

SPORTS MEDICINE

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Onyshko Appeal Knocked Out by Pennsylvania Superior Court

By Kristen E. Mericle, Esq., Dylan F. Henry, Esq., Kimberly L. Sachs, Esq., and Kacie E. Kergides, Esq., of Montgomery McCracken

On January 8, 2021, a panel of three judges from the Superior Court of Pennsylvania denied an appeal by Matthew Onyshko, former linebacker for California University of Pennsylvania (“Cal U”). In our Summer 2019 issue, we discussed the 2014 lawsuit alleging that the National Collegiate Athletic Association (“NCAA”) was negligent for failing to warn of the long-term effects of repeated head injuries from participating in football. This article serves as an update on recent developments in the case.

Onyshko Goes Head-to-Head with NCAA

As a brief recap, Onyshko suffered upwards of twenty concussions—three of which resulted in lost consciousness—while playing for the Cal U Vulcans from 1999-2003. Thereafter, Onyshko progressively suffered from “frequent severe headaches, numbness, twitching, muscle atrophy, fatigue, loss of mobility, slurred speech, difficulty swallowing, weakness and other neurological symptoms.”¹ Onyshko was ultimately diagnosed with

¹ *Onyshko v. Nat’l Collegiate Athletic Ass’n*, No. 1611 WDA 2019, 2021 WL 73954, at *1 (Pa. Super. Ct. Jan. 8, 2021).

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Engendering Debate: The Varying State of Transgender Athlete Participation Policies

By Rachel L. Goodman, Esq., Dylan F. Henry, Kacie E. Kergides, Esq., and Kimberly L. Sachs, Esq. of Montgomery McCracken Walker & Rhoads LLP

One Minnesotan powerlifter’s lawsuit shines a light on the inconsistent treatment of transgender athletes in sports.

On January 11, 2021, JayCee Cooper, a 33-year-old transwoman sued USA Powerlifting (USAP), the nation’s largest organization dedicated to competitive squatting, bench pressing, and deadlifting. USAP divides competitors according to age, weight, and gender and matches them

up against other athletes who fit into the same categories. Ms. Cooper alleges that USAP violated the Minnesota Human Rights Act by refusing to allow Cooper to compete in its powerlifting competitions because she is transgender.

Cooper’s Success and Distress Competing as Male

Cooper was raised a biological male. As a child, she participated in a variety of youth sports until middle school, when Cooper discovered that she excelled at curling and pursued the sport at an elite national level

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SPORTS MEDICINE

and the **LAW**

HOLT HACKNEY

Publisher and Managing Editor

STEVE PACHMAN, DYLAN HENRY and KIM SACHS

Editors in Chief

THE ROBERTS GROUP

Design Editor

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Inquires may be directed to Steve Pachman—
spachman@mmwr.com

Cardiac MRI Shows Less Myocarditis in Athletes Recovered From COVID-19

Myocarditis among recovering COVID-19 athletes less common than previously reported.

In a letter published in the December issue of the American Heart Association's medical journal *Circulation* a group of researchers at Vanderbilt University Medical Center (VUMC) dispute the most recent findings of the incidence of myocarditis in athletes with a history of COVID-19.

The Vanderbilt study, "COVID-19 Myocardial Pathology Evaluation in Athletes with Cardiac Magnetic Resonance," found a much lower degree of myocarditis in athletes than what was previously reported in other studies.

"The differences in the findings are extremely important. The whole world paused after seeing the alarmingly high rates of myocardial inflammation and edema initially published," said Dan Clark, MD, MPH, first

author of the report, instructor of Cardiovascular Medicine, and an adult congenital heart disease fellow. "Our study evaluated 59 Vanderbilt University athletes and compared them to a healthy control group as well as a group of 60 athletic controls.

"The degree of myocarditis found by cardiac MRI in Vanderbilt athletes was only 3%, which is really good news," said Clark. "Since our first evaluation, we have screened almost double that number and the same findings are holding true.

"But there was also a piece of disappointing news," he said. "None of the other screening tests helped us to identify the athletes

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Joint Statement About Cardiac Screening

The following is a statement issued by the six of the most prominent professional sports leagues in North America:

"The study published recently by JAMA Cardiology is an illustration of the collaboration among medical experts at MLB, MLS, NBA, NHL, NFL and WNBA and our respective players associations over the past year. Since the onset of the pandemic, we have worked more closely together than ever to share lessons learned to ensure the best possible care for players. As part of that ongoing collaboration, each league implemented a similar cardiac screening program for athletes with prior COVID-19 infection.

"The screening programs, which are based on American College of Cardiology recommendations, are used to detect serious conditions resulting from the virus and help promote an athlete's safe return to play after COVID-19 infection.

