SPORTS MEDICINE

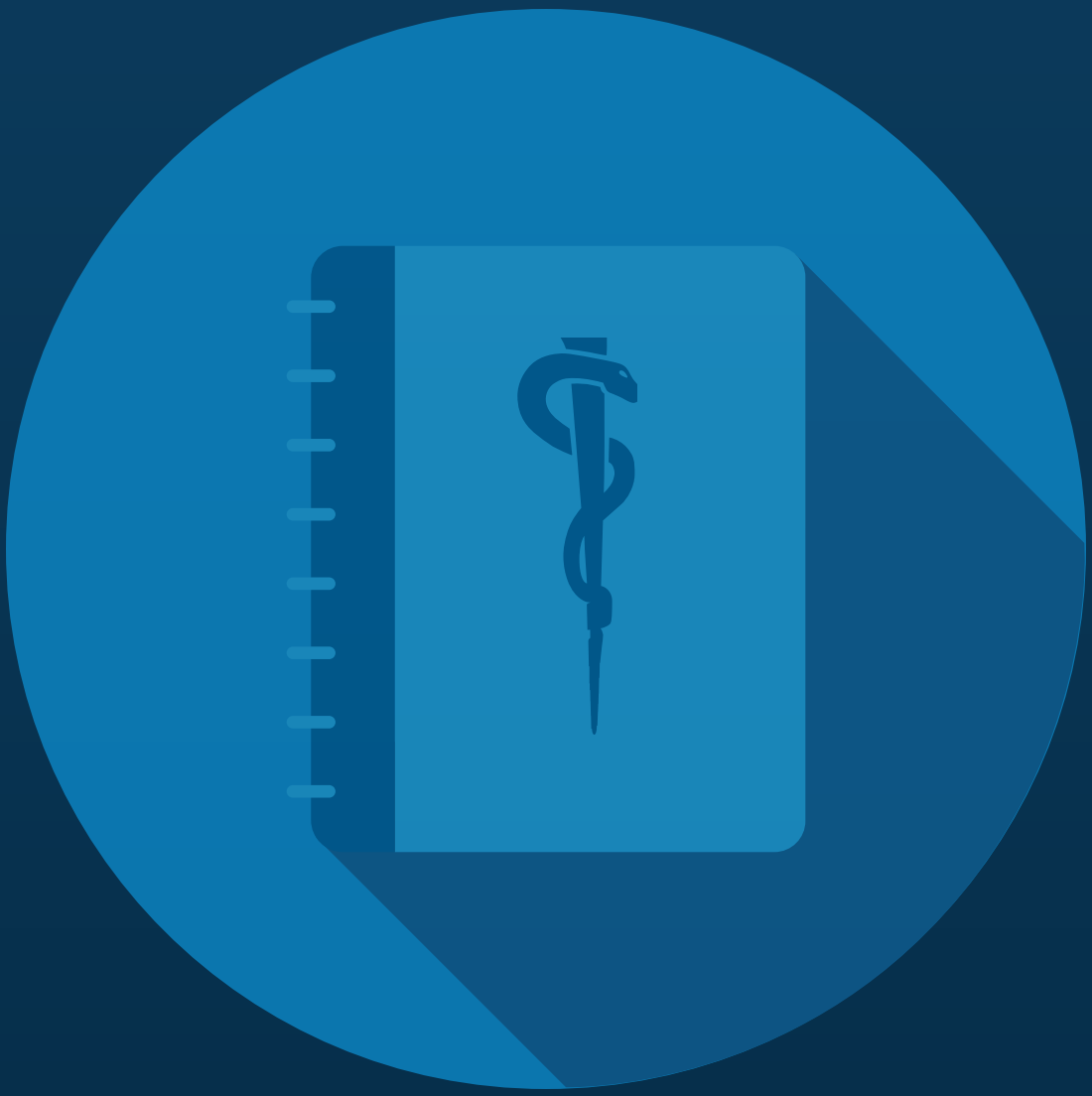
LEGAL DIGEST

QUARTERLY LEGAL NEWSLETTER FOR THE NATIONAL ATHLETIC TRAINERS' ASSOCIATION

VOLUME 2, ISSUE 1

NATIONAL ATHLETIC TRAINERS' ASSOCIATION

ARE *YOU* LIABLE?



As an athletic trainer, it is your responsibility to protect yourself from potential liability. Understanding the risks involved with patient care is essential for health care providers. The *Athletic Training Liability Toolkit* is a new resource created to help athletic trainers assess their liability.

NATIONAL ATHLETIC TRAINERS' ASSOCIATION

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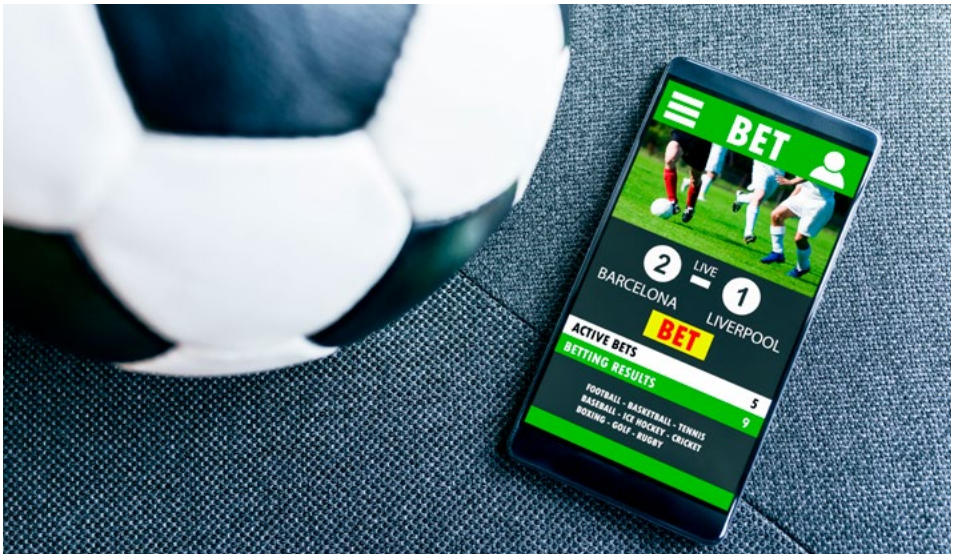

With the U.S. Supreme Court striking down the Professional and Amateur Sports Protection Act, it's important for athletic trainers to understand how they'll possibly be affected and their ethical requirements.

