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# Sacked by the Clock: Analyzing Statute of Limitations Defenses in the Context of Football-Related CTE Lawsuits

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# SACKED BY THE CLOCK: ANALYZING STATUTE OF LIMITATIONS DEFENSES IN THE CONTEXT OF FOOTBALL-RELATED CTE LAWSUITS

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## I. INTRODUCTION

Just like touchdown catches, hard-hitting tackles, field goal posts, and referees, the clock plays a crucial role in the game of football.[1] Some of the game's greatest moments would not have occurred without time dwindling down. The Tennessee Titans could have run another play after Kevin Dyson came up one yard short of the endzone in Super Bowl XXXIV.[2] The Buffalo Bills' 1991 season would not have ended with Scott Norwood's famous field goal kick sailing wide right.[3] The band would not have run on the field during the famous California kickoff return against Stanford in 1982.[4] History would be rewritten, and football would not be the same.

Football players must learn to work with time constraints. They need to learn to use the clock to their advantage, but also must cope with its unforgiving nature when it runs out. Unfortunately for some players, retirement will not save them from dealing with a different sort of clock: statutes of limitations. Those who fall victim to the game's violent nature may see the clock fade out on their ability to seek restitution.

As former football players and their families continue to file suit against football organizations for negligence in player safety, football organizations are opting for a common play from the playbook: statute of limitations defenses.[5] A statute of limitations is a device implemented by legislatures to prevent lawsuits from being filed after a certain period of time has passed.[6] This defense has become common in chronic traumatic encephalopathy (CTE) lawsuits due to the nature of the injury. CTE is a degenerative brain disease caused by repeated hits to the head.[7] As CTE

1. *American Football Rules*, RULESOFSPORT.COM, https://www.rulesofsport.com/sports/american-football.html [https://perma.cc/CDH2-FJJ8].

2. Dan Van Wie, *Top 25 Moments in NFL History*, BLEACHER REPORT (May 18, 2012), https://bleacherreport.com/articles/1183382-top-25-moments-in-nfl-history#slide0.

3. *Id.*

4. *100 Greatest Moments in Sports History*, SPORTS ILLUSTRATED, https://www.si.com/100-greatest/?q=29-the-play [https://perma.cc/K4JV-S238].

5. *See e.g.*, Schmitz v. NCAA, 155 Ohio St. 3d 389 (2018); DeCarlo v. National Football League, No. 161644/2015, 2017 N.Y. Misc. Lexis 292 (N.Y. Sup. Ct. 2017).

6. 51 AM. JUR. 2D *Limitation of Actions* § 2.

7. *Frequently Asked Questions About CTE*, B.U. RES.: CTE CTR., https://www.bu.edu/cte/about/frequently-asked-questions [https://perma.cc/VNC3-ZRM4].

cannot be diagnosed in a living person, CTE lawsuits are typically brought years after a player's football career has ended.[8] Therefore, a statute of limitation defense is an easy out for a football organization.

This comment argues that football-related CTE lawsuits should only be barred by a statute of limitations in rare situations. Section II provides an overview of CTE and its relation to football. Section II also discusses how statutes of limitations apply to CTE cases and cases of a similar nature. Section III analyzes the arguments made by the defendant football organization in a recent football-related CTE case. Using these arguments as an example, Section III concludes that football-related CTE cases should only be barred by statutes of limitations in rare situations.

## II. BACKGROUND

Chronic traumatic encephalopathy and other cognitive impairments will forever be intertwined with football. As football players continue to place more value on their personal health, America is seeing more players take football organizations to court over injuries sustained during their careers. When former players file suit against football organizations over their injuries, courts will look to a line of cases involving latent injuries. Part A of this section defines chronic traumatic encephalopathy. Part B then details the connection between CTE and football. This includes a history of measures taken to prevent head injuries, research and studies done on the subject matter, and an overview of CTE litigation. Part C introduces relevant legal concepts that play a vital role in CTE litigation, including the concept of a statute of limitations and the discovery rule. Finally, Part D analyzes *Schmitz v. NCAA*, a recent football-related CTE lawsuit in Ohio.

### *A. Chronic Traumatic Encephalopathy*

Chronic traumatic encephalopathy (CTE) is a brain disease caused by successive hits to the head.[9] When the brain is subjected to repeated trauma, brain tissue begins to degenerate.[10] This degeneration is accompanied by the buildup of tau, an abnormal protein, in the brain tissue.[11] As this buildup progresses, CTE victims begin to experience symptoms including "memory loss, confusion, impaired judgment, impulse control problems, aggression, depression, suicidality,

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*

parkinsonism, and eventually progressive dementia."[12]

Along with its debilitating symptoms, CTE poses a major problem in diagnosis. There is currently no means of definitively diagnosing a living person with CTE.[13] As there is no MRI or other brain imaging technology capable of diagnosing a patient with CTE, diagnosis can only be made postmortem.[14] As research continues, criteria for diagnosis have been proposed.[15] However, as symptoms of CTE are characteristic of many other diseases, there is no certain method of determining CTE affliction.[16]

