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## For Whom the SOL Tolls: Examining the Role of the Discovery Rule and Statutes of Limitations in NCAA Concussion Litigation

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## For Whom the SOL Tolls: Examining the Role of the Discovery Rule and Statutes of Limitations in NCAA Concussion Litigation

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## FOR WHOM THE SOL TOLLS: EXAMINING THE ROLE OF THE DISCOVERY RULE AND STATUTES OF LIMITATIONS IN NCAA CONCUSSION LITIGATION

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**ABSTRACT.** In April of 2016, the National Football League (NFL) and retired NFL football players reached a settlement agreement stemming from a class action lawsuit over medical conditions associated with game-related head trauma. While the NFL did not admit wrongdoing, it did agree to monetary settlements (for qualified applicants) provided that the player release the NFL of all concussion-related claims. This article aims to investigate similar, and potential future, litigation brought by former collegiate football players against the National Collegiate Athletic Association (NCAA) with a focus on examining the role of the discovery rule and statutes of limitations. While the article primarily focuses on the application of the discovery rule and statutes of limitations as it relates to concussion litigation, it also aims to provide insights to future application to other latent medical issues, namely post-pandemic Coronavirus (Covid-19) claims.

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## INTRODUCTION

The actual (and perceived) impact of concussions, which can lead to traumatic brain injury (TBI) and Chronic Traumatic Encephalopathy (CTE), among athletes in contact sports has become a focal concern over the past decade for many athletes, sport organizations, and sport governing bodies.<sup>1</sup> As a result, several policy and rule changes within a variety of sport organizations have occurred.<sup>2</sup> The National Football League (NFL), National Hockey League (NHL), National Collegiate Athletic Association (NCAA), and World Wrestling Entertainment (WWE), have seen an increase in litigation with the legal emphasis based on negligence liability.<sup>3</sup>

Typically, in personal injury cases, the statute of limitations begins immediately when the incident or injury occurs, which would be a bar to recovery for many of the claims that have been filed.<sup>4</sup> In contact sports, however, damage to the brain, which causes dementia, CTE, and other concussion-related injuries and diseases, often develops slowly.<sup>5</sup> The question being raised is whether the discovery rule should be applied to the statute of limitations for plaintiffs seeking to recover damages decades after their playing days due to the slow-developing nature of CTE and other neurodegenerative issues. One policy reason behind statutes of limitations is to prevent “stale” claims in which evidence may be lost and the

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<sup>1</sup> *Brain Injury Research*, BRAIN INJURY RESEARCH INSTITUTE, <http://www.protectthebrain.org/Brain-Injury-Research.aspx> (last visited July 17, 2022) [<https://perma.cc/8LUM-N2V9>]; Bryant Lee, *Knocked Unconscious: College Football Scholarships and Traumatic Brain Injury*, 85 GEO. WASH. L. REV., 613, 617 (2017).

<sup>2</sup> *Concussion Prevention Strategies*, PHYSIOPEDIA, [https://www.physio-pedia.com/Concussion\\_Prevention\\_Strategies](https://www.physio-pedia.com/Concussion_Prevention_Strategies) (last visited Aug. 4, 2022) [<https://perma.cc/3S25-K543>].

<sup>3</sup> Official NFL Concussion Website, <https://www.nflconcussionsettlement.com> (last visited Apr. 24, 2022) [<https://perma.cc/HHA3-LMNJ>]; Daniel Kaplan, *NHL Paid \$70.6 Million in Legal Fees for Concussion Settlement that Paid Players \$18.49 Million*, THE ATHLETIC (Apr. 29, 2021), <https://theathletic.com/2549607/2021/04/29/nhl-paid-70-6-million-in-legal-fees-for-concussion-settlement-that-paid-players-18-49-million> [<https://perma.cc/8DWQ-WPEF>]; Todd Hatcher, *NCAA Faces Proposed Class Action over Student Athlete Concussions*, EXPERT INSTITUTE, <https://www.expertinstitute.com/resources/insights/ncaa-faces-proposed-class-action-lawsuit-over-student-athlete-concussions> (last visited July 31, 2022) [<https://perma.cc/2ZSX-2H62>]; Associated Press, *Supreme Court Declines to Hear Wrestlers’ Brain Damage Case Against WWE* (Apr. 26, 2021), [https://www.espn.com/wwe/story/\\_/id/31338515/supreme-court-declines-hear-wrestlers-brain-damage-cases-wwe](https://www.espn.com/wwe/story/_/id/31338515/supreme-court-declines-hear-wrestlers-brain-damage-cases-wwe) [<https://perma.cc/UHS5-UP57>].

<sup>4</sup> David Goduen, *What’s the Deadline to File a Personal Injury Lawsuit*, ALL LAW, <https://www.alllaw.com/articles/nolo/personal-injury/deadlines-file-lawsuit.html> (last visited Apr. 24, 2022) [<https://perma.cc/P62J-6A5X>].

<sup>5</sup> *What is CTE*, CONCUSSION LEGACY FOUNDATION, <https://concussionfoundation.org/CTE-resources/what-is-CTE> (last visited April 24, 2022) [<https://perma.cc/5TGV-VES4>].

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memories of witnesses and involved parties may fade.<sup>6</sup> The discovery rule is an exception to the regular statute of limitations that essentially delays the running of the statute of limitations until the plaintiff could or should “discover” that they had an actionable claim.<sup>7</sup> This rule is used in situations where the court believes it would be unjust to bar a cause of action from a plaintiff who could not have known that they had sustained injuries.<sup>8</sup> Some argue that, because of the delayed effects of CTE, the discovery rule should be applied in CTE-related litigation.

*Schmitz v NCAA* examined the issue of CTE-related lawsuits and the application of the statute of limitations.<sup>9</sup> More specifically at issue is whether CTE is just a latent effect of immediately manifested injuries (i.e., concussions), or whether CTE is an entirely separate and new injury.<sup>10</sup> This was the first time this issue, as it relates to sports-related concussions, was before a state’s highest court. In a similar case, the federal district court for the Northern District of Illinois denied the NCAA’s motion to dismiss a concussion case centered around two former Purdue University football players that the defendants believed to be time-barred.<sup>11</sup> Akin to the *Schmitz case*, the court considered arguments from both sides regarding whether the plaintiff’s injuries were the result of a “sudden traumatic event” which would mean the statute of limitations would begin running at the time of the incident, or the plaintiff’s injuries were the result of a “non-traumatic event” thus delaying the statute of limitations until the resulting injury was known.<sup>12</sup> Ultimately, the court decided that the plaintiff’s “allegations, when taken as a whole, paint a picture that falls more within the ‘nontraumatic event’ category of cases.”<sup>13</sup>

This article will give background on traumatic brain injuries in football, the purpose of statutes of limitations, and the evolution of the discovery rule. It will then analyze the application of the discovery rule and the role of the statute of limitations in the current landscape of NCAA concussion litigation and will provide some insight as to the potential future applications of these statute of limitations battles in other latent injuries.

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<sup>6</sup> Greg Chilina, *What is a Statute of Limitation and What is the Purpose of It?*, CHILINA LAW FIRM (July 16, 2017), <https://www.chilinalaw.com/2017/07/statute-limitations-purpose> [<https://perma.cc/VM5Z-BPU9>].

<sup>7</sup> David Crump, *Statutes of Limitations: The Underlying Policies*, 54 U. LOUISVILLE L. REV. 437, 445 (2016).

<sup>8</sup> *Id.* at 447.

<sup>9</sup> 122 N.E.3d 80 (Ohio 2018).

<sup>10</sup> *See id.* at 84.

<sup>11</sup> *Rose v. NCAA*, 346 F. Supp. 3d 1212, 1229 (N.D. Ill. 2018).

