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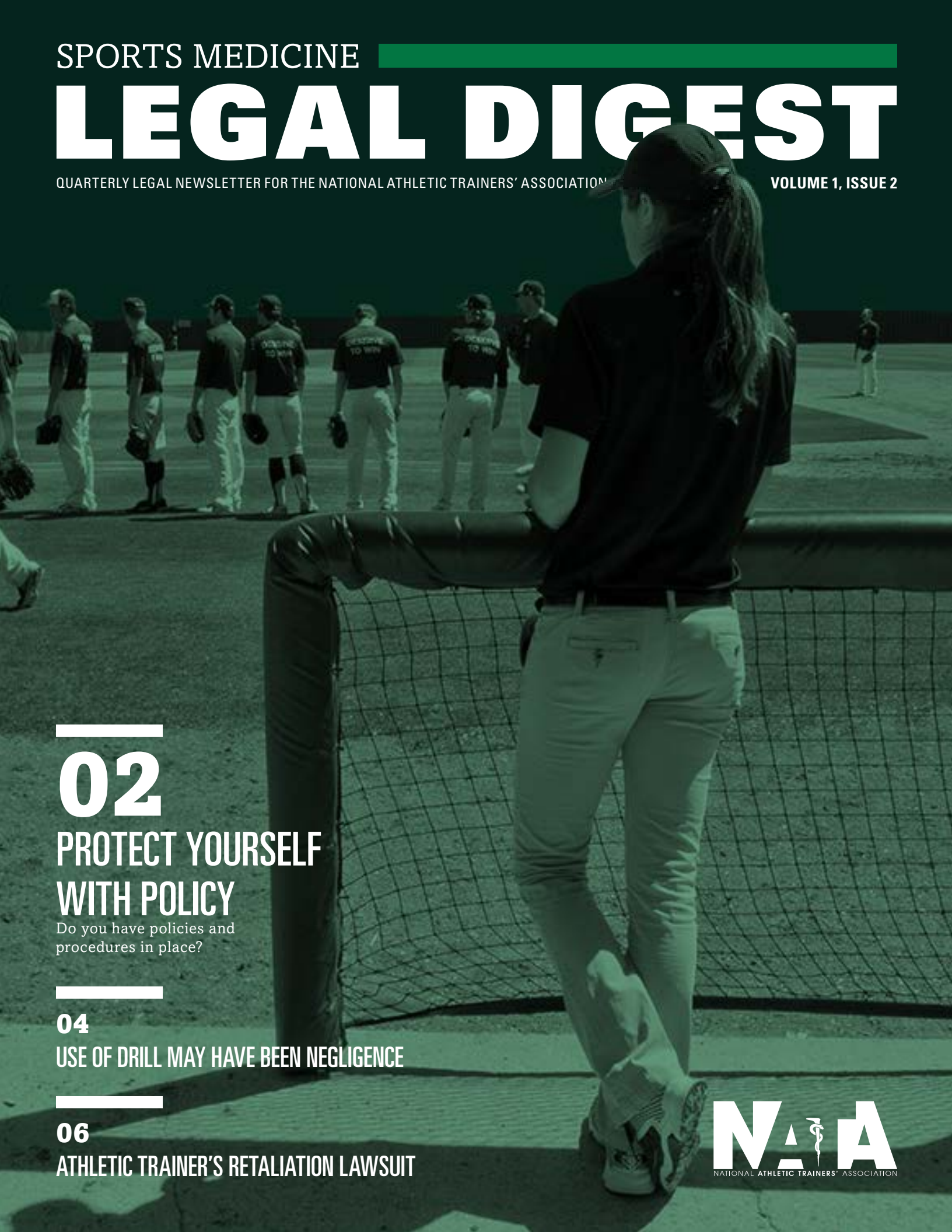

NATA
NATIONAL ATHLETIC TRAINERS' ASSOCIATION

Protect Yourself with Policy

Do you have policies and procedures in place?

BY TIMOTHY NEAL, MS, ATC, CCISM, AND JEFF G. KONIN, PHD, PT, ATC

In the event of an investigation or litigation, one of the first things an expert witness and attorney will want to examine is a policy (or lack thereof) for the situation in question, and whether or not the associated procedures were carried out as planned. As a practicing athletic trainer, do you have policies and procedures in place that provide guidance for action or health and safety concerns of your patients? How have you developed policy at your place of employment? Most importantly, why is having a specific policy for various situations important?

These and other questions should be contemplated when developing policies and procedures for you and your fellow athletic trainers to follow to ensure quality care and minimize liability.

By definition, a policy is a plan that expresses the intended behavior related to a specific issue of concern within an organization. Policies are broad statements with an overriding theme that are developed to address appropriate medical care and responses (such as an emergency) and ensure that national standards, recommendations and laws are being followed. In general, these national standards and recommendations, and certainly the laws, will be the standard by which athletic trainers will be held to in the event of a real or perceived poor medical outcome.

Policy development in sports medicine includes having specific policies on emergency action planning, concussion management, sickle-cell trait, mental health, heat illness and medical information/documentation. Many ATs focus on having emergency action plans in place—which is very important—but EAPs are only one part of the puzzle. Your policy and procedures manual goes above and beyond EAPs to include policies for the situations an athletic trainer may encounter on a regular basis, both medical and administrative.