While multiple concussive impacts may lead to CTE, prior symptomatic injuries are not the only cause.[17] CTE can also result from minor impacts that do not manifest symptoms immediately.[18] It is the repetition of the impacts to the head, rather than the severity of them, that leads to the accumulation of the tau protein.[19] Therefore, while most head impacts will not lead to CTE, those who subject themselves to repeated head impacts are at a higher risk.[20]

### *B. CTE and Football*

Arguably no group of individuals experiences more head impacts than football players. For example, lineman experience head impacts on nearly every play and linebackers are tasked with bringing the ball-carrier to the ground by any means necessary.[21] Quarterbacks, whom the rules protect far more than other players, still experience violent blows when they are thrown to the turf.[22] Football players are not merely subjected to head impacts, they are in the business of head impacts.

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12. *Id.*

13. *Id.*

14. *Id.*; Mayo Clinic Staff, *Chronic Traumatic Enecphalopathy*, MAYO CLINIC (June 4, 2019), https://www.mayoclinic.org/diseases-conditions/chronic-traumatic-encephalopathy/diagnosis-treatment/drc-20370925 [https://perma.cc/VY3X-4EBK] (A CTE diagnosis "requires evidence of degeneration of brain tissue and deposits of tau and other proteins in the brain that can be seen only upon inspection after death (autopsy)").

15. CTRS. FOR DISEASE CONTROL AND PREVENTION, ANSWERING QUESTIONS ABOUT CHRONIC TRAUMATIC ENCEPHALOPATHY (CTE) 2 (updated Jan. 2019), https://www.cdc.gov/traumaticbraininjury/pdf/CDC-CTE-ProvidersFactSheet-508.pdf [https://perma.cc/65NB-YLYJ].

16. *Id.*

17. *Id.* at 1.

18. *Id.*

19. *Id.*

20. *Id* at 2.

21. Joe Ward, Josh Williams & Sam Manchester, *110 N.F.L. Brains*, N.Y. TIMES (Jul. 25, 2017), https://www.nytimes.com/interactive/2017/07/25/sports/football/nfl-cte.html [https://perma.cc/DTG4-GU86].

22. *Id.*

### 1. Head Injury Prevention in Football

Over the course of the last century, the National Collegiate Athletic Association (NCAA) and the National Football League (NFL) have implemented countless strategies to combat concussions and other head injuries in order to protect their players.[23] These prevention practices are apparent in today's football games, but this was not always this case.

The NCAA did not require football players to wear helmets until 1939.[24] No rule outlawed deliberate or malicious use of a player's helmet in hitting another player until 1964.[25] Helmets were not required to provide any baseline standard of protection until 1978.[26] The commonplace equipment and rules that protect players today took years to be incorporated into the game.

Concussion prevention in the NCAA did not begin to heat up until 1999 when the NCAA funded a concussion study to be conducted by Kevin Guskiewicz and Michael McCrea.[27] After Guskiewicz and McCrea's study was published in 2003, the NCAA made important changes that would have seemed trivial before.[28] Horse-collar tackles were made illegal, rules were imposed to punish hits on defenseless players, and NCAA conferences were required to review flagrant fouls for hitting a player with the crown of the helmet.[29]

The NFL instituted changes on a similar timeline to the NCAA. While the NFL took its first major step with the establishment of the Mild Traumatic Brain Injury (MTBI) committee in 1994, the committee mainly dismissed concussion concerns throughout the 2000s.[30] However, when independent experts were appointed to the MTBI committee in 2009, the NFL began making substantive changes.[31] Starting in 2009, players who exhibited symptoms of a concussion could not return to a game.[32] The

23. *Concussion Timeline*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaa.org/sport-science-institute/concussion-timeline [https://perma.cc/L5G2-F2UZ]; Lauren Ezell, *Timeline: The NFL's Concussion Crisis*, PUB. BROAD. SERV. (Oct. 8, 2013, 9:57 PM), https://www.pbs.org/wgbh/pages/frontline/sports/league-of-denial/timeline-the-nfls-concussion-crisis/#1994 [https://perma.cc/SFW3-5PEV].

24. *Concussion Timeline*, *supra* note 23.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*; *See also NCAA bans horse-collar tackle from college football*, ESPN (Aug. 20, 2008), https://www.espn.com/college-football/news/story?id=3544920 [https://perma.cc/CL3B-76H3] (A horse collar tackle occurs "when a runner is yanked to the ground from the inside collar of his shoulder pads or jersey.").

30. Ezell, *supra* note 23.

31. *Id.*

32. *Id.*

NFL later changed its kickoff rules,[33] placed independent neurologists on the sidelines,[34] and donated $100 million to engineering and medical research focused on injury prevention.[35]

Today, all NCAA schools are required to have a concussion management plan in place.[36] The NFL Competition Committee analyzes injury data following each season to work towards player safety.[37] Both organizations have taken great strides to combat the risk of head injuries.[38] However, these efforts do not erase the countless injuries to retired players who were not afforded today's protections.[39]

### 2. Research and Studies

In 2003, Guskiewicz and McCrea published their study on concussions in college football players.[40] This study involved screening players during the preseason and monitoring those who experienced concussions during the season.[41] Guskiewicz and McCrea determined that players with a history of concussions are more likely to experience future concussions.[42] While this study importantly caught the attention of the NCAA and the NFL, it was only the beginning.