<sup>12</sup> *See id.* at 1222-33.

<sup>13</sup> *Id.* at 1222.

## I. CHRONIC TRAUMATIC ENCEPHALOPATHY (CTE) AND COLLEGIATE FOOTBALL

In the United States, there are upwards of 2.5 million TBIs each year.<sup>14</sup> Further, there are thousands of cases of TBIs stemming from participation in football each year with pre-collegiate football accounting for 90,000 concussions annually.<sup>15</sup> TBIs vary in type and include concussions, CTE, early-onset Alzheimer's, and dementia among others.<sup>16</sup>

CTE is a progressive neurodegenerative tauopathy condition associated with repeated impact to the head and/or repeated episodes of concussions.<sup>17</sup> CTE is a latent pathological disease that can only be diagnosed after death through an autopsy, though medical research is currently ongoing in an attempt to diagnose CTE during one's life.<sup>18</sup> While CTE is currently not diagnosed until post-mortem, many who are suffering from premortem CTE have been found to exhibit cognitive and neuropsychiatric impairment.<sup>19</sup> These impairments could include but are not limited to, chronic depression, suicide attempts, insomnia, paranoia, and impaired memory suffered from depression.<sup>20</sup>

It should also be noted that while CTE is diagnosed postmortem, research shows that there is a "significant correlation between generally decreased cognitive function and participation in contact sports."<sup>21</sup> In a sport like football, where there are frequent collisions and blunt force trauma to the head region, the risk of suffering a concussion is much higher than in other sports and activities.<sup>22</sup> The American Association of Neurological Surgeons (AANS) defines a concussion as "... a

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<sup>14</sup> *Frequently Asked Questions*, BRAIN TRAUMA FOUNDATION, <https://www.braintrauma.org/faq> (last visited Apr. 24, 2022) [<https://perma.cc/LQH4-VMK7>].

<sup>15</sup> Kevin Grier & Tyler Cowen, *What Would the End of Football Look Like?*, GRANTLAND (Feb. 13, 2012), <https://grantland.com/features/cte-concussion-crisis-economic-look-end-football> [<https://perma.cc/XA4B-HSMK>].

<sup>16</sup> Lee, *supra* note 1, at 617.

<sup>17</sup> Ann C. McKee et al., *The Spectrum of Disease in Chronic Traumatic Encephalopathy*, 136 BRAIN 43, 59 (2013).

<sup>18</sup> *See generally* Jesse Mez et al., *Assessing Clinicopathological Correlation in Chronic Traumatic Encephalopathy: Rationale and Methods for the UNITE Study*, 7 ALZHEIMER'S RESEARCH & THERAPY 62 (2015).

<sup>19</sup> Bennet I. Omalu et al., *Chronic Traumatic Encephalopathy (CTE) in a National Football League Player Case Report and Emerging Medicolegal Practice Questions*, 6 J. FORENSIC NURSING 40, 44 (2010).

<sup>20</sup> *See generally id.*

<sup>21</sup> Cailyn M. Reilly, *The NCAA Needs Smelling Salts When It Comes to Concussion Regulation in Major College Athletics*, 19 UCLA ENT. L. REV. 245, 257 (2012).

<sup>22</sup> Christine M. Baugh et al., *Frequency of Head-Impact-Related Outcomes by Position in NCAA Division I Collegiate Football Players*, 32 J. NEUROTRAUMA 314, 314 (2015).

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clinical syndrome characterized by immediate and transient alteration in brain function, including alteration of mental status and level of consciousness, resulting from mechanical force or trauma.”<sup>23</sup> CTE is caused by “repetitive brain trauma, including symptomatic concussions, as well as asymptomatic sub-concussive hits to the head.”<sup>24</sup> Hence, it is reasonable to surmise that concussions serve as an antecedent condition to potential CTE within participants of football.

In 2000, Dr. Julian Bailes conducted a study on former professional football players related to injuries sustained playing the sport with a particular emphasis on head injuries.<sup>25</sup> The study showed that 60% of the participants had suffered at least one concussion with many experiencing neurological issues.<sup>26</sup> A subsequent study by Bailes found a link between concussions and long-term neurological issues.<sup>27</sup> Finally, a third Bailes study of football players found a causative link between concussions and long-term brain damage.<sup>28</sup>

As more research into concussions and CTE has been published, youth (or pee-wee) football, NFL, and NCAA have made slight changes to address the growing concerns related to the violent nature of the sport to better protect their participants.<sup>29</sup> That said, these changes have not yet yielded significant progress toward the minimization of concussions (and by proxy CTE). The first major legislation to address concussions was the Lystedt Law,<sup>30</sup> which dictates that a youth

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<sup>23</sup> Khoi D. Than, *A Neurosurgeon Explains: Concussion*, AMERICAN ASSOCIATION OF NEUROLOGICAL SURGEONS, <https://www.aans.org/en/Patients/Neurosurgical-Conditions-and-Treatments/Concussion> (last visited July 24, 2022) [<https://perma.cc/5EHX-BZJ6>].

<sup>24</sup> *Frequently Asked Questions About CTE*, BOSTON UNIVERSITY CTE CENTER, <https://www.bu.edu/cte/about/frequently-asked-questions> (last visited July 24, 2022) [<https://perma.cc/FM37-J8KH>].

<sup>25</sup> K. Adam Pretty, *Dropping the Ball: The Failure of the NCAA to Address Concussions in College Football*, 89 NOTRE DAME L. REV. 2359, 2364 (2014).

<sup>26</sup> *Id.*

<sup>27</sup> Kevin M. Guskiewicz et al., *Association Between Recurrent Concussion and Late-Life Cognitive Impairment in Retired Professional Football Players*, 57 NEUROSURGERY 719, 721 (2005).

<sup>28</sup> *Id.*

<sup>29</sup> Jacqueline Howard, *Kickoff Rule Tied to Fewer Concussions in Ivy League Football, New Research Says*, CNN (Oct. 2, 2018, 4:02 AM), <https://www.cnn.com/2018/10/02/health/kickoff-concussions-ivy-league-study/index.html> [<https://perma.cc/77JX-MNJB>]; *Health and Safety Rules Changes, NFL Football Operations*, <https://operations.nfl.com/the-rules/rules-changes/health-safety-rules-changes> (last visited July 24, 2022) [<https://perma.cc/3CVL-EBDQ>]; Ken Belson, *Not Safe for Children? Football's Leaders Make Drastic Changes to Youth Game*, THE NEW YORK TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/sports/youth-football-wants-to-save-the-game-by-shrinking-it.html> [<https://perma.cc/9SQW-J7KS>].

<sup>30</sup> WASH. REV. CODE § 28A.600.190 (2009)



player suspected of sustaining a concussion must be removed from competition,<sup>31</sup> and may not return to competition until they are evaluated and cleared by a licensed healthcare provider.<sup>32</sup> Similar youth sport concussion legislation has now been adopted by all fifty states with additional elements of continued education for youth sport participants on the dangers of concussions and head injuries.<sup>33</sup>

The NCAA was founded in 1906 to keep athletes safe<sup>34</sup> in response to the alarming number of deaths that occurred in football.<sup>35</sup> The NCAA was formed to “protect young people from the dangerous and exploitive athletics practices of the time.”<sup>36</sup> However, the NCAA leaves it to each member institution to develop and implement their own standards of player safety (i.e., a concussion management plan), while the NCAA merely provides guidelines and recommendations.<sup>37</sup> These safety standards and the evaluation of the athletes typically fall on an institution’s athletic training staff, which is beholden to the coaches, athletic department, and university at large.<sup>38</sup> Further, the societal pressures and inner-team dynamics related to sport participation coupled with staff who are encouraged to push players beyond their “physical limits,” can lead to repeated TBI (or secondary concussions) in a quick return to play.<sup>39</sup> Hence, it is difficult for NCAA athletes to seek independent doctors to help diagnose and provide maintenance for concussive issues.