Governing and professional organizations, such as the National Athletic Trainers' Association, have developed position, consensus and official statements on various areas of health and safety of athletes and patients. States have developed laws that require policies to be developed to appropriately care for concussions in interscholastic

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SHARE YOUR THOUGHTS

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athletes, for example. Athletic trainers employed in the collegiate and secondary school settings should be aware of and help develop policies that meet national standards and state laws.

If you need a refresher, a good place to start is reviewing the statements put out by NATA,[1] the American College of Sports Medicine,[2] the NCAA Sports Medicine Handbook[3] and the National Federation of High Schools.[4] Each of these resources offers up-to-date information on standards of recognition and care for various conditions and situations.

Once you have a policy, you need a procedure. All policies are carried out by way of planned procedures. Procedures provide specific guidelines and directions, are written in clear and simple language and shared with all stakeholders. For example, a secondary school setting may have a policy on managing individuals who acquire Methicillin-Resistant Staphylococcus Aureus (MRSA). The procedures would succinctly address issues related to proper skin care, universal precautions, abstaining from participation and return-to-participation guidelines.

How do you begin developing policies and procedures? Start by reviewing governing and accrediting organization's standards. Begin with identifying the issues in your setting that require a written policy. Referring to best practices and current standards of care, draft a document and have it reviewed by all stakeholders. An effective policy should be written so it can be easily understood by all stakeholders, even those outside the medical team. Be sure to have your risk manager and general counsel review the policy and procedures from a risk management perspective. Once approved, disseminate and review the completed policy again with all stakeholders and add it to your organization's policy manual. Put in place an annual review of all policies with the sports medicine staff and risk manager/general counsel.

Be sure to keep in touch annually with all necessary stakeholders—athletic trainers, coaches, administrators, athletes/patients—through various methods of communication to make sure everyone is aware of any updates.

Policy and procedure development is a stepwise process. Establishing policies and procedures based on best practices and current standards of care helps ensure quality care for the patient/athlete and minimizes liability for the school or organization. By not developing an effective policy and procedure or not following the established policy or procedure, athletic trainers risk liability from a real or perceived poor outcome in their duty to care for their patients. Athletic trainers should make it a personal policy to develop and adhere to effective policy in their professional practice.

About the authors: Timothy Neal, MS, ATC, CCISM, is an assistant professor and director of the athletic training program at Concordia University Ann Arbor, and president of TLN Consulting. Jeff G. Konin, PhD, PT, ATC, is professor and chair of the Physical Therapy Department at the University of Rhode Island and founding partner of The Rehberg Konin Group.

References

1. Courson R, Goldenbeg M, et al. Inter-Association Consensus Statement on Best Practices for Sports Medicine Management for Secondary Schools and Colleges. *J Athl Train.* 2014;49(1):128-137. http://journals.lww.com/acsm-msse/pages/collectiondetails.aspx?TopicalCollectionId=1
2. ACSM Position Statements, http://journals.lww.com/acsm-msse/pages/collectiondetails.aspx?TopicalCollectionId=1
3. *2014-2015 NCAA Sports Medicine Handbook, 25th Ed.* 2014. The National Collegiate Athletic Association. NCAA Publications, Indianapolis, Indiana.
4. National Federation of High Schools. www.nfhs.org/sports-resource-content/nfhs-sports-medicine-position-statements-and-guidelines/

RELATED RESOURCES

- **"Implementing Health and Safety Policy Changes at the High School Level From a Leadership Perspective"**
- **"Sport Safety Policy Changes: Saving Lives and Protecting Athletes"**
- **"The Inter-Association Task Force Document on Emergency Health and Safety: Best-Practice Recommendations for Youth Sports Leagues"**
- **"Policies, Procedures, and Practices Regarding Sport-Related Concussion in Community College Athletes"**

COLUMN

TESTIMONY IMMUNITY IS CRITICAL ELEMENT TO PROTECTING CONFIDENTIALITY

ATs Care teams trained to understand confidentiality as part of peer-support interventions

BY TIMOTHY NEAL, MS, ATC, CCISM, AND DAVID MIDDLEMAS, EDD, ATC, CCISM
ATS CARE COMMITTEE

An athletic trainer has just attempted to revive an athlete who has suddenly died. Despite the AT having an effective EAP in place and making every effort toward resuscitating, the athlete had an underlying medical condition that was unsurmountable. The AT would like to talk to someone on how this event has impacted him/her psychologically, but has no one to turn to outside of their work environment because he/she has been informed by administration not to discuss the event. How can the AT receive assistance for their psychological well-being? Who can provide this assistance while understanding his/her perspective and keeping the information confidential?

The situation above is considered a critical incident. Critical incidents are unusually challenging events that may have the potential to create significant human distress and can overwhelm one's usual coping mechanisms.[1] The International Critical Incident Stress Foundation (ICISF) has developed a comprehensive, phase-sensitive, integrated, multicomponent approach to crisis intervention known as Critical Incident Stress Management (CISM).[1] Developed by Dr. Jeff Mitchell and Dr. George Everly, CISM is the world's oldest and most widely used approach to crisis mental health interventions.

