Sports Litigation Alert

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Will Sovereign Immunity Continue to Protect Municipalities, Public Schools and Public Employees from Athletic Liability?

By Charles F. Gfeller and Heather L. McCoy

A high school football player gets his "bell rung" in a big game. Though he exhibits some telltale signs of a possible concussion – dizziness, confusion, grogginess – his coach puts him back in the game after he insists he's feeling better. The coach, a newcomer to the school from out of state, is either unaware of the state's recently enacted concussion laws (and their strict return-to-play requirements) or has decided to ignore them. Ten minutes after reentering the game, the player suffers a second blow to the head and falls to the ground unconscious. He is diagnosed with second impact syndrome. Though he survives – a rarity for young athletes who suffer from SIS – he has severe permanent disabilities. His parents subsequently file a lawsuit on his behalf against the school district, the principal, the athletic director, and the coach.The defendants file motions to dismiss for failure to state a claim upon which relief can be granted, arguing that, as municipal entities and municipal employees, they are immune from suit. Will their motion be granted? Will their case be dismissed?

The answer to this question is becoming increasingly uncertain in many jurisdictions due to the widespread enactment of "concussion laws." Traditionally, municipalities and their employees have been immune from tort liability in civil suits seeking damages for personal injuries. The existence and extent of these immunities varies by jurisdiction, and many states have enacted tort reform acts to limit immunity by providing exceptions or waivers, and capping damages where lawsuits were permitted. Nonetheless, the doctrine of sovereign immunity, or governmental immunity, is still a staple on many states' books, and, in some states it still provides a complete bar to lawsuits alleging negligence based on failure to supervise, train and / or exercise due care to protect student athletes from harm. However, sovereign immunity may be showing signs of erosion, due in large part to this country's growing awareness of the prevalence of traumatic brain injuries in youth athletics.

Typically, the recently enacted concussion laws place educational requirements and responsive obligations on coaches, trainers, and other scholastic and youth sports personnel. Coaches and others who are closely involved with youth athletics are often required to take classes on concussion awareness and symptom recognition. The statutes also often require schools and athletic programs to implement measures designed to keep concussed athletes off the field until a physician has given the green light to return.

Plaintiffs' attorneys will likely attempt to use concussion laws as swords when pursuing claims on behalf of injured athletes, attempting to circumvent immunity laws that may otherwise limit exposure. In other words, plaintiffs' attorneys will take the position that if a school did not implement or enforce a sufficient education program or protocol for dealing with concussed athletes, in accordance with the applicable concussion law, then the school and the relevant employees (coaches, trainers, etc.) should be liable. Indeed, to

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prevent this, many states have included provisions in their concussion laws specifically noting, for example, that "nothing in this [statute] abrogates or limits the protections applicable to public entities and public employees." Colorado Revised Statutes § 25-43-101; *see also*, Nebraska Revised Statutes § 71-9106. However, for the state that did not include such language, or for the state that has exempted public schools and / or public employees from immunity (either in full, in limited circumstances, or based upon a court's evaluation of certain criteria), the question looms as to whether these concussion laws broaden the duty of care owed to student athletes, thus broadening potential exposure for otherwise immune entities and employees. *See, e.g.*, Virginia Code Annotated § 22.1-271.5; Alabama Code 1975 § 22-11E-2.

One particular court's analysis is helpful in illustrating how courts may expand the applicable standard of care based on the enactment of concussion laws and the increased knowledge and awareness regarding traumatic brain injuries among student athletes. In *Cerney v. Cedar Bluffs*, the Supreme Court of Nebraska heard an appeal regarding whether the trial court properly found that a high school's conduct regarding an injured football player comported with the applicable standard of care. 267 Neb. 958 (2004). Brent Cerny, a high school junior in 1995, struck his head on the ground in a Friday football game, and took himself out of play stating that he felt "fuzzy" or "dizzy." Cerny asked to return later in the game and his coaches let him after observing that Cerny seemed "normal." During the following Tuesday's practice, Cerny suffered another head injury that caused second impact syndrome and resulted in permanent brain disabilities. *Id*. at 960-961. Cerny brought suit against his school pursuant to Nebraska's tort claims act under a theory of *respondeat superior*, alleging that the school, acting through its coaches, was negligent in failing to adequately examine Cerny following his concussion to determine the need for medical attention. *Id.* at 961-962.

On appeal, the court affirmed that the applicable standard of care for a reasonable coach *in 1995* included certain factors. 267 Neb. at 964. However, the court's analysis hinged on the fact that the coach's actions comported with the reasonable actions a coach would have taken in 1995. The court noted that the training now required by the State of Nebraska (in 2004 when the decision was rendered) was different than it was in 1995 and instructed coaches to not permit an athlete to return to competition until receiving clearance from a physician. *Id.* at 963.

Consequently, it is likely that a Nebraska court determining the applicable standard of care in a similar case, post-2004, would hold a coach to a different standard of care than that which the *Cerny* coaches were held, one which includes the standard that a reasonable coach would not permit the athlete to return to play until he is cleared by a physician. Further, following Nebraska's enactment of the Concussion Awareness Act in July 2012, which *requires* the removal of an athlete from play with signs or symptoms of a concussion, and *requires* a health care professional's written clearance for return to play, a coach or trainer would likely be held to an even higher standard of care.

The evolution of the law with respect to concussions, as seen in statutes and case law, suggests that legislatures and courts alike are placing increased legal responsibility on coaches, trainers, and other school officials to properly handle concussed athletes, which may lead to erosion of the sovereign immunity that once protected them.

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