The first evidence of CTE in a football player came in 2005, when Dr. Bennet Omalu published his work on the brain of former NFL player, Mike Webster.[43] As Webster struggled with dementia and amnesia, Omalu expected to find evidence of trauma in his autopsy.[44] When he did

33. *Id.*

34. *Id.*

35. *NFL Concussion Fast Facts*, CNN (Aug. 15, 2019, 3:30 PM), https://www.cnn.com/2013/08/30/us/nfl-concussions-fast-facts/index.html [https://perma.cc/3K9L-SXDG].

36. *Concussion*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, http://www.ncaa.org/sport-science-institute/concussion [https://perma.cc/4VEY-WNS5].

37. *Health & Safety*, NAT'L FOOTBALL LEAGUE, https://operations.nfl.com/football-ops/nfl-ops-honoring-the-game/health-safety [https://perma.cc/PFG4-JJ6J]

38. *Concussion Timeline*, *supra* note 23; Ezell, *supra* note 23.

39. Kevin Guskiewicz, et al., *Cumulative Effects Associated With Recurrent Concussion in Collegiate Football Players*, JAMA NETWORK (Nov. 19, 2003), https://jamanetwork.com/journals/jama/fullarticle/197667 [https://perma.cc/QLL7-Q2F9] (Studies show around 10% of college football players received a concussion each year in the 1980s, while that number decreased to around 4.4% in recent years).

40. *Id.*

41. *Id.*

42. *Id.*

43. *See* Daniel Rapaport, *Timeline: Six Studies of Head Trauma in Football That Helped Establish Link to CTE*, SPORTS ILLUSTRATED (Jul. 26, 2017), https://www.si.com/nfl/2017/07/26/nfl-concussion-head-trauma-studies-football-timeline [https://perma.cc/4VMG-HJBW]; Ezell, *supra* note 23.

44. *Dr. Bennet Omalu Spotlights a Profoundly Inconvenient Truth*, UNIV. OF WASH. SCH. OF PUB. HEALTH (Sept. 28, 2017), https://epi.washington.edu/news/dr-bennet-omalu-spotlights-profoundly-inconvenient-truth [https://perma.cc/NNK8-G7BQ]

not find evidence of injury at first glance, he performed more tests.[45] He then discovered buildup of the tau protein in Webster's brain and coined the disease "chronic traumatic encephalopathy."[46]

Years later, studies have brought to light many more documented cases of CTE in football players. In 2012, researchers from Boston University published a study on fifteen cases of CTE in former NFL players.[47] While this study drastically expanded the number of known cases of CTE in football players, a 2017 study would go further.[48] Dr. Anne McKee examined the brains of 202 former football players, finding CTE in 177.[49] Notably, the study found CTE in 110 of the 111 former NFL players examined.[50] While the study acknowledged a selection bias, its conclusions were shocking nonetheless.[51] One-hundred and seventy-seven diagnoses of CTE in a single study highlights the severity of the CTE problem in football.

### 3. CTE Litigation

As CTE awareness has increased, many former football players and their families have filed lawsuits against the NFL, the NCAA, and other football organizations. In response to thousands of lawsuits,[52] the NFL agreed to a class action settlement of over $1 billion in 2017.[53] The NCAA similarly agreed to a settlement in 2019 that required the NCAA to fund a medical monitoring program for its athletes.[54]

The first football-related CTE case to make it to trial was that of Greg Ploetz.[55] Ploetz played for the Texas Longhorns in 1969.[56] In 2017,

45. *Id.*

46. *Id.*

47. Rapaport, *supra* note 43.

48. *Id.*

49. Jesse Mez, et al., *Clinicopathological Evaluation of Chronic Traumatic Encephalopathy in Players of American Football*, JAMA NETWORK (Jul. 25, 2017), https://jamanetwork.com/journals/jama/fullarticle/2645104 [https://perma.cc/9XE3-HAH7].

50. *Id*.

51. Ward, Williams & Manchester, *supra* note 21 (McKee acknowledged many families donated the brains of their loved ones due to their belief that they exhibited symptoms of CTE).

52. *Claims in NFL concussion settlement hit $500 million in less than 2 years*, CBS NEWS (Jul. 30, 2018, 7:10 PM), https://www.cbsnews.com/news/nfl-concussion-claims-hit-500-million-less-than-2-years/ [https://perma.cc/GBP4-2TFA].

53. *Id.*

54. *Judge OKs Concussion Suit Settlement vs. NCAA*, ESPN (Aug. 12, 2019), https://www.espn.com/college-football/story/_/id/27376128/judge-oks-concussion-suit-settlement-vs-ncaa [https://perma.cc/F8W2-9G3G].