To provide CISM interventions, one must be trained through an approved ICISF training course. Crisis interventions target the response of the individual, not the incident itself. An important element to keep in mind is that CISM

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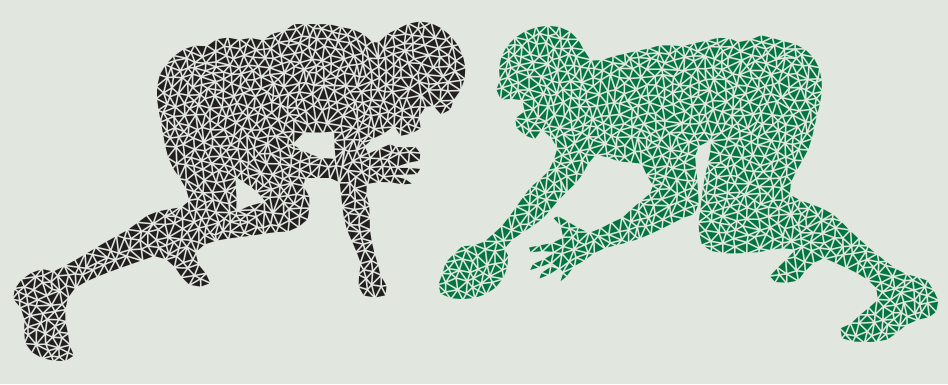

Appeals Court: Use of Oklahoma Drill May Have Been Gross Negligence

A state appeals court has reversed a trial court ruling, giving new life to the claims of two student athletes who sued their coaches and college after suffering head, shoulder and spinal injuries during football practice.

In so ruling, the panel of judges found that questions remain about whether the actions of the defendants constituted gross negligence and whether the waiver the plaintiffs signed should act as a shield to gross negligence claims.

This case involves personal injuries suffered by the plaintiffs March 29, 2010, while they were participating in a tackling drill during the first day of spring contact football practice at the college. The school is a nonprofit junior college and a member of the National Junior College Athletic Association. Traditionally, the school employed two athletic trainers to support the football program. In June and July 2009, the athletic trainers tendered their resignations to the school.

After the athletic director advertised the job openings, two applicants emerged. The school hired them in August 2009. Although they had earned their Bachelor of Science degrees in athletic training in the spring 2009, neither of them were certified or licensed at any time relevant to the underlying action.

In August 2009, they learned they had not passed the Board of Certification Inc. examination and informed the AD. In response, the AD retitled them as "first responders." Neither of them completed a new or amended job description, despite the inaccuracy about their qualifications on the original job description. In September 2009, the school hired a certified part-time athletic trainer, but she did not attend football practices during the 2009-10 academic year. All three job descriptions were identical.

The first responders were the only sports medicine staff working with the football players March 29, 2010. The court further noted that a couple football players said they "represented themselves as [athletic trainers] and that the coaching staff propagated that representation." The suit notes that it was upon the advice of one of the first responders that one of the players returned to the tackling drill after his initial injury.

The court noted that both players were experienced football players leading up to their time at the college and were educated along the way about the proper tackling technique.

In anticipation of spring football tryouts in 2010, they were presented on March 22, 2010, with a Waiver of Liability and Hold Harmless Agreement. The waiver, in relevant part, provides:

"In consideration for my participation in (sport), I hereby release, waive, discharge, and covenant not to sue (the school), its trustees, officers, agents, and employees from any and all liability, claims, demands, actions, and causes of action whatsoever arising out of or related to any loss, damage, or injury, including death, that may be sustained by me, or to any property belonging to me, while participating in such athletic activity... It is my express intent that this Release and Hold Harmless Agreement shall bind my family, if I am alive, and my heirs, assigns, and personal representative, if I am deceased, and shall be deemed as a release, waiver, discharge, and covenant not to sue (the school), its trustees, officers, agents, and employees. I hereby further agree that this Waiver of Liability and Hold Harmless Agreement shall be construed in accordance with (state) laws."

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ATs CARE, *continued from page 03*

can be provided from one peer to another. Peer-to-peer support has been shown to be an effective method of supporting individuals and their responses to a critical incident. Peer-to-peer CISM interventions have been used by fire departments, rescue emergency personnel and police departments for a number of years, helping untold numbers of professionals deal with stress in the aftermath of a critical incident experienced in the line of duty.

In 2016, the NATA Board of Directors approved a committee, ATs Care, and the use of ATs trained in CISM as part of newly formed ATs Care peer-to-peer support program. The mission of NATA's ATs Care program is to aid ATs and athletic training students in the aftermath of a critical incident, utilizing a peer-to-peer system to assist, monitor and encourage these individuals to seek initial support through a state or regional ATs Care teams.[2]

One of the most important factors in peer-support interventions after a critical incident is providing appropriate support while maintaining the confidentiality of the conversations. To this end, the ATs Care program adheres to the following:

All ATs Care team members must complete the Assisting Individuals in Crisis Intervention course through ICISF. This ensures that the ATs Care member reaching out to a fellow AT or athletic training student in the aftermath of a critical incident is able to use effective techniques to offer psychological "first aid" and follow-up to the affected individual.

