COURT ORDER

Gee v. NCAA
Case No. 20 STCV 43627 [*R/T Case Nos. BC 718 783, BC 719 516, 19 AVCV 00225, 19 STCV 30887, 20 STCV 37361, and 20 STCV 28453*]

TYPE OF MOTION:	(1): Application for Pro Hac Vice Admission of Jill K. Nicaud; (2): Motion for Summary Judgment, or in the alternative, Summary Adjudication.
MOVING PARTY:	(1): Plaintiff, Alana Gee; (2): Defendant, National Collegiate Athletic Association.
RESPONDING PARTY:	(1): None; (2): Plaintiff, Alana Gee.
HEARING DATE:	Monday, August 1, 2022

Plaintiff alleges that her decedent was a college football player who developed Chronic Traumatic Encephalopathy due to repeated blows to the head.

On November 12, 2020, Plaintiff Alana Gee ("Gee"), acting as personal representative of the Estate of Matthew Gee, filed her Complaint for (1) Negligence (Survival Action) and (2) Negligence (Wrongful Death) against Defendant National Collegiate Athletic Association ("NCAA"). On December 23, 2020, Defendant NCAA filed its Answer.

Jury Trial is currently set for October 10, 2022.

(1) MSJ/MSA

Defendant NCAA now moves this court, per Code of Civil Procedure § 437c, for summary judgment on the Complaint, or in the alternative, summary adjudication on the following issues:

ISSUE NO. 1: Plaintiff's negligence claim fails because Plaintiff cannot establish that the NCAA had a special relationship with Matthew Gee or the University of Southern California's coaching staff;

ISSUE NO. 2: Plaintiff's negligence claim fails because Plaintiff cannot establish that the NCAA owed a duty to Matthew Gee pursuant to a negligent undertaking theory;

ISSUE NO. 3: Plaintiff's negligence claim is barred by the doctrine of primary assumption of risk;

ISSUE NO. 4: Plaintiff's negligence claim fails because Plaintiff cannot establish that the NCAA caused Matthew Gee's injuries.

Plaintiff's Objections to the Declaration of William A. Molinski are OVERRULED. Plaintiff's Objections to the Declaration of Rudolph Castellani are OVERRULED. Plaintiff's Objections to the Declaration of Vernon Williams are OVERRULED. Plaintiff's Objections to the Declaration of Jeffrey S. Goodman are OVERRULED..

The motion for summary judgment is DENIED. The motion for summary adjudication is also DENIED.

Defendant NCAA attacks Plaintiff's claims on two grounds, raising the purely legal issue of whether it owes any legal duty to protect players from the effects of playing football, as well as the evidentiary issue of whether Plaintiff has any evidence that the decedent's condition was caused by playing football. As the record currently stands, it seems reasonably clear that the NCAA owes a duty to protect players. The Plaintiff's ability to prove causation in this particular case seems less clear.

The facts as described by both parties are relatively simple. The decedent, Mr. Matthew Gee, played football as a minor. He was recruited to play for the University of Southern California, as a linebacker, which he did between 1988 and 1992. He played for the (then-Los Angeles) Raiders subsequent to his college career He died in 2018, at the age of 49. His family donated Mr. Gee's brain to a research program at Boston University. In early 2020, a Dr. Thor D. Stein issued a report indicating that Mr. Gee had had "low stage" Chronic Traumatic Encephalopathy ("CTE"). (Declaration of William A. Molinski Exhibit 15).

There is presently only one piece of evidence that Mr. Gee suffered a head injury while playing at USC. His wife, Alana Gee, testified at deposition that Mr. Gee once told her about a hit he had suffered in practice during his freshman year which led the coaching staff to ask him the usual screening questions for a concussion. (Declaration of William A. Molinski Exhibit 2, p. 175:21-176:14). Mrs. Gee did not know her husband at the time this hit supposedly occurred; he reported it to her at least a year later. (Id. p. 176:21-177:12). Mrs. Gee did not know how Mr. Gee answered the screening questions, or if anyone ever determined that Mr. Gee did have a concussion. (Id. p. 177:13-180:10).

Duty

The baseline rule for duty appears in Civil Code § 1714(a), first enacted in 1872:

"Everyone is responsible, not only for the result of his or her willful acts. but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person."

As the California Supreme Court has recently explained, that rule "has its limits." Brown v. USA Taekwondo (2021) 11 Cal.5th 204, 214. Generally, duties are imposed on defendants where (a) the defendant created the risk of the harm that befell the plaintiff, (b) the defendant undertook to help the plaintiff deal with some risk, (c) a specific statute creates a duty; or (d) the defendant has a "special relationship" with *either* the plaintiff *or* the person who actually caused the harm. See Id. at 214-215.

The NCAA argues that it falls into none of those categories. Plaintiff counters that it falls into at least two: undertaking and special relationship. Plaintiff appears to be right on both counts.