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Jeneita M. Bell, *The Clinical Implications of Youth Sports Concussion Laws: A Review*, 13 AM. J. LIFESTYLE MED. 172, 172 (2017).

<sup>34</sup> *Well-Being*, NCAA.ORG, <https://www.ncaa.org/sports/2021/2/10/health-and-safety.aspx#well-being> [<https://perma.cc/8T58-N4A4>].

<sup>35</sup> Bob Green, *The President Who Saved Football*, CNN.COM (Feb. 5, 2012 at 8:25 AM), <https://www.cnn.com/2012/02/05/opinion/greene-super-bowl> (pointing out that 18 players died in 1905) [<https://perma.cc/F48P-LCWA>].

<sup>36</sup> Dan Treadway, *Why Does the NCAA Exist?*, HUFFINGTON POST (Dec. 6, 2017), [https://www.huffpost.com/entry/johnny-manziel-ncaa-eligibility\\_b\\_3020985](https://www.huffpost.com/entry/johnny-manziel-ncaa-eligibility_b_3020985) [<https://perma.cc/782U-2736>].

<sup>37</sup> Pretty, *supra* note 25, at 2370-71.

<sup>38</sup> *Id.* at 2382.

<sup>39</sup> *Id.*; Jamie Robbins, PhD, *Understanding the Psychology of Injured Athletes and Returning to Play*; PODIATRY TODAY (June 2012), <https://www.hmpgloballearningnetwork.com/site/podiatry/understanding-psychology-injured-athletes-and-returning-play> [<https://perma.cc/BE6C-UYSU>].

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## **II. STATUES OF LIMITATIONS**

Statutes of limitations are, as the name suggests, passed by a state's legislative body and have the effect of barring a legal claim after a proscribed period of time.<sup>40</sup> Any claims filed after the statute of limitations runs out cannot proceed regardless of the egregiousness of the alleged tortious behavior.<sup>41</sup> Failing to file a claim before the statute of limitations runs out is, in sports terms, a forfeit.<sup>42</sup> In passing such a statute, the state's legislature attempts to balance the importance of a plaintiff receiving their day in court with the unfairness of forcing a party to defend actions that occurred long before.<sup>43</sup> The relative fairness of imposing time limitations on innocent plaintiffs is arguable,<sup>44</sup> however, every state has enacted such a statute.<sup>45</sup> The length of time a plaintiff has to bring a claim varies by state and by type of claim, but the range for personal injury cases is between two and six years.<sup>46</sup> There are several policy reasons to time-bar civil legal claims<sup>47</sup> that numerous jurisdictions articulate in numerous cases. Perhaps the California Supreme Court provided the most succinct summary of the purpose of the statute of limitations by saying:

The fundamental purpose of the statute [of limitations] is to give defendants reasonable repose, that is, to protect parties from defending stale claims. A second policy underlying the statute is to require plaintiffs to diligently pursue their claims.<sup>48</sup>

Legislators in all fifty states have determined that, at some point, potential defendants should receive peace of mind, as subjecting a party to the threat of being sued indefinitely would be unfair.<sup>49</sup> As time passes, witnesses' memories tend to fade while records and other evidence may be lost, destroyed, or damaged.

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<sup>40</sup> *Statute of Limitations*, CORNELL LAW SCHOOL: LEGAL INFORMATION CENTER, [https://www.law.cornell.edu/wex/statute\\_of\\_limitations](https://www.law.cornell.edu/wex/statute_of_limitations) (last visited Apr. 30, 2022) [<https://perma.cc/P4RX-CRC9>].

<sup>41</sup> *Statute of Limitation on a Personal Injury Case*, ENJURIS, <https://www.enjuris.com/personal-injury-law/statute-of-limitations.html> (last visited Apr. 30, 2022) [<https://perma.cc/9QKX-4KNS>].

<sup>42</sup> *See id.*

<sup>43</sup> Christine M. Benson, *Statutes of Limitations in Tort: What Do They Limit*, 71 MARQ. L. Rev. 770, 771 (1988).

<sup>44</sup> *See generally* Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purpose of Statutes of Limitation*, 28 PAC. L.J. 453 (1997).

<sup>45</sup> *See generally* Katelyn Ashton, *50-State Survey of Statutes of Limitations and Repose in Prescription Product Liability Cases*, BUTLER SNOW (Nov. 16, 2020), <https://www.jdsupra.com/legalnews/50-state-survey-of-statutes-of-20476> [<https://perma.cc/B35J-RK5Z>].

<sup>46</sup> *Id.*

<sup>47</sup> *See generally* Ochoa & Wistrich, *supra* note 44.

<sup>48</sup> *Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 928 (Cal. 1988).

<sup>49</sup> Ochoa & Wistrich, *supra* note 44, at 460.

In most tort cases, the injury is evident immediately as is the tortious behavior that caused it. For example, in an automobile accident, the physical injuries suffered by a potential plaintiff are manifested immediately, as is the cause of those injuries (the collision of the car). In situations such as this, the statute of limitations is typically a non-issue. Plaintiffs are aware that they have been injured, and they have a proscribed period to bring any cause of action against the tortfeasor. What happens when an injury takes longer to develop? CTE, for instance, can take years if not decades to develop and can only be diagnosed posthumously.<sup>50</sup> Strict adherence to the statute of limitations would effectively deprive CTE victims of their day in court.

### III. THE DISCOVERY RULE

Rigid application of statutes of limitations is inherently unjust in cases where the injuries are latent or slow developing in nature. This problem was perhaps best articulated in a dissenting opinion out of the Second Circuit:

Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal 'axiom', that a statute of limitations does not begin to run against a cause of action before a judicial remedy is available to the plaintiff.<sup>51</sup>

To combat this injustice, most states adopted some version of a “discovery rule” either by legislative action or by judicial interpretation.<sup>52</sup> Discovery rules delay or toll the statute of limitations until the plaintiff discovers that they have suffered an injury.<sup>53</sup> Each state’s version of the discovery rule is worded slightly differently and may have practical differences in application. For example, Mississippi codified its discovery rule which states, “[i]n actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.”<sup>54</sup> Mississippi’s discovery rule is crafted so that the statute of limitations begins once an injury is discovered or should have been discovered by a plaintiff exercising reasonable diligence. Other discovery rules expand the scope to toll statute of limitations not just when the plaintiff discovers the injury, but also

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<sup>50</sup> *Chronic Traumatic Encephalopathy*, THE MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/chronic-traumatic-encephalopathy/symptoms-causes/syc-20370921> (last visited July 25, 2022) [<https://perma.cc/6CNH-BVYZ>].

<sup>51</sup> *Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J., dissenting) (footnotes omitted).

<sup>52</sup> Ashton, *supra* note 45.

<sup>53</sup> *See id.*

<sup>54</sup> MISS. CODE ANN. § 15-1-49(2) (1990).

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when they discover that the injury is the result of wrongdoing by a specific party. New Hampshire specifically codified their discovery rule to state that a cause of action must commence “within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.”<sup>55</sup>

To fully grasp the role of the discovery rule in NCAA concussion cases, it is vital to explore how it has been applied in similar instances. The body of litigation in asbestos-related litigation and the latent nature of asbestos-related diseases and illnesses make such litigation the best comparison.

