SPRING 2022

CONCUSSION DEFENSE REPORTER

Riddell Picks Up Another Legal Victory in Concussion Case, After Court Pans Plaintiffs' Expert Testimony

A federal judge from the Northern District of Illinois has handed Riddell a major victory in a case where former high school football players sued the helmet maker, claiming a lack of warnings or "misleading" warnings contributed to the long-term brain and neurocognitive injuries that arose from the head injuries they suffered while playing football.

Central to the court's findings was its determination that the plaintiffs' expert witness testimony lacked credibility.

The plaintiffs in the case are all former high school football players in Texas or Iowa. There are seven bellwether plaintiffs: Simson Green, Jaquaries Johnson, Gregory Page, Michael Sterns, Ashton Whitby, Walker Whitehorn, and Jeffrey Wodka.

The defendants are two related business entities: BRG Sports, Inc., formerly known as Riddell Sports Group, Inc., and Riddell, Inc., a wholly owned subsidiary of BRG. Both companies are involved in the manufacturing, distribution, and sale of Riddell football helmets.

Each plaintiff wore a Riddell helmet during the time period relevant to these lawsuits, some as early as 1975 and others as late as 2002 or later. Beginning in 1983 and until the late 1990s, Riddell affixed

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High School Concussion Case Filed Decades Too Late

By Jeff Birren, Senior Writer

Sports-related concussion cases have received a lot of publicity and this in turn continues to generate more cases. One such case was filed in the United States Federal Court in Florida. Plaintiff Maurice Jackson claimed that while playing high school football, he suffered severe blows to his head that caused "disorientation, a ringing sensation, hearing loss, nausea, and vomiting." Despite these asserted symptoms, Jackson was allegedly encouraged to continue to play, and, as a result, he has long term brain damage and other symptoms consistent with CTE. However, Jackson also alleged that this happened in 1990 and 1991, and that his contemporaneous symptoms were "clear" at the time of the injuries. Jackson finally sued in 2020. The District Court dismissed the case as untimely. Recently, the Eleventh Circuit affirmed in an unpublished opinion (Jackson v. Scott, Case No. 21-11572, Non-Argument Calendar ("Jackson") (1-4-22)).

Facts

Jackson "played high school football at several Broward County, Florida high

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For Those (Still) Keeping Score

By Anthony B. Corleto and Ikedi O. Onyemaobim , of Gordon Rees Scully Mansukhani, LLP.

Our last review of reported outcomes in chronic traumatic encephalopathy ("CTE") cases—For Those Keeping Score, Dec. 2020—covered developments in Archie v Pop Warner,[1] the Honorable Anita B. Brody's rationale for approving the National Football League's class settlement,[2] rejection of a homicide defendant's petition to assert a CTE defense,[3] summary judgment based on the participant waiver in an NCAA post-concussion syndrome case,[4] and the Onyshko defense verdict against claims that college football caused ALS.[5] We concluded that contrary to media portrayal, judicial outcomes reflect reality: science has not determined that contact sport participation leads to CTE and cognitive decline.

But wait, there's more . . .

In April 2021, Riddell helmet maker, BRG Sports, Inc., scored a major victory in the product liability multidistrict litigation ("MDL") pending in the Northern District of Illinois, Adams v BRG Sports, Inc.[6] There, plaintiffs claimed that design defects and failures to warn caused them to suffer "brain and neurocognitive injuries" related to concussions, as the result of playing high school football while wearing a BRG/Riddell helmet. Each claimed that wearing a "better designed helmet" would have prevented or lessened the severity of their injuries. Plaintiffs' expert, neurologist Dr. Randall Benson, MD, essentially opined that "good helmet design can mitigate the risk of head injuries." Concluding that this opinion fell "short of providing evidence sufficient to permit a reasonable jury to find the required connection between Riddell's helmet designs and the plaintiff's injuries," the court granted Riddell's motion for summary judgment on design defect claims. Finding that Riddell did not address causation in the failure-to-warn context, the plaintiffs' failure-to-warn claim survived.

