

Sports Concussion Litigation: Bringing or Defending Claims Against Professional, Collegiate or Youth Leagues

Viable Causes of Action, Damages Assessment, and Settlement Structures

WEDNESDAY, DECEMBER 6, 2017

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Latest Developments in Sports Concussion Litigation

Timothy L. Epstein

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NFL Concussion Litigation

- The NFL's lengthy concussion crisis has brought with it a hefty cost.
 - The result has been a wave of expensive lawsuits against the NCAA, the NFL, and Riddell
- September 14, 2016 - Commissioner Goodell announces an initiative intended to increase the safety of the game, specifically by preventing, diagnosing and treating head injuries. The League and its 32 club owners will provide \$100 million in support of engineering advancements and medical research -- in addition to the \$100 million previously pledged by the League to medical and neuroscience research.
- July 25, 2017 - A study published in the medical journal JAMA identifies Chronic Traumatic Encephalopathy ("CTE") in 99% of deceased NFL players' brains that were donated to scientific research -- 110 out of 111 former NFL players.
- September 21, 2017 - Attorney Jose Baez tells reporters that results from tests performed on the brain of Aaron Hernandez, the former New England Patriots tight end who was convicted in 2015 of murder, showed a "severe case" of CTE.
- November 10, 2017 - Researchers publish in the journal Neurosurgery, what they say is the first case of a living person identified with CTE. Lead author Dr. Bennet Omalu confirmed to CNN that the subject of the case, while unnamed in the study, was former NFL player, Fred McNeill -- who died in 2015.

NFL Concussion Litigation-*Hernandez v. NFL*

- Aaron Hernandez's daughter filed a lawsuit against the NFL and the New England Patriots seeking \$20 million on a claim of loss of parental consortium.
- Complaint claims that at the time of his death, Aaron Hernandez had the most severe case of CTE medically seen in a person of his young age (28 years old) by Boston University's CTE Center.
 - Claims NFL was aware of the damage and failed to disclose, treat, and protect despite a duty to establish rules for the health and safety of players and as a result of the breach of duty, Hernandez suffered CTE which resulted in depression, uncontrollable aggression, and suicidal impulses
 - As a result, his daughter was deprived of the love, affection, society, and companionship of her father while he was alive.

NFL Concussion Litigation – NFL stalling on paying?

- The families of debilitated former NFL players say the League is obstructing their access to an estimated \$1 billion settlement over concussions by reflexively rejecting valid claims and bogging down the process with unreasonable demands.
- As of November 13th, of 1,400 claims filed, only 140 have been approved.
- The 140 approved claims are worth \$195 million, but the NFL has written checks for only \$100 million.
- The League has appealed eight awards that the administrator granted, and 12 players have appealed their awards, calling the awards too low.
- The delays are making it harder for the NFL players and their families to cover escalating medical costs and, in some cases, to repay high-interest loans they took out using their settlement monies as collateral.

NHL Concussion Litigation

- In contrast to the NFL, settlement has not been reached in the NHL case, and the NHL remains defiant on acknowledging any link between CTE and head trauma.
- The current NHL concussion litigation began in 2013-14 when a group of players filed suit against the League in Washington, charging the NHL with willfully ignoring science in pursuit of profits.
 - The lawsuit, which has since been transferred to District Court in Minneapolis, has expanded to include more than 200 players.
- The NHL, in response to the allegations, argues that the players have always been responsible for their own health.
 - The League's initial response to the litigation tried to absolve NHL officials of responsibility by noting that players should have "put two and two together", and realized on their own that a hockey career could cause brain damage.
- Unlike many NFL luminaries, notable NHL Hall of Famers, including Paul Kariya, Eric Lindros, and Chris Pronger, whose careers came to an early end due to post-concussion issues have chosen not to champion the cause.

Mike Peluso v. New Jersey Devils, et al.

- Mike Peluso, a longtime NHL enforcer and Stanley Cup champion, accuses the New Jersey Devils and the St. Louis Blues of hiding a neurology report for decades.
 - Claims two of his former teams “intentionally concealed” key medical records that warned further head injuries could put him at risk of suffering recurrent seizures
 - The Devils 1993 injury report and the 1994 medical report resurfaced last year when Peluso was still part of a concussion lawsuit filed against the NHL by more than 150 former players.
 - The lawyers representing the players in the concussion litigation would ideally like to begin with a bellwether case centering on just one player
 - Might be Mike Peluso given his well-documented struggle

NCAA Concussion Litigation

- In June 2016, the NCAA and the plaintiffs, led by former football player Adrian Arrington, reached a settlement in the major class action litigation facing the Association.
- *Arrington v. NCAA*, No. 2011 cv 06356
 - Class Action suit led by former football player at Eastern Illinois University
 - Following multiple concussions, Arrington began suffering from seizures and memory loss
 - The allegations alleged that the NCAA and its institutions were negligent and fraudulently concealed information related to head trauma
 - ND of IL Judge John Lee approved the \$75 million settlement with \$70 million to be used for a medical monitoring program for college athletes, and \$5 million for a program to research prevention and treatment of concussions.
 - However, Judge Lee declined to exempt the NCAA from future class-action suits, leading to continued filings against the Association and its member institutions.

NCAA Concussion Litigation- *Langston v. NCAA*

- June 2017- *Langston v. NCAA* – Example of pending concussion lawsuit
 - The family of a former college linebacker who killed himself in 2014 is suing the NCAA, assailing its handling of concussions that included more than 100 allegedly suffered by Zack Langston at Pittsburg State.
 - An autopsy of Langston's brain showed CTE present.
 - The lawsuit claims the NCAA knew for decades "that severe head impacts can lead to long-term brain injury." But both "recklessly ignored these facts" and failed to put in place concussion-management protocols to safeguard student-athletes, according to the lawsuit.
 - The case along with multiple other individual personal injury actions for concussion-related issues remain pending at various stages in court houses throughout the US.

Worker's Compensation Brain Injury Only Litigation

- Avoiding concussion litigation by seeking to have CTE covered under the NFL's workers' compensation benefits --
- On December 21, 2016, in the U.S. District Court for the Southern District of Florida in Ft. Lauderdale, Judge Beth Bloom dismissed the suit (*Gaiter et al. v. National Football League*) without prejudice.
 - The federal court case brought by 38 former National Football League players seeking to force the NFL to recognize CTE as a covered disease under workers' compensation has been withdrawn.
 - Instead of pursuing their joint case, the players will file separate workers' compensation claims in individual states, according to their lawyer.

Worker's Compensation Brain Injury Only Litigation - State Law

- Seeking medical care or money through California's workers' compensation system for brain trauma and other injuries suffered on the playing field.
 - California is notorious for being one-sided in its support of employees' work comp claims. NFL players recognize they will receive higher benefits for filing an injury claim in California, over other states in the country.
 - Legislation has attempted to limit workers comp coverage for professional athletes. For instance, California passed a law in 2013 that prevents athletes from other states from filing workers comp claims there.
- Other state laws also address comp coverage for professional athletes.
 - Highly paid professional athletes in Michigan are limited from collecting wage differential benefits.
 - In Massachusetts and Florida, professional athletes are not categorized as employees. Florida law prevents workers from filing workers comp claims in other states for injuries incurred while working outside of Florida.
 - Illinois currently caps workers' comp benefits at around \$775 per week. The most a professional athlete would stand to gain would be around \$40,000 per year.

Plaintiff Strategies and Defense Tactics

Jason E. Luckasevic
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Plaintiff Strategies (Pro/College)

- Leagues (Duty)
 - Negligence
 - Fraud/Concealment
- Teams
 - Latent (worker's compensation)
- Physicians/Coaches/Trainers
 - Plead medical malpractice

Plaintiff Strategies (High School and Lower)

- Duty
- State law (Lysteadt Law)
- Sovereign Immunity
- Coaches

Plaintiff Strategies (Other)

- Helmet Makers
- Technology

Plaintiff Strategies

- Concussion History
 - Misleading
- * Knowledge (state or art)
- Causation
- CTE in living
- Experts

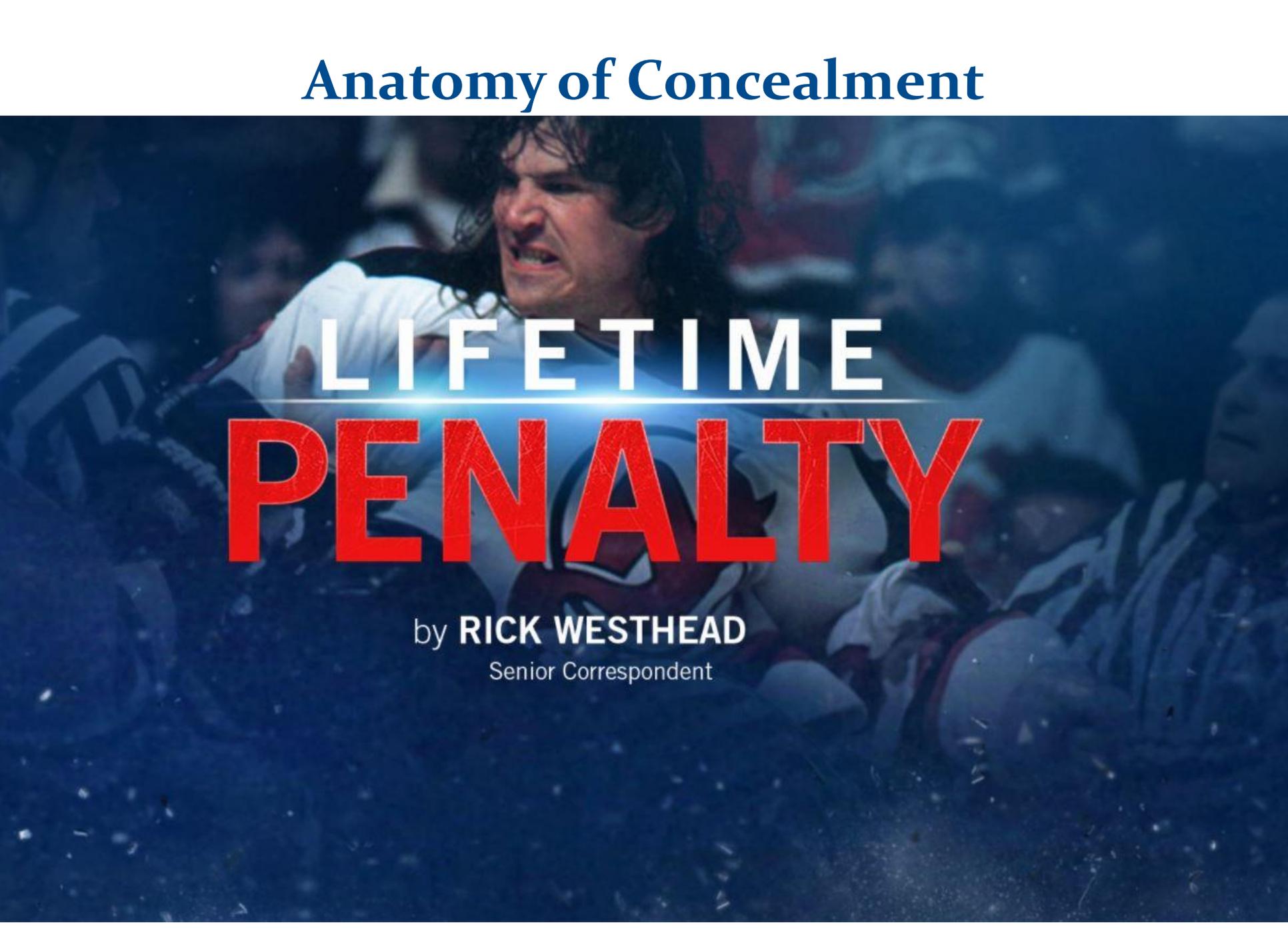
Defense Tactics

- Preemption/Duty
- Ask about concussions
- Talk about entire football career
 - Big fish in small pond
- Past medical history
 - Trauma
 - Cognitive Issues (e.g., ADHD)
- We didn't know
- But, if we did know, we didn't cause his problem

