

## PRODUCT LIABILITY ALERT

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### Ohio Supreme Court tackles impact of latent injuries on the discovery rule in football-related head trauma case



The Supreme Court of Ohio recently gave its take on football-related concussions in *Schmitz, et al. v. NCAA et al.* There, the Court found claims stemming from injuries allegedly sustained while playing college football in the 1970s, but not diagnosed until 2012, did not accrue until the player discovered his neurological impairment and its connection to the defendants' alleged conduct.

#### A football player's story

Steven Schmitz played football for the University of Notre Dame from 1974-1978. During his college career he suffered repetitive blows to the head and was occasionally disorientated and showed concussion-like symptoms. Notre Dame's staff never monitored or treated him, nor did Notre Dame or the NCAA educate Schmitz or his teammates on the risks of repetitive head blows.

In December 2012, physicians diagnosed Schmitz with chronic traumatic encephalopathy (CTE), a disease which causes diminished brain function and progressive cognitive decline. By 2014, Schmitz, aged 58, was

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diagnosed with severe memory loss, cognitive decline, Alzheimer's disease and dementia. In October 2014, he and his wife filed suit against Notre Dame and the NCAA for negligence, fraudulent concealment and constructive fraud, among other claims. They argued the defendants knew or should have known that football players are at a greater risk for chronic brain injuries, the defendants aggravated and ignored those risks, and the defendants failed to develop a system to mitigate or prevent those risks. Schmitz died in February 2015.



The Supreme Court of Ohio held that chronic brain injuries arising from football-related head trauma are a “latent injury” and subject to the discovery rule.

Before trial, the defendants moved to dismiss all of the plaintiffs’ claims as time-barred because any alleged wrongful conduct occurred in the 1970s and plaintiffs failed to state a claim upon which relief could be granted. The trial court granted the motions. The 8th Circuit Court of Appeals reversed the dismissal, holding the negligence claim was subject to the discovery rule and governed by 2305.10(A)’s two-year statute of limitations and the fraud-related claims were governed by 2305.09(C)’s four-year statute of limitations.

### **Are these claims time-barred?**

Right now, no.

Concerning the negligence claim, the Supreme Court of Ohio held that chronic brain injuries arising from football-related head trauma are a “latent injury” and subject to the discovery rule. Under the discovery rule, the two-year, personal injury statute of limitations enumerated in 2305.10(A) does not begin to run until (1) the plaintiff discovers or, with reasonable diligence, should have discovered the injury, and (2) the plaintiff knows, or should know, the injury is related to the defendant’s conduct.

Here, the Court could not conclusively find the negligence claim time-barred based on the language of the complaint which alleged Schmitz did

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not discover his chronic brain injury until his December 2012 diagnosis. The complaint also did not show he had reason to know he suffered from a chronic brain injury until that diagnosis, nor did it show he had reason to know he suffered a latent injury while playing football. Since the lawsuit was filed within two years of discovering his injury, the negligence claim was not time-barred. The 8th District's reversal was proper. But, the Court importantly noted that if further discovery uncovered Schmitz knew or had reason to know of his latent injury prior to October 2012, the claim could be dismissed as time-barred.

As for the plaintiffs' fraud-related claims, the Court also found these claims not time-barred. When reversing the 8th District, the Court found the fraud-related claims arose from the same underlying conduct—that Notre Dame and the NCAA failed to treat, monitor and educate Schmitz despite their knowledge of chronic brain injuries caused by blows to the head—alleged in the negligence claim. Because the essential character of the fraud-related claims was the same as the negligence claim, the fraud-related claims could not be separated from the negligence claim. Thus, the fraud-related claims were also subject to 2305.10(A)'s two-year statute of limitations.

### Takeaways

The Supreme Court of Ohio followed a nation-wide trend of classifying sports concussions as "latent injuries." The United States District Court for the District of Minnesota applied the same standard for an NHL player in 2015 and the United States District Court for the District of Connecticut followed suit for a WWE wrestler in 2016.

Further, the wording in Schmitz's complaint mattered. Although the Court indicated a chronic brain injury is a "latent injury," it was clear that had the complaint revealed Schmitz knew or had reason to know of a chronic brain injury prior to his December 2012 diagnosis, his claims would be time-barred. Further, as public knowledge of latent neurological impairments caused by football-related head trauma expands, individual awareness may play a role in the court's determination of when a statute of limitations begins to run for these types of claims.

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