In September 2021, the Ninth Circuit affirmed the lower court's order granting summary judgment in Archie v. Pop Warner Little Scholars, Inc., concurring that plaintiffs' experts, the pathologist Bennet Omalu, MD, MBA, MPH, CPE, DABP-AP,CP,FP,NP and the neuropsychiatrist James R. Merikangas, MD, had no reliable bases for their opinions,[7] and that there was "too great an analytical gap between the data and the opinion proffered."[8] The Archie plaintiffs claimed that playing youth football between age 8 and 14 caused their sons to die some ten years later in their mid-20's, by self-inflicted gunshot wound and in a high speed motorcycle accident. Allowing that each expert concluded playing Pop Warner football could have caused CTE, and CTE is linked to suicidal and reckless behaviors, the court found that neither expert had adequately explained "the logical leap from the underlying conclusion to the ultimate conclusion." Finding that the experts had only shown that Pop Warner football could have caused plaintiffs deaths, and had failed to explain why Pop Warner football was the likely cause of death, the Ninth Circuit also agreed with the lower court's alternative holding, that even if Dr. Omalu and Dr. Merikangas' opinions were admissible, they each failed to raise a triable issue of fact as to causation.

In October 2021, BRG Sports, Inc. won summary judgment against the CTE suicide claim of a former high school football athlete, in Wilbourn v BRG Sports, Inc.[9] There, the plaintiff claimed to have suffered at least 14 concussions wearing a Riddell helmet. As with the Archie

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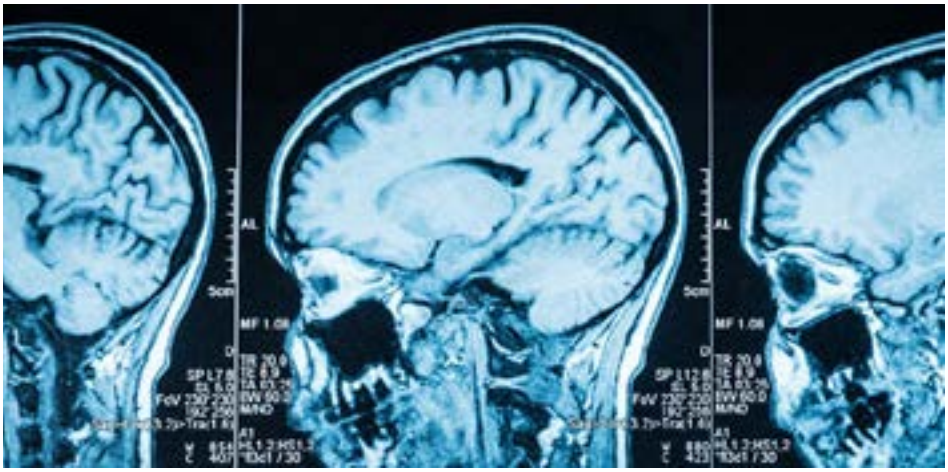

plaintiffs, the Wilbourn plaintiff's brain was submitted to Boston University, and as in Archie, the suicide was attributed primarily to psychological factors, such as depression, and CTE was considered only a "contributing diagnosis." As in Adams, the Wilbourn court points out the critical evidentiary gap in Dr. Benson's analysis: whether CTE would have occurred without the use of Riddell helmets. "Benson's report presents no evidence to show that the helmets were a 'substantial factor' in [plaintiff's] death." Expressing sympathy for the plaintiff, the court notes that it is not the first to face these issues, specifically citing Adams, Archie, and Judge Brody's rationale in the NFL class action settlement: "Clinical study of CTE is in its infancy" and it is "difficult to draw generalizable conclusions" until there are "long term, longitudinal, prospective epidemiological studies in living subjects."

In January 2022, BRG Sports, Inc. secured another momentous summary judgment in the Northern District of Illinois.[10] Specifically, the court in Adams v. BRG Sports, Inc. granted summary judgment over the bellwether plaintiffs who claimed Riddell helmets had insufficient injury warning labels. With respect to the failure to warn claims that survived the April 2021 summary judgment (discussed above), Judge Matthew F. Kennedy ruled in favor of BRG Sports because the bellwether plaintiffs "came nowhere close" to producing expert testimony necessary to go to trial over Riddell helmets' alleged deficient warning. This ruling marks the ends each of the bellwether plaintiffs' lawsuits against BRG Sports. However, Judge Kennedy concluded that the ruling cannot be used by BRG Sports to dismiss claims from other plaintiffs whose lawsuits "were expressly put on hold" pending the bellwether plaintiffs' litigation, as doing so "would amount to a serious violation of due process—dismissing the claims of dozens of plaintiffs without giving them an opportunity to be heard."

