CONCUSSION DEFENSE REPORTER

Catastrophic Brain Injury Team Scores Major Win in the Ninth Circuit

By Anthony B. Corleto and Philip Robert Brinson, of Gordon & Rees

By unanimous opinion, a Ninth Circuit panel affirmed summary judgment against chronic traumatic encephalopathy ("CTE") wrongful death claims brought by the estates of two young men. Archie v. Pop Warner, No. 20-55081; CD CA 2:16-cv-06603.

Archie was brought by the mothers of two former youth football players, each of whom died in their mid-twenties, a decade after they last played youth football; one from a self-inflicted gunshot wound, the other in a motorcycle accident. The mothers sued for monetary damages and to enjoin advertising that "youth tackle football is safe for minor children." Their theory alleged that exposure to repetitive contact in football leads to CTE, the disease process found in autopsied brain tissue of football players Aaron Hernandez and Junior Seau.

The Archie plaintiffs each claim their son had CTE from playing youth football, and this led to the behavior that ended their lives. Worth noting: each also played football in high school and one played into college. Also worth noting, the suicide victim was diagnosed bi-polar and was admitted multiple times for psychiatric holds. In December 2019, District Court granted Pop Warner's motion for summary judgment, finding "[T]here is

See BRAIN on page 11

Even in Extreme Sport, Court Accords Primacy of Primary Assumption of Risk

By Jon Heshka, Associate Professor at Thompson Rivers University

An appellate court in *Wolf v. Kaplan*, 2021-Ohio-2447 has ruled that a triathlete injured when she crashed in a race after being clipped by a competitor cannot claim damages because the collision was an inherent risk that she assumed.

Mary Ellen Wolf was an experienced triathlete. She was a certified race director for USA Triathlon, the national governing body for triathlon, and had qualified for the USA Triathlon Nationals. During the August 2018 race, she crashed just over a mile into its bicycling portion and sustained a concussion, a closed fracture of the sacrum, two fractures of the left pubic bone, and multiple abrasions.

In April 2019, Wolf filed a complaint against Gregory Kaplan and asserted claims for battery, assault, negligence, and gross negligence. Wolf alleged that Kaplan violated the drafting rules and caused her to crash. Kaplan filed a motion for summary judgment that was opposed by Wolf.

In becoming a member of USA Triathlon, Wolf electronically signed a Waiver and Release of Liability, Assump-

See EXTREME on page 11

INSIDE THIS ISSUE

CONCUSSION DEFENSE REPORTER

Concussion Defense Reporter is published by Hackney Publications. Direct inquiries to Hackney Publications at:

info@hackneypublications.com.

HOLT HACKNEY
Editor and Publisher

JEFF BIRREN
GARY CHESTER
ELLEN STAUROWSKY, ED.D.
ROBERT J. ROMANO
Senior Writers

ERIKA PEREZ
Design Editor

Hackney Publications

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

Big Ten Conference Names Dr. James Borchers Chief Medical Officer

The Big Ten Conference has announced that Dr. James Borchers has been named the Big Ten Conference's first-ever Chief Medical Officer. Borchers most recently served as the head team physician for The Ohio State University athletics department.

In this role, Borchers will serve as a consultant to all 14 Big Ten member institutions on matters of student-athlete health and safety and will lead all conference sports medicine programming and initiatives – including policy development, research, educational opportunities, and public outreach. Borchers will also provide advice and guidance to Big Ten Conference Commissioner Kevin Warren, the Council of Presidents and Chancellors, Athletics Directors, Faculty Athletic Representatives, Senior Woman Administrators, team physicians, athletic trainers, coaches, and the Mental Health & Wellness Cabinet.

"The physical and mental well-being of our student-athletes is our top priority," said Big Ten Conference Commissioner Kevin Warren. "The addition of Dr. Borchers will further serve and protect the health and safety of our nearly 10,000 student-athletes. It will also ensure the conference is on the cutting edge of the latest medical advances and that we maintain strong interconnectivity to the best and brightest professionals in the medical community."

Borchers will work closely with all key conference constituents to develop industry-leading practices and procedures. He also will serve as a conference spokesperson to effectively communicate health and medical matters to external stakeholders.

"It is an honor to be named Chief Medical Officer for the Big Ten Conference, which has long been a leader in collegiate athletics," said Borchers. "This will be a tremendous opportunity to collaborate with the talented medical professionals within the conference and across all levels of college and professional sports as we continue to provide a best-in-class environment of health, safety and wellness for our nearly 10,000 student-athletes."

"Dr. Borchers has many years of experience in collegiate athletics as a student-athlete and as a medical professional," said Dr. Chris Kratochvil, chair of the Big Ten Conference Task Force for Emerging Infectious Diseases. "He is very well-connected with trusted relationships within the medical community and is positioned for success as the Chief Medical Officer of the Big Ten Conference."

CDR Concussion Defense Reporter

Court Finds Arguments Made in Concussion Case Against NFL Sufficient to Survive Motion to Dismiss

A federal judge from the Eastern District of Missouri has allowed the spouse of a former NFL football player, Donnell K. Baker (Baker), to continue to bring her concussion claim, which alleges that defendants National Football League Inc./Enterprises (NFL) and Los Angeles Rams (Rams) were negligent when they failed to protect Baker from the head injuries he suffered that would prematurely take his life.

Specifically, Connie Joann Baker, representing herself as a pro se litigant, claimed that Baker "was injured, incapacitated, and died as a result of the defendants' reckless disregard for his personal health and safety as a professional athlete."

