving excessive police force or matters involving a prison inmate's medical neglect, by way of example. Recently, an Oregon District Court analyzed a "garden variety" concussion suit, which we would typically see plead as a negligence case, brought as a civil rights violation.

In reality, a "Section 1983[1]" claim is nothing more than a procedural device, based on a federal statute, that gives federal courts jurisdiction to hear civil rights cases. Section 1983 provides an individual the right to sue state government employees and others acting "under color of state law" for civil rights violations. Section 1983 does not provide civil rights; rather, it is a means to enforce civil rights that already exist. Since a party cannot be liable under Section 1983 alone, a constitutional violation has to be simultaneously plead.

In *Martin v. Hermiston School District.* 8R, 2020 U.S. Dist. LEXIS 208287 (D. Or. Nov. 4, 2020), the plaintiffs brought an action under §1983 alleging that the defendants (a public school district, athletic director, football coaches and athletic trainer) violated the 14th Amendment rights of a high school sophomore when he suf-

See HOW WOULD on Page 7

1 42 U.S.C §1983.

Insightful Concussion Webinars Set

Two concussion webinars will be held in the coming weeks that will explore more deeply the issues around Chronic Traumatic Encephalopathy (CTE), from the defendant's perspective. Both webinars are sponsored by Concussion Defense Reporter.

Human Factors in Sports Concussion—July 28

Every sports concussion case, whether a "second hit" or a "CTE suicide", has one question in common: How did we get here? How claimants, coaches and others perceive, process and act is the subject of Human Factors. Join Gordon & Rees attorney Tony Corleto and Joe Sala, Ph.D. from Exponent for a discussion of how warning and safety information factor into behavior on and off the field.

Register here.

Forensic Psychology in Sports Concussion—August 12

CTE has been described as a progressive degenerative brain disease inextricably linked to football, hockey and other collision sports. The causal relationship between sports and CTE is widely debated in medical literature and in our courts. Join Gordon & Rees attorney Tony Corleto and Bill Barr, Ph.D. from NYU Langone for a discussion of the latest developments in diagnostic criteria and medico-legal implications.

Register here. ●

GORDON&REES SCULLY MANSUKHANI

YOUR 50 STATE PARTNER®

INSIDE THIS ISSUE

The Inaugural *Gordon & Rees Concussion Defense Reporter*

Thanks for exploring the Gordon & Rees *Concussion Defense Reporter*. In this issue, we have updates on Lystedt-based litigation, a constitutional approach to sport concussion claims, preemption as a defense, and updated research related to cognitive impairment and head impact rates.

We also invite you to attend two upcoming webinars, *Human Factors in Sports Concussion* on July 28, and *Forensic Psychology in Sports Concussion* on August 12. As always, we welcome your feedback and suggestions for future editions and events.

Concussion Defense Reporter is published by Hackney Publications. Direct inquiries to Hackney Publications at: 512-716-7977 or info@hackneypublications.com.

ANTHONY CORLETO
Editor in Chief

HOLT HACKNEY
Editor and Publisher

Hackney Publications

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

YOUR 50 STATE PARTNER®

Gordon & Rees is the advertiser and sponsor and the views expressed here are not the firm's views.

No Middle-Age Rise in Brain Issues for Men Who Played High School Football

Decades after their days on the gridiron, middle-aged men who played football in high school are not experiencing greater problems with concentration, memory, or depression compared to men who did not play football, reports a study in *Clinical Journal of Sport Medicine*.

"Men who played high-school football did not report worse brain health compared with those who played other contact sports, noncontact sports, or did not participate in sports during high school," according to the new research, led by Grant L. Iverson, PhD, of Harvard Medical School. The study offers reassurance that playing high-school football is not, in itself, a risk factor for cognitive or mood disorders or other problems that have been linked to a history of repeated concussions in professional football players.

The researchers analyzed responses to an online survey completed by 407 men aged 35 to 55 years. Of these, 123 reported playing football in high school. The study excluded men with recent concussions or those who played semi-professional football.

Rates of a wide range of brain health problems were assessed for the ex-football players, compared to men who played other contact sports, non-contact sports, or no sports. Men who played contact sports, especially football, had more concussions than the other two groups: more than 80 percent of men who played high-school football reported at least one concussion.

Overall, the former football players were no more likely to have problems with brain health in their mid-thirties to mid-fifties. High-school sports experience was unrelated to problems with depression, anxiety, or anger; concentration or memory problems; or headaches, migraines, neck or back pain, or chronic pain. For football and other contact sports, rates of brain health problems were unrelated to years playing sports.

There were a few significant differences between groups. Men who played high-school football were more likely to report sleep problems: 39 percent, compared to about 20 to 30 percent of the other groups. Ex-football players were also more likely to be prescribed medications for headaches or chronic pain.

The study identified several factors that predicted an increased rate of memory problems, including sleep difficulties, anxiety, history of concussions, and feeling depressed. Although some of these factors were more common among former football players, playing football itself was not a significant predictor.

Reports of long-term neurological abnormalities among former National Football League (NFL) players have raised concerns over the brain health of men who played football at the high-school level. Previous studies have found no increase in mental health, cognitive, or mood problems in former high-school football players. The new research – partly supported by the NFL – is the first to focus on middle-aged men.

Dr. Iverson and colleagues emphasize that, "without question," some men who played high-school football will develop problems with psychological health and cognitive function later in life. However, these risks "do not seem to be greater than the rates in men who did not play football."

The researchers note that there are strong associations between depression and anxiety, headaches and migraine, chronic pain, and memory problems, which commonly occur together and are "mutually amplifying." Dr. Iverson and colleagues conclude, "[E]vidence-based treatment and rehabilitation for these problems can substantially reduce symptoms and improve functioning and quality of life." ●

Preemption Saves NHL from Head Trauma Claims

Nadine Hughes, Associate, Gordon Rees Scully Mansukhani, LLP

What is federal preemption? In the legal world, federal preemption is a doctrine based on the Supremacy Clause of the U.S. Constitution that allows federal laws to supersede conflicting state laws. Courts determine whether a federal law preempts a conflicting state law by generally analyzing the express language in the federal and state law or by examining Congress's preemptive intent in the federal law's structure and purpose. For instance, the Voting Rights Act is an important federal civil rights law that preempts conflicting state statutory or state constitutional laws. As you will read below, bringing a preemptive argument can be a vital tool in winning a case for your client.

