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Is the Sovereign Immunity of Athletic Trainers at State-Funded Colleges and Universities Coming Under Fire?

Illinois Court finds athletic trainers subject to duty of care independent of State employment - Sellers v. Rudert

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A recent case decided in Illinois has determined that athletic trainers in Illinois may be held personally liable for negligence claims brought against them, despite the fact that they are employed by state-funded institutions. In *Sellers v. Rudert*, 918 N.E.2d 586 (Ill. App. Ct. 2009), the Appellate Court of Illinois for the Fourth District found that athletic trainers at Eastern Illinois University were subject to a duty of care established by the Illinois Athletic Trainers Practice Act.

The Court determined that this duty was separate and independent from the trainers' state employment. As such, the trainers were not permitted to raise the defense of sovereign immunity that would typically be available to state employees. This decision allowed the plaintiff in the case, a former member of the University's football team, to maintain a negligence action directly against the trainers.

Sovereign immunity is a doctrine that generally provides that the state government and its governmental bodies, such as state funded colleges and universities, are immune from being sued for legal wrongs committed by the governmental bodies or their individual employees. However, Illinois, like every other state, has laws which "waive" the ability of the government to claim the complete protection of sovereign immunity in certain instances.

Illinois state law provides that negligence actions against the State and/or its employees may be brought in the Illinois Court of Claims, a special court which was created to hear these specific types of actions. In addition to this limited waiver of sovereign immunity, Illinois law requires the State to defend suits brought against state employees for actions occurring within the scope of the employee's State employment. The law also requires the State to pay the costs and expenses of defending the suits.

In the *Sellers* case, a former Eastern Illinois University football player brought a negligence action against, among others, two University athletic trainers for a severe neurologic injury suffered while playing in a football game for the University. The athletic trainers attempted to have the claims against them dismissed, arguing that the football player was suing them for actions that occurred while working for the University and thus, within the scope of their state employment. Therefore, the athletic trainers argued that based on Illinois law, the case should have been brought in the Court of Claims against the State, and not against the individual trainers in the Circuit Court of Champaign County.

However, the Court held that the Illinois Athletic Trainers Practice Act established a duty of care that was independent of the athletic trainer's state employment with Eastern Illinois University. Because the duty of care imposed by the Act was independent of the trainers' state employment, the Court found that any violations of the standard of care required by the Act could not be said to have occurred within the scope of the trainers' state employment. This meant that the trainers themselves, and not the State, were

responsible for defending the suit and that the trainers could become personally responsible for paying the costs and expenses associated with the suit. The Court then sent the case back to the trial court to determine whether the athletic trainers' treatment of the football player amounted to negligence.

It is important to note that the *Sellers* decision applies only to licensed athletic trainers who are employed by state-funded institutions in the State of Illinois. As such, athletic trainers who fall within this classification should be aware that their actions could subject them to personal liability if found to be in violation of the standards of care imposed by the Illinois Athletic Trainers Practice Act. It is especially important to remember that in many instances, the colleges and universities who employ these trainers may still be immune from liability as a result of sovereign immunity. If this is the case, the trainers, and not the colleges and universities, may be responsible for the costs and expenses associated with defending any such lawsuits.

As of the date of this article, Illinois remains the only State whose appellate courts have specifically held that athletic trainers at state-funded institutions may be held independently liable by virtue of a state licensing act for their conduct in the treatment of student athletes, even when acting within the scope of their state employment. Despite the limited effects of the *Sellers* Court's ruling, athletic trainers at state-funded colleges and universities across the country should be aware of the ruling and its potential implications on their profession. Athletic trainers should not assume that they will be immune from liability simply by virtue of their state employment. Further, athletic trainers at all state-funded colleges and universities should be aware that the Illinois decision may signal the beginning of a policy change across the United States toward limiting the ability of athletic trainers to claim sovereign immunity protection.

Other Courts that have addressed the liability of athletic trainers

In the past, other States have found that athletic trainers at state-funded universities are immune from liability for their conduct in treating students athletes by virtue of their status as state employees. Courts in Alabama, Arkansas and Mississippi specifically found that athletic trainers were acting within the scope of their state employment when treating injured athletes, and as such, were shielded from negligence claims by sovereign immunity.

A majority of states have laws that require state employees who wish to invoke the protections of sovereign immunity to not only be acting within the scope and course of their state employment, but also to be acting with "judgment and discretion" in carrying out their state employment. While it has not been decided in other states whether the actions of athletic trainers require the judgment and discretion necessary to invoke the protections of sovereign immunity, it should be noted that in the Alabama and Mississippi cases it was determined that the athletic trainers were found to be acting within their judgment and discretion in the course of treating the injured student athletes. Arkansas' sovereign immunity law is rare in that it provides immunity from liability to all state employees for actions that occur within the scope and course of their employment, so long as the actions were not malicious.

Other States with Courts of Claims for wrongful actions by the State and its employees

Other States, such as Connecticut, Kentucky, North Carolina, Ohio, Tennessee and Texas, have "waived" their sovereign immunity by setting up special courts of claims, boards and commissions, similar to the Illinois Court of Claims, to hear actions brought against the State and/or its employees.