Another important reason ATs Care requires team members to undergo this formal CISM training is so the team member understands the information discussed by the ATs Care member and the affected AT is protected and confidential. Information discussed in CISM interventions is generally not subject to subpoena, discovery or introduction into evidence in a civil, criminal or administrative hearing. ("Generally" is a legal term used to indicate usual practice. It is not, however, all-inclusive protection. For example, if a patient indicates a desire to harm themselves or others, and the interventionalist believes there is credible evidence that harm may occur, then the protection of confidentiality is abrogated and the interventionalist is usually required by law to report this threat to the proper authorities.)

Immunity is freedom from an obligation or penalty to which others are subject protection or

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APPEALS, *continued from page 04*

Both players admitted to knowing that by signing the waiver, they had agreed not to sue the school or its agents for any injuries incurred while playing football at the school, noted the court.

The Oklahoma Drill

On March 29, 2010, both players participated in a variation of the Oklahoma Drill at the school's first fully padded, full-contact tryout practice of the season. The plaintiffs' expert neither defined the drill nor acknowledged its use in the sport of football. The defendants' expert explained that the Oklahoma Drill is "a live contact drill that is usually performed in a confined space." He opined that "there are many variations of the Oklahoma Drill," including those used at Texas A&M University and Virginia Tech University. "Significantly," both men had previously participated in a variation of the Oklahoma Drill either in high school or at the school, according to the court.

> *"It was unclear whether the failure of the college to have qualified medical personnel at the training practice constituted gross negligence or recklessness, as recklessness could not be waived in a pre-injury exculpatory release."*

Ultimately, the men filed a complaint on May 4, 2012, advancing claims of negligence and negligence per se and requesting punitive damages. At the close of discovery, the school filed a motion for summary judgment. (a final decision by a judge that resolves a lawsuit before there is a trial).

In granting summary judgment to the school, the trial court relied primarily on the waiver and its belief that it satisfied a three-part test—it must not contravene public policy, it must be between persons relating entirely to their own private affairs and, thirdly, each party must be a free bargaining agent to the agreement so the contract is not one of adhesion.

The plaintiffs argued on appeal that the court should have instead focused on whether the scope of the defendants' conduct exceeded the parameters of the waiver; specifically, whether the defendants' "failure to hire qualified personnel constitutes negligence, gross negligence or recklessness . . . should be left to the jury."

This argument carried weight with the appeal's court.

"Summary judgment was erroneously granted to the college based on a waiver," according to the court.

"Genuine issues of material fact existed regarding whether the scope of a waiver covered claims of gross negligence and reckless conduct.

"Although the waiver was properly deemed valid because it did not violate public policy, related to the private affairs of the parties, and was not a contract of adhesion, it could not release the college from its own reckless conduct as a matter of law. Moreover, it was unclear whether the failure of the college to have qualified medical personnel at the training practice constituted gross negligence or recklessness, as recklessness could not be waived in a pre-injury exculpatory release."

RELATED RESOURCES

+ "Characterizations of a Quality Certified Athletic Trainer"
+ "The Relationship Between Candidate Psychological Factors and First-Attempt Pass Rate on the Board of Certification Examination"
+ "Recently Certified Athletic Trainers' Undergraduate Educational Preparation in Psychosocial Intervention and Referral"
+ "High School Athletes' Parents' Perceptions and Knowledge of the Skills and Job Requirements of the Certified Athletic Trainer"
+ "Master's Level Professional Athletic Training Programs: Program Characteristics, Graduation Requirements, and Outcome Measures"

ATs CARE, *continued from page 04*

exemption from something, especially by obligation or threat of penalty.[3] Testimony immunity is a key element in protecting the affected AT during CISM intervention. It is important that the AT who has gone through a critical incident understands that CISM interventions are not an investigative technique or operational critique. The purpose of CISM is not to determine any culpability. At present, 32 states have enacted CISM laws that establish the confidentiality of discussions between an individual experiencing a critical incident and the CISM-trained peer providing assistance.[4] An example of a state law concerning the delivery of CISM services would be Michigan's Act No. 40, Public Acts of 2016, Senate Bill 44.[5] Having CISM training is critical for not only being properly trained to assist peer ATs, but also to legally protect the information shared during the interventions.

ATs Care has developed a testimony immunity policy for use in ATs Care peer-support CISM interventions fashioned from state CISM laws. Additionally, ATs Care has a code of ethics for ATs Care members to abide by to ensure the confidentiality of information discussed. By ensuring that conversations are confidential, ATs who have been through a critical incident can freely receive support from a CISM-trained athletic trainer without worrying about the conversation being subject to legal or administrative discovery.

Learn more about the ATs Care program at www.nata.org/ATs-Care.