So, for those still keeping score on outcomes, the defense is still winning.

Read more about our Catastrophic Brain Injury Defense Group.

[1] Archie, et al. v. Pop Warner, USDC CDCA, No. 2:16-cv-06603. Plaintiff McCrae's claim with respect to her son Richard Caldwell was dismissed for failing to satisfy the discovery rule. ("…that McCrae 'did not become aware that Richard's participation in youth tackle football caused him to develop chronic traumatic brain injuries until the issue was widely publicized in December 2015' … falls short of meeting the discovery rule…" Archie v. Pop Warner, 20, 2017, Docket No. 107, at 8, 9). The Barnes plaintiffs' claims were dismissed for lack of standing ("… the increased risk of a future potential injury is insufficient to meet the injury in fact requirement of Article III standing." Archie v. Pop Warner, Oct 20, 2017, Docket No. 107, at 11, 12).

[2] In re Nat. Football League Players' Concussion Inj. Litig., 307 F.R.D. 351, 382 (E.D. Pa. 2015) (certifying an NFL concussion settlement class because "compensation would be certain").

[3] Humphries v. Sherman, CV 18-5748, 2019 U.S. Dist. LEXIS 88116, April 11, 2019 (questioned counsel about the factual basis for pursuing a CTE defense and finding it wanting).

[4] Bradley v. NCAA, 16-346, 2020 US Dist Lexis 94091, May 29, 2020. ("Therefore, the Court agrees with the University defendants that "[b]ecause the Acknowledgement of Risk form signed by [the] [p]laintiff applies to injuries arising from inherent risks of the sport, such as concussions, as well as the subsequent treatment of such injuries, the] [University] [d]efendants are entitled to summary judgment as a matter of law," Univ. Defs.' Mem. at 20, and "concludes that the [41] District of Columbia would apply its normal rule enforcing waivers that are clear and unambiguous.")

[5] Onyshko v. National Collegiate Athletic Ass'n., No. C-63-CV-201403620 (Wash. Cty. Ct. Comm. Pleas, PA).

[6] Adams v. BRG Sports, Inc., No. 17 C 8544, 2021 WL 1517881 (N.D. Ill. Apr. 17, 2021).

[7] Archie v. Pop Warner Little Scholars, Inc., No. 20-55081, 2021 WL 4130082, at *1-2 (9th Cir. Sept. 10, 2021) (citing Kumho Tire Co. v. Carmichael, 526 U.S. 137, 146, 143 L. Ed. 2d 238 (1999)).

[8] Archie v. Pop Warner Little Scholars, Inc., No. 20-55081, 2021 WL 4130082, at *1 (9th Cir. Sept. 10, 2021) (citing Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146, 139 L. Ed. 2d 508 (1997)).

[9] See Wilbourn v. BRG Sports, Inc., No. 4:19-CV-0263-P, 2021 WL 4988044 (N.D. Tex. Oct. 27, 2021).

[10] See Adams v. BRG Sports, Inc., No. 17 C 8544, 2022 WL 93497 (N.D. Ill. Jan. 10, 2022).

Anthony B. Corleto

In Latest Chapter of NFL Concussion Litigation Saga, NFL Fights with Its Insurers—and Its Insurers Fight Among Themselves—Over $1 Billion in Coverage

(Editor's Note: What follows appeared in Sports Medicine and the Law, a periodical produced by Hackney Publications and Montgomery McCracken)

By Joseph E. Samuel, Jr., Esq.

Nearly seven years after reaching a class-wide settlement—then estimated at roughly $1 billion—with thousands of retired players who brought concussion-related lawsuits, the National Football League is now pressing its claims in New York state court to recoup those funds from various insurers. Meanwhile, disputes remain even among the insurers themselves about who is liable.