Sports Wagering and Sports Medicine: A Developing Situation

BY JORDAN GRANTHAM

The U.S. Supreme Court on May 14 struck down the Professional and Amateur Sports Protection Act (PASPA), a federal law passed in 1992 that prohibited states from authorizing sports wagering. The court ruled that PASPA was unconstitutional because it violated principles that limited the federal government's control over state policy.

Justice Samuel Alito wrote an explanation for the court's 6-3 opinion: "The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each state is free to act on its own."

The decision was watched with great interest by various industries across the country that would be affected by the ruling, including sports medicine. The American Gaming Association estimates that Americans wager $150 billion in illegal sports bets annually, but that figure is disputed. At least one economist estimates that amount to be closer to $67 billion. Certain sports are more wager-friendly: According to the Nevada state gaming control board, sportsbooks in Nevada made the most money off basketball bets in 2017 ($87 million), followed by football ($76.9 million), horse racing ($42.4 million) and baseball ($36.8 million).

Collegiate sports, especially Division I football and men's basketball, which accounted for most of the sport wagering activity before the court's decision, stand to be significantly impacted as legalized sports gambling becomes more widespread.

The Legal Landscape

As of mid-August, only four states have full-scale legalized sports betting: Nevada, Delaware, New Jersey and Mississippi. Four more states – West Virginia, Pennsylvania, New York and Rhode Island – have passed some sort of bill allowing sports betting, and 14 more states have started steps toward legalizing sports wagering. The rest of the states haven't started any legislative activity yet, and one state in particular is unlikely to do so: Utah's anti-gambling stance is written into its state constitution.

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ESPN has a bill-tracker following activity in all of the states: **www.espn.com/chalk/story/_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states**.

The Supreme Court's decision may not be the last we hear on this issue from the federal level. The decision left the door open for Congress to regulate sports betting directly. A House Judiciary Committee hearing titled "Post-PASPA: An Examination of Sports Betting in America," was scheduled for late June, only to be postponed hours later. The hearing in the Subcommittee on Crime, Terrorism, Homeland Security and Investigations had invited potential witnesses to testify, including the NFL. No new date for the hearing has been announced.

Sports Entities Weigh In

One entity that stands to be most affected by the legalization of sports wagering is the NCAA. On May 16, two days after the Supreme Court struck down PASPA, the NCAA suspended its policy that prevented its championships from being held in states that allowed sports betting. Now, any state can host an NCAA championship, regardless of whether that state has legalized sports wagering.

On Aug. 8, the NCAA issued a resolution reaffirming its support for its existing policy that prohibits NCAA student athletes and all staff, both athletic and non-athletic associated with athletics at member institutions and conference offices, from participating in sports wagering activities. The resolution directed divisional governing bodies to determine if additional legislation was needed that recognizes the change in the environment that includes legalized sports betting, but also "safeguards fair competition and ethical practices expected in intercollegiate athletics programs."

The NCAA developed an internal staff group to review issues and develop recommendations related to sports wagering. According to a memo distributed to the NCAA membership, this staff group will examine "educational efforts, integrity services, information/data management, NCAA policy, political landscape [state and federal laws] and officiating." That same memo stated that Donald Remy, chief legal officer for the NCAA, will lead the NCAA's efforts to "request federal government assistance for national guidelines and requirements governing the sports wagering environment."

The NCAA also posted a detailed FAQ about sports wagering on its website at **www.ncaa.org/enforcement/sports-wagering**.

The major professional sports leagues have weighed in with statements that emphasize protecting the integrity of the game.

"We have spent considerable time planning for the potential of broadly legalized sports gambling and are prepared to address these changes in a thoughtful and comprehensive way, including substantial education and compliance trainings for our clubs, players, employees and partners. These efforts include supporting commonsense legislation that protects our players, coaches and fans and maintains public confidence in our games. We are asking Congress to enact uniform standards for states that choose to legalize sports betting that include, at a minimum, four core principles: 1) There must be substantial consumer protections; 2) Sports leagues can protect our content and intellectual property from those who attempt to steal or misuse it; 3) Fans will have access to official, reliable league data; and 4) Law enforcement will have the resources, monitoring and enforcement tools necessary to protect our fans and penalize bad actors here at home and abroad," wrote Roger Goodell, NFL commissioner.

"We have spent considerable time planning for the potential of broadly legalized sports gambling and are prepared to address these changes in a thoughtful and comprehensive way."

- Roger Goodell

"We remain in favor of a federal framework that would provide a uniform approach to sports gambling in states that choose to permit it, but we will remain active in ongoing discussions with state legislatures. Regardless of the particulars of any future sports betting law, the integrity of our game remains our highest priority," wrote Adam Silver, NBA commissioner.

"Today's decision by the [U.S.] Supreme Court will have profound effects on Major League Baseball. As each state considers whether to allow sports betting, we will continue to seek the proper protections for our sport, in partnership with other professional sports. Our most important priority is protecting the integrity of our games. We will continue to support legislation that creates air-tight coordination and partnerships between the state, the casino operators and the governing bodies in sports toward that goal," wrote Major League Baseball.

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Q & A

DIANE SARTANOWICZ USES ATHLETIC TRAINING BACKGROUND TO AID CONCUSSION PREVENTION BATTLE

In many ways, Massachusetts is ground zero for sports concussion research and developing policies that mitigate the damage they can cause. It's no surprise that District One Director Diane Sartanowicz, MS, LAT, ATC, is right in the middle of it as director of the Massachusetts Concussion Management Coalition (MCMC).

MCMC is considered a pioneer in concussion research and education outreach, embracing the objective of "bringing everyone together to collaborate on the best way to tackle the many issues surrounding concussions."

Given her background as an athletic trainer, we sought out Sartanowicz to discuss her path to leadership and her role at the MCMC (**www.massconcussion.org**).

How would you describe your position as director of MCMC?

MCMC is dedicated to improving the safety of Massachusetts' youth by increasing awareness and education on concussion management. Our committee is made up of key stakeholders within the commonwealth all with a common goal in mind. As the director, I collaborate with the Department of Public Health, Massachusetts Interscholastic Athletic Association, Athletic Trainers of Massachusetts, Massachusetts School Nurse Organization as well as several clinicians/physicians within the state. We are trying to provide the tools and resources necessary for schools to be successful when it comes to concussions and their management.