On March 29, 2021, the United States District Court for the Northern District Court of Illinois issued a decisive ruling in a case brought by two former professional ice hockey players against the National Hockey League ("NHL") and its Board of Governors. Plaintiffs Daniel Carcillo and Nicholas Boynton ("Plaintiffs") alleged that they each suffered serious head injuries during their careers, and that the NHL and its Board of Governors' ("Defendants") were liable for those injuries. The Court ultimately dismissed Plaintiffs' case after it held that a majority of their claims were preempted by federal law and the Plaintiffs failed to exhaust their contractual remedies in accordance with the collective-bargaining agreements ("CBAs"). The Court also declined to exercise supplemental jurisdiction over Plaintiffs' remaining claims.

Plaintiffs each played in hundreds of games for multiple NHL teams in different states during their respective careers. Mr. Carcillo played in 429 games while playing for the NHL from 2006 to 2015 and Mr. Boynton played in 605 games while playing for the NHL from 1999 to 2011. In their lawsuit Plaintiffs alleged that they each suffered head injuries and trauma that resulted from Defendants' promotion of fighting during gameplay. Plaintiffs also alleged that their injuries were a result of Defendants' misrepresentation, concealment, and failure to warn players of the risks of head trauma. Plaintiffs further alleged that Defendants knew that head injuries result from fights during gameplay, and that those injuries could result in serious and lasting injury.

Plaintiffs initially filed their lawsuit in June 2018 in the United States District Court for the District of Minnesota, but the case was eventually transferred to the Northern District of Illinois after the parties jointly moved to transfer venue. Plaintiffs brought three sets of state law claims: two claims alleging general negligence; two claims alleging failure to warn; and two claims alleging intentional concealment and misrepresentation of materials facts. Defendants asserted several affirmative defenses, including a fatal preemption defense. Defendants argued that Section 301 of the Labor Management Relations Act ("LMRA") preempted Plaintiffs' state law claims due to the CBAs governing their employment as NHL players.

The Court held that Section 301 of the "LMRA provides a federal rule for contract disputes between employers and labor organizations or between different labor organizations." The Court further held that Section 301 completely preempts claims that are founded "directly on rights created by collective-bargaining agreements" and are "substantially dependent on analysis of a collective-bargaining agreement." As you will see below, as a result of Section 301 completely preempting Plaintiffs' state-law claims, the Court dismissed the lawsuit due to an arbitration clause in the CBAs.

The first step in its preemption analysis required the Court to decide which state law(s) applied to Plaintiffs' claims. In order to determine whether the LMRA completely preempted Plaintiffs' claims, the Court had to decide whether the state law claims were "inextricably intertwined with consideration of the terms of the labor contract." The LMRA will not preempt a state law to the extent that law may have *some* connection to a CBA.

Here, Mr. Carcillo and Mr. Boynton played most of their games in Pennsylvania and Massachusetts, respectively. Because Plaintiffs alleged that they suffered their injuries during these games, the Court applied Pennsylvania and Massachusetts law.

Negligence Claims

Plaintiffs' first two claims alleged that their injuries stemmed from "the proximate result of the NHL's negligence." In order to prevail on these negligence claims, Plaintiffs had to prove that (1) Defendants owed Plaintiffs a duty of reasonable care; (2) Defendants breached this duty; and (3) the breach caused damage to Plaintiffs. Accordingly, the Court assessed each theory separately for the purposes of preemption.

Plaintiffs alleged that Defendants caused them unreasonable harm by "promoting" and "glorifying" fighting during gameplay. In previous cases brought by professional ice hockey players against the NHL, federal courts have concluded that a duty to refrain from unreasonable harm is considered common law and does not require the interpretation of a CBA. Therefore, the LMRA did not preempt Plaintiffs' claims that were based on Defendants' alleged breach of common law duties to refrain from reasonable harm.

However, the remainder of the negligence claims were based on Defendants' alleged breach of their supposed "self-

See PREEMPTION on Page 4

Preemption Saves NHL from Head Trauma Claims

Continued From Page 3

imposed and self-declared duties" to keep Plaintiffs safe, to advise them "of all risks," and "to not increase" the risk of "permanent brain damage and/or addiction." Both Massachusetts and Pennsylvania law provide that a defendant may be liable for harm caused by negligently performing duties they *voluntarily undertook* (e.g., self-imposed and self-declared duties). In order for the Court to determine the scope of Defendants' alleged "self-imposed and self-declared duties," the Court had to reference the CBA because it was not possible to define the scope of Defendants duty, or whether they even had a duty, without reference to the CBA. Therefore, the Court held that Plaintiffs' negligence claims that alleged Defendants breached certain duties they *voluntarily assumed* were completely preempted by the LMRA.

Failure to Warn

Plaintiffs' next two claims alleged that Defendants "knew or should have known" that playing with a brain injury would result in brain damage, and that Defendants negligently failed to warn Plaintiffs of this risk.

Under Massachusetts law, Mr. Carcillo had to refer to a special relationship, such as a fiduciary relationship, outside of the CBA in order to avoid preemption. Similarly, under Pennsylvania law, Mr. Boynton had to refer to a relationship, such as a landowner-invitee relationship, or a duty that runs from a manufacturer to a consumer, in order to avoid preemption. To the extent that the Defendants owed Plaintiffs a duty to warn, such a duty would arise only under the CBA. The Court held that because Plaintiffs failed to present any legal authority to impose a duty to warn existed outside of the CBA, their claims were completely preempted by the LMRA.

Misrepresentation

Plaintiffs' final two claims alleged that Defendants "misrepresented the risk of brain damage." The Court analyzed these claims under two theories: (1) Defendants' intentional misrepresentation by omission or negligent misrepresentation, and (2) Defendants' misrepresentation by making affirmative misrepresentations.