Plaintiff Strategies and Defense Tactics

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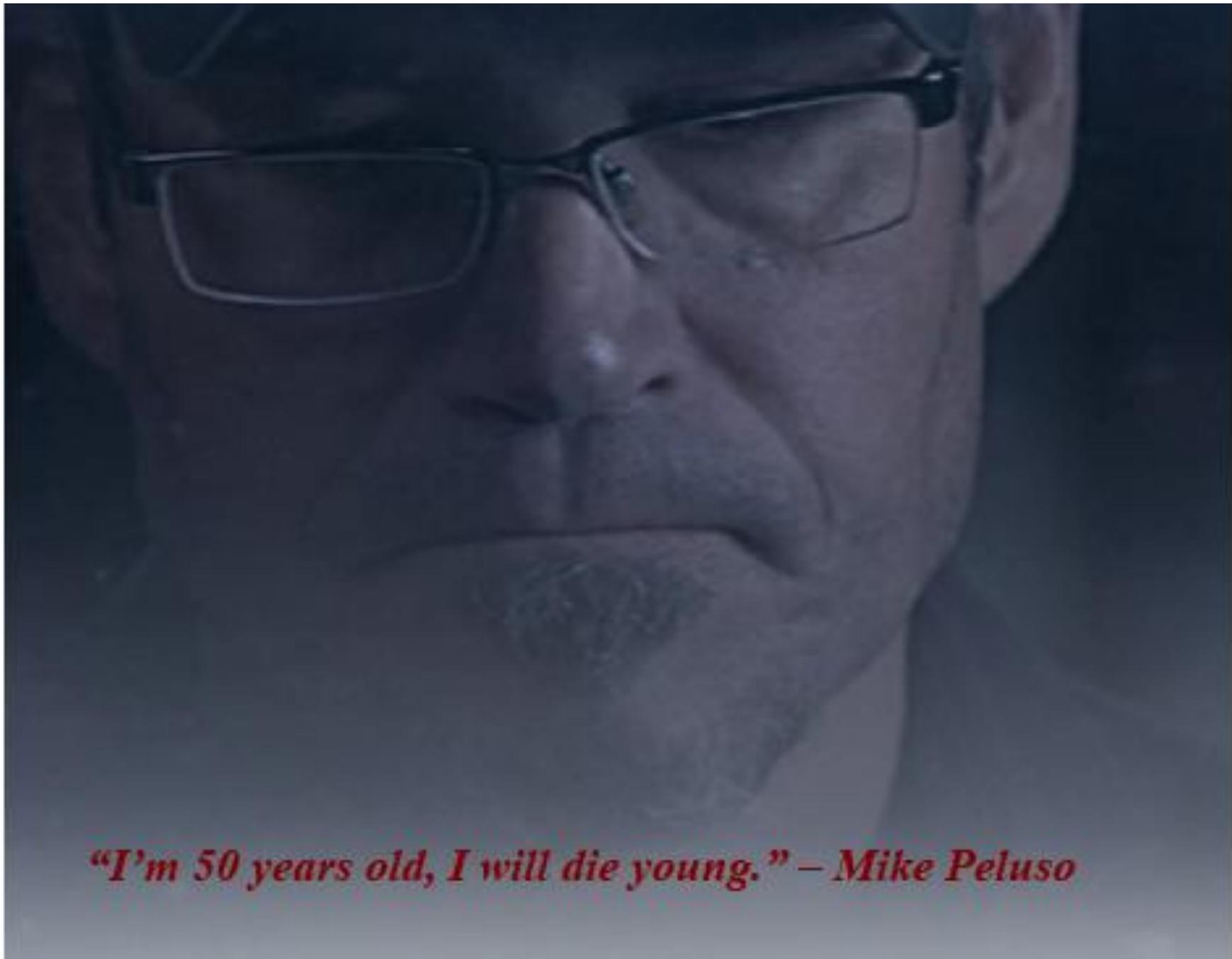
Anatomy of Concealment



LIFETIME PENALTY

by **RICK WESTHEAD**

Senior Correspondent



“I’m 50 years old, I will die young.” – Mike Peluso

the New Jersey Devils; 1996-1997 for the St. Louis Blues; and 1997 for the Calgary Flames.

8. Mr. Peluso played in 458 NHL games as a forward/enforcer. As an enforcer – a position in Hockey where the primary job duty is to protect the skilled the players which requires constant initiating and engaging in bare knuckled fist fights – Peluso was involved in a total of 240 fights in NHL games. Peluso had 1,951 penalty minutes during his NHL career and is one of only four NHL players to incur over 400 penalty minutes in one season.

9. Peluso was part of the famed “Crash Line” of the mid 1990’s – known for their unwavering loyalty to follow the directions of their coaches to protect skilled players at all costs – including through violence, a required lack of regard for their own safety, and reckless abandonment.

10. With the encouragement and under the direction of the Team Defendants, and without any warnings about the serious risks to his brain, Peluso participated in hundreds of bareknuckle fights throughout his NHL career. Peluso also received body checks, slashes from hockey sticks, blows delivered by fists, elbows, and other body parts, to his head and other body parts during the course of games and practices throughout his professional playing career.

11. Peluso currently has permanent damage to the right side of his brain (he was a left-handed fighter and absorbed the majority of punches to the right side of his brain); has had 9 grand mal seizures; has early onset dementia at the young age of 51, and struggles daily with depression, anxiety, memory loss, and the constant threat of more seizures.

[T]here is indication of significant acquired neuropsychological dysfunction.... These deficits are considered to be permanent and will likely increase in the future.¹⁷

54. Dr. Lamberty diagnosed Mr. Peluso with:¹⁸

- Major Neurocognitive disorder secondary to traumatic brain injury;
- Major Depression, Recurrent, moderate to severe; and
- Anxiety, NOS.

M. **05/23/2016**: MR. PELUSO'S NEUROLOGIST WHO HAS TREATED HIM FOR FIVE YEARS FINDS THAT MR. PELUSO HAS DEMENTIA AND HIS DEMENTIA IS CAUSED FROM HIS HEAD INJURIES IN THE NHL.¹⁹

55. Dr. Steven D. Stein, M.D, is Mr. Peluso's personal Neurologist of 6 years

Dr. Stein reviewed Dr. Lamberty's report and then analyzed her findings based on his six years of evaluations with the Mr. Peluso and issued a report stating that the Mr. Peluso had signs of early onset Dementia, a significant mood disorder that was preventing him from working, and Anxiety NOS:

I am a neurologist who has been involved in the care of Mr. Mike Peluso since January 2011. Mr. Peluso has a seizure disorder as well as a chronic cognitive and mood disorder. In my opinion, both of these conditions are, more likely than not, related to his career as a professional hockey player. *It is my understanding he has experienced numerous, significant head injuries in the course of his professional hockey career. He recently underwent neuropsychological testing by Dr. Kerri Lamberty. The result of this testing revealed major neurocognitive disorder as well as evidence of major depression and anxiety.* The cognitive disorder is of a degree that it will impact day-to-day activities. *In my opinion, these deficits*

However, rather than accept Applicants claim or acknowledge his injuries, Defendants denied Applicant's industrial condition and concealed the true nature of his injury by making allegations to the contrary, for example:

Attorneys for CHUBB/Federal stated: Applicant's "alleged" seizure disorder was caused by "lack of sleep, partying, dehydration, binge drinking, and failure to take medication"²⁴

Attorneys for CHUBB/Federal stated: "[Applicant] ha[s] not offered any medical evidence to support the allegations of brain damage and diagnosis of dementia."²⁵

Attorneys for CHUBB/Federal stated: "Defendant can find no medical evidence stating [Applicant's seizure's could have been prevented] and direct the Board's attention to the voluminous medical treatment in which the applicant's seizures have been a result of binge drinking, partying, lack of sleep, and noncompliance with

²⁴ Insurance Business Canada, *National Hockey League Insurer Chubb Hits Back After Sport Star's Accusations*, 1/20/2017, found at <http://www.insurancebusinessmag.com/ca/news/breaking-news/national-hockey-league-insurer-chubb-hits-back-after-sport-stars-accusations-59041.aspx>; CHUBB/Federal's Answer to Applicant's Petition for Removal/Reconsideration on Order Bifurcating Trial on Jurisdiction Only, dated 1/12/17, pgs.8-9.

²⁵ *Id.*

A. **02/18/1994: LOU LAMORIELLO – PRESIDENT AND GENERAL MANAGER OF THE DEVILS – STATES THAT MR. PELUSO’S SEIZURE WAS RELATED ONLY TO DEHYDRATION¹**

1. According to the New York Times:

MIKE PELUSO will have more tests Friday in New Jersey to determine the cause of seizure he suffered on Monday during the team's mini-vacation in Florida. LOU LAMORIELLO, the president and general manager of the Devils, said the seizure was primarily due to dehydration and lack of nutrition. But the Devils are concerned that it could be related to a concussion Peluso suffered in Quebec Dec. 18. Peluso banged his head on the ice during a fight with TONY TWIST of the Nordiques and was kept overnight in a hospital for

VI. DISCOVERY VIOLATIONS IN CALIFORNIA

74. On 11/28/12, Mr. Peluso filed a cumulative trauma case in California alleging injuries to multiple parts of his body and head. Chubb Insurance company denied his case.

75. On 11/28/2012, Mr. Peluso's counsel served all Defendants with a continuing Request for Production of Documents that required medical records be produced in 30 days (10 days according to statute).

76. On 12/20/12, after receiving no response within 10 days, Mr. Peluso's Counsel subpoenaed records of the New Jersey Devils and other Defendants.

77. On 8/1/13, Mr. Peluso's counsel still had not received a response so Mr. Peluso corresponded with counsel for the New Jersey Devils and Chubb Counsel stated that they were requesting records and would forward upon receipt.

78. On 8/9/13, Mr. Peluso's counsel received a notification letter from its subpoena company that the New Jersey Devils and other Defendants "failed to comply to our out of state subpoena and is not responding to our emails."