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SPORTS WAGERING, *continued from page 04*

"The Supreme Court's decision today paves the way to an entirely different landscape – one in which we have not previously operated. We will review our current practices and policies and decide whether adjustments are needed, and if so, what those adjustments will look like. It's important to emphasize that the Supreme Court's decision has no immediate impact on existing league rules relating to sports wagering, and particularly, wagering involving NHL games. So, while changes may be considered in the future, today's decision does not directly impact the operation of the league or any of our clubs in the short term," wrote the National Hockey League.

"Although Major League Soccer is supportive of today's Supreme Court decision, we also believe that it is critical that state legislatures and other regulatory bodies work closely with the professional sports leagues in the United States to develop a regulatory framework to protect the integrity of each of our respective sports. We look forward to being a part of that process," wrote Major League Soccer.

The NBA announced a partnership with MGM Resorts International July 31 to make MGM the official gaming partner of the NBA and WNBA.

Examining the Athletic Trainer Perspective

NATA issued an official statement recommending that collegiate sports programs consider adopting a standard public injury report policy. (You can read the full statement at **www.nata.org/news-publications/pressroom/statements/official**.) Part of the statement included the following recommendations from the NATA Intercollegiate Council for Sports Medicine, an athletic conference-based council comprised of members from the college/university setting, including athletic trainers working in Division I, Division II, Division III, Junior College and NAIA institutions:

- **Provide accurate and concise information on injury reports.** Reporting erroneous or misleading information is an ethics violation for the sports medicine professionals involved in the process.
- **Report once or twice a week, as agreed upon by the NCAA or conference officials.** The frequency of reports directly relates to the accuracy of the information included in the report.
- **Limit injury descriptions to "upper body injury" or "lower body injury."** Gambling enthusiasts may attempt to coax for more information, however, student athlete privacy and protection is paramount.
- **Categorize athlete participation status** in two categories: out – will not play, doubtful – unlikely to play.
- **Engage sports medicine professionals in discussions related to injury reports** to ensure compliance with student athlete and privacy policies.

ATs and Gambling

Rob Mathner, a professor at Troy University with a research specialty in sports wagering, said, "In light of the fact that [athletic trainers] are in close proximity to athletes all the time, they are on the frontlines of this battle for what we would call inside information." Mathner, who worked in athletic compliance for various universities before moving into academia, was one of the authors of the first research study to examine the sports wagering habits of collegiate athletic staff, including athletic trainers. His research revealed trends related to gambling habits of ATs:

- Almost 40 percent of ATs said they had placed a monetary bet on any sporting event at some point, with 72.2 percent of ATs engaged in gambling, sports wagering or other betting activities during the past 12 months
- Male ATs are more likely to engage in sports wagering (42 percent) than female ATs (29 percent).
- ATs assigned to non-revenue sports were more likely to consider sports wagering a harmless pastime (25 percent) than those assigned to revenue sports (11 percent).
- ATs who participated in fantasy sport leagues were more likely to perceive sports wagering as

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>
> - Rob Mathner

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What has been the most challenging aspect of the role?

The most difficult aspect of my role is educating communities about the best practices surrounding concussions. The research and science change rapidly, and we need to be able to provide the most accurate information to help clinicians, such as athletic trainers and school nurses, and educate student athletes and parents. Our coalition is providing common language about mild traumatic brain injuries to guide clinical practices.

How would you assess the future of youth hockey in the state in light of growing awareness about concussions?

There is a strong participation rate in youth ice hockey in Massachusetts. The organization and structure allow for skills growth as well as player safety. There are several injury prevention courses that are taught to both coaches and players that address head injuries and concussions. Massachusetts Hockey also understands the value of providing proper medical coverage for their teams and tournaments.

What is on MCMC's near horizon in terms of goals and objectives?

Through the generous funding of the NHL Alumni Foundation, we are able to provide free ImPACT® neurocognitive testing to all schools enrolled in our program. We have given out more than tests – both baseline and post-injury – over the past two years. What is most important to our program is the education component that goes along with it. MCMC and its resources are able to support schools' implementation of a concussion management policy. We are able to educate all those involved with the management of the student athlete. Our committee is always asking the question: What else can we provide for schools and their communities? In the near future, we

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SPORTS WAGERING, *continued from page 05*

a harmless behavior and more likely to engage in betting on sports events (48 percent) than those who did not participate in fantasy sport leagues (28 percent).

Mathner said he was not surprised by the Supreme Court decision, but he is interested to see how the decision changes the landscape for sports. He thinks athletic trainers will be one of the logical targets for those seeking insider information. He's also concerned the communal element of athletic training facilities will lead to other student athletes having valuable injury information, not just ATs. He provided the following hypothetical example:

"If I'm a cross country runner and I'm getting treatment at the same time as a football player's getting treatment, I know and see the severity of the injury he's being treated for … I'm thinking, 'There is no way this guy is going to play based on what I saw in the [athletic training facility].'

"That's where, I think, you have the continued potential for information to get out. The more popular [sports wagering] becomes, the more prevalent, it might not be a football or basketball player tipping off the information. What about an athlete who rooms with another athlete, or someone who is dating an athlete? That's where the continued information lines can be developed. And I'm telling you, people who have gambling problems, they won't stop until they can find a good mole or a good informant."

Mathner said if he was still working in a collegiate compliance role, he'd be very focused on educating all stakeholders – not just student athletes, but also athletic trainers, all athletic staff, boosters, campus police, campus housing – about the various rules and laws surrounding sports wagering. He said everyone involved needs to be educated on what's permissible and what isn't permissible when it comes to membership rules (including the NATA Code of Ethics or the NCAA Bylaws) and even from a criminal standpoint. He noted that all stakeholders should be educated about how someone looking to place a wager might approach them for insider information so they can be better equipped to recognize red flags.

The Ethics of Gambling

A recent article in the *NATA News* (p. 28-29, March 2018) laid out the ethical side of the issue for athletic trainers. Collegiate athletic trainers at NCAA institutions are governed by NCAA requirements (10.3) that forbid wagering on amateur, collegiate or professional sports. Within the NATA Code of Ethics, gambling is addressed in these principles:

Principle 1, Article 4: Members shall preserve the confidentiality of privileged information and shall not release or otherwise publish in any form, including social media, such information to a third party not involved in the patient's care without a release unless required by law.

