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IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA  
CIVIL DIVISION

MATTHEW ONYSHKO AND JESSICA, )  
ONYSHKO, his wife, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 NATIONAL COLLEGIATE ATHLETIC, )  
 ASSOCIATION, )  
 )  
 Defendant. )  
 )

No. 2014-3620

FILED  
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PROthonotary  
WASHINGTON CO. PA.  


**Opinion and Order**

Before the Court are Motions for Summary Judgment pursuant to Pa. R.C.P. 1035 (2)(1) and (2) filed by the Defendant National Collegiate Athletic Association (“NCAA”).

**I. Factual and Procedural History**

This action arises out of Plaintiff Matthew Onyshko’s recently diagnosed brain and spinal cord injuries he attributes to repeated blows to his head suffered during his five-year collegiate football career at California University of Pennsylvania (“Cal U”) between 1999 and 2003.

In June of 2014, Onyshko and his wife filed a two-count Complaint alleging negligence and loss of consortium against the National Collegiate Athletic Association (“NCAA”) based on its failure to adequately supervise, regulate, and minimize the risk of long-term brain injury resulting from repeated head impacts. Plaintiff contends that these failures increased Mr. Onyshko’s risk of developing long-term health conditions when, as a Cal U student-athlete, he relied upon the NCAA to protect his health and safety. Plaintiffs’ Response to MSJ Brief, p. 1.

The NCAA filed preliminary objections on grounds that Plaintiffs’ Complaint failed to adequately plead the existence of the legal duty owed to them by the NCAA. This Court denied the NCAA’s Preliminary Objections on December 3, 2014. In response, on August 8, 2016, the

NCAA filed the instant *Motion for Summary Judgment*, arguing that 1) the two-year statute of limitations for personal injury actions time-bars Plaintiffs' claims, and the discovery rule does not toll their claims; 2) the NCAA assumed no legal duty to protect Mr. Onyshko from the long term risks of concussion while playing collegiate football because there is no duty to protect from the inherent risks of an activity, thereby precluding its negligence claim; 3) the NCAA did not breach any purported duty to protect him against the long-term risks of concussion while playing collegiate football; 4) that Mr. Onyshko's alleged head injuries incurred while playing NCAA football did not cause his subsequent development of amyotrophic lateral sclerosis ("ALS"); and 5) the loss of consortium claim should fail because it is a derivative claim which cannot survive independently of Plaintiffs' negligence claim.

#### **Legal Standard**

Summary judgment is appropriate when, after the pleadings and discovery are closed, the record shows there is no genuine issue of material fact as to a necessary element of a cause of action or defense, or after discovery, an adverse party has failed to produce evidence of facts essential to its cause of action or defense. Pa. R.C.P. 1035.2. In considering the merits of a *Motion for Summary Judgment*, a court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Tori v. Metropolitan Life Insurance Company*, 928 A.2d 186 (Pa. 2007).

## II. Discussion

### 1. Statute of Limitations (“SOL”) and the Discovery Rule.

Defendant NCAA avers that it is entitled to summary judgment in the instant action because Plaintiffs’ claims are time-barred pursuant to the two-year statute of limitations for personal injury cases. The Plaintiff contends that the statute of limitations was tolled regarding his claim because he was not aware that Mr. Onyshko possibly suffered from an injury caused by repeated head trauma due to the negligence of the NCAA in 2012. It is not disputed that the two-year statute of limitations has elapsed from the time Plaintiff allegedly sustained head injuries playing football from 1999-2003 and the time when Plaintiff filed the Complaint in 2013. At issue is whether the Discovery Rule tolls the statute of limitations.

The Discovery Rule suspends, or tolls the running of the SOL when the complaining party is reasonably unaware that his injury has been caused by another party’s conduct at the time the injury accrued. *Gleason v. Borough of Moosic*, 15 A.3d 479, 484 (Pa. 2011). If reasonable minds could differ regarding whether the injury was ascertainable through the exercise of reasonable diligence during the limitations period, the entry of summary judgment based on expiration of the limitations period is inappropriate. *Id.* at 487. The point of time at which the complaining party should reasonably be aware that he has suffered an injury is generally an issue of fact to be determined by the jury; only where the facts are so clear that reasonable minds cannot differ may the commencement of the limitations period be determined as a matter of law. *Sadtler v. Jackson-Cross Co.*, 587 A.2d 727, 732 (1991).

