

# SPORTS MEDICINE

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and the **LAW**

## Pushing Players Too Far to “Do Something” Will Not “Win the Day” in Court – Takeaways from two UO Suits

By Dylan Henry and Kim Sachs

When Willie Taggart took over as the head coach for the University of Oregon football program, the Ducks’ motto changed from “Win the Day” to “Do Something.” Now, Taggart, his staff, the University, and the NCAA are faced with two lawsuits alleging that Taggart and his staff did too much, or not enough, during the team’s winter-break workout sessions.

In January 2019, Doug Brenner and Sam Poutasi—two offensive linemen for the University of Oregon (“Oregon”)—filed separate negligence lawsuits against former head coach Willie Taggart, former strength

and conditioning coach Irele Oderinde, the National Collegiate Athletic Association (“NCAA”), and Oregon, seeking a collective \$16.5 million in damages. Both lawsuits stem from a series of workouts administered by Oderinde in January 2017, which sent Brenner, Poutasi, and a third student-athlete (Cam McCormick) to the hospital with rhabdomyolysis, a serious condition in which muscle tissue rapidly breaks down and releases dangerous proteins into the bloodstream. The student-athletes claim Taggart and Oderinde were negligent in imposing physically impossible exercise regimens on football players—regimens

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## Family Sues School Employees After Son Almost Dies at Soccer Practice

By David P. Hodge

On July 21, 2017, Patrick Clancy participated in a pre-season soccer practice for his high school team, Monticello High School outside of Charlottesville, Virginia. During and after practice, Clancy became severely ill and demonstrated signs of heat-related illness (HRI). At 8:00am on that day when practice began, the temperature was over 80 degrees, having previously reached as high as 97 degrees the day before. Monticello practiced on a synthetic turf field, which according to the Penn State Center for Sports Surface

Research can reach temperatures as much as 60 degrees higher than the air temperature. As a result, the heat index at the end of that day’s practice reached between 124 and 139 degrees Fahrenheit, which is deemed as “extreme danger” by the National Weather Service (NWS).

The day of the incident marked practice number seven for the Monticello team and practice number four for Clancy as he had missed three earlier practices. One main goal for these pre-season practices was to acclimate players’ bodies to the heat, which typically takes 10-14 days, according to the

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## American Osteopathic Association: Physicians Want eSport Players Treated as College Athletes

With more than 80 US colleges offering varsity eSport teams, physicians writing in the British Journal of Medicine say collegiate players should be treated as athletes, with an appropriate level of medical care to promote continuing health.

Osteopathic sports medicine physi-

cians at New York Institute of Technology College of Osteopathic Medicine surveyed 65 collegiate varsity eSport players from nine American universities, finding that the players' training schedules averaged five to 10 hours per day, with many players reporting physical injuries.

The most common reported complaint was eye fatigue (56 percent), followed by neck and back pain (42 percent), wrist pain (36 percent), and hand pain (32 percent). Only two percent of those who suffered an ailment sought medical attention.

"When we think of an eSport player, we don't typically think he or she needs a physician's clearance to participate in a sedentary activity with little chance of injury," says Hallie Zwibel, DO, director of sports medicine at New York Institute of Technology College of Osteopathic Medicine, who also oversees NYIT's Center for eSports Medicine, and is co-author on this study. "Quite contrary to that belief, these athletes suffer health concerns and chronic overuse injuries—some of which are career ending. It's time we begin to proactively manage these issues."

### Causes of injury

eSport requires players to focus on LED computer monitors for long periods of time. Recent research has demonstrated that excessive exposure to LED light can damage retinas and disrupt melatonin levels and natural circadian rhythm. As a result, players often experience eye strain and impaired sleep patterns.

Given the necessity of being seated for hours on end, posture is also negatively affected in eSport gamers, resulting in neck and back pain. In addition, the survey found 40 percent of players get no physical activity, furthering susceptibility to injury due to weakened musculature.

The high number of hours dedicated to practice could easily cause overuse injuries, and that risk is compounded by the intensity of game play. The average novice players make approximately 50 action moves per minute. However, higher level players make 500-600 action moves per minute—or about 10 moves per second.

In addition to overuse injuries, there are mental health issues related to eSports, including addictive behavior, personal hygiene issues, social anxiety, and sleep disturbances.

### Catching up

Colleges, universities, and high schools are adding eSport teams at a rapid pace. In the US, There are more than 50 colleges with varsity eSport teams under the National Association of Collegiate eSports, and 22 colleges in the US currently offer scholarships for gaming. The NCAA is currently investigating whether to recognize eSport.

Researchers say schools need to also provide the same level of preventive training and care and injury treatment expected for traditional athletes. Dr. Zwibel says college eSport teams require the support of multidisciplinary medical staff who can identify and address social or addictive behaviors, like changes in academic or work performance, and chronic eSport gaming injuries, such as wrist or hand problems, eye strain and postural assessments.

