

## Cardinals defend concussion claims

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*Sure, the calendar says September. The only sign of fall in most of Arizona, however, is football season in full swing. The Arizona Cardinals of the National Football League (NFL) are defending a lawsuit filed by three former player employees. The case is a side note to a larger national story about the NFL's proposed settlement with retired players. The case also flags a potential end run around the exclusive remedy for workplace injury claims that Arizona employers count on, thanks to the state's workers' compensation laws.*

### ***Before they were Arizona Cardinals***

The case against the Arizona Cardinals is proceeding in a Missouri state court. The plaintiffs are Roy Green, John "J.T." Smith, and Edward Scott, all of whom played for the Cardinals in St. Louis before the team moved to Arizona after the end of the 1987 NFL season. All three of them are claiming their injuries — multiple concussive and subconcussive blows to the head — were suffered between September and December 1987.

The former Cardinals players allege negligence, negligent concealment, and fraudulent concealment. They claim the Cardinals knew or should have known for many years that the sort of brain trauma to which they were exposed regularly could lead to serious neurological impairment. The players allege that despite having that knowledge from studies dating back to the early 1920s, the Cardinals either negligently or fraudulently represented to them that concussions weren't serious and lacked long-term negative effects.

Many of the same allegations are being asserted in lawsuits by hundreds of retired NFL players. More than 300 such cases, filed by more than 5,000 individuals, have been consolidated before a single

federal judge in Philadelphia. The Cardinals' initial game plan was to get Green and his teammates' case into federal court and transferred off to Pennsylvania with all the other cases. A Missouri federal judge said no in May and sent the case back to state court, where the players began to seek discovery (pretrial fact-finding) regarding what the NFL and the Cardinals organization knew about the extent of risk of neurological injury to players and when they knew it.

The consolidated cases had been in settlement mode for years. The NFL clearly wanted to curb negative publicity and avoid the very probing into the league's awareness of risk that the former Cardinals players appeared to be on the verge of obtaining. The NFL and the players' attorneys first announced a global settlement back in August 2013 for \$765 million to cover all claims of retired players for the next 65 years. The judge rejected that settlement, but in late June, the parties in the consolidated case came back with a new deal, which the Philadelphia federal judge preliminarily approved in just 11 days' time.

The terms of the new global settlement remain controversial, and we won't know whether it will become effective until after the Pennsylvania court conducts what's called a fairness hearing in November. In the meantime, however, it appears the Arizona Cardinals are using that settlement to try to block further discovery in the Green lawsuit in Missouri.

The Philadelphia judge's order that preliminarily approved the settlement also prohibited any members of the proposed class — including Green and his teammates — from moving forward with any lawsuit unless they opt out of the class. The Cardinals filed that order in the Missouri state court the next day, effectively shutting down Green's case. For the time being at least, it appears the Cardinals aren't going to have to disclose what they

knew about the risks of brain injury to NFL player employees and when they knew it.

### *Where's my immunity?*

By now, Arizona employers must be wondering why the Cardinals team isn't protected from this lawsuit by the immunity provided by the workers' comp system. The no-fault workers' comp system is designed both to make employees whole for any economic losses arising from on-the-job injuries and to give employers protection from even greater potential liability under Arizona common law if they happen to be at fault in a worker's injury. So the natural question is, why doesn't workers' comp provide the Arizona Cardinals with a "get out of court free" card?

The answer in Missouri is likely based a 2011 state appellate court decision in a case involving a worker who had contracted mesothelioma, a cancer strongly associated with asbestos exposure. The Missouri appellate court held that the state's workers' comp law didn't encompass occupational diseases. The ruling is based on language in the Missouri workers' comp law that limits its scope to an "accident."

The good news for Arizona employers is that the state statutory language here has a much broader scope for workers' comp claims. Under A.R.S. § 23-1022(A), the right to workers' comp arises for "injuries sustained by an employee." The word "accident" is nowhere in the statute.

Arizona does have an exception to employer immunity beyond the workers' comp system for certain on-the-job injuries. The exception applies only to "willful misconduct." Willful misconduct is defined as "an act done knowingly and purposefully with the direct object of injuring another." As a further limitation, the act causing the injury has to be done by the owner of the business or, if a corporation, someone at an officer level.

If Green and his teammates were making a claim against the Arizona Cardinals for injuries they suffered after the team's move to the Grand Canyon State, it appears that only one of their claims would have any chance in court. Negligence alone or even

negligent concealment wouldn't meet the statutory test. Only their fraudulent concealment claims would have a chance — and then only if the players had proof that a team officer knew enough about the risks that he was disregarding the life, limb, or bodily safety of his player employees by sending them onto the field.

### *Goal line stance*

The workers' comp system is an effective resolution of the difficult policy issue of what to do with employees who are injured on the job. Arizona requires insurance and risk-pooling to provide benefits to injured workers and, at the same time, gives employers important protection against potentially much greater liability. Keep that in mind the next time you pay your premiums or respond to an on-the-job injury.

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