

# SPORTS MEDICINE

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and the **LAW**

## New Bellwether Cases Against NCAA Move Forward in Texas

By Jessica Rizzo, J.D. Candidate, Kimberly L. Sachs, Esq., and Dylan F. Henry, Esq.

Back in 2018, all eyes were on Dallas County, Texas, where aggrieved widow Deb Hardin-Ploetz had sued the National College Athletics Association (NCAA) for allegedly ignoring the injuries that led to the death of her husband.<sup>1</sup> When Greg Ploetz, a former University of Texas linebacker, died at the age of 66 after suffering from severe dementia for a decade, an autopsy revealed that he had an advanced stage of chronic traumatic encephalopathy (CTE), the degenerative brain disease allegedly induced by

<sup>1</sup> See Complaint, *Hardin-Ploetz, v. National Collegiate Athletic Association*, WL 10604058 (Tex. Dist. 2017).

the type of repeated head trauma that football players regularly experience. Hardin-Ploetz believed the NCAA was to blame, and she sought \$1 million in damages for negligence and wrongful death.

Hardin-Ploetz's case was hardly the first of its kind, but it was closely watched by college athletics leaders and legal experts at the time because it was the first such case to go before a jury. A verdict in the widow's favor would likely have opened the floodgates to a wave of similar negligence actions against the NCAA. All hopes and fears that the case would set a major new precedent, however, were laid to rest on just the third day of trial when the judge announced that the two sides had reached a settlement, the details

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## Saved By The Bell—Penn State Dodges Further Litigation in Whistleblower Case

By Fiona Steele, J.D. Candidate, Kacie Kergides, Esq., and Kimberly L. Sachs, Esq.

Employers take note—in Pennsylvania, the 180-day statute of limitations for whistleblower claims starts running when an employee receives definitive notice of an adverse employment decision—not on the effective date of termination. At least, that is what one Pennsylvania court held in April 2020 when it had the opportunity to clarify the statute of limitations under the Pennsylvania Whistleblower Act (the Act). Now, once an employee has been informed of an employer's intent to take

adverse employment action against him or her, whether by letter or word of mouth, the employee has 180 days in which to file a complaint. Failure to do so within that time period will result in any later claim being dismissed as untimely.

### The Clock Starts

Recently, in *Lynch v. Pennsylvania State University*, the Pennsylvania Court of Common Pleas of Dauphin County clarified the statute of limitations for claims under the Act.<sup>1</sup> The Act provides that a plaintiff has

<sup>1</sup> See *Lynch v. The Pennsylvania State University*,

See **SAVED** on Page 12

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## SPORTS MEDICINE

and the **LAW**

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## Arrington Settlement Update: Concussion Reporting Process

By Dylan Henry, Esq.,  
Kimberly Sachs, Esq.,  
and Kacie Kergides, Esq.

NCAA member schools: listen up. In our last issue, we discussed the *Arrington* Settlement Agreement (i.e., the settlement agreement the NCAA reached in the *Arrington* concussion class-action lawsuit), its terms, and more importantly, its potential for causing confusion. As part of the *Arrington* Settlement Agreement, the NCAA is required to create a reporting process through which its member schools will report diagnosed concussions in student-athletes. In January, in an effort to comply with that reporting obligation, all three NCAA divisions passed legislation requiring an active member institution “to report all instances of diagnosed sport-related concussions in student-athletes and their resolution to the NCAA on an annual basis pursuant to policies and procedures maintained by the Committee on Competitive Safeguards and Medical Aspects of Sports.” This summer, the Committee established those policies and procedures, as well as a website and online reporting portal ([annualconcussionreporting.com](http://annualconcussionreporting.com)). The NCAA website

has step-by-step instructions on how to use the reporting portal.

The initial 2020-2021 reporting cycle began on July 1, 2020, and NCAA legislation requires that schools report any concussion diagnosed on or after May 18, 2020. To do so, member institutions must access the online portal on [annualconcussionreporting.com](http://annualconcussionreporting.com) and report (1) the total number of concussions diagnosed since May 18, 2020; and (2) of those concussions diagnosed since May 18, 2020, the total number that have resolved. After successfully submitting a concussion report in the portal, the reporter will receive an email, which contains a confirmation number as well as the number of reported and resolved concussions for the purpose of checking reporting accuracy.

It is imperative that NCAA member institutions thoroughly review the step-by-step instructions and accurately report any and all diagnosed concussions in order to comply with the reporting obligations created by the *Arrington* Settlement Agreement. Be sure to check out future issues of *Sports Medicine and the Law* for updates as the obligations and implications created by the *Arrington* Settlement Agreement continue to develop and evolve. ●

## COVID-19 and Sports Activity: How Heart Could be Affected

From inflammation to heart failure, the effects the new coronavirus (COVID-19) could have on an athlete's heart are alarming, particularly as it relates to vigorous-intensity exercise, training and sporting activities, according to a study.

“This particular virus affects the heart more commonly than other viruses, and that's why we're urging caution. We are learning that as many as 30% of patients hospitalized with COVID-19 have evidence of cardiac injury,” says LifeBridge Health Director of Sports Cardiology Sunal Makadia, M.D., FACC. “While we don't know

if similar numbers of non-hospitalized patients have cardiac involvement, we are concerned that we may be overlooking a potentially dangerous effect of COVID-19.”

Makadia suggested that athletes may need to undergo cardiac screening in addition to COVID-19 testing. “For people who have cardiac inflammation (myocarditis), we know that exercise during the acute phase can actually make the disease worse by increasing the virus's ability to replicate, potentially increasing inflammation and the risk for cardiac arrhythmias, heart failure and sudden death.”

## Hydrate at Home: Another Court Refuses to Recognize Athlete's Right to Hydration During Play

By Patrick Smith, J.D. Candidate  
and Kacie Kergides, Esq.

In August 2015, fifteen-year old freshman “M.T.” attended the freshman football team’s first “heat acclimation training” session of the year at Penn Hills High School.

It was M.T.’s first ever organized football practice, and it would involve a three-hour conditioning session in the summer heat of August. Despite Penn Hills’ knowledge of M.T. testing positive for the sickle-cell trait, the athletic staff and trainers reportedly did not make any effort to check if he was hydrated or exhibiting any signs of heat-illness during the conditioning session. In fact, M.T. alleged the coaches and trainers specifically asked players to not bring water bottles to practice that day.

As the team’s training session concluded, M.T. reportedly collapsed on the field. Rather than attending to M.T., the athletic staff allegedly returned to the locker room and left M.T. to lie in the field until his mother arrived to take him home. M.T. was apparently able to crawl to the car, where his mother found him gasping for air. When his mother began to drive home, M.T. lost consciousness and began seizing in his car seat. His mother immediately called for an ambulance to bring him to the hospital, where he was found to have suffered a stroke and severe muscle breakdown. The hospital concluded these injuries were a result of a bad sickle-cell reaction, triggered by severe dehydration and physical exertion. These injuries are believed to have lasting effects on the former Penn Hills student-athlete.