"Using de-identified data from the six leagues, the peer-reviewed study published

today found very few cases of inflammatory heart disease and that a return to professional sports following COVID-19 infection can be safely achieved using this return to play screening program. In this study of 789 COVID-19 positive athletes from across our leagues, evidence of inflammatory heart disease was identified in 0.6% of athletes. The study also found no adverse cardiac events occurring in the athletes who underwent cardiac screening and subsequently resumed professional sport participation. The study additionally reflects the care provided by club medical and athletic training staffs who contributed to the study.

"As with other lessons professional sports have learned about COVID-19, the results of this study are being shared broadly to continue to contribute to the growing body of knowledge about the virus – a commitment we collectively share with each other and our players for the benefit of society beyond sports." ●

Important New Research Shows Practice—Not Game Play—Increases Exposure to Concussion

By Kacie E. Kergides, Dylan F. Henry, and Kimberly L. Sachs of Montgomery McCracken Walker & Rhoads LLP

Last month, the Concussion Assessment, Research and Education (CARE) Consortium published new research showing that practice—not game play—increases exposure to concussion and other potentially harmful head injuries. That’s right—over the course of five seasons, the study found that almost three out of every four concussions and two out of every three potentially concussion-causing head impacts occurred in practice, not game play.¹

The CARE Consortium team, led by Dr. Michael McCrea, studied a total of 658 collegiate football players from 2015 to 2019 across six Division 1 NCAA football programs. Using the Head Impact Telemetry (HIT) system, the study prioritized players for instrumentation based on their level of participation (meaning starters were prioritized over reserves).

Over those five seasons, the CARE Consortium team recorded a total of 528,684 head impacts during football practices or games. Head impact exposure (i.e., potentially concussion-causing hits) was two times more likely to occur during preseason events than during regular season events. Moreover, almost half of the total concussions (48.5%) occurred during preseason training, despite preseason representing only one-fifth (21%) of the football season. In the regular season, the total Head Impact Exposure (HIE) was almost double in practices than in games.

The data is clear: Concussions and HIE are disproportionately higher in preseason than regular season, with most concussions and HIE occurring during practices, not

games. Based on the study’s findings, and with a focus on student-athlete safety, the researchers offered four areas of consideration for the future:

1. Policy and Governance
2. Institutional Responsiveness
3. Athlete Instruction
4. Monitoring Efficacy

The researchers call upon sport governing bodies and schools to implement policy and rule changes to reduce the number of concussions and HIE. Further, they recommend, where possible, that schools implement concussion-detecting technology, both to reduce exposure and associated injury risk and to continue to study and collect data on head injuries. “These findings offer a powerful opportunity to modify approaches to preseason training and football practices to keep players safer,” said Dr. McCrea, “By modifying practices and preseason training, football teams could greatly reduce the risk of injury and exposure for their players, while still maintaining the competitive nature of game play. Through a combination of policy and education, similar strategies could be implemented to help prevent concussion and HIE in high school and youth football, too.”

From a commonsense perspective, these findings are unsurprising. Practices involve more repetitions, whereas game play is typically once per week and involves fewer full-contact hits. Further, in preseason, players are typically in not as good of shape compared to in season, so they find themselves in more compromised positions, exposing themselves to greater chance of injury. Moreover, during the season, practices are less grueling, when compared to

preseason practice, so as to rest and prepare for games and avoid injury in season.

Obviously, the purpose of the study is to identify risk areas to help mitigate and reduce student-athlete injuries. An unintended consequence, however, is the legal impact of this study and similar studies. In the space of concussions and head injuries, the standard of care that schools, coaches, and athletic trainers must provide to their athletes is always evolving, and this study adds another star to that ever-evolving constellation. Those in charge of student-athlete safety must stay abreast of developments in this area and failing to do so may be detrimental in the event litigation is filed.

Now that we have hard data showing that preseason is riskier than the season and that practice is riskier than the game, is it not a drastic leap of logic that a school be found negligent for not reducing the number of contact practices? Potentially. Plaintiffs’ lawyers in future lawsuits will most certainly point to this study to argue that schools were aware of the negative consequences of preseason and practice and chose to not change their policies.

In order to protect themselves from future lawsuits—and, perhaps more importantly, to protect the student-athletes’ health and safety—sport governing bodies and schools should familiarize themselves with this study and implement policies and protocols that reduce the number of full-contact practices. ●



Kacie E. Kergides



Dylan F. Henry



Kimberly L. Sachs

1 McCrea, *et al.*, “Opportunities for Prevention of Concussion and Repetitive Head Impact Exposure in College Football Players” *JAMA Neurol.* 2021;78(3):346-50 (published online Feb. 1, 2021).

The Varying State of Transgender Athlete Participation Policies

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through college. In curling and in all other sports, Cooper always competed as a male.