79. On 12/23/13, counsel for the New Jersey Devils/Chubb wrote and stated it was in the process of obtaining records and informed Mr. Peluso's counsel that "there is no need to subpoena these records."

80. On 11/25/14, Mr. Peluso's counsel still had not received any documents from the New Jersey Devils. However, counsel for the New Jersey Devils wrote and stated that its "discovery was complete" and it was prepared to "proceed forward on all issues

on this matter.” This was an implicit representation that the New Jersey Devils had no documents and that a diligent search had been conducted to confirm such representation.

81. On **2/20/15**, Mr. Peluso’s counsel still had not received any documents from the New Jersey Devils. However, counsel for the New Jersey Devils wrote: “At this time, our office is filing a [Declaration of Readiness to Proceed for an MSC] ... as we have completed all discovery.” This was still another implicit representation that the New Jersey Devils had no responsive documents.

82. On **6/29/15** – *two years and seven months after Mr. Peluso’s Request for Production of Records* – the New Jersey Devils finally produced medical records and documents. As stated earlier, two **key medical records were omitted**. The medical records showed Defendants had a duty to protect Mr. Peluso and did not.

“Due to defendant New Jersey Devils’ dereliction of its discovery obligations.... the New Jersey Devils ‘wrongfully withheld’” key medical records.¹

1. On 11/15/16, the California Workers Compensation Appeals Board held that Defendants 1) engaged in serious discovery violations and 2) “wrongfully withheld” documents.

The Court stated:²

The New Jersey Devils Records are essential to this analysis. These documents were responsive to valid discovery requests propounded in this case but were inexplicably not produced by defendant New Jersey Devils.... Due to defendant New Jersey Devils’ dereliction of its discovery obligations, these documents clearly ‘were not available’ to [Mr. Peluso] prior to the close of discovery.

[T]he New Jersey Devils wrongfully withheld ... [medical documents]....

December 18, 1993, Fight that Leads to Mr. Peluso's First Grand Mal Seizure



Figure 1 - Mike Peluso: No Helmet in a bareknuckle fight that led to the concussion that precipitated his first Grand Mal Seizure.



Figure 2 - Mike Peluso is hit in the head with a bareknuckle fist



Figure 3 - Mike Peluso is hit again on his left temple and knocked unconscious



Figure 4 - Mike Peluso's unprotected skull is driven into the ice by the opposing player



Figure 5 - Mike Peluso's unprotected skull bounces off the ice floor



Figure 6 - Mike Peluso lays unconscious



Figure 7 - Mike Peluso lying unconscious as a result of his skull being driven into the ice after a bareknuckle punch knocks him out



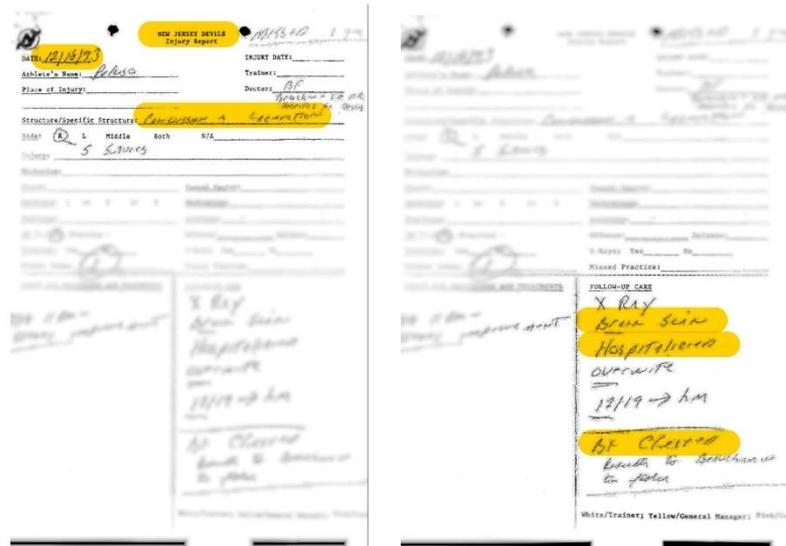
Figure 8 – Mike Peluso is helped off the ice and sent to the locker room where staff observed him repeatedly showering in the locker room because he could not remember that he had already showered. Mike also experienced headaches, dizziness and nausea.

Mike went on to have nine (9) Grand Mal Seizures as a result and now lives with a Chronic Seizure Disorder and Early onset Dementia.

24. One sports website reported the fight as follows:

The fight is over quickly. Twist lands 2 hard punches and Peluso is helmetless.... [Twist's punch] catches Peluso flush on the jaw and Peluso collapses and is knocked out before he hits the ice. Due to Peluso's helmet being off he really smashed his head on the ice when he went down.

Peluso is motionless on the ice clearly out of it. He manages to lift his head up but he is obviously in bad shape. Randy McKay helps the New Jersey trainer get to Peluso and they attend to him. Peluso would end up spending the night in the hospital with a concussion....



C. 12/23/1993:

26. Shortly after his hospitalization from this serious injury, and despite not being able to remember his way to the arena (Mr. Peluso’s girlfriend had to drive him to the arena), Mr. Peluso was forced to come back to work. Mr. Peluso’s head coach informed him that the opposing team had six “linebackers” and Mr. Peluso was needed to protect the skilled players that evening. Mr. Peluso complied and played in a game against the Toronto Maple Leafs. During that game, Mr. Peluso was hit in the head by opposing player Ken Baumgartner and sustained further head injury. *Despite this occurring with the team, no documents regarding this event were ever produced in his workers compensation case.*

NEW JERSEY DEVILS
Injury Report

M/ISS RD 1 2 2

DATE: 12/18/93

INJURY DATE: _____

Athlete's Name: P. P. P.

Trainer: _____

Place of Injury: _____

Doctor: BP
Brookview - ER DR
Hospital for Jersey

Structure/Specific Structure: CONCUSSION & LACERATION

FOLLOW-UP CARE

X RAY

BRAIN SCAN

HOSPITALIZED

OVERNITE

12/19 → HM

BT CLEAR

Results to Beuchamp
to folder

Devils' Peluso has a seizure after Twist fight

Sun-Sentinel wire services

New Jersey defenseman Mike Peluso experienced a seizure last week in which he had to be restrained by teammates in a workout room.

He was hospitalized in St. Petersburg for two days after the incident, in which he trashed the room in which the Devils were exercising. Some fear that the reaction was as a result of a concussion Peluso sustained Dec. 18 in a fight with Quebec's Tony Twist.

"That was the first thing I thought of, that he was still having problems from that concussion," said defenseman Viacheslav Fetisov. "I was on the ice that game when he hit his head [on the ice], and it was scary.

"I'm not a doctor, but you have to rest a little after something like that. Mike is just a workout machine — especially on his day off. Other guys are resting and he wants to work out."

- E. 02/18/1994: LOU LAMORIELLO – PRESIDENT AND GENERAL MANAGER OF THE DEVILS – STATES THAT MR. PELUSO’S SEIZURE WAS RELATED TO DEHYDRATION¹⁰

28. According to the New York Times:

MIKE PELUSO will have more tests Friday in New Jersey to determine the cause of seizure he suffered on Monday during the team's mini-vacation in Florida. LOU LAMORIELLO, the president and general manager of the Devils, said the seizure was primarily due to dehydration and lack of nutrition. But the Devils are concerned that it could be related to a concussion Peluso suffered in Quebec Dec. 18. Peluso banged his head on the ice during a fight with TONY TWIST of the Nordiques and was kept overnight in a hospital for observation.

¹⁰See Alex Yannis, "HOCKEY - Consecutive-Shot Goals Confound Brodeur Again" NEW YORK TIMES, Feb. 18, 1994.

F. 12/93-2/94: PELUSO IS PREVENTED FROM TAKING TIME OFF AND SUSTAINS MULTIPLE HEAD INJURIES – INCLUDING 10 DOCUMENTED BARE KNUCKLE FISTS TO HIS BRAIN - FROM 7 FIGHTS BETWEEN HIS 12/18/93 CONCUSSION AND BEING “CLEARED” TO RETURN ON 12/20/94.

29. From www.Dropyourgloves.com:

13	Dec 18	NHL	NJ-Que	Tony Twist *	+3	+5	Loss	8.8	R(24),M(8)	2-5	1-3
14	Dec 23	NHL	Tor-NJ	Ken Baumgartner	+3	+20	Draw	4.8	R(5),M(2)	6-8	2-1
15	Jan 4	NHL	NYI-NJ	Dean Chynoweth	+2	+35	Win	3.7	R(3),M(1)	7-1	2-0
16	Jan 19	NHL	NJ-Win	Dean Kennedy	+2	+17	Draw	3.7	R(3),M(3)		
17	Jan 26	NHL	NJ-Edm	Kelly Buchberger	+2	+25	Win	6.2	R(5),M(2)	7-2	5-0
18	Feb 2	NHL	Buf-NJ	Matthew Barnaby (TAT)	+3	+34	Win	7	R(7),M(2)	15-15	6-4
19	Feb 20	NHL	NJ-Chi	Cam Russell		+25	Win	5.5	Rev (2)	11-8	4-2

G. 02/20/1994: THREE NEWSPAPER OUTLETS – INCLUDING THE NEW YORK TIMES AND PRIOR TO THE 2/21/94 REPORT – ANNOUNCED THAT MIKE PELUSO HAS BEEN CLEARED BY TEAM DOCTORS AND ALLOWED TO CONTINUE SUSTAINING FURTHER HEAD INJURY.

30. From the New York Times, 2/20/94:

MIKE PELUSO , who went into a seizure last Monday as a result of dehydration, returned to the lineup after receiving clearance from the Devils' doctors. . . . STEPHANE RICHER developed a sore back this morning and was scratched. . . . JASON SMITH was the other scratch for the Devils, who were left with 22 players after BEN HANKINSON made his sixth trip to the team's top affiliate in the minor leagues, the Albany River Rats of the American Hockey League.

H. 02/21/1994: DEVILS' NEUROLOGIST FINDS MR. PELUSO'S GRAND MAL SEIZURE IS CAUSED BY THE FIGHT AND CONCUSSION SUSTAINED ON 12/18/93 AND MR. PELUSO CAN ONLY CONTINUE TO PLAY IF HE DOESN'T SUSTAIN FURTHER HEAD INJURIES.¹¹

¹¹ See 02/21/1994 Report of Dr. Marvin Ruderman of the Neurology Associates of New Jersey

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NEUROLOGY
ELECTROENCEPHALOGRAPHY
ELECTRORETINOGRAPHY
NEUROMUSCULAR DISORDERS

February 21, 1994

Leonard Jaffe, M.D.
609 Morris Avenue
Springfield, New Jersey 07081

Re: Mr. Mike Peluso

Dear Len:

I had the opportunity to examine Mr. Mike Peluso in my office on February 18, 1994. The patient is a 28 year old gentleman with no complaints at the present time. He reportedly experienced a seizure on 2/14/94.