#### **IV. APPLICATION OF THE DISCOVERY RULE IN ABESTOS LITIGATION**

Asbestos is a naturally occurring mineral that has been used for its fire-resistant properties for thousands of years.<sup>56</sup> It was used heavily in construction materials for decades in the United States.<sup>57</sup> Exposure to and inhalation of asbestos is now known to cause mesothelioma and asbestosis.<sup>58</sup> Mesothelioma is a type of cancer that develops in the tissue surrounding the lungs, chest cavity, and abdomen. It has the potential to damage the heart and diaphragm as well.<sup>59</sup> Asbestosis is non-cancerous and it involves scarring of the lung tissue which can make it difficult to breathe as the scar tissue develops.<sup>60</sup> Much like CTE, there is no cure for mesothelioma or asbestosis<sup>61</sup> and the average life expectancy after a mesothelioma diagnosis is between twelve and twenty-one months.<sup>62</sup> Also similar to CTE, mesothelioma takes decades to develop with some latency periods between exposure and development as high as fifty years.<sup>63</sup> It is exceptionally rare for the disease to develop in less than

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<sup>55</sup> NH REV. STAT. Ann. § 508:4, I (2018).

<sup>56</sup> *A History of Asbestos Litigation*, MESOTHELIOMA + ASBESTOS AWARENESS CENTER (July 27, 2016), <https://www.maacenter.org/blog/a-brief-history-of-asbestos-litigation> [hereinafter MAAC Staff] [<https://perma.cc/XC8C-3EMG>].

<sup>57</sup> *Id.*

<sup>58</sup> Sean Marchese, *Mesothelioma vs. Asbestosis*, ASBESTOS.COM (Feb. 10, 2022), <https://www.asbestos.com/asbestosis/mesothelioma/#:~:text=Asbestosis%20and%20mesothelioma%20are%20both,in%20the%20lungs%20and%20abdomen> [<https://perma.cc/D4MR-A3C5>].

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Karen Selby, *Mesothelioma Latency Period*, ASBESTOS.COM (Mar. 29, 2022), <https://www.asbestos.com/mesothelioma/latency-period> [<https://perma.cc/9YYN-MJDX>].

fifteen years.<sup>64</sup> Similarly, asbestosis has a typical latency period of twenty to thirty years.<sup>65</sup>

The earliest known asbestos-related lawsuit in the United States was filed in 1929 in a New Jersey federal court.<sup>66</sup> Despite evidence that employers knew of the dangers of asbestos as early as the 1920s, asbestos continued to be widely used in U.S. industry.<sup>67</sup> By the 1960s, the correlations between asbestos exposure and lung diseases became more widely known, which caused the number of asbestos-related legal claims to skyrocket in the late 1960s and early 1970s.<sup>68</sup> In this time period, discovery rules were not well-developed as latent disease and injuries were a relatively new phenomena.<sup>69</sup> There were four main approaches that courts used to handle the somewhat novel issue of latent diseases: the first breath rule, the last breath rule, the time of medical injury rule, and the discovery rule.<sup>70</sup>

### **A. The “First Breath” Rule**

The prevailing theory behind the first breath rule is that a cause of action accrues at the time of the wrongful act.<sup>71</sup> This theory, in effect, barred the vast majority of people suffering from asbestos-related illnesses in most jurisdictions from bringing a legal claim as any claim would accrue, and therefore the statute of limitations period would begin, upon an individual’s first exposure to asbestos. Because the typical latency period for mesothelioma, asbestosis, and CTE, for example, is longer than even the most liberal statutes of limitations periods, there would effectively be no opportunity for legal recourse for those who develop these diseases under application of this rule.

### **B. The “Last Breath” Rule**

The last breath rule is/was only slightly more plaintiff-friendly than the first breath rule. Under this rule, every new exposure to asbestos or other harmful

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<sup>64</sup> *Id.*

<sup>65</sup> Karen Selby, *How Does Asbestosis Develop?*, ASBESTOS.COM (Mar. 29, 2022), <https://www.asbestos.com/asbestosis/causes/#:~:text=Latency%20Period%20of%20Asbestosis&text=In%20most%20cases%2C%20asbestosis%20symptoms,duration%20and%20intensity%20of%20exposure> [https://perma.cc/W4XF-AKXU].

<sup>66</sup> MAAC Staff, *supra* note 56.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See Susan D. Glimcher, *Statutes of Limitations and the Discovery Rule in Latent Injury Claims: An Exception or the Law*, 43 U. PITT. L. REV. 501 (1982).

<sup>70</sup> *Id.* at 505-515.

<sup>71</sup> *Id.* at 506.

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substances gave rise to a new cause of action.<sup>72</sup> This alleviates some of the harshness of the first breath rule but still leaves most would-be plaintiffs with no recourse.<sup>73</sup>

**C. The “Time of Medical Injury Rule”**

The “time of medical injury rule” posits that an injury occurs, and therefore a claim accrues, when there is medical evidence of an injury.<sup>74</sup> This approach determines the date of injury on a case-by-case basis. While facially this is fairer to plaintiffs than either the first breath or last breath rule, it is not without its problems as illustrated in *Locke v. Johns-Manville Corp.*<sup>75</sup>

It is worth noting that Johns-Manville was the target of numerous asbestos-related lawsuits, and as result, filed for bankruptcy in 1982.<sup>76</sup> The plaintiff, Douglas Locke, was exposed to asbestos from 1948 to 1972<sup>77</sup> and filed suit in July of 1978.<sup>78</sup> When Locke filed the suit, Virginia’s relevant statute of limitations was two years, which prompted the defendants to file motions for summary judgment arguing that the claim was time-barred.<sup>79</sup> Locke began experiencing symptoms in November of 1977 and sought medical attention, but he had no medical evidence of mesothelioma or any other lung disease.<sup>80</sup> The first evidence of abnormalities in Locke’s lungs appeared in May of 1978, and he was diagnosed with mesothelioma in June of the same year,<sup>81</sup> one month before his claim was filed. Ultimately, the court declined to adopt a last breath style rule. Locke’s statute of limitations would have run out in 1974, and the court ruled that his claim was not time-barred. However, they failed to fully define what constitutes the date of the medical injury. This leaves open the question of whether the presence of any medical injury caused by tortious actions, no matter how slight, begins the accrual period for the statute of limitations even for more severe and slower developing injuries that result from the same conduct. In Locke’s case, this point was moot, as the time between the development of mild symptoms and the diagnosis of mesothelioma was roughly seven months. The period between the development of mild symptoms and the filing of the suit was roughly nine months, both within the applicable statute of

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<sup>72</sup> Glimcher, *supra* note 69, at 507.

<sup>73</sup> *Id.* at 509.

<sup>74</sup> *Id.*

<sup>75</sup> 275 S.E.2d 900 (Va. 1981).

<sup>76</sup> MAAC Staff, *supra* note 56.

<sup>77</sup> Locke, 275 S.E.2d at 902.

<sup>78</sup> *Id.* at 901.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 902.

limitations of two years. To put this question into context of CTE, would the diagnosis of a concussion initiate the statute of limitations for a CTE claim?<sup>82</sup>

#### **D. The Discovery Rule**

A discovery rule, which tolls the statute of limitations until the plaintiff discovers, or with reasonable diligence should discover, that they are injured, and that the injury was caused by tortious conduct, may effectively operate identically to a “time of medical injury” rule in many cases but it does so without the unnecessary ambiguity. It removes the problems involved in determining a date of medical injury by substituting the date that the injury should have been discovered.<sup>83</sup>

#### **E. Results of Asbestos Litigation**

To provide some historical perspective, asbestos litigation remains active in the United States. The aforementioned Johns-Manville Corporation set up a trust to pay future asbestos-related claims as part of their bankruptcy proceedings in 1988.<sup>84</sup> That trust has paid out hundreds of millions of dollars of claims alone and continues to pay claims.<sup>85</sup> There are roughly sixty remaining asbestos trusts with \$30 billion combined for future claimants, and it is estimated that over \$20 billion has been paid out of these trusts to asbestos claimants thus far.<sup>86</sup> Litigation was expected to have peaked in 2020,<sup>87</sup> but will likely continue for several years if not decades.

