

SPORTS MEDICINE

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and the **LAW**

Safe! Jury Finds High School Baseball Coach Not Liable In Bang-Bang Play

By Jon Hughes and Kacie Kergides, of Montgomery McCracken Walker & Rhoads LLP

On April 4, 2012, something that has happened thousands of times before—and thousands of times since—left one student-athlete catastrophically injured: a high school baseball coach instructed one of his players to slide into third base.

Sliding into the Facts

In April 2012, Jake Mesar was a fifteen-year-old freshman on the junior varsity baseball team at Bound Brook High School in Bound Brook, New Jersey. During the second inning of Bound Brook’s first baseball game of the season—and Mesar’s first game of his high school

career—Mesar hit a line drive into the outfield, scoring two runs for his team. As Mesar began to make his way around the bases, John Suk, Bound Brook’s third base coach, instructed Mesar to slide into third base. Mesar slid, and in doing so, suffered a catastrophic ankle injury. The injury was so severe it required multiple surgeries and a stem cell injection. Mesar was also required to wear an external stabilizing frame to keep the bones properly aligned, and, at one point, a doctor told Mesar that amputation would be required. Fortunately, Mesar ultimately recovered, but doctors recommended that he never play baseball again.

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Mind the (Causal) Gap: Plaintiffs’ Experts Fail To Tie Death To CTE, CTE To Football

By Jack K. Hagerty and Dylan F. Henry, of Montgomery McCracken Walker & Rhoads LLP

Head-To-Head—The Case

In December 2019, a Court for the Central District of California granted summary judgment in favor of Pop Warner Little Scholars, Inc., ending a three-year case brought against Pop Warner by two mothers who claimed their sons developed Chronic Traumatic Encephalopathy (“CTE”) from playing Pop Warner football.¹ Paul Bright Jr. (Kimberly Archie’s

son) and Tyler Cornell (Jo Cornell’s son) both played Pop Warner football in their youth, both passed away in 2014, and both were alleged to have Stage I CTE, which was discovered in postmortem autopsies of their brains. Bright Jr. passed away at age 24 from a motorcycle accident; Cornell passed away at age 25 by suicide.

The mothers filed a class-action lawsuit in September 2016, alleging Pop Warner “failed to provide for the safety and health

¹ 16-6603 (C.D. Cal. Dec. 27, 2019) (order granting summary judgment to defendants).

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and the **LAW**

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Congressmen Introduce Bill to Improve Student Athlete Concussion Safety

Congressmen Pete Stauber (MN-08) and Mark DeSaulnier (CA-11) introduced H.R. 5611, the Protecting Student Athletes from Concussions Act, last month. The legislation would direct states to establish comprehensive guidelines for schools on the treatment of youth sports concussions and help inform students on the signs, symptoms, and risks of concussions.

Specifically, H.R. 5611 would implement processes for school personnel to follow if a student is suspected of having a concussion and for students and personnel to follow for the student to be gradually reintroduced to academics and physical activity.

“As a former hockey player, I am well aware that concussions are a serious injury that can cause grave repercussions down the road if they are not properly addressed. By raising awareness on the danger of concussions and directing states to establish concussion safety guidelines for schools, we will be better equipped to protect young athletes from the potentially devastating consequences of concussions,” said Stauber.

“Concussions are an often-silent health condition that can have serious, long-term consequences and sadly with still-developing brains, younger athletes are at greater risk from sports-related concussions than college or professional athletes. These injuries can jeopardize students’ future ability to compete in sports, their academic performance, and their mental health. Together with a community of schools and medical professionals, we can make real progress toward protecting our student athletes,” said DeSaulnier.

The NFL’s Senior Vice President of Public Policy and Government Affairs Brendon Plack said the league “was pleased to once again support the Protecting Student Athletes from Concussions Act. Over the last decade, the league has engaged in important efforts to encourage youth to play sports

and stay active, while minimizing the risk of preventable and unnecessary injuries. We believe this bill would help do that by ensuring that core concussion safety standards apply to all primary and secondary students throughout the country – regardless of grade. We encourage Congress to pass the bill. It’s a win for student athletes’ safety.”

Similarly, Major League Baseball spokesperson added: “Major League Baseball supports the Protecting Student Athletes from Concussions Act. This bill will ensure nationwide compliance with evidence-based best practices for the prevention, diagnosis and treatment of head injuries in youth sports and, like the protocols in MLB, protect student athletes from returning to play until they are medically cleared to do so.”

Finally, George Chiampas, Chief Medical Officer of the U.S. Soccer Federation, added that “U.S. Soccer commends Representatives DeSaulnier and Stauber for their leadership on this important issue. It is critically important that coaches, players, parents and referees have the information and guidance they need to improve the prevention, identification and management of head injuries, and concussions in particular, across all sports.”

The following groups support this legislation: American Academy of Neurology (AAN), American Physical Therapy Association (APTA), National Hockey League (NHL), Major League Baseball (MLB), National Athletic Trainers Association (NATA), National Collegiate Athletic Association (NCAA), National Council of Youth Sports (NCYS), National Disability Rights Network (NDRN), National Football League (NFL), National Interscholastic Athletic Administrators Association (NIAAA), National Parent Teacher Association, Pop Warner Little Scholars, USA Cheer, U.S. Soccer Federation, USA Football. ●

Cruel & Unusual (Exercise as) Punishment?