First, Plaintiffs alleged that Defendants knowingly concealed the risk of brain damage and the effects of fighting. Under both Massachusetts and Pennsylvania law, Plaintiffs had to prove that Defendants "possessed a duty to disclose" in order to succeed on claims for intentional misrepresentation by omission or negligent misrepresentation. As discussed earlier, this duty typically arises from a contractual, or fiduciary relationship. Plaintiffs failed to allege that a fiduciary relationship existed. Likewise, the Court was required to interpret the CBA in order to analyze whether Defendants had a duty to disclose this information. As a result, the LMRA completely preempted Plaintiffs' theories of intentional misrepresentation by omission or negligent misrepresentation.

Second, Plaintiffs' alleged that they relied upon Defendants' misrepresentations to their detriment. Specifically, Plaintiffs alleged that Defendants made affirmative representations that players would not suffer "any later-in-life risks" and were not subjecting themselves to conduct that could lead to brain damage. Based on precedent, this theory arises from a duty to refrain from making affirmative misrepresentations. Both Massachusetts and Pennsylvania law recognize this as a common law duty and the LMRA does not preempt a theory claiming the NHL harmed the players by communicating that head trauma is not dangerous. Thus, the Court held that the final two claims were not preempted by the LMRA to the extent Plaintiffs maintained a theory that Defendants injured them through making "active, intentional misrepresentations."

The Court's Ruling

In sum, Section 301 completely preempted Plaintiffs' claims for: negligence, "to the extent based upon allegations that Defendants breached certain duties they voluntarily undertook and that they failed to disclose certain information"; failure to warn, in their entirety; and misrepresentation, "to the extent based upon an intentional misrepresentation by omission or negligent misrepresentation theory." Because of this complete preemption, the Court considered the claims under Section 301 and, therefore, the Court found it had subject matter jurisdiction over the case.

However, an article from the CBA provided that all disputes "involving the interpretation or application of, or compliance with, any provision of" the CBA had to be resolved through a grievance procedure and arbitration. The Court held that where a labor contract requires mandatory arbitration, "a plaintiff seeking redress under that contract can only bring a so-called 'hybrid' Section 301 claim after the grievance process has failed." Plaintiffs failed to allege that they exhausted their contractual remedies, which required them to utilize the grievance and arbitration procedures provided by the CBA. Accordingly, the Court dismissed all of the Plaintiffs' federal claims without prejudice. After dismissing all federal claims, the Court declined to exercise supplemental jurisdiction over the non-preempted state law claims. The Court thereby granted Defendants' motion for judgment on the pleadings.

The case is *Carcillo et al. v. National Hockey League, et al.*, Case No. 19 CV 6156, U.S. The Court's decision may be found here. ●

Michigan's Appeals Court Tackles the Legislature's Intent on Concussion Protection

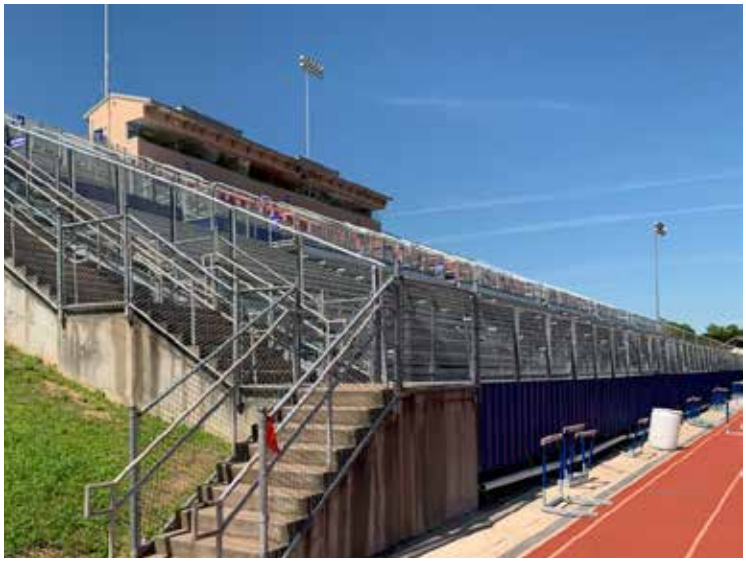
When it comes to concussion protection, state laws protecting the health and safety of student athletes are primary. The specific legal claims that can proceed before the Court can vary from state to state.

In Randall v Michigan High School Athletic Association, et. al. (2020 WL 6811661), the Michigan Court of Appeals reviewed, de novo, the specific question of whether the State Legislature intended to create a private cause of action arising from Michigan's concussion protection statute, 2012 PA 342. The Randall Court ruled that although no private cause of action was created by the statute, it did create duties or standards applicable to medical professionals and to coaches and other involved adults, for removal of youth athletes suspected of sustaining a concussion.

High school hockey team goalie, Samuel Randall, claimed that his coach, and trainer failed to remove him from a youth hockey game when he showed signs of concussion after two separate collisions during the game.

The first collision involved a hit to Randall's head by an opposing team member's elbow, which he claimed resulted in loss of consciousness and falling to the ice, where he remained for approximately four minutes. The length of time he remained on the ice was hotly contested. Athletic trainer, Anthony Polazzo completed a three-page assessment after the first collision., and cleared his return to play. Polazzo claims that he advised Plaintiff to signal to the referee or athletic trainer if his headache returned, if he felt dizzy, or if could not think straight. Plaintiff remained in net and the game continued.

Five to six minutes after the first hit, Randall took a second hit in the head, this time from a player's knee. Plaintiff claimed that before the hit, he signaled Polazzo that he wanted to come off the ice, and waited for Polazzo to stop play. When the opposing team scored a goal the second collision occurred. Contrary to Randall's testimony, Polazzo testified that Randall did not signal to come off the ice until after the second hit, not before. Polazzo also reported on the assessment form that he believed Randall suffered a concussion. Randall was eventually removed from the game after the second hit.