By contrast, concussion and CTE litigation are still in their infancy, and the cases currently pending will largely determine the future legal status of all former football players who suffer from CTE or other traumatic brain injuries. While the National Football League was able to arbitrate the class-action lawsuit and come to a settlement agreement, the NCAA does not have the benefit of mandatory arbitration that the NFL had with their former players, nor do their member conferences or institutions.<sup>88</sup>

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<sup>82</sup> The NCAA makes a similar argument in *Schmitz* discussed *infra* note 112.

<sup>83</sup> Glimcher, *supra* note 69, at 516.

<sup>84</sup> MAAC Staff, *supra* note 56.

<sup>85</sup> *Id.*

<sup>86</sup> Joe Lahav. *Mesothelioma and Asbestos Trust Funds*, THE MESOTHELIOMA CENTER (Apr. 15, 2022). <https://www.asbestos.com/mesothelioma-lawyer/compensation/trust-fund/#:~:text=There%20are%20approximately%2060%20active,paid%20between%202006%20and%202012> [https://perma.cc/UP74-RSW4].

<sup>87</sup> MAAC Staff, *supra* note 56.

<sup>88</sup> Michael McCann, *Analyzing Ploetz v. NCAA, the First Legal Battle Over CTE to Reach Trial*, SPORTS ILLUSTRATED (Apr. 26, 2018), <https://www.si.com/college/2018/04/26/greg-ploetz-ncaa-cte-concussion-lawsuit> [https://perma.cc/DT28-UBDK].

## V. THE STATUTE OF LIMITATIONS AND THE DISCOVERY RULE IN NCAA CONCUSSION LITIGATION

The factual allegations and legal claims in NCAA concussion and CTE lawsuits are largely uniform. They commonly include allegations that the NCAA, and its member conferences or institutions, acted unreasonably in their failure to protect student athletes from the dangers of repetitive head trauma that occurs in the course of normal participation in football along with claims that the NCAA knew, or should have known, of these dangers.<sup>89</sup> For this reason, NCAA concussion cases were consolidated to the Northern District of Illinois in front of Judge John Z. Lee as part of multi-district litigation (MDL) for pre-trial proceedings.<sup>90</sup> The MDL docket currently has 570 member cases.<sup>91</sup>

What strength these legal claims have is not yet determined. To date, there has not been a lawsuit regarding CTE and football with a full trial on the merits of a case.<sup>92</sup> Much like in asbestos litigation, defeating a 12(b)(6) motion to dismiss a case because it is time-barred is an important first step for plaintiffs seeking to recover damages for brain injuries resulting from participation in NCAA football, but it is far from a final victory. To recover damages, these plaintiffs will need to prove each element of their claim by a preponderance of the evidence. Defeating the statute of limitations defense of the NCAA gives plaintiffs the opportunity for their cases and arguments to be heard, and increases the chances of receiving an agreeable settlement offer.

### A. *Rose v. NCAA*<sup>93</sup>

The plaintiffs, in this case, played football for Purdue University from 1996-2001.<sup>94</sup> In addition to the NCAA, the plaintiffs named the Big Ten Conference as a defendant, of which Purdue University was and continues to be a member. As part of their claims, the plaintiffs allege that the defendants were in “a superior position to know of and to mitigate the risks of concussions and traumatic brain injuries.”<sup>95</sup> The plaintiffs further alleged that the defendants had constructive knowledge of the

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<sup>89</sup> See *id.*; McCann, *supra* note 88.

<sup>90</sup> *In re National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation*, MDL No. 2492 (N.D. Ill. 2019)

<sup>91</sup> See *id.* (showing 570 member cases), <https://www.ilnd.uscourts.gov/mdl-details.aspx?yiHo4wGm56ytS3xx5DcbTw==> [<https://perma.cc/Q3K5-8KXW>].

<sup>92</sup> See McCann *supra* note 88 (discussing *Ploetz v. NCAA* as the first football CTE case to make it to trial); See also Bauer-Wolf, *infra* note 131 (discussing settlement of *Ploetz v. NCAA* just 3 days into trial).

<sup>93</sup> 346 F. Supp. 3d 1212 (N.D. Ill. 2018).

<sup>94</sup> *Id.* at 1217.

<sup>95</sup> *Id.* at 1218.



dangers of concussions as early as 1952 by citing medical journals and research that were available at that time.<sup>96</sup> In total, the plaintiffs brought six legal claims; negligence, fraudulent concealment, breach of express contract, breach of implied contract, breach of express contract as third-party beneficiaries, and unjust enrichment.<sup>97</sup>

The two named plaintiffs, Michael Rose and Timothy Stratton, played football for Purdue from 1996-1999 and 1998-2001, respectively. They brought this action in 2017.<sup>98</sup> Because of the sixteen-year gap between the plaintiff's final participation in college football and the commencement of the lawsuit, the defendants filed a 12(b)(6) motion to dismiss the claims as time-barred under the Illinois statute of limitations, which provides that plaintiffs have two years to file their claims in personal injury matters.<sup>99</sup> Illinois courts also recognize a plaintiff-friendly discovery rule which states that the statute of limitations does not begin to run until the wronged person knows or reasonably should know of his injury and also know or reasonably should know that it was wrongfully caused.<sup>100</sup> Because Rose and Stratton are still alive, they do not have a CTE diagnosis but allege they suffer from neurodegenerative diseases that cause memory loss and depression, among other symptoms.<sup>101</sup>

As part of the analysis of whether and how the discovery rule should apply in this case, the court considered case law to determine when a plaintiff "reasonably should have discovered their injury" by distinguishing between injuries that are caused by a sudden, traumatic event and those that have a "late or insidious onset."<sup>102</sup> In the case of sudden, traumatic events, an injury, and therefore a cause of action, accrues immediately, and any conditions of that same injury that may develop later should be factored into the present legal claim. The defendants argue that the injuries currently being suffered by the plaintiffs are latent effects of injuries that were present while they were playing each and every time they experienced a concussive or sub-concussive hit,<sup>103</sup> essentially asking the court to adopt a theory similar to that of the "last breath" rule. The court declined this argument, emphasizing that even if the plaintiffs were aware of an injury each time they were hit, they were not aware that the injury may have been wrongfully caused.<sup>104</sup>

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 1216-17.

<sup>98</sup> *Id.* at 1217.

<sup>99</sup> 735 ILL. COMP. STAT. ANN. § 5/13-202 (2016).

<sup>100</sup> See *Halperin v. Halperin*, 750 F.3d 668, 671 (7th Cir. 2014).

<sup>101</sup> *Rose*, 346 F. Supp. 3d at 1217.

<sup>102</sup> *Hollander v. Brown*, 457 F.3d 688, 692 (7th Cir. 2006).

<sup>103</sup> *Rose*, 346 F. Supp. 3d at 1222.

<sup>104</sup> See *id.* at 1223. (noting the emphasis on the "and" in the *Golla* quote).

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The defendants also made arguments that the plaintiffs should have been on notice of their injury and that it may have been wrongfully caused at different points in the interim between the end of their playing careers and the filing of their claims.<sup>105</sup> They cited multiple sources as evidence that put the plaintiffs on constructive notice that their cause of action had accrued, including well-publicized studies on concussions between 2002 and 2007, the fact that the NCAA amended its concussion policy in 2010, and another college football player filing a concussion-based lawsuit against the NCAA in 2011.<sup>106</sup> Under this argument, the statute of limitations period would have ended in 2013 at the latest, thus time-barring the plaintiffs' claims.