Claims of Constitutional Violations Dismissed in Student Athlete Wrongful Death Case, *Giordano v. School Board*

By Elizabeth Catalano and Kimberly Sachs, of Montgomery McCracken Walker & Rhoads LLP

After the tragic death of Zachary Tyler Martin-Polsenberg, a former football player at Riverdale High School in Fort Myers, Florida, Laurie Giordano, his bereaved mother, brought a federal lawsuit against the School Board of Lee County, Florida, Coach James Delgado, and Lee County EMS (collectively, the “Defendants”). The suit alleged common law counts of negligence and wrongful death, as well as two federal 42 U.S.C. § 1983 claims for alleged violations of Zachary’s substantive due process rights under the Fourteenth Amendment to the United States Constitution. Essentially, Giordano maintained that Coach Delgado and the School Board’s actions constituted a “deliberate indifference to [Zachary’s] health and safety.” In January 2020, a federal court in Florida granted the Defendants’ motion to dismiss the constitutional claims with prejudice, finding Coach Delgado’s actions did not “shock the conscience.” Despite this victory for the Defendants, Zachary’s story is another catastrophic example of what can go wrong when coaches use exercise for punishment and those in charge of student-athlete safety ignore safety protocols.

The Warm-Up: The Facts¹

On June 29, 2017, a ninety-degree summer day in Southwest Florida, Zachary attended a several-hour-long voluntary football practice at Riverdale High. Despite the piercing heat, Coach James Delgado pushed the bounds of safety, withholding water from players, discouraging players from taking breaks, and threatening to punish those who asked

1 All facts are taken from the face of the pleadings and filings in this matter.



Elizabeth Catalano



Kim Sachs

for water by kicking them off the team. Zachary, who was sixteen years old at the time, displayed clear signs of heat exhaustion, which the coaches ignored. Instead, the coaches forced Zachary and the rest of the team to run “never-ending sprints” at the end of the practice while continuing to withhold water.

During the post-practice huddle, Zachary “collapsed, began convulsing, and vomited” due to heat exhaustion. Coaches, however, continued to ignore his symptoms and did nothing for several minutes. After another player informed Zachary’s mother that Zachary had collapsed, Coach Delgado finally decided to call 911 to request an ambulance. During the call, Coach Delgado intentionally downplayed the severity of the situation, saying Zachary was “fine,” thereby contributing to Lee County EMS’s slow arrival and inadequate emergency care. As a result, the EMS service arrived without any means to transport Zachary to the hospital and failed to perform any life-saving measures such as the “cool first, transport second” method. Zachary’s temperature reached 107 degrees when he fell into a heat-induced coma that he could not recover from. He passed away several days later from complications related to the heat exhaustion.

The Work-Out: The Constitution and Sports

First Set—The Court’s Ruling

The Fourteenth Amendment of the United States Constitution prohibits states from “depriving any person of life, liberty, or property, without due process of law.” Section 1983 of the United States Code imposes liability on the individual actor who, acting on behalf of the state, deprives a person “of any rights, privileges, or immunities secured by the Constitution and laws.”

Giordano alleged that the coaches and the school board owed an affirmative duty of care to Zachary, and that Coach Delgado violated Zachary’s constitutional rights to due process “by forcing him to perform physical drills in the intense heat, denying him water, and failing to seek emergency medical care when he was injured.” Furthermore, she argued that Coach Delgado acted “in an unrestrained manner and with absolute power,” and that his actions, including denying Zachary adequate hydration through verbal threats, demonstrated a conscious indifference and callous disregard for Zachary’s health and safety.

The Defendants argued there was no underlying constitutional violation in Giordano’s claims.

The Court agreed with the Defendants. In arriving at this decision, the Court noted the Constitution imposes affirmative duties of care on state actors only in limited circumstances, such as where the state has a “custodial relationship” with an individual (such as in a prison or mental institution), or where the state’s conduct “shocks the conscience.” Both standards are difficult thresholds to prove.

Relying on a similar case that held a school had no custodial relationship with

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Constitutional Violation Claims Dismissed in Athlete Wrongful Death Case

Continued From Page 3

a football player who chose to participate in an extra-curricular activity, the Court determined that Zachary's mother failed to allege that Zachary had a custodial relationship with the Defendants at a *voluntary* summer football practice. The Court also reasoned that despite the egregious, conscious, and intentional decisions and acts that Coach Delgado made to deprive Zachary of water and downplay his condition, the allegations did not rise to the level of "conscience-shocking" because there were no allegations of physical conduct by the Coach or corporal punishment with an intent to punish or injure. After granting leave for the plaintiff to amend, the Court dismissed the constitutional claims with prejudice, and dismissed the negligence and wrongful death claims without prejudice.

Second Set—Constitutional Claims and State Actors

Plaintiffs face several challenges when asserting constitutional claims in the sports-injury setting and when the defendants are state institutions and state actors.

As the *Giordano* case demonstrated, plaintiffs face a stricter pleading requirement when alleging violations of Section 1983. To successfully assert a Section 1983 claim in this setting, a plaintiff must show that the actor's conduct "shocks the conscience" and that there was a custodial relationship that created an affirmative duty on the state and state actors. This is a more stringent requirement than a typical negligence claim.

So why do plaintiffs assert Section 1983 claims if these claims are more difficult to prove? The answer is qualified immunity.

Qualified immunity (which was not an issue in the *Giordano* case) arises in cases where a state institution (like a state university) and its employees (state actors) are the defendants. The state actors, who could otherwise be liable for their negligent conduct, will likely assert that they

are immune from suit under the qualified immunity doctrine. Qualified immunity is a form of legal immunity that protects state actors from lawsuits arising out of their discretionary acts performed within their official capacity. Here's the kicker, qualified immunity does not protect from actions that violate "clearly established" federal law or constitutional rights. Because of this, creative plaintiff's lawyers in the sports-injury setting will assert Section 1983 claims in an attempt to circumvent qualified immunity, which would otherwise prevent suit in a typical negligence case, because the state-actor defendant (coaches, athletic trainers, physicians) allegedly violated a constitutional right.