Despite any success, Cooper struggled with her gender identity throughout her athletic endeavors and was diagnosed with gender dysphoria at the age of 26. According to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM), gender dysphoria is "marked incongruence between one's experienced/expressed gender and their assigned gender" that causes "significant distress or impairment."¹ Cooper's doctors began treating her gender dysphoria using spironolactone, finasteride, and estrogen, drugs that decrease the production of testosterone and minimize its bodily effects. However, a year after her diagnosis, Cooper realized that competing as a male was still causing her significant distress. She subsequently abandoned organized sports altogether.

"Not a Fit for Every Athlete"

In 2018, almost four years after beginning hormone therapy, Cooper returned to organized athletics and began training as a powerlifter. In order to compete nationally, she became a USAP member. Cooper set her sights on two USAP-sanctioned

meets in particular: the 2019 Minnesota Women's State Bench Press Competition and Minnesota Women's Championship.

However, Cooper never made it to the bench. According to her complaint, USAP banned her participation, citing two protocols under its Transgender Participation Policy (TPP): (1) its ban on spironolactone, as the TPP forbids and will not, under any circumstances, exempt the use of testosterone or other androgens that assist in gender transitions, and (2) its exclusion of transgender women, who may not participate in USAP competitions.² The TPP deems USAP "an inclusive organization for all," but clarifies that the organization "is not a fit for every athlete and for every medical condition or situation."³ According to the TPP, "powerlifting is a sport of strength,"⁴ and although transgender women "may be weaker" and may have [have] "less muscle" compared to their pre-transition bodies, "the biological benefits given them at birth still remain" and dominate "over" those held by females.⁵

"Spectators in Our Own Sports": The Debate Over the TPP in the Midwest and Beyond

Cooper's exclusion under the TPP forms the basis of her discrimination claims, and her story has sparked debate across Minnesota, the entire country, and the world. Supporters of the TPP and similar policies in other sports organizations argue such measures are necessary to ensure women's equal access to opportunities like athletic scholarships. Former Idaho State

University basketball player, NCAA Division I basketball coach, and current Idaho House Representative Barbara Ehardt, for example, warns that allowing transgender athletes to compete as women will erase the progress women in sports have made over the last half-century.⁶ Without a ban on transgender athletes, Ehardt cautions, "we will be forced to be spectators in our own sports."⁷

Opponents of the TPP, in contrast, describe the policy as unnecessary, unscientific, and motivated by bigotry. In a letter to USAP's executive director and president, United States Representative for the 5th District of Minnesota Ilhan Omar called the notion that transwomen have a competitive advantage over ciswomen a "myth . . . not supported by medical science." According to Omar, policies like the TPP are in place to "stoke fear and violence against one of the most at-risk communities in the world." Ehardt and Omar are just two examples of athletes, activists, and politicians who have spoken out about this issue in recent months.

No Uniformity in Who Can Wear the Uniform

Cooper's case not only sparks a heated debate, but also exposes the startling inconsistencies amongst organizations' transgender athlete policies. Consider the case of USA Gymnastics (USAG), which the U.S. Olympic Committee and International Gymnastics Federation designated as the United States' national governing body for the sport. Unlike USAP, on November 17, 2020, USAG

1 A person must also experience at least two of the following symptoms for a minimum of six months in order to be diagnosed with the disorder:

- A strong desire to be rid of one's sex characteristics
- A strong desire for the sex characteristics of the other gender
- A strong desire to be of the other gender (or some alternative gender different from one's assigned gender)
- A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender)
- A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender)

<https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>

2 <https://www.usapowerlifting.com/transgender-participation-policy/>

3 <https://www.usapowerlifting.com/transgender-participation-policy/>

4 <https://www.usapowerlifting.com/transgender-participation-policy/>

5 <https://www.usapowerlifting.com/transgender-participation-policy/>

6 <https://www.nytimes.com/2020/08/18/sports/transgender-athletes-womens-sports-idaho.html>

7 <https://www.nytimes.com/2020/08/18/sports/transgender-athletes-womens-sports-idaho.html>

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After Career Change, Sachs Finds Rewarding Path as Attorney

Kimberly L. Sachs began her career in the media industry. But something was missing. It didn't take long before the University of Wisconsin-Madison graduate realized there was a more rewarding path – becoming a lawyer.

So Sachs changed directions, securing her J.D. degree, *magna cum laude*, from Villanova University Charles Widger School of Law.

Shortly thereafter, she became an associate in Montgomery McCracken's Litigation Department, where she focuses her practice on complex litigation matters in the areas of sports law, intellectual property, white-collar defense, and employment.

Sachs excels in sports law, and currently serves as a co-editor of *Sports Medicine and Law*. For those reasons and others we singled her out for the interview below.

Question: *When did you first decide you wanted to be a lawyer and what led to it?*

Answer: After graduating from college, I worked in the communications field for four years—two years in television and film and two years in print media. The work was interesting, but it wasn't rewarding. I decided to go to law school (and ultimately become a lawyer) because I wanted to be challenged at work and feel like I was making a difference on a larger scale. I love writing, critical thinking, and problem solving, so practicing law seemed like the perfect fit for me. I'm in my third year of practice now and haven't looked back.