But the plaintiff's claim could have easily been dismissed because of her failure to prepay the required filing fee. That failure and the defendants' motion to dismiss suggesting her claim should be barred because of that failure were the crux of the instant opinion.

The motion to dismiss was brought pursuant to 28 U.S.C. § 1915(e)(2), which requires a court to "dismiss a complaint filed in forma pauperis if it is frivolous, malicious, or fails to state a claim upon which relief can be granted," the court wrote. "To state a claim, a plaintiff must demonstrate a plausible claim for relief, which is more than a 'mere possibility of misconduct.' Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 678. "Determining whether a complaint states a plausible claim for relief is a context-specific task that requires the reviewing court to draw upon judicial experience and common sense. Id. at 679. The court must 'accept as true the facts alleged, but not legal conclusions or threadbare recitals of the elements of a cause of action, supported by mere conclusory statements.' Barton v. Taber, 820 F.3d 958, 964 (8th Cir. 2016). See also Brown v. Green Tree Servicing LLC, 820 F.3d 371, 372-73 (8th Cir. 2016) (stating that court must accept factual allegations in complaint as true, but is not required to 'accept as true any legal conclusion couched as a factual allegation')."

When reviewing a pro se complaint under § 1915(e)(2), the court noted that it "must give it the benefit of a liberal construction. Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972). A 'liberal construction' means that if the essence of an allegation is discernible, the district court should construe the plaintiff's complaint in a way that permits his or her claim to be considered within the proper legal framework. Solomon v. Petray, 795 F.3d 777, 787 (8th Cir. 2015). However, even pro se complaints are required to allege facts which, if true, state a claim for relief as a matter of law. Martin v. Aubuchon, 623 F.2d 1282, 1286 (8th Cir. 1980). See also Stone v. Harry, 364 F.3d 912, 914-15 (8th Cir. 2004) (stating that federal courts are not required to 'assume facts that are not alleged, just because an additional factual allegation would have formed a stronger complaint'). In addition, affording a pro se complaint the benefit of a liberal construction does not mean that procedural rules in ordinary civil litigation must be interpreted so as to excuse mistakes by those who proceed without counsel. See McNeil v. United States, 508 U.S. 106, 113, 113 S. Ct. 1980, 124 L. Ed. 2d 21 (1993)."

The court then turned to the merits of the claim – the plaintiff's argument that the defendants knew about the risk of concussion. "Rather than meeting its duty of care by protecting its employees, the plaintiff alleges that the NFL and the Rams downplayed the risks associated with football, causing harm to its players," wrote the court.

It also recounted the Baker's personal journey as offered by the plaintiff. He played for the NFL from 1994 to 1998. He was with the Rams from December 1996 to September 1998. During his NFL playing career, he "was knocked unconscious, suffered numerous concussions, and was 'subjected to countless sub-concussive hits,'" according to the plaintiff. At the time that Baker played in the NFL, "there were no adequate or substantial concussion management protocols or policies in place to address and treat" his concussions.

The plaintiff stated that at some point during Baker's professional football career, "he began exhibiting signs of declining cognitive abilities." He also suffered from depression, mood swings, and seizures. After visiting with a neurologist, Baker was allegedly diagnosed with seizures that had been "caused from repeated hits to the head from his time playing" in the NFL. On February 5, 2020, Baker died in his sleep while having a seizure.

Thus, plaintiff argued that the NFL and the Rams negligently caused Baker's wrongful death. Specifically, she stated that both defendants had a duty of care "to protect and promote the health and safety of its players." This duty included appropriate guidance and regulations regarding head injuries and warnings to players about the dangers, according to the plaintiff.

Specifically, the plaintiff alleged that the NFL and the Rams breached its duties by failing to implement appropriate guidelines regarding the evaluation of traumatic brain injuries, not only on

the playing field, but "in the weeks and months after" sustaining an injury. She further accused the defendants of failing to provide "treatment for the latent effects" of traumatic brain injuries.

Because of this breach, Baker was exposed to repetitive head injuries that ultimately led to his death, she alleged. The plaintiff also argued that the NFL and the Rams breached an implied contract between themselves and Baker. In particular, she stated that there was an implied contract between Baker and the defendants by which Baker agreed to be bound by league and team rules, while the league and team agreed to abide by its own agreements and bylaws. The plaintiff argued that the defendants breached their implied contractual duties by failing to provide Baker with a safe working environment.

As the court noted above, 28 U.S.C. § 1915(e) directs it to dismiss complaints filed in forma pauperis if they are frivolous, malicious, or fail to state a claim upon which relief can be granted. First, with regard to frivolity, the Court may dismiss a complaint as frivolous if it lacks an arguable basis in law or fact. Martinez v. Turner, 977 F.2d 421, 423 (8th Cir. 1992). Such a dismissal encompasses allegations that are fanciful, fantastic, and delusional. Denton v. Hernandez, 504 U.S. 25, 32, 112 S. Ct. 1728, 118 L. Ed. 2d 340 (1992). "[A] finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them." Id.

Here, noted the court, the plaintiff "has alleged that Baker suffered a traumatic brain injury from repeated concussions endured during his professional football career. Further, she contends that the NFL and the Rams knew about the dangers of concussions, but did not take proper measures to guard against their long-term effects. Without passing judgment on the merits, the court has determined that these allegations are not fanciful, fantastic, or delusional, such as is required for a finding of frivolity.