References

1. Everley GS. Assisting Individuals in Crisis, 5th Ed. International Critical Incident Stress Foundation, 2015, Ellicott City, MD.
2. National Athletic Trainers' Association. ATs Care peer-to-peer support program. National Athletic Trainers' Association, Carrollton, TX; 2017. Available at: https://www.nata.org/membership/about-membership/member-resources/ats-care.
3. Merriam-Webster Dictionary on-line. www.merriam-webster.com/dictionary/immunity.
4. International Critical Incident Stress Foundation. List of states with state law concerning the delivery of CISM provided to Tim Neal by ICISF.
5. http://www.legislature.mi.gov/documents/2015-2016/publicact/pdf/2016-PA-0040.pdf
6. ATs Care Testimonial Videos: https://vimeopro.com/nata1950/ats-care-testimonial-videos
7. Interassociation Recommendations for Developing a Plan to Recognize and Refer Student-Athletes With Psychological Concerns at the Secondary School Level: A Consensus Statement: http://natajournals.org/doi/full/10.4085/1062-6050-50.3.03?=
8. Inter-Association Recommendations for Developing a Plan to Recognize and Refer Student-Athletes With Psychological Concerns at the Collegiate Level: An Executive Summary of a Consensus Statement: http://natajournals.org/doi/full/10.4085/1062-6050-48.4.13?=

Athletic Trainer's Retaliation Lawsuit Can Continue Against School Board and Superintendent

A federal judge has permitted a claim brought by an athletic trainer, who alleged the school district and its superintendent retaliated against her in connection with her whistleblowing activities, to continue, granting only part of the defendants' motion to dismiss.

The impetus for the lawsuit was plaintiff athletic trainer's formal complaint, in September 2014, to her supervisors in the school district, including the superintendent, that there were various legal and policy violations in connection with the student athletics program.

Specifically, her complaints included allegations that medications were being illegally administered to student athletes. Further, she alleged that a former coach for the football team allowed students, without medical clearance, to participate in team practices, ignored the heat indices and conducted contact drills "prior to the time allowed."

Further, the superintendent allegedly covered up the allegations, and the police department "visited" her in an attempt to intimidate her. In addition, the complaint alleges that in retaliation for these and similar complaints she made in September 2015, she was "removed from her position as athletic trainer for the football team," and was "ordered not to step on or near the football field."

The plaintiff sued the school district and superintendent, in her individual capacity, alleging that they retaliated against her for whistleblowing activities. This, she alleged, violated her rights under the First and Fourteenth Amendments to the U.S. Constitution and state laws. She also asserted common law causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing.

On Sept. 9, 2016, the defendants moved to partially dismiss her complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6), or the failure to state a claim upon which relief can be granted.

The court first considered her allegation that the defendants violated her right to free speech by retaliating against her for making protected communications. The claim relies on Section 1983, which provides that "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

"Thus, to sufficiently set forth a section 1983 claim, a complaint must allege the violation of a right secured by the Constitution or laws of the United States and that the alleged violation was committed by a person acting under color of state law." See Harvey v. Plains Twp. Police Dep't, 635 F.3d 606, 609 (3d Cir. 2011); see also West v. Atkins, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988).

In the second count, the plaintiff asserts similar state law claims.

The counts were considered together as one argument.

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The plaintiff sued the school district and superintendent, in her individual capacity, alleging that they retaliated against her for whistleblowing activities. This, she alleged, violated her rights under the First and Fourteenth Amendments to the U.S. Constitution and state laws.

Q & A

ATHLETIC TRAINER TAMMI GAW CARVES OUT NICHE IN THE LEGAL FIELD

Tammi Gaw, Esq, MS, ATC, is used to shattering conventions. Not only has she excelled as an athletic trainer, but she is also a practicing attorney. She is the vice president of administration for the World Police & Fire Games and runs her own consulting firm, Advantage Rule (http://tammi-gaw.squarespace.com). It doesn't end there; Gaw is a contributing author of *Empower: Women's Stories of Breakthrough Discovery and Triumph.*

Q: What came first, wanting to be a lawyer or athletic trainer?

Ahh, the chicken or the egg. Athletic training was my first career, and I didn't go to law school until much later. That said, I've always been an advocate at heart so it is not a surprise that I chose two fields for which advocacy is a primary function. I still consider athletic training to be the field that contributed most to my professional growth and success.

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RETALIATION, *continued from page 06*

In its analysis, the court noted that a municipality may be liable under section 1983 only where the constitutional injury is alleged to have been caused by a municipal "policy" or "custom." In such cases, a policy can be set if a decisionmaker, whether a school board or superintendent, has enough authority to be considered "a final policymaker."

Thus, based on the information available at this, the motion to dismiss stage, it is plausible that the superintendent has final unreviewable authority as to the alleged actions taken against the plaintiff.

"Reading the complaint in the light most favorable to the plaintiff, [she] has plausibly alleged that [the superintendent] was in a position of final policy-making authority with respect to allegedly punitive actions against [her], and that the superintendent's actions should be deemed to bind the school district. Accordingly, the defendants' motion to dismiss the first and second counts as to the school district is denied."

Turning to the superintendent's motion to dismiss her Fourteenth Amendment claim, the defendants argued the complaint "failed to identify the particular right affected and fails to allege facts sufficient to hold [the superintendent]liable for a Fourteenth Amendment violation."

The judge did not agree.

The plaintiff's Fourteenth Amendment claim is plainly intertwined with the First Amendment claim, and the defendants "do not challenge the sufficiency of the pleadings for the First Amendment claim as to the superintendent. Simply put, the defendants' arguments seem to target claims that do not appear in the complaint," according to the court. Thus, the motion to dismiss the Fourteenth Amendment claims against the superintendent was denied.