Q: *How would you describe your overall practice?*

A: I focus my practice on traumatic brain injuries, whether sustained in the sports context or in other situations. I also counsel individuals, school systems, and organizations on catastrophic sports injury matters and the proper management of sport-related concussions and other sport-related brain injuries. When I'm not working on TBI matters, I divide my time between intel-



Kimberly L. Sachs

lectual property and commercial litigation.

Q: *What led you to the sports medicine niche?*

A: My first day at Montgomery McCracken, I became the lead associate on a case that was scheduled for a four-week traumatic brain injury trial in New York. Though the case did not involve a catastrophic sports injury, the alleged injuries were similar to those we see in the sports medicine area—concussion, traumatic brain injury, etc.—and the theory of liability was the same—negligence. During the trial, I was able to work directly with some of the leading experts in the sports medicine field, and once the trial ended, I continued to work on cases in this area. I've since worked on upwards of five brain injury/catastrophic injury matters, and I'm continuing to learn more and more with each new case.

Q: *What kinds of cases in the niche most interest you?*

A: All of the cases in this field are super interesting. The cases that interest me the most are those that involve complex medical issues and histories. Being able to work with and learn from internationally renowned experts has been one of the most rewarding parts of being a lawyer. It's not every day that you get to talk to physicians for the US Olympic Team, top athletic trainers, or lead doctors for collegiate sports teams.

Q: *How did your experience as a Legal Extern in the Villanova University Office of the Vice President and General Counsel shape you as a lawyer?*

A: Working as a legal extern for the Villanova University Office of the Vice President and General Counsel gave me tremendous insight into the expectations of clients and highlighted the importance of outside counsel, especially outside counsel with an expertise in a niche area of law. The experience also helped me understand the tension between the law and business practicalities and taught me to approach law in a more pragmatic way. Go Cats!

Q: *What's the best part about being a lawyer?*

A: The best part about being a lawyer is being able to bring effective solutions to clients' problems and work with and learn from your colleagues. I am constantly relying on and learning new things from Steve Pachman, Dick Placey, Dylan Henry, and Kacie Kergides—the other members of MMWR's Catastrophic Sports Injury Defense Group—and our collective brain is one of our biggest assets when analyzing new cases, discussing developments in concussion and CTE litigation, and working on TBI matters.

The best part about being a lawyer in this field is being able to work directly with some of the top neurologists, neuropsychologists, and neuroradiologists, literally in the world. These experts are helping to shape the concussion landscape every day with their work, research, and publications, and being able to call on them for their knowledge for complex cases has been an invaluable asset. I also have immense respect for these experts who are helping to make sports safer.

Q: *If you weren't a lawyer, what would be your profession?*

A: If I didn't practice law, I'd probably still work in the media industry. It wasn't so bad—it's where I met my husband! ●

The Varying State of Transgender Athlete Participation Policies

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announced that transgender and non-binary athletes competing at the national level “are permitted to compete in the gender category with which they identify without restriction.”⁸

The National Collegiate Athletic Association (NCAA) employs yet another scheme.⁹ Its Policy on Transgender Student-Athlete Participation first distinguishes between “transgender student-athletes undergoing hormonal treatment for gender transition” and those not taking any such medication.¹⁰ With respect to athletes undergoing hormonal treatment, trans-male student-athletes with gender identity disorder diagnoses can obtain exemptions to compete as men.¹¹ Trans-female student-athletes must complete a full year of testosterone suppression treatment before competing as women.¹² For students not undergoing hormonal treatments, the NCAA permits trans-male athletes’ participation on men’s or women’s teams, but bans trans-female athletes from competing as women.¹³

The International Olympic Committee (IOC) takes a fourth approach. Under the IOC’s policy, athletes who transitioned from female to male may compete as males without restriction.¹⁴ However, those transitioning from male

to female can only compete as women if they (1) declare their gender identity as female for a minimum of four years; (2) demonstrate total testosterone levels below a certain threshold for at least a year before and throughout the period of competition; and (3) submit to testing by the organization to ensure compliance with the policy.¹⁵ Thus, examples like USAP, USAG, the NCAA, and the IOC reveal the lack of consistency in transgender athlete eligibility requirements amongst the leading national and international sports’ organizations.