"Second, as to maliciousness, a case may be dismissed under 28 U.S.C. § 1915 if it is 'plainly part of a longstanding pattern of abusive and repetitious lawsuits' or contains abusive language. See Horsey v. Asher, 741 F.2d 209, 212-13 (8th Cir. 1984); and In re Tyler, 839 F.2d 1290, 1294 (8th Cir. 1988). In this case, there is clearly nothing malicious in the complaint, as there is no indication that it has been filed to harass defendants, or that it is part of a pattern of repetitious lawsuits.

"Finally, as to stating a claim, the Court notes that plaintiff must demonstrate a plausible claim for relief; which is more than a 'mere possibility of misconduct.' Ashcroft, 556 U.S. at 679. 'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' Id. at 678.

The court went on to note that "when evaluating whether a self-represented plaintiff has asserted sufficient facts to state a claim, a pro se complaint, however inartfully pleaded, is held to less stringent standards than formal pleadings drafted by lawyers. Jackson v. Nixon, 747 F.3d 537, 541 (8th Cir. 2014)."

"In this case, the plaintiff has alleged that the NFL and the Rams had a duty to protect Baker's health and well-being, and that they breached this duty by failing to provide proper protocols for dealing with concussions, and by failing to disclose the dangers of head injuries to players. Because of this breach, the plaintiff has alleged that Baker suffered a traumatic brain injury that gave him a seizure disorder, ultimately resulting in his death. The court must accept these facts as true, and make all reasonable inferences in the plaintiff's favor. See Jones v. Douglas Cty. Sheriff's Dep't, 915 F.3d 498, 499 (8th Cir. 2019). Taking that into consideration, and in light of the plaintiff's status as a self-represented litigant, the court has determined that the allegations in the complaint are sufficient for purposes of initial review under 28 U.S.C. § 1915."

Baker v. NFL Inc. et al.; E.D. Mo.; No. 4:21-cv-00157-SNLJ; 8/17/21

New South Wales Supreme Court Dismisses Controversial Concussion Lawsuit

Just days before a controversial concussion lawsuit was set to be heard, the New South Wales Supreme Court dismissed the claim.

The litigation involved former Newcastle Knights star James McManus, who sued the National Rugby League team in 2017 for $1 million, claiming it was negligent in its handling of the repeated concussions he suffered during his playing career.

McManus, who retired in 2015 after playing in 166 games, alleged in the lawsuit that he suffers from chronic traumatic encephalopathy (CTE).

His complaint alleged that "CTE and other injuries are progressive and degenerative. Therefore, the plaintiff's capacity to engage in paid employment, and his ability to compete in the open market, will diminish over time. The plaintiff is presently aged 35 years. But for his injuries, the plaintiff would have worked to the age of 67 years."

It further charged that "as a consequence of his injuries the plaintiff's earning capacity has been reduced, so that now

CDR Concussion Defense Reporter

he can only generally work 3-4 days per week on a regular basis."

Predictably, the NRL was pleased with the ruling, issuing the following statement: "The claim brought by James McManus against the Newcastle Knights, which was managed by the NRL, has been finalised with the NSW Supreme Court ordering judgment for the Knights."

"The NRL is pleased that this long-running matter has been resolved in the Knights' favour.

"The NRL was confident in its defence of the claim under the Civil Liability Act and we are pleased that the matter could be resolved without further cost and expense for all parties."

Court Rules for Iowa School District and teacher in Concussion Lawsuit

A federal judge from the Southern District of Iowa has granted a motion for summary judgment to Des Moines Public Schools and a teacher, holding that it was not obligated to protect a student who was attacked and injured, suffering a concussion, by her classmates at a 2019 school dance.

Plaintiff Kristy Mitchell, the mother of 15-year-old Nevaeh Osorio, sued a teacher and the district for negligent supervision and a failure to protect her daughter in violation of state and federal law.

The district argued in its motion that "Iowa federal courts have ... refused to find a duty exists between an educational institution and a non-student who enters the boundaries of its campus." Further, it claimed the plaintiff "has not and cannot prove (the teacher) or the district owed any duty to Plaintiff whatsoever."

In considering the first claim, the court found that the plaintiffs failed to show that the defendants, the teacher and district, assumed a duty to protect the girl. Notably, it concluded that the teacher did not increase the risk for the girl.

In the second claim, it found that the teacher was entitled to qualified immunity.

Attorney Analyzes Pennsylvania Supreme Court's Ruling in Onyshko

The NCAA may be losing court cases on multiple fronts, but when it comes to concussion litigation, the association appears to be holding its own.

Most recently, the Pennsylvania Supreme Court refused to reconsider a lawsuit brought by a former college football player, Matthew Onyshko, who blamed the NCAA for brain injuries that left him debilitated and in a wheelchair.

The ruling came after Onyshko appealed the decision of a Pennsylvania Superior Court, which also refused to revive the case.

"On September 2, 2021, the Pennsylvania Supreme Court issued a per curiam denial of Onyshko's Petition for Allowance of appeal, signaling what is for now the end of Matthew and Jessica Onyshko's legal effort to link his ALS to his college football career," Anthony Corleto of Gordon Rees told Concussion Litigation Reporter.

"In May 2019, a Pennsylvania Jury returned a verdict in favor of the NCAA, finding no liability. In October 2019, the court denied Onyshko's post trial motion to set aside the verdict and grant a new trial, arguing among other things that the court incorrectly excluded the opinion of Dr. Bennet Omalu. In March of this year, an appellate panel (mentioned above) affirmed the post-trial order, adopting it 'as their own.'