In a widely publicized 2015 settlement approved by the U.S. District Court for the Eastern District of Pennsylvania, the NFL agreed to set up an open-ended fund to compensate the alleged victims in a class of concussion lawsuits. Individual payouts from the fund were capped at $5 million. Players were required to submit to baseline assessments and other medical examinations to determine their injuries. At the time, experts predicted that the fund would pay out at least $1 billion. As of the Claims Administrator's latest status report in January 2022, the fund has already paid over $861 million, including over $830 million to members of the class and their lawyers. Since that settlement, the NFL continued to litigate against various insurers in an effort to obtain coverage. Twenty-nine such insurers have resolved the claims against them, including Westport Insurance Corp., but the NFL continues to litigate against four insurers.

In September 2021, insurer American Guarantee and Liability Insurance Company ("AGLIC")1 moved for summary judgment on the NFL's coverage claims against it, arguing that the very nature of concussion-related football injuries means that the NFL is not eligible to recover under AGLIC's policy.2 AGLIC argued that the excess policy it issued the NFL only applies when the NFL "at minimum, exhaust[s] the $51 million in coverage provided by the primary, umbrella and lower-level excess insurance policies beneath AGLIC's coverage." Because those underlying policies do not have aggregate limits, AGLIC argued, its re-insurance policy can never be triggered, and there is $51 million available for each "occurrence." AGLIC claimed that "each player's alleged injuries from head impacts are at least one 'occurrence,'" and because the class-wide settlement limits any payments to players at $5 million each, AGLIC's re-insurance policy can never be reached.

The other three insurers in the case strenuously opposed AGLIC's motion.3 In a November 2021 filing, TIG Insurance Company, the North River Insurance Company, and the U.S. Fire Insurance Company4 disputed whether each former player's impacts to the head during football games constituted an "occurrence," calling this a "flawed assumption." Instead, these insurers suggested that "the NFL Parties' allegedly fraudulent and knowing conduct" weighs on whether there even was an occurrence and, if so, the number of those occurrences. These insurers also argued that summary judgment is premature given that fact discovery, including depositions, is yet to conclude. Notably, the insurers claimed that "the determination of the number of occurrences is a highly fact-intensive inquiry and an issue of first impression in the context of sports-related head trauma claims, not just in New York but throughout the country."

In its own response,5 the NFL sided with AGLIC and agreed that with respect to the other three insurers' policies, that there "is at least one separate 'occurrence' and thus at least one separate 'per occurrence' limit for each underlying tort claimant." The NFL also agreed that these policies have no aggregate limits. However, the NFL asked the court to "discontinue" its claims against AGLIC without prejudice, arguing that it was too early to determine "definitively" whether any former NFL players who opted out of the class-wide settlement might have claims that exceed $51 million at some point in the future. Importantly, the NFL noted that AGLIC's excess policy only covered a single season—the 2001-02 policy period—while the Fairfax insurers "together issued 24 consecutive years of primary coverage from 1978 through 2002 as well as a number of umbrella and excess policies."

In other words, the dispute pits AGLIC and the NFL on the one hand, with the Fairfax insurers on the other. It will turn on what the Fairfax insurers dubbed "an issue of first impression … throughout the country"—namely, whether the repeated impacts to the head experienced

1 AGLIC is a member of the Zurich Insurance Group.

2 See AGLIC's Memorandum of Law in Support of Motion for Summary Judgment, Alterra America Ins. Co. v. NFL, Case Index No. 652813/2012, at Doc. No. 648 (N.Y. Sup. Ct. Sept. 30, 2021).

3 See Alterra, at Doc. No. 674.

4 These three insurers are each subsidiaries of conglomerate insurer Fairfax Financial Holdings Limited.

5 Alterra, at Doc. No. 688.

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during football by each former player themselves constitute "occurrences," or whether the NFL's alleged "concealment and misrepresentations of the alleged risks of football" is itself the "occurrence," as the Fairfax insurers argue.