55. Mark Schlabach, *NCAA, Wife of Former Texas DT Greg Ploetz Settle CTE Lawsuit*, ESPN (Jun. 15, 2018), https://www.espn.com/college-football/story/_/id/23806167/ncaa-wife-ex-texas-longhorns-dt-greg-ploetz-settle-cte-lawsuit [https://perma.cc/ALH5-FWDX].

56. *Id.*

Ploetz's widow sued for negligence and wrongful death years after her husband last stepped foot on the field.[57] While this was a potential landmark case for CTE victims,[58] Debra Hardin-Ploetz settled for an undisclosed amount after three days of trial.[59] Nevertheless, this case set the foundation for future CTE suits.

### *C. Statutes of Limitations*

As CTE cases continue to be filed, one major hurdle that former players and their families face is statutes of limitations. Statutes of limitations bar lawsuits in which a cause of action accrued over certain period of time.[60] Statutes of limitations are meant to promote time-efficient lawsuits and to punish those who do not timely pursue a cause of action.[61]

For example, a common statute of limitations for causes of action under tort law is two years.[62] Therefore, if an individual is injured and has a cause of action under tort law, she must bring the suit within two years of the date of injury. If she fails to do so, her cause of action would be barred by the statute. This general rule serves the policy of statutes of limitations in most cases, but not those involving latent injuries. A latent injury is one which does not manifest itself immediately.[63] In a latent injury case, the general rule could potentially bar a plaintiff from recovery before she even discovers her injuries.[64]

#### 1. The Discovery Rule

In response to the problem of latent injuries, courts introduced an exception to statutes of limitations called the discovery rule. While the discovery rule differs from state to state, it is commonly a two-pronged analysis.[65] A statute of limitations begins to accrue under the discovery rule once the plaintiff (1) knows or reasonably should know she has been

57. *Id.*

58. *Id.*

59. *Id.*

60. 51 AM. JUR. 2D *Limitation of Actions* § 2.

61. *Id.* § 5.

62. OHIO REV. CODE ANN. § 2305.10(A) (LexisNexis 2019); ARIZ. REV. STAT. ANN. § 12-542 (LexisNexis 2019); KAN. STAT. ANN. § 60-513 (LexisNexis 2019).

63. Liddell v. SCA Servs. of Ohio, 70 Ohio St. 3d 6, 10 (Ohio 1994).

64. O'Stricker v. Jim Walter Corp., 4 Ohio St. 3d 84,87 (Ohio 1983).

65. 51 AM. JUR. 2D *Limitation of Actions* § 158; *O'Stricker*, 4 Ohio St. at 90 (Ohio applies the discovery rule to injuries that do not manifest themselves immediately); Wheeler v. Novartis Pharms. Corp., 944 F. Supp. 2d 1344, 1351 (S.D. Ga. 2013) (Georgia follows the common discovery rule, but only applies it to continuing torts); Anderson Living Trust v. WPX Energy Prod., LLC, 27 F. Supp. 3d 1188, 1213 (D.N.M. 2014) (New Mexico does not toll the statute of limitations until the plaintiff "discovers or with reasonable diligence should have discovered that a claim exists").

injured, and (2) knows or reasonably should know the injury was caused by the defendant.[66]

For example, the Supreme Court of Ohio in *O'Stricker v. Jim Walter Corp.* applied this two-pronged analysis to a plasterer who was exposed to asbestos.[67] In *O'Stricker*, the plaintiff worked as a plasterer from 1969-1979.[68] This job required the plaintiff to work with fireproofing material that contained asbestos.[69] The plaintiff became ill and consulted a physician who diagnosed the plaintiff with a cell carcinoma of the larynx.[70] When the plaintiff sued the manufacturers of the fireproofing materials for negligence in 1979, the trial court held that his claim was barred by the statute of limitations.[71] The court reasoned that his last asbestos exposure was in 1973, six years prior to the suit.[72] When the case made its way to the Supreme Court of Ohio, the court chose to avoid this "unconscionable result."[73] The court held that, in the case of latent injuries, "the cause of action arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured, whichever date occurs first."[74]

### 2. Discovery of Latent Injuries

The discovery rule states that the statute of limitations begins to run when a plaintiff knows or reasonably should know she has been injured *and* the plaintiff knows or reasonably should know that the defendant caused the injury.[75] Therefore, the distinction between experiencing symptoms of *an injury* and discovery of *the injury for which one filed suit* is crucial in determining whether one's cause of action is barred by a statute of limitations. *Liddell v. SCA Servs. of Ohio*[76] provides a helpful illustration of the distinction.

In *Liddell*, the plaintiff police officer responded to the scene of a flaming garbage truck in 1981.[77] Unfortunately for the officer, the

66. 51 AM. JUR. 2D *Limitation of Actions* § 158.
67. *O'Stricker*, 4 Ohio St. at 86.
68. *Id.* at 84.
69. *Id.*
70. *Id.*
71. *Id.* at 85.
72. *Id.*
73. *Id.* at 87 (quoting Wyler v. Tripi, 25 Ohio St. 2d 164, 168 (Ohio 1971)).
74. *Id.*
75. 51 AM. JUR. 2D *Limitation of Actions* § 158.
76. Liddell v. SCA Servs. of Ohio, 70 Ohio St. 3d 6 (Ohio 1994).
77. *Id.* at 6.