"Onyshko's legal team has stated publicly that they intend to bring a wrongful death suit when he ultimately and presumably passes due to ALS (Lou Gehrig's disease). A few things have to happen for that to succeed. First, science has to advance to the point that ALS as a disease process and his ultimate death can be tied to his athletic experience. Second, the court would have to hold NCAA to a standard of care based on that newly found causal connection between football and ALS. Neither of which is likely to happen."

NCAA-DOD CARE Consortium Receives $42.65M Award to Launch the Next Phase of Study

Next phase of CARE, the CARE-SALTOS Integrated Study to follow athletes 10+ years after concussive injury and repetitive head impact exposure

The NCAA-U.S. Department of Defense Concussion Assessment, Research and Education (CARE) Consortium — the largest concussion and repetitive head impact study in history — has received a $25 million award from the Medical Technology Enterprise Consortium (MTEC) via the U.S. Army Medical Research and Development Command (USAMRDC).

The funding is from the Defense Health Program under the oversight of the assistant secretary of defense for health affairs. Moreover, an additional $10 million from the NCAA and $7.65 million from the Defense Health Agency via a Cooperative Research and Development Agreement will provide funding to begin the next phase of the landmark research project.

CARE is the product of the historic NCAA-DOD Grand Alliance that was created in 2014.

This next phase of CARE, known as the CARE/Service Academy Longitudinal mTBI Outcomes Study (SALTOS) Integrated (CSI) Study, will investigate the nature and causes of long-term effects of head impact exposure (HIE) and concussion/mild traumatic brain injury in NCAA student-athletes and military service members.

The newly awarded funding from MTEC/DoD and the NCAA provides the CSI Study investigative team additional resources to build upon existing CARE/SALTOS research by following former CARE research participants beyond graduation to evaluate the long-term or late effects of HIE and/or concussion/mTBI for up to 10 years or more after initial exposure or injury.

The most comprehensive, prospective study of its kind to better understand concussion, HIE and effects on brain health, the CARE Consortium is funded by the NCAA and DOD with broad aims to enhance the health and safety of NCAA student-athletes and military service members. It also serves as a valuable resource for youth sports participants and society at large. It is the first major concussion study to assess both women and men in 24 sports; before CARE, most concussion literature came from men's football and men's ice hockey.

The latest awards bring the total Grand Alliance funding now to over $105 million.

The initial phase of CARE focused on the six-month natural history and neurobiology of acute concussion and HIE. The second phase, CARE 2.0, prospectively investigated the intermediate effects — such as changes in brain health outcomes over a college career — and early persistent health effects associated with HIE and concussion soon after graduation.

With the MTEC/DOD award, combined with additional funding from the NCAA, the CSI Study is well-positioned to investigate the brain health of NCAA athletes and military service members who have had concussion or HIE, compared to those who have had neither. Additionally, the effects of other medical conditions on brain health will be assessed in military service members.

Anticipated outcomes from the CSI Study include determining the prevalence and characteristics of long-term brain health problems associated with HIE and concussion and mild traumatic brain injury. The study also seeks to validate advanced biomarkers (such as neuroimaging and blood) that detect early indicators of such long-term health issues.

"Identifying the neurobiological pathways that possibly contribute to long-term negative consequences of concussion and repetitive head impacts is critical for the development of early interventions and strategies in athletes and service academies who are at risk," said NCAA Chief Medical Officer Dr. Brian Hainline. "We are confident this award from MTEC, coupled with additional funding from the NCAA and DoD, will provide us the support to develop an array of interventions that might mitigate possible long-term effects of concussion or HIE."

"The process of conducting warfighter brain health research is maximized through partnerships like this with other governmental agencies, industry and academia through data sharing and analysis activities," said Terry Rauch, Ph.D., director of medical research and development at the Office of the Assistant Secretary of Defense for Health Affairs. "We must continue to refine our approaches toward protection and mitigation of TBIs including concussion. As the Department better understands brain exposures and injuries, we will begin to reduce potentially negative long-term and late effects."

An integrated public/private effort, CSI is designed to identify the unique individual characteristics (such as phenotypes/genotypes) of individuals at a higher versus lower risk of negative outcomes associated with concussion and HIE. Findings will be published, making them available to the broader scientific community to promote further development of specific strategies for injury prevention, early recognition, and mitigating treatments of those at greatest risk of brain health effects.

Launched in 2014 as part of the NCAA-DOD Grand Alliance, the CARE Consortium is overseen by principal in-

CDR Concussion Defense Reporter

vestigators at research institutions across the country. Leveraging its extensive infrastructure and experienced research team, CARE has published over 80 scientific papers that provide critical contributions toward advancing the science of mTBI/concussion and HIE.

The Indiana University School of Medicine serves as the administrative and operations core and is the central coordination center for the CARE Consortium. Led by Dr. Thomas W. McAllister, professor of psychiatry, the Indiana team provides regulatory and fiduciary oversight, as well as biostatistics and data management, neuroimaging, bioinformatics, biomarkers/biospecimen management, and other support resources for the consortium.

The University of Michigan leads the longitudinal clinical study core, a prospective, multi-institution clinical research protocol studying the natural history of concussion among NCAA student-athletes and military service academy cadets. Steven Broglio, Ph.D., professor of kinesiology and director of the U-M Concussion Center, leads this effort.

Michael McCrea, Ph.D., professor of neurosurgery and co-director of the Center for Neurotrauma Research at the Medical College of Wisconsin, directs the advanced research core, which includes head impact sensor technologies, advanced neuroimaging and biological markers that include detailed genetic testing.