Oral argument on AGLIC's motion is scheduled for April 19, 2022. At that argument, AGLIC and the NFL will rely on New York law that holds "the operative occurrence" to mean "the last link in the causal chain leading to [the insured's] liability. Appalachian Ins. Co. v. Gen. Elec. Co., 8 N.Y. 3d 162, 170-173 (2007) (citing Arthur A. Johnson Corp. v. Indem. Ins. Co., 7 N.Y. 2d 222 (1959). According to AGLIC and the NFL, this is also referred to as the "unfortunate event" test, differing from a test that other jurisdictions apply that instead looks to the originating cause.6 Applying this test in light of the temporal and spatial differences between each claimant, AGLIC and the NFL argue, the court must conclude that each claimant's repeated exposure to head impacts during NFL football constitute the "last link in the causal chain."

The three Fairfax insurers argue that Appalachian Ins. Co. and other related cases are "factually distinguishable" because they involve incidents of sexual abuse or exposure to toxic substances like asbestos. The insurers claim that the underlying class of former players did not seek to hold the NFL liable for head impacts during football, a risk the insurers called "inherent" and "voluntarily assumed by players who chose professional football as a career." Instead, the Fairfax insurers claim that the underlying "occurrence" is the NFL's "misrepresentation or fraudulent concealment of the risks of such head trauma."

Is Insurance "Killing Football"? An Update

It remains to be seen how the court will rule after the April 2022 oral argument, but the decision could have a major impact on how insurers view and value the risks of football going forward. In a previous article titled Insurance is Not Killing Football, Other Contact Sports—It's Making Them Safer, we noted how ESPN's Outside the Lines was reporting that the insurance market for football and other high-contact sports was at risk of drying up. That Outside the Lines report specifically identified asbestos litigation as a potential roadmap of how insurance coverage issues might proceed.

Now, in light of AGLIC's motion, the comparison seems particularly poignant. AGLIC and the NFL are seeking to hold the Fairfax insurers liable based on caselaw that developed primarily in the context of asbestos and other toxic torts. See Appalachian Ins. Co., 831 N.Y. 3d at 162. Meanwhile, the Fairfax insurers seek to distinguish those cases by highlighting differences between the repeated "occurrences" that take place in the toxic tort context and the allegedly single "occurrence" of the NFL's "misrepresentation or fraudulent concealment of the risks of such head trauma."

If AGLIC and the NFL prevail, and repeated instances of head trauma are directly linked to toxic tort cases, the warning from Outside the Lines carries more weight. But if the Fairfax insurers prevail, and the underlying occurrence is viewed merely as the collective action of NFL executives, the comparison to asbestos is no longer as strong. Put simply, insurers might be more willing to offer brain trauma insurance if courts begin to view actions by organizational leaders as the underlying insurable risk, rather than the inherent nature of football and other contact sports. This could have major implications for organizations like Pop Warner, who itself is engaged in concussion litigation and recently won a major victory in the U.S. Court of Appeals for the Ninth Circuit.7

Sports Medicine and the Law will continue to follow the NFL's pursuit of insurance coverage over its concussion litigation settlement and will provide an update after the New York Supreme Court resolves this novel and important legal issue.

6 See supra note 5, at 11-12.

7 See, e.g., Archie v. Pop Warner Little Scholars, Inc., 2019 WL 8230854 (C.D. Cal. Dec. 27, 2019), aff'd, 2021 WL 4130082 (9th Cir. Sept. 10, 2021) (granting summary judgment to Pop Warner because there was "not a sufficient evidentiary basis that Pop Warner's alleged negligence in connection with Pop Warner Football . . . was a substantial factor in" a class action claimant's accident and another's suicide allegedly resulting from chronic traumatic encephalopathy (CTE)).

Study Explores Methods to Help Reduce Injury Following Successful Post-Concussion Return-To-Play

Children's Hospital Colorado (Children's Colorado) has released a study that examines the efficacy of a neuromuscular training (NMT) intervention that may lead to new treatment approaches and better outcomes for athletes when they return to playing sports after a sports-related concussion.

While preliminary, the findings indicate the risk of sports-related injuries for the year after a concussion among the control group (athletes who did not participate in the NMT intervention) was 3.6 times higher than the risk of injury in the group of athletes who completed the NMT training. The full study, funded by the Children's Colorado Research Institute Pilot Award Program, is featured in the American Journal of Sports Medicine.

David R. Howell, Ph.D., ATC, lead researcher at the Sports Medicine Center, Children's Colorado, and assistant professor in the Department of Orthopedics, University of Colorado School of Medicine, conducted the single-site prospective randomized clinical trial along with a team of other investigators from Children's Colorado's Sports Medicine Center.