The lawsuit alleged that Polazzo, in his role as athletic trainer for both teams, was negligent in failing to properly treat and evaluate Randall for injuries including concussion symptoms and allowing him to return to the game after the initial collision. Plaintiff alleged both ordinary negligence and negligence per se under Michigan's concussion protection statute. Polazzo moved for summary judgment under Michigan's medical malpractice laws. The motion was denied and Polazzo appealed.

On appeal, the Michigan Court of Appeals considered whether the concussion protection statute created a private statutory action, the legal duty arising from the statute for purposes of common law causes of action, and the distinction between ordinary negligence and medical malpractice. The Court also considered whether the concussion protection statute imposed a duty on medical professionals, such as athletic trainer, Polazzo. The Court ruled that a breach of the statute relating to a medical professional's duties was malpractice. The court further reasoned that because the statute covered all adults, it established a duty supporting an ordinary negligence claim.

The Appellate Court found no language to infer that the legislature intended to create a private cause of action.

The Court affirmed denial of Polazzo's dispositive motion, finding that Plaintiff could proceed on an ordinary negligence claim, because the statute created a legal duty applicable to lay persons as well as medical professionals. Critically, the Court observed that whether Polazzo actually treated and evaluated Randall was irrelevant, because his failure to remove Randall from the game constituted a breach of the duty under either standard.

Pro Tip

The Randall decision illustrates how a state act designed to protect youth athletes also creates legal duty. It also illustrates the need to parse out defenses based on alternate claims which may have higher standards and specific procedural bars. ●

Former NFL Players May Not Suffer More Severe Cognitive Impairment Than Others, Study Indicates

Even though repeated hits to the head are common in professional sports, the long-term effects of concussions are still poorly understood. While many believe that professional athletes who experience multiple concussions will end up with severe cognitive impairment later in life, a UT Southwestern study suggests that may not necessarily be the case.

The preliminary study, published in Cognitive and Behavioral Neurology, looked at a small cohort of retired professional football players who had a history of concussions and were diagnosed with mild cognitive impairment (MCI), a known risk factor for Alzheimer's disease. The 10 retired athletes, plus 10 nonathletes, were given a battery of cognitive tests to assess their verbal memory, learning, and language skills. The nonathletes also had MCI but no history of traumatic brain injury.

"For the most part, the athletes had a similar cognitive profile to the nonathletes," says Nyaz Didehbani, Ph.D., assistant professor in the department of psychiatry and the study's corresponding first author." But they did score lower on a couple of items, more specifically on our naming test, which has been showing up in a number of our studies. A consistent complaint from many of our athletes includes word-finding and naming difficulties."

Name recall, or the ability to see something and name it, diminishes quite frequently with normal aging, says Munro Cullum, Ph.D., vice chair and chief of the division of psychology in the department of psychiatry and the study's senior author. "It's not that they have lost the ability, but rather have a reduced ability to quickly retrieve words when they're shown a picture."

Despite differences in their ability to name recall, the retired football players scored similarly to the nonathletes on verbal memory and learning. This is in contrast to findings from other studies in which a history of concussions in athletes has been found to also affect these areas.

"Overall, the study is suggestive that just because you've had a history of multiple concussions, it doesn't mean you will develop a neurodegenerative change or problems later in life," says Cullum.

The retired NFL players range in age from 64 to 77 and played anywhere from six to 14 years in the NFL. The nonathletes were selected from an Alzheimer's Disease Research Center database at UT Southwestern. The groups were similar in age, sex, race, and education.

One clue as to why multiple concussions appear to have a selective effect on name recall may lie within the brain itself. Imaging from other studies done by the UT Southwestern group on these athletes demonstrated an interesting phenomenon.

"We had an imaging finding of an abnormality in the white matter deep in the part of the brain where word retrieval is thought to occur," Cullum says. These studies found that changes in white matter in retired athletes with a history of concussions were linked to poorer performance in naming, though it is still unclear why only this area of the brain appears to be affected. The authors are designing experiments to learn more.

Although the degree of the cognitive impairment wasn't much worse in retired athletes with MCI, this study provides only a small picture of the issue. There is evidence from other studies that exposure to repeated concussions can lead to earlier onset of MCI and that cognitive impairment may be higher in retired athletes.

The team at UT Southwestern is working to resolve these conflicting results from other studies by following a larger cohort of retired athletes over time. They are seeking to investigate the long-term effects of concussion on the brain by assessing how cognition changes over time, the rates at which it changes, and the effects of comorbidities (the presence of other illnesses) and psychological factors in athletes with MCI and a history of head injuries.

Within the context of this study, the authors are also interested in looking at different ways to evaluate cognition to better understand the state of neurodegenerative changes in athletes and to determine if the link between concussion and MCI is direct or correlative.

"Their being professional athletes does not necessitate automatically falling into this doom-and-gloom category that the cognitive impairment will progress and worsen," says Didehbani. "Those cases are really just a subset, just like with the normal population."

Cullum holds the Pam Blumenthal Distinguished Professorship in Clinical Psychology. ●

How Would Dershowitz Litigate a Concussion Claim? *Martin v. Hermiston*

Continued From Page 1

fered a serious head injury while playing football on a public high school junior varsity team. Specifically, the plaintiffs claim that the infant plaintiff, "C.M.," sustained a head injury in a September 2016 football game, and that school district/coaches did not follow the proper concussion protocols prior to his return to play. The school, coaches and athletic trainer deny that C.M. sustained an injury in the September 2016 game, but that alternatively, if he did, they had no knowledge of it. C.M. sustained a second head injury during an October 2016 game, and claims that he now suffers from headaches, diminished cognitive functioning, memory loss, and emotional issues, which include four suicide attempts. His parents allege that these injuries have ruined their emotional and physical connection with C.M. They claim that their relationship with him now consists of trying to get him to eat and preventing further suicide attempts.