Mr. Peluso is a hockey player for the New Jersey Devils. He said he had played a game on 2/13/94, and the following day while exercising on a stairmaster, he felt dizzy and lightheaded, and passed out. He apparently suffered a grand mal seizure at that time. Mr. Peluso said

Figure 1 - above - Neurologist states that Mr. Peluso sustained a seizure while working out with the team.

... of ... at ... and Physical responses were flexor bilaterally. The gait was normal, including heel, toe and tandem walking. The Romberg sign was negative.

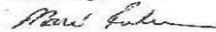
I find that Mr. Peluso's neurological examination is normal at the present time. He likely experienced a major motor seizure on 2/14/94, which I believe is most likely related to a post-traumatic seizure as a consequence of the cerebral concussion in December 1993. I do not believe this was related to dehydration. The use of alcohol on the previous evening may have been a factor in lowering the seizure threshold, although I believe it is less likely that this was simply an alcohol withdrawal in view of the EEG results. I asked Mr. Peluso to increase the dose of Tegretol to 200 mg. PO tid. A serum Tegretol will be obtained on 2/24/94, and a CBC was requested. A repeat CBC

Figure 2 - above - Neurologist states that Mr. Peluso's seizure was caused by 12/18/93 concussion and not dehydration.

... understands that there is still a risk of recurrent seizures. I do not believe that the participation in playing hockey in itself poses an excessive risk for the development of further seizures unless he were to sustain head injuries. He will continue to use a helmet. I advised that he refrain from driving for at least six months. I will be in contact with Mr. Peluso again following results of the serum Tegretol level.

Thank you for referring this patient for evaluation.

Sincerely,


Marvin I. Ruderman, M.D.
MIR/jw

cc: Dr. Barry Fisher
Mr. Leo Lazortello

Figure 3 - above - Report was sent to Devils' GM and Team Doctor and Neurologist was retained by the Devils. Report clearly states that Mr. Peluso can only continue playing if the Defendant prevented further head injuries

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DIPLOMATE, AMERICAN BOARD OF PSYCHIATRY & NEUROLOGY (AB) /
DIPLOMATE, AMERICAN BOARD OF ELECTRODIAGNOSTIC MEDICINE

NEUROLOGIC
ELECTROMYOGRAM
ELECTROENCEPHALOGRAPHY
NEUROMUSCULAR DISORDERS

February 21, 1994

Leonard Jaffe, M.D.
609 Morris Avenue
Springfield, New Jersey 07081

Re: Mr. Mike Peluso

Dear Len:

I had the opportunity to examine Mr. Mike Peluso in my office on February 18, 1994. The patient is a 28 year old gentleman with no complaints at the present time. He reportedly experienced a seizure on 2/14/94.

Mr. Peluso is a hockey player for the New Jersey Devils. He said he had played a game on 2/13/94, and the following day while exercising on a stairmaster, he felt dizzy and lightheaded, and passed out. He apparently suffered a grand mal seizure at that time. Mr. Peluso said he did not bite his tongue or experience incontinence. He recalled that he had experienced a concussion in December 1993 when he fell back on the ice and struck his head during a game. He said he had brief loss of consciousness at that time. He was wearing a helmet. This occurred in Quebec, and he was admitted to a hospital for one day.

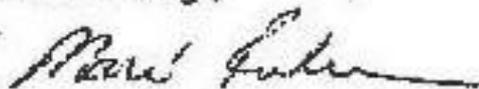
flexor bilaterally. The gait was normal, including heel, toe and tandem walking. The Romberg sign was negative.

I find that Mr. Peluso's neurological examination is normal at the present time. He likely experienced a major motor seizure on 2/14/94, which I believe is most likely related to a post-traumatic seizure as a consequence of the cerebral concussion in December 1993. I do not believe this was related to dehydration. The use of alcohol on the previous evening may have been a factor in lowering the seizure threshold, although I believe it is less likely that this was simply an alcohol withdrawal in view of the EEG results. I asked Mr. Peluso to increase the dose of Tegretol to 200 mg. PO tid. A serum Tegretol will be obtained on 2/24/94, and a CBC was requested. A repeat CBC

understands that there is still a risk of recurrent seizures. I do not believe that the participation in playing hockey in itself poses an excessive risk for the development of further seizures unless he were to sustain head injuries. He will continue to use a helmet. I advised that he refrain from driving for at least six months. I will be in contact with Mr. Peluso again following results of the serum Tegretol level.

Thank you for referring this patient for evaluation.

Sincerely,



Marvin I. Ruderman, M.D.

MIR/jw

cc: Dr. Barry Fisher
Mr. Leo Lamoriello

Mike Peluso Fights

Height 6'4" (193 cm) Weight 225 lb (102 kg)

Total 259 Fights (.354 per Game)
Career 76-55-61 / Win 53% / Fun 4.9

14 unfair fights

Mike Peluso 1993-1994 Fights

#	Date	Lg	Game	Opponent			Out come	Fun	Reviews Messages	Punches (For-Ag)	
				Name	Ht+/-	Wt+/-				Thrown	Landed
1	Sep 16	NHL	NJ-Phi	Jim Cummins <small>(TBT)</small>	+2	+15	Win	5	R(3),M(1) <small>👍👍👍</small>		
2	Sep 22	NHL	Phi-NJ	Jim Cummins <small>(TBT)</small>	+2	+15	Loss	5.5	R(8),M(1) <small>👍👍👍</small>		
3	Sep 23	NHL	Har-NJ	Scott Daniels	+1	+10	Update / Review				
4	Oct 1	NHL	NJ-NYR	Adam Graves	+4	+20	Draw	4.4	R(5),M(1) <small>👍👍👍</small>	8-5	1
5	Oct 1	NHL	NJ-NYR	Mike Hartman	+4	+25	Win	5.2	R(6),M(1) <small>👍👍👍</small>	9-4	7
6	Oct 8	NHL	NJ-Wsh	Kevin Hatcher	+1	+7	Draw	6.2	R(6),M(4) <small>👍👍👍</small>	16-9	11
7	Oct 12	NHL	Win-NJ	Tie Domi <small>(TBT)</small>	+6	+12	Loss	7.1	R(16),M(5) <small>👍👍👍</small>	9-9	5
8	Oct 16	NHL	NJ-NYI	Mick Vukota	+2	+10	Loss	3.2	R(5),M(1)	1-4	0
9	Nov 7	NHL	NJ-SJ	Doug Zmolek	+2	+5	Draw	3	R(6),M(1) <small>👍👍👍</small>	5-4	2
10	Nov 20	NHL	Del-NJ	Terry Carkner	+1	+15	Draw	1.8	R(4),M(1) <small>👍👍👍</small>	0-3	0
11	Nov 23	NHL	NJ-Que	Chris Simon	+1	+8	Loss	6.3	R(12),M(3) <small>👍👍👍</small>	6-7	2
12	Dec 4	NHL	Chi-NJ	Neil Wilkinson	+1	+31	Win	4.3	Rev (3)	7-0	5
13	Dec 18	NHL	NJ-Que	Tony Twist <small>👊</small>	+3	+5	<small>(KO)</small> Loss	8.8	R(24),M(8) <small>👍👍👍</small>	2-5	1
14	Dec 23	NHL	Tor-NJ	Ken Baumgartner	+3	+20	Draw	4.8	R(5),M(2) <small>👍👍👍</small>	6-8	2
15	Jan 4	NHL	NYI-NJ	Dean Chynoweth	+2	+35	Win	3.7	R(3),M(1)	7-1	2
16	Jan 19	NHL	NJ-Win	Dean Kennedy	+2	+17	Draw	3.7	R(3),M(3) <small>👍👍👍</small>		
17	Jan 26	NHL	NJ-Edm	Kelly Buchberger	+2	+25	Win	6.2	R(5),M(2) <small>👍👍👍</small>	7-2	5
18	Feb 2	NHL	Buf-NJ	Matthew Barnaby <small>(TBT)</small>	+3	+34	Win	7	R(7),M(2) <small>👍👍👍</small>	15-15	6

18				Kypreos									
2	Sep 18	NHL	NYR-NJ	Daniel Lacroix	+2	+20							Msg (1)
3	Sep 18	NHL	NYR-NJ	Eric Cairns	+2	+18	Draw	5					Rev (1)
4	Sep 26	NHL	NYI-NJ	Mick Vukota	+2	+10	Update / Review						
5	Oct 12	NHL	Win-NJ	Jason Doig	+1	+4							Msg (2)
6	Oct 28	NHL	Pit-NJ	Chris Tamer	+2	+20	Draw	3					Rev (1)
7	Nov 2	NHL	NJ-SJ	Jeff Odgers ^(TAT)	+4	+25	Loss	8			R(12).M(3)	14-19	10-12
8	Nov 8	NHL	Cal-NJ	Jamie Huscroft	+2	+15	TKO Win	6.4			R(5).M(1)		
9	Nov 12	NHL	NJ-Phi	Shawn Antoski		+10	Loss	5.7			R(6).M(6)		
10	Nov 18	NHL	Buf-NJ	Rob Ray	+4	+3	Draw	2.2			R(7).M(2)	1-4	0-0
11	Dec 1	NHL	TB-NJ	Rudy Poeschek	+2	+15	Loss	4			R(2).M(2)		
12	Dec 6	NHL	NJ-Mtl	Lyle Odelein	+5	+15	Loss	4.3			R(3).M(2)		
13	Dec 15	NHL	NJ-Det	Keith Primeau	+1	+5	Win	7.7			R(6).M(2)	16-10	7-3
14	Dec 16	NHL	Buf-NJ	Matthew Barnaby	+3	+34	Unfair				R(2).M(3)		
15	Dec 16	NHL	Buf-NJ	Brent Hughes	+5	+45	Win	4.3			R(4).M(3)	12-4	8-1
16	Dec 31	NHL	NJ-Chi	Jim Cummins	+2	+15	Win	6			Rev (1)		
17	Jan 9	NHL	Stl-NJ	Tony Twist	+3	+5	Loss	3			R(6).M(2)	1-3	0-2
18	Jan 14	NHL	Dal-NJ	Shane Churla	+3	+25	Win	6.3			R(4).M(2)	12-7	6-3
19	Jan 30	NHL	NJ-Van	Gino Odjick	+1	+10	Loss	4.2			R(5).M(2)	2-7	1-4
20	Feb 3	NHL	NJ-Ott	Dennis Vial	+3	+5	Win	6			Rev (2)		
21	Feb 11	NHL	Ana-NJ	Dave Karpa	+3	+15	Win	5.5			R(6).M(2)		
22	Feb 21	NHL	Fla-NJ	Radek	+2	+25	Unfair				R(5).M(4)		