In 2008, Matthew Onyshko sought medical attention for the symptom of hand weakness he was experiencing, which led to a diagnosis of ALS by Dr. Lacomis on February, 25, 2008. Exhibit B, Onyshko Vol. IV, p. 225. Mr. Onyshko testified that he asked Dr. Lacomis whether

Onyshko's history of playing football caused the ALS symptoms that he was experiencing, and Dr. Lacomis "shrugged it off." Defendant's Exhibit 28 p. 226. Mr. Onyshko avers that he was not aware that he possibly suffered from an injury caused by repeated head trauma due to the negligence of the NCAA until 2012, when Plaintiff saw a segment on TV regarding Steve Gleason, a former professional football player diagnosed with ALS, in February of 2012. Plaintiffs' Exhibit B, Onyshko Volume I, pp. 29-30. Plaintiffs contend that before that, no medical provider had suggested that it was possible that his medical condition was linked to playing collegiate football.

Defendant NCAA avers that Plaintiff was aware of his injury in 2008, pointing to his diagnosis from a second opinion by Dr. Sandeep Rana in October of 2008. Dr. Rana's medical report states under the "Review of Systems" paragraph:

He [Matthew Onyshko] has had multiple concussions due to playing football. On one occasion when he was in 8<sup>th</sup> grade, he also did have trauma to his spinal cord, which caused transient numbness in his extremities.

Plaintiffs' Exhibit B, Onyshko Vol. IV, pp. 235-36.

Considering the evidence in the light most favorable to the Plaintiff, it is clear that Defendant's averments fall short of showing that Mr. Onyshko was informed by a physician that he suffered from an injury **caused by the negligence of the NCAA during his collegiate football career**. Whether Onyshko should have been reasonably aware in 2008 that he had suffered an injury caused by repeated head trauma due to the negligence of the NCAA and whether Onyshko exercised reasonable diligence in investigating his injury during this period are issues of fact to be determined by the jury. Accordingly, Defendant's *Motion for Summary Judgment* on that issue is denied.

## 2. Duty of Care Owed

The Defendant asserts that it owed no duty to the Plaintiffs on grounds that there is no duty to protect them from inherent risks in an activity. *Craig v. Amateur Softball Ass'n of Am.*, 951 A.2d 372 (Pa.Super. 2008). Although an actor generally has no affirmative duty to act, an exception exists pursuant to the Restatement 2nd of Torts §323 where a special relationship between an actor and another party “undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if A) His failure to exercise reasonable care increases the risk of such harm or B) he has undertaken to perform a duty owed by the other to the third person, or C) the harm is suffered because of reliance of the other or the third person upon the undertaking.” The Restatement 2nd of Torts §323 has been adopted in Pennsylvania. *DeJesus v. Liberty Mutual Insurance Co.*, 223 A.2d 849, 850 (1966).

Plaintiffs argue that the NCAA owed them a legally recognized duty based on the NCAA’s 1) failure in its undertaking to provide adequate educational and safety standards for students athletes to act as a leader in protecting student-athletes; 2) failure in its undertaking to assist member institutions in protecting student-athletes; 3) assumption of a duty to student athletes by undertaking to act as a leader in providing “healthy and safe” environments, and 4) assumption of the duty owed to student athletes by member institutions to formulate safety guidelines.

Defendant NCAA essentially repeats the same argument it raised in its preliminary objections, which this Court denied, that there is no duty under Pennsylvania law to protect another from inherent risks in an activity. *Craig v. Amateur Softball Ass'n of Am.*, 951 A.2d

372, 377 (Pa.Super. 2008). This argument lacks merit because it oversimplifies and conflates the risk of injury with the negligent treatment, management and prevention of such injuries. While suffering a head injury in the course of playing football is likely a danger inherent to the sport, the negligent treatment and management of such injuries, leading to severe long term damage, is beyond the scope of the inherent risk assumed by players. Thus, waiving risks arising from contact in football itself is different than waiving being properly supervised. Courts have recognized a failure to supervise a high school football player's injury as beyond the scope of inherent risk and imposed the normal duty of reasonable care. *Zalkin v. Am. Learning Sys. Inc.*, 639 So. 2d 1020-21 (Fl. Dist. Ct. App. 1994).