Max Reps—Raising the Bar for the Standard of Care

Zachary's unfortunate story also highlights a broader issue: what is the standard of care for schools, coaches, and athletic trainers in heat stroke cases and how is that standard met or breached?

In the *Giordano* case, Zachary's mother argued that defendants failed to follow the standards set forth by the Florida High School Athletic Association (FHSAA) for handling heat acclimatization, precautions for hot weather, and medical emergencies. She claimed that Coach Delgado and the School Board failed to comply with these policies by intentionally failing to hydrate players, by not having trainers or other medical personnel present during the workout, and by not having ice packs, immersion tubs, or other helpful equipment contemplated by the FHSAA policy available for the coaches to use.²

2 Apparently, Riverdale did have this equipment and ice available in the school building, but it was not readily available and "no one knew what to do." Nate Foy, *Major policy approved to prevent heat illness for high school athletes*, NBC 2 (April 30, 2018) <https://www.nbc-2.com/story/38078598/major-policy-approved-to-prevent-heat-illness-for-high-school-athletes>

After Zachary's death, his mother began campaigning for the FHSAA to improve player safety and prevent heat exhaustion and heat stroke by requiring, among other things, cold water immersion tubs and wet bulb globe thermometers at every school. Florida leads the nation in football player heat-stroke related deaths, with four high school athlete deaths in the past nine years.³ Zachary's mother reasoned that "if there had been a cold water immersion tub available, that would have been the difference between [Zachary] still being here today and passing away."⁴ "Extensive medical research shows there is a 100 percent survival rate if a person with heat stroke is immersed in ice-cold water within 10 minutes."⁵ The FHSAA Sports Medicine Advisory Committee recommended that all member schools have cold water immersion tubs. In 2018, the FHSAA eventually approved a new policy requiring Florida athletes and coaches to pass a heat illness prevention course before participating in sports, and voted to "strongly recommend," but not mandate, wet bulb globe thermometers and cold-water immersion tubs near any athletic activity.⁶

3 Michelle Kaufman, *Ice tubs save athletes' lives after heatstroke, so why don't all schools have them?*, Miami Herald (Oct. 23, 2019) <https://www.miamiherald.com/sports/high-school/article236483518.html> (noting 64 total heat-related athlete deaths, with 90% occurring in practice and the majority being high school players).

4 Nate Foy, *After her son died, this mother is fighting for high school football player's safety*, NBC 2, (April 16, 2018) <https://www.nbc-2.com/story/37968890/after-her-son-died-this-mother-is-fighting-for-high-school-football-players-safety>

5 See Kaufman, *supra* note 4.

6 See Foy, *supra* note 3; Sean Barie, *FHSAA Board votes to 'strongly recommend' cold water tubs for athletes*, NBC 2 (June 12, 2018) <https://www.nbc-2.com/story/38408616/fhsaa-board-votes-to-strongly-recommend-cold-water-tubs-for-athletes>

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Head Athletic Trainer at US Lacrosse Talks About Her Career, Risk Management, and Other Topics in Interview

Last fall, in a blog post on the US Lacrosse website, Kellie Loehr, the organization's head athletic trainer, was interviewed for a story on mental health.

A few decades ago, it might have seemed odd that a AT was asked about such topics. Not anymore, and certainly not when it comes to the next generation of leaders in the sports medicine field, like Loehr.

For her part, Loehr rolled with the questioning, exemplifying a keen eye for such problems: "It's important to recognize that these signs and symptoms can manifest differently in different athletes. One athlete may present completely different than another athlete."

We sought out Loehr with the following interview to get her perspective on similar issues as well as her fast-rising career.

Question: *What led to your interest in becoming an athletic trainer?*

Answer: I actually initially wanted to be a physical therapist, and as a competitive swimmer growing up, I knew I wanted to work more with an athletic or physical active population. I had a great relationship with my athletic trainer in high school, and she really encouraged me to shadow a variety of clinicians and to check out the athletic training programs within the state. My senior year of high school I started working as a student athletic trainer with her and was accepted to the athletic training program at West Chester University. I feel lucky that I was able to find a career I am passionate about so early in life.

Q: *How has getting a master's degree in Sports Management helped your career?*

A: I earned my master's degree in Sports Management from Louisiana State University which really helped me in my administrative role as a community liaison and head athletic trainer. A lot of the classes were geared towards finance management, law and economic issues, policy develop-



My role is a dual position between the two organizations that allows me to be integrated in this sport governing body at an organizational level.

— Kellie Loehr

ment and facility management, all of which I do regularly in my role at US Lacrosse. I was able to get a stronger knowledge base of these topics, which we had only briefly discussed in my undergrad classes.

Q: *Has there been anyone who stands out as a mentor during your career?*

A: There have been so many people throughout my career who have stood out and taught me something different, but Scott Heinerichs, athletic trainer and now Dean of the College of Health Sciences at WCU, has been a mentor of mine since I started school. He is someone that always pushed me to be the best person and athletic trainer that I could be. He taught me the importance of work-life balance and encouraged me to push past my comfort zone to reach the goals that I had.

