

Litigators of the Week: A Defense Win for the NCAA in the First Concussion Suit to Go to Trial

A trial team led by Will Stute, William Molinski and David Fuad of Orrick, Herrington & Sutcliffe won the first jury trial seeking to hold the NCAA liable for concussion-related injuries from playing college football.

By Ross Todd
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Lawyers for the widow of Matthew Gee, a linebacker on the 1990 Rose Bowl-winning USC football team, were seeking nearly \$55 million in damages from the NCAA last month in the first case to go to trial seeking to hold the organization liable for concussion-related injuries.

Lawyers claimed Gee endured 6,000 blows to the head during his college playing days, and attempted to tie his death to chronic traumatic encephalopathy, or CTE, a degenerative brain disease.

But the NCAA's defense team, led by Will Stute, William Molinski and David Fuad of Orrick, Herrington & Sutcliffe, made the case that Gee had many other health problems and those combined with his drug and alcohol use led to his death at age 49. On Nov. 22, after a three-week trial and just one day of deliberations, a state court jury in Los Angeles returned a defense verdict for the NCAA.

Lit Daily: What was at stake here for the NCAA in this first CTE-related case to make it to trial?

Will Stute: We have other cases pending that involve similar allegations, although each case is different. As you mention, this was the first case



(L-R) Will Stute, William Molinski and David Fuad of Orrick, Herrington & Sutcliffe.

Courtesy photos

involving allegations of CTE to go to a jury. Fortunately, we were successful in showing that the NCAA was not liable for events that happened decades ago.

In this case, it was important to educate the jury on how the NCAA is organized, including explaining that member schools have retained the responsibility for the day-to-day health and safety of their student athletes. We also had to overcome the public misperception driven by the media and well-publicized cases that claims like those made in this case are valid – even when tragic or emotional.

Who was on your team and how did you divide the work?

Bill Molinski: The best part of this case was working with such a talented group of diverse, young lawyers. From Orrick, senior associate **Natalie Nahabet** in particular was masterful at identifying and working with our experts, and her trial instincts and grit through long weeks of trial inspired the rest of the team.

We also partnered with **Chris Schmidt** and his team at **Bryan Cave Leighton Paisner**, including **Jonathan Potts** and **Suzanne Hart**. They provided invaluable support and deep expertise in the complicated neuroscience and NCAA history issues in the case.

Stute: I have worked for years with **Greg Pottorff** and **Kimberly Fort** at the NCAA, and we could not ask for a better client. They had our back at every turn and were great partners, including giving us all the tools we needed to defend this case against an aggressive, deep team of very experienced plaintiffs' attorneys from four different firms. Greg Pottorff was very hands-on in developing strategy with us, and his support, input and guidance were enormously valuable.

In addition to handling opening and closing, I focused on the cause of Mathew Gee's death, and demonstrating that football played no role in his tragic passing. Bill Molinski was focused on the alleged negligent conduct and role of the NCAA, and educating the jury on all the NCAA does to support its member schools and to promote the health and safety of student-athletes. David Fuad handled the experts specializing in the health conditions that caused Mathew Gee's death, as well as Matthew Gee's family members.

And I have to give a shout-out to several Orrick associates whose contributions were essential to our success—**John Badalich**, **Justin Washington**, **Deena Dulgerian** and **Alexis Golling-Sledge**.

What were your key trial themes and how did you try to drive them home with the jury?

Molinski: It was important to show the jury that the NCAA has a long history supporting its member schools and promoting the health and safety of student-athletes. Also, Chris Schmidt from Bryan Cave did an excellent job helping us demonstrate to the jury that the science behind CTE is not settled even today. Additionally, we showed that Matthew Gee's death was entirely unrelated to college football.

Matthew Gee's playing days at USC predate the discovery of CTE. He had also a whole host of health issues that you could point to that were unrelated to football. How much can you take away from your defense here as you gear up for other concussion-related claims the NCAA faces down the road?

Stute: In this case and others against the NCAA, plaintiffs attribute all sorts of medical or psychological issues to head impacts from football when the medical history and records do not support that claim. The jury agreed this was a misguided attempt to cast blame on the NCAA, a collegiate athletic association, for medical issues that were not linked to football.

Molinski: Importantly, the jury found no negligence by the NCAA before even getting to causation. We presented extensive testimony and medical records, and the jury recognized that while supporting our position in this case that the NCAA acted reasonably.

The testimony from Gee's widow had the potential to be very damaging for your client, yet I gather she provided some useful evidence for you—notably that his condition improved when he took certain medicine. What was your approach with her?

Stute: We have profound sympathy for Ms. Gee and the Gee family. But we simply followed the

evidence, and felt confident that showing the totality of Mr. Gee's life and history would be persuasive for the jury.

The experts that testified here are likely to be involved in any future trials. What did you learn from how the expert testimony came in?

David Fuad: Some of our experts will be involved in other trials, but the key experts for us here included a liver expert and a cardiologist who we found specifically because of Matthew Gee's medical issues. That unique medical testimony was critical in showing that Mr. Gee's death was not related to head impacts or college football. This case reinforced that having the right mix of experts for each case is more important than relying on any particular expert.

How many more of these cases are there pending? And what comes next for you and the team on this front?

Stute: We have another jury trial scheduled in January 2023 in Indianapolis, and others scheduled for trial in 2023 and 2024. While we are happy with the results in this case, each of these cases involve different facts and individuals who played the sport at different times. We look forward to continuing to aggressively defend these cases that we believe erroneously target the NCAA.

Fuad: This was the second case we've tried and won for the NCAA this year, and it is gratifying to see jurors paying close attention to the facts of each case and understanding the NCAA's story.

What will you remember most about handling this trial?

Stute: Having the NCAA's position vindicated by our jury was very gratifying, as I have been working with the NCAA on these issues for many years. More generally, I love trying cases and this case had everything a trial lawyer could ask for—high stakes, broad implications, complicated legal and factual arguments, a skilled and experienced team of adversaries, and a lot of media attention. Last but not least, I am very proud of the way our highly diverse defense team effectively brought different ways of thinking and perspectives to bear on how we tried this case.

Molinski: Watching junior lawyers play active roles at trial and turn into trial lawyers before my eyes was hugely rewarding and I will always remember that. I will also remember the effort and care that our trial judge, Judge Terry Green put into this case, even making himself available at home at night and on weekends for phone calls to resolve evidentiary issues outside of court so as not to waste the jury's time. And of course, I will never forget the satisfaction of hearing the verdict read in court, knowing that they reached the right outcome.

Fuad: For many on the team, this was their first jury trial after the pandemic. Of course, one of the most memorable parts of any trial is the camaraderie that comes from being together in stressful conditions. For lawyers who may question the value of coming into the office, the experience we had of being around each other day and night, learning from each other, and building deep in-person relationships was truly meaningful, and it was a wonderful reminder of the power of being together.