State laws and federal policy only further complicate this picture. In March 2020, Idaho became the first state in the country to enact a so-called “transgender sports ban” when it passed the Fairness in Women’s Sports Act, which requires publicly funded athletic programs to make exclusions “based on biological sex” and creates a cause of action for “any student who is deprived of an athletic opportunity or suffers any direct or indirect harm as a result of a violation.”¹⁶ The American Civil Liberties Union (ACLU) filed suit to challenge the Act, but analogous legislation has since been introduced in 29 states.¹⁷

At the federal level, the Biden administration appears poised to embrace an opposing position. On January 20, 2021, his first day in office, President Biden signed an Executive Order on Preventing and Combating Discrimination on the Basis of

Gender Identity or Sexual Orientation.¹⁸ Declaring that “all persons should receive equal treatment under the law, no matter their gender identity or sexual orientation,” the Executive Order explicitly states that “children should be able to learn without worrying about whether they will be denied access to . . . the locker room, or school sports.”¹⁹

The U.S. Department of Education (DOE) cited this Executive Order on February 23, 2021, when it withdrew a 2020 Trump administration letter filed in connection with *Soule v. Connecticut Association of Schools*. In *Soule*, three cisgender female high school students argue that Connecticut deprived them of “honors and the opportunities to compete at elite levels” when it allowed trans-female athletes to compete against them in track and field.²⁰ The withdrawn DOE letter interpreted Title IX regulations to prohibit transgender female athletes from taking “biologically female” spots on sports teams.²¹

In short, there is little, if any, uniformity in the treatment of transgender athletes in 2021, and consensus appears to be anything but imminent. However, amidst this discord and confusion, the lawsuits in Minnesota, Idaho, and Connecticut make one thing very clear: as policies for transgender athletes continue to be developed and debated, litigation is all but certain to ensue. ●

8 https://usagym.org/PDFs/About%20USA%20Gymnastics/transgender_policy.pdf

9 https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf

10 https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf

11 https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf

12 https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf

13 https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf

14 https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf

15 https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf

16 <https://legislature.idaho.gov/sessioninfo/billbookmark/?yr=2020&bn=H0500>

17 <https://www.hrc.org/news/these-are-the-states-trying-to-stop-trans-kids-from-playing-sports>

18 <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>

19 <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>

20 <https://adfflegal.org/case/soule-v-connecticut-association-schools#close>

21 <https://adfflegal.org/case/soule-v-connecticut-association-schools#close>

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amyotrophic lateral sclerosis (“ALS”), despite having no genetic predisposition to the disease. ALS, also known as Lou Gehrig’s disease, is a neurodegenerative disease that affects nerve function in the brain and spine. There is currently no cure for ALS. Onyshko is confined to a wheelchair and relies on an eye-tracking computer system (“ETCS”) to speak.

On June 27, 2014, Onyshko and his wife filed their negligence action against the NCAA in the Pennsylvania Court of Common Pleas, seeking \$9.6 million in damages.² Onyshko alleged that the NCAA breached its duty to warn him of the effects of repeated head trauma. The NCAA moved to dismiss the case twice, claiming it did not owe a duty and that Onyshko assumed the inherent short and long-term risks of playing football. Judge Katherine Emery rejected these arguments and held that the jury must decide the scope of the NCAA’s duty and whether the NCAA breached this duty. Notably, Judge Emery acknowledged the NCAA’s argument that “getting hit in the head is an inherent risk of football.” In rejecting the motions to dismiss, however, Judge Emery cited the Plaintiff’s assertions “that the NCAA increased Mr. Onyshko’s risk of long-term injury by failing to disclose crucial information as well as failing to have procedures in place with respect to returning to play after sustaining serious head injuries.”

NCAA Emerges Victorious After Battle with Onyshko

In May 2019, a sixteen-person jury heard Onyshko’s case, marking it as the first

² The case was initially filed in the United States District Court for the Western District of Pennsylvania on December 17, 2013 but was voluntarily dismissed and refiled in the Washington County Court of Common Pleas in Pennsylvania.

football-related case concerning ALS to go to trial. Onyshko’s case came shortly after the highly publicized and first-ever football-brain disease case—*Ploetz v. NCAA*—went to trial. However, *Ploetz* settled three days into trial, providing no guidance on how juries would view negligence cases against the NCAA and other similarly-situated defendants. Both Ploetz and Onyshko were represented by the same attorney, Gene Egdorf.

During trial, Onyshko presented expert testimony from renowned sports-related brain disease doctors, Dr. Bennet Omalu and Dr. Robert Cantu. Dr. Omalu referred to Onyshko’s condition as trauma-induced ALS, CTE-ALS, and chronic traumatic myeloencephalopathy (“CTME”). Omalu asserted that Onyshko’s repeated head trauma contributed significantly to his ALS diagnosis, citing the high level of ALS found in football players compared to the general public. The NCAA countered by arguing that Onyshko did not report any of his concussions to coaches or athletic staff while playing football in college, which prevented Cal U from diagnosing or treating his head injuries.

The jury returned a verdict in favor of the NCAA – the verdict slip read “Was the [NCAA] negligent? No.” This verdict provided little clarity with regard to the NCAA’s duty, as the sole governing body of collegiate athletics, to inform student athletes of the lasting effects of repeated head trauma and whether it breached that duty. Shortly thereafter, Onyshko’s attorney, Gene Egdorf, stated that he planned to appeal the case and file a wrongful death action once Onyshko passes.