Q: *Tell us about your role as Head Athletic Trainer at US Lacrosse; Is it more managerial, or do you spend more time in the field? What does the role of community liaison at MedStar entail?*

A: My role is a dual position between the two organizations that allows me to be integrated in this sport governing body at an organizational level. This really allows me to create a community relationship and provide a variety of services. I primarily work within four realms of the USL organization- facilities, national teams, partnerships and marketing, and sport science and safety. We have over 200 events on our field throughout the year, so I am usually onsite as a medical host or helping to secure athletic training coverage for visiting teams. Our men's and women's national teams are on-site for several events a year, so I help to select and oversee their volunteer medical staff, manage inventory and medical records through HealthAthlete (our EMR system), and help to manage and implement policies that affect the teams. I also help the medical staff and players with logistical issues, such as insurance claims and prepping for our off-site events, since

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Athletic Trainers and Club Sports; Ohio Injury Highlights the Problem

As more and more high schools face budgetary constraints, the question of whether it is financially feasible to field a football team is surfacing.

The West Union High School acknowledged that problem recently and turned the program over to a private organization to carry the burden.

Everything was fine until West Union Club Football player Trent Heater suffered a rib injury when he was struck by an opposing player's helmet. The injury could have just as easily been a concussion. Laying on the field, Heater had a hard time breathing.

Because the team was being managed by a club, they did not have to staff the

game with an athletic trainer, who might have made a more prudent decision.

Instead, an EMT examined Heater. Concluding that he lacked the proper equipment to treat the junior at the facility, the EMT had Heater life flighted to a nearby hospital. At the hospital, it was determined that he fractured his ribs.

"That's a scary feeling," his father, Brett Heater, told TV Station WKRC. "The upside to that is, you know, the people that pick him up are extremely well trained, know what they're doing. They can give him the best help that's available."

The elder Heater was stuck with a \$40,000 star flight bill.

Dr. Carl Maresh, a professor and the

director of the exercise science Laboratory in the Department of Human Sciences at Ohio State University, suggested to the media that the practice of high school's divesting football programs poses problems.

"You have the same potential problems and the same potential dangers or risk associated with a club team – as you do a sports team associated with a high school," he said. "If you're going to make the huge investment of having a football team, for example, then I think that it behooves the administration or those making the decisions to decide whether or not they're going to provide that in the safest way possible." •

US Lacrosse Athletic Trainer Talks About Her Career, Risk Management

Continued From Page 5

they are not at our facility all the time.

The almost 20-year partnership between USL and MedStar runs very deep, and my position helps to streamline marketing efforts to reach common goals. We collaborate on so many levels; some of our biggest projects include the LaxFit Program, Health and Performance Series and the LaxCon Sports Medicine Symposium.

Q: *What are the most common injury risks for a LAX athlete?*

A: The difference in the men's and women's game itself plays a big role when it comes to injuries. Men have a higher incidence in body-to-body contact injuries than women, who's injuries are more likely to be caused by a stick or ball. Lower body injuries are still the most common in both games, including ankle sprains, muscle strains, and contusions. Men though have a higher incidence of shoulder and wrist injuries, where women are more likely to have a head or face injury. Of course, concussions are still a hot topic, and the

recent development of optional women's headgear has sparked some controversy throughout the sport.

Q: *Is the issue of concussions more prevalent, or less prevalent than it was two years ago, and to what would you attribute that to?*

A: While the rates are still lower than many other sports, recent research has shown that there has been an increase in concussions on a national level in lacrosse, especially in youth males, over the last several years. I think that what research doesn't always show though is why are we seeing this. Certainly, there are more participants in lacrosse specifically, as the sport has grown exponentially over the last decade, leading to more potential exposures to injury. However, there is also a lot more public awareness to concussions as well, and it's possible we're seeing more reporting of symptoms than we have in the past because of that.

Q: *How has your awareness of legal issues changed over the years since you became a professional? What would be an example?*

A: My awareness of legal issues has really developed throughout my career. When I worked at the collegiate level, I was more concerned with things like negligence and malpractice, because I was doing much more hands-on work with athletes. Now that my job is more administrative, I work closely with our risk management department when updating or creating new policies to be sure we are minimizing our legal risk. For example, we are currently working on updating our Team USA player agreements to reflect the use of our performance tracking units and ensure that all parties involved (players, coaches, medical staff, etc.) are aware of what biometric data is being collected from them and how it is being used and stored. I also think it's so important to have someone who knows specifics about the legal side of things within an organization to ensure that things are handled appropriately. Ultimately, our goal is to keep our players safe both medically and legally. •

Magistrate Recommends Dropping Claim Against Coach Who Ordered Players to Strike Referee, Leading to Concussion

A magistrate judge from the Western District of Texas has recommended that a football referee's claim that a coach, in his individual capacity, was responsible for a concussion and other injuries he suffered when the coach's players blindsided him in a high school game be dismissed with prejudice.

In so ruling, the judge concluded that the coach, Mack Edward Breed, was entitled qualified immunity.

The recommendation could put an end to an ugly incident that drew national headlines on September 4, 2015 in Marble Falls, Texas. The incident can be viewed here: (<https://www.youtube.com/watch?v=0Q7p87ej3J4>).

The game pitted John Jay High School (JJHS), which is part of Northside Independent School District (initially a co-defendant), and Marble Falls High School. Breed was an assistant football coach at JJHS and an employee of NISD.

Watts claimed that, shortly before the game ended, Coach Breed, angry at some calls that he disagreed with, directed two JJHS players to hit Watts and "make him pay" for alleged bad calls and racist statements. Thereafter, the players tackled Watts from behind, knocking him to the ground. Watts alleges he suffered cuts, bruises, abrasions, and a concussion from the hit.