M.T., through his mother, filed suit in the United States District Court for the Western District of Pennsylvania against Penn Hills’ head football coach, athletic director, freshman football coach, Penn Hills’ principal, and the Penn Hills’ school

district as a whole.<sup>1</sup> M.T. also brought claims against UPMC, the sports medicine group contracted by Penn Hills, and the two athletic trainers present on the day of M.T.’s injury. The most noteworthy cause of action in M.T.’s complaint, and the only claim the Court analyzed thoroughly, was Plaintiff’s § 1983 claim.<sup>2</sup>

Section 1983 of the United States Code allows individuals to sue state officials who are acting under the “color” of state law for depriving them of their rights, privileges, or immunities guaranteed by statute or the U.S. Constitution. M.T. alleged each defendant acted under the “color” of the state when they violated his Fourteenth Amendment right to bodily integrity.<sup>3</sup> In response, the defendants moved to dismiss M.T.’s complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. The court noted the defendant’s arguments for dismissal amounted to (1) each individual defendant was eligible for qualified immunity for the § 1983 claims against them and (2) Penn Hills School District and UPMC had *Monell* immunity because they simply employed the alleged tortfeasors.

### Qualified Immunity

Each individual defendant, aside from the Penn Hills School District and UPMC, re-

sponded to M.T.’s § 1983 claims by arguing they were entitled to “qualified immunity” for their actions. Qualified immunity arises in a case where a state institution (like a public high school) and its employees (state actors) are the defendants. The doctrine of qualified immunity, in short, shields state officials from lawsuits deriving from the state official’s use of discretionary action while on the job. Whether such a government official “may be held personally liable for allegedly unlawful official action generally turns on the ‘objective legal reasonableness’ of the action, assessed in light of the legal rules that were ‘clearly established’ at the time it was taken.”<sup>4</sup>

Therefore, the court asked whether, in August 2015, it would have been apparent to a reasonable high school football coach, principal, or athletic trainer that failure to implement a hydration plan and monitor M.T. for heat illness symptoms violated M.T.’s constitutional rights. Looking to Third Circuit precedent for clearly established rights in the school-athletic setting, the court held that no such right has ever been “clearly established.” The court explained that, in the school-athletic setting, the state actor must have engaged in “patently egregious and intentional misconduct” to have violated a right such that the incident could not be classified as a “typical risk” associated with the athletic activity.

To illustrate a “typical risk” of athletic activities, the court cited to a functionally identical case where a football player died after a rigorous football practice.<sup>5</sup> In that case, the 11th Circuit found that failure to monitor hydration or check for signs of

1 See *M.T. by & Through Eison v. Peterman*, 2019 WL 461083, at \*1 (W.D. Pa. Feb. 6, 2019).

2 Plaintiff’s complaint also alleged defendants violated his right to bodily integrity under the Pennsylvania state constitution. This claim was dismissed because the Court held there is no recognized private cause of action for damages under the Pennsylvania constitution. See *Peterman*, 2019 WL 461083, at \*3 (W.D. Pa. 2019).

3 For the sake of analysis, the Court included UPMC and their athletic trainers as “state actors” but did not reach a decision on whether they actually were state actors. *Peterman*, at \*5 (W.D. Pa. 2019).

4 *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

5 See *Davis v. Carter*, 555 F.3d 979, 982 (11th Cir. 2009).

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## Another Court Refuses to Recognize Athlete's Right to Hydration

Continued From Page 3

heat-related illness fell into the realm of unfortunate but “typical” risks of athletic activities. Finding no other cases clearly establishing the right to adequate hydration and monitoring for heat-illness, the Western District found the individual defendants eligible for qualified immunity against M.T.’s § 1983 claims.

### Monell Liability

Because qualified immunity is only available for individual actors, both Penn Hills School District and UPMC—public entities—argued they could not be liable under § 1983 for vicarious liability.<sup>6</sup> While the court agreed that a public entity could not be held liable solely for employing a tortfeasor, the court subsequently stated that public entities may be held liable if the entity utilizes inadequate policy measures, poor training, or lack of supervision that proximately causes the alleged constitutional injury. If a plaintiff attempts to establish liability on a “failure-to-train” theory, it must show the entity employed acts or omissions which displayed “deliberate indifference.” The court explained, if the plaintiff is relying on the facts of a single-incident, deliberate indifference requires plaintiffs to allege facts which essentially show that the public entity knew to a “moral certainty” that the specific constitutional injury would occur as a result of the entity’s deficient policies or supervision.

Applying this standard, the court found M.T. not only failed to plead facts demonstrating deliberate indifference from a pattern or history theory, but also failed to plead a single-incident theory. The court held that while the events surrounding M.T.’s injury were unfortunate, M.T. did

not establish that defendants were “deliberately indifferent” in supervising or knew to a “moral certainty” that the specific constitutional right would be violated. In closing, the court held even if M.T. pled sufficient facts and made an appropriate showing, the right to a proper hydration plan and to be monitored for heat illness was not a clearly established right that could thus be violated.

### Hydrate and Monitor Your Student-Athletes

Although the claims against Penn Hills and UPMC were dismissed for failure to state a claim, this case should serve as a warning to all schools and teams to make sure they have an adequate hydration plan in place and an athletic staff capable of spotting signs of heat-illness. While this case focused on § 1983 claims, failure to assure proper hydration and heat-illness detection could be the basis of a multitude of other tort-based claims.<sup>7</sup>

Further, Qualified Immunity and *Monell* liability are extremely fact sensitive and application of each varies based on the specific context of the alleged injury. Both qualified immunity and *Monell* liability shield defendants of lawsuits when acting under the “color” of state power, but only to a certain extent. Both doctrines contain an exception for exceptionally egregious behavior that is so obviously unlawful and leads to an injury. As demonstrated by the court’s thorough analysis, failure to properly monitor student-athletes and provide an adequate hydration plan walks the line between “typical risk” and “egregious misconduct.” It is foreseeable that one day a court could rule differ-

ently and hold a student-athlete has a recognized right to implementation of a hydration plan and monitoring for heat related illness. As is the case in many § 1983 claims, once one court finds such a right, it is increasingly more likely other courts will follow suit.

In order to avoid being the entity that triggers this legal cascade, we advise all athletic departments to train their athletic staff, athletic trainers, and coaches on preventing exercise-induced exertional heat stroke and other heat-related illness and to provide their student-athletes with adequate hydration and monitor their hydration. This will not only mitigate the risk of any potential liability, but also, more importantly, ensure student-athletes stay safe and ready to compete at a high level. ●

## School District Prevails in Soccer Player Concussion Lawsuit

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defendants were entitled to governmental immunity and that Angelina was an identifiable person to which the imminent harm exception to governmental immunity applied. The appellate court disagreed, finding that the trial court properly granted motion for summary judgment and subsequently affirmed the decision. ●

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6 See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 692 (1978) (holding court cannot impose liability vicariously on governing bodies solely on basis of existence of employer-employee relationship with tortfeasor).