Principle 4, Article 3: Members shall not place financial gain above the patient's welfare and shall not participate in any arrangement that exploits the patient.

"Innocent comments about an athlete's injury or playing status due to injury may provide information to someone looking to place a wager on that athlete's next contest."

- Tim Neal, MS, ATC, CCISM, and Gretchen Schlabach, PhD, ATC

Principle 4, Article 4: Members shall not, through direct or indirect means, use information obtained in the course of the practice of athletic training to try and influence the score or outcome of an athletic event, or attempt to induce financial gain through gambling.

"Innocent comments about an athlete's injury or playing status due to injury made to family members, friends or acquaintances is not only a violation of patient confidentiality, but it may also provide information to someone looking to place a wager on that athlete's next contest wrote authors Tim Neal, MS, ATC, CCISM, and Gretchen Schlabach, PhD, ATC.

Neal and Schlabach recommended that ATs refrain from discussing a patient's health outside the confines of the sports medicine department and those specifically designated to receive that information (per the school's release of medical information policy). They also recommended that athletic trainers be aware of the school's policy on releasing information to the public so they can make sure they are following it properly. Those policies on releasing information "should include the personal release of the athlete in question, and ideally, the athlete should be alerted ahead of time about what will be discussed."

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would like to be able to provide other tools and resources that school nurses and athletic trainers need to handle concussions.

Boston is the nerve center of concussion science. Who are some of the people and organizations that have been most helpful in terms of what you are trying to accomplish?

It is important for everyone to be informed about the latest research and science on concussions. In Massachusetts, we have some of the best collaborations from research and teaching, such as Boston Children's Hospital, Massachusetts General Hospital and Boston University School of Medicine, to name a few. We are also fortunate to work with the Maine Concussion Management Initiative on how state practice acts influence the implementation and management of concussion policies.

How does being an athletic trainer help you do your job?

Athletic trainers play a key role in the prevention, recognition and treatment of sports-related concussions. Our education and skillset make us uniquely qualified to provide care for concussed athletes. Concussion management takes a multidisciplinary team approach just like my role as director of MCMC. I have the pleasure of bringing together many points of view from other health care professionals so we can provide the best possible care for our student athletes in the state.

How has your relationship with other ATs and NATA, specifically, changed since you took the position?

I have had the pleasure of being involved with my profession for many years, starting at the state level and now as NATA District One director. During this time, I have been

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Medical Disqualifications: Legal Precedent and Future Considerations

BY TIMOTHY NEAL, MS, AT, ATC, CCISM, AND JEFF KONIN, PHD, PT, ATC, FACSM, FNATA

The issue of medical disqualification can be a contentious issue in sports medicine. It is an emotional matter for the athlete, parents and coaches who were counting on the athlete being a member of the team. The desire to participate in athletics is a strong one for athletes. Being informed they're not medically cleared to participate creates confusion and, in some instances, anger toward the medical professionals making the decisions. These are all reasonable reactions despite the medical team having the athlete's overall health and safety at the forefront of the decision-making process.

Athletes and their family may choose to request a waiver to indemnify the school against liability in the event of a catastrophic outcome as a result of participation against best medical judgment. Another avenue is to get second – or third – medical opinions on the condition that resulted in a medical disqualification. Lastly, an athlete and their family may choose to go to court to reverse a medical decision made by a team physician. The athletic trainer has input into the medical decision made by the team physician; outlining the accurate medical history of the condition/injury provided by the athlete, and the potential risks to an athlete's health and well-being as a result of participation are some areas of input by the AT in the medical clearance process. Additionally, fully informing the athlete (and their parents, as appropriate) of the medical condition and involving the athlete (and parents) in the discussion of the risks and decision to medically disqualify can't be understated. Much confusion and angst can be ameliorated with full disclosure and explanation of risks that prohibit physical participation.

The potential areas of legal action in regards to medical disqualifications are twofold: ensuring the medical disqualification will be upheld, and future litigation against the team physician and athletic trainer who failed to medically disqualify an athlete in the face of a known medical condition that put the athlete at unreasonable risk with physical participation. One area that is instructive for schools making medical clearance decisions and disqualifications is case law. Let's briefly examine the results of two court decisions that have established that the team physician has the final authority to grant

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Q&A, *continued from page 06*

able to forge new relationships with school nurses, athletic directors and athletic trainers. Having a seat at the table of the NATA Board of Directors allows me the opportunity to see firsthand how the athletic training profession is growing. I am able to show schools the value of athletic trainers and the role they play within health care.

CASE SUMMARY

FAMILY OF DECEASED PRO BASKETBALL PLAYER SUES NBA FOR NEGLIGENCE

The mother of a 26-year-old professional basketball player who died while playing for an NBA G League team, has sued the NBA in a wrongful death action.

On March 24, during the final minutes of the last game of the team's regular season, the player suddenly collapsed to the floor, unconscious and in full cardiac arrest. The attorneys representing the player maintain that, for more than five minutes, "not a single lifesaving measure was taken to address [his] fatal condition. He was kept on life support for two days and then died."

The lawsuit brings claims of negligence and gross negligence for the wrongful death of the player against the NBA, the basketball company and owners of arena where the game was held.

"When the otherwise healthy heart of a professional NBA athlete suddenly stops during a game, there is absolutely no reason, in 2018, that his heart cannot be immediately restarted," the attorney said. "No attempts were made to save [his] life. No CPR, no defibrillation, nothing. This is the tragedy of this case, [he] should be alive today, the human consequences are difficult to quantify.

"Changes must come to the NBA and we are bringing the lawsuit to cause those changes. No other young man should have to die on a basketball court again."

medical clearance to an athlete with concerning medical conditions. Both of these cases involve a collegiate setting.

In September 1994, 17-year-old Nicholas Knapp was a highly recruited basketball player. He had accepted an athletic scholarship to participate at Northwestern University at the start of his senior year of high school. Shortly after accepting the scholarship, following the end of an informal pick-up basketball game, Knapp collapsed as a result of hypertrophic cardiomyopathy, and was successfully resuscitated via electrical defibrillation shocks, IV medication and intubation. Ten days following this event, an implantable cardioverter-defibrillator was placed in his chest.[1] The device monitors cardiac rhythm and delivers a shock to the heart upon recognition of potential lethal ventricular tachyarrhythmias, thus restoring sinus rhythm within a matter of seconds.