Next, the judge considered her claims for breach of contract and breach of the implied covenant of good faith and fair dealing against the school district and superintendent. The defendants succeeded on their argument that the plaintiff "has not alleged the existence of an explicit employment contract, and the policy manual provision upon which she bases her claim cannot create an implied contract."

The court noted that a municipality may be liable under section 1983 only where the constitutional injury is alleged to have been caused by a municipal 'policy' or 'custom.'

RELATED RESOURCES

+ NATA Code of Ethics
+ "Experiences With and Perceptions of Workplace Bullying Among Athletic Trainers in the Secondary School Setting"
+ "Experiences With Workplace Bullying Among Athletic Trainers in the Collegiate Setting"
+ "Perceptions of Workplace Bullying Among Athletic Trainers in the Collegiate Setting"
+ "Perceptions of Sexual Harassment in Athletic Training"

Q&A, *continued from page 06*

Q: How has having a legal background helped you as an athletic trainer?

While the athletic training curricula has advanced over the years, being a lawyer has given me much more knowledge and understanding of things ranging from risk management to protection against litigation than I ever learned in my athletic training curriculum. It has given me a more holistic approach to athletic training and also a platform from which to educate other ATs on legal aspects of athletic training.

Q: How would you characterize the profession in terms of career advancement for female athletic trainers?

It is improving in terms of women in the athletic training profession as a whole, but there is still progress needed in terms of gender breakdown at the head athletic trainer and professional sports levels. There also needs to be a greater push for racial diversity at all levels. NATA's most recent ethnicity demographic breakdown demonstrates that less than 10 percent are women of color. There is still much more work to be done to recruit and ensure our profession reflects not only the diversity of our athletes and patients, but society as a whole.

Q: Are athletic trainers gaining enough voice in terms of preventing concussed athletes from returning to the field? Why or why not?

It can depend on the setting and the specific school/team environment. Some settings understand the position of the athletic trainer as a lynchpin of the return-to-play protocol while others are

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NCAA Bylaw Regarding Return-to-Play Decisions Set to Kick Off for Divisions II and III

In an effort to clarify concussion return-to-play protocol, the NCAA passed a measure, the Independent Medical Care bylaw, which requires all of its member institutions to designate primary athletics health care providers (defined as the team physician and athletic trainer) as impartial medical observers to ensure return-to-play decisions are made by qualified medical professionals instead of coaches, parents or players. The rule went into effect in October 2016 for Division I and goes into effect in August 2017 for Division II and III schools.

In an exclusive interview with *Concussion Litigation Reporter*, the NCAA's Chief Medical Officer, Dr. Brian Hainline, said the designated health care professional's authority is "unchallengeable." To that end, coaches are not permitted

> *The NCAA's Chief Medical Officer, Dr. Brian Hainline, said that the designated health care professional's authority is 'unchallengeable.'*

"to serve as the sole supervisor for any medical provider, nor have sole hiring, retention and dismissal authority over the provider."

Typically that designee will be a team physician or the school's head athletic trainer.

The language of the actual Independent Medical Care bylaw is:

"An active member institution shall establish an administrative structure that provides independent medical care and affirms the unchallengeable autonomous authority of primary athletics health care providers (team physicians and athletic trainers) to determine medical management and return-to-play decisions related to student-athletes. An active institution shall designate an athletics health care administrator to oversee the institution's athletic health care administration and delivery."

NCAA Chief Medical Officer Dr. Brian Hainline

Delving into the bylaw a little more deeply, member institutions must establish:

"Administrative Structure: The legislation requires an administrative structure that provides for the 'unchallengeable autonomous authority' of primary athletics health care providers (defined as the team physicians and athletic trainers) to have final decision-making authority for the diagnosis, management and return-to-play determinations for student-athlete care.

"Athletics Health Care Administrator: The legislation also requires the designation of an 'athletics health care administrator' to oversee a school's athletic health care administration and delivery. While primary athletics health care providers will retain unchallengeable autonomous authority to determine medical management and return-to-play decisions, the athletics health care administrator will play an administrative role serving as the primary point of contact to assure schools are compliant with NCAA health and safety legislation and inter-association recommendations."

RELATED RESOURCES

+ **Athletics Health Care Administration Best Practices**
+ **NATA Endorses Three Consensus Statements Released by NCAA**
+ **NCAA: Independent Medical Care Best Practices**

Q&A, *continued from page 07*

behind the times. The developments in the NFL involving concussion spotters clearly indicate our voices are being recognized more—but we have all seen failures in the concussion protocols that show there is still more work to be done.

ATs will always walk that fine line between maintaining trust with an athlete to honestly report their symptoms and the responsibility to inform the coach of the athlete's condition that could result in the athlete missing a game or more. When an AT works in a setting where there is significant pressure to return a player to the field, the AT may feel pressured to take a certain action. In that vein, there are several groups looking at changing the reporting structure on professional teams to include an independent doctor not employed by or beholden to the league or individual teams. I think most people, certainly those in the sports world, know the value athletic trainers bring to keeping athletes safe, healthy and playing. We must continue to advocate for ATs to be present at the table where these decisions are being made.

Q: Who has been most influential in your career and why?