7 Plaintiff’s state law negligence claims against Defendant UPMC were dismissed because Plaintiff failed to file a certificate of merit within sixty days of the complaint’s filing. See *Peterman*, Civil Action No. 17-1619, 2019 WL 461083, at \*7 (W.D. Pa. 2019).

## Pro Wrestlers Fail to Take Down WWE In Brain Injury Tag Team

By Elizabeth Catalano, Esq.  
and Dylan F. Henry, Esq.

### The Match Up

In 2016, several former professional wrestlers sued World Wrestling Entertainment (WWE), claiming that WWE was aware of the short-term and long-term risks associated with repeated head trauma and failed to warn the wrestlers of those risks for years. The wrestlers' claims mirrored those claims professional football players brought against the NFL in similar failure-to-warn concussion litigation. The wrestlers alleged that they suffered neurological injuries (including chronic traumatic encephalopathy (CTE)) caused by repeated head trauma sustained while wrestling for WWE. They further alleged that WWE maintained business practices that "exploited" the wrestlers by failing to provide them with any protections or employee benefits.<sup>1</sup>

A key issue in the cases against WWE is the statute of limitations. Typically (depending on state law), a plaintiff would have 2 years to bring a negligence claim (which these failure-to-warn claims are). The general rule is the plaintiff's clock starts to run from the date the negligent conduct occurred. Here, it would be the date that WWE failed to warn the wrestlers of the long-term risks associated with repeated head trauma, not when the injuries occurred.

Like most rules, there is an exception to the statute of limitations. In order to toll (legalese meaning to pause) the statute of

limitations, the wrestlers needed to successfully show that either their due diligence did not and could not have led to discovery of the cause of action against WWE or that WWE knew of the risks and concealed them from the wrestlers.

In their attempt to save their case, the wrestlers argued that their claims were timely because WWE had actual knowledge about the health risks involved in wrestling and not only failed to warn the wrestlers but also actively concealed the dangers of repeated head trauma until 2015. The wrestlers were therefore unaware of their injuries before that time and thus, their clock arguably did not start to run until 2015. The wrestlers pointed to "evidence" of actual knowledge dating back to 1995, when they alleged that WWE's doctor had explained the danger of post-concussion syndrome.

### The Smackdown

Between 2016 and 2018, Judge Vanessa L. Bryant of the District of Connecticut sided with WWE and dismissed the cases as being untimely, i.e. barred by the statute of limitations. For example, Judge Bryant explained that for the plaintiffs' tort claims, the alleged concealment of risks by WWE must have occurred at a time when the plaintiffs were still wrestling and could still suffer head injuries while wrestling. However, no plaintiff had alleged that he or she wrestled for WWE later than 2011, and the first suit was brought in 2016. The court held that WWE did not have a continuing duty to warn the plaintiffs after their employment ended, and thus the statute of limitations clock began to run when the plaintiffs stopped wrestling.

In dismissing some of the wrestlers' cases, Judge Bryant noted that plaintiffs' counsel had the opportunity to conduct extensive discovery in prior consolidated cases, but was "unable to uncover any evidence showing that WWE has or had actual knowledge that concussions or subconcussive blows incurred during professional wrestling

matches cause CTE." Unfortunately for the wrestler-plaintiffs, "[t]he earliest evidence they were able to uncover is the fact that WWE learned from public news reports that one wrestler, Christopher Benoit, was diagnosed with CTE in 2007, which was after most of the Plaintiffs retired." Even if this had occurred earlier, the Court indicated its unwillingness to find the diagnosis of one wrestler with CTE to "imbue WWE with actual awareness of a probable link between wrestling and CTE."<sup>2</sup>

The wrestlers' attorneys did not do their client any favors, as Judge Bryant's opinion detailed the multiple procedural errors made by the attorneys in each of the cases, in addition to their improper conduct, failure to conduct factual due diligence, and filing of irrelevant, inflammatory, and inaccurate information in the pleadings.

The wrestlers appealed. The case is now pending before the United States Court of Appeals for the Second Circuit. It appears the wrestlers are unlikely to succeed in their bid to overcome their time-barred dismissal. Because of recent case law and because of the procedural nature of the claims as being consolidated, the appeals (except for the *Laurinaitis* case) were also untimely, according to the WWE.<sup>3</sup>

The WWE cases demonstrate one of the biggest issues plaintiffs face in these failure-to-warn head injury cases – time. Typically,

<sup>2</sup> *McCullough v. World Wrestling Entertainment, Inc.*, No. 3:15-cv-01074-VLB (Memorandum of Decision Granting Defendants' Motions for Judgment on the Pleadings and to Dismiss and Granting in Part and Denying in Part Defendants' Motion for Sanctions), at p. 33; *see also* Mike Curley, "WWE Wins 2 Bouts In Suits Over Wrestlers' Concussions" (Sept. 17, 2018), <https://www.law360.com/articles/1083554/wwe-wins-2-bouts-in-suits-over-wrestlers-concussions>.

<sup>3</sup> *See generally* Pete Brush, "High Court Ruling May KO 2nd Circ. WWE Injury Appeals" (June 5, 2020), <https://www.law360.com/articles/1280479/high-court-ruling-may-ko-2nd-circ-wwe-injury-appeals>.

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these claims stem from decades-old head injuries. The plaintiffs face an uphill battle trying to successfully argue that the failure to warn years ago caused the harm alleged today.

The WWE case is similar to the NFL concussion litigation in the type of claims and defenses asserted, but is different in at least one key area – the tolling of the statute of limitations.

To compare, in the NFL concussion litigation, the plaintiffs were actually able to uncover stronger evidence that the NFL was aware of the risks of repetitive head traumas, but ignored, minimized, or suppressed information concerning the link between that trauma and cognitive damage. In their suit alleging negligence, medical monitoring, fraudulent concealment, fraud, and negligent misrepresentation, among other claims, the football players were able to point to specific examples of concealment, like the NFL's (1994) Mild Traumatic Brain Injury Committee which was allegedly "at the forefront of a disinformation campaign that disseminated 'junk science' denying the link between head injuries and cognitive disorders."<sup>4</sup>

<sup>4</sup> *In re National Football League Players Concussion Injury Litigation*, 821 F.3d 410, 422 (3d

### Grappling With Time

Though the Second Circuit's decision is still pending, the WWE cases are a great example of how time is not on plaintiffs' side in these failure-to-warn cases, specifically when the allegations are failure to warn about CTE or other brain diseases that take years to develop. Further complicating the timing is that CTE can only be diagnosed during a posthumous autopsy of the brain, and thus, CTE claims should only be brought after death, which can occur decades after the initial head trauma.

That said, time is not always on the defendant's side in these cases either, and the statute of limitations is not as strong of a shield for defendants as one might think. While the statute of limitations is the general rule, courts have and will apply the exception to the rule and toll the statute of limitations. As more failure-to-warn / CTE and latent brain disease cases are filed, more caselaw will be made regarding what evidence is sufficient to toll the statute of limitations.