"It is important to understand that a concussion is a brain injury, but it is one that athletes can recover from. However, prior research indicates athletes who are cleared after a concussion have a greater risk of subsequent sports-related injuries such as ACL tears or sprained ankles than those without a concussion," said Dr. Howell. "We want to understand the risks and potential ways to mitigate risks so kids can get back to safely doing the things they love."

Persistent neuromuscular control deficits (trouble with balance, posture, reaction time, or other functions necessary for sports performance) have been documented after athletes are cleared to return to sports. In prior studies, this research team found that athletes demonstrated post-concussion deficits that were detected when combining motor and cognitive measures. They also found that those deficits may take longer to resolve than symptoms and may contribute to a higher injury risk after a concussion. In the study, 27 youth athletes were put through a progressive intervention including core strength training, multi-tasking performance and motor factors (balance, posture, attention, orienting, awareness or functional adaptability) over an eight-week period after clearance to return to playing sports.

Despite the study limitations, these findings provide initial promising evidence for clinicians to consider when developing return-to-play and rehabilitation programs for athletes who sustain a concussion.

For a year after returning from an injury, athletes kept a monthly log of sports-related injuries and organized sport competitions. Preliminary data found that during the year after returning to sports following a concussion, time-loss sports-related injuries were more common among control group participants relative to NMT intervention group participants, despite similar levels of sports competition between the two groups over the year (75% of the control athletes sustained an injury vs. 36% of the NMT group).

"An injury to the brain impacts many different parts of the body and the severity is hard to judge. The brain is the core of who you are—it touches all facets of your life and has many different effects on individuals. Each athlete is on a recovery spectrum post-concussion, so we need to understand what interventions or treatments might work best for each individual,» said Dr. Howell. "The clinical takeaway from this study was that a relatively simple and progressive intervention performed twice per week under guidance of an athletic trainer can help keep athletes safe during a time after concussion where they may be potentially vulnerable to further injuries."

After athletes were cleared to return to sports following a concussion, the NMT intervention demonstrated a significant protective effect in reducing time-loss, sports-related injury over the subsequent year. Despite the study limitations, these findings provide initial promising evidence for clinicians to consider when developing return-to-play and rehabilitation programs for athletes who sustain a concussion. This is part one of a two-part study. The next steps involve understanding if the same effects can be observed using a more accessible approach where the researchers ask athletes to perform a guided intervention using telehealth or smartphone technology.

"The hope is that under proper guidance of a sports medicine clinician or concussion specialist, this approach can be accessed by athletes who do not have everyday access to in-person rehabilitation," said Dr. Howell.

More information: David R. Howell et al, An 8-Week Neuromuscular Training Program After Concussion Reduces 1-Year Subsequent Injury Risk: A Randomized Clinical Trial, The American Journal of Sports Medicine (2022). DOI: 10.1177/03635465211069372

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warning labels to the back of its football helmets. The warning stated: "Do not use this helmet to strike an opponent. Such an action is against football rules and may cause severe brain or neck injury. Playing the game of football in itself can cause injury, and no helmet can prevent all such injuries."

The plaintiffs asserted that this label was "inherently misleading" by conveying that the helmet would protect against injuries so long as participants adhered to the rules of football. They also alleged that Riddell had "superior knowledge" about the relative risks of wearing helmets as early as the 1970s but did not disclose those risks. The plaintiffs further alleged that Riddell's later warnings—including those involving the "Revolution Helmet" product line from 2003, which Riddell claimed to be 31 percent safer than other available helmets—"were similarly misleading and failed to effectively disclose the long-term dangers these players would be exposed to while wearing the Riddell helmets."

Each of the plaintiffs claimed to suffer from brain and neurocognitive injuries—namely mild traumatic brain injuries (MTBIs). MTBIs include concussions, which may cause post-concussion syndrome, chronic traumatic encephalopathy (CTE), and "second impact syndrome." Some bellwether plaintiffs maintained that the scope and existence of their injuries were only recently discovered, as they say they experienced the neurocognitive effects of their injuries only as recently as 2017.