"The common concerns and injuries that are seen in eSport athletes are not the typical injuries seen in traditional student athletes," says Dr. Zwibel. "Many physicians and athletic trainers may not identify these injuries because eSports are relatively new and the health consequences are emerging as these teams become more common."

## SPORTS MEDICINE

and the **LAW**

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## Athletic Trainer Talks About Risk Management and Other Challenges and Opportunities

Like most professions in the sports industry, being an athletic trainer means constantly keeping abreast of better ways of doing things. It also requires monitoring the regulatory environment, thus protecting your own livelihood and shielding your employer from unnecessary litigation risk.

Greg Janik, the Clinical Professor / Director of Athletic Training Services at King's College, has always maintained a keen interest in both. It's a passion that not only fueled a successful career at the Wilkes-Barre, PA school, but one that helped him ascend to the role of president of both the Pennsylvania Athletic Trainers' Society and the Eastern Athletic Trainers Association.



**Greg Janik**

Given his growing voice in the industry, we sought out Janik to get his thoughts on some of the more important issues of the day.

**Question:** *How has your job as an athletic trainer (AT) changed since the beginning of your career?*

**Answer:** The profession of athletic training continues to evolve and advance as does medicine and thus, ATs are expected to remain up to speed with current research. While athletic training has always been primarily evidence-based, I think there's been more of a shift to literature based evidence over clinician-based evidence. Basically, in the past we often looked primarily at our mentors for guidance in regards to what medicine works in different situations. Today we still do this, but we also have increased desire to find studies that prove these principles with research studies. The one common

factor over time has always been a heavy focus on the patient's perspective, although there's been more of a change in recording not only objective data (such as range of motion and strength) and subjective data (such as pain levels and emotions), but also collecting outcomes and assessing them to assure positive changes are occurring due to our interventions.

**Q:** *Is there more of a regulatory component today than there was before? If so, why is that?*

**A:** Yes, there is more of a regulatory component today and it's probably due to the increase in health care policies legislated by government. The intention of these policies, such as concussion and sudden cardiac death laws, are to better protect the public. In turn, ATs are often responsible for developing and following policies to assure the standards of the law are being met. In addition to the law, ATs must also be current with scientific literature and review their policies annually to ensure their policies are up-to-date. Also, with increased access to the internet, everyone can be an "expert" within seconds through a quick search. This can lead to differences in interpretations and thus, by having a pre-established policy, it sets the standard of care that is to be followed by the medical providers of the organization.

**Q:** *Who do you interact with the most when it comes to fellow employees? Has that changed over the years? If so, why?*

**A:** By far the most interaction and communications take place with our team physicians. Since the ATs work under the direction of our physicians, we work closely with them in policy development and implementation. Further, our physicians have the absolute authority in determining the health status of our patients who participate in intercollegiate athletics so it is incumbent on us to communicate often and work closely together in order to best

protect our patients. Additionally, a key concept in medicine is open communication with the various medical providers (e.g. doctors, physician assistants, ATs), the patient, and those that play an important role in the patient's life (i.e. parents, guardians, coach, teacher, etc.). When everyone is on the same page with an open dialogue, the expectations are clear which allows for an understandable course of collaborative care to be determined. Over the years, one change has been an increase in communications with the College's Chief Risk Officer and looking at liability concerns with the ATs and how we can provide the highest level care to our patients while mitigating risks.

**Q:** *Has a parent ever threatened to sue? If so, how did you respond?*

**A:** Fortunately, no. I feel this is in great part due to the relationships I try to establish with my patients. I want them to know that my primary goal is to protect and keep them safe and healthy. My actions then reinforce this; not just words. I also smile often; I'm approachable and every day I try to practice athletic training with empathy and integrity. Further, I feel this open communication is critical, so I also ask the patient a lot of questions, listen to their responses, and strive to provide clear expectations.

**Q:** *What three injuries or conditions involving student athletes keep you up at night most, and why?*

**A:** Any conditions that can lead to a disability or kill someone obviously keeps me up at night, but I also often reflect and will question if I handled the situation well and what I could have potentially done better. Was I compassionate enough? Did I explain the injury clearly enough? Did I give the patient clear take-home instructions? Did I do anything to risk further injury? Did

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## Court Dismisses Former College Kicker's Claim He Was Cut in Violation of Disabilities Laws

A federal judge from the Eastern District of Louisiana has dismissed with prejudice the claim of a former Tulane University football player, who alleged that the school and several individual defendants cut him from the team because of his learning disability in violation of federal and state law.