NCAA Dodges Appeal, Left Unscathed

In August 2020, Onyshko asked a three-judge panel from the Superior Court of

Pennsylvania for a new trial.³ One of Onyshko’s attorneys, Diana Nickerson Jacobs, argued that testimony from Cal U administrator William Biddington, not a party to the litigation, regarding repeated head trauma warnings given by the university “improperly muddied the water about the NCAA’s responsibilities.”⁴

Biddington testified that he created and implemented policies to warn and educate student athletes on concussion indicators and the related long-term effects. Biddington admittedly did not attend the team meetings in which the information was delivered to the players. He instead provided the trainers with the information, who in turn presented the practices and policies to the team. The head athletic trainer testified to being present in a preseason meeting in which the concussion policies were discussed.

The NCAA’s attorney, Lewis W. Schlossberg, argued that the warnings provided by Cal U were relevant to refute the allegation that the NCAA’s failure to provide this information caused Onyshko’s injuries. Schlossberg stated, “Even if [the NCAA] didn’t produce the information, Cal U did,... Because Cal U in fact provided this very information, the NCAA could not have been the cause of the development of his injuries.”⁵ Jacobs countered that the “jury had no method to consider the evidence from Cal U, whether these actions were reasonable or whether they negated the harm caused by the NCAA’s conduct.”⁶

³ Matthew Santoni, *Ex-College Athlete Seeks to Revive NCAA Concussion Suit*, Law 360 (August 25, 2020), <https://www.law360.com/articles/1304271/ex-college-athlete-seeks-to-revive-ncaa-concussion-suit>.

⁴ *See id.*

⁵ *See id.*

⁶ *See id.*

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On January 8, 2021, the panel adopted Judge Lucas' opinion from October 1, 2019, holding that Onyshko was not entitled to relief. Once again, this appellate decision does not provide concrete guidance as to how negligence arguments in subsequent sports-related latent-brain-disease cases will fare.

The panel's rejection reinforced the notion that these are fact-dependent cases, to be decided by juries. Further, the NCAA's efforts to offer evidence that the university informed student athletes of the effects of repeated head trauma were allowed by the court and proved successful, despite possible confusion of the jury. It is unclear whether this strategy will be permitted by future courts hearing similar cases.

NCAA Fending Off Future TBI Negligence Lawsuits

One of Onyshko's lawyers, Jason Luckasevic, initiated the first lawsuit against the National Football League ("NFL") on behalf of 120 former players.⁷ The suit cascaded into a class action lawsuit on behalf of thousands of former NFL players and ended in a \$1 billion settlement in 2016 to be distributed over 65 years.

Luckasevic decided he was going to "take [the NCAA] on case by case by case" next. The *Onyshko* case was the first in his pursuit to hold the NCAA liable for its negligence. Thereafter, Luckasevic brought multiple individual suits against the NCAA on behalf of former student-athletes in numerous states. He plans to continue his crusade as more courts resume civil jury cases that were put on hold due

7 Jason Schwartz, *The Lawyer Who Took on the NFL Over Concussions Has a New Strategy That Could Devastate the NCAA*, Sports Illustrated (Oct. 16, 2020), <https://www.si.com/college/2020/10/16/ncaa-concussion-cases-daily-cover>.

to the COVID-19 pandemic.

Separate from Luckasevic's efforts, in 2013, similar TBI suits brought by student-athletes against the NCAA were consolidated.⁸ United States District Judge John Lee granted final approval of the \$75 million dollar settlement in August 2019.⁹ Seventy million dollars were directed to fund concussion and TBI sports injury scanning for former and current players and \$5 million was dedicated to concussion-related research.

The NCAA has faced a slew of similar class actions by former student-athletes. Currently, in the Northern District of Illinois, a multi-district litigation ("MDL") is proceeding against the NCAA, as well as various leagues and numerous colleges and universities. Four bellwether cases are advancing through fact discovery for determining class certification for student-athletes who played football and sustained head trauma from 1952 to 2010.

The NCAA will likely be thwarting off individual suits, piloted by Luckasevic and others, and class action suits concerning its failure to warn student-athletes of the lasting health effects from head trauma for the foreseeable future.

Other Defendants Surviving Repeated Blows by Negligence Suits

Plaintiffs in sports-related head injury

8 Todd Hatcher, *NCAA Faces Proposed Class Action Lawsuit Over Student Athlete Concussions*, Expert Institute (Feb. 12, 2021), <https://www.expertinstitute.com/resources/insights/ncaa-faces-proposed-class-action-lawsuit-over-student-athlete-concussions/>.