There have been so many people over the years, but I think from an athletic training perspective, it has to be Anita Clark, MS, MA, ATC. She was the assistant athletic trainer at the University of Oklahoma when I started my career there and is one of the smartest and most professional people with whom I have ever had the privilege to work. I learned so much about medicine, patient interaction and how to handle the red tape of athletic training from her, which I have carried with me ever since. She retired recently, and it was a joy for many of us to stand up and tell her what she meant to us over the years.

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Appeals Court Frees School District of Hospital Company's Indemnity Claim in Concussion Case

A state appeals court has ruled that when a school district settled a lawsuit brought by a concussed high school football player and his family, it effectively dismissed the indemnity claim against the school district brought by the hospital that treated the player.

In so ruling, the panel of judges found that the public policy of encouraging settlements outweighed the hospital's bid for relief.

The plaintiff sued after he suffered a head injury during a football game Sept. 5, 2014. He was taken to the hospital's emergency room where he was diagnosed with a minor concussion.

The plaintiff rested at home for a couple of days, bypassing both the classroom and practice field. He then went to see a doctor at a clinic in the hospital, who evaluated him and affirmed the diagnosis of a concussion. The doctor told him he was not to resume practice until Sept. 15, 2014. The plaintiff reportedly delivered the note from the clinic on Sept. 10, 2014, to his head coach.

The coach, allegedly, exchanged text messages about the plaintiff's symptoms with the athletic trainer, who was employed by the same hospital. The athletic trainer allegedly told the coach the plaintiff could possibly have the flu. She also allegedly told the head coach that an ImPACT test may help determine his readiness to return to play. The coach had the plaintiff take an ImPACT test. According to the lawsuit, the athletic trainer reviewed the results of the test Sept. 11, 2014, and determined he had passed the test, allegedly without reviewing the medical records at the hospital. The plaintiff was allowed to return that day to a noncontact practice.

The hospital, however, questioned the applicability of the school district's case law, claiming it 'dealt only with equitable or common-law indemnity, and that the rule is different when the indemnity claim arises from a contract.'

Just before the game Sept. 12, 2014, the coach and/or athletic trainer verbally cleared the player to play, according to the lawsuit, even though he had not been medically cleared by the physician at the hospital. He played.

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Q&A, *continued from page 08*

Q: As both a lawyer and an athletic trainer, what do you think athletic trainers can do to better protect themselves against today's most common legal issues in sports medicine?

Documentation is the most basic way for ATs to protect themselves. They must also remember and understand that their records could be discoverable or subject to subpoena in a lawsuit. Following best practice guidelines already in place by NATA and/or state law is something all ATs should do, regardless of the setting in which they are employed.

Second, athletic trainers occupy a unique space in that we are dedicated to our athletes and patients, but may also answer to teams, leagues or coaching staffs that have larger agendas. Lawyers are fortunate to have ethics hotlines that we can call if we find ourselves in a situation with a client that requires balancing zealous representation with adherence to the rules of professional conduct. Doctors have similar hotlines. I would like to see something like that for athletic trainers who find themselves in need of guidance on specific issues, particularly younger professionals who do not have mentors or others who they feel they can safely ask for help. In the absence of such a resource, ATs must take it upon themselves to stay on top of developments in risk management and liability. That is one of the reasons I am excited about this digest as a new resource for the NATA membership.

Finally, make an effort to self-educate and understand potential risks. I would like to see more CEUs covering liability and risk management because there is a feeling of "that doesn't apply to me" with respect to certain legal matters. If you work as an AT in a clinical setting, particularly one that bills Medicare, you need to understand anti-kickback statutes. If you work with minors, you need to understand how your state law treats waivers for participation of minors. If you have a social media presence, even one that purports to be anonymous, you need to understand how what you post could open you up to privacy and HIPAA violations, in addition to running afoul of the NATA Code of Ethics.

INDEMNITY, *continued from page 09*

While standing on the sideline at halftime, he collapsed. Unconscious and unresponsive, he was taken by ambulance to the same hospital, where he underwent an emergency craniotomy. As a result of the incident, the plaintiff has severe neurological and brain deficits. He is a quadriplegic who cannot speak, requiring 24-hour care.

The plaintiff sued the school district, coach, hospital, athletic trainer and three different insurance companies.

The Instant Legal Challenge

The school district settled with the plaintiffs in December 2016, claiming it bought "peace with finality," terminating its own claims and any claims against it, including the hospital's cross claim against it for indemnity. The hospital has objected.

By way of background, the appeals court noted that Aug. 1, 2014, the school district and hospital entered into a service ageement, pursuant to which the school district agreed to pay the hospital to provide certain sports medicine and athletic training services to district's sports teams. After the plaintiffs filed the lawsuit, the school district and hospital cross-claimed against each other, each relying on an indemnity provision in the Aug. 1 service agreement.

But the school district claimed the settlement with the plaintiffs ended its exposure to any claims by the remaining tortfeasors for contribution or exemption from legal responsibility.

The hospital, however, questioned the applicability of the school district's case law, claiming it "dealt only with equitable or common-law indemnity, and that the rule is different when the indemnity claim arises from a contract," citing Howard S. Wright Construction Co. v. F.E. DeBeer Mech Constr. Co., 185 Mont. 47, 604 P.2d 323 (1979) to support this argument.