For example, in *Schmitz v. NCAA*,<sup>5</sup> the

Cir. 2016) (approving final class settlement agreement).

<sup>5</sup> *Schmitz v. Nat'l Collegiate Athletic Ass'n*, 122 N.E.3d 80 (Ohio 2018); <http://www.courtnewsOhio.gov/cases/2018/>

Ohio Supreme Court ruled that a former University of Notre Dame football player who played from 1974-1978 and later suffered from CTE had not necessarily run out of time to sue Notre Dame and the NCAA. The Ohio Supreme Court essentially held that CTE is football's signature latent disease. In doing so, the court emphasized that even if Schmitz had experienced some neurological impairment prior to his CTE diagnosis in December 2012, there was no way to conclusively determine that his claims were barred by the statute of limitations because he did not know and had no reason to know that he had suffered a latent brain injury while playing football.<sup>6</sup> The *Schmitz* holding is important because it was the first appellate court decision in the country to hold that CTE could be a latent disease, and thus toll the statute of limitations.

Although the WWE cases will likely be unsuccessful on appeal, it is important to keep tabs on how these failure-to-warn / CTE and brain disease cases play out. Every sports team and athletic institution can be affected in the future from caselaw that is made today.

**UPDATE:** After this article went to print, the Second Circuit panel issued its decision on the wrestlers' appeals. As predicted, the panel dismissed the three WWE class action suits brought by the wrestlers due to their appeals being untimely under Supreme Court precedent. The court also affirmed the dismissal of the remaining Laurinaitis case, which Judge Bryant first dismissed because the wrestlers stopped wrestling before WWE knew about the risks of brain trauma alleged. Still pending is the trial court's determination of the amount of sanctions that the wrestlers' attorney will have to pay WWE for his misconduct throughout the case. ●

[SCO/1031/170098.asp#.X0aLtShKiUk](https://www.courtnewsOhio.gov/cases/2018/SCO/1031/170098.asp#.X0aLtShKiUk)  
<sup>6</sup> *Id.* at 88.

### Study Suggests Bacteria Is Prevalent on Gym Equipment

Research presented by the American Society for Microbiology (ASM) has found that 43% of Staphylococcus bacteria found on exercise equipment in university gyms were ampicillin-resistant, with 73% of those isolates being resistant to multiple additional drugs. The late Xin Fan, Ph.D., and her student Chase A. Weikel of West Chester University (WCU) conducted the research in cooperation with WCU's John M. Pisciotta, Ph.D., associate professor of Biology.

According to the U.S. Centers for Disease Control and Prevention, roughly

120,000 *S. aureus* bacteremia cases resulted in 20,000 deaths in 2017. Skin abrasions are a common route of entry of pathogenic *S. aureus* strains.

"These results suggest regularly contacted surfaces in different recreational environments can harbor multi-drug resistant *S. aureus* (MDRSA) and should be disinfected frequently to best maintain public health and community wellbeing," said Chase A. Weikel, a 2018 graduate of West Chester University and current graduate student at Thomas Jefferson University in Philadelphia.

## NFL Player Lane Johnson Sues Nearly All Concerned and Loses

By Jeff Birren

Philadelphia offensive tackle Lane Johnson is a better football player than a litigant. In 2016 Johnson failed a test for a performance-enhancing substance, leading to a suspension by the NFL. Johnson responded by filing a grievance. He lost, so he sued to overturn the suspension and sought damages. Once his case was moved to the correct court, he lost again and appealed to the Second Circuit. On July 17, 2020 the Second Circuit affirmed the District Court.

### The Facts

Johnson played college football first at Kilgore Junior College and then transferred to Oklahoma. He played tight end and defensive end before switching to offensive tackle in 2011. In 2013 Philadelphia selected him with the fourth pick of the NFL Draft and he started all 16 games that season. In May 2014 Johnson “tested positive for a performance-enhancing substance and served a four-game suspension” (*David Lane Johnson v. National Football League Players Association* (“NFLPA”) *National Football League* (“NFL”) and *National Football League Management Council* (“NFLMC”), (“*Johnson*”), U.S. Court of Appeals, Second Circuit, Case No. 19-2734-cv, (July 17, 2020) “Summary Order” at 3).

Johnson appealed, claiming that he had made a mistake because the drug was prescribed to him by his family physician who did not know the NFL rules. He lost, and thus became subject to reasonable cause testing up to 24 times a year (*Sports Illustrated*, Michael McCann, “Lane Johnson’s Bold Move” (“*Bold Move*”) (1-11-17)). There is an adage that one “who does not learn from history is bound to repeat it” and so it was to be for Johnson.

In January 2016 Johnson signed a six-year contract extension for over \$63M, making him the NFL’s highest-paid right tackle. For reasons unstated, Johnson

“twice” ingested “a prohibited substance that he had obtained from an anonymous ‘friend’” and in July Johnson was informed that he had again tested positive for a performance-enhancing substance (*Johnson at 3*). To Johnson the fault lay elsewhere, and with almost everyone else. He “challenged the procedures pursuant to which his urine sample was collected and analyzed” and filed a grievance (Id. at 3/4). He went public with his complaints and “believed that other persons, groups and even the government were at fault” (*Bold Move at 3*). He “attributed the positive result to taking an amino acid supplement, manufacturers of which Johnson has threatened to sue for incorrectly listing ingredients. Johnson also blamed the NFLPA for providing players with an app designed to inform players about approved and disapproved substances” and even “criticized the U.S. Food and Drug Administration’s lack of regulation over supplements” (Id.). Johnson asked that the “B” sample be tested and that also came back positive (Id. at 4).

The arbitration went forward. Johnson sought discovery on a number of issues, even how the arbitrator was selected. He objected to the arbitrator, an attorney at Wilmer Hale, alleging conflicts of interest between Wilmer Hale and the NFL and NFLPA. The arbitrator ruled on October 11, 2016 that “the drug test was authorized under” the NFL’s policy and “that ‘none of the collection and analysis issues’ raised by Johnson justified overturning his suspension” (*Johnson at 4*).

### Johnson Heads to The Wrong Court

So, Johnson sued the NFLPA, the NFL and the NFLMC in the Northern District of Ohio (*David Lane Johnson v. NFLPA, NFL & NFLMC*, (N.D. Ohio, Case # 5:17-cv-0047SL, Document #1, Complaint and Petition To Vacate Arbitration Award (1-6-17) (“*D.L. Johnson*”). He sought “vacatur of the arbitration award” and asserted

“claims against the NFL, the Management Council, and the Players Association for breach of the duty of fair representation, breach of the CBA, and a violation of his rights under the LMRA, the National Labor Relations Act (‘the ‘NLRA’), and the Labor Management Relations Disclosure Act” (*Johnson at 4*). Johnson apparently depicted the NFLPA as “as corrupt and incompetent” (*Bold Move at 6*). Moreover, it supposedly “deliberately withheld relevant and pertinent information” from him and that it “retaliated against Johnson because of its public dispute with Johnson over the poor quality of the NFLPA’s representation” and that this was done “out of personal animosity” (Id.). He also claimed the NFLPA breached its duty of fair representation “‘by willfully and fraudulently mislead[ing]’ him about his appeal options and strategies” and “‘depriving’ him of the chance to receive and inspect documents germane to his appeal” (Id.).