Watts sued, pursuant to [42 U.S.C. § 1983](#), raising a substantive due process claim pursuant to Fourteenth Amendment to the Constitution. He claimed, specifically, that the defendants violated his right to "bodily integrity and personal security." He further alleged that Breed acted with deliberate indifference when he instructed the players to hit him.

In 2018, the same magistrate recommended the court dismiss the claim against NISD and Breed, in his official capacity.

The court adopted the recommendation.

In the instant case, the magistrate judge considered the defendant's motion for summary judgment on the § 1983 claim based on qualified immunity.

"Breed asserts he is entitled to qualified immunity on Watts' substantive due process claims against him," wrote the judge. "The doctrine of qualified immunity protects government officers from civil liability in their individual capacities if their conduct does not violate clearly established statutory or constitutional law of which a reasonable person would have known. *Kisela v. Hughes*, 138 S.Ct. 1148, 1152, 200 L. Ed. 2d 449 (2018). For a right to be 'clearly established' the law in effect at the time of the incident must 'dictate, that is truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what the defendant is doing violates federal law in these circumstances.' *Sama v. Hannigan*, 669 F.3d 585, 591 (5th Cir. 2012).

"Watts asserts a substantive due process claim arguing that Breed was a state actor who violated his right to bodily integrity when he told two John Jay football players 'to hit' Watts and 'make him pay.' The Court already ruled on this claim with regard to the official capacity claims against Breed and the claims against NISD. The Court's holding that Watts failed to state a constitutional violation was based on the fact that two football players, and not Breed assaulted Watts.

"The Court found that Watts could not state a violation of his substantive due process right to bodily integrity because he could not establish either the 'special relationship' or the state-created danger theory exceptions to the well-settled principle that a state could not be held liable for the actions of a private individual. *Id.*

at 3-6. When an individual is harmed by students rather than school or government officials, there is no constitutional violation unless one of these two exceptions applies. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).

"Watts attaches to his Response, Exhibit A, which shows that Breed pled guilty to a Class A Misdemeanor Assault on December 14, 2015, for the football players' attack of Watts. Watts asks the Court to take judicial notice of Breed's guilty plea. He also cites the Texas Penal Code, Section 7.02(a)(2), which states that 'A person is criminally responsible for an offense committed by the conduct of another if: (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.' Tex. Penal Code § 7.02(a)(2). Watts alleges that, under the 'law of parties' theory, this guilty plea shows that Breed himself individually 'assaulted' Watts and caused him injury, despite the fact that Watts' claims are based upon the fact that he was tackled not by Breed but by two football players. Thus, Watts argues, Breed, a 'state actor' assaulted him, and not private individuals.

"Watts has failed to demonstrate that Breed acted objectively unreasonably in light of clearly established law at the time of the incident," wrote the court, citing *White v. Pauly*, U.S. , 137 S.Ct. 548, 551, 196 L. Ed. 2d 463 (2017) (per curiam).

"No matter how he attempts to present it, Watts alleges a state-created danger theory of liability. This court already addressed that issue in its prior report and recommendation, noting that the Fifth Circuit has continuously declined to recognize the merit of the state-created

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More Than a Knee Injury: ACL Tears Cause Harmful Changes in Our Brain Structure

It's known that some joint function is often permanently lost after anterior cruciate ligament reconstruction, and re-injury is common even with intensive physical therapy, but it's unclear why.

New research from the University of Michigan School of Kinesiology shows structural changes in the brains of patients who underwent ACL reconstruction. These changes hinder recovery and may contribute to performance deficits and re-injury, says study co-author Lindsey Lepley, U-M assistant professor of athletic training.

Lindsey Lepley and colleague Adam Lepley, clinical assistant professor of athletic training, took MRI brain scans of 10 ACL-reconstructed patients. The scans showed that part of the corticospinal tract — the pathway that shuttles messages from brain to muscles — had atrophied in the patients.

The corticospinal tract runs from front to back through both hemispheres of the brain. The side of the tract that controls the ACL-reconstructed knee was about 15 percent smaller than on the uninjured side, the researchers say.

Think of the altered corticospinal tract as a traffic tunnel that narrows, letting fewer cars pass through, they say. In the ACL reconstructed patients, less information gets from the brain to the muscle because less information can travel along the smaller tract.

"In essence, the brain not only alters the way it communicates with the rest of the body, joints, muscles, etc., but the structural makeup of the basic building blocks of the brain are also changed after ACL injury," Adam Lepley said. "We think that this is a protective mechanism, in which our body is trying to limit unwanted movement around a joint injury ... and can be applied to not just ACL injuries, but other musculoskeletal injuries as well."

Another recent study shows that downstream neural activity in the quadriceps is impaired during sport-like movements after ACL surgery, which suggests that poor brain structure and communication can lead to reduced functioning, the researchers say.

The bottom line for patients and clinicians is that a knee injury is not just about knees — other areas, like the brain structure, are negatively impacted, too.

"It means that during treatment, a systemic approach should be taken not just to improve range of motion or swelling at the injured joint, but also consider other impairments like poor movement patterns and muscle activation in order to get better outcomes," Lindsey Lepley said. "There is evidence of using visual retraining, different motor learning modalities like external focus of attention and biofeedback, which can help 'rewire' the brain to help the body adapt to a new normal."

Brian Norton Named Assistant Director of Athletics for Athletic Medicine

Washington State Director of Athletics Patrick Chun has announced the addition of Brian Norton to the Cougars' Athletic Medicine staff as the Assistant Director of Athletics for Athletic Medicine.