Plaintiff Brandon Purcell enrolled at Tulane University in the fall of 2013, and walked on to the football team as a kicker. Purcell claimed that he suffers from a learning disability, which necessitated certain academic accommodations, including double time to take tests, a sound-reduced environment, and a note taker. He also alleged that due to his disability, he has better concentration in the morning. Accordingly, his athletics academic advisor, Ruben Dupree, approved him for 8 a.m. classes. This represented a departure from the general rule that Tulane football players should not take morning classes.

In the spring of 2015, Purcell was taking 8 a.m. classes five days a week. Nevertheless, he was scheduled for a training session from 7-8:30 a.m. He stated that he would attend the initial portion of the workout, leave for his 8 a.m. classes and return to work with his coach after class to complete the missed portion of the workout. On March 4, 2015, Purcell claimed he was called into the office of special teams coach Doug Lichtenberger and was dismissed from the football team. He alleged that Coach Lichtenberger told him that he was a "hindrance" and a "bad example for the team."

Purcell then contacted Athletic Director Rick Dickson and head football coach Curtis Johnson complaining of discrimination, hostile learning environment, retaliation, and intentional infliction of emotional distress. He alleged that Lichtenberger improperly used Purcell as an example of bad behavior, inciting other members of the football team to harass him and causing

emotional distress.

Later that month, Purcell met with Assistant Athletic Director Barbara Burke, who allegedly indicated that he had been removed from the team because there were too many kickers. The plaintiff alleged that the reason is pretextual, claiming that he outperformed other kickers who remained on the team. Purcell ultimately met with Dickson, and demanded an explanation why he was removed from the team, according to the court. Dickson declined to intervene in the matter. He then met with Coach Johnson, Coach Rob Phillips, Coach Byron Ellis, and Coach Wayne Cordova to discuss the matter. The plaintiff alleged that they continued to assert pretextual reasons for his removal from the team.

After this meeting, Purcell continued to train with the team. However, he alleged, he suffered increased abuse and retaliation. He also alleged that his former friends and teammates participated in the abuse, making both physical threats and anti-Semitic comments toward him. The plaintiff then filed a complaint with Wendy Stark of Tulane's Office of Institutional Equity. Due to the reported increased retaliation, Stark began an independent investigation of the situation. He alleged that Stark failed to maintain confidentiality and participated in the conspiracy and cover up of the disability discrimination, hostile learning environment, retaliation, defamation, and intentional infliction of mental distress.

The situation got worse before it got better, leading to the filing of a lawsuit, brought pursuant to federal and state law against Tulane University and, in some cases, more than a dozen individual defendants.

The defendants moved to dismiss the various claims, pursuant to Federal Rule of Civil Procedure 12(b)6, or the failure to properly state a claim. The court granted the motion, but left the door open for

the plaintiff to re-file his complaint. The plaintiff obliged, and parts of his claim were dismissed again.

Pursuant to the latest complaint, the only remaining defendants are the administrators of the Tulane Educational Fund (Tulane) and Byron Ellis, Tulane's Director of Football Operations. The claims that remain against Tulane include alleged violations of the Americans with Disabilities Act (ADA), the Rehabilitation Act (Act), and the Louisiana Civil Rights Act for Persons with Disabilities. The remaining claims against Ellis include a Louisiana state law defamation claim by Purcell and associated state law loss of consortium claims by his parents.

In its analysis, the court immediately dismissed the ADA claim for "lack of standing."

Turning to Section 504 of the Act, the court quoted from the statute, which provides:

"No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

"The Act defines an 'individual with a disability' as 'any individual who has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment.' The Act further defines 'program or activity' to include 'all the operations of . . . a college, university, or other postsecondary institution.'"

The court assumed that Purcell's learning disability "qualifies him for protection un-

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## Court Dismisses Kicker's Claim He Was Cut in Violation of Disabilities Laws

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der the Rehabilitation Act and that Tulane qualifies as a program under the Act from which Purcell cannot be excluded based on his disability. The question, then, is whether Tulane violated the Act when it released Purcell from its football team.

"Purcell alleges that Tulane violated the Act in three distinct ways. First, he claims that Tulane discriminated against him because of his disability when he was cut from the football team in March 2015, subsequently reinstated, and then cut again in August 2015. Second, Purcell claims that Tulane allowed a hostile environment to flourish because 'Purcell was subjected to harassment as a result of complaining about discrimination.' Third, and finally, Purcell claims Tulane retaliated against him by cutting him from the team a second time after Purcell complained to the university that he was cut the first time because of his disability."

The court went on to address each individually.

On the first point, it wrote that "to succeed on a discrimination claim under the Act, a plaintiff must show that he suffered discrimination solely because of his disability." Purcell made his argument by noting that special teams coach Lichtenberger told him he was cut "because he missed

too many practices because he had taken morning classes "because of his disability. The court found that the plaintiffs' argument "suffers from fatal flaws. At the outset, this Court notes that Purcell's disability accommodation plan did not mandate that he take morning classes. He in fact took many afternoon classes throughout his education at Tulane, eventually graduating with a 3.6 cumulative GPA. ... Further, Coach Lichtenberger testified that he did not even know about Purcell's disability when he cut Purcell from the team in March 2015." For this and other reasons, the plaintiff failed to carry his burden that the real reason he was cut was because of his disability.