Seven weeks after his cardiac arrest, Knapp signed a letter of intent in accepting his athletic scholarship to attend and play for Northwestern University. Knapp, when reporting to Northwestern University in the fall of 1995, was declared medically disqualified for participation, but was permitted to retain his athletic scholarship to attend school for a four-year period. The decision not to clear Knapp was based on the individualized review of Knapp's cardiac arrest, cardiac condition, steps (implantable cardioverter-defibrillator), medical examination by treating and consulting cardiologists and their report to the team physician. Also used in the determination were the guidelines of the 26th Bethesda Conference: Recommendations for Determining Eligibility for Competition in Athletes with Cardiovascular Abnormalities.[2]

Knapp immediately filed a complaint in federal district court, alleging Northwestern University violated sections of the federal Rehabilitation Act of 1973. This statute prohibits discrimination against an athlete who is disabled. If the athlete has a physical impairment, she or he is entitled to an individual evaluation in light of the medical evidence and can be disqualified from competitive sports if there is a substantial risk of serious harm to the athlete or to others. Knapp argued that he should be permitted to assume the risks associated with playing basketball with significant cardiac risks, even if that risk included death. Knapp argued that playing basketball was a major or essential life activity.

After much argument from both the plaintiff and defense counsels and experts, the federal court sided in favor of Knapp to participate in basketball at Northwestern University. Northwestern University then appealed the federal court ruling in favor of Knapp. In November 1996, the U.S. Court of Appeals for the Seventh Circuit reversed the federal district court's decision.[3] The U.S. Court of Appeals ruled, "Playing intercollegiate basketball obviously is not in and of itself a major life activity, and is not a basic function of life. Playing or enjoying intercollegiate sports therefore cannot be held out as a necessary part of learning for all students."[3]

The most important point made by the appellate court was that medical determination of eligibility to participate in competitive sports is the domain of the team physician and schools, not the courts. The requirements for medical clearance by the school's team physician needs to reach three benchmarks: The decision is 1) reasonable; 2) individualized based on medical records and history; and 3) based on reliable scientific evidence.[3] The court also ruled that the team physician may rely on consensus guidelines and recommendations when making medical judgements on medical clearance.[3] Following those three requirements would absolve a university from violating a student athlete's Rehabilitation Act right. The court did not comment on whether the Knapp medical disqualification decision by Northwestern University was the correct one. The court ruled that a school's medical professionals, not courts, should decide the medical clearance

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CASE SUMMARY

ATHLETE PRESSURED TO PLAY THROUGH HEAD INJURY SUES FOOTBALL COACH AND SCHOOL DISTRICT

BY MICHAEL S. CARROLL AND STEVEN H. WIECZOREK

Attorneys filed a lawsuit Feb. 26 in the Michigan Eastern District Court for incidents that involved a high school football player in Flint, Michigan, in 2015-16. The lawsuit alleges that the player's former coach, the current high school's athletic director, failed to follow the appropriate concussion protocols set forth by the Michigan High School Athletic Association (MHSAA) when the player took a hard hit to his head and allegedly suffered a concussion while participating in football activities. It is also alleged that the former coach perpetuated and advanced a culture in which injuries to student athletes who participated in football activities were ignored, discounted and/or otherwise disregarded. The lawsuit blames the former coach for fostering an environment in which the high school's football players were discouraged from disclosing injuries or seeking medical help. The former coach allegedly publicly berated and embarrassed players who spoke of injuries and used denigrating language directed at players in order to enforce this culture.

The incidents in question stem from a series of events that took place in October 2015. During one specific football practice, the player, then a junior on the varsity football team, was involved in helmet-to-helmet contact with another player. Because of the contact, the player was visibly shaken; his subsequent actions, as described by teammates, were synonymous with an individual who has sustained a concussive event, including memory loss, blank staring and loss of balance and coordination. The lawsuit alleges that the coach failed to instruct the player to seek immediate medical attention or follow up treatment from a family doctor and failed to inform any administrators, educators or the student's parents of the hit or concussion-like symptoms. Furthermore, the former coach knew, or should have known, that the player

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MEDICAL DISQUALIFICATIONS, *continued from page 08*

of an individual to physically compete in sports at that school. Other schools may decide differently than Northwestern University and pass Knapp to play competitive athletics.

The other case was that of Gavin Class. In August 2013, Class was a football student athlete at Towson University when he experienced a heatstroke injury during practice. Class sustained multiple organ failures, a coma and near death. Among the medical challenges Class overcame was requiring a liver transplant and numerous surgeries. Class, through much perseverance and courage, recovered his health and re-entered Towson University in January 2014. After being medically disqualified for his medical condition, liver transplant and the risk of experiencing possible heatstroke with participation in football, Class filed suit against Towson University to re-gain his medical clearance under the Americans with Disability Act, and section 504 of the 1973 Rehabilitation Act. Class argued that his inability to regulate his body temperature and his susceptibility to heatstroke constituted a "disability" as defined by these federal acts, and was otherwise qualified to play intercollegiate football if Towson University agreed to his proposed accommodations.

After a one-day bench trial July 28, 2015, the District Court of Maryland agreed with Class that Towson University violated Class' ADA and Rehabilitation Act rights, and had ruling. The U.S. Court of Appeals for the Fourth District reversed the district court's ruling Nov. 13, 2015, granting Towson University the right to determine the medical eligibility of an athlete's participation via the team physician.[4] In its decision, the Court of Appeals cited that the accommodations were unreasonable, and that Class' "disability" was only when actively exercising, such as when playing football, during which Class would be wearing football equipment and special padding to provide protection to his transplanted liver, thus raising his body temperature. The Appellate Court reasoned that Class couldn't actively put himself into the disability that he argued he had because, without activity, Class had no issues regulating his body temperature. The Court found that Towson University's decision was a good-faith application of its policy to protect the health and safety of student athletes, was in compliance with statutory obligations to provide reasonable accommodations and was not a disguise for discrimination under ADA or Rehabilitation Act. In their decision, the judges cited Knapp v. Northwestern, and that the Class decision was made individually, with reason, and with best available medical evidence.