To prove a claim under 42 USC §1983, a plaintiff must establish both (1) the deprivation of a right secured by the constitution or statutory law, and (2) that a person acting under color of state law committed the deprivation. The defendants, as a public school district and its employees, concede they were acting under color of state law, but they moved to dismiss the case arguing that the plaintiffs failed to establish as a matter of law, that they suffered a constitutional violation.

C.M. argues that the defendants conduct violated his *fundamental right to bodily autonomy* protected by the 14th Amendment's Due Process Clause when they returned him to practice and play after his September 2016 concussion, without proper medical clearance. The Supreme Court, in the landmark case of *Roe v. Wade*[2], held that the right to bodily autonomy is a fundamental right protected by substantive due process[3]. The fundamental right to bodily autonomy includes the right to be free from physical injury, bodily restraint and bodily intrusions[4].

To establish a Due Process violation, plaintiffs must show that an official's actions "shocks the conscience" and violates the "decencies of civilized conduct," or interferes with the rights implicit in the concept or ordered liberty."[5] In general, states (or those acting under the color of state law) are not liable for *omissions* under the 14th Amendment. However, a state's omission or failure to act may give rise to a 1983 claim when the state "*affirmatively places* the plaintiff in danger by acting with *deliberate indifference* to a *known or obvious danger*.[6]" Plaintiffs argue that defendants acted with deliberate indifference to the known or obvious danger that C.M. could become seriously injured when they returned him to practice and play following his September 2016 concussion, without medical clearance and while he still had concussion symptoms. Again, the defendants deny knowledge of the September 2016 head injury.

The Court reasoned that coaches direct the players in every aspect of the game and therefore act affirmatively when they place players on the field. Coaches determine when to take the field; what position the players play; what plays they run; how long they play, etc. Based upon the facts specific to this case, the Court found that plaintiffs put forward sufficient evidence, to put to the jury, the question of whether Defendants affirmatively placed C.M. in danger. The relevant inquiry will be whether the defendants left the C.M. "in a situation that was more dangerous than the one in which they found him." This just appears to be another way of saying that the defendants had a duty not to affirmatively increase the risk of harm to C.M.

The Court also found a question of fact as to whether the coaches acted with "deliberate indifference." To establish deliberate indifference, plaintiff must show that the defendant recognized the unreasonable risk and actually intended to expose the plaintiff to such risks without regard to the consequences to the plaintiff (i.e. it requires a culpable state of mind).

Ultimately, the jury will have to decide if there was deliberate indifference on the part of the coaches/district, and whether that deliberate indifference "shocked the conscience" in order to rise to the level of a due process violation. The jury will also examine whether the School District's decision, not to implement a procedure for tracking player head injuries and ensuring that a player who sustained a concussion did not return to practice or play without proper medical clearance, was so obviously deficient that it establishes the school district's "deliberate indifference" to its players' constitutional rights.

The parents of C.M. have also brought civil rights violations claims under the 14th Amendment, which gives parents a fundamental right to a "familial relationship with their child.[7]" The Courts have held that that familial relationship includes the right to companionship and society of the child.[8] The Court in *Martin* determined that the jury will similarly have to decide whether the plaintiffs have produced sufficient evidence to demonstrate that C.M.'s injuries have interfered with that fundamental familial right.

2 410 US 113 (1973).

3 *See also*, *Lawrence v. Texas*, 539 US 558, 564 (2003).

4 *Ingraham v. Wright*, 430 IS 651, 673 (1977).

5 *US v. Salerno*, 481 US 739, 746 (1987).

6 This is referred to as the "state created exception."

7 *Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987).

8 *Id.*

See HOW WOULD on Page 8

Anthony Corleto Joins Gordon Rees as Partner, Bringing Successful Concussion Defense Practice with Him

Sports Lawyer Anthony Corleto has joined Gordon Rees Scully Mansukhani as a partner, where he will continue to grow the successful concussion defense practice he built at Wilson Elser.

Corleto's practice focuses on sports concussion, professional liability, intellectual property and complex tort matters. His clients include sport governing bodies, universities, environmental consultants, software developers, manufacturers, attorneys and public housing authorities. He regularly tries cases and argues appeals in the state and federal courts of Connecticut and New York.

Anthony Corleto

"We are very excited that Tony has joined Gordon & Rees," said Don Derrico Managing Partner of the Westchester office. "He's an extremely talented litigator and will be an asset as we continue to service the needs of our clients in the northeast and across the country."

Corleto is admitted to practice in Connecticut, New York, the U.S. Court of Appeals for the Second Circuit, and the U.S. District Courts of Connecticut and New York.

He earned his law degree from Pace University School of Law and undergraduate degree from St. John's University School of Risk Management.

Corleto also serves as Editor-in-Chief of Concussion Defense Reporter. ●

Former Football Player Withdraws from Concussion Lawsuit Against Pittsburgh, Claiming He Never Intended to Sue

Former University of Pittsburgh football player Craig Bokor was as shocked as former coaches at his alma mater when he was listed as a plaintiff early last month in a concussion lawsuit against Pitt.

Yes, he was interviewed by the attorneys who brought the suit. But Bokor, a defensive lineman at the school from 2005-09, claimed he never consented to being a party.

"There was never any idea of a lawsuit getting filed," he told the media. "We had no clue it was going to come to that. It wasn't anything we agreed to or wanted to happen."

Joining Bokor in the lawsuit was former Pitt wide receiver Joseph DelSardo, who also withdrew his complaint. The plaintiffs were represented by Napoli Shkolnik, in federal court in Pittsburgh.

Bokor, reportedly, reached out to the firm that filed after he learned of it, but was allegedly told that the statute of limitations on his claim was running out, which is why he was added. The player further added that the lawsuit suggested he was suffering from migraines, anxiety, and memory loss, attributable to the concussions. Bokor said he has none of those symptoms.

In the original lawsuit, the would-be plaintiffs named the university and the NCAA as well as the Big East and Atlantic Coast conferences. The claimed, as most of the previous suits have, that the defendants were aware of the risks, but did not adequately protect the plaintiffs. Specifically, they alleged claims of negligence, fraudulent concealment, breach of contract and unjust enrichment.