Norton joins the Cougar staff after over 16 years of work as the Assistant Athletic Director for sports medicine at Eastern Washington University from 2003 through late 2019. During his time at Eastern Washington, Brian managed services provided to 325 student-athletes competing in 14 total NCAA Division I sports.

He oversaw a staff of five athletic trainers, along with nine medical support staff members as well. Norton also served as the athletic departments head football athletic trainer during his time at Eastern Washington. Brian also has three years of service on the NATA Intercollegiate Council for Sports Medicine (ICSM).

Prior to EWU, Brian was the Head Athletic Trainer/Director of Athletic Training Education at Southwestern College in Winfield, Kansas where he served as the head football, men's basketball men's soccer and track and field athletic trainer. Norton also served as an assistant professor and program director for the school's athletic training education program. Before his stint at Southwestern, Brian served as the Head Athletic Trainer from 1995-1996 at the University of Rio Grande in Ohio.

Norton received his bachelor's degree in athletic training from the University of Kansas in 1993, and a master's degree in physical education from Ohio University in 1996.

University of South Florida Adopts Independent Medical Model for Student-Athlete Care

USF Health and USF Athletics have partnered on an implementation of an independent medical model that supports the physical and psychosocial welfare of student-athletes.

Under the new model, physicians will have increased contact with athletic trainers and student-athletes within the Selmon Athletic Center Athletic Training Clinic, where they care for more than 450 student-athletes.

The new model includes shifting reporting and funding lines of 16 athletic trainers and the Behavioral Health Coordinator previously in USF Athletics to now fall under the Department of Orthopedics and Sports Medicine within the USF Health Morsani College of Medicine, according to Jennifer Farrant, MSEd, ATC, administrator for the Department of Orthopedic Surgery and Sports Medicine and Department of USF Family Medicine.

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CDR Digest

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“Through this model, we’ve found a way to make sure our athletic trainers are reporting through a physician to ensure the medical decisions made by and for the student-athlete are truly in his or her best interest,” Farrant said.

“Long-term, this model will increase the educational and research opportunities that come with having an athletic training program housed within a medical school,” Farrant added. “This new model will help the recruiting efforts of student-athletes, athletic trainers, and other primary care physicians.”

Division 1 athletic trainers have historically reported through athletic departments and not a physician, Farrant noted.

In the past, physicians weren’t always available because they were in clinic or had other patient obligations, according to Renée Dubault, chief operating officer and associate executive director of Business Operations for USF Health.

“One of the most important benefits of this effort will be a better level of care for student-athletes and direct access to physician care,” Dubault said.

Models like this aren’t common, but there is a growing trend to move in this direction. The NCAA recommends true medi-

cal models with independent medical decision-making. Going forward, it’s important for athletic trainers and physicians to have that independence when it comes to medical decisions of student-athletes, said Steve Walz, MA, ATC, LAT, Associate Athletic Director-Director of Sports Medicine for USF Athletics. “It also allows for better collaboration and oversight of the athletic training staff with the team physicians.”

Athletic Trainer Uses Defibrillator to Save 15-year-old Hockey Player

A 15-year-old sophomore at University of Detroit Jesuit High School was saved by an athletic trainer (AT) after he went into cardiac arrest during a practice at the Hazel Park Ice Arena.

The AT, Eric Schwab, works for the Henry Ford Health System as well as serves as the head athletic trainer for U of D Jesuit. He was there that day when Conor Place collapsed on the ice.

Schwab performed two rounds of CPR on Conor before someone was able to bring him a defibrillator.

“We got the pulse back and he started becoming responsive to my verbal commands,” Schwab told the media. “That was a relief.”

Safe! Jury Finds High School Baseball Coach Not Liable In Bang-Bang Play

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Swinging for the Fences (and the Courthouse)

Three years after his catastrophic injury, Mesar and his family filed a lawsuit in 2015 against Suk and the school district for negligence alleging that Suk’s were so reckless that they constituted “an extreme departure from ordinary care in which a high degree of danger is present.”

The judge initially dismissed the complaint finding that “recklessness was the applicable standard under the factual circumstances, and plaintiff failed to plead recklessness.” Mesar appealed, and the Appellate Division of the Superior Court of New Jersey reversed the lower court’s decision and found that “defendants were on notice and fairly apprised of plaintiff’s allegation that their conduct was reckless, and dismissal of the complaint for failure to plead recklessness was mistaken.” The case went to trial



Jon Hughes



Kacie Kergides

in June 2019.

Throughout the litigation, Suk conceded in his deposition that he did in fact signal Mesar to slide into third base during the second inning, and during the trial, Suk testified that he “[made] the decision for [Mesar] to slide, to avoid injury and to avoid contact (with the third basemen),

so [Mesar] could approach the bag safely . . .” Suk continued, “It was going to be a bang-bang play.”

In their attempt to persuade the jury that Suk’s actions were so reckless that they constituted “an extreme departure from ordinary care in which a high degree of danger is apparent,” Mesar’s counsel focused on several issues while cross-examining Suk. First, that Suk was not focused on Mesar as he approached third base but was instead focused on runners heading to home plate as a result of Mesar’s base hit. Second, that Suk instructed Mesar to slide too late and too close to third base, thereby not giving Mesar the requisite distance and notice to safely complete the slide. Lastly, plaintiff’s counsel suggested that Suk was not qualified to act as third base coach because Suk never received any instruction or schooling

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to serve as a third base coach.