"Thirteen years later, the Supreme Court (in Durden v. Hydro Flame Corp., 1996 MT 186, ¶ 31, 295 Mont. 318, 983 P.2d 943) held that the public policy in favor of promoting settlements was so important that it outweighed the competing policy of placing ultimate responsibility on 'up stream' manufacturers of defective products:

"A system which allows indemnity claims to be maintained in product liability actions in which one of the defendants chooses to settle with the plaintiff . . . would make it virtually impossible for less than all defendants to settle a case. No defendant would ever settle if it thought it could be brought back into the action and have to pay attorney fees and a potential judgment. On the other hand, by following the policy articulated in Deere [State ex rel. Deere & Co. v. District Court, 224 Mont. 384, 397, 730 P.2d 396, 404-405 (1986)], defendants who do not settle will be put at risk if other defendants settle. In the long run, this will promote settlement rather than trials."

In summary, the appeals court noted that "the indemnity provision does not operate the way [the hospital] says it does. Its plain language does not indemnify [the hospital] against its own negligence. Moreover, the Supreme Court has said indemnity language that was much more direct than the clause at issue here does not indemnify the indemnitee for its own negligence. Slater v. Central Plumbing & Heating Co., 275 Mont. 266, 270-271, 912 P.2d 780, 782 (1996)(Slater I)(suggesting Wright would be decided differently under current law).

"A contractual claim for indemnity attributable only to the other party's negligence is really a claim for contribution. Slater v. Central Plumbing & Heating Co., 1999 MT 257, ¶ 32, 297 Mont. 7, 993 P.2d 654 (Slater II). [The school district] concedes that Mont. Code Ann. § 27-1-703(6) still entitles [the hospital] to try to reduce its liability by arguing, settlement notwithstanding, that [the district] contributed to the Plaintiffs' damages. This is consistent with the Supreme Court's recent holdings that § 27-1-703 displaces and supersedes separate claims for contribution or indemnity."

Unconscious and unresponsive, he was taken by ambulance to the same hospital, where he underwent an emergency craniotomy. As a result of the incident, the plaintiff has severe neurological and brain deficits. He is a quadriplegic who cannot speak, requiring 24-hour care.

RELATED RESOURCES

+ "Epidemiology of Sport-Related Concussions in High School Athletes: National Athletic Treatment, Injury and Outcomes Network (NATION), 2011–2012 Through 2013–2014"
+ "Knowledge of Concussion and Reporting Behaviors in High School Athletes With or Without Access to an Athletic Trainer"
+ "Clinical Evaluation of the Concussed Athlete: A View From the Sideline"
+ "Legal Aspects of Concussion: The Ever-Evolving Standard of Care"
+ "If You're Not Measuring, You're Guessing: The Advent of Objective Concussion Assessments"
+ Head-Impact–Measurement Devices: A Systematic Review
+ Concussion Infographic Handout
+ "Parents and the New Concussion Paradigm"

North Carolina Return-to-Play Lawsuit Puts Spotlight on Protocols

In 2014, a 17-year-old football player in North Carolina suffered a concussion after a collision with another teammate during practice.

According to a lawsuit recently filed by the player's family in North Carolina, the school's failure to properly respond to this concussion led to the teen's death two days after the incident. In its complaint, the family alleges that while the school's coaches and staff checked the player and sat him out for the remainder of practice, they never notified his parents of his injury and subsequently allowed the player to return two days later to participate in pregame drills and warmups without obtaining any medical clearance. The family alleges that their son began complaining of headaches during these drills and then collapsed and died shortly thereafter.

In its lawsuit, the player's family alleges the school violated North Carolina's Return-to-Play laws enacted to prevent concussion-related injuries arising when a youth sports participant returns to play too soon after suffering a concussion. Further, they alleged that "the aforesaid injuries, death and damages sustained by [our son] were directly and proximately caused by the careless, negligent, grossly negligent, reckless, and willful and/or wantonly actions of the defendants."

Similar Return-to-Play laws "have been enacted in some form by every state in the country in response to the changing landscape of concussion awareness in youth sports," said attorney Gary Wolensky of Buchalter Law Firm in Los Angeles. "Such laws are intended to increase awareness and care in addressing concussions. Specifically, Return-to-Play laws generally impose educational, training and notification requirements designed to ensure that coaches, parents and youth athletes are better educated about the signs and risks of concussions."

The family alleges that while the school's coaches and staff checked the player and sat him out for the remainder of practice, they never notified his parents of his injury.

The defendants, in their response, acknowledged that the athlete wasn't cleared to play by any doctor and didn't participate in the concussion protocol. But they argued that school employees did not know he had suffered a concussion or had complained of headaches before his collapse.

"[The athlete] was negligent in one or more respects and failed to exercise the proper care which prudent persons under the same or similar circumstances would have exercised," according to the district.

The family has requested a jury trial that could begin as soon as Nov. 13.

RELATED RESOURCES

- **Current Concepts in Return to Play for Concussions**
- **Concussion Care Requires Communication**
- **Knowledge of Concussion and Reporting Behaviors in High School Athletes With or Without Access to an Athletic Trainer**
- **Clinical Evaluation of the Concussed Athlete: A View From the Sideline**
- **Legal Aspects of Concussion: The Ever-Evolving Standard of Care**