"The NCAA was created to protect the students that participate in various college sports, including football. Despite its alleged purpose, the NCAA has failed to take reasonable actions to protect players from the chronic risks created by such injuries and fraudulently concealed those risks from players," according to the complaint. ●

How Would Dershowitz Litigate a Concussion Claim? *Martin v. Hermiston*

Continued From Page 7

It will be interesting to see how this case plays out at trial. There will be additional arguments made at trial about negligence, negligence *per se*, and entitlement to qualified immunity. Nonetheless, the real question is, by opening these types of personal injury lawsuits to constitutional 14th Amendment scrutiny, simply because the defendant is acting under the "color of law" – are we not, in actuality, putting targets on the back of all public schools that have interscholastic athletics? By having sports teams where students can be injured in any capacity (which is almost guaranteed when playing youth sports), do the schools now have to worry about violating their players' civil rights? Talk about opening Pandora's Box... ●

Washington State's Lystedt Law – an Update

By Tony Corleto, of Gordon & Rees

Enacted by the Washington State legislature in 2009 (RCWA 28A.600.190) the "Zackery Lystedt Law" set the pattern for similar legislative and regulatory acts in each state and the District of Columbia.

Washington's law established an education requirement for coaches, youth athletes and their parents, requiring each school district to develop a concussion and head injury information sheet for athletes and parents. Critically, the law also requires: (i) removal from play of athletes suspected of sustaining concussion or head injury; and (ii) written medical clearance before returning to play. Although implementation varies in each state, invariably each includes an information component, criteria for removal upon injury and criteria for return with medical clearance.

This article examines two decisions from the Washington Supreme and Appellate courts which illustrate the interplay of Lystedt with traditional tort law and procedural principals. In *Swank*, Washington's Supreme Court addresses private causes of action, volunteer immunity and long arm jurisdiction. In *Anderson*, the Court of Appeals restricts *Lystedt* to sport activities.

Private Right of Action Recognized

What happens when a statute regulates conduct? In some instances (e.g., securities, telemarketing) penalties, rights of action and other remedies are implemented. In areas that are generally unregulated (e.g., youth sports) remedies are left to the judicial system. Lystedt laws fall into the latter category: invariably they specify no penalty, right of action or limitation of action. At this point in time, the core Lystedt requirements for disclosure, removal from play and return to play, are recognized as standards of care in tort claims. The approach taken by each court gives insight for defense strategies.

Washington's Supreme Court expressly recognized the right to sue based on a Lystedt violation in *Swank v Valley Christian School*, 118 Wash.2d 663 (2017). The case arises from on field events in 2009, the year Lystedt was adopted. Valley Christian School (VCS) adopted the requisite information disclosure and implemented the prescribed removal from play and return to play criteria.

On September 18, 2009, Drew Swank took a hard hit to the head in a football game, was removed from play and later complained of neck pain and headaches. Three days later he saw the family physician, Dr. Burns, in Coeur d'Alene, Idaho where the Swanks resided. Dr. Burns examined Drew in Idaho and told him to stay out of contact sports for the next three days. He prescribed ibuprofen and advised that if Drew experienced headaches after playing football, he would need to stay out of contact sports for a week.

Two days later Drew had been without headaches. His mother asked Dr. Burns for a release because Washington's new law required a doctor's note for Drew to practice. Later that day, Dr. Burns wrote a note releasing Drew and his mother picked it up from the Idaho office. Drew's father gave a copy of the medical release to the VCS coach, Puryear.

Playing in the next game, Drew appeared "sluggish," confused, and slow to respond. Drew's father recalled uncharacteristically poor play on kickoff returns and coach Puryear yelling at Drew from the sidelines in apparent frustration over missed plays. Drew's teammates recalled coaches yelling frequently about his positioning. During the game, coach Puryear called Drew to the sidelines, grabbed his face mask and, according to Drew's father, "began to jerk it up and down hard while he screamed at [Drew]". Drew returned to the game, was hit by an opposing player, staggered to the sideline and collapsed. Drew died two days later.

Three years later, Drew's parents sued VCS, coach Puryear, and Dr. Burns, claiming that each violated the Lystedt law. Each defendant moved for and was granted summary judgment. The Court of Appeals affirmed dismissal of Lystedt based claims against the school and coach, affirmed the jurisdictional dismissal in favor of the doctoy and reversed dismissal of the general negligence claim against VCS, holding: (1) Lystedt did not create an implied statutory cause of action, (2) coach Puryear was entitled to volunteer immunity, (3) the battery claim (coach Puryear's) jerking of Drew's face mask is barred by the two-year statute of limitations; and (4) the court lacked personal long-arm jurisdiction over Dr. Burns in Idaho.

Implied Cause of Action

Holding that Lystedt implied a cause of action, Washington's Supreme Court reversed dismissal of the coach and reinstated the Swanks' claims that VCS and coach Puryear violated the Lystedt law. The court also found the grant of summary judgment on the general negligence claim against coach Puryear "erroneous" and reversed the grant of summary judgment on this point. Finally, the court found that the trial court lacked personal jurisdiction over Dr. Burns and affirm the grant of summary judgment for the claims against him.

In Bennett v Hardy, 113 Wash.2d 912 (1990) Washington's Supreme Court created a test to determine whether a statute includes an implied cause of action. Bennett sued her employer for age discrimination under the state's non-discrimination statute, which made age discrimination an unfair employment practice, but did not create a remedy. Opposing summary judgment, the plaintiffs argued they should be able to sue their employer for an implied cause of action. Finding that plaintiff is within the class intended to benefit from the statute,

See WASHINGTON on Page 10

Washington State's Lystedt Law – an Update

Continued From Page 9

that legislative intent supports a remedy, and that implying a remedy is consistent with the act's underlying purpose, the *Bennett* court denied the motion. Their rationale is generally recognized: "We can assume that the legislature is aware of the doctrine of implied statutory causes of action and also assume that the legislature would not enact a remedial statute granting rights to an identifiable class without enabling members of that class to enforce those rights. Without an implicit creation of a remedy, the statute is meaningless."