The court ultimately denied the defendants' motion to dismiss the claims, but they did so without explicitly ruling that the claims were not time-barred.<sup>107</sup> Under Rule 12(b)(6), in order to dismiss a claim based on a failure to comply with the statute of limitations, the allegations in the complaint, when taken in the light most favorable to the plaintiff, must show that the claim is time-barred on its face.<sup>108</sup> In other words, the plaintiff must essentially plead themselves out of court.<sup>109</sup> The court noted the fact that the plaintiffs never stated that they were aware of the concussion research, updated NCAA concussion protocols, or other concussion-based lawsuits in their complaint, thus a dismissal would be inappropriate.<sup>110</sup> The narrow ruling leaves the door open for a court to eventually rule that the plaintiffs' claims, in this case, time-barred:

...discovery may reveal that the nature and circumstances surrounding the incidents were sufficient to place a reasonable person on notice that actionable conduct may have been involved. Discovery will also shed light on whether neurodegenerative disorders and diseases are latent conditions caused by the occurrence of injuries of which a reasonable person should have been aware, as the Big Ten asserts... the Court does not believe that *Plaintiffs' complaint* indicates that their claims are barred by the two-year statute of limitations.<sup>111</sup>

**B. *Schmitz v. NCAA***<sup>112</sup>

*Schmitz v. NCAA* shares several similarities with the *Rose* case, and the decision was delivered by the Supreme Court of Ohio three days after the *Rose* decision. This case marked the first time that a state supreme court considered arguments

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 1221.

<sup>109</sup> *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 901 (7th Cir. 2004).

<sup>110</sup> *Rose*, 346 F. Supp. 3d at 1223.

<sup>111</sup> *Id.*

<sup>112</sup> *Schmitz v. Natl. Collegiate Athletic Assn.*, 155 Ohio St.3d 389 (Ohio 2018).

regarding whether CTE is a latent disease or just latent effects of a previously manifested injury.<sup>113</sup> Additionally, as this is a state supreme court case, the oral arguments can provide at least a modicum of insight into the legal strategies of the involved parties. This is particularly true of the NCAA, as the lead counsel for the defendants in this case is also lead counsel for the NCAA in the current MDL.<sup>114</sup>

Steven Schmitz played football at Notre Dame in the mid-1970s and was diagnosed with CTE in 2012.<sup>115</sup> By 2014, when this claim was filed, Schmitz had also been diagnosed with severe memory loss, cognitive decline, Alzheimer's, and dementia at the age of 58.<sup>116</sup> Schmitz died in February of 2015 shortly after filing the complaint.<sup>117</sup>

Ohio's relevant statute of limitations provides that claims must be filed within two years of when they accrue.<sup>118</sup> The state recognizes a judicially created discovery rule wherein the claim for a latent injury accrues either on "the date on which the plaintiff is informed by competent medical authority that he has been injured, or upon the date on which...he should have become aware that he had been injured."<sup>119</sup>

The defendants argued that the plaintiff's claim accrued while he was still playing football and that CTE and the other problems he was experiencing near the end of his life were "the latent effects of neuro-cognitive and neuro-behavioral injuries he sustained while playing football."<sup>120</sup> The court followed a similar analysis as the court in *Rose* and ultimately came to a nearly identical conclusion. They refused to grant the dismissal of the claims for the defendants as time-barred, but they also did not explicitly state that the claims were not time-barred.<sup>121</sup>

The oral arguments provided some interesting insight that is not available in the court's analysis. The defense argued that the discovery rule is judicially created, and

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<sup>113</sup> Steven M. Sellers, *Notre Dame Player's Brain Injury May Be 'Latent,' Ohio Judges Rule*, BLOOMBERG LAW (Oct. 31, 2018, 11:22 AM), <https://news.bloomberglaw.com/product-liability-and-toxics-law/notre-dame-players-brain-injury-may-be-latent-ohio-judges-rule-2> [<https://perma.cc/569C-Y3JT>].

<sup>114</sup> *Schmitz*, *supra* note 112, at ¶ 1.

<sup>115</sup> It is unclear how Schmitz received a CTE diagnosis prior to death. As discussed *supra* note 19, CTE is typically only diagnosable posthumously.

<sup>116</sup> *Schmitz*, *supra* note 112, at ¶ 1.

<sup>117</sup> *Id.*

<sup>118</sup> OHIO REV. CODE ANN. § 2305.10(A) (2008).

<sup>119</sup> *O'Stricker v. Jim Walter Corp.*, 4 Ohio St.3d 84, 87 (Ohio 1983).

<sup>120</sup> *Schmitz*, *supra* note 112, at ¶ 19.

<sup>121</sup> *Id.* at ¶ 36.

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that expansion of the rule is effectively legislating from the bench.<sup>122</sup> This argument points to the fact that the legislative branch of each state’s government could pass laws that create exceptions to the statute of limitations for latent diseases like concussions if they so choose, and that it is beyond the role of the court to create such exceptions. This is an argument that the defendants are likely to re-employ if these cases reach a full trial on the merits. As both the *Rose* and *Schmitz* rulings have allowed for a court to ultimately find that these claims are time-barred, the NCAA is unlikely to abandon this argument in a trial setting.

The defendants also raised issues with the perceived injustice of forcing Notre Dame to defend a “stale” claim, where the coaches and other University representatives who were responsible for the allegedly tortious conduct have since left Notre Dame’s employment or passed away.<sup>123</sup> The plaintiff’s response to this argument was noteworthy. Counsel for the plaintiff stated that specific factual allegations in this case are not material to the plaintiff’s claims, nor are they material for the defense.<sup>124</sup> It is conceivable court could be convinced, because of the research regarding CTE and the link between participation in football and the development of the disease, that specific factual allegations regarding what an individual player or coach did at practices or in games are unnecessary to a court’s analysis. As the attorney for Schmitz’s estate stated in oral arguments, “everyone knows what was going on” in football practices during that era.<sup>125</sup> This argument has the potential to assuage any court’s potential concerns regarding forcing the NCAA to defend a “stale claim.”

**C. *Ploetz v. NCAA***<sup>126</sup>

Greg Ploetz played football for the University of Texas in the late 1960s and early 1970s, earning Southwest Conference Defensive Player of the Year in his final season at Texas.<sup>127</sup> Ploetz suffered from a litany of serious health problems throughout his post-football days, including depression, memory loss, confusion,

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<sup>122</sup> *Supreme Court of Ohio - Case No. 2017-0098 Natl. Collegiate Athletic Assn. v. Schmitz* at (17:20), THE OHIO CHANNEL (Apr. 11, 2018), <https://www.ohiochannel.org/video/supreme-court-of-ohio-case-no-2017-0098-natl-collegiate-athletic-assn-v-schmitz> [hereinafter *Schmitz oral arguments*] [<https://perma.cc/EU9K-N43S>].

<sup>123</sup> *Id.* at (17:10).

<sup>124</sup> *Id.* at (35:00).

<sup>125</sup> *Id.*

<sup>126</sup> The NCAA and the widow of a former Texas Longhorns football player reached an undisclosed settlement during a civil trial in Dallas, TX in which the widow’s attorneys argued the NCAA was responsible for his brain injuries and death more than four decades after he played for the Longhorns. Mark Schlabach, *NCAA, Wife of Former Texas DT Greg Ploetz Settle CTE Lawsuit*, ESPN.COM (June 15, 2018), [https://www.espn.com/college-football/story/\\_/id/23806167/ncaa-wife-ex-texas-longhorns-dt-greg-ploetz-settle-cte-lawsuit](https://www.espn.com/college-football/story/_/id/23806167/ncaa-wife-ex-texas-longhorns-dt-greg-ploetz-settle-cte-lawsuit) [<https://perma.cc/32T7-HDVS>].