The Uniformed Services University of the Health Sciences coordinates engagement with the four military academies in the consortium. Retired Army Col. Paul F. Pasquina, M.D., professor and chair of the department of rehabilitation medicine and director of the Center for Rehabilitation Sciences Research, leads this aspect of the study.

The Next Phase of the CARE Consortium

(Editor's Note: The following was provided by the NCAA.)

Despite the prevalence of concussions among student-athletes and active military service members, many mysteries remain on treating and preventing mild traumatic brain injury. The NCAA-U.S. Department of Defense Concussion Assessment, Research and Education Consortium — the largest concussion and repetitive head impact study ever conducted — aims to help physicians better understand these mysteries by attempting to more clearly define and identify the natural history and neurobiology of concussion and repetitive head impact exposure.

"We didn't understand concussion that well. We didn't know the natural history of concussions. There were no objective biomarkers for concussion. There were so many unanswered questions," said NCAA Chief Medical Officer Brian Hainline in this week's Social Series episode. "The NCAA thought it was a phenomenal opportunity to work in a partnership with the DOD to investigate this space that has now (resulted in) the CARE Consortium."

Hainline was joined on the podcast by Terry Rauch, director of medical research and development at the Office of the Assistant Secretary of Defense for Health Affairs, and CARE principal investigator Dr. Paul Pasquina, professor and chair of the Department of Physical Medicine and Rehabilitation at the Uniformed Services University of the Health Sciences and chief of the Department of Rehabilitation at Walter Reed National Military Medical Center.

NCAA-DOD collaboration

The NCAA-DOD research collaboration was officially established in May 2014 as the NCAA-DOD Grand Alliance. The NCAA and DOD saw that a research partnership between the two organizations would use their unique positions in the concussion space.

"I've had the privilege, but also the responsibility, of taking care of numerous service members that have sustained blast-related (and) impact-related brain injuries. And, quite frankly, distinguishing the two of those is very difficult," Pasquina said.

Reported mild traumatic brain injuries from military service members in Iraq and Afghanistan, Pasquina said, happened biomechanically like a sport-related concussion. Further, demographic similarities abound when comparing service members and student-athletes.

"They're athletic, they're intelligent, they're goal-seeking, and they push themselves to the edge of excellence from a sport point of view and a military point of view," Hainline said.

Changing the culture around concussion

Pasquina shared that he believes CARE results have prompted a fundamental shift in treating individuals with concussion/mTBI. If he had one overall message, he said, it would be that everyone recovers at a different rate.

"We've learned the traditional adage of, 'Oh, you'll get better in five days or one week or two weeks' are arbitrary numbers," Pasquina said. "What we've discovered is highly motivated athletes, cadets, midshipmen are going to return as soon as possible. But only 80% will be better within two to three weeks, and 20% will have persistent symptoms."

Pasquina remains optimistic that the knowledge gained from this study will hopefully feed out to all universities and

club sports, high school sports, peewee sports, and all athletic and nonathletic events.

The study has also bridged long-existing gaps in concussion research. For example, before the CARE Consortium, there was very little data on female concussions across all 24 sports. By conducting the research and getting new information — such as female concussion data — CARE has contributed significantly to a change in the perceived norms of concussion safety.

Forward-thinking research

The CARE Consortium recently received a $25 million award from the Medical Technology Enterprise Consortium via the U.S. Army Medical Research and Development Command to conduct its next research phase. The phase, called the CARE-SALTOS Integrated Study, is designed to follow athletes 10 or more years after concussive injury and repetitive head impact exposure.

"Some head injuries that occur at a certain point of time may have a consequence later on in life and may place individuals at risk for certain types of neurodegenerative disorders," Rauch said. "These are things that we need to understand when we put service members in harm's way, whether it be training or deployment, and they suffer repeated head injuries over the course of the time they serve. We need to understand how that may affect them later in life."

During the episode, Hainline, Rauch and Pasquina expressed a hope that CARE may contribute to a deeper understanding about the impact of certain concussion/mTBI events and later effects on student-athlete and service member health.

"On the DOD side, we care about the health of our young men and women that are wearing the uniform and defending this nation," Pasquina said. "On the NCAA side, they care about the health and welfare of their student-athletes, not just for the short term while they're at the university, but for their long term, as well."

"It's been a privilege, a pleasure and eye-opening," Hainline said. "We've discovered so much, and the NCAA is really grateful for the ability to work with the Department of Defense. It's a partnership that means the world to us, but I also think to society."

Issue of Past Concussions, One Arising from Cheerleading Accident, Are key Component in Indiana Supreme Court Decision

The Indiana Supreme Court has delivered a mixed ruling in a case involving a young woman, who suffered a head injury in a car accident and subsequently sued the other driver.

Complicating the case were the other two previous concussions that plaintiff Sydney Renner suffered, one when she fell on a swing set in 2013 and then another, in 2014, when she fell six to eight feet during a cheerleading routine, hitting her head on the floor.

The incident leading to the litigation occurred on April 20, 2016, when then-18-year-old Renner was stopped in traffic and Trevor Shepard-Bazant struck the back of her vehicle at a low speed, pushing her into the vehicle in front of her. Although shaken and upset by the accident, Renner did not strike her head, lose consciousness, or lose her ability to recount the accident. And she told a police officer dispatched to the scene that she was fine. Renner drove her car home, but soon noticed she had a severe headache. This concerned her mother because Renner had a history of two significant concussions (mentioned above).

In the previous concussions, Renner was treated by Dr. Timothy Mullally. After the second concussion, Dr. Mullally instructed her parents to take her to the hospital if she suffered another head injury and a headache. So, when Renner arrived home after the 2016 accident complaining of a severe headache, her mother took her to the emergency room right away.

