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Warriors in line to be two-time losers if Durant pursues lawsuit

NBA Finals. Game 5. Golden State Warriors superstar Kevin Durant returned to action after a long layoff due to a partially torn right calf.

Before the game his coach, former Chicago Bull Steve Kerr, assured the media that “we have no long-term concerns or Achilles issues, what we know is that he could possibly tweak it, that’s their only concern.”

Then, just 12 minutes into the critical game, Durant made a move to the basket ... and dropped to the floor writhing in pain, grasping his right lower leg. An MRI confirmed that Durant’s right Achilles tendon had ruptured.

Apparently, neither Durant nor his coach was aware of the risk of an Achilles injury. ESPN’s Jay Williams, Durant’s close friend boldly used the word “misdiagnosed” on the air. He explicitly blamed the Warriors for Durant’s catastrophic injury and insinuated that the team’s assurances were a key reason for Durant taking the floor for Game Five.

“And I know for a fact that he was told that with a torn calf, a partial torn calf, that it unloaded the pressure on the Achilles, that there was no chance that the Achilles could be injured at all,” Williams said.

The fallout was significant. Kerr echoed Williams’ statements saying, “Had we known this was a possibility — that this was even in the realm of possibility — there’s no way we

would’ve ever allowed Kevin to come back, so it’s devastating.” Devastating, indeed.

With Durant set to become an unrestricted free agent at the end of the season, the injury was potentially devastating to Durant’s future earnings. The rehab will require that Durant sit for the entirety of the 2019-20 NBA season while recuperating.

His long-term prognosis is guarded. According to a 2013 research paper published in the American Journal of Sports Medicine, players only have a 38.9% chance of ever playing in the NBA again after suffering this injury.

Of those that returned, 27% played only one more season before having their NBA career end early. The lucky few that made it to the second season missed an average of 55.9 games for the rest of their careers.

While Durant has since signed a four-year max deal with the Brooklyn Nets worth \$164 million, his future earnings may very well be negatively impacted by the decision to play in Game 5.

If so, would or could Durant pursue a claim for damages against the Warriors and/or their medical staff for negligently allowing him to play?

If the doctor is the team’s employee, then players — as the doctor’s co-employees — are barred from bringing a common-law action against the



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doctor by the Workers’ Compensation Act’s exclusive remedy provision, with some exceptions. See *Bryant v. Fox*, 162 Ill. App. 3d 46, 50 (1st Dist. 1987). But, if the team doctor is the team’s independent contractor, then players may bring common-law actions against the doctor. See id. at 49-50.

To determine employee versus independent contractor, courts look to several factors. See id. at 50. Above all else, however, “the right to control the manner in which work is done” is the “single most important factor.” Id.

In *Bryant*, for example, the court determined that whether the Chicago Bears exercised

sufficient control over the manner in which its team doctor performed his work was a fact question for the jury and, therefore, held that the doctor was not, as a matter of law, an employee subject to the Workers’ Compensation Act. See id. at 51.

Under *Bryant*, and depending on the individual facts pertaining to the employment status of other doctors, players may sue team doctors for medical malpractice.

In California, where Durant’s lawsuit would likely be brought, the law works the same way in this respect. Compare *Hendy v. Losse*, 54 Cal. 3d 723, 733-43 (1991) (discussing California’s Workers’ Compensation Act in a similar light as *Bryant*).

That is the easy case; players can sue independent contractors without worrying about workers’ compensation laws. But, just as in Illinois, a California workers’ compensation action is typically an athlete’s exclusive course of action in instances where a team doctor, acting as the team’s employee, gives incorrect advice to an athlete and an injury results. See *Privette v. Superior Court*, 5 Cal. 4th 689, 697 (1993) (quoting *Johns-Manville Products Corp. v. Superior Court*, 27 Cal. 3d 465, 468 (1980)) (“When the conditions of compensation exist, recovery under the workers’ compensation scheme ‘is the exclusive remedy against an employer

[or other employee] for injury ... of an employee.”).

However, intentional or fraudulent poor advice can fall outside the California workers' compensation laws' exclusive remedy provisions. See *Kruger v. San Francisco 49ers*, 234 Cal. Rptr. 579, 582-85 (Ct. App. 1987) (unpublished) (affirming

ment medical information so as to induce the employee into going back to work. See *Johns-Manville*, 27 Cal. 3d at 476-78.

Unfortunately for the Warriors, innuendo suggests that pushing Durant to play in the face of serious injury may not be a novel, isolated incident.

Warriors tried to downplay the seriousness of Iguodala's leg fracture in the 2018 playoffs.

The Warriors apparently tried to pawn his injury off as a mere bone bruise as they pressed him on when he could return to the court. Fortunately, Iguodala did not suffer any further injury.

tor an employee (via the workers' compensation exception) or an independent contractor (via a direct common-law action).

In either event, a lawsuit would likely be brought in California where the statute of limitations for medical malpractice is three years from the date of



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a trial court judgment holding the 49ers liable for fraudulently concealing the extent of a former player's injuries).

This is particularly true where the defendant is found to have aggravated an employee's injury, such as by fraudulently concealing perti-

In the 2018 NBA playoffs, when the Warriors played the Rockets in the Western Conference Finals, Andre Iguodala played in only the first three games of the seven-game series. Iguodala told reporters in the midst of the Durant injury controversy that the

The prior incident with Iguodala could be critically important in Durant's lawsuit, should he pursue a case against the Warriors. Therefore, Durant might state a common-law action against the team doctor notwithstanding whether the court considers the team doc-

the incident — in this case, June 10, 2022.

His advisers have undoubtedly circled that June 10, 2022, date on his calendar. If Durant does not return to the court — or is a shell of himself when he does — expect a mammoth lawsuit to be filed by then.