Plaintiff avers that Onyshko never received any education from the NCAA or the team coaches or trainers about the symptoms of a head injury or medical knowledge of when it was appropriate to return to playing after sustaining a head injury. *See* Plaintiffs' Statement of Facts, p. 5. Further, Plaintiff Onyshko does not claim that the NCAA permitted him to play without a helmet; he claims the NCAA falsely guaranteed that his helmet would protect him – and it did not.

Defendant NCAA also avers that no duty should be imposed because unlike the universities, it lacks the enforcement mechanisms to implement legislation over its member institutions. This argument also lacks merit because the NCAA is the supreme regulatory body in college athletics with the stated purpose of “hav[ing] a clear moral obligation to make sure we do everything we can to protect and support student-athletes.”<sup>1</sup>

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<sup>1</sup> Mark Emmert, Executive Director of the NCAA, speaking at a U.S. Senate committee hearing, <http://www.cbssports.com/college-football/news/ncaa-mark-emmert-is-wrong-witness-in-wrongful-death-lawsuit/>

Given the authority of the NCAA and Plaintiffs' testimony regarding the NCAA's lack of adequate injury prevention education<sup>2</sup>, it is reasonably foreseeable that Mr. Onyshko might suffer long-term injuries if the NCAA failed to take reasonable steps to provide education and set appropriate safety standards regarding the handling of concussions. Thus, we find that there is a genuine issue of material fact as to whether the NCAA owed a duty to protect Mr. Onyshko against the long-term risks of concussions suffered while playing collegiate football. Accordingly, Defendant's *Motion for Summary Judgment* on this question is denied.

### **3. Breach of Duty**

Defendant NCAA argues that even if it were found to have a legal duty, the record establishes as a matter of law that it did not breach such legal duty. Defendant avers that the Sports Medicine Handbook set forth "the recommended best practices" at the time with respect to the "management of concussions in collegiate sports." Defendant's MSJ Brief, p.33. The NCAA's expert, Robert Harbaugh, M.D. opines—that the NCAA "did not in any way violate any standards." *See* Report of Robert Harbaugh, Defendant's MSJ Brief, Exh. 27 at p. 5-6.

Plaintiffs contend that the evidence of record regarding the NCAA's breach of its legal duty demonstrates an issue of material fact for the jury to decide. As stated above, Plaintiffs aver that Onyshko never received any education from the NCAA or the team coaches or trainers about the symptoms of a head injury or medical knowledge of when it was safe to return to play after sustaining a head injury. *See* Statement of Facts, p. 5. Additionally, Plaintiffs aver that the NCAA declined to include return-to-play guidelines and concussion management policies from the American Academy of Neurology in its Sports Medicine Handbook, which could have prevented permanent, later-developing injuries such as Mr. Onyshko's ALS. Plaintiffs' MSJ

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<sup>2</sup> Onyshko testified that he "never received any education from the NCAA or the team coaches or trainers about the symptoms of a head injury or when it was appropriate to return to playing after sustaining a head injury. *See* Statement of Facts, p. 5.

Brief, p. 40-41. Michael Steinagel, head athletic trainer at California University of Pennsylvania, testified that he was not provided, directly or indirectly, any return-to-play guidelines or a concussion management policy from the NCAA. Plaintiffs' Exh. QQ, p. 100.

Here, the record contains conflicting testimony regarding whether the NCAA's Sports Medicine Handbook contained proper return-to-play and concussion management policies. Because the question of what weight to give a witness's testimony is one for the jury, considering all inferences in favor of Plaintiffs, it is clear that an issue of material fact exists regarding whether the NCAA breached its alleged legal duty to institute proper safety policies that educate and protect Plaintiff from long-term head injuries. Summary judgment on the breach of duty must be denied.

**4. No Evidence of Injury from Playing Football at Cal U and No Evidence of a Causal Link to the Head Injury and ALS**

Defendant NCAA also argues that it is entitled to summary judgment because 1) there is no evidence that Onyshko suffered from an injury related to repetitive head trauma while playing football at Cal U and 2) that there is no generally accepted scientific or medical evidence establishing a causative link between the head injuries Mr. Onyshko allegedly sustained and his current diagnosis of ALS.