On the second point, the court noted that for the plaintiff to show there was a hostile environment in violation of the Act, he would need to prove: "(1) he was an individual with a disability, (2) he was harassed based on his disability, (3) the harassment was sufficiently severe or pervasive that it altered the condition of his education and created an abusive educational environment, (4) [defendant] knew about the harassment, and (5) [defendant] was deliberately indifferent to the harassment. Even assuming Purcell qualifies as a disabled individual protected by the Act, the plaintiff has failed to provide evidence

showing Purcell was harassed based on his disability," wrote the court in dismissing the claim.

On the final point, the court wrote that "to establish a prima facie case of retaliation under the Act, a plaintiff must show: (1) he engaged in a protected activity; (2) the defendant took an adverse action against him; and (3) a causal connection existed between the adverse action and the protected activity." The defendant cut the plaintiff "for non-retaliatory reasons" and the plaintiff "has failed to provide evidence that the second cut would not have occurred, but for Purcell's complaints about his initial cut. As such, Tulane is entitled to summary judgment on this claim."

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Brandon Purcell, et al. v. Tulane University of Louisiana, et al.; E.D. La.; Civil Action NO: 16-1834, 2017 U.S. Dist. LEXIS 212371; 12/18/18

Attorneys of Record: (for plaintiffs) Wanda Anderson Davis, LEAD ATTORNEY, Leefe, Gibbs, Sullivan, Dupre & Aldous, Metairie, LA. (for defendants) Maria Nan Alessandra, LEAD ATTORNEY, Kim M. Boyle, Phelps Dunbar, LLP (New Orleans), New Orleans, LA.

## Athletic Trainer Talks About Risk Management and Other Challenges

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I manage the injury in the safest manner? I think frequent and honest reflection is needed to continually improve care. Ultimately, I am most concerned with any of the leading causes of sports-related disability and death, not listed in any particular order, such as sudden cardiac arrest, traumatic head injuries, cervical spine injuries, exertional heat stroke, internal traumas (e.g. spleen, liver, kidneys, lungs), exertional sickling, anaphylaxis and severe weather to mention

just a few (LOL) more common conditions that keep me up at night. The practice of athletic training, which is equally a science and an art, is extremely challenging at times especially when dealing with acute injuries that often present with many different and frequently vague appearances than what is regularly taught. Also, ATs must rely on the honesty of our patients who often feel pressure (sometimes real and sometimes perceived) from their coaches, teammates,

and parents, among others to "tough it out" and not "let their team down," so ATs must also try to determine when our patients are lying to us and/or simply not telling us everything. Overall, ATs are an extremely caring profession that practice sports medicine with the highest integrity and want to make a difference in their patients' lives; therefore, if there is anything that we do that may hamper the success of our patients I would think most ATs would lose sleep.

## Auburn Researchers: Additional Rules for Player Safety Will Impact Popularity of College Football

News of traumatic brain injuries and suicides among professional and college football players has made many question the violent nature of the game. Rule changes, such as the NCAA's targeting rule, have been imposed to promote player safety, and yet concussions continue to occur.

Using Auburn University's functional magnetic resonance imaging, or fMRI, machine, to study the brain functions of college football fans and non-football fans when they were exposed to violent imagery, a team of researchers suspect additional regulations that improve player safety and make the game less violent could impact fandom.

Auburn Associate Professor David Martin in the Department of Nutrition, Dietetics and Hospitality Management posed it as such: "If we have fans who are attracted to the violence aspect of the sport and we start to sanitize it to make it safer for the players, at what point do we start to lose fans?"

The team of researchers in electrical engineering, psychology, psychiatry and hospitality found fans to be less empathic to violence in the game and violence in general than non-fans.

"This finding does not demonstrate that football enthusiasts are more prone to violence or less sensitive to violent imagery, but instead, that violence within the context of football may provide less affective arousal compared to general violence," the study reads.

While social and behavioral effects of violence in movies and video games have been studied extensively, much less is known about how sports affect perceptions of violence.

Areas of the brain that indicate emotion regulation, perception of others' pain and the nerve origin of violent behavior were

less active in football fans, according to the study, published in *Frontiers in Public Health*. This decreased empathetic response and perhaps altered behavioral responses in otherwise healthy people are often associated with increased or repeated exposure to violence.