After the jurors deliberated for approximately two hours, the foreman announced that seven jurors found Suk and the other co-defendants not liable, while one juror found them to be liable. In other words, Suk was found not responsible for Mesar's injury, and Mesar was not entitled to any compensation for injuries he suffered as a result of the alleged recklessness of Suk and the other co-defendants.

Throwing a Curve Ball at Youth Sports

If Suk and the other co-defendants were held liable, it could have fundamentally changed not only high school sports, but youth sports in general. Individuals would no longer be willing to volunteer to serve as coaches. Schools might even no longer be willing to have teams as they would most likely be required to carry expensive insurance policies. Coaches would be scrutinized for everything that occurred on the field, court, mat, or pool.

Reducing liability in high school sports has been a hot topic lately, as it pertains to catastrophic injuries, particularly focusing around concussions. In May 2019, the National Federation of High School Associations published an article entitled,

*"10 Steps to Reduce Liability of School Sports, Athletics Personnel."*¹ Interestingly, none of the ten steps identified in the article directly relate to duties that high school coaches have to their student athletes once the athletic competition commences. Instead, the article discusses topics such as: (i) Locker Room Supervision; (ii) Reasonable and Safe Discipline for Student-Athletes; (iii) Preventative Measures Against Hazing and Sexual Harassment; and (iv) Obligations to Pregnant and Parenting Students.

Moreover, while many other articles discuss a coach's duties or obligations as they pertain to injuries sustained by student athletes, most of these articles address preventative measures (*e.g.*, use of safe and appropriate equipment) or best practices with respect practice related injuries (*e.g.*, proper hydration and rest), as opposed to instruction or guidance related to mitigation or elimination of student athlete injuries sustained while the sport is being played.²

1 Len Green, "10 Steps to Reduce Liability of School Sports, Athletics Personnel (May 17, 2019), <https://www.nfhs.org/articles/10-steps-to-reduce-liability-of-school-sports-athletics-personnel/>

2 Two notable exceptions to this general comment are lawsuits directed at coaches and sponsors of the athletic program for injuries either:

While Suk was found not liable, this lawsuit raises many concerns for schools and coaches. As a way to minimize their liability, schools and coaches should make sure their policies and protocols are up to date and in compliance with the standards set by organizations such as the National Athletic Trainers Association and the National Federation of High School Associations.

Despite taking all of the necessary precautions, however, this case demonstrates that all it takes is one injury, one lawsuit, and one adverse jury verdict to forever change the landscape of organized high school sports. And in the litigious society in which we live, a repeat lawsuit like this one is more likely than not. Attaching legal liability to every in-game decision a coach makes would turn Monday-morning quarterbacks (second guessing every decision from a strategy standpoint) into Monday-morning lawyer-backs (second guessing every decision from a legal cause of harm standpoint)." Fortunately, the Defendants retired the side and the jury kept organized high school sports in fair territory, for the time being. ●

(i) allegedly sustained after a student athlete became concussed; or (ii) allegedly sustained after a student athlete became dehydrated.

Constitutional Violation Claims Dismissed in Athlete Wrongful Death Case

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The Cool-Down: Eliminating Exercise as Punishment

Ultimately, complicating all the issues with constitutional claims and the applicable standard of care is the serious problem of coaches using exercise as punishment for athletes. *Sports Medicine and the Law* recently published an article on the NCAA Sports Science Institute's Interassociation Recommendations: *Preventing Catastrophic Injury and*

Death in Collegiate Sports recommendation that physical activity should *never* be used for punitive purposes. The National Athletic Trainers' Association similarly recommends that "No additional physical burden that would increase the risk of injury or sudden death should be placed on the athlete under any circumstance."

Certainly, Coach Delgado's use of the "never-ending sprints" conditioning drills

at the end of a three-hour long practice in excessive heat, while deliberately withholding water from athletes, would constitute an additional physical burden and problematic punitive exercise. Coaches should be educated in both the dangers of punitive exercise and the preventative safety measures related to issues like heat stroke to protect players and ensure that the standard of care is upheld under their watch. ●

Plaintiffs' Experts Fail To Tie Death To CTE, CTE To Football

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of child participants in its program,” and asserted claims for negligence, fraud, deceptive business practices, and wrongful death.

Pop Warner moved for summary judgment, claiming there was insufficient evidence to prove it knew of the risks associated with CTE at the time Archie's and Cornell's sons played youth football in its organization.

Pop Warner argued that the plaintiffs failed to make the necessary causation showing. First, Pop Warner claimed there was absolutely no evidence that Bright Jr. or Cornell ever suffered a concussion while playing youth football at Pop Warner. Second, Pop Warner argued there was insufficient proof to support the general allegation that youth football causes CTE.

In opposing Pop Warner's motion for summary judgment, Archie and Cornell relied on the opinions of three experts—Dr. James Merikangas, Dr. Brent Harris, and Dr. Bennet Omalu. Plaintiffs' experts argued *all* football games result in repetitive head trauma for the players, and all head trauma is capable of causing brain damage.

Proof of the (Dura) Matter Asserted—The Battle of the Experts on CTE Causation

The Court excluded the opinion of Dr. Merikangas at the outset, finding he failed to consider other potential causal factors and did not base his opinion on any medical records or other evidence.

The other two experts—Drs. Harris and Omalu—did offer opinions, though Dr. Harris stated he was unable to opine on causation, which was one of the key elements of the case. Dr. Omalu's opinion was similarly unhelpful to the district court; though Dr. Omalu broadly discussed CTE in his expert report, he failed to explain how or why Pop Warner football was a substantial factor in the players' deaths



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Dylan F. Henry

given the multitude of other factors that could have caused or contributed to the alleged development of CTE, or the potential causes (separate and apart from CTE) of the untimely deaths.