Following transfer of these cases from the Northern District of California, the Court has treated them similarly to a mass-tort multidistrict litigation proceeding. In a first amended "master complaint" containing allegations common to all plaintiffs and in individual "short-form complaints" with allegations specific to each individual plaintiff, the plaintiffs allege that the defendants' negligence (design defect and failure to warn) caused their brain and neurocognitive injuries. To support these claims, the plaintiffs designated Dr. Michael Motley as their warnings expert and Dr. Randall Benson as their causation expert. Riddell did not dispute that the bellwether plaintiffs each wore a Riddell helmet at some point during their football careers. It argued, however, that the helmets did not cause the plaintiffs' injuries and that its warnings were adequate.

In April 2021, the Court granted summary judgment in favor of Riddell on the plaintiffs' design defect claims but left intact the plaintiffs' failure to warn claims. Adams v. BRG Sports, Inc., Nos. 17 C 8544, 17 C 8972 & 18 C 129, 2021 U.S. Dist. LEXIS 74217, 2021 WL 1517881 (N.D. Ill. Apr. 17, 2021).

Relevant to the instant opinion, the defendants moved to exclude plaintiffs' experts Dr. Motley and Dr. Benson based on Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

The defendants also moved for summary judgment on the plaintiffs' failure to warn claims. Among other contentions, Riddell argued that "should even one expert be excluded, the plaintiffs cannot prove all of the elements of their failure to warn claims."

The court was receptive.

"Given the complete failure of plaintiffs' counsel to come up with admissible expert testimony to support the handful of plaintiffs on whose claims the parties have focused, it is now time to accelerate the remainder of this litigation," it wrote in granting the defendants' motion to exclude and for summary judgement.

However, the court rejected the defendants' bid for judgment in the non-bellwether cases.

"The court understands Riddell's frustration with the fact that despite having proceeded this long, plaintiffs' counsel came nowhere close to producing the expert testimony needed to support the bellwether plaintiffs' claims. Given the way the litigation has been structured, however, Riddell cannot appropriately leverage this into a dismissal of the claims of non-bellwether plaintiffs that were expressly put on hold pending litigation of the claims of the bellwether plaintiffs. To do otherwise would amount to a serious violation of due process—dismissing the claims of dozens of plaintiffs without giving them an opportunity to be heard."

Adams et al v. BRG Sports et al; N. D. of Ill.; Case No. 17 C 8972; Case No. 18 C 129; Case No. 17 C 8544; Case No. 18 C 7250; 1/10/22

Attorneys of Record: (for plaintiffs) Kelli Walter and Vincent Circelli of Circelli & Walter, Jay Edelson of Edelson PC. (for defendants) Eden Darrell and Paul Cereghini of Bowman and Brooke and Mark Howard Boyle of Donohue, Brown, Mathewson & Smyth

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schools" (Id. at 4). His Complaint alleged that in games and practice he was required "to absorb consistent, sudden, and violent blows to his head." This caused the symptoms described above, and ultimately "long term brain damage." The intervening years were not always kind to Jackson, and "he is currently a prisoner of the state of Florida where he has been continuously incarcerated for the last 16 years." Recently he "became aware of chronic traumatic encephalopathy and its association with football after reading several news articles and watching television programs on the topic."

Jackson filed his Complaint on December 23, 2020 (Jackson v. Scott et al, S.D. Fla., Case No. 0:20-cv-62656-WPD, ("Jackson v. Scott"), (12-23-20)). The defendants were "Ken Scott, his high school head coach during his junior and senior years," the Broward County School Board, "the Florida High School Athletic Association, and several other known and unknown individuals affiliated with the school board and FHSAA." He claimed: "the defendants violated his due process right to bodily integrity and showed deliberate indifference to his medical needs" (Jackson, at 4).

In the District Court, Briefly

Jackson filed in forma pauperis and made a motion to proceed that way (Jackson v. Scott, Doc. No. 3). The Court granted that motion (Id., Doc. #7). He also made a motion for the court to appoint counsel (Id., Doc. #4), but that was denied (Id., Doc. #8). The Court then "screened his complaint under 28 U.S.C. §1915(e)(2)." That section requires the District Court "to dismiss the case at any time if the court determines that" it "fails to state a claim on which relief may be granted."