With rising concerns over players' health — such as the correlation between repetitive brain trauma and incidents of chronic traumatic encephalopathy, or CTE, depression and suicidal risk — recent rule changes have been imposed to increase player safety. For instance, the NCAA instituted the targeting rule in 2013 that calls for a player to be ejected if he makes contact with a defenseless opponent above the shoulders. The National Football League adopted the NCAA's rule in 2017.

Brain trauma is an issue for professional athletes, as well as youth football players, who may also be exposed to large numbers of repetitive head collisions. Therefore, concussions and sub-concussive blows to the head commonly found in football can be considered an urgent public health burden which requires a policy response either from the government or the sporting body.

So far, the NCAA targeting rule has been met with marginal resistance from football fans.

However, the research team found previous research that said fans find the most enjoyment in the unscripted, on-the-field violence of college football. Previous studies also indicated violence in sport to have a socio-cultural impact, meaning the exposure to violence and aggression may cause some sports fans to be more prone to acts of violence. Their impulsive behaviors may result in destructive acts of violence and their muted perceptions of pain may increase suicidal risk.

Martin's own research also examines the consumer behavior side of college football.

"This issue of traumatic brain injury has really driven the changes that are happening in the world of sports," he said. "I'm interested in what happens to Auburn University and the city of Auburn, or any college town, if college football gets regulated away."

"We know that when college football does well, corporate sponsorships increase, undergraduate applications increase and alumni support increases. So the success of football is very much tied to the success of the university as a whole. If football were to go away or if it were to change so dramatically that alumni and fan support is lessened, that has huge economic implications for the university, the city and the country."

Regulations limiting the game of football may not be far off as researchers across the country are working on a non-evasive way to diagnose CTE. Currently, the only way to detect it is a post-mortem autopsy. Once the new testing method is available, Martin said youth, high school, college and professional football players can be tested and researchers will know, "with a high degree of certainty, what percentage of those players will have permanent brain damage."

"To me, that will be a very important day," he proclaimed. "I don't know what the percentage has to be for there to be a major change in football, but it will either regulate the game out of existence or people just won't play it anymore."

The study was conducted by Martin, Electrical Engineering Associate Professor Gopi Deshpande and Psychology Professor Jeffrey Katz from Auburn; Psychology Assistant Professor Thomas Daniel from Westfield State University in Westfield, Massachusetts; Kyle M. Townsend, clinical assistant professor of hospitality at Georgia State University in Atlanta; and Postdoctoral Research Fellow Yun Wang at Columbia University in New York.

## Pachman to Speak at Michigan Sport Medicine Conference

Steven Pachman, a partner in Montgomery McCracken's Litigation Department and a member of the firm's Sports Injury practice group, is slated to speak at "Mind, Body, & Spirit... treating the entire athlete: An evidence-based approach to sports medicine and concussion prevention" on May 31. The program is being put on by The University of Michigan Injury Prevention Center and brings local, regional, and nationally renowned speakers together to discuss some of the most pressing topics in Orthopaedics, Neurology, and Sports Medicine.

Pachman will be presenting "Unresolved science and law of concussion and CTE" to clinicians, medical doctors, physician assistants, and athletic trainers, as well as coaches, researchers, and legislators. More information on the Summit can be found here: <https://injurycenter.umich.edu/event/sport-concussion-summit-2019/>

Pachman's practice concentrates on the



**Steven Pachman**

defense of traumatic brain injury (TBI) cases, and representing individuals and school systems in catastrophic sports injury matters arising out of alleged pre-

mature return-to-play decisions and other negligence theories in the sports' context. His representations include a number of high-profile, nationally-publicized concussion and other TBI cases against NCAA member colleges and universities, high schools, and school personnel, including athletic trainers, coaches, physicians, and nurse practitioners. These cases involve catastrophically-injured football players and other athletes who allegedly sustained prior concussions and Second Impact Syndrome as well as players diagnosed with chronic traumatic encephalopathy (CTE) following a post-mortem autopsy of the brain. Pachman also regularly advises school officials and attorneys, risk managers, athletic departments and their staff, and health care professionals on institutional liability issues concerning sport-related concussions, Second Impact Syndrome, and other sport-related injuries.

## NCAA Soccer Rules Committee Proposes Hydration Breaks

Based on a recommendation from the NCAA Committee on Competitive Safeguards and Medical Aspects of Sports, the NCAA Men's and Women's Soccer Rules Committee proposed hydration breaks at a set time during each half.

The proposed rule would be applied when the wet bulb globe temperature is equal to or greater than 86 degrees and would start with the 2019 season.

All rules proposals must be approved by the NCAA Playing Rules Oversight Panel, which is scheduled to review the soccer rules recommendations.

The committee, which met March 12-13 in Indianapolis, proposed the hydration breaks occur between the 25- and 30-minute marks of the first half and the 70- and 75-minute marks of the second half and

last for a minimum of two minutes. Appropriate host personnel will conduct the temperature measurements before the game and again throughout the game. Appropriate host personnel will instruct the on-field officials if the threshold for hydration breaks is met. The referee is responsible for informing the head coaches and implementing the hydration breaks. Additional breaks are permissible at the discretion of the referee.