Johnson was not from Ohio, he did not play college or pro football in Ohio, nor is the NFL or NFLPA office located in Ohio. His only apparent connection to the state is that his lawyer is based in Cleveland. Johnson’s next legal defeat was soon coming.

The defendants responded by filing motions to transfer the case to the Southern District of New York and to stay the Ohio litigation (*D.L. Johnson*, Memorandum Opinion and Order, Doc. #68, at 1/2 (7-6-17)). Johnson opposed the motions and claimed that he appealed his suspension “from Ohio” (whatever that is supposed to mean) (Id. at 4). He also “appears to be relying upon the fact that Cleveland, Ohio has an NFL team (the Browns) as the basis for venue” and thus the NFL and all of its teams were residents of Ohio (Id. at 6). To the Court at least, “the issue is quite simple: is the Northern District of Ohio the appropriate venue for a case that: involves a plaintiff from Oklahoma who plays pro-

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professionally for a football team that operates out of Philadelphia, Pennsylvania, and three defendants who are headquartered in New York, NY, New York, NY, and Washington, DC, respectively” and that sought to set aside an arbitration that took place in New York City (Id. at 4).

The Court found that venue was not proper in Ohio and that even if it was it would still grant the motion to transfer “to a more convenient forum” (Id. at 6). Thus, the parties were back in “New York, NY”. With the case now in its proper venue, Johnson did not have to wait long until his next judicial loss.

### In the Right Court

The NFLPA, NFL and NFLMC filed motions to dismiss. The case had the ironic twist of placing Daniel Nash of Akin, Gump, long-time counsel for the NFL and NFLMC, and Jeffrey Kessler, one of the NFLPA’s counsel, on the same side. Usually they are on opposite sides of NFL-NFLPA cases. Johnson opposed the motions. On October 3, 2018 the Court confirmed the arbitration award, denied Johnson’s petition for vacatur, and dismissed Johnson’s duty of fair representation claim against the NFLPA because “Johnson had failed to plausibly allege that the Players Association acted in an arbitrary or discriminatory manner or in bad faith, or that their actions had seriously undermined the arbitral process” (17-cv-5131(RJS), Case Doc. #124, (S.D. N.Y) LEXIS 225346), (*Johnson* at 4). It denied the motion as to one claim “because it concluded that the Players Association had failed to provide a copy of a side agreement relating to the timeline for reasonable-cause testing” (Id. at 4/5). That document was soon forth-coming (Id. at 5).

Johnson’s next loss came a month later when the Court granted the NFL and NFLMC’s motion to dismiss, “holding that Johnson’s failure to plausibly allege a viola-

tion of the duty of fair representation by the Players Association necessarily precluded his LMRA claim against the NFL and the Management Council” (Case Doc. #145, LEXIS 200646) (*Johnson* at 5).

Having produced the previously withheld document, the NFLPA moved for summary judgment on the remaining claim. Johnson opposed the motion and as always sought further discovery. The Court rejected his motion for additional discovery in January 2019 (Id.), yet Johnson’s summary judgment opposition was based on his supposed need for further discovery. Finally, on August 2, 2019 the Court granted summary judgment to the NFLPA. “Johnson failed to show a material dispute as to whether all agreements to which he was entitled had been produced to him” (*Johnson* at 6). Since the document had been produced, the claim was “moot” and that the “threadbare” “retaliation” claim was “clearly nonviable and cannot be the basis for ongoing litigation and discovery in this case.” The Court concluded by stating that the “Clerk of the Court is respectfully directed to terminate the motion ... and to close this case” (*Johnson*, Opinion and Order, Case Doc. #155, LEXIS 129500 (8-2-19) at 7).

Johnson appealed and concluded his opening brief by stating that he was seeking to “reverse the District Court’s denial of Johnson’s motion to vacate” and “reverse the District Court’s grant of summary judgment in favor of the NFLPA, permit Johnson to conduct discovery, require the NFLPA to answer Johnson’s Amended Complaint, and reverse the District Court’s orders granting, in part, the NFLPA’s motion to dismiss, granting the NFL’s motion to dismiss under Civil Rule 12(c), and denying Johnson’s motion to vacate” (*Johnson*, Opening Brief at 37, Doc. # 51 (12-10-19). The NFL filed its appellate brief on 3-10-20 (Doc. # 77). The NFLPA also filed on 3-10-20

(Doc. #76) and after it was told that it was defective, filed a “cured” brief on 3-13-20 (Doc. #82). Johnson’s reply brief came on April 21, 2020 (Doc. #97). Oral argument was held on June 24, 2020 (Doc. #107). Johnson did not have to wait long as the Second Circuit issued its Summary Order less than four weeks later.

### The Second Circuit Speaks

The Circuit began by considering Johnson’s claims that the District Court erred in dismissing his hybrid duty of fair representation claim against the NFLPA and his LMRA claim against the NFL and NFLMC. The Court reviewed the dismissals *de novo* (*Johnson* at 6). It stated that it was a hybrid claim because it was both a claim against the union and a LMRA Section 301 claim against the employer. To establish such a claim Johnson had to allege both that the NFL breached the collective bargaining agreement and the union breached its duty of fair representation. Johnson could sue both, but he therefore had to “allege violations on the parts of both” (Id.). Johnson insisted that the NFLPA breached its duty due to its “failure to provide him with documents, including the complete Policy, his discipline file, and his testing file” and “this amounted to a ‘*per se*’ breach of its duty of fair representation” (Id. at 7). The Court yawned.

“This contention finds no support in our precedents, but even assuming the failure of the union to produce documents constitutes such a breach, Johnson remains unable to identify how the failure of the Players Association to provide these documents affected the outcome of his case” (Id.). Moreover, the arbitrator was aware of these discovery requests but “nonetheless confirmed Johnson’s discipline, finding that ‘none of the collection and analysis issued raised by... Johnson’ ‘justified overturning

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## School District Prevails in Soccer Player Concussion Lawsuit

By Michael S. Carroll

An appellate court in Connecticut affirmed a previous ruling in a lawsuit brought by the mother of an injured girls' soccer player who sustained a concussion during practice. In doing so, the court explained, and relied upon, the concept of governmental immunity and took a common-sense approach to injuries sustained during the course of a routine contact sport.