The District Court determined "that because Jackson sued under Section 1983, his claims were subject to a four-year statute of limitations borrowed from Florida tort law." It held that the claims "accrued in 1991, the date of the latest incident forming the basis of his complaint." The Court "concluded that the statute of limitations began to run at that time, that it had clearly expired, and that Jackson had therefore failed to state a claim upon which relief could be granted" (Jackson, at 4). The District Court dismissed the case on March 10, 2021 (Jackson v. Scott, Doc. #9), before the defendants made an appearance in the case. Jackson filed a motion to alter or amend the judgment (Id., Doc. #10, (4-5-21)), that was denied (Id., Doc. #11 (4-20-21)). Jackson promptly filed his Notice of Appeal (Id., Doc. #12, (5-5-21)).

In The Eleventh Circuit

Jackson proceeded "pro se" (Jackson, at 4). He appealed both the dismissal of his Complaint and the denial of his motion to alter or amend the judgment (Jackson, at 5). The Circuit first took up the dismissal of the Complaint. Jackson argued that his claims were timely because CTE "is a 'degenerative disease' that 'may not manifest to any medically detectable degree for many years.' We disagree."

The appellate court reviews a "dismissal de novo and takes all allegations in the complaint as true." However, the District Court may dismiss the complaint "if it is apparent from the face of the complaint that the applicable statute of limitations bars the claim." Such a dismissal is reviewed de novo. The statute of limitations for "Section 1983 claims is borrowed from the forum state's residual personal injury statute of limitations, which in Florida is four years." The statute begins to run "when 'the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights …. This requires only that the plaintiff know or should know (1) that he has suffered an injury that forms the basis of his action and (2) who has inflicted the injury" (Id.).

The Court held that the District Court "did not err in dismissing Jackson's Section 1983 claims as untimely." "According to his own allegations, symptoms from the injuries forming the basis of his action were 'clear' when the injuries occurred." Moreover, the injuries "were so obvious that a television reporter approached the sideline during the 1991 game concerned about Jackson's 'apparent and visibly injured condition.'" Jackson's argument that "his coaches showed deliberate indifference is premised on the allegation" that the injuries were "obvious" and "significant." He also "knew the identities of the individuals that allegedly inflicted his injuries by urging him to continue playing in the game." Thus, the facts "that he now relies on to support his Section 1983 action were apparent to him in 1991" and that is "when his cause of action accrued and when the statute of limitations began to run." Approximately "twenty-nine years passed between the time his cause of action accrued and when Jackson filed his complaint" (Id. at 6). The claims were therefore untimely, and the Circuit affirmed the dismissal.

Motion to Alter or Amend the Judgment

The denial of the Federal Rules of Civil Procedure 59(e) motion is reviewed for abuse of discretion, and it will be affirmed unless the District Court "has made a clear error of judgment or applied the wrong legal standard." The motion "may only be granted on the grounds of newly discovered evidence or manifest errors of law or fact." It "may not be used to

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relitigate old matters or to raise arguments that could have been raised prior to the judgment."

The Circuit held that the District Court "did not abuse its discretion" in denying the motion. Jackson failed to show that the court below "made a clear error of judgment or applied the wrong standard in dismissing his Section 1983 claims as untimely." He may have recently "learned of additional long-term consequences of his football injuries" but he had alleged "that his injuries were apparent to him and others in 1991." Finally, because the District Court "dismissed all of the Section 1983 claims over which it had jurisdiction, it did not err by declining to exercise supplemental jurisdiction over any remaining state constitutional claims."

Conclusion

Jackson can file a motion for certiorari in the Supreme Court, where the odds will be daunting. He can also contemplate trying to file his "state constitutional claims" in the appropriate state court. Athletes have endured concussions since sports began but it is only in recent decades that the severity of the problems have come into focus. Nevertheless, many athletes knew at the time that they had concussion-related injuries, and Jackson holds that is when the statute of limitations begins. For those wishing to file such decades-old claims, Jackson should be considered when writing the complaint, and counsel will have to contend with its reasoning when opposing a motion to dismiss or summary judgment. Time and tide wait for no one, and so it can be with the statute of limitations.