 

garbage truck had been transporting hazardous waste.[78] When an explosion occurred on the scene, the officer was exposed to toxic fumes.[79] The officer went to the hospital to receive treatment for smoke inhalation, as he had "a scratchy throat and a burning and watering of his eyes."[80] While the officer returned to work the next day, he began to experience frequent sinus infections.[81] He also had a benign papilloma removed from his nasal cavity in 1987.[82] Finally, in 1988, the officer developed a cancerous growth in his nasal cavity.[83]

The defendant garbage transportation company argued that the officer's cause of action for negligence was barred by the statute of limitations.[84] It reasoned that the officer was visibly injured on the day of the incident, and the officer waited over seven years to file suit.[85] The trial court agreed,[86] but the Supreme Court of Ohio later overturned this decision.[87] The court held that the officer did not discover his cancer until he was diagnosed years after this incident.[88] The court distinguished the officer's minor injuries from his cancer and importantly noted that, if the plaintiff had filed suit immediately, his specification of damages would have been deemed too speculative.[89] Using this rationale, the court held that the statute of limitations did not bar the police officer's suit because he did not discover the injury for which he filed suit until seven years after the incident.[90] The *Liddell* case, therefore, demonstrates that experiencing symptoms of *an injury* does not equate to discovery of *the injury for which one files suit.*[91]

### *D. Schmitz. v. NCAA*[92]

*Schmitz v. NCAA* illustrates the application of the discovery rule in CTE litigation. *Schmitz* involves a 1970s Notre Dame football player, Steven Schmitz, who developed CTE and later passed away in February

78. *Id.*
79. *Id.*
80. *Id.* at 7.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 8.
86. *Id.* at 7.
87. *Id.* at 13.
88. *Id.*
89. *Id.*
90. *Id.*
91. See *id.*
92. Schmitz v. NCAA, 155 Ohio St. 3d 389 (Ohio 2018).

of 2015.[93] His wife, Yvette Schmitz, filed suit against Notre Dame and the NCAA in 2014, claiming that the defendants "failed to notify, educate, and protect Schmitz from the long-term dangers of repeated concussive and subconcussive head impacts."[94]

Unsurprisingly, the NCAA filed a motion to dismiss on the ground that Schmitz's claim was barred by the two-year statute of limitations.[95] The defendants' main argument against the use of the discovery rule was based on a statement in Schmitz's amended complaint.[96] According to the defendants, because Schmitz referenced his impairments as latent effects of injuries he sustained while playing football, he demonstrated that he knew of his injury years prior to the suit.[97] The defendants claimed that the statute of limitations began to run at that point, even though Schmitz was unaware of the extent of the injuries.[98] The trial court granted the defendants' motion.[99]

After the Eighth District Court of Appeals affirmed in part and reversed in part, the case made its way to the Supreme Court of Ohio.[100] Upon consideration of the court's precedent in *O'Stricker* and *Liddell*, the court found that the complaint alone did not demonstrate that Schmitz's claim was time-barred.[101] The court made three important points in reaching this conclusion.

First, the court acknowledged that Schmitz's concussive symptoms put him on notice that he had sustained head injuries.[102] However, the court decided that concussive symptoms "do not inherently suggest the existence of actionable wrongdoing."[103] The court called head injuries an "inherent part of football."[104]

Second, the court likened concussive symptoms to the plaintiff in *Liddell*'s repeated sinus infections.[105] Just as the police officer in *Liddell*'s cancer did not manifest itself through sinus infections, Schmitz's CTE did not manifest itself through concussive symptoms.[106]

Finally, the court conditioned its holding on the fact that, "[u]ltimately,

93. *Id.* at 389.
94. *Id.*
95. *Id.* at 391.
96. *Id.* at 394.
97. *Id.*
98. *Id.*
99. *Id.* at 391.
100. *Id.*
101. *Id.* at 397.
102. *Id.* at 395-396.
103. *Id.* at 396.
104. *Id.*
105. *Id.*
106. *Id.*

it may be true—as [defendants] argue—that [Schmitz's] claims accrued before" the time of suit.[107] It stressed that the determination of this issue would be made through discovery, not merely the reading of the amended complaint.[108] The court stated that Schmitz could have discovered his cause of action through his symptoms, published medical literature, or the NCAA's changes in concussion protocol.[109] Discovery would bring to light whether or not he reasonably could have done so.[110]

Using these three points, the court remanded the case for further discovery to determine whether the claim was barred by the statute of limitations.

## III. DISCUSSION

As former football players and their families continue to file lawsuits seeking recovery for their injuries, they will likely continue to be met by statute of limitations defenses. These cases involve aging or deceased players who usually have not played football in years. Football organizations will continue to hide behind the shield of statutes of limitations for as long as they can. However, in future football-related CTE litigation, courts should only dismiss cases as barred by a statute of limitations in rare situations.