<sup>127</sup> McCann, *supra* note 88.

erratic behavior, and difficulty communicating, which progressively got worse until his death in 2015.<sup>128</sup> Neurologists from the Concussion Legacy Foundation examined Ploetz's brain posthumously and discovered that he had suffered such extensive brain damage that it was classified as stage four CTE, which is the most severe.<sup>129</sup> This prompted Ploetz's widow, Debra Hardin-Ploetz, to file suit against the NCAA alleging \$1 million in damages for negligence and wrongful death.<sup>130</sup>

Like other cases, Ploetz had to defeat a motion to dismiss the claims as time-barred in order to reach a trial on the merits. This was the first case to make it to trial that involved football and CTE.<sup>131</sup> The Texas court empaneled a jury and heard opening arguments, but on the third day of trial, the court returned from a lunch break to news that the two sides had come to a settlement agreement.<sup>132</sup> Settlements in civil litigation are common, and the vast majority of civil disputes are settled before trial.<sup>133</sup> What is far less common is for the parties to a lawsuit to go through an extensive pre-trial discovery process, go through jury selection and opening arguments, and then settle the case.<sup>134</sup>

The NCAA knew that an adverse ruling could open the proverbial floodgates for the numerous other CTE-related cases that were filed against them, so, they made a settlement offer.<sup>135</sup> The terms of the settlement are undisclosed, and the NCAA did not admit fault as part of the settlement.<sup>136</sup>

The opening arguments can provide further insight into the NCAA's legal strategy and potentially impactful strategies by plaintiffs in these cases. The NCAA accused the plaintiff of "Monday Morning Quarterbacking" due to the plaintiff's allegations that the NCAA should have known that football caused CTE in the

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Jeremy Bauer-Wolf, *A Verdict That Could Have Changed the Tide*, INSIDE HIGHER ED (June 26, 2018), <https://www.insidehighered.com/news/2018/06/26/settlement-highly-anticipated-concussion-lawsuit-against-ncaa> [<https://perma.cc/2BJ7-KKU7>].

<sup>133</sup> *What Percentage of Lawsuits Settle Before Trial? What are some Statistics on Personal Injury Settlements?*, BLACK'S LAW DICTIONARY, <https://thelawdictionary.org/article/what-percentage-of-lawsuits-settle-before-trial-what-are-some-statistics-on-personal-injury-settlements> (last visited May 1, 2022) [<https://perma.cc/TBN9-VQPY>].

<sup>134</sup> *Id.*

<sup>135</sup> See Bauer-Wolf, *supra* note 131 (suggesting the NCAA may have gotten a read from the judge that a verdict would be unfavorable); See also *id.* (Attorney Jay Edelson's statement regarding the NCAA not believing the evidence is in their favor.).

<sup>136</sup> *Id.*

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1960s.<sup>137</sup> The NCAA argued that the first suggestion of a link between football and CTE was in 2005.<sup>138</sup>

While the settlement did remove much of the potential significance of this case, it does at least indicate that the NCAA is willing to settle CTE lawsuits if the price is right. Settlements may not provide all the answers the public seeks regarding what the NCAA knew about the dangers of CTE and when they knew of those dangers, but it does provide some recourse for those who believe they suffered from CTE as a result of the NCAA's negligence.

## **VI. LIMITATIONS OF THE DISCOVERY RULE IN CTE LITIGATION**

Without the application of the discovery rule, the *Schmitz* and *Rose* cases (and potentially many others) would have been dismissed as time-barred. While this is obviously beneficial to the plaintiffs, it is still possible that a court will determine the claims were not timely filed, therefore ending any further argument. For example, in *Schmitz*, the NCAA argued that CTE and the other neurological issues that plagued Steven Schmitz were not new injuries but were latent effects of a previously manifested injury.<sup>139</sup> That issue would most likely come down to expert testimony from medical professionals, with the courts siding with the experts they find more credible. If the courts determine, through expert testimony, that these injuries are latent effects of previously manifested injuries, the discovery rule would not apply, and the statute of limitations would not toll. Under such a ruling, Steven Schmitz would have had to bring this action within a few years of his final playing days and allege damages from repetitive concussive and sub-concussive blows to the head, speculating as to the long-term effects in order to recover for the NCAA's alleged negligence. Such a claim would be highly unlikely to make it past summary judgment.

Further, because CTE cannot be definitively diagnosed until death, the question as to "when a plaintiff reasonably should have discovered that they are injured" becomes vague. Former football players who are experiencing even mild neurological symptoms, some of which could be attributable to the normal aging process or other issues, may feel compelled to commence a lawsuit for football-related brain injuries so they do not lose their ability to file a claim because of the statute of limitations. Because of these issues that are unique to CTE, there is an

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<sup>137</sup> Daniel Siegal, *NCAA Settles Suit Over Football Player's CTE Death Mid-Trial*, LAW 360 (June 15, 2018), <https://www.law360.com/texas/articles/1054387-> [<https://perma.cc/UHC3-NLZN>].

<sup>138</sup> *Id.*

<sup>139</sup> Schmitz oral arguments, *supra* note 122, at (3:30).

argument as to whether the statute of limitations should apply to CTE cases at all.<sup>140</sup> By removing the issue of the timing of filing a claim, those suffering from football-related brain injuries would have a greater opportunity to be heard on the merits of their claim.<sup>141</sup> Beyond the fairness of allowing these plaintiffs to bring their claims, removal of the statute of limitations would save the courts time and resources. The *Schmitz* case was appealed and made its way to the Ohio Supreme Court over a procedural issue that was immaterial to the merits of the case.<sup>142</sup> The issue of whether the statute of limitations ran out on Steven Schmitz's claims has still not reached a final resolution.<sup>143</sup>

## VII. APPLICABILITY OF THE DISCOVERY RULE IN FUTURE NCAA LITIGATION

The future applicability of the NCAA concussion plaintiffs' ability to defeat the NCAA's motions to dismiss claims as time-barred is difficult to determine. That is the very nature of latent, insidious diseases. They are currently unknown and are slow to develop. Importantly, defeating a 12(b)(6) motion to dismiss a time-barred claim is not a final victory for the plaintiff. It simply means that the plaintiff has an opportunity to bring forth their claim, which they would have to prove by a preponderance of the evidence in order to recover damages. It also increases the chances of a plaintiff attaining a settlement offer. As the *Ploetz* case may indicate, the NCAA's appetite for litigating certain matters may not be nearly as robust as its willingness to litigate matters involving amateurism.<sup>144</sup> For potential future plaintiffs against the NCAA, defeating a statute of limitations argument could potentially bring forth a significant settlement offer.

One potential application would be latent or longer-term effects that COVID-19 may have on collegiate football players. In the spring of 2020, the college sports world came to a halt when the remainder of the college baseball season was canceled,<sup>145</sup> and, perhaps more surprisingly, the 2020 NCAA March Madness basketball tournament was canceled.<sup>146</sup> The seriousness of the NCAA canceling the

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<sup>140</sup> See e.g., Dominic DiMattia, *How Much Brain Deterioration Do You Need to Get into Court: Analyzing the Issue of Statutes of Limitations for Athletes' Concussion-Related Injury Litigation Through the Lens of Toxic Tort Law*, 48 U. BALT. LAW REV. 435, 448 (2019).

<sup>141</sup> *Id.*

<sup>142</sup> Schmitz, *supra* note 112, at ¶ 6-9.

<sup>143</sup> *Id.* at ¶ 36.