Here, the evidence of record establishes that Mr. Onyshko allegedly experienced concussion symptoms throughout his career playing football at Cal U but did not know that the symptoms were indicative of a concussion/head injury. Plaintiff Onyshko estimated that he sustained 3,000 to 5,000 hits per year during his college football career. *See* Statement of Facts, p. 7. Onyshko testifies to experiencing concussion-like symptoms while playing collegiate football, including blackouts, memory loss, dizziness, light sensitivity, headache, and confusion. Statement of Facts, pp. 3-6. Whether Onyshko was aware at the time the symptoms occurred



that they were indicative of a concussion is irrelevant— Plaintiffs' case rests on whether Onyshko experienced various symptoms that are indicative of a head injury and did not receive any education from the NCAA on what those symptoms were, not on his ability to self-diagnose those symptoms between 1999 and 2003.

As mentioned above, Defendant also avers that there is no generally accepted scientific or medical evidence establishing a causative link between the head injuries Mr. Onyshko allegedly sustained and his current diagnosis of ALS. However, this Court finds that the expert opinions of Dr. Omalu and Dr. Amen create a genuine issue of material fact regarding whether concussive and sub-concussive blows to the head sustained while playing collegiate football can cause ALS.

Dr. Daniel Amen opines in his expert report:

In my opinion, playing collegiate football was a substantial contributing factor to Matthew Onyshko's [single photon emission computed tomography] SPECT findings, clinical findings, and diagnosis of ALS. Repetitive trauma from football, established in literature and in my experience with NCAA players and NFL players, have shown the type of damage we have seen in Mr. Onyshko's scan, along with an increased incidence in ALS.

Plaintiffs' MSJ Brief, Exh. UU.

Dr. Amalu explains in his expert report:

There is a 40-fold higher prevalence of ALS in football players than the general US population.<sup>3</sup> The neurodegenerative mortality of football players from dementia and ALS is 4x higher than the general US population. . . These opinions and conclusions are supported and documented in numerous clinical studies and medical articles by the medical and scientific community. . . In the instance of Matthew Onyshko, his exposure to repetitive blunt force traumas and blows of the head while playing collegiate football was a significant contributory factor to his development of clinical symptoms and presumptive diagnosis of ALS. . . Having reviewed his social history and clinical history, he is suffering from CTE-ALS or CTME. His disease is incurable, progressive and permanent. He will eventually die from his neurodegenerative disease after prolonged and persistent conscious pain and suffering, and debilitation. I have provided my opinions with a reasonable degree of medical certainty.

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<sup>3</sup> Abel EL. Football increases the risk for Lou Gehrig's Disease, Amyotrophic Lateral Sclerosis. *Perceptual and Motor Skill* 2007; 104: 1251-1254.

Plaintiffs' MSJ Brief, Exh. A, p. 5-6.

Because the question of what weight to give a witness's expert opinion is one for the jury, considering all inferences in favor of Plaintiffs, it is clear that an issue of material fact exists regarding whether concussive and sub-concussive head impacts sustained by Matthew Onyshko during his collegiate football career caused ALS, and the NCAA's Motion for Summary Judgment is denied.

#### **5. Loss of Consortium**

The NCAA avers that Plaintiffs' loss of consortium claim on behalf of Plaintiff-wife, Jessica Onyshko, should be dismissed because it contends that it is entitled to summary judgment on Plaintiffs' negligence claim. This Court finds that because summary judgment is unwarranted in this action, the loss of consortium claim will survive.

#### **IV. Conclusion**

For the foregoing reasons, Defendant's *Motion for Summary Judgment* is DENIED in all counts set forth in Plaintiffs' *Complaint*.

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CIVIL DIVISION

MATTHEW ONYSHKO AND JESSICA, )  
ONYSHKO, his wife, )

Plaintiffs, )

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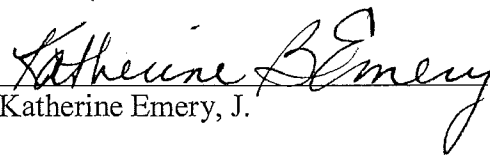
NATIONAL COLLEGIATE ATHLETIC, )  
ASSOCIATION, )

Defendant. )

**ORDER**

AND NOW, this 24<sup>th</sup> day of March, 2016, upon consideration of Defendant NCAA's *Motion for Summary Judgment* and argument thereupon, it is hereby ORDERED, ADJUDGED, and DECREED that same are DENIED and all claims in Plaintiff Matthew Onyshko and Jessica Onyshko's Complaint remain.

BY THE COURT:

  
Katherine Emery, J.