19	Feb 20	NHL	NJ-Chi	Cam Russell	+25		Win	5.5	Rev (2)	11-8	4
20	Feb 28	NHL	StL-NJ	Kelly Chase	+5	+24	Unfair		R(2).M(1)	4-1	2
21	Feb 28	NHL	StL-NJ	Kelly Chase	+5	+24	Draw	5.5	R(2).M(2)	4-6	1
22	Mar 5	NHL	Cal-NJ	Sandy McCarthy	+1	+2	Loss	5.8	R(6).M(2)	11-3	3
23	Mar 17	NHL	NJ-Buf	Ken Sutton	+4	+25	Win	4.2	R(5).M(1)	12-3	9
24	Mar 19	NHL	NJ-Bos	Jamie Huscroft	+2	+15	Win	6.3	R(4).M(1)	8-7	4
25	Apr 12	NHL	NJ-Phi	Rob Zettler	+1	+23	Draw	2.3	R(3).M(2)	2-2	1
26	Apr 14	NHL	Ott-NJ	Dennis Vial	+3	+5	Draw	6	Rev (6)	11-7	6
27	Apr 17	NHL	Buf-NJ	Brad May	+3	+12	Loss	6.6	R(5).M(2)	12-15	4
28	Apr 23	NHL	NJ-Buf	Rob Ray	+4	+3	Draw	5.6	R(9).M(2)	6-10	4
29	Apr 23	NHL	NJ-Buf	Rob Ray	+4	+3	Win	6	R(7).M(19)	7-2	5
30	Apr 23	NHL	NJ-Buf	Rob Ray	+4	+3	Draw	3.2	Rev (5)	1-1	1
31	May 21	NHL	NYR-NJ	Jeff Beukeboom	+1	+5	Win	3.7	Rev (3)	7-2	5
Totals							11-7-11		180	194-143	9-5
Average per Fight					+2	+14	52%	5.1	5.81	7.2-5.3	3-2

Mike Peluso 1994-1995 Fights

#	Date	Lg	Game	Opponent			Out come	Fun	Reviews Messages	Punches (Fc Ag)	
				Name	Ht+/-	Wt+/-				Thrown	Land
1	Sep 20	NHL	NJ-NYI	Rich Pilon	+4	+9	Win	6	Rev (2)	12-4	6-2
2	Jan 25	NHL	NJ-Buf	Doug Houda	+2	+16	Win	5.3	Rev (3)		
3	Jan 26	NHL	NJ-Bos	David Shaw	+2	+21	Win	6	Rev (2)		
4	Jan 28	NHL	NJ-Mtl	Lyle Odelein	+5	+15	Draw	4.5	Rev (2)		
5	Feb 4	NHL	NJ-Que	Adam Deadmarsh	+4	+20			Rev (2)		
6	Feb 12	NHL	NJ-Fla	Scott Mellanby	+3	+17	Win	5	Rev (2)		

7	Feb 12	NHL	NJ-Fla	Paul Laus	†3	†10	Win	5.8	R(8),M(1)		
8	Feb 15	NHL	Wsh-NJ	Rob Pearson	†2	†27	Win	4.5	Rev (2)	6-2	4-0
9	Feb 17	NHL	NYI-NJ	Mick Vukota	†2	†10	Draw	3	Rev (3)	3-1	1-1
10	Feb 18	NHL	NJ-NYI	Mick Vukota	†2	†10	Draw	1	Rev (2)		
11	Feb 20	NHL	NJ-Wsh	Kevin Kaminski	†7	†55	Draw	4.3	R(3),M(1)	4-3	1-2
12	Feb 27	NHL	Mtl-NJ	Lyle Odelein	†5	†15	Unfair		R(2),M(1)		
13	Mar 2	NHL	NJ-Bos	Brent Hughes	†5	†45	Win	4.3	R(3),M(2)	5-6	2-0
14	Mar 2	NHL	NJ-Bos	Daniel Lacroix	†2	†20	Loss	3	R(2),M(1)		
15	Mar 8	NHL	NJ-NYR	Darren Langdon	†3	†20	Win	5.8	R(8),M(3)	19-12	9-5
16	Mar 19	NHL	Bos-NJ	Jamie Huscroft	†2	†15	Win	6.8	R(4),M(1)		
17	Mar 26	NHL	NJ-NYI	Mick Vukota	†2	†10	Draw	4.3	Rev (3)		
18	Mar 29	NHL	NJ-Ott	Scott Levins		†15	Win	6.3	R(6),M(1)		
19	Apr 12	NHL	NJ-Wsh	Kevin Kaminski	†7	†55	Unfair		R(10),M(4)	3-0	3-0
20	Apr 22	NHL	Phi-NJ	Shawn Antoski		†10	Loss	5.7	R(6),M(1)	3-3	2-2
21	Apr 28	NHL	Fla-NJ	Paul Laus	†3	†10	Draw	3	Rev (6)	2-3	1-1
22	Jun 10	NHL	Phi-NJ	Kevin Dineen	†5	†35			Msg (1)		
Totals							10-2-6	81		57-34	29-13
Average per Fight					†3	†20	59%	4.7	3.68	6.3-3.8	3.1-1.4

Mike Peluso 1995-1996 Fights

#	Date	Lg	Game	Opponent			Out come	Fun	Reviews Messages	Punches (For Ag)	
				Name	Ht+/-	Wt+/-				Thrown	Landed
1	Sep	NHL	NYR-NJ	Nick	†4	†20			R(1),M(8)		

				Dvorak								
23	Apr 2	NHL	NJ-NYR	Shane Churla <small>TAT</small>	+3	+25	Loss	7.6	R(10),M(3)		11-15	4-6
Totals							7-7-3		89		69-69	36-31
Average per Fight					+2	+13	52%	5.2	3.87		8.6-8.6	4.5-3.9

Mike Peluso 1996-1997 Fights

#	Date	Lg	Game	Opponent Name	Ht+/-	Wt+/-	Out come	Fun	Reviews Messages	Punches (F Ag) Thrown/Land
1	Sep 16	NHL	NJ-NYR	Darren Langdon	+3	+20	Win	5	R(9),M(3)	11-6 5-
2	Sep 16	NHL	NJ-NYR	Eric Cairns	+2	+18	Loss	5.3	R(10),M(1)	6-4 1-
3	Sep 16	NHL	NJ-NYR	Sylvain Blouin	+2	+10	TKO Win	7.1	R(9),M(4)	13-9 6-
4	Sep 26	NHL	NJ-Det	Darren McCarty	+3	+10	Loss	6.3	Rev (4)	
5	Sep 28	NHL	NYR-NJ	Jeff Beukeboom	+1	+5	Draw	3	Rev (2)	4-3 0-
6	Oct 7	NHL	NJ-Phi	Scott Daniels	+1	+10	Win	5.3	Rev (6)	11-10 6-
7	Oct 7	NHL	NJ-Phi	Dan Kordic	+1	+8	Loss	4.6	R(7),M(1)	4-9 1-
8	Oct 19	NHL	NJ-Har	Keith Primeau	+1	+5	TKO Win	6.8	R(7),M(1)	6-5 2-
9	Oct 29	NHL	NJ-Bos	Trent McCleary	+3	+47	Unfair		R(4),M(1)	4-0 3-
10	Oct 30	NHL	NYR-NJ	Eric Cairns	+2	+18	Draw	3.3	Rev (4)	5-4 2-
11	Nov 7	NHL	NJ-Chi	Jim Cummins	+2	+15	Win	7	R(8),M(1)	12-12 6-
12	Nov 9	NHL	NYI-NJ	Mick Vukota	+2	+10	Loss	2.8	Rev (4)	3-6 1-
13	Nov 19	NHL	NJ-Ott	Phil Crowe	+2	+5	Win	6.6	R(8),M(2)	8-5 4-
14	Nov 27	NHL	StL-Ana	Warren Rychel	+4	+20	Draw	3	Rev (3)	
15	Dec 1	NHL	SJ-StL	Andrei Nazarov	+1	+5	Win	5.2	R(6),M(1)	13-3 7-
16	Dec 3	NHL	StL-Tor	Tie Domi	+6	+12	Loss	2.8	Rev (5)	

17	Dec 8	NHL	StL-Edm	Kelly Buchberger	†2	†25	Win	6	R(3),M(2)		
18	Dec 11	NHL	StL-Dal	Todd Harvey	†4	†15	Win	4.8	Rev (5)	6-5	3-
19	Dec 21	NHL	StL-Phi	Karl Dykhuis	†1	†11	Win	6.2	R(5),M(2)	17-7	9-
20	Dec 22	NHL	LA-StL	Brad Smyth	†4	†25	Win	4.3	R(4),M(2)	8-2	3-
21	Jan 20	NHL	StL-NYI	Steve Webb	†4	†14	TKO Win	6.3	R(4),M(1)	5-2	3-
22	Jan 25	NHL	StL-Mtl	Chris Murray	†2	†16	Win	4	Rev (3)	7-3	4-
23	Feb 8	NHL	StL-Bos	Dean Chynoweth	†2	†35	Win	6.2	R(6),M(1)		
24	Feb 23	NHL	Cal-StL	Todd Simpson	†1	†2	Update / Review				
25	Feb 27	NHL	StL-Fla	Paul Laus	†3	†10	Loss	3.2	R(5),M(2)	1-11	0-
26	Mar 13	NHL	StL-LA	Sean O'Donnell	†1	†9	Loss	3	R(3),M(4)	0-6	0-
27	Apr 1	NHL	StL-Det	Darren McCarty	†3	†10	Draw	5	R(5),M(1)	10-8	2-
28	Apr 3	NHL	NYI-StL	Ken Belanger		†5	Loss	7	R(8),M(1)	11-12	3-
29	Apr 22	NHL	Det-StL	Jamie Pushor	†1	†7	Draw	5.2	Rev (5)		
30	Apr 22	NHL	Det-StL	Slava Kozlov	†6	†33	Unfair		Rev (2)	1-N/A	0-N
Totals							14-8-5		154	166-131	71-53
Average per Fight					†2	†10	57%	5	5.13	7.2-6.0	3.7-2.4

Mike Peluso 1997-1998 Fights

#	Date	Lg	Game	Opponent			Out come	Fun	Reviews Messages	Punche Ag Thrown
				Name	Ht+/-	Wht+/-				
1	Sep 15	NHL	Tor-NYR	Kelly Chase	†5	†24			Update / Review	
2	Sep 22	NHL	NYR-Cal	Todd Simpson	†1	†2			Update / Review	
3	Sep 23	NHL	NYR-SJ	Marty	†3				Update / Review	

4	Oct 3	NHL	Col-Cal	McSorley Wade Belak	+1	+4	Draw	4	Rev (4)	
5	Oct 9	NHL	NYR-Cal	Ryan VandenBussche	+4	+20	Draw	7	R(8),M(2)	8-9
6	Oct 22	NHL	Cal-Buf	Rob Ray	+4	+3	Win	7	R(2),M(2)	
7	Oct 23	NHL	Cal-Phi	Luke Richardson	+1	+10	Win	7.3	R(8),M(1)	6-4
8	Nov 2	NHL	Cal-Phx	Jim McKenzie		+5	Loss	4	Rev (4)	6-7
9	Nov 10	NHL	Cal-Chi	Bob Probert	+1	+5	Draw	3	R(1),M(1)	3-0
10	Nov 20	NHL	Cal-Fla	Paul Laus	+3	+10	Win	3.5	R(2),M(1)	
11	Nov 22	NHL	Cal-TB	Louie DeBrusk	+3		Win	5	Rev (1)	
12	Nov 23	NHL	Cal-Car	Stu Grimson	+1	+5	Draw	4.3	R(3),M(3)	
Totals									33	23-20
Average per Fight					+2	+5	60%	5	2.75	5.8-5.0

K. VIDEOTAPE EVIDENCE OF HEAD INJURIES SUSTAINED BY PELUSO IN HOCKEY FIGHTS AFTER THE NEUROLOGICAL REPORT ISSUES:

47. Videotape Evidence of Head Injuries Sustained in Hockey Fights After the Neurological Report Is Given to Defendants:

- a. 12/23/1993, Newark, New Jersey (after Defendants are told Mr. Peluso can no longer sustain head hits)
 - i. <https://youtu.be/ZaCxi5pQJvg>
- b. 1/19/1994, Winnipeg, Canada (after Defendants are told Mr. Peluso can no longer sustain head hits)
 - i. <https://youtu.be/5EgGWrsHdPw>
- c. 1/26/1994, Edmonton, Canada (after Defendants are told Mr. Peluso can no longer sustain head hits)
 - i. <https://youtu.be/5EgGWrsHdPw>
- d. 2/2/1994, Edmonton, Canada (after Defendants are told Mr. Peluso can no longer sustain head hits)

Even viewing the allegations in the light most favorable to Peluso, Dr. Ruderman's report cannot establish the "virtual certainty" of harm for Peluso's allegations to fall within New Jersey's "intentional wrong" exception. The report first states that the doctor found "that Mr. Peluso's neurological examination is normal at the present time." Ex. 1. The report continues:

I believe that he may participate in hockey games with the New Jersey Devils, but he understands that there is still a risk of recurrent seizures. I do not believe that the participation in playing hockey in itself poses an excessive risk for the development of further seizures unless he were to sustain head injuries.

Id. Peluso's claims rest upon a mischaracterization of, and embellishment of, any potential risk of future head injuries as noted by Dr. Ruderman in this single passage. *See, e.g.,* Compl. ¶5 (alleging Defendants "*knew the link between Mr. Peluso's head injuries and permanent brain damage* because they had their own Board Certified Team Neurologist tell them that *Mr. Peluso would have brain damage if they allowed him to continue to receive head injuries*") (emphasis in original).

Peluso cannot alter the language of the report, which states that Peluso had a “normal” neurological exam and that he could continue playing hockey. Ex. 1. Although the report offers a physician’s opinion about a possible risk, this possibility of *risk* does not constitute the “virtual certainty” of harm required to fall outside the exclusivity of New Jersey’s workers’ compensation regime. See *Millison*, 101 N.J. at 178 (“[T]he mere knowledge and appreciation of a risk—even the strong probability of a risk—will come up short of the ‘substantial certainty’ needed to find an intentional wrong resulting in avoidance of the exclusive-remedy bar of the compensation statute.”); *Kane v. County of Burlington*, No. L-1946-08, 2011 WL 6111707, at *4 (N.J. App. Dec. 9, 2011) (“Although the risk to the employee is great, the employer’s conduct may be characterized as reckless or wanton, but it is not an intentional wrong.”) (internal quotations omitted). Indeed, Peluso does not plead that he ever suffered additional seizures during his playing career.

In short, Peluso has failed to plead an “intentional” act based on the Devils’ awareness of a “virtual certainty” of harm, and his sole remedy is to bring his claims

Moreover, unlike New Jersey’s and Missouri’s exceptions, which encompass risks equivalent to the “virtual certainty of harm,” California’s fraudulent concealment exception instead focuses on the “existence of the injury.” Cal. Lab. Code §3602(b)(2).

In California, “merely concealing generalized risks ... that can aggravate a work-related injury – as opposed to concealing knowledge of the specific work-related injury itself” – do not support a claim for relief under §3602(b)(2). *Evans*, 2017 WL 3115143, at *2 (emphasis added); see also *Lazo v. Mobil Oil Refining Corp.*, No. CV 14-1072, 2014 WL 12596424, at *3 (C.D. Cal. May 30, 2014) (“Knowledge of risk does not equate to knowledge of injury, and the former is inadequate” under §3602(b)(2)); *Jensen*, 105 Cal. App. 4th at 1326 (““Contrary to the [trial] court’s statement, [the employer’s] prior knowledge of its unsafe work environment and the potential risks to its employees, even if it could be proven, would be insufficient....””) (quoting *Hughes Aircraft Co. v. Superior Court*, 44 Cal. App. 4th 1790, 1797 (1996)).

Peluso was fully aware of the two alleged injuries he suffered: a concussion on December 1993, and a seizure in February 2014 that occurred on a treadmill during a team workout. Compl. ¶¶21–25, 27. Peluso’s allegations do not concern a separate, unknown injury, but rather a perception of “risk” of additional injury based upon these two existing injuries. But the concealment of “risk” is not an exception under the plain

C. IN SEPTEMBER, 2017 43 MEDICAL RECORDS AND PERSONNEL RECORDS NEVER BEFORE PRODUCED REVEAL APPLICANT'S INJURY WAS CONCEALED AND AGGRAVATED BY DEFENDANTS

More importantly, however, on 7/1/2017, again despite multiple discovery requests, Applicant was provided again, for the first time, 43 medical records and personnel records – including medical records which demonstrated that Defendants did not simply conceal the risk of a seizure disorder, but

²³ See Ex. 2, EAMS Doc ID #64853589, 5:10–12. (emphasis in original).

NEW JERSEY DEVILS
Injury Report

Bayfront Tampa
894 1000

DATE: 2/14/19

INJURY DATE: MISSED

Athlete's Name: Pe/USO

Trainer: 2+1

Place of Injury: TAMPA OFFICE

Doctor: SCOTT
Bayfront - Tampa
Rupert MA

Structure/Specific Structure: HAND

Side: R L Middle Both N/A

Injury: CONCUSSION - SEIZURE

Mechanism: PC

Onset: Casual Factor:

Severity: 1 1+ 2 2+ 3 Medication:

Position: Activity:

GM (1,2,3) Practice - Offense: Defense:

Hospital: Yes No X-Rays: Yes No

Missed Games: 1 Missed Practice: 2

FIRST AID PROCEDURES AND TREATMENTS

FOLLOW-UP CARE

2/13 - DID NOT EAT, REST
DRINKING
2/14 - EXERCISE - PASS
OUT - 3 SUTURE LACERATION
OF FORE HAND - SEIZURE

Rupert MA 2/18

VALIUM SHOT → Bayfront
Hosp. MA → Hospitalization

2/14 DR SCOTT (813 855)
(824 7131)

GLUCOSE TOL TEST
MRI

EEG - 2 SEIZURES
INDICATE BRAIN
WAVE DISTURBANCE
RT TEMP LOBE
→ Doc 18

White/Trainer; Yellow/General Manager; Pink/Coach

PAT -6429 SAI BARNABAS MEDICAL CENTER
03/12/94 07:23 AM (QCM\$SP) PAGE 001

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PELUSO MICHAEL M 28
1397776A0704 ADN: 03/11/94 OPD

DX: ABNORMAL FINDINGS
RUDERMAN MARVIN

PATHOLOGY RESULTS SUMMARY

REPORT PERIOD: 03/11/94 10:50 AM - 07:23 AM 03/12/94

DEPARTMENT OF PATHOLOGY
SAINT BARNABAS MEDICAL CENTER
OLD SHORT HILLS ROAD, LIVINGSTON, NEW JERSEY 07039

* * NEW RESULTS. OUT-OF-RANGE RESULTS ARE IN RED.

CHEMISTRY: DRUG LEVELS

09/04/94

17:21

RIVERVIEW MEDICAL CENTL
1 RIVERVIEW PLAZA, RED BANK, N.J.
VITO GULLI, M.D. - DIR. OF LABORATORIES

NAME: PELUSO, MIKE

LOC: DEV

AGE: SEX: M

HOSP. #: DEV-314

BIRTHDATE: 00/00/00

ACCT. #: 74099993

ADMIT:

PHYS: COMMENTUCCI, RICHARD M. D.

***** CHEMISTRY PROFILES *****

DATE: 09/04/94

TIME: 0800

LOC: DEV

REF RNG UNITS

GLUCOSE	76	75-110	MG/DL
BUN	16	9-21	MG/DL
CREAT	1.0	0.7-1.4	MG/DL
BUN/CREAT	16		
URIC ACID	5.6	3.5-8.5	MG/DL
SODIUM	139	137-145	MMOL/L
POTASSIUM	4.0	3.6-5.0	MMOL/L
CHLORIDE	102	98-107	MMOL/L
CO2	28	24-30	MMOL/L
ANION GAP	13	10-20	
PHOS	4.3	2.5-4.5	MG/DL
CALCIUM	9.3	8.4-10.2	MG/DL
T. PROTEIN	6.9	6.3-8.2	G/DL
ALBUMIN	4.2	3.9-5.0	G/DL
A:G RATIO	1.6	>1	
ALK PHOS	95	38-126	U/L
AST	43 H	5-40	U/L
LD	503	313-618	U/L
CK	308 H	35-225	U/L
CKMB		0-12	U/L
% MB		<4	%
ALT	50	7-56	U/L
T. BILI	0.4	0.2-1.3	MG/DL
CHOL	192	<200	MG/DL
TRIG	160	40-160	MG/DL

C. IN SEPTEMBER, 2017 43 MEDICAL RECORDS AND PERSONNEL RECORDS NEVER BEFORE PRODUCED REVEAL APPLICANT'S INJURY WAS CONCEALED AND AGGRAVATED BY DEFENDANTS

More importantly, however, on 7/1/2017, again despite multiple discovery requests, Applicant was provided again, for the first time, 43 medical records and personnel records – including medical records which demonstrated that Defendants did not simply conceal the risk of a seizure disorder, but

²³ See Ex. 2, EAMS Doc ID #64853589, 5:10–12. (emphasis in original).

in fact, concealed an injury that Applicant was actually already experiencing and would only continue to worsen with every additional head injury. *See Ex. 32, Medical Records & Documents Demonstrating Mr. Peluso's Neurological Injuries Were in Existence in 1994 and Concealed from Him.* The concealed medical records contained diagnostics including an EEG showing temporal lobe damage directly after his 1994 seizure; "Abnormal Findings" after his 1994 neurological visit; and very high Creatine Kinase (CKBB) levels. (*CKBB is found primarily in brain and indicates muscle damage and seizures, among other things.*) *Id.* at 2-3.

1. If Applicant's Neurologists Had the Medical Records Produced in 2016 and 2017 Back When Applicant was First Injured in 1993/94 or retired in 1998, Applicant's Current Neurological Condition Could Have Been Prevented

According to Applicant's neurologist: "Applicant was, in fact, suffering from permanent neurological injury as of the date of date of the 2/14/94 EEG." Further, according to Applicant's neurologist, if Applicant's neurologists had the medical records produced in September of 2017, they could have diagnosed his condition properly back in 2000. His condition would have been diagnosed as a focal seizure disorder with temporal lobe damage caused by traumatic brain injury, Applicant could have been provided the proper care and diagnosis such that Applicant's neurological condition would have not been in its current state.

Applicant's treating doctor, an expert in brain injuries and professional athletes, stated:

1. Did Mr. Peluso have an actual injury as opposed to the increased risk of a seizure disorder?

If we look at the New Jersey Devils Injury Report of 2/14/1994 we see Injury: Concussion leading to Seizures. And from Dr. Scott's Office: That Mike's EEG showed 2 seizures indicating a brain wave disturbance in the right temporal lobe that resulted from the December 18th, 1993 incident on the ice. In addition, there was the 9/4/1994 Lab Report showing very levels of Creatine Kinase (CK). CKBB is found primarily in the brain, indicating muscle damage and the presence of seizures in the brain. **Here is the proof, an abnormal EEG and Lab Values indicating seizure activity, that Mr. Peluso had already suffered a serious injury. Then this was not a case of increased risk only for a seizure disorder. The seizure disorder already existed, and was not being treated properly.**

2. Would these documents have helped Mr. Peluso's neurologists in Minnesota make a correct diagnosis?

The reports from The Minneapolis Clinic of Neurology (8/25/1999, Dr. Trusheim and

8/15/2000 from Dr. Labine to Dr. Jack Hubbard) indicate that they were unable to make a diagnosis of epilepsy at that time because (in both cases): **“I do not have the medical records to go on.....”** Regarding the 8/15/2000 report, Mr. Peluso had already suffered 3 more Grand Mal Seizures. As both these doctors indicated: they were hindered in making the proper diagnosis because of a lack of information as to exactly what happened to Mr. Peluso while playing for the New Jersey Devils. This is tragic because Mr. Peluso went on to suffer an additional 8-10 Grand Mal Seizures (which are always damaging to the brain/mind) before his condition was stabilized with Dr. Steven Stein on the newest anti-seizure medication, Keppra.

3. If so, what effect would it have on Mike’s subsequent seizures, current neurological condition, his quality of life, and his life expectancy?

A TBI is always a progressive, debilitating condition affecting all aspects of a person’s life. As I indicated above, this includes cognitive deficits, perceptual problems, physical symptoms, and behavioral and emotional issues. All of which Mr. Peluso currently suffers with. I believe much of Mr. Peluso’s debilitating condition could have been avoided if the medical treatment that managed his condition more accurately, could have been provided.

8, Report of Dr. Leighton Reynolds, 11/13/17.

As the below comments and reactions of NHL Fans demonstrate, NHL fans are not viewing these actions favorably:

Withholding medical reports is the point where the debate about responsibility completely ends. There is a good argument for each side (team vs player) if a player is informed of a risk and plays. You can argue that the team should prevent a player from making a dangerous choice and you can argue that the player is an adult and should have autonomy to make decisions about his own life and career.

But when the team prevents the player from making an informed decision, there is just no justification for that. If this is in fact true, the organization has no leg to stand on.

* * *

Peluso didn't just fight, but he also played an extremely physical game where he regularly absorbed contact to the head from things other than fists.

This is on Lamoriello-Fisher-Jaffe conspiring to keep Peluso in the dark as to what was really going on.

Not everyone is George Foreman...Peluso was likely one of those guys who just wasn't cut out to play hockey (for very long at least). This is information that he deserved to know.

Peluso was THE man.

* * *

So I'm sure you'll remember that I was pretty favorable to the league in how I think the concussion lawsuits will turn out as we were posting this week.

This changes things a lot for me. I'm amazed that any team did something this heartless, reckless, and dumb. And I'm now also expecting to hear this happened in more than just one organization.

I still think the players will have a tough time in court fighting their fight, but I think they will (and should) get reparations. The NHL definitely deserves what it has coming.

tear down a lot of careers. I hope it happens.

We always say “they knew the risks.” But what if they didn’t? What if they were deliberately misinformed of the risks?

* * *

What this does set a precedent for though, are the larger class action suits surrounding the withholding of information from the players by the league. A few more stories come out like this against other teams and it starts to get to the point where it’s not hard to show a pattern of behaviour around the league.

* * *

The huge difference though is that Ortmeyer and any other player who makes a similar decision gets to make that decision for himself. Peluso didn’t get that choice, and that’s where the huge problem lies.

* * *

Yep. Lots of fans slinging shit at the NJ org right now but I bet you every single team is guilty of something similar.

* * *

Lou not backing Mike Peluso up is the biggest stain on his career. That’s the deal. You play hard for the team, you submit to the system everyone has everyone’s back. The devils let Mike down, and continue to do so. I could maybe accept the argument that they didn’t know much about concussions etc but we do now. Make it up to him. It’s his freaking life we’re talking about.

Disgusted.

Settlement Structures and Settlement Planning in Sports Concussion Litigation

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Settlement Structures & Planning

- Pre-Settlement Planning
- Post- Settlement Planning
- Qualified Assignments
- Trust Types and Trust Applications

Settlement Structures & Planning

Why is Settlement Planning important to your client?

After interviewing 436 Class Members of the NFL Concussion Settlement, in addition to speaking with team physicians, neurologists and neuropsychologists, these are some of the concerns that were voiced about the retired players' personal situations:

- "Who will make sure these funds are used for my future medical care as I continue to decline cognitively?"
- "Will I lose my public assistance and/or state and federal benefits, (Medicaid, Housing, etc...), once I receive my settlement?"
- "Who will protect me from my family or friends from taking advantage of me?"
- "How do I protect myself from current and/or future creditors?"
 - Pending Divorce
 - Foreclosures
 - Credit Card Debt

Settlement Structures & Planning

Why is Settlement Planning important to you?

- Reputational Risk
- Tailend Liability
- Fiduciary Duty
- ABA Model Rules of Professional Conduct
- Standard of Suitability
- Best Interest of the Client and/or Beneficiary

Settlement Structures & Planning

Why is Settlement Planning important to you?

ABA Model Rules of Professional Conduct: Client-Lawyer Relationship Rule 1.14 Client With Diminished Capacity

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- **(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.**
- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Settlement Structures & Planning

Why is Settlement Planning important to you?

Fiduciary Duty

- **A fiduciary duty is the highest standard of care.** The person who has a fiduciary duty is called the fiduciary, and the person to whom he owes the duty, is typically referred to as the principal or the beneficiary. **His or her beneficiaries are entitled to damages, even if they suffered no harm.**
- A fiduciary obligation exists whenever the relationship with the client involves a special trust, confidence, and **reliance on the fiduciary to exercise his discretion or expertise in acting for the client. The fiduciary must knowingly accept that trust and confidence to exercise his expertise and discretion to act on the client's behalf.**
- When one person does agree to act for another in a fiduciary relationship, the law forbids the fiduciary from acting in any manner adverse or contrary to the interests of the client, or from acting for his own benefit in relation to the subject matter. **The client is entitled to the best efforts of the fiduciary on his behalf and the fiduciary must exercise all of the skill, care and diligence at his disposal when acting on behalf of the client. A person acting in a fiduciary capacity is held to a high standard of honesty and full disclosure in regard to the client and must not obtain a personal benefit at the expense of the client.**

Settlement Structures & Planning

Consider adding a Standard of Suitability, State and Federal Benefits and Current Financial Situation to your client intake process:

Financial Situation:

- Medical Liens?
- Foreclosures?
- Credit Card Debt?
- Bankruptcy?
- Child support/Alimony?
- Currently Separated from Spouse?
- Pending Divorce?
- A Named Defendant in a lawsuit?

Settlement Structures & Planning

Consider adding a Standard of Suitability, State and Federal Benefits and Current Financial Situation to your client intake process:

State and Federal Benefits:

- Supplemental Security Income
- Medicare/Medicaid
- State Administered Alcohol, Drug Abuse, and/or Mental Health Services
- Child and/or Adult Care Food Programs
- Supplemental Nutrition Assistance
- Section 8 Housing
- FAFSA Federal Student Aid

Settlement Structures & Planning

CASE STUDY:

Eric

Male, 46

Diagnosis: **Level 2 Neurocognitive Impairment**

State of Residence: **CA**

Pending Divorce

Previously Divorced, Pays Child Support and Alimony

Foreclosure on Primary Residence

Receiving **Public Benefits**

Defaulted on Credit Cards

Medical **Liens**

2 Children, Ages 15 & 17, **Applying for College**

Settlement Structures & Planning

CASE STUDY:

Eric

Male, 46

Diagnosis: **Level 2 Neurocognitive Impairment**

- May still have the ability to implement his own plan of action

State of Residence: **CA**

- Community Property State

Pending Divorce

- All assets acquired during the marriage are considered "community property".)

Previously Divorced

- Child support and/or alimony are often modifiable

Foreclosure on Primary Residence

- Existing creditor

Receiving **Public Benefits**

- Asset-based testing

Defaulted on Credit Cards

- Existing creditor

Medical **Liens**

2 Children, Ages 15 & 17, **Applying for College**

- FAFSA Application Impacted by Assets

Settlement Structures & Planning

CASE STUDY:

Eric

Male, 46

Diagnosis: **Level 2 Neurocognitive Impairment**

- May still have the ability to implement his own plan of action
 - **Consider appointing a Power of Attorney to assist in decision making related to accepting and distributing Settlement Proceeds**

State of Residence: **CA**

- Community Property State

Pending Divorce

- All assets acquired during the marriage are considered "community property"
 - **Consider a Qualified Assignment of Settlement Proceeds**

Previously Divorced

- Child support and/or alimony modifiable
 - **Consider a Qualified Assignment of Settlement Proceeds into a Trust**

Settlement Structures & Planning

CASE STUDY:

Eric

Male, 46

Diagnosis: **Level 2 Neurocognitive Impairment**

Foreclosure on Primary Residence

- Existing creditor
 - **Consider a Qualified Assignment of Settlement Proceeds into a Trust**

Receiving **Public Benefits**

- Asset-based testing
 - **Consider a Qualified Assignment of Settlement Proceeds into a Trust**

Defaulted on Credit Cards

- Existing creditor
 - **Consider a Qualified Assignment of Settlement Proceeds into a Trust**

Medical **Liens**

2 Children, Ages 15 & 17, **Applying for College**

- FAFSA Application Impacted by Assets
 - **Consider a Qualified Assignment of Settlement Proceeds into a Trust**

Settlement Structures & Planning

CASE STUDY:

Eric

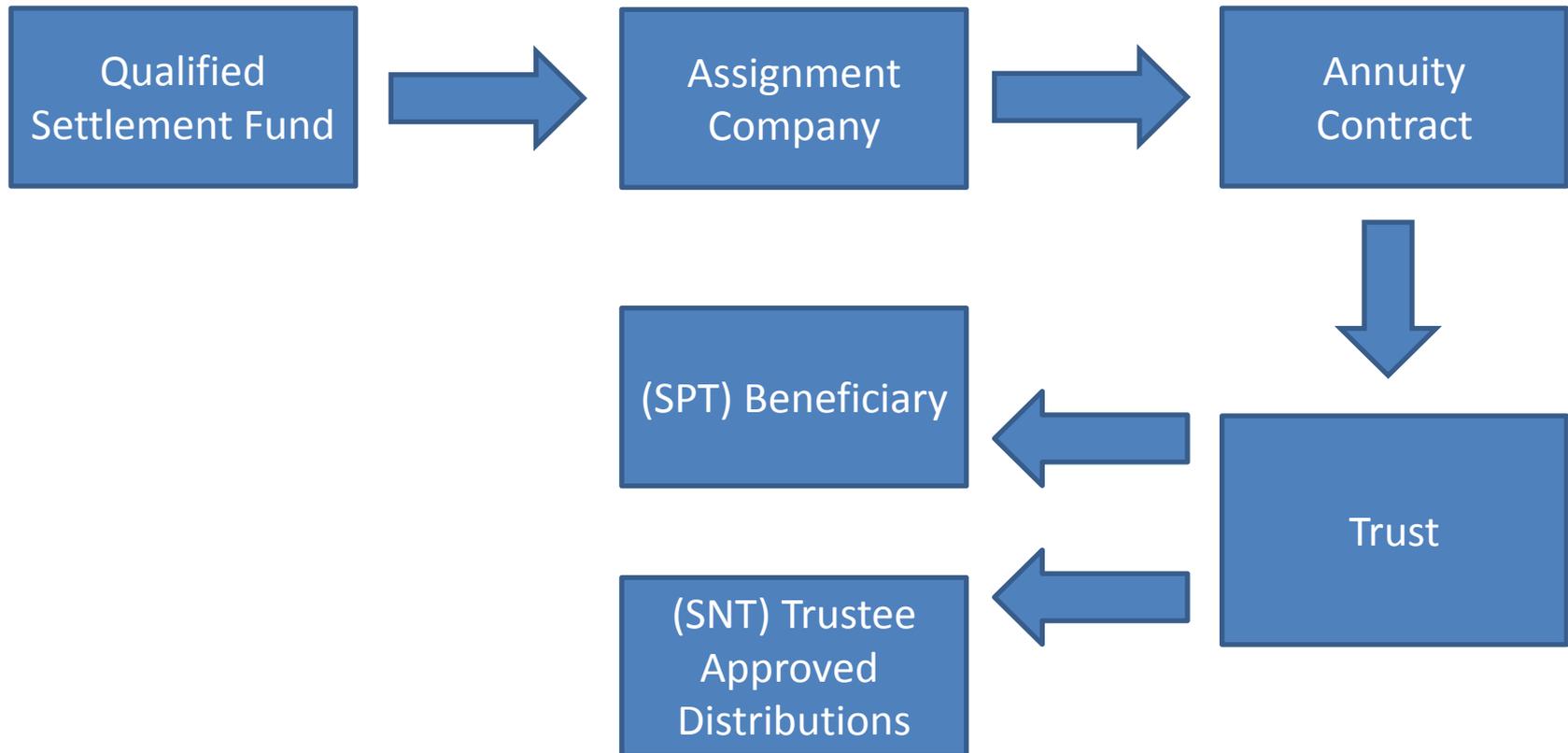
Male, 46

Diagnosis: **Level 2 Neurocognitive Impairment**

- Eric may want to make decisions today, while he still has the ability to, which may impact his medical care in the future
- Eric may want to consider appointing a Power of Attorney on his behalf to assist him in making financial decisions as it relates to the receipt and distribution of his settlement proceeds
- Eric will likely want to consider using a Qualified Assignment to avoid Constructive Receipt of his Settlement Proceeds
- Eric will want to consider establishing a Trust, which would be named the Payee of the Qualified Assignment and receive periodic payments to support his needs

Settlement Structures & Planning

Eric's Action Plan:



Settlement Structures & Planning

TRYING TO HELP ERIC AVOID CONSTRUCTIVE RECEIPT

- Constructive receipt rules focus on when a taxpayer has the right to receive money, so it is important to discuss legal and contract rights.
- The IRS regulations generally provide that a fund, account, or trust is a “qualified settlement fund” if it satisfies the following three requirements:
 - it is established under an order of, or is approved by, specified governmental entities (including courts) and is subject to the continuing jurisdiction of that entity;
 - it is established to resolve or satisfy one or more claims that have resulted or may result from an event that has occurred and that has given rise to at least one claim asserting specified liabilities; and
 - the fund, account, or trust must be a trust under applicable state law or its assets must otherwise be segregated from other assets of the transferor.
- A fund, account, or trust is not treated as the owner of assets of the fund, account, or trust until all three of the above requirements are met.

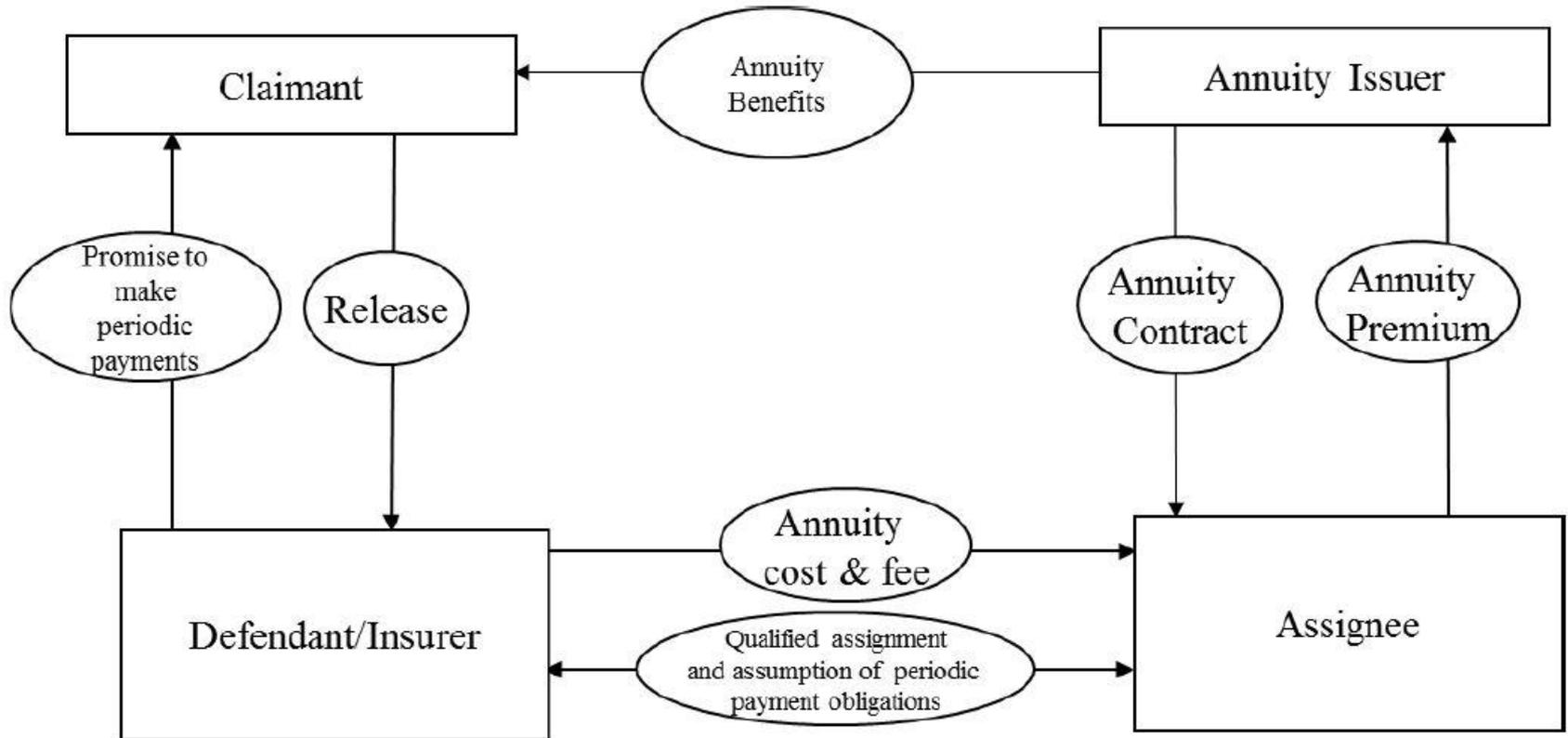
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STEP 1. Qualified Assignments & Periodic Payment Schedule

- A Qualified Assignment, also referred to as a "Periodic Payment" or "Structured Settlement," is a financial or insurance arrangement whereby a claimant agrees to resolve a personal injury tort claim by receiving periodic payments on an agreed schedule rather than a lump sum.
- IRC Section 130 permits a tort defendant or its liability insurer to settle a claim using a periodic payment settlement and to transfer the responsibility for future payments to an "assignment company," which normally is an affiliate of the life insurer that issues an annuity contract to fund the settlement.
- Periodic payments are designed to enable settling claimants to receive future payments, including earnings, tax-free.
- Almost all periodic payment settlements are backed by a highly rated US life insurer.

Settlement Structures & Planning

“ASSIGNED” SETTLEMENT INVOLVING A QUALIFIED ASSIGNMENT UNDER IRC SEC 130



Settlement Structures & Planning

STEP 2: Establishing a Trust

Types of Trust to consider:

- Supplemental Needs or Special Needs Trust
 - A special needs trust is a trust designed for beneficiaries with disabilities, either physically or mentally challenged
 - It is written so the beneficiary can enjoy the use of property that is held in the trust for his or her benefit, while at the same time allowing the beneficiary to receive essential needs-based government benefits.
 - In addition to the public benefits preservation reasons for such a trust, there will be administrative advantages of using a trust to hold and manage property intended for the benefit of the beneficiary if the beneficiary lacks the legal capacity to handle his or her own financial affairs.

Settlement Structures & Planning

STEP 2: Establishing a Trust

Types of Trust to consider:

- Spendthrift Trust / Minor's Trust / Settlement Protection Trust / Settlement Preservation Trust
 - A spendthrift trust is a trust that is created for the benefit of a person (often unable to control his spending) that gives an independent trustee full authority to make decisions as to how the trust funds may be spent for the benefit of the beneficiary.
 - Creditors of the beneficiary generally cannot reach the funds in the trust, and the funds are not actually under the control of the beneficiary.
 - A trust generally will not be treated as a spendthrift trust unless the trust agreement contains language showing that the creator intended the trust to qualify as spendthrift. This is what is known as a spendthrift clause or spendthrift provision.

Settlement Structures & Planning

Attorney Fee Deferral Options:

- Fixed Annuity
 - Fixed determinable payments
 - Guaranteed by highly-rated US Life Companies
- Variable Private Placement Annuity
 - Variable investment options
 - Off-shore tax-treaty, typically Bermuda or Barbados
- Non-Qualified Deferred Compensation
 - On-shore
 - Bank of New York Mellon, Trustee
 - Low-cost ETFs
 - Loans allowable

Contact

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