### Background

In October of 2013, "Angelina," who was 12 years old and in the seventh grade, was participating in a mandatory soccer practice at Har-Bur Middle School in Burlington, CT. The practice was supervised by gym teacher and coach, Robert Samudosky. During the practice, the team was split into four groups, each consisting of six players. Samudosky participated as a member of one of these teams while they engaged in scrimmages inside the gymnasium of the middle school. At some point during the scrimmage, Angelina and Samudosky found themselves on opposing teams. Samudosky had possession of the ball in his defensive area and went to clear it. He looked down and kicked the ball quite forcibly, striking Angelina in her face from approximately six feet away. As a result, Angelina became "tingly" and "dizzy," and her nose began to bleed. After Samudosky had her go to the girls' locker room to treat her bloody nose, she returned and participated in the remainder of the practice. Samudosky never informed Angelina's mother, Theresa Maselli, regarding the incident. After learning of the injury, Maselli subsequently took Angelina to see a physician, who diagnosed her with a concussion. Due to lingering symptoms, Angelina did not attend school full-time until January of 2014 and eventually transferred to another school and repeated the seventh grade. She reported that she continued to have nosebleeds and headaches on a regular basis and that they leave her feeling humili-

ated. Maselli attempted to follow-up with school officials regarding the incident but was unhappy with the response she received.

### Trial Court

In July of 2016, plaintiff Maselli brought suit against four defendants: (a) Regional School District Number 10, (b) superintendent Alan Beitman, (c) middle school principal Kenneth Smith, and (d) coach Robert Samudosky in Connecticut Superior Court. Maselli asserted six total claims against defendants, four directed solely at Samudosky and two against all defendants. The claims against Samudosky included assault and battery, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence. The other two claims against all defendants were based in negligence and recklessness. In August of 2017, defendants moved for summary judgment on all counts, asserting that plaintiff's claims were barred by the doctrine of governmental immunity pursuant to statute Conn. Gen. Stat. § 52-557n (a) (2) (B), which shields a municipality from liability for damages resulting from the negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law. Defendants also argued that plaintiff's claims regarding assault and battery and recklessness failed as a matter of law. When reviewing the four claims of the case directed at Samudosky alone and whether he committed civil assault and battery on Angelina, the court found that he did not. The court reasoned that there was no evidence that Samudosky acted with an intent to hit or injure Angelina, which is required under the claim, and that instead her injury resulted from a common and normal practice in the sport of soccer. As a result, the claim of intentional assault and battery failed as a matter of law. Likewise, the court found that the facts did not support a finding of negligent or intentional

infliction of emotional distress on Angelina. The court noted that such a finding would need to demonstrate outrageousness on the part of the defendant and the existence of severe emotional distress. In the present case, there was no evidence that Angelina experienced an extended period of distress nor did she seek medical treatment. Additionally, governmental immunity shielded Samudosky from liability related to these claims. The plaintiff argued that Angelina fell under the identifiable person-imminent harm exception to governmental immunity. This exception exists when the circumstances make it apparent to a public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm. In such a scenario, governmental immunity may not apply. The court found that Angelina was not an identified person for purposes of the exception, as she voluntarily chose to participate in the soccer team, and therefore the exception did not apply.

Count five against all defendants alleged negligence based on their response to the incident, including their failure to immediately notify plaintiff of her daughter's injuries and failure to address her educational needs. Again, plaintiff attempted to utilize the identifiable person-imminent harm exception to governmental immunity, but the court found that Angelina was not subject to imminent harm during the course of a normal soccer practice. In Count six against all defendants, plaintiff asserted a recklessness claim but merely incorporated the same allegations contained in Count five regarding negligence. Defendants argued that such a claim fails as a matter of law, and the court agreed, granting summary judgment.

### Appellate Court

On appeal, plaintiff argued that the court improperly granted defendants' motion for summary judgment because, among other things, the court improperly concluded that

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## New Bellwether Cases Against NCAA Move Forward in Texas

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of which remain undisclosed.<sup>2</sup>

This year, however, the families of two other former college football players—John Davis and Julius Whittier—brought their own \$1 million actions against the NCAA in Dallas County, and the stakes are as high as ever.<sup>3</sup> Should either case be tried to verdict, the implications for college athletics and for football itself could be profound.

### Family of Former SMU Lineman Alleges NCAA to Blame for Death

John Davis was a lineman at Southern Methodist University (SMU) in the 1950s. He was diagnosed with Alzheimer's disease in 2001 and was posthumously diagnosed with stage 4 CTE in 2017. According to his family, Davis suffered multiple concussions while playing football, and in the decades following college he suffered headaches, progressive memory loss, confusion, anxiety, and motor impairment. Davis gradually withdrew from society, became increasingly paranoid, and even experienced occasional psychotic episodes, his family says. Davis's injuries were so severe, they allege, that his wife, Karol, struggled to care for him.

In the complaint, which was filed in March 2020, Davis's family alleges that the NCAA had a duty to protect Davis from the long-term effects of repeated head trauma when he was a college athlete. In addition, the family contends that the NCAA knew or should have known of the dangers players faced, citing medical literature on head injuries dating back to as early as 1901 that suggested such injuries allegedly caused "insanity."<sup>4</sup> The complaint

also cites a 1928 article in which the term "punch drunk" is first used to describe the often-debilitating condition afflicting many professional boxers after receiving repeated blows to the head.<sup>5</sup>

Davis's family says that by 1933 the NCAA's own medical handbook for schools and colleges recommended that players with concussions should abstain from play until they are symptom-free for at least 48 hours. Players experiencing longer-lingering symptoms should not have been permitted to compete for at least 21 days, according to the handbook. In spite of its awareness of the risks to players, Davis's family contends, the NCAA "failed to exercise its power to impose system-wide return to play guidelines for intercollegiate football players and member institutions," including SMU.<sup>6</sup> The NCAA's failure to protect Davis from the long-term effects of repeated head trauma, they say, directly and proximately caused Davis's injuries and, ultimately, his miserable and preventable death.

In April, the NCAA responded with a general denial and a laundry list of affirmative defenses.<sup>7</sup> Among other things, the NCAA asserted that it was not negligent, that Davis was contributorily negligent, that Davis's claims are barred by the statute of limitations, that Davis assumed the risk of injury when he voluntarily participated in playing, and that Davis's injuries were not proximately caused by his participation in football. The NCAA asked the court to dismiss the case.

Texas has since been pummeled by the COVID-19 crisis, with jury trials presently suspended at least through September, but Judge Paula Rosales sided with the plaintiffs at a July 6 dismissal hearing, and the case is now on track to go forward once it is feasible.

2 Jeremy Baur-Wolf, *A Verdict That Could Have Changed the Tide*, Inside Higher Ed (June 26, 2018), <https://www.insidehighered.com/news/2018/06/26/settlement-highly-anticipated-concussion-lawsuit-against-ncaa>.

3 Amended Complaint & Demand for Jury Trial, *Davis v. National Collegiate Athletic Association*, No. CC-20-01121-D (Tex. Dist. 2020).

4 *Id.* at 11.

5 *Id.*

6 *Id.* at 14.

7 See Answer and Affirmative Defenses, *Davis v. National Collegiate Athletic Association*, No. CC-20-01121-D (Tex. Dist. 2020)

### First African-American UT Football Player's Family Brings Similar Action

Julius Whittier became the first African-American football player at the University of Texas in 1970. After college, he went to law school and became an attorney with the Dallas County district attorney's office. According to the complaint his surviving sister and three children filed in June 2020, Whittier suffered repeated sub-concussive blows to the head as a student-athlete, and began experiencing memory problems and behavioral changes in 2008 that cut his legal career short.<sup>8</sup> He died in 2018 at the age of 68, having spent the last few years of his life in an assisted care facility.