### *A. The Good and the Bad of the Schmitz Case*

The *Schmitz* case represents an important step in the right direction, as the Supreme Court of Ohio applied the discovery rule exception to the statute of limitations. Furthermore, the court recognized that concussive symptoms alone do not equate to the discovery of CTE.[111] In labeling concussive symptoms "an inherent part of football," rather than an indicator of CTE, the court eliminated a crucial roadblock that many CTE litigants face in filing suit.[112] However, the court fell short in its instructions on remand. Instead of giving structured guidelines for CTE discovery amongst a statute of limitations defense, the court briefly mentioned what *may* be enough to bar Schmitz's claim under the statute of limitations.[113]

The court noted that prior symptoms, published medical literature, and

107. *Id.* at 397.
108. *Id*.
109. *Id* at 396-97.
110. *Id.* at 397.
111. *Id.* at 396.
112. *Id*.
113. *Id.* at 396-97.

the NCAA's changes in concussion protocol could be enough to trigger the statute of limitations under the discovery rule.[114] However, the court did not provide adequate guidance as to what would be considered sufficient evidence to start the clock.[115] The court did not thoughtfully analyze the possible implications of prior symptoms, published medical literature, or NCAA protocol changes. Instead, the court timidly repeated that Schmitz's amended complaint, alone, did not demonstrate that he discovered his injury.[116] Because the court chose to provide suggestions, rather than meaningful precedent, it allowed the world to remain in the dark as to how the discovery rule applies to CTE litigation.

### *B. CTE Claims Should Only be Barred by a Statute of Limitations in Rare Situations*

As more CTE cases progress to discovery, courts will need to delve deeper into what is sufficient to start a statute of limitations when the discovery rule exception applies. Courts will need to consider whether certain types of evidence definitively show that a former player discovered his CTE. Due to the complexity of these cases, courts should make these decisions with great care. This will require analyzing each of the three arguments made by the defendants in *Schmitz*. Those arguments are that both prongs of the discovery rule are met, and therefore the statute of limitations beings to run, when:

> (1) A former player has experienced concussive symptoms and other cognitive impairments;
> (2) published medical literature on CTE in football exists; or
> (3) the NCAA and the NFL have instituted rule changes and improvements in concussion protocol.

As each of these arguments are flawed, future courts should decide that CTE cases should only be barred by a statute of limitations in rare situations.

#### 1. Concussive Symptoms and Other Cognitive Impairments

The first of three arguments made by the defendants in *Schmitz* is one that will likely be made in every football-related CTE case. The defendants argued that Schmitz discovered his injury when he experienced concussive symptoms and other cognitive impairments years

114. *Id*.
115. *Id.*
116. *Id.*

prior to filing suit.[117] As CTE is caused by repeated impacts to the head, almost all CTE lawsuits will involve a plaintiff who, at least, experienced concussive symptoms.[118] Therefore, it is vitally important to determine whether, and under what circumstances, evidence of prior concussive symptoms and other cognitive impairments will bar a claim under a statute of limitations.

As noted above in *Liddell*, it is important to distinguish between experiencing symptoms of *an injury* and discovery of *the injury for which one files suit*. While evidence of concussive symptoms proves a plaintiff knew he suffered *an injury*, this evidence does not prove the defendant knew of *the injury for which he filed suit*. Plaintiffs are not filing suit for the concussions the players suffered, they are filing suit for the result of those concussions and other head impacts: the development of CTE. This difference was correctly noticed by the court in *Schmitz* in regard to concussive symptoms.[119] However, the court failed to extend this notion to other cognitive impairments. Future courts will need to determine if evidence of memory loss, Alzheimer's disease, or dementia is sufficient proof that both prongs of the discovery rule are met.

In order to bar a plaintiff from suit, evidence of cognitive impairments must satisfy both prongs of the discovery rule. The evidence must prove that the plaintiff (1) knew or reasonably should have known he was injured, and (2) knew or reasonably should have known the injury was caused by the defendant. If a piece of evidence fails to prove both prongs, then that evidence, alone, cannot bar that plaintiff from suit. For example, concussive symptoms clearly do not meet either prong because they are an "inherent part of football."[120] Because concussions are so common, a player may not realize the gravity of his injury, or recognize the wrongdoing of a coach, team, or football organization (*e.g.*, the NFL or the NCAA).

The analysis is not so simple when it comes to memory loss, Alzheimer's disease, and dementia. These cognitive impairments usually manifest years later and would never be considered trivial. However, evidence of these impairments still fails to meet both prongs of the discovery rule.

To meet the first prong, evidence of these impairments would need to prove that the plaintiff was aware of his CTE. This is clearly not the case. While the symptoms of CTE are very similar to that of memory loss, Alzheimer's disease, and dementia, each of these impairments can exist independently from CTE. A plaintiff who experiences these impairments

117. *Id.* at 396.