The court noted Dr. Omalu utterly failed to explain the scientific or methodological basis for his conclusions and highlighted Pop Warner's competing expert opinions, which harshly criticized the unreliability of the science surrounding CTE.

Thinking it Through—The Court Decides

The Court agreed with Pop Warner, finding there was no triable issue of fact given the dearth of evidence relied on by Archie and Cornell. In arriving at this decision, the Court focused solely on the issue of causation. The Court invoked the “substantial factor” test, which recognizes that negligent conduct can combine with another factor to cause harm. Under this theory, if the same harm would have occurred *without* the allegedly negligent conduct, then the negligent conduct is not a “substantial factor” capable of establishing legal causation.

While the Court held that ruling out every possible cause of harm is not required, the Court recognized that expert testimony that only establishes a mere

possibility, as compared to a probability, is insufficient to establish causation. With these considerations in mind, the Court concluded Archie and Cornell's expert declarations and testimony were legally insufficient to establish causation and were insufficient to legally link the time Bright Jr. and Cornell played Pop Warner football with CTE, and CTE with their untimely deaths.

Meditating on The Future—Takeaways

This case is one of many in a continuing trend that attempts to link participation in high-contact sports with latent brain diseases and resulting complications (CTE, Alzheimer's, Dementia, ALS). In addition, it demonstrates that cases in this context boil down to a battle of the experts on causation: can the plaintiff successfully bridge the causal gaps between participation in a sport (and the failure to warn about the long term risks associated with participation in the sport) and some latent brain disease, and then the gap between the brain disease and the ultimate harm, which, in most cases, is death. Because the science surrounding CTE is still in its infancy, the fate of litigation often hinges on which expert the judge or jury sides with.

In this case, all plaintiffs' experts conceded there was no documented evidence that established either decedent suffered a concussion, or any form of head trauma, in the course of playing Pop Warner football. Instead, plaintiffs and their experts rested on the theory that brain damage may be *assumed* by virtue of the decedents' participation in Pop Warner football.

Furthermore, the plaintiffs' expert testimony and declarations were scant on explaining the underlying scientific

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Plaintiffs' Experts Fail To Tie Death To CTE, CTE To Football

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or methodological bases. Ultimately, the Court found that the opinions were not reliable because, at the end of the day, they simply did not make sense.

So long as the science behind CTE and its links to football and other high-risk contact sports (or to repetitive head trauma that occurs outside the sports setting) remains unsettled, it will be up to the courts and the juries to make decisions on a case-by-case basis. The Court in the Pop Warner case could have easily punted on the issue and allowed this case to proceed to trial. There, it would be up to the finder of fact—either the judge or the jury—to assess the expert opinions and ultimately decide the liability issue based on how they understood the science. Until the scientific community can reach a clearer consensus on CTE and causation, we can expect these sport-related CTE (and other latent brain disease) cases to increase because it

is not only easier for plaintiffs to bring a lawsuit, but, more importantly, maintain these types of suits.

Afterthought—CTE and Dr. Bennet Omalu

CTE and Dr. Bennet Omalu gained mainstream attention in 2015 when Columbia Pictures released “Concussion,” a feature-length film in which Will Smith portrayed Dr. Omalu. In the film, the NFL actively attempts to suppress Dr. Omalu, who is presented as having discovered CTE, in his efforts to spread awareness of the degenerative condition. In reality, Dr. Omalu published a paper in 2005 discussing his analysis of the brain of a deceased NFL player and the research linking repetitive head trauma to brain damage that dates back to the 1920s.

Recently, in addition to the Pop Warner Court’s opinion discrediting Dr. Omalu’s

opinion, Dr. Omalu was the subject of a highly critical Washington Post article that outlines his apparent transition from medical researcher to plaintiffs’ evangelical expert for hire.² Dr. Omalu has earned a pretty penny testifying as plaintiffs’ expert in many sport-related TBI, CTE, and other latent brain disease cases. The article highlights Dr. Omalu’s efforts to “brand” CTE and himself, his transition from scientist to salesmen, and debunks the doctor’s claims that he discovered and named CTE. The article also reports that fears of CTE’s prevalence are overblown and provides a necessary and measured counter-point to the inundation of CTE articles of late. ●

² Will Hobson, *From Scientist to Salesman*, Washington Post (Jan. 22, 2020), <https://www.washingtonpost.com/graphics/2020/sports/cte-bennet-omalu/>.

Magistrate Says to Drop Claim Against Coach

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danger theory. See *Doe ex rel. Magee v. Covington County Sch. Dist. ex rel. Keys*, 675 F.3d 849, 869 (5th Cir. 2012). The unlawfulness of Breed’s conduct was not ‘clearly established’ at the time of the incident. *District of Columbia v. Wesby*, 138 S.Ct. 577, 589, 199 L. Ed. 2d 453 (2018); *Ashcroft v. al-Kidd*, 563 U.S. 731, 742, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011).

“If a plaintiff does not state a claim that a defendant violated clearly established

law, then ‘a defendant pleading qualified immunity is entitled to dismissal.’ *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). Breed, in his individual capacity, is entitled to qualified immunity on Watts’ substantive due process claim.” ●

Robert Watts v. Northside Ind. School Dist. and Mack Edward Breed; W.D. Tex.; 2019 U.S. Dist. LEXIS 213216, A-17-CV-887 LY; 12/7/19