Undertaking

Plaintiff mixes their argument on the issue of undertaking with their argument on the "Primary Assumption of Risk Doctrine." In a sports context, the two are essentially opposite sides of the same coin. Those engaged in a sport assume the risk of injury that the sport entails; it would be fatal to almost any sport worthy of the name if participants could sue any time they were injured. Mayes v. La Sierra University (2022) 73 Cal.App.5th 686, 697-698. On the flip side, those who own sports teams, operate sports venues, or otherwise govern the conduct of the sport have twin duties (1) not to make the sport any more dangerous than it already is, and (2) to reduce identifiable risks if they can do so "*without also altering the nature of the activity.*" Id. at 698-699 (emphasis in original).

It is undisputed that the NCAA is the rule-making body for college football. Plaintiff, with some evidentiary support, argues that the NCAA was founded as an injury-prevention society after a particularly bad college football season in 1905. Whatever the ultimate truth of that assertion, the NCAA has clearly viewed itself as the responsible body for the conduct of nearly all college sports, football included. It is certainly capable of adopting rules to govern both the play on the field and the handling of injuries off the field.

Blows to the head are an obvious risk of the game of football. That risk cannot be eliminated without altering the nature of the game. Plaintiff suggests some ways that the risk could be reduced, but there is no realistic way to change the on-field play enough to wipe out that sort of contact. It is much more reasonable to expect alterations to the rules about how players are evaluated and handled on the sidelines. The NCAA has made some such alterations in more recent years. If it knew enough to have made alterations earlier (an issue discussed in detail below), it certainly had a duty to do so.

Special Relationship

"A special relationship between the defendant and the victim is one that "gives the victim a right to expect" protection from the defendant, while a special relationship between the

defendant and the dangerous third party is one that "entails an ability to control [the third party's] conduct." (Regents, *supra*, 4 Cal.5th at p. 619.) Relationships between parents and children, colleges and students, employers and employees, common carriers and passengers, and innkeepers and guests, are all examples of special relationships that give rise to an affirmative duty to protect." Brown, *supra*, 11 Cal.5th 216.

The list of special relationships given in Brown is not exclusive. A special relationship may exist where (1) one party is dependent on another to some degree, (2) the dependent party is a member of a definable community, and (3) the dependent party provides a benefit to the other party. Regents of University of California v. Superior Court (2018) 4 Cal.5th 607, 621; Doe v. Roman Catholic Archbishop of Los Angeles (2021) 70 Cal.App.5th 657, 670. Those elements are satisfied here. Collegiate athletes are dependent on the NCAA because they can only compete under its auspices and by complying with its rules. It is the governing body for college sports. Collegiate athletes are also a definable community, and they do provide a benefit to the NCAA, which collects revenue from the games in which they appear.

The NCAA's attempt to compare this case to the Brown case overlooks the fact that that case involved allegations of sexual abuse. The primary issue in that case was the defendant's relationship with the *perpetrator*. As explained in Brown (quoting Regents), that inquiry focuses on the defendant's ability to control the perpetrator. Here, there is no specific "perpetrator." The inquiry in this case focuses on the defendant's relationship with the *injured party* – looking specifically at whether they have a right to expect protection from the defendant. In cases like this one, the primary issue is the ability to enact protocols and rules that minimize potential injuries to all the athletes in a given sport. The NCAA is obviously best positioned for that.

Rowland Factors

As Defendant NCAA points out, even where a special relationship exists, the famed "Rowland factors" may create an exception to a defendant's duty. The Rowland factors are as follows: (1) foreseeability of harm, (2) degree of certainty of injury, (3) closeness of the connection between the defendant's conduct and the injury suffered, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) the burden and consequences of imposing a duty, and (7) the insurability of the risk. Rowland v. Christian (1968) 69 Cal.2d 108, 113.

The factors must be evaluated at a "broad level of generality," not on case-specific facts. Regents, *supra*, 4 Cal.5th at 628-629. Whether a specific defendant should have foreseen harm from a specific perpetrator in any given case "would be relevant to whether plaintiff had established proximate cause," not to the existence of a duty. Brown, *supra*, 11 Cal.5th at 231 (Cuellar, J., concurring) (citing Cabral v. Ralphs Grocery Co. (2011) 51 Cal.4th 764, 772-773). Thus, the question is not whether Defendant NCAA should have foreseen that head trauma might cause Matthew Gee to contract CTE – it is whether any governing body could have foreseen that head trauma might cause CTE (or some similar ailment) in any football player.

Physicians began tracking CTE in the 1940s. (Plaintiff's Additional Facts ["PAF"] Nos. 23-24). Even before that specific name was applied, physicians had been tracking something

with similar symptoms in sports like football and boxing. (Id.). As early as 1933, the NCAA developed a concussion protocol to be used on the sidelines at football games. (PAF No. 30). That protocol never became part of the rules – it existed merely as a suggestion until it was actually *removed* from the medical handbook in 1987. (PAF Nos. 30-31).

This evidence is drawn from Plaintiff's papers. Defendant NCAA cites to no evidence on the topic of its own knowledge, even as it asserts a lack thereof. (Memorandum p. 10:17-26). Based on the evidence Plaintiff has presented, the risk of head trauma was foreseeable. Changing game rules or making the concussion protocol mandatory rather than a suggestion would impose a minimal burden, and potentially prevent significant harm. At this time and on this record, therefore, the Rowland factors do not counsel the creation of an exception to the NCAA's duty.