Like Ploetz and Davis, Whittier was originally diagnosed with Alzheimer's, but an autopsy revealed that he had CTE. "He continually spoke of how he was trained to block, using his head," Whittier's sister recently told the *San Antonio Express-News*.<sup>9</sup>

The Whittier family also alleges that the NCAA breached its duty to keep athletes safe, and also cites a century's worth of medical literature as evidence that the NCAA knew or should have known about the long-term effects of repeated head trauma. They, too, have requested a jury trial. The NCAA has not yet responded to the Whittier's complaint.

### Stay Tuned

One of the few conclusions legal commentators were able to draw after the *Ploetz* case was that the NCAA seems to be will-

8 See Complaint, *Whittier v. National Collegiate Athletic Association* (Tex. Dist. 2020).

9 David Barron, *Family of UT football pioneer Julius Whittier sues NCAA over head trauma leading to death*, San Antonio Express News (June 30, 2020), [https://www.expressnews.com/sports/college\\_sports/longhorns/article/Julius-Whittier-Texas-football-NCAA-lawsuit-15377616.php](https://www.expressnews.com/sports/college_sports/longhorns/article/Julius-Whittier-Texas-football-NCAA-lawsuit-15377616.php).

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## Summit Attendees Stress Interdisciplinary Approach Among Caregivers, Like Athletic Trainers and Sports Medicine Pros

**D**uring eight hours of Zoom calls Aug. 10-11, approximately 50 professionals from mental health, higher education and sports medicine organizations discussed mental health disparities facing student-athletes of color and reflected on ways to better support them.

The occasion: The NCAA's Diverse Student-Athlete Mental Health and Well-Being Summit, a joint effort between the Association's Sport Science Institute and the office of inclusion.

"The major overarching theme from the summit, which wasn't a surprise, was that mental health care in this country is lacking but especially lacking for people of color," said Darryl Conway, senior associate athletics director/chief health and welfare officer at Michigan, who served as co-chair of the summit's steering committee. "The stigmas associated with people of color seeking mental health care are there, and those are things that need to be overcome, along with the lack of providers of color, which was a huge theme. How can we improve that? How can we get more providers of color? That was something that that was very important and is a huge takeaway."

Underrepresentation of people of color in professions including mental health care,

athletic training, medicine and athletics, in general, was among the barriers to mental health care the summit attendees discussed in detail, according to the NCAA.

The summit also focused on a few other main topics: resources and support for athletes and staff, clinical training and care, institutional systems and research. Within these topics were several themes. They included anti-racism athlete training and education, approaches to increase help-seeking behaviors and reduce stigma in mental health, support for identity development beyond sports, and increased preventative screening.

"The first overwhelming sentiment from the summit is women and men who are trusted veteran professionals in their fields, nationwide, all shared the same professional assessments: This a generation that needs more, not less, assistance in the holistic education provided by intercollegiate athletics," said Britton Katz, interim vice chancellor for student affairs and dean of students at the University of South Carolina Upstate. "I'm grateful to the NCAA for setting up such a task force that allowed us to propose ideas."

One of those ideas was to focus on a student-athlete's entire support system,

such as coaches, athletic trainers, academic advisors and legal guardians, among others. Conway emphasized the importance of thinking of mental health and well-being as a group endeavor, not an individual journey.

"So much of this and so much of health care is an interdisciplinary approach, and there's no one person that can do it all. And there shouldn't be one person that can do it all because it needs to be a team effort. So, the ability to have everybody involved in it and everybody lending a hand is important because everybody's coming at it from different angles and different experiences," Conway said.

"A coach is going to have a way different experience with some things than an athletic trainer is, than a dietitian is, than a strength coach is, than a mental health provider is. Even a mental health provider who's embedded in athletics is going to view things differently than a mental health provider that works at a campus health system or works in private practice. A physician is going to view things differently than a psychologist. And a sport psychologist is going to view things differently than a social worker or a clinical psychologist. Those are all, for me, the reasons that an interdisciplinary approach is what is needed and what must happen." ●

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ing to settle with individual plaintiffs for reasonable sums. As part of a class action settled in 2014, the association agreed to establish a \$70 million fund for testing and diagnosing concussions in current and former college athletes, but it has not yet been ordered to pay damages to an individual plaintiff because of latent brain diseases, such as CTE.

The biggest issue with assessing liability in failure-to-warn cases is the jury and how it would decide liability and damages. Failure-

to-warn cases present complex legal and medical issues, mainly on the causation element of a negligence claim. That is, a plaintiff must successfully prove that (1) a defendant knew of the long-term risks associated with repetitive concussive and sub-concussive blows; (2) the defendant had a duty to warn about those risks and failed to do so; (3) the defendant's failure to warn caused the plaintiff to sustain repetitive concussive and sub-concussive blows; and (4) the repetitive concussive and sub-concussive blows caused

a latent brain disease such as CTE. This is a very tenuous tightrope a plaintiff must walk to get from the allegations in the complaint to an actual award from the jury.

If either case proceeds to trial, and more importantly, a jury verdict, it will be the first of its kind and provide a much-needed data point for plaintiffs and defendants to assess liability in the CTE litigation world. Until then, plaintiffs, defendants, and their lawyers are left to wonder how a jury will rule on these complex scientific and legal issues. ●

## Saved By The Bell—Penn State Dodges Further Litigation

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180 days to bring suit following an alleged whistleblower violation. However, there has been some debate over when, exactly, the 180 days begins to run.

According to the court in *Lynch*, the 180-day clock begins to run on the day that an employee receives definitive notice of the adverse employment decision and *not* on the effective date of termination. The plaintiff in *Lynch* found this out the hard way, when the court dismissed his whistleblower claims against the Pennsylvania State University and its employees (collectively, Penn State defendants) because they were time-barred.

### Race Against Time

On August 23, 2019, Dr. Scott A. Lynch, the former Intercollegiate Athletics Team Orthopedic Physician for the Penn State University football team and Director of Athletic Medicine for Penn State University, filed a whistleblower suit against multiple defendants, including Penn State University and James Franklin, Penn State's head football coach. Dr. Lynch alleged the defendants unlawfully retaliated against him by terminating his employment after he made a "good faith reporting of Defendant James Franklin's alleged attempts to influence and interfere with the Plaintiff's medical management and return-to-play decisions related to student athletes." According to Dr. Lynch, Franklin repeatedly tried to interfere with his autonomous medical authority to determine whether and when a student-athlete was cleared to play. The Penn State defendants never reached the substance of these allegations; rather, the Penn State defendants objected to the claim as untimely, stating that it was time-barred by the 180-day statute of limitations.