118. *Frequently Asked Questions about CTE*, *supra* note 7.

119. *Schmitz*, 155 Ohio St. at 396.

120. *Id.*

could realize his frequent memory loss or be diagnosed with Alzheimer's disease or dementia. However, there is no definitive way to diagnose CTE in a living person.[121] Without a means of diagnosis, there is no way to prove the connection between cognitive impairments and CTE. Therefore, a person experiencing cognitive impairments cannot be reasonably expected to have discovered his underlying CTE.

To meet the second prong, evidence of memory loss, Alzheimer's disease, and dementia would need to prove the plaintiff was aware that his injuries were caused by the defendant. Once again, the similarities in symptoms of CTE and other cognitive impairments make this impossible. Many individuals who never played football develop memory loss, Alzheimer's disease, or dementia. There is no definitive way for a former player to trace the cause of his impairment back to football. Doing so would be nothing more than an assumption. Therefore, a former football player experiencing cognitive impairments cannot be reasonably expected to have discovered that a coach, team, or football organization is at fault for his injuries.

For these reasons, courts should not bar CTE lawsuits solely because of cognitive impairments of any kind. While memory loss, Alzheimer's disease, and dementia occur with less frequency than concussions, experiencing these impairments does not automatically signal CTE affliction. Nor do these cognitive impairments necessarily signal that a former player developed an injury as a result of playing football. Evidence must meet both prongs of the discovery rule to bar the plaintiff from recovery. It is clear that experiencing these impairments does not put a former player on notice of his development of CTE or of the cause of his injury. Therefore, in almost every situation relating to CTE in football players, the discovery rule is not satisfied simply because a player has one of the aforementioned impairments. Consequently, these impairments are not sufficient to start the statute of limitations.

### 2. Published Medical Literature

The second of the three arguments made by the defendants in *Schmitz* is that both prongs of the discovery rule are met because medical literature linking CTE to football has been published.[122] This argument will likely be made in many football-related CTE cases due to its simplicity. Studies like Dr. Anne McKee's, which found CTE in 177 of 202 former football players, certainly opened the eyes of many.[123] The argument that medical literature should put any injured football player on notice of CTE's

121. *Frequently Asked Questions about CTE*, *supra* note 7.

122. *Schmitz*, 155 Ohio St. 3d at 396.

123. Ward, Williams & Manchester, *supra* note 21.

connection to football is plausible on its face. However, evidence of published medical literature must satisfy both prongs of the discovery rule to bar a plaintiff from suit.

First, published medical literature on CTE and football must prove that a former player knew or reasonably should have known he had developed CTE. This is a very high bar for a defendant to meet. As CTE cannot be diagnosed in a living person, it is impossible to definitively prove that a plaintiff *knew* he had developed CTE.[124] This would be nothing more than an assumption. However, if a former player were to be exposed to medical literature on CTE and football, there is an argument to be made that he *reasonably should have known* he had developed CTE.

This argument has several important requirements. First, the former player must have experienced symptoms of CTE. Without experiencing symptoms, the former player would be basing his conclusion merely on the fact that he played football. This is unreasonable because many people who play football do not develop CTE.

Second, the former player must have been sufficiently exposed to medical literature. This would require not simply reading the literature, but understanding it and applying its concepts to his own symptoms and experiences. For a former player to *reasonably* conclude he had developed CTE, he would need knowledge and understanding to back the conclusion.

Finally, the defendant must virtually rule out other explanations for the former player's symptoms. Individuals can experience symptoms of cognitive impairments for a variety of reasons. Without ruling out other causes, the former player could not reasonably conclude that he has developed CTE. The defendant could introduce evidence of the former player's young age or absence of family history of any cognitive impairments. This evidence may render Alzheimer's disease or dementia less likely causes. Regardless of how it is demonstrated, there must be a reason to believe CTE is the most likely cause of the former player's symptoms.

Once each of these facts is established, the defendant would also need to meet the second prong of the discovery rule. The defendant would need to prove that the plaintiff knew or reasonably should have known his injury was caused by the defendant football organization. Published medical literature would certainly play an important role in making this connection. Many studies link football to cognitive impairments and CTE.[125] However, medical literature alone would not be enough to prove that the injury was caused by the defendant. The plaintiff would need

124. *Frequently Asked Questions about CTE*, *supra* note 7.

125. *See, e.g.*, Rapaport, *supra* note 43; Mez, et al., *supra* note 49.

outside proof that the defendant caused the injury. For example, evidence that the defendant carelessly sent the plaintiff back into games with concussive symptoms, coupled with the plaintiff's exposure to medical literature, could allow the plaintiff to reasonably conclude that the defendant caused his injury via negligence.

While published medical literature alone is not enough to establish that both prongs of the discovery rule are met, under certain circumstances, a legitimate argument could be made that a plaintiff reasonably should have known he had CTE and that his CTE was caused by the defendant. If a former player who experiences symptoms of CTE (1) is legitimately informed on published medical literature; (2) has a medical history that virtually rules out other explanations for his symptoms; and (3) has evidence of the defendant's negligence in regard to his safety, then that player *might* be deemed to have discovered his CTE. These circumstances would be rare and difficult to prove. However, nothing less than a showing of this nature would meet the requirements of the discovery rule.