9 Joseph M. Hanna, *NCAA \$75 Million Settlement Gets Final Approval with \$14 Million in Fees*, Lexology, <https://www.lexology.com/library/detail.aspx?g=7c0a3f50-4b9e-48f7-96dc-88ce3b306d68> (last visited Feb. 26, 2021).

cases at the collegiate level typically bring negligence suits against the university and all relevant parties employed by the university, including athletic trainers, athletic directors, team doctors, and coaches and staff. As previously mentioned herein, (and for a host of other reasons including sovereign immunity) there is a trend for Plaintiffs to sue the NCAA and other defendants more removed from the day-to-day interaction with the student-athletes, such as the athletic conferences and divisions.

These entities have and likely will continue to use the "No Duty" argument that the NCAA benefited from in the *Onyshko* case. If a duty is established, these defendants will refute the breach and causation elements of these negligence claims by attacking the Plaintiff's attempts to use expert testimony to bridge the causal gaps in their claims. The science is still unsettled, particularly concerning CTE, which creates further uncertainty for parties bringing and defending these actions.

It is clear Plaintiffs in these cases can survive the procedural thresholds and get these cases before a jury. It is unclear, however, how juries will continue to decide these cases should they go to trial. The *Onyshko* verdict will not provide the NCAA and similar defendants with a get-out-of-jail-free card as these cases are factually dependent and will be decided by juries on a case-by-case basis. But defendants beware: if just one jury finds the NCAA, a conference, or a division negligent for not warning collegiate athletes of the effects of repeated head trauma, legal experts presume the litigation floodgates may open. ●

Jogging Class Heat Stroke Settlement Nearly \$40 Million

Marissa Freeman, who was catastrophically injured after suffering heat stroke during an outdoor class at California State University San Bernardino, received \$39,500,000 in a settlement.

It was reportedly the largest settlement ever for an injury case involving the California State University system.

On September 26, 2018, Freeman was participating in a jogging class at CSU San Bernardino, along with other students with varying jogging experience, from novice to expert.

The students were required to complete activity classes, similar to the jogging class, to graduate. On the first day of exercise, the CSU instructor assigned a run on a 5K course on the concrete and asphalt surrounding campus, even though temperatures were at a dangerous 95 degrees and students were not yet acclimated to working out in these conditions.

“This presented an extreme risk of heat illnesses, including heat stroke,” according to the law firm representing the plaintiff. “Near the end of the run and while the instructor was at another location, Freeman collapsed on the hot concrete outside of Coussoulis Arena with severe heat stroke. University personnel, including an athletic trainer, responded but did not provide any recommended rapid whole-body cooling to treat her heat stroke or move Freeman

to the air-conditioned arena 20 feet away as they were waiting for paramedics to arrive. Evidence established that neither the instructor nor the other CSUSB employees had received required CAL-OSHA training in heat illness prevention and treatment before the incident.”

As a result of the heat stroke, Freeman suffered a severe brain injury, cardiac arrest, and multi-system organ failure, she underwent months of hospitalization and more than one year of in-patient rehabilitation before she could be released home to her family. Freeman’s cognitive function, speech, and motor control remain severely impaired, and she will require 24/7 care, therapy, and medical attention, according to the firm.

“During the lawsuit, CSU denied responsibility and contended that Freeman negligently overexerted herself in the class,” claimed the firm. “CSU also sued Freeman’s medical providers, including the fire department, ambulance, hospital emergency room, and skilled nursing facility, claiming that they negligently caused her injuries in the process of attempting to save Freeman’s life and provide care.”

On October 26, 2020, pretrial hearings commenced in a makeshift courtroom created for trial proceedings during COVID-19 in the San Bernardino Historic Courthouse. Over three weeks, 105 pretrial

motions were heard and decided. After extensive argument and submission of expert testimony by CSU, their claims that Freeman’s medical providers and first responders were negligent and caused her injuries were dismissed due to lack of evidence.

At the trial, settlement negotiations between CSU and the Freeman family began in earnest, leading to the resolution.

In addition to the monetary settlement and as a condition of the agreement with the Freeman family, California State University agreed to develop and implement a system-wide policy for heat illness prevention, education, and protocols with input from Dr. Douglas Casa, the head of the Korey Stringer Institute, a heat illness research and advocacy organization. This policy will apply in all academic environments to the nearly 500,000 enrolled students at all 23 California State University campuses.

Andrew Jones, executive vice chancellor and general counsel for California State University, issued the following statement to the media.

“We are relieved to come to a resolution that will enable Ms. Freeman to receive the care she needs for the rest of her life,” he said. “The university will continue to take steps to heighten the awareness of our faculty, staff and students to the potential for heat-related injuries and how to mitigate against them.” ●

Study — Lack of Heat Policies Put Athletes at Risk

Every year, sports coaches have to navigate how to safely get their teams in shape to compete while temperatures during outdoor practices soar. New research from the University of Georgia aims to help them do just that.