Dr. Lynch's effective date of termination  
*et al.*, No. 2019-cv-06337 (Ct. C.P. Dauphin  
Cnty., Pa. 2020).

was March 1, 2019, which is less than 180 days from when he filed suit on August 23, 2019. Therefore, if the clock began its countdown on the effective date of termination, Dr. Lynch's claim would not be barred by the statute of limitations. Penn State disagreed and argued in that the statute of limitations began when Dr. Lynch received definitive notice of the adverse employment action. That is, on January 28, 2019, one of the defendants informed Dr. Lynch that someone had asked for his termination. If that was not definitive enough, on February 4, 2019, a "Dear Colleague" letter written by one of the defendants was published and circulated. The letter stated that on March 1, 2019, there would be a change in the leadership of the university's athletic medicine department. Furthermore, it announced that another individual would be taking over Dr. Lynch's position as Director of Athletic Medicine.

The question before the court was whether the whistleblower statute of limitations started running on *March 1* (the effective date of termination) or on *February 4* (when Dr. Lynch was definitively informed that adverse employment action was being taken against him). After discussing relevant case law and public policy, the court ultimately sided with the Penn State defendants. The court concluded that "it is clear from the face of the Complaint that the 'alleged violation' for purposes of the Act occurred when Plaintiff received the Dear Colleague letter from Defendant Kevin P. Black, M.D. This is when he was, at the very least, threatened with being discharged from his duties as Orthopedic Physician for the Penn State *football* team and Director of Athletic Medicine at Penn State." The court additionally noted that while it is unclear if Dr. Lynch received that letter, he did have an exit interview on February 21, 2019. Therefore, at the very latest, Dr. Lynch was aware of his

termination on February 21, 2019 and his claims against the Penn State defendants were still time-barred.

### The Final Countdown

Whether Dr. Lynch's claims against the Penn State defendants had any merit will remain unknown due to a technical foot fault regarding the 180-day filing requirement. This case, however, still provides important learning lessons for colleges and universities with athletic programs faced with similar allegations, i.e., undue influence from the athletic department (e.g., coaches and staff) over what should otherwise be independent medical authority.

Procedurally, timing errors like this one can oftentimes keep a case out of court no matter how legitimate the underlying claims are. Moving forward, Pennsylvania employers should keep meticulous records that identify exactly when and how an employee receives initial notice of adverse employment action.

Substantively, colleges and universities with athletic programs should take steps to ensure they have a strong response to allegations that a head coach interfered with a team doctor's autonomous and independent authority regarding medical management of athletes and return-to-play decisions—a claim that is far too common today. An athletic program's main focus must be creating and maintaining policies and practices that allow the medical personnel to have complete autonomy and independence in medical decisions (e.g., clearing a player to return to play). A program can achieve that in a number of ways.

Some schools have adopted a medical model of reporting where the medical personnel assigned to a particular sports program report to the medical arm of the university, not the head coach or athletic department. Other schools have clear

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## NFL Player Lane Johnson Sues Nearly All Concerned and Loses

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his suspension” (Id.). The arbitrator had also rejected his argument “that access to these side agreements ... would have changed the arbitral outcome. We agree and affirm.” The dismissal of that claim “necessarily precluded his LMRA § 301 claim against his employers” (Id. at 8).

The Court then turned to the summary judgment ruling. The court below found that the NFLPA had eventually “produced all of the documents to which he was entitled” and granted summary judgment (Id. at 9). Johnson argued that there was a “material dispute” as to whether all of the documents had been produced. This went nowhere. “Johnson’s first argument lacks merit because he was unable to dispute the evidence in the record that all relevant documents had been produced” since the NFLPA had submitted declarations from its legal team “that all amendments to the Policy had been produced.” “Johnson’s speculation that additional relevant documents existed was insufficient to create a material dispute” (Id. at 9).

Johnson’s second argument was that due to the delayed production he was “entitled to damages, including compensatory, punitive damages, and attorney’s fees and costs” (Id.). The Court did not agree. “Johnson suffered no actual damages” due to the “belated production, as it had no impact on the arbitral outcome, and he failed to make any showing of bad faith on the part of the union” (Id. at 10).

Johnson also challenged the denial of his discovery motion. That issue was reviewed for “abuse of discretion.” The Court cited the statute and two prior cases, and at the end of a four-sentence paragraph the Court stated that: “We see no abuse of discretion here” (Id.).

Johnson’s final argument was that the District Court “erred in denying his motion to vacate the arbitration award” because the NFLPA’s “failure to provide him with the

entire Policy at the time of his arbitration deprived him of a ‘full and fair hearing’” (Id.). The Court stated that it reviewed such orders “*de novo* on questions of law and for clear error on findings of fact” citing Tom Brady’s defeat in the Second Circuit, 820 F.3d 527 (2<sup>nd</sup> Cir. 2016). Johnson’s “belief that he was deprived of certain documents relating to the Policy at the time of his arbitration comes nowhere close to the high threshold needed to vacate an LMRA arbitration award under our precedent. The arbitrator was specifically authorized under the Policy to make discovery rulings, and he was well within his broad discretion to explicitly reject many of the document requests Johnson seek to revive here” again citing *Brady* (Id. at 11).

Johnson had been “given clear notice of the contemplated disciplinary action that was to be taken against him, the appeal was heard by a qualified arbitrator and he had a full and fair opportunity to present his arguments. That was more than sufficient under our precedent to confirm the award” (Id.). With that, the Court affirmed “the judgment and orders of the District Court” (Id. at 12).

### Conclusion

Johnson’s chances for a successful certiorari petition in the Supreme Court are small.

## Penn State Dodges Further Litigation

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policies and practices on final decision making authority as it relates to medical decisions. No matter how the school gets there, the destination is independence, and for lawsuit purposes, being able to prove that independence for the medical providers will not only arm defendants with a strong defense if litigation begins, but will also, and more importantly, promote

Back in 2016 he also blamed the pharmaceutical company that made his drug but claims against it may now be barred by the statute of limitations. It is likely time for Johnson to move on, knowing that a third failed test would lead to a suspension for two seasons, that he would then have to petition in order to be reinstated, and that a legal challenge to such a suspension is not likely to succeed.

Johnson can now serve as a learning lesson to current and future players who are contemplating performance enhancing drugs. The “blame game” is unlikely to work and Johnson’s loss of ten weeks of salary, plus the obligation to pay his defendants’ legal costs may deter others from using such drugs. Lawyers eager to represent those who fail such tests will be obligated to explain the unlikely chances of winning such a challenge and what the actual cost will be. Finally, athletes, their family, friends, and advisors need to understand that “I did not know” is not going to work in the arbitration or in court seeking to overturn an adverse arbitration ruling. ●

*Birren is then former general counsel of the Oakland Raiders and an adjunct sports law professor at the Southwestern.*

student-athlete safety by ensuring that doctors are not pressured to prematurely return student-athletes to play. For more information on the independent medical model, be sure to check out “Behind the Lines: Recent Changes to D1 Athletics Programs’ Reporting Structures,” published in *Sports Medicine and the Law* Summer 2019. ●