At the emergency room, Renner told the doctor she had a headache, but no neck or back pain. The treating doctor prescribed medication and advised her to follow up with her personal physician. Renner visited Dr. Mullally the next day. Once again, he diagnosed Renner with, among other things, a concussion. He referred her to a physical therapist for further evaluation and advised her to rest.

Renner 's injuries occurred at a particularly inconvenient time for her. Both her senior prom and a post-prom trip to an amusement park were scheduled just days after the accident. And despite the protests of her parents and Dr. Mullally's advice to rest, Renner attended both events. Both events caused her to develop severe headaches and the roller coasters resulted in memory loss.

During the following months, Renner was treated by several healthcare providers. Sometimes she followed their advice, other times she did not. Renner 's symptoms were much more prolonged than they had been in either 2013 or 2014. She also suffered two additional head injuries during the summer after her 2016 accident: the first when she lost her balance

CDR Concussion Defense Reporter

and struck her head on a doorknob, and the second when her brother accidentally kneed her in the head while wrestling. However, aside from her headaches, her symptoms had dramatically improved by the time she began college classes at Indiana University Northwest in the Fall of 2016.

Still, Renner did not perform well in her college classes. She attributed her headaches and difficulty concentrating to the accident and claims that these problems, in turn, caused her to struggle in school. Her parents also noticed her becoming forgetful. However, testimony at trial revealed several other factors that potentially affected her performance, including her poor study habits, excessive TV viewing, irregular sleep patterns, and job obligations.

Attributing her problems to the 2016 car accident, Renner sued Trevor for negligence. After he failed to timely answer her complaint, the trial court granted a default judgment. The court then held a seven-day trial on damages. Sydney requested over $600,000 in damages, while Trevor argued that she should not recover more than $20,000. The trial court ultimately awarded Renner $132,000 in damages. In reaching this figure, the court factored in all five concussions that Renner suffered from 2013 to 2016, along with her medical expenses and her failure to follow post-concussion protocols recommended by her treating physicians.

Renner filed a motion to correct errors, asking the court to increase the damages awarded. After a hearing, the trial court denied her motion, stating again that Renner 's injuries arose from the cumulative effects of at least five documented concussions, and all of these traumas contributed to her present condition.

Renner appealed and the Court of Appeals reversed. Renner v. Shepard-Bazant, 159 N.E.3d 1, 13 (Ind. Ct. App. 2020). The panel held the trial court erred in its calculation of damages because "(1) the court failed to apply the eggshell-skull doctrine; and (2) Trevor did not meet his burden of showing that Renner suffered separate harm, from either the head injuries sustained after the accident or from her failure to follow her healthcare providers' advice. Id. at 10, 12. The Court of Appeals remanded to the trial court for retrial on the amount of damages. Id. at 13.

Trevor petitioned this Court for transfer, which we granted, thus vacating the Court of Appeals opinion.

The Supreme Court wrote that "in resolving whether the trial court's award of damages was inadequate, we consider three issues. First, we consider whether the trial court improperly reduced Sydney's award for her post-accident failure to mitigate damages. See infra Section I.A. Second, we consider whether the trial court properly concluded Trevor's negligence was not the sole cause of all of Renner 's injuries. See infra Section I.B. Finally, we consider whether the trial court improperly reduced Renner 's award for the two concussions she sustained before the accident. See infra Section II."

On the first point, the court wrote that "the trial court properly reduced Sydney's damages because she failed to mitigate her damages and failed to show the accident caused all of her injuries."

The high court relied heavily on *Humphrey v. Tuck*, No. 20S-CT-548, __ N.E.3d __ (Ind., Sept. 8, 2020) in deciding this point. "Overall, viewing the evidence most favorably to the trial court's judgment, the trial court properly concluded that Trevor carried his burden to show both elements of his mitigation-of-damages defense," wrote the court. "The evidence presented shows that Renner negligently disregarded her doctors' recommendations to avoid physical activity and busy environments and to fill her eyeglass prescription to help with her headaches. Based on this evidence, it was reasonable for the trial court to infer that Renner 's failure to follow her doctors' instructions exacerbated her symptoms and prolonged her recovery. Although Trevor could not quantify how much harm Renner suffered from her decisions to disregard her doctors' orders, this evidence, as in *Tuck*, was sufficient for the finder of fact to reasonably conclude that Renner 's failure to follow her doctors' orders caused 'a discreet, identifiable harm.' See *Tuck*, 151 N.E.3d at 1208 (quoting Willis, 839 N.E.2d at 1188)."

On the second argument, that Renner failed to show that Trevor's negligence caused all of her injuries, symptoms, and poor academic performance, the court agreed. "While Trevor presented no expert witnesses to rebut Sydney's claims for damages, and while a failure to present such evidence will often prove fatal to a defense, the record provides ample support for his claims," wrote the court.

The court elaborated, citing testimony that supported the trial court's finding that "the two head injuries Renner sustained during the summer following the accident were concussions. And this finding supported, in part, the court's reduction of Renner's damages. Renner, however, contests this finding as unsupported by sufficient expert testimony. We disagree. While the medical testimony failed to show that Renner experienced new concussions because of her two post-accident head injuries, the evidence is sufficient to infer that both incidents at least caused a continuation or temporary aggravation of Renner 's existing concussion symptoms."

However, on Renner's argument that the trial court erred when it reduced her damages for her two pre-accident concussions, the court agreed with the plaintiff.