Causation

Even if the NCAA owed Mr. Gee a duty to change playing rules and require concussion protocols, Plaintiff still has to prove that the absence of these things caused Mr. Gee's death. Ordinarily, causation is a matter of fact for the jury to determine. This court cannot grant summary judgment unless it would be impossible for any reasonable jury to find that the NCAA caused Mr. Gee's death.

As matters currently stand, the Plaintiff has evidence that would allow a jury to forge every causal link but one. Plaintiff has experts who will testify either that (a) Mr. Gee's death was actually caused by CTE or (b) that the dangerous behaviors which led to his death were caused by CTE.[1] Plaintiff has experts who will testify that CTE is caused by repeated blows to the head. But Plaintiff is missing the evidence which would show that Mr. Gee's CTE was specifically caused by football.

Essentially Plaintiff's argument is as follows: "Mr. Gee played football at USC. Mr. Gee had CTE. CTE is caused by hitting your head. We know Mr. Gee said he got hit hard at least once, and you cannot play football without hitting your head repeatedly. Therefore, Mr. Gee's CTE came from playing football at USC." This argument ignores three things: (1) no human person can *live* without hitting their head, (2) there are many former football players who do not have CTE; and (3) Mr. Gee played significant amounts of football both before and after his time at USC.

The human body is a complex organism, and causation can never be assigned with total certainty. Nor does the law require such certainty. But there does have to be something which raises one possible cause above another. A jury cannot simply look at a menu of options and pick the one it likes. See Jones v. Ortho Pharmaceutical Corp. (1985) 163 Cal.App.3d 396, 402-403.

As one federal court in this jurisdiction recently held, when faced with a similar case in which some of the same experts gave testimony: "there is not a sufficient evidentiary basis that Pop Warner's alleged negligence in connection with Pop Warner Football, to the exclusion of high school football, other experiences, social or biological factors, was a substantial factor in Paul Bright, Jr.'s motorcycle accident and Tyler Cornell's suicide. Plaintiffs essentially argue that

[1] The NCAA has opposing experts, but the court cannot resolve such a duel on summary judgment.

any child that plays Pop Warner football, simply by virtue of participating, without any documentation of head trauma, if found with CTE post-mortem, has a viable cause of action based on any occurrence as a result of recklessness or mood behaviors in that person's life. The Court does not agree that this satisfies the factual causation standard." Archie v. Pop Warner Little Scholars, Inc. (C.D. Cal. 2019) 2019 WL 8230854 at *12 (affirmed by Archie v. Pop Warner Little Scholars, Inc. (9th Cir. 2021) 2021 WL 4130082).

It is not enough for Plaintiff to say that 'CTE is caused by blows to the head, collegiate football is one possible source of blows to the head, therefore collegiate football caused Mr. Gee's CTE.' That is nothing more than a guess. The jury has no real way of telling whether collegiate football was the cause, or whether it was a particularly nasty fall, or something else entirely.

However, if Mr. Gee had suffered some specific, identifiable injury while playing collegiate football, there would be something to lift collegiate football above the other possibilities. Then the jury would have some rational basis for a finding of causation here. And there is some indication that Mr. Gee may have suffered a recorded head injury in his freshman year at USC. The testimony given by Mrs. Gee (cited above) indicates that there may have been medical records and that Mr. Gee may have been held out of practice for several days.

By itself, Mrs. Gee's testimony is not proof of an injury or concussion. It is only proof that at one point the medical staff at USC asked Mr. Gee some questions. But her testimony suggests that there may be more evidence to obtain about that incident. And on summary judgment, it is the NCAA's burden to prove that Plaintiff could never get sufficient evidence to prove their case. See Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850-851, 854. So long as open questions remain about the incident to which Mrs. Gee testified, the NCAA cannot meet its burden. Plaintiff may yet find evidence that would support a causation finding by a rational jury.

Conclusion

In this record, Plaintiff has produced the bare minimum they need to proceed with the case. Any less and Defense would prevail. In federal court, where the moving party merely has to show that the opposition *currently* lacks the evidence to prove their case, the Defense might well prevail. But this is not federal court. And clearing the bar by a whisker is still clearing the bar.

The real strength of the Defense motion, at this stage of the proceedings, is not in their duty analysis. The NCAA owes a duty to the athletes for whom it makes the rules, whether that duty is established by reference to an undertaking in a sports context or a special relationship. But Plaintiff's ability to establish causation is very much in question. To avoid a non-suit at trial, Plaintiff will have to find some evidence of a specific, identifiable head injury suffered by Mr. Gee while playing or practicing for USC. In the absence of such evidence, Plaintiff would simply be asking a jury to look at Mr. Gee's death, look at the several possible causes of his CTE, and pick one. That is not a trial; it is a game of darts.

Because there is still a possibility that Plaintiff will be able to find some evidence of a specific, identifiable head injury suffered by Mr. Gee while playing at USC, the motion for summary judgment is DENIED. The motion for summary adjudication is also DENIED.

Dated: 8/4/22

Terry A. Green
Judge of the Superior Court

08/09/2022