What impact does the Knapp v. Northwestern and Class v. Towson University cases have for medical clearance? These cases establish in case law that the school's team

School team physicians have the responsibility to make the final medical decision on the eligibility of an athlete.

to make accommodations for Class to participate. Some of those accommodations would include close monitoring of Class' body temperature with a sophisticated thermal detection apparatus that had to be used every five to 10 minutes with one trained person dedicated to continuously taking Class' temperature and remove him if his temperature reached a point that would put him at risk for heat exhaustion or heatstroke.

Towson University immediately appealed the district court's ruling, granting a motion to stay the district court's decision until the U.S. Court of Appeals could hear the case, thus preventing Class from participation until the physician of record has the final decision on the medical clearance of a student athlete, as long as any medical disqualification has been decided answering these three questions: 1) Is the decision being made for the individual circumstances of the athlete in question? In both cases, the decisions were made for each individualized circumstance. 2) Is the medical disqualification reasonable given the circumstances of a disability or potential exacerbation of the disability? In the case of Class, the U.S. Appellate Court ruled that Class could not actively put himself into his disability of not being able to regulate his body temperature without significant and unreasonable (court

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HEAD INJURY, *continued from page 08*

had possibly suffered a concussion in practice and prevented him from playing in games or practicing until a medical professional cleared him to return. The lawsuit calls the former coach's conduct objectively unreasonable.

MHSAA concussion protocol states that any athlete who exhibits signs, symptoms or behaviors consistent with a concussion (such as loss of consciousness, headache, dizziness, confusion or balance problems) shall be immediately removed from the contest and shall not return to play until cleared by an appropriate health care professional. Prior to returning to physical activity (practice or competition), the student and parent (if a minor student) must complete the Post-Concussion Consent Form, which accompanies the written unconditional clearance of an MD, DO, PA or NP. Subsequent violations of this protocol would render the player ineligible and subject the offending team to probation and/or game forfeiture, according to policy.

In this matter, it is alleged that the former coach held the player out for one practice the following day, but allowed the player to play in the team's next football game two days after the first incident and without invoking any return-to-play protocol. The player suffered another blow to the head during game play, which once again left him unsteady on his feet and required assistance to help him to the sideline. The player was unable to swallow any water and subsequently suffered a seizure and passed out before being taken to the hospital, where he stayed for two days. When he regained consciousness, he did not remember getting hit or the ride to the hospital. He was diagnosed with a post-traumatic seizure and a concussion. The suit states that he continued to experience sporadic seizures over the next several months until April 2016. He also experienced reoccuring episodes in which his limbs and head would shake, and he heard hostile voices. He experienced changes in his personality, difficulty in school, sleepiness and difficulty concentrating over the next several months, leading to concerns regarding the potential long-term effects from his injuries.

The lawsuit alleges that hard or violent head-first collisions between players were a regular occurrence with the football team, and that collisions regularly resulted in players being knocked unconscious on the field or exhibiting signs of brain trauma or concussion-like

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determination) accommodations to monitor his body temperature. In Knapp's case, exerting himself at the high level of basketball would place his heart at risk, and with an implantable cardiac device, susceptible to damage due to contact was unreasonable accommodations. 3) Is the decision based on best medical evidence? In both Knapp and Class' decisions, the Appellate Courts were not satisfied that the accommodations requested would not sufficiently guarantee protection from their respective conditions that had already threatened their lives.

School team physicians have the responsibility to make the final medical decision on the eligibility of an athlete. Both Appellate Courts noted that courts should not make medical decisions because judges are not trained medical professionals. Nor did the courts state that the decisions of team physicians – Dr. Howard Sweeney at Northwestern University or Dr. Kari Kindschi at Towson University – were the correct decisions. However, both Appellate Courts determined that both medical decisions were made and supported by the records of the student athletes medical conditions, and are made by medical professionals and not courts. Thus, there is strong case law supporting the rights of team physicians to make final decisions on medical clearance, not by second opinions by outside physicians or clearances by non-school team physicians.

There is one area that team physicians and athletic trainers should be contemplating going forward in the area of medical disqualifications. In light of potential long-term consequences or the possibility of a medical condition on the fringes of acceptability in participation, should an athlete be medically disqualified with an injury such as concussions? When making medical clearance decisions, the team physician and the AT, as the physician's advisor on the physical demands and risks of sport on the athlete in question, should turn to consensus statements and recommendations in participation.[3] Some questions to contemplate in the determination of medical clearance come from the 2014 NATA Position Statement: Pre Participation Physical Examinations and Medically Disqualifying Conditions, of which both authors of this article were on the writing group[5]: 1) Does the condition pose an unacceptable risk or place the athlete at increased risk for further injury? 2) Can the athlete safely participate with treatment (or special accommodations)? 3) What do published guidelines (such as the 36th Bethesda Conference) recommend on full participation in a given sport?

Another area of growing contention is that of medical disqualification or non-clearance of an incoming student athlete based on concussion history. Many student athletes, parents and coaches get upset when an athlete loses his/her medical clearance because of concussions, and team physicians can hesitate determining disqualification given the resistance on the part of the athlete, parents or coaches. This then begs the question, how many concussions, or how few severe concussions, does it take to finally medically disqualify an athlete? In the future, will it be no documented concussions, but a measurable cerebral change from subconcussive hits?

As determined in both Knapp and Class cases, participating in sports is not a "major life activity" as basic functions of life, such as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." Interestingly, in the concussion litigation cases, the authors act as expert witnesses, several of "the basic life functions" noted in the Knapp ruling have been reportedly impaired in plaintiffs seeking relief. In the 2014 NATA Position Statement: Management of Sport-Related Concussions,[6] it was noted that, "once an athlete has suffered a concussion, he or she is at increased risk for subsequent head injuries." One of the citations in the position statement came from one of the position statement's authors. Kevin Guskiewicz, PhD, ATC, FNATA (et al), "found that collegiate athletes had a three-fold greater risk of suffering a concussion if they had sustained three or more previous concussions in

This then begs the question, how many concussions, or how few severe concussions, does it take to finally medically disqualify an athlete?