The wet bulb globe temperature is a measure of heat stress in direct sunlight, which accounts for temperature, humidity, wind speed, angle of the sun and cloud cover. If a school does not already have a device to measure the wet bulb globe temperature, the school would be required to purchase a device. The cost is minimal.

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**Wet bulb globe temperature readings 86 degrees or higher will require a break in play midway through each half.**

If approved, the rule would align closely NCAA collegiate soccer with FIFA and U.S. soccer.

## Pushing Players Too Far to “Do Something” Will Not “Win the Day” in Court

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Taggart and Oderinde allegedly knew or should have known were contrary to the warnings and guidelines issued by the NCAA. Poutasi and Brenner further allege that Oregon and the NCAA negligently failed to prohibit and regulate Oderinde’s punishment-style workouts. Brenner claims this negligence caused him to suffer \$11.5 million in damages. Poutasi is seeking \$5 million for physical and emotional pain, inconvenience, loss of enjoyment of life, and diminishment of avocational abilities. McCormick has not joined either lawsuit.

### The Workout

According to Poutasi’s complaint, on the morning of January 10, 2017, he arrived at practice and saw garbage cans intended to serve as vomit receptacles lining the walls of the workout room. There was no water available in the room and the coaches had breathing machines available in the event a student-athlete lost consciousness and passed out. The workout required 40 student-athletes to execute 10 perfect push-ups in unison. If even one student-athlete failed to use perfect technique, Taggart and Oderinde stopped the drill, made the student-athletes perform numerous up-downs, and would then re-start the push-up drill from the beginning. Poutasi contends Taggart and Oderinde knew this was an impossible drill to successfully complete, but proceeded with the workout anyway to “weed out the ‘snakes’ on the team.”

The complaint goes on to allege that Taggart and Oderinde continued to impose extreme physical regimens on the student-athletes over the course of several days even though the student-athletes were passing out, vomiting, and collapsing during practice. Oderinde allegedly knew of the health risks associated with the regimens and mockingly asked student-athletes if they “had any blood in their pee yet.” As

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**Both lawsuits allege a single cause of action—negligence. They claim Taggart and Oderinde negligently imposed extreme physical exercises on student-athletes under the guise of strength and conditioning.**

the student-athletes became more exhausted and close to physically breaking, Oderinde allegedly pressed the student-athletes even harder. Poutasi claims Oderinde would shout, “If anyone wants to quit on their team, feel free to stop. If you want to give up on your team, then you can.” That statement, coupled with Taggart’s threat that he and Oderinde intended to eliminate the weakest players, allegedly signaled to Poutasi and the other student-athletes that there would be consequences if they did not continue with the conditioning exercises.

### The Injuries

On the morning of January 13, 2017—three days after the initial offseason workout—Poutasi says student-athletes, including Brenner and McCormick, began experiencing muscle seizures and excreting black urine, which is a sign the body’s organs are beginning to shut down and a symptom of rhabdomyolysis. According to the Mayo Clinic, rhabdomyolysis occurs when over-fatigued muscles break down and release myoglobin, a dangerous protein, into the bloodstream. When myoglobin reaches the kidneys, it can cause serious kidney damage, and, in some cases, can lead to total kidney failure. The symptoms

of rhabdomyolysis vary but typically include muscle aches, muscle weakness, and cola-colored urine—the same symptoms Brenner and Poutasi were exhibiting on January 13. When they consulted the team doctor about these symptoms, they were sent to the hospital immediately, where they remained for several days.

According to Poutasi’s complaint, he suffered severely swollen arms, muscle aches and pains, loss of use of arms, elevated creatinine kinase levels, discolored urine, and damage to his kidneys as a direct and proximate result of the workouts and the resulting acute exertional rhabdomyolysis. Brenner alleges similar injuries. In his complaint, he says the defendants’ negligence caused him to suffer permanent renal injury and increased his risk of kidney failure, kidney disease, and death.

Both players remain on Oregon’s football roster.

### Takeaway

The Poutasi and Brenner lawsuits both allege a single cause of action—negligence. They claim Taggart and Oderinde negligently imposed extreme physical exercises on student-athletes under the guise of strength and conditioning and contend Taggart and Oderinde knew or should have known that such exercises could lead to serious health injuries or even death. They further allege that Oderinde did not have an industry-required strength and conditioning certification and contend Oregon and the NCAA were negligent in failing to prohibit and regulate Oderinde’s physical punishment regimens.