The 'Eggshell Rule'

Under the "eggshell skull" rule, "a defendant 'takes his victim as he finds him.' Bailey v. State, 979 N.E.2d 133, 142 (Ind. 2012)," according to the high

court. "This longstanding rule recognizes that 'if one throws a piece of chalk' at a 'victim with an eggshell skull, and the chalk strikes the victim and fractures his skull, the perpetrator would be guilty . . . even though he did not intend to do great bodily harm.' Defries v. State, 264 Ind. 233, 244-45, 342 N.E.2d 622, 630 (1976).

"A defendant is thus liable to the extent that their conduct aggravates a pre-existing condition, but is not liable for damages stemming from a pre-existing injury that independently causes harm. Dunn v. Cadiente, 516 N.E.2d 52, 56 (Ind. 1987).

"In its order denying Renner 's motion to correct error, the trial court noted that Trevor 'is not excused from liability just because Renner had suffered previous concussions.' Appellant's App. Vol. 2, p. 28. However, the following paragraph shows that, at a minimum, the court did not properly apply the eggshell-skull rule. 'The extent of [Trevor]'s liability,' the order states, 'is determined by causation. Renner's injuries arose from the cumulative effects of at least five documented instances of mild traumatic brain injury.' Id. at 29. The court concluded that '[a]ll of these traumas contributed to her present condition' and, therefore, denied Renner 's motion to correct error. Id.

"Expert testimony established that concussions are cumulative, meaning that the 'more concussions you have, the more likely you are going to have permanent . . . brain damage.' Tr. Vol. 3, p. 48 (testimony of Dr. Salberg). Expert testimony likewise established that Sydney's prior concussions made her more vulnerable to concussions in the future. But this testimony did not show that her two pre-accident concussions proximately caused her injuries after the accident, or that she failed to recover from the concussions. No one testified that Renner continued to experience any effects of her two earlier concussions prior to the accident. To the contrary, Dr. Salberg stated that Renner 'had made a hundred percent recovery' from the two concussions. Id. at 52. And according to Dr. Fink, Sydney's current cognitive inefficiencies 'seem[ed] to start following . . . the car accident.' Tr. Vol. 2, p. 74.

The panel found that district court did not abuse its discretion in finding the opinions unreliable and inadmissible.

"To be sure, while Dr. Salberg opined that Renner had fully recovered from her concussions, he acknowledged that Renner likely wouldn't have shown the same symptoms following the accident had she not experienced the two prior concussions. And Dr. Mullally testified that it was 'possible' for 'a person that sustains her third concussion to experience a prolonged recovery [from the third concussion] more so than someone who would sustain a first or a second.' Tr. Vol. 5, p. 69. But this testimony merely suggests that the accident aggravated her pre-existing condition, not that she failed to recover from her two earlier concussions. This situation is nearly identical to the scenario of a victim with an eggshell skull. In the moments before the accident, Renner had no injuries resulting from her two previous concussions. But, like the man with an eggshell skull, her prior concussions meant that small impacts that wouldn't ordinarily have detrimental effects could cause severe symptoms. Because a defendant must take the plaintiff as he finds her, Bailey, 979 N.E.2d at 142, Trevor is liable to 'the extent to which his conduct has resulted in an aggravation of the pre-existing condition,' see Dunn, 516 N.E.2d at 56.

"In arguing that the trial court permissibly considered Renner 's prior concussions, Trevor relies on the Court of Appeals decision in Spaulding v. Cook, 89 N.E.3d 413 (Ind. Ct. App. 2017), trans. denied. But this case is distinguishable from Spaulding. The plaintiff there, who suffered from preexisting conditions, failed to inform his doctor of an earlier accident that could have also caused his symptoms, and his doctor 'could not state with absolute certainty that the accident' had caused the plaintiff's injuries. Id. at 423.

"Here, Sydney's doctors were aware of her previous concussions. And while Renner 's prior concussions may have made her more vulnerable to future injury, none of the testimony presented at trial showed that she failed to recover from her two earlier concussions. Instead, it shows that the accident aggravated her pre-existing condition, which made her more susceptible to future concussions. And the trial court recognized as much when it observed that 'the effects of multiple concussions upon an individual are cumulative.' Judgment Order at 1.

"Because the evidence, taken favorably to the trial court's judgment, did not show that Renner 's prior concussions independently caused the harm she suffered after the accident, the trial court should have applied the eggshell-skull rule and should not have reduced Sydney's damages on account of her two prior concussions."

Renner v. Shepard-Bazant; S Supreme Court of Indiana; Case No. 21S-CT-138; 8/31/21

Attorneys of Record: (FOR APPELLANT) David W. Westland, Nicole A. Bennett, Westland & Bennett, P.C., Hammond, Indiana. (FOR APPELLEE) Martin J. Gardner, Andria M. Oaks, Christopher J. Uyhelji, Gardner & Rans.

CDR Concussion Defense Reporter

Catastrophic Brain Injury Team Scores Major Win

Continued from page 1

not a sufficient evidentiary basis that Pop Warner's alleged negligence in connection with Pop Warner Football, to the exclusion of high school football, other experiences, social or biological factors, was a substantial factor[.] The plaintiffs essentially argue that any child that plays Pop Warner football, simply by virtue of participating, without any documentation of head trauma, if found with CTE postmortem, has a viable cause of action based on any occurrence as a result of recklessness or mood behaviors in that person's life. The Court does not agree that this satisfies the factual causation standard."