### 3. Rule Changes and Concussion Protocol Advancements

The third of the three arguments made by the defendants in *Schmitz* is that both prongs of the discovery rule are met due to the NCAA and the NFL's rule changes and improvements in concussion protocol.[126] This argument is very similar to the argument that published medical literature should put a player on notice of his CTE. Defendants in football-related CTE cases will make this argument because, again, it seems plausible on its face. It is likely that a former football player would continue to follow football throughout his life. Anyone who has regularly watched football over the past few decades has seen the NCAA and NFL's rule changes and concussion protocol improvements. While knowledge of these changes does not equate to discovering one's own CTE, it could factor into the analysis of the discovery rule's second prong.

Knowledge of the NCAA and NFL's rule changes and concussion protocol improvements clearly does not show that a former player knows he has CTE. Instead, the changes demonstrate two things. First, head injuries in football were a serious enough issue to warrant change. Second, the NCAA and NFL understand the gravity of the situation and are actively working to improve player safety. These changes do not provide a former player any information with which he could reasonably conclude he has CTE. The changes may put the player on notice that football has caused head injuries, but it gives a player no information about *his own* affliction. Unless the player has an in depth understanding

126. Schmitz v. NCAA, 155 Ohio St. 3d 389, 397 (Ohio 2018).

of CTE and its symptoms, he cannot reasonably conclude that he has developed CTE. Knowledge of NCAA and NFL rule changes should not even move the needle when it comes to the first prong of the discovery rule.

On the other hand, the NCAA and NFL's rule changes and concussion protocol improvements could serve as important evidence that a player knew or reasonably should have known his injury was caused by a football organization. The changes the organizations have made over the years can be seen as an admission to prior negligence. A former player who suffers from cognitive impairments could see these changes and recognize that he was not afforded the same protection as players are today. The rule changes and concussion protocol improvements, alone, would not put a former player on notice that his injury is a result of football. However, knowledge of the rule changes could serve as an important first step towards recognition of football's role in a player's injury.

Defendants in football-related CTE cases are likely to argue that rule changes and concussion protocol improvements put former players on notice of their injury and its cause. That argument is a vast overstatement. The changes may tip off a player that playing football caused his injury. However, this conclusion assumes the former player continued to watch football, was aware of the changes, and understood the reasoning behind the changes. Even if all of this is proven, knowledge of the rule changes is completely irrelevant to the first prong of the discovery rule. News that the NFL banned hits with the crown of the helmet would not provide any former player with reason to conclude that the he has developed CTE.

## IV. CONCLUSION

CTE is a horrendous brain disease caused by repeated hits to the head.[127] Studies have proven that football players are at a higher risk of developing CTE due to the violent nature of the game.[128] While the NCAA and the NFL have instituted countless changes to protect current players, thousands of other players did not have the privilege of adequate protection.[129] Many former football players and their families have taken notice of this injustice and chosen to file suit. Some lucky individuals were compensated through class action settlements.[130] Others are left to

127. *Frequently Asked Questions About CTE*, *supra* note 7.

128. *See* Ward, Williams & Manchester, *supra* note 21.

129. *Concussion Timeline*, *supra* note 23. Ezell, *supra* note 23.

130. *Claims in NFL concussion settlement hit $500 million in less than 2 years*, *supra* note 52; *Judge OKs Concussion Suit Settlement vs. NCAA*, *supra* note 54.

fight on their own and must overcome several obstacles to do so.

Statutes of limitations are one of the obstacles these individuals must overcome. Statutes of limitations serve several important policy considerations, but it is questionable whether these policies are properly served in football-related CTE cases.[131] Following general statutes of limitations, former players who developed CTE would be barred from suit before they discovered their injuries. Fortunately for these players, courts developed the discovery rule. With the discovery rule in place, courts must consider the circumstances surrounding each individual's discovery of his injury, as opposed to immediately barring the suits based solely on the timeline.

The discovery rule asks the defendant to perform a difficult task. Defendants arguing a statute of limitations defense must prove what the plaintiff *reasonably* should have known. Because CTE cannot be detected in a living person, we must temper our expectations of when someone *reasonably* should know he has developed CTE.[132] Because cognitive impairments have so many possible causes, we must deeply consider when a plaintiff can *reasonably* conclude his injury is caused by a certain defendant.

Both prongs of the discovery rule are difficult to prove, as they should be. People who suffer from latent injuries, including former football players, should be allowed to bring a lawsuit upon discovery of their injuries. When more football-related CTE cases make their way into court, most of them should not be found to be barred by a statute of limitations. Only a very rare plaintiff can be deemed to have discovered the nature and cause of his CTE.

131. 51 AM. JUR. 2D *Limitation of Actions* § 5.

132. *Frequently Asked Questions about CTE*, *supra* note 7.