<sup>144</sup> See e.g., *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015); *Bloom v. NCAA*, 93 P.3d 621 (Colo. App. 2004); *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

<sup>145</sup> Steven Almsay, *The NCAA is Canceling March Madness*, CNN.COM (Mar. 12, 2020 4:42 PM), <https://www.cnn.com/2020/03/12/us/march-madness-withdrawals-spt/index.html> [<https://perma.cc/D4LC-DJFX>].

<sup>146</sup> *Id.*

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men's basketball tournament cannot be overstated, as the organization earns nearly \$1 billion in revenue from the television broadcast rights to the tournament alone.<sup>147</sup> Just a few months later, every FBS football conference participated in the football season. The Big Ten Conference, for example, initially decided to cancel the season,<sup>148</sup> but eventually ended up playing a shortened season.<sup>149</sup> The NCAA offered little guidance or advice as it pertained to COVID-19 protocols for the football season and left the bulk of the decision-making to the various athletic conferences and institutions,<sup>150</sup> perhaps as a result of lessons learned in the course of CTE litigation. Several institutions willfully trotted their football student-athletes onto the field despite having deemed face-to-face classroom instruction as too risky, opting for the remote delivery of courses instead.<sup>151</sup> Unsurprisingly, a number of college football players contracted the COVID-19 virus.<sup>152</sup> Some institutions seemed to be cognizant of the potential for legal liability arising from continuing play during the pandemic. Ohio State University, for example, had their football players sign something called "The Buckeye Pledge," which was a two-page document laying out the risks of contracting COVID-19 and included the line "[a]lthough the university is following coronavirus guidelines issued by the CDC and other experts to reduce the

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<sup>147</sup> Mike Ozanian, *March Madness Is Most Profitable Postseason TV Deal in Sports*, FORBES.COM (Mar. 19, 2019, 9:24 AM), <https://www.forbes.com/sites/sportsmoney/2019/03/19/march-madness-is-most-profitable-postseason-tv-deal-in-sports/?sh=ff60f2b17955> [<https://perma.cc/2TXF-YUL2>].

<sup>148</sup> Dennis Dodd & Adam Silverstein, *Big Ten Cancels College Football Season for Fall 2020, Hopes to Play in Spring 2021*, CBS SPORTS (Aug. 11, 2020 at 3:25 PM), <https://www.cbssports.com/college-football/news/big-ten-cancels-college-football-season-for-fall-2020-hopes-to-play-in-spring-2021> [<https://perma.cc/CYK6-ASVT>].

<sup>149</sup> *Big Ten Announces Schedule for 2020 Football Season*, BIG TEN CONFERENCE (Sept. 19, 2020 at 10:45 AM), <https://bigten.org/news/2020/9/19/big-ten-announces-schedule-for-2020-football-season.aspx> [<https://perma.cc/G4WN-Z33Y>].

<sup>150</sup> Marc Edelman, Thomas A. Baker, John T. Holden, & Dr. Andrew Shuman, *Exploring College Sports in the Time of COVID-19: A Legal, Medical, and Ethical Analysis*, 2021 MICH. ST. L. REV. 469 at 508.

<sup>151</sup> See e.g., Rachel Bachman & Laine Higgins, *Coronavirus Is Turning College Football into Football Without College*, THE WALL STREET JOURNAL (Aug. 21, 2018), <https://www.wsj.com/articles/coronavirus-is-turning-college-football-into-football-without-college-11598012279> [<https://perma.cc/A86D-PD4Y>]; Billy Witz, *Classrooms Shut Down at Cal State Colleges, but Football May Take the Field*, THE NEW YORK TIMES (May 14, 2020), <https://www.nytimes.com/2020/05/13/sports/ncaaf-football/cal-state-college-football-coronavirus.html> [<https://perma.cc/W24B-MARD>].

<sup>152</sup> Dennis Dodd, *Did College Football Return Too Soon? Positive COVID-19 Tests Generating Negative Views About 2020 Season*, CBS SPORTS (June 22, 2020 at 5:35 PM), <https://www.cbssports.com/college-football/news/did-college-football-return-too-soon-positive-covid-19-tests-generating-negative-views-about-2020> [<https://perma.cc/Y5QC-A9M2>].



spread of infection, I can never be completely shielded from all risk of illness caused by COVID-19 or other infections.”<sup>153</sup> The Buckeye Pledge was signed by all football student athletes, except those under 18 who were required to have their parent/guardian sign for them.<sup>154</sup> Despite the formal nature of this document, Ohio State insists that it was not intended to be considered legally binding.<sup>155</sup> It is difficult to imagine a scenario where Ohio State does not attempt to wield this document against the player(s) who signed it in the face of litigation involving COVID-19.

The potential for legal liability for the NCAA and its member conferences and institutions will depend on the ability of potential plaintiffs to show that one or more of the parties was negligent during the COVID-19 pandemic.<sup>156</sup> The NCAA mostly delegated decision-making authority to the conferences and institutions but did provide a list of nine core principles for bringing back sports from an advisory panel that was consistent with federal guidelines.<sup>157</sup> Because these principles were more recommendations than rules, there was little consistency between the institutions in regards to how or if they were implemented.<sup>158</sup>

If there are long-term, latent impacts of COVID-19, it is extremely likely that potential plaintiffs against the NCAA will battle the same statutes of limitation issues as CTE plaintiffs. Under this scenario, our already overburdened courts would, once again, be placed in the unenviable position of using valuable time and resources on purely procedural issues that have nothing to do with the merits of the case. Legislators at both the state and federal levels can, and should, remove this issue from the courts by passing a specific exemption to their statute of limitations for potential long-term effects of COVID-19. This would not only save the courts, plaintiffs, NCAA, conferences, and institutions valuable time, money, and resources, but it would do so without being unfairly prejudicial to potential defendants. The defendants would still have a number of defenses available to them, including lack of causation, primary assumption of the risk, and, for some institutions, sovereign immunity.<sup>159</sup> Any concerns regarding lost or deteriorating evidence are a non-factor in this situation. The COVID-19 response from the NCAA, member conferences and institutions were and continues to be heavily documented and receives extensive media coverage. Specific factual allegations in these cases would be less vital than

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<sup>153</sup> Matt Bonesteel, *Ohio State Football Players Sign Coronavirus Pledge Acknowledging Risk Involved*, THE WASHINGTON POST (June 15, 2020), <https://www.washingtonpost.com/sports/2020/06/15/ohio-state-football-players-sign-coronavirus-pledge-acknowledging-risk-involved> [https://perma.cc/23G8-45BQ].

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> Edelman et al., *supra* note 150, at 508.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 509.

<sup>159</sup> *Id.* at 510.

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in traditional negligence suits. If an individual can show that they played football in the 2020 season, contracted COVID-19 in that time frame and that they are suffering from long term effects of COVID-19, the parties and the courts should move forward and hear arguments regarding whether the NCAA or its member conferences and institutions were negligent in their approach to returning to play.

**CONCLUSION**

Statutes of limitations were not constructed or passed with the problems unique to latent, slow-developing injuries in mind. Asbestos litigation represented the first time that courts were confronted with mass torts involving latent injuries. These lawsuits spurred many jurisdictions to develop judicially created discovery rules that toll the statute of limitations until a plaintiff discovers their injury, and that the injury is due to the tortious conduct of another party. While these discovery rules offer some respite for plaintiffs suffering from latent injuries like CTE, they are not without their limitations and are not immune to challenges. The discovery process, which is a lengthy pre-trial process, favors deep-pocketed defendants who can drag procedural arguments along without ever having to defend the merits of the case. State and federal legislatures can and should pass laws to carve out specific exceptions to statutes of limitations for latent injuries such as CTE and potential long-term effects of COVID-19.