On appeal, plaintiffs argued that district court incorrectly excluded their causation experts, the noted pathologist Bennet Omalu and the neuropsychiatrist James Merikangas. At deposition, Merikangas admitted he had no specific basis to conclude the decedents suffered head trauma playing Pop Warner football "aside from the fact that people playing football have head trauma." Observing that the plaintiffs offered no explanation of how, given evidence of significant other independent factors, the expert found participation in Pop Warner a substantial factor in their death, district court found his opinion "unreliable" and that it should be excluded under Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590 (1993). Citing testimony from plaintiff's original neuropathologist, that there was no reason to believe the motorcycle death was anything but an accident, and that he cannot opine as to whether CTE was the cause of death in either decedent, District court also declared "unreliable" Omalu's unsupported declaration that youth football was a "substantial factor" in both deaths.

While Renner 's prior concussions may have made her more vulnerable to future injury, none of the testimony presented at trial showed that she failed to recover from her two earlier concussions.

Observing the opinions of both Merikangas and Omalu "contained no explanation supporting the logical leap from the underlying conclusion to the ultimate conclusion," and that neither "explained why Pop Warner was a substantial cause rather than simply a possible cause," the panel found that district court did not abuse its discretion in finding the opinions unreliable and inadmissible. The panel also agreed with district court's alternative holding, that even if the causation experts rendered admissible opinions, they failed to raise a triable issue, as the opinions "showed only that Pop Warner football could have caused the deaths and contained no explanation why Pop Warner football likely caused the deaths."

Anthony Corleto, partner in the Westchester office, handled the Ninth circuit argument and the successful summary judgment motion at District Court. Corleto and Houston partner Philip Brinson, co-lead the firm's Catastrophic Brain Injury Defense Group. The Catastrophic Brain Injury Defense group is made up of attorneys based nationwide with extensive experience and a track record of success defending sports concussion and CTE matters, including class actions. Our attorneys regularly work with clients to develop best practices, risk management strategies, and crisis management protocols.

Court Accords Primacy of Primary Assumption of Risk

Continued from page 1

tion of Risk and Indemnity Agreement, under which she understood and acknowledged that triathlon events – including its swimming, bicycling and running portions – are "inherently dangerous" and that participation involves risks and dangers which include the potential for serious bodily injury caused by contact or collision with other participants. Wolf agreed to release claims for liability caused in whole or in part by the negligence of other participants in the race.

Another athlete witnessed the accident and testified that, while he did not see the exact moment of contact, it was impossible to think that contact was not made due to Kaplan's proximity to Wolf at the time of her crash. This athlete testified that Kaplan momentarily and inadvertently drafted behind Wolf and

then passed her in an unsafe manner. Kaplan denied making any contact and there was no physical evidence to show contact between the bikes that Kaplan and Wolf were riding.

The trial court granted Kaplan's motion for summary judgment saying that there was no evidence Kaplan intentionally or recklessly injured Wolf. Wolf appealed claiming that the record contains questions of material fact as to whether Kaplan's actions involved reckless and/or intentional conduct that was in violation of the race rules, which she claimed caused the crash and her resulting injuries.

In July 2021, the Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County held that the alleged conduct was a foreseeable and customary risk of the sport of triathlon, that the doctrine of primary assumption of risk applies, and that, as a matter of law, the alleged conduct could not be found intentional or reckless.

The court recognized that a participant in a recreational or sport activity assumes the ordinary risks and cannot recovery for an injury without showing that the other participant's action was either reckless or intentional. This limitation is premised upon the doctrine of primary assumption of risk and is based on the rationale that such a participant assumes the inherent risks associated with the sport or activity. Citing *Gentry v. Craycraft*, 101 Ohio St.3d 141, 2004-Ohio-379, 802 N.E.2d 1116 at 10, the court said that the underlying policy is to "strike a balance between encouraging vigorous and free participation in recreational or sports activities, while ensuring the safety of the players."

The court cited a 2003 Court of Appeal of California case of *Moser v. Ratinoff*, 105 Cl. App. 4th 1211, 1222-1223, 30 Cal.Rptr.2d 198 (2003) which involved one cycling swerving into another during a long-distance ride. That court stated that "in various sports, going too fast, making sharp turns, not taking certain precautions, or proceeding beyond one's abilities are actions held not to be totally outside the range of ordinary activities involved with those sports." The court in *Moser* said that the defendant's actions may have been negligent, but they were not intentional, wanton or reckless conduct totally outside the range of ordinary activity involved in the sport.

In an extreme sport where the general public may question the extent to which it is reasonable at all, the courts have again recognized the primacy of the doctrine of primary assumption of risk.

The appellate court in *Wolf v. Kaplan* noted that "there is no question that triathlon is an inherently dangerous sport and that participation involves foreseeable risks and dangers for serious bodily injury that can arise from accidents, contact, or collision with other participants" [24]. Even though it was alleged that Kaplan passed Wolf with an unsafe maneuver, such conduct is not outside the range of ordinary activity involved in the sport.

The court further found it is not outside the range of ordinary activity involved in the cycling portion of a triathlon race for participants to come into close contact with one another, collide with another participant, or commit a rule infraction in an effort to advance their position. Such conduct is anticipated by the customs and practices of the sport, is reasonably foreseeable, and presents a risk of injury inherent in the sport.

In an extreme sport where the general public may question the extent to which it is reasonable at all, the courts have again recognized the primacy of the doctrine of primary assumption of risk, that a rule violation is in itself an insufficient basis by which to attach liability, and that free and vigorous participation in triathlons would likely be adversely affected if liability were imposed under the circumstances at bar.