As counsel to athletic trainers and universities, the allegations against Taggart, Oderinde, Oregon, and the NCAA are ones we commonly see. Student-athlete injuries have become a hot-button issue in the last decade and lawsuits naming

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coaches, athletic trainers, and universities as defendants are on the rise. The risk of liability is especially high for strength and conditioning coaches, who plan and oversee workouts, and athletic trainers, who are often the first to identify injuries, develop a treatment plan, and return student-athletes to play. In today’s litigious society, every action strength and conditioning coaches and athletic trainers make carries with it significant responsibility, and that responsibility flows to the head coach and the university as well.

Fortunately, there are steps athletic trainers, coaches, and universities can take to ensure they are keeping with best practices and creating a safe environment for student-athletes. First is training and education. Coaches and universities should require all athletic trainers and strength and conditioning coaches to have the industry-required certifications from their respective organizations. This helps mitigate potential liability both on paper and in practice. In the Poutasi and Brenner cases, Oderinde’s sole credential was a two-day strength training course offered by the Track and Field and Cross Country Coaches Association. Poutasi and Brenner used this to show that Oderinde was underqualified to implement such grueling exercises, and that the defendants did not care that the workouts violated NCAA guidelines. Should these cases proceed to trial, and if supported by the evidence, Plaintiffs’ counsel will get many miles out of the fact that Oderinde did not carry the industry required certifications, regardless of Oderinde’s bona fides as a strength and conditioning coach.

Next, strength and conditioning coaches and athletic trainers should ensure all workouts are in compliance with NCAA regulations and make student-athlete safety their primary concern. All strength and con-

ditioning workouts should be reviewed and approved by university medical staff before administering the workouts. If, as Poutasi and Brenner claim in their lawsuits, student-athletes pass out, vomit, and collapse during practice, strength and conditioning coaches should heed these warnings and give the student-athletes adequate time to rest and recover. When the student-athletes are ready to return to training, coaches and staff should closely monitor the student-athletes and modify the exercise regimens as needed. Punishment-style workouts that are contrary to industry standards should be avoided at all costs.

Finally, maintaining a proper culture is crucial. Coaches and staff must ensure that the culture they maintain does not discourage student-athletes from being forthright about their physical and mental symptoms. Here, players did not feel like they could take a break or tell Oderinde about their pain and fatigue because of his past comments to players, such as “I don’t give a fuck about your shoulders! Do you think Stanford gives a fuck about your shoulders?” These statements created a culture in which student-athletes thought there would be consequences if they failed to keep working through the training exercises, no matter their physical breaking point. As these cases continue to move forward, Plaintiffs’ counsel will use Oderinde’s comments to show there was a toxic culture of intimidation and fear at Oregon and will take all the teeth out of defendants’ argument that the plaintiffs could have and should have stopped the workout if they were experiencing those symptoms.

Take this case study as a learning opportunity and put these principles into practice. With the benefit of hindsight, it is easy to Monday morning “lawyer-back” what the defendants should have done here.

The defendants are facing a set of unfavorable facts that could have been corrected before any workout began and that would have increased player safety and mitigated legal risks. Ensure your staff has the proper training, education, and certifications, ensure workout programs are reviewed and approved by medical staff, and ensure the culture of the program is one that encourages player self-reporting and safety, rather than discourages it.



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## Family Sues After Son Almost Dies at Soccer Practice

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National Federation of High School Associations (NFHS). Because it was pre-season, players were running during practice almost constantly and treated the practices as pseudo-tryouts. Toward the end of practice on that day, Clancy became visibly ill and stopped sweating, a sign of dehydration and exertional heat illness. Clancy's brother, also a member of the team, drove him home after practice. Clancy could not walk or talk, and his mother attempted to cool his body by putting him in a cold shower. Clancy turned blue and began to vomit, at which point his mother rushed him to the hospital, where he received an IV and had his body temperature cooled. Doctors determined that Clancy suffered from exertional heat illness, leading to permanent injury and disability. For likely the rest of his life, he must take precautions to not become overheated. His family has incurred significant medical bills and filed two claims against both the coach and athletic director.

### Standard of Care for Coaches

In any negligence case, the conduct of a defendant will be measured against the standard of care owed to the aggrieved party. The standard of care for soccer coaches stems from a variety of areas, including recommendations from several agencies, including the National Athletic Trainers' Association (NATA), the Virginia High School League (VHSL), the United States Soccer Federation (USFL), the National Federation of High School Associations (NFHS), and the Synthetic Turf Council (STC). Included in those duties are altering practice locations or occurrences when



the heat index becomes excessive, having fluids readily available for participants during practices and contests, and structuring periodic breaks in practice to allow participants to cool off. Pierson did not do any of these. The athletes were told to bring their own water, did not receive any breaks in practice to cool off, and did not have any shade available to potentially cool off. Another group of standards include establishing a hydration protocol specific to soccer, educating players on that protocol and on the dangers of heat illness, and actively monitoring players' fluid intake. The complaint alleges that defendants did not have any protocol in place, nor did they monitor any players' fluid intake.