Turning back to *Lystedt*, the *Swank* court observed that there is no dispute Drew was within the class intended to benefit from *Lystedt*, that legislative concern for catastrophic and significant injuries associated with youth athlete concussions is clear, and that the legislature contemplated the possibility of civil liability when it exempted volunteer health care providers from liability. Finally, observing that "One of the major purposes of tort law is to encourage people to act with reasonable care for the welfare of themselves and others", the court found that recognizing a private remedy would serve *Lystedt's* purpose of preventing injuries by encouraging people to act with due care for the welfare of youth athletes and giving youth athletes recourse.

Volunteer Immunity Defense

The court's handling of coach Puryear's volunteer immunity defense is particularly instructive. Washington's Volunteer Protection Act (RCW 4.24.670) immunizes volunteers from liability for simple negligence. However, volunteers are not immune for acts that are grossly negligent or reckless. RCW 4.24.670 provides immunity for a volunteer of a nonprofit organization for harm caused by an act or omission on behalf of the organization "if the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer."

Although Coach Puryear plainly met the definition of volunteer, evidence was sufficient for a jury to find that Coach Puryear acted with gross negligence or recklessness. Simple negligence is the degree of care which the reasonably prudent person would exercise in the same or similar circumstances. Simonetta v. Viad Corp., 165 Wash.2d 341, 348, 197 P.3d 127 (2008) ("Under the law of negligence, a defendant's duty is to exercise ordinary care."). Gross negligence is "negligence substantially and appreciably greater than ordinary negligence." Nist, 67 Wash.2d at 331, 407 P.2d 798; *see also* Eastwood v. Horse Harbor Found., Inc., 170 Wash.2d 380, 401, 241 P.3d 1256 (2010).

Reckless misconduct differs from negligence in that the actor "must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent." Reckless misconduct, unlike gross negligence, "requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man." (quoting Restatement § 500 cmt. g); *see also* State v. Graham, 153 Wash.2d 400, 408, 103 P.3d 1238 (2005).

Here, the Swanks presented evidence about Coach Puryear's conduct that a jury could find to be gross negligence or reckless misconduct. The evidence would support the Swanks' claims that Coach Puryear violated the Lystedt law, as well as their common law negligence claims.

Testimony suggested that Coach Puryear failed to monitor Drew for symptoms of a concussion during the game. Coach Puryear testified that he was not looking at Drew during the game for the possibility of a concussion. Other testimony contradicted Puryear's statement that he believed Drew's play was normal up until the injury. Several witnesses described Drew's conduct during the game as highly unusual and consistent with the "signs" of a concussion as disclosed in VCS's CIS: "appears dazed; confused about assignment; forgets plays; is unsure of game, score, or opponent; moves clumsily or displays incoordination; any change in typical behavior or personality." Witnesses further described Puryear and the assistant coach yelling at Drew from the sidelines in frustration over his poor performance, and about Puryear grabbing Drew's face mask and shaking it up and down while yelling at him.

The Swanks submitted further evidence from a medical expert who concluded that Coach Puryear violated the relevant standard of care, that Drew's game behavior was an indication that he "more likely than not continued to suffer from the concussion he had been previously diagnosed with", and that "the coaching staff should have removed Drew from play once he began to exhibit the signs and symptoms [of a concussion] and kept Drew off the field until he had been properly evaluated and cleared to return to play again."

The court observed that this collective evidence could suggest that Coach Puryear "substantially" failed to meet the standards of a reasonable and prudent person under the circumstances, and as a whole, the evidence created genuine issues of material fact regarding Puryear's degree of fault. Holding that a reasonable jury may conclude Puryear was grossly negligent or reckless summary judgment on the claims against Coach Puryear was reversed.

Long Arm Jurisdiction

Every state recognizes the concept of long arm jurisdiction: the court's power to com-

See WASHINGTON on Page 11

Washington State's Lystedt Law – an Update

Continued From Page 10

pel non-citizens or non-residents to appear and answer outside their home jurisdiction. Conversely, every state recognizes limits on this power, based on the nature and particulars of the defendant's conduct. Generally, courts have no power to compel the appearance of someone who doesn't reside, work or have some other relevant presence in the forum state. Although Dr. Burns' treatment affected someone who was injured in Washington and was expressly done for purposes of complying with Washington's *Lystedt* act, the *Swank* court recognized the limitation of its power over Dr. Burns as a non-resident / non-citizen practitioner: Dr. Burns provided medical care to Drew solely in Idaho; therefore, the tort is deemed to have taken place in Idaho, not Washington.

Washington's long-arm statute reaches: "Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits . . . to the jurisdiction of the courts of this state [for] any cause of action arising from [such] acts: (b) The commission of a tortious act within this state."

Washington generally follows the rule that when an injury occurs in the forum, it is inseparable from the tortious act, and thus the act is deemed to have occurred in the forum for purposes of the long-arm statute. Lewis, 119 Wash.2d at 670, 835 P.2d 221 . However, Washington recognizes an exception for professional malpractice. Id. at 673, 835 P.2d 221. A nonresident professional's malpractice in another state against a Washington resident, without more, does not confer jurisdiction, regardless of whether injury was suffered upon the plaintiff's return to Washington.

Because Dr. Burns rendered treatment solely in Idaho, less than 30 miles from the school, he was not subject to jurisdiction in Washington, and his dismissal was upheld.

Lystedt Confined to Sports

What activities are within *Lystedt?* Washington's Appellate Court has declined to extend the education requirement to other school based activities, specifically field trips.

In *Anderson v Snohomosh School District,* parents of a high school student brought suit after their daughter, Haley, suffered a concussion and a second impact riding the Matterhorn at Disneyland on a school field trip. Between the first and second impacts, Haley had informed a chaperone of her initial injury. The chaperone, untrained any aspect of medicine or concussion recognition and management, told Haley that "she didn't look concussed" and let her proceed with further activity. After the band flew home, Haley experienced dizziness and headaches and was diagnosed with 'second impact'syndrome.