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symptoms. Players experiencing such symptoms didn't receive medical treatment or testing to determine the existence or severity of a concussion. Instead, the former coach and other assistant coaches fostered and advanced an attitude of "go hard, hit hard." Coaches also discouraged players from seeking medical assistance when injured and berated students into not reporting injuries by calling them "sissies" and telling them to "play through the pain," further perpetuating this hostile sporting environment. The lawsuit names both the former coach and school district as defendants, claiming that school district educators and administrators were aware of the environment fostered by the former coach with the football team that caused players to participate in football activities, despite being physically unable to do so.

Count I: Substantive Due Process Violation of the 14th Amendment - 42 U.S.C. § 1983 (State Created Danger)

The suit states that the former coach had a duty to protect the player from dangers of harm that were known to him and created by him. He failed in this duty by committing affirmative acts that created or increased the risk the player was subjected to, thus leading to his injuries. By his own actions, the former coach fostered and advanced a culture that increased these risks. This constituted a "state-created danger" in violation of the player's constitutional rights under the Due Process Clause of the 14th Amendment of the U.S. Constitution to personal security and bodily integrity, and to be free from state actions that deprive a person of life, liberty or property without due process of law.

Count II: Substantive Due Process Violation of the 14th Amendment - 42 U.S.C. § 1983 (Deliberate Indifference)

The former coach acted with deliberate indifference to the health and safety of the player when he knew and disregarded a substantial risk by failing to evaluate the player for head-related injuries, despite having knowledge that he had suffered a violent hit to the head and exhibited signs of a concussion. Additionally, the former coach failed to notify any health care personnel regarding the player's condition and failed to follow proper procedures (as outlines by MHSAA) in place for the recognition,

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a seven-year period."[6] This information within a published guideline can serve as evidence when making medical clearance decisions.

The area of concussion management should also include parameters on medical disqualification to ensure the long-term well-being of the athlete. Informing an athlete and their family wishing to participate with a concussion history of multiple, documented concussions, or a long-term recovery from a single concussion, is essential. Consider Kruger v. San Francisco Forty-Niners. In this case, the First U.S. Court of Appeals determined team physicians did not fully disclose the adverse effects of on-going steroid injections into Kruger's knee, but also continued participation in "the dangers associated with the prolonged violent traumatic impact inherent in professional football."[7] This case demonstrated that team physicians can be held liable if they fail to make full disclosures on the potential long-term effects of participating with certain medical conditions or injuries, despite measures to manage the injury (through steroid injections). The Appellate Court cited Truman v. Thomas,[8] whereby, "patients are generally persons unlearned in the medical sciences and consequently are entitled to rely upon the physicians for full disclosure of material medical information."

Athletes are patients. They and their families are not medical professionals who fully understand implications of medical decisions. Team physicians need to fully explain all potential consequences, long and short term, of continued participation with medical conditions or injuries. Numerous media reports from former NFL players have stated that had they known that continuing with their career after multiple concussions was dangerous, they would have retired sooner.

The authors hope this article will assist the team physician, athletic trainer and schools in the legal considerations in making medical clearance decisions. There is legal precedence on the team physician making the final determination of medical clearance if certain parameters are present, and in thinking forward on the appropriate risks for participation with on-going medical conditions such as concussions, or potential life-threatening situations, such as participation with certain cardiac conditions.

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The area of concussion management should also include parameters on medical disqualification to ensure the long-term well-being of the athlete.

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evaluation and treatment of head trauma. The suit notes that the former coach had ample time to consider his actions with respect to the player's condition and didn't have to make a hurried judgment call. His actions were objectively unreasonable and constitute a violation of the player's constitutional rights under the Due Process Clause of the 14th Amendment, as his conduct was malicious, deliberate, intentional and undertaken with a total disregard of the known risk that the player faced.

Count III: Municipal/Supervisory Liability - 42 U.S.C. § 1983

The school district owed the player a duty to properly hire, supervise, monitor and train its employees so as not to violate constitutional protections afforded to students. At the time of the incidents that led to the suit, the former coach was an employee of a public school district, acting as a public school athletic director and coach, and was acting within the scope of his employment and under the color of state law. As such, the school district is liable for the player's constitutional rights violations on the part of the former coach. The former coach wasn't only the head football coach, but also the athletic director and therefore had a supervisory role and decision-making authority to enact policies, procedures and regulations related to the health and safety of student athletes, specifically injuries related to concussions. Both the school district and former coach were deliberately indifferent to the player's constitutional rights by failing to supervise school district personnel when they had knowledge of repeated instances of ignoring and/or downplaying injuries suffered by students during football activities. As such, both the school district and former coach are liable to the player under federal law for injuries suffered, including severe physical, psychological and emotional injuries.

Count IV: Gross Negligence/Willful and Wonton Conduct

The school district and former coach owed a duty to the player to act in a reasonable manner and with reasonable care to avoid creating or increasing the likelihood of injury. The former coach was grossly negligent and acted in a willful or wanton manner toward the player when he pushed the player to continue

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CASE SUMMARY

TEENAGE SOCCER PLAYERS TARGET SOCCER'S GOVERNING BODIES WITH CONCUSSION LAWSUIT

The U.S. Soccer Federation (USSF), and its largest member – the U.S. Youth Soccer Association (USYSA) – have found themselves at the center of a class action lawsuit. The parents of two teenage girls from Pennsylvania who suffered concussions while playing soccer claim the sport's governing bodies haven't done enough to protect young female players from head injuries.

"The defendants have failed to adopt and enforce laws of the game that would reduce the risk of preventable injuries resulting from concussions and repetitive head injuries," according to a complaint filed by the parents. "The defendants have failed to mandate and enforce the use of protective headgear for youth girl soccer players to prevent and/or reduce concussive symptoms and/or injuries" in the face of "substantial evidence that young people may be more susceptible to damage resulting from repetitive concussive and subconcussive brain trauma."

The plaintiffs noted that USSF and USAYSA have adopted "Laws of the Game" that "set forth compulsory equipment for players as: a shirt with sleeves, shorts, socks, shin guards and footwear." Yet, "protective headgear is not required."

Turning to the actual complaint, Count I addressed negligence, or the allegation that "each defendant had a duty toward the plaintiffs … to supervise, regulate, monitor and provide reasonable and appropriate rules to minimize the risk of injury to the players."