In these States, as in Illinois, the University or the State will generally be responsible for defending the action on behalf of the state employee and for paying the costs and expenses of the litigation, so long as the employee was acting within the scope and course of his State employment when committing the alleged wrong. In those instances where the employee is found not to have been acting within the scope and course of his state employment, the claim may generally be brought against the individual employee in the traditional court system of the particular state.

Specifically, two of these Courts of Claims have heard cases involving athletic trainers. The Ohio Court of Claims heard an action brought against Bowling Green State University and its athletic training staff for the alleged negligence of the athletic trainers in their treatment of a student athlete who complained of cramps while practicing with the football team. The student athlete died within a few hours of suffering the initial cramps as a result of medical complications related to an issue that was previously unknown to the training staff. The Court of Claims ultimately determined that the training staff was not negligent in its treatment of the student athlete. As such, the University was not responsible for paying the damages claimed by the plaintiffs.

In a similar case, the Claims Commission of the State of Tennessee found that the State of Tennessee was liable for the actions of an athletic trainer at the University of Tennessee at Martin for failing to properly convey the symptoms of an injured student athlete to a team physician after the team physician had specifically requested that the trainer keep the physician updated as to the athlete's symptoms following a concussion. The decision was affirmed by an appellate court within Tennessee's state court system.

How should trainers react to the Illinois decision and what steps can be taken to ensure that trainers don't find themselves personally liable for conduct occurring within the bounds of their state employment?

Again, athletic trainers should be aware that the Illinois decision is unique in that it specifically found athletic trainers to be acting outside of the scope of their State employment when in violation of standards imposed by state licensing laws. To date, no other State appellate court has held that athletic trainers are who are subject to state specific licensing laws lose the protection of sovereign immunity when their actions are in breach of the duties imposed by those licensing laws.

However, athletic trainers should also be aware of the fact that the sovereign immunity laws in nearly every state will not protect state employees whose actions consist of intentional wrongdoing, willful, wanton and/or malicious conduct, or gross negligence, as actions of these kinds will generally be found to be outside of the trainer's state employment.

Athletic trainers should recognize the limited nature of the Illinois decision - it applies only to independently licensed trainers at state-funded institutions in Illinois. However, now that the decision has been published, courts in other States may choose to apply the logic of the Illinois Court and impose an independent duty of care on athletic trainers who are subject to standards of care and treatment by their various state licensing agencies.

As most courts have yet to directly address the issues faced by the Illinois Court, it is difficult to determine how other States may handle similar factual situations. However, there are several guidelines that all athletic trainers should follow in order to protect themselves from potential liability for their conduct in the treatment of student athletes.

- Become intimately familiar with the standards of care imposed on athletic trainers by your various state licensing agencies and by the common law of your States, especially in regard to the treatment of injured student athletes.
- Be aware of any rules, guidelines and/or policies imposed by the NCAA, its member conferences and your specific institutions with regard to the treatment of injured student athletes.
- Take action to ensure compliance with all of these standards by yourself and by other members of your training staffs, especially those for whom you are directly responsible for supervising.
- Speak with the lawyers at your institutions to determine what specific laws may apply to you in your State and to determine what the state of the law is with regard to the doctrine of sovereign immunity in your state, especially as it applies to employees of state-funded colleges and universities.

- Discuss with your employer the availability and necessity of maintaining insurance coverage for allegedly wrongful acts that may be committed by you and/or members of your training staffs.
- Speak with your campus risk managers to ensure that proper procedures and policies are in place for the reporting and treatment of injuries suffered by student athletes.
- Ensure that such policies and procedures are being followed at all times by members of your training staffs, and the coaching staffs and the players of the various athletic teams.
- Be aware of any rules, guidelines and/or policies imposed by the NCAA, its member conferences and your specific institutions with regard to mandatory attendance by members of athletic training staffs at practices, competitions and/or other functions or activities that team members are participating in.
- Have emergency procedures in place for instances when you will not personally be attending a practice, competition and/or other function or activity that team members are participating in to ensure that other members of your training staffs and the coaching staffs and players of the athletic teams are prepared for and capable of handling emergency situations that may arise.Maintain open lines of communication with team physicians and doctors regarding the status of injured student athletes, especially with regard to any treatment and/or care that you and/or members of your staff may be responsible for providing to the student athletes following operations and/or procedures.

Conclusion

Athletic trainers at state-funded colleges and universities across the United States should no longer assume that they will be immune from liability for negligent acts committed while treating injured student athletes by virtue of their state employment. In order to prevent liability for their conduct in treating injured student athletes, athletic trainers should make sure that they are familiar with and in compliance with all applicable standards of care imposed by state licensing laws and by the common law of each trainer's state. Finally, athletic trainers should speak with officials at their respective institutions to ensure that proper policies and procedures for the reporting and treatment of injuries to student athletes are in place and being complied with by all members of their athletic training staffs and various athletic teams.

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