Finally, a standard of care is owed with

regards to the implementation of an Emergency Action Plan (EAP), having a certified athletic trainer present at practice along with first aid equipment, and having both a Wet Bulb Thermometer to assess humidity and an infrared thermometer to assess field-level temperatures. Neither thermometer was present at practice, nor was an athletic trainer or first aid kit. The school did not have an EAP in place for soccer.

These standard of care principles also arguably applied to the athletic director of the high school, Matthew Pearman. Pearman should have known that the field-temperature on an artificial surface would be extremely high on that day of practice, and he should have known that the school was not going to provide water coolers, shade, an EAP, an athletic trainer, or any type of thermometer.

### Counts Brought Forth by Plaintiffs

The Clancys brought forth two counts against both Pierson and Pearman. The first count of negligence argued that both defendants fell below the standard of care of coaches and athletic directors. The second count of gross negligence argued that the defendants did not even demonstrate scant care for the health and well-being of the plaintiff Clancy. The plaintiffs demand judgement of the defendants in the amount of \$1 million dollars.

### Case Law — Simple Negligence

There is a history of cases in the Commonwealth of Virginia that will help understand topics in this case, namely sovereign

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immunity. As decided in *City of Virginia Beach v. Carmichael Dev. Co.*, 259 Va. 493, 499, 527 S.E.2d 778, 781 (2000), sovereign immunity is “a rule of social policy, which protects the state from burdensome interference with the performance of its governmental functions and preserves its control over state funds, property, and instrumentalities.”

There has been confusion on to whom sovereign immunity applies. The court in *Messina v. Burden*, 228 Va. 301, 307, 321 S.E.2d 657, 660 (1984) stated that in Virginia, the immunity enjoyed by governmental employees is not independent of the immunity enjoyed by the Commonwealth itself and that “the State can only act through individuals.” Therefore, employees are logically an extension of the Commonwealth. This principle has been granted in past cases involving the negligent acts of employees. In *Lawhorne v. Harlan*, 214 Va. 405, 200 S.E.2d 569 (1973), the court ruled that doctors at a state medical center, which is afforded immunity, are also granted immunity from liability for negligence in the performance of duties for their employer. In *Lentz v. Morris*, 236 Va. 78, (Va. 1988), a high school gym teacher who failed to properly supervise a student was granted sovereign immunity. In *Banks v. Sellers*, 224 Va. 168, 294 S.E.2d 862 (1982), a high school principal was entitled to sovereign immunity under similar circumstances.

However, there have been distinctions made between the governmental agencies themselves and their employees with to whom sovereign immunity applies. In *Crabbe v. School Board and Albrite*, 209 Va. 356, 164 S.E.2d 639 (1968), the court ruled that the school board was immune and not liable for a student’s injury, but the teacher, in his own individual capacity, was not immune for his negligent supervision. *Short v. Griffiths*, 220 Va. 53, 255

S.E.2d 479 (1979) followed the decision in *Crabbe* in stating that a high school athletic director, basketball coach, and grounds supervisor were not entitled to the immunity the school board was when a student fell on broken glass while running on an outdoor track.

The analysis of the function of the employee is thus important. The court must determine whether the acts of a high school employee are of interest to the Commonwealth, thus falling under the immunity given to governmental agencies. Further, as in the decision in *Lawhorne*, the scope of actions must be analyzed. In that case, the court decided that the defendant was acting within the scope of employment which extended the hospital’s immunity to him. Immunity was also given to the defendants in *Burnam v. West*, 681 F. Supp. 1169, 1172 (E.D. Va. 1988) where a teacher was acting under the direction of their principal.

### Gross Negligence

In this case, the plaintiffs are also suing the coach and athletic director for gross negligence. Two principles apply here: whether or not gross negligence can be proven and whether or not sovereign immunity will be applied to the defendants. To the second point of discussion, Virginia case law is somewhat clear that sovereign immunity will not be granted to an employee that commits gross negligence (*Elder v. Holland*, 208 Va. 15, 155 S.E.2d 369, 1967).

At the end of the soccer practice on



July 21, 2017, defendant Pierson noticed that plaintiff Clancy was out of water and ridiculed him in front of his teammates for only bringing one two-liter bottle, even though Pearson instructed each athlete to bring exactly that amount. Pearson was also quoted as saying “Your mother must love Ryan [Clancy’s brother] more.” Adding this intentional mockery on top of the already stated lack of standard care provides the plaintiffs their argument for gross negligence.

### Conclusion

The court in this case will have several distinctions to make regarding the level of negligence of the coach and athletic director, as well as whether or not the defendants should be afforded the same sovereign immunity that likely applies to the high school itself.

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