Different states have different heat policies guiding outdoor practices. In areas less prone to extreme temperatures—Alaska, for example—strong heat guidelines aren’t as urgently needed as in hotter regions.

But for states that regularly see high heat and high humidity, a similar lack of rules could prove disastrous. And as temperatures rise across the globe, states that previously haven’t experienced dramatic heat waves will need to adapt their policies as well.

“Heat is one of the leading weather killers,” said [Andrew Grundstein](#), a professor and climate scientist in UGA’s [Franklin College of Arts and Sciences](#) and lead author of the study, published in the [Journal of Science](#)

[and Medicine in Sport](#). “It’s one of the top three causes of death in sports, and we have a lot of states that are not prepared for heat right now.”

Measuring Up

The researchers wanted to see how well suited those varying policies are to protecting against a given state’s threat. To determine each state’s heat vulnerability, the team

See **STUDY!** on Page 10

Cardiac MRI Shows Less Myocarditis in Athletes Recovered From COVID-19

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with myocarditis, and none of those athletes had experienced symptoms of COVID.

“Initially, we hoped that the standard screening tests for athletes would be definitive because we wanted something that was widely available and quick,” said Clark. “We hoped that a cardiac MRI would only be used if absolutely necessary.

“However, their blood work, clinical exams, EKG, echocardiograms and other cardiovascular screening were normal. All of those traditional screening results would have led us to agree to allow some athletes to participate in a sporting event or practice, while the MRI told a different story.”

Myocarditis is a disorder of abnormal inflammation of the heart muscle and is a leading cause of sudden cardiac death among athletes. The findings highlight the importance of considering cardiac MRI in addition to traditional screening measures to detect myocarditis.

It is well documented that COVID-19 may affect the heart.

“Our data also demonstrated more scarring in healthy heart muscle than we would have thought,” Clark said.

Those findings led the group to dig deeper and compare a healthy, athletic population with normal cardiac MRI values against those who had recovered from COVID.

The athletic control group without COVID showed 24% (1 in 4) scarring in the heart muscle while the COVID athlete group had a 27% (1 in 4) scarring ratio. According to Clark, athletes commonly have a small area of benign scar due to athletic remodeling. This scarring related to athletic changes was evident in both athletic groups studied.

“This particular piece of information is very important to share – myocarditis after COVID-19 tends to be in a similar spot,” he said. “Without the knowledge that this area of scarring is common in healthy ath-

letes, clinicians could attribute the scarring to consequences from COVID-19. Those assumptions might unnecessarily restrict some athletes from competition.”

Clark says his team’s findings suggest that the addition of cardiac MRI as an assessment tool for athletes may be very helpful in determining safe return-to-play guidelines.

Clark summarized the group’s findings as follows:

“Myocarditis among recovering COVID-19 athletes is less common than previously reported. We also want to highlight that the comparison to a healthy athletic control group without COVID is critically important to show that many changes on a cardiac MRI are related to athleticism and not COVID-19. However, despite the lower incidence of myocarditis than expected, cardiac MRI remains a very useful tool for evaluating competitive athletes prior to a return to sports. ●

Study — Lack of Heat Policies Put Athletes at Risk

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analyzed each state’s policies by how they lined up with established best practices for health and safety in sports and compared them to the state’s climate.

The team examined how closely aligned high school sports policies were to best practices for health and safety. Policies like gradually acclimating players to practicing in the heat over time and adjusting outside activities based on how hot it is—like giving more breaks and having players take off some equipment.

Some of the findings were concerning.

“We have 29% of states that are in what we call the problem category,” said Grundstein. “That means they’re states that get very hot and don’t have very good policies, so their players are highly vulnerable to heat.”

Many of those “problem” states are in the South, like Mississippi, Alabama, Texas

and Florida, among others. But states can do a lot more to be proactive in protecting their players.

Positive Changes

For example, at the time of the study, Louisiana’s policies placed it in the problem group. But in response to growing concerns about student-athlete safety, the governor signed a sweeping bill into law that now requires schools to acclimatize their students to practicing in the heat, monitor environmental conditions and mandate emergency action plans for heat-induced health threats.

For Grundstein, it was the perfect example of how states can turn things around.

“Louisiana was one of the worst states—it was really hot, and they had really weak policies,” he said. “When they shifted the policy, they moved all the way over to our what we

call fortified category, where they had much better policies and that means the players are going to be much less vulnerable.”

Necessary adjustments

As temperatures continue to rise across the globe, the implementation of adaptive policies that respond to environmental conditions will become increasingly important. Many states that previously didn’t have to worry about extreme temperatures are experiencing more hot days than ever before, something Grundstein hopes will prompt them to reexamine their policies and make necessary adjustments to keep students safe.

“If you’re in a hot climate, that doesn’t mean you can’t go out there and participate in sports,” Grundstein said. “It just means you need better policies.” ●