KRISTEN L. SHEELY, *et al.*,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,	*	MONTGOMERY COUNTY
Defendants.	*	Civil No. 380569-V

* * * * * * * * *

MOTION TO DISMISS COMPLAINT AND REQUEST FOR HEARING

Defendants Thomas Rogish, James Schumacher, and Michael Sweitzer, Jr. (collectively the "Frostburg Defendants"), through counsel, and pursuant to Maryland Rules 2-311 and 2-322, move to dismiss the Complaint upon the following grounds.

1. Counts I, XI, XII, and XXII against the Frostburg Defendants must be dismissed for failure to state a claim upon which relief can be granted.

2. Counts II and XIII against Defendant Sweitzer must be dismissed for failure to state a claim upon which relief can be granted.

3. Plