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For Those (Still) Keeping Score

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Our last review of reported outcomes in chronic traumatic encephalopathy ("CTE") cases—*For Those Keeping Score, Dec. 2020*—covered developments in *Archie v Pop Warner*,[1] the Honorable Anita B. Brody's rationale for approving the National Football League's class settlement,[2] rejection of a homicide defendant's petition to assert a CTE defense,[3] summary judgment based on the participant waiver in an NCAA post-concussion syndrome case,[4] and the *Onyshko* defense verdict against claims that college football caused ALS.[5] We concluded that contrary to media portrayal, judicial outcomes reflect reality: science has not determined that contact sport participation leads to CTE and cognitive decline.

But wait, there's more . . .

In April 2021, Riddell helmet maker, BRG Sports, Inc., scored a major victory in the product liability multidistrict litigation ("MDL") pending in the Northern District of Illinois, *Adams v BRG Sports, Inc*.[6] There, plaintiffs claimed that design defects and failures to warn caused them to suffer "brain and neurocognitive injuries" related to concussions, as the result of playing high school football while wearing a BRG/Riddell helmet. Each claimed that wearing a "better designed helmet" would have prevented or lessened the severity of their injuries. Plaintiffs' expert, neurologist Dr. Randall Benson, MD, essentially opined that "good helmet design can mitigate the risk of head injuries." Concluding that this opinion fell "short of providing evidence sufficient to permit a reasonable jury to find the required connection between Riddell's helmet designs and the plaintiff's injuries," the court granted Riddell's motion for summary judgment on design defect claims. Finding that Riddell did not address causation in the failure-to-warn context, the plaintiffs' failure-to-warn claim survived.

In September 2021, the Ninth Circuit affirmed the lower court's order granting summary judgment in *Archie v. Pop Warner Little Scholars, Inc.*, concurring that plaintiffs' experts, the pathologist Bennet Omalu, MD, MBA, MPH, CPE, DABP-AP,CP,FP,NP and the neuropsychiatrist James R. Merikangas, MD, had no reliable bases for their opinions,[7] and that there was "too great an analytical gap between the data and the opinion proffered."[8] The *Archie* plaintiffs claimed that playing youth football between age 8 and 14 caused their sons to die some ten years later in their mid-20's, by self-inflicted gunshot wound and in a high

speed motorcycle accident. Allowing that each expert concluded playing Pop Warner football could have caused CTE, and CTE is linked to suicidal and reckless behaviors, the court found that neither expert had adequately explained "the logical leap from the underlying conclusion to the ultimate conclusion." Finding that the experts had only shown that Pop Warner football ***could*** have caused plaintiffs deaths, and had failed to explain why Pop Warner football was the likely cause of death, the Ninth Circuit also agreed with the lower court's alternative holding, that even if Dr. Omalu and Dr. Merikangas' opinions were admissible, they each failed to raise a triable issue of fact as to causation.

In October 2021, BRG Sports, Inc. won summary judgment against the CTE suicide claim of a former high school football athlete, in *Wilbourn v BRG Sports, Inc.*[9] There, the plaintiff claimed to have suffered at least 14 concussions wearing a Riddell helmet. As with the *Archie* plaintiffs, the *Wilbourn* plaintiff's brain was submitted to Boston University, and as in *Archie*, the suicide was attributed primarily to psychological factors, such as depression, and CTE was considered only a "contributing diagnosis." As in *Adams*, the *Wilbourn* court points out the critical evidentiary gap in Dr. Benson's analysis: whether CTE would have occurred without the use of Riddell helmets. "Benson's report presents no evidence to show that the helmets were a 'substantial factor' in [plaintiff's] death." Expressing sympathy for the plaintiff, the court notes that it is not the first to face these issues, specifically citing *Adams*, *Archie,* and Judge Brody's rationale in the NFL class action settlement: "Clinical study of CTE is in its infancy" and it is "difficult to draw generalizable conclusions" until there are "long term, longitudinal, prospective epidemiological studies in living subjects."

In January 2022, BRG Sports, Inc. secured another momentous summary judgment in the Northern District of Illinois.[10] Specifically, the court in *Adams v. BRG Sports, Inc.* granted summary judgment over the bellwether plaintiffs who claimed Riddell helmets had insufficient injury warning labels. With respect to the failure to warn claims that survived the April 2021 summary judgment (discussed above), Judge Matthew F. Kennedy ruled in favor of BRG Sports because the bellwether plaintiffs "came nowhere close" to producing expert testimony necessary to go to trial over Riddell helmets' alleged deficient warning. This ruling marks the ends each of the bellwether plaintiffs' lawsuits against BRG Sports. However, Judge Kennedy concluded that the ruling cannot be used by BRG Sports to dismiss claims from other plaintiffs whose lawsuits "were expressly put on hold" pending the bellwether plaintiffs' litigation, as doing so "would amount to a serious violation of due process—dismissing the claims of dozens of plaintiffs without giving them an opportunity to be heard."

So, for those still keeping score on outcomes, the defense is still winning.

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[1] *Archie, et al. v. Pop Warner,* USDC CDCA, No. 2:16-cv-06603. Plaintiff McCrae's claim with respect to her son Richard Caldwell was dismissed for failing to satisfy the discovery rule. (*"...that McCrae 'did not become aware that Richard's participation in youth tackle football caused him to develop chronic traumatic brain injuries until the issue was widely publicized in December 2015' ... falls short of meeting the discovery rule..." Archie v. Pop Warner,* 20, 2017, Docket No. 107, at 8, 9). The Barnes plaintiffs' claims were dismissed for lack of standing ("... the increased risk of a future potential injury is insufficient to meet the injury in fact requirement of Article III standing." *Archie v. Pop Warner,* Oct 20, 2017, Docket No. 107, at 11, 12).

[2] *In re Nat. Football League Players' Concussion Inj. Litig.*, 307 F.R.D. 351, 382 (E.D. Pa. 2015) (certifying an NFL concussion settlement class because "compensation would be certain").

[3] *Humphries v. Sherman,* CV 18-5748, 2019 U.S. Dist. LEXIS 88116, April 11, 2019 (questioned counsel about the factual basis for pursuing a CTE defense and finding it wanting).

[4] *Bradley v. NCAA,* 16-346, 2020 US Dist Lexis 94091, May 29, 2020. ("Therefore, the Court agrees with the University defendants that "[b]ecause the Acknowledgement of Risk form signed by [the] [p]laintiff applies to injuries arising from inherent risks of the sport, such as concussions, as well as the subsequent treatment of such injuries, the] [University] [d]efendants are entitled to summary judgment as a matter of law," Univ. Defs.' Mem. at 20, and "concludes that the [41] District of Columbia would apply its normal rule enforcing waivers that are clear and unambiguous.")

[5] *Onyshko v. National Collegiate Athletic Ass'n.*, No. C-63-CV-201403620 (Wash. Cty. Ct. Comm. Pleas, PA).

[6] *Adams v. BRG Sports, Inc.*, No. 17 C 8544, 2021 WL 1517881 (N.D. Ill. Apr. 17, 2021).

[7] *Archie v. Pop Warner Little Scholars, Inc.*, No. 20-55081, 2021 WL 4130082, at *1-2 (9th Cir. Sept. 10, 2021) (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 146, 143 L. Ed. 2d 238 (1999)).

[8] *Archie v. Pop Warner Little Scholars, Inc.*, No. 20-55081, 2021 WL 4130082, at *1 (9th Cir. Sept. 10, 2021) (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 139 L. Ed. 2d 508 (1997)).

[9] See *Wilbourn v. BRG Sports, Inc.*, No. 4:19-CV-0263-P, 2021 WL 4988044 (N.D. Tex. Oct. 27, 2021).

[10] See *Adams v. BRG Sports, Inc.*, No. 17 C 8544, 2022 WL 93497 (N.D. Ill. Jan. 10, 2022).