Further, they "knew or should have known that their actions, or inaction, in light of the rate and extent of concussions reported and made known to the defendants would cause harm to players in both the short and long term. The defendants breached the duty of due care they owed to the plaintiffs and the class, both generally and in the following particular respects:

a. In failing to educate players and their parents concerning concussion safety and prevention;
b. In failing to educate players and parents about equipment known to reduce concussive symptoms and/or injuries;
c. In failing to require players to wear headgear as to reduce concussive symptoms and/or injuries;
d. In failing to warn players and parents of the unreasonable risk of not wearing headgear;
e. In failing to rely upon up-to-date research regarding concussion risk and prevention;
f. In discouraging the use of headgear for the purpose of preventing concussive symptoms and/or injuries;
g. In failing to properly research concussion prevention when the defendants knew or should have known concussion research is constantly progressing;
h. In failing to promulgate rules and regulations to adequately address the dangers of repeated concussions and accumulation of subconcussive hits, as to reduce short and long term injuries;
i. In concealing and misrepresenting pertinent facts concerning concussion prevention equipment;
j. In failing to adopt rules and reasonably enforce those rules to minimize the risk of;
k. Other acts of negligence or carelessness that may materialize during the pendency of this action."

The defendants have failed to adopt and enforce laws of the game that would reduce the risk of preventable injuries resulting from concussions and repetitive head injuries.

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participation in football activities following his initial violent collision with another player, a collision that left the player exhibiting clear signs of a concussion. The former coach's conduct was the proximate cause of the player's injuries following the second violent collision. Being further injured was a reasonably foreseeable result of the former coach's gross negligence.

The lawsuit is seeking $75,000, plus costs, interest and attorney fees, as well as punitive and/or exemplary damages. $

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The plaintiffs continued, noting that they "relied upon the guidance, expertise and instruction of the defendants in understanding risks associated with the serious and life-altering medical issue of concussive and subconcussive risk in soccer.

"At all times, the defendants had superior knowledge of material information regarding the effect of repeated traumatic head injuries and available equipment to reduce those injuries, but refused, or otherwise failed, to mandate the equipment as compulsory equipment. At all times pertinent hereto, the defendants knew or should have known, that discouraging protective headgear use would hinder players from wearing protective headgear, despite the undeniable medical benefits of such use." Further, the defendants "failed to recognize the nationwide initiative to inform and educate league members about concussion prevention.

"As a result of the foregoing, the plaintiffs and the class have an improper risk of injury caused by the misconduct of the defendants. Moreover, the plaintiffs have no adequate remedy at law in that monetary damages cannot fully compensate them for the risk of long-term physical and economic losses due to concussions and subconcussive injuries resulting from the defendants' failure to mandate necessary protective headgear. Instead, the plaintiffs need medical monitoring as a remedy for the defendants' negligence where permitted under state law."

In Count II, the plaintiffs alleged a Breach of Voluntary Undertaking, or that "the defendant voluntarily assumed a duty toward the plaintiffs and the class to supervise, regulate, monitor and provide reasonable and appropriate rules to minimize the risk of injury to the players."

Further, they alleged the defendants "acted carelessly and negligently in fulfilling their assumed duties as the regulatory bodies for soccer and soccer players, including the plaintiffs and the class. In addition, the defendants knew, or should have known, that their action, or inaction, would cause harm to players in both the short and long term. The defendants knew that, through the reach of the laws of the game, they had the power to direct and influence how the greater community treats concussion management issues and by publication of the laws of the game assumed a duty to protect the plaintiffs and the class.

In addition, the plaintiffs argued that the defendants "had an independent, assumed and voluntary duty to enact and enforce laws of the game that properly protect players. The defendants were careless and negligent by breaching their assumed and voluntary duty of due care for the benefit of the plaintiffs and the class, both generally and in the following particular respects as set forth above and summarized below:

a. In failing to educate players and their parents concerning concussion safety and prevention;
b. In failing to educate players and parents about equipment known to reduce concussive symptoms and/or injuries;
c. In failing to require players wear headgear as to reduce concussive symptoms and/or injuries;
d. In failing to warn players and parents of the unreasonable risk of not wearing headgear;
e. In failing to rely upon up-to-date research regarding concussion risk and prevention;
f. In discouraging the use of headgear for the purpose of preventing concussive symptoms and/or injuries;
g. In failing to properly research concussion prevention when the defendants knew or should have known concussion research is constantly progressing;
h. In failing to promulgate rules and regulations to adequately address the dangers of repeated concussions and accumulation of subconcussive hits, as to reduce short- and long-term injuries;
i. In concealing and misrepresenting pertinent facts concerning concussion prevention equipment;
j. In failing to adopt rules and reasonably enforce those rules to minimize the risk of players suffering debilitating concussions; and
k. Other acts of negligence or carelessness that may materialize during the pendency of this action."

The plaintiffs argued that the defendants "had an independent assumed and voluntary duty to enact and enforce laws of the game that properly protect players."

Turning to Count III, the plaintiffs alleged Fraudulent Concealment, or that their belief the defendants "have known that concussions, subconcussive hits, and repeated blows to the head can cause neurological injury. Scientific and medical studies have shown the existence of TBI as a result of contact sports as far back as the 1920s in boxing. Increased technology and medical advances since that date have added to the composite of neuroscience research regarding concussions.

"The defendants passively issued guidelines about the existence of concussions, but underplayed the dangers of neurological injury. On information and belief, through a concealment of these material facts, the defendants created a false belief held by the plaintiff that:

a. concussions and subconcussive hits were not as dangerous as they actually are; and
b. they would be cared for in the event of the injury out of the duty that the defendants had to the plaintiff."

Finally, the plaintiffs alleged that the defendants "had a duty to warn their members about the dangers of concussions and the equipment available to prevent concussion injuries. The defendants failed in this duty and/or falsely represented the effects of neurological injury and the impact it could play in the future lives of players. On information and belief, the defendants failed in this duty and/or falsely represented the effects of protective headgear in substantially reducing concussions and concussion symptoms in the plaintiffs and the class. On information and belief, this concealment of material facts directly led to the plaintiffs' exposure to danger after suffering a concussion. These material facts on concussion research could have prevented many players from suffering soccer-induced concussions. The defendants' knowledge, concealment of that knowledge and/or intentional blindness, and ineffectual efforts to promote a culture of player-safety all contributed to the injuries sustained by the plaintiffs and putative Class."

The actual complaint can be viewed at **www.classaction.org/media/sherman-et-al-v-the-united-states-soccer-federation-inc-et-al.pdf**.