The Andersons sued the District and the trip chaperones, alleging that while acting as agents for the District, the chaperones failed to provide reasonable and necessary medical care after her head injury, and that their failure to prevent ongoing trauma was a proximate cause of Haley's "second impact syndrome".

Independent of *Lystedt,* Washington, school districts have "an enhanced and solemn duty to protect minor students in [their] care." Christensen v. Royal Sch. Dist. No. 160, 156 Wn.2d 62, 67, 124 P.3d 283 (2005). They must exercise the care that an ordinarily responsible and prudent person would exercise under the same or similar circumstances. N.L., 186 Wn.2d at 430. Further, school districts must take certain precautions to protect the students in their custody from dangers reasonably to be anticipated. Hendrickson v. Moses Lake Sch. Dist., 192 Wn.2d 269, 276, 428 P.3d 1197 (2018). If harm is reasonably foreseeable, a school district may be liable if it failed to take reasonable steps to prevent that harm. Id.

In opposition to the District's motion for summary judgment plaintiffs argued in part that the District's *Lystedt* "Concussion Form, which student athletes and their parents sign to acknowledge the risks and symptoms of a concussion, made the risk of injury foreseeable. The court noted that "[u]nlike student athletes who are protected by a mandated concussion protocol, there is no district policy or mandate requirement that would override the students' responses." It pointed out that the Districts general policy requires that word of illness or accident be sent to the principal's office and the nurse, but that the school was closed on at the time of Haley's injury. It also cited a declaration stating that the principal's primary duty in that situation is to inform the parents, and this was effectively accomplished.

The District argued that it has no duty to seek medical attention every time a student reports hitting their head and having a headache, noting that *Lystedt,* which requires youth athletes be removed from play immediately when they are suspected of sustaining a concussion or head injury, applies *only* to student athletes. The District further argues that "[t]o create Lystedt-like duties for schools, toward every student, based on the imputed knowledge that 'all concussions are potentially serious' would completely change the landscape of school liability for student head injuries."

The Appellate Court agreed, holding that *Lystedt* plainly applies only to student athletes. See RCW 28A.600.190, and that the concussion form is also directed to the parents of student athletes. ●

Head Impact Rates in Major High School Sports Identified

A new study from researchers at Children's Hospital of Philadelphia (CHOP) used head impact sensors in four different sports and studied male and female athletes to determine which of these sports put students at the highest risk for head impacts that could lead to concussions. The findings were published online by the Orthopaedic Journal of Sports Medicine.

"Adolescents are particularly vulnerable to concussion because they frequently participate in sporting and recreational activities and have slower recovery periods compared to adults," said Kristy Arbogast, PhD, senior author and co-lead of the Minds Matter Concussion Program at CHOP. "Providing reliable data on head impact exposure and sport-specific mechanisms may help sports organizations identify strategies to reduce impact exposure and lower the risk of acute injury."

Building upon previous research that determined how to derive accurate data from headband-mounted head impact sensors through video confirmation, CHOP researchers sought to quantify sport and gender differences in head impact rates and mechanisms in male and female high school soccer, basketball, lacrosse, and female field hockey.

This is the first study to provide head impact analysis for basketball and field hockey and is one of the largest studies of its kind because of its inclusion of multiple sports and both genders. Data was collected from 124 athletes (56 girls, 68 boys) over the course of 104 games and more than 1,600 head impacts across the four sports.

Soccer had the highest head impact rate for both boys and girls across the sports that were analyzed. This was attributed to the role of intentional headers, which accounted for 80% of the head impacts in that sport. High school male sports consistently had higher head impact rates than female sports in soccer, basketball, and lacrosse.

Basketball had a higher head impact rate than lacrosse and field hockey for females and a similar impact rate to lacrosse for males. The similarity in impact rate between male basketball and lacrosse was unexpected considering male lacrosse is classified as a collision sport permitting intentional checking and body contact and requires the use of a helmet.

Impact mechanisms varied by sport, creating sport-specific targets for prevention efforts aimed at reducing head impact exposure. For example, lacrosse had a higher proportion of equipment-to-head impacts than the other sports due to the role of the stick in lacrosse. However, most of the head impacts in basketball were due to player-to-player contact. These findings point to potential sport- and gender-specific rule and equipment strategies to minimize head impact exposure.

"It's important to recognize that all head impacts are not created equal, so future studies need to explore the magnitude of these impacts," Arbogast said. "For example, lacrosse and basketball may have similar impact rates, but the severity of impacts in lacrosse may be higher." ●

Division II Prohibits Certain Drills and Activities for Football

The Division II Management Council and Presidents Council have voted to immediately prohibit certain football activities and drills that may increase the probability of head impact exposure and do not simulate game-like scenarios.

The prohibited athletic activities include drills that encourage or create straight-line contact, as specified in policies and procedures established and maintained by the Division II Football Committee and the NCAA Committee on Competitive Safeguards and Medical Aspects of Sports.

After the Management Council recommended the prohibition, the Presidents Council approved it via emergency legislation in order to protect the health and safety of student-athletes. Feedback from several groups, including a survey of Division II head football coaches, supported the change.

Division I voted in May to prohibit the same activities and drills, while also approving other changes to its preseason football model. The modifications were informed by a number of data points that suggest the preseason practice period may lead to a disproportionate amount of concussions and head impact exposure, including, among others, information from NCAA member conferences, the NCAA injury surveillance program and the NCAA-Department of Defense Concussion Assessment, Research and Education Consortium.

Division II will consider other modifications to its preseason football model. Any additional changes are expected to be proposed through the traditional legislative process and voted on by the membership at the 2022 NCAA Convention in January.

"Division II will continue to engage key stakeholders from within the membership, including student-athletes, coaches and medical professionals, as other potential changes to football are discussed and developed," said Sandra Jordan, chair of the Division II Presidents Council and president at the University of South Carolina Aiken. "Our priority will always be the safety of student-athletes and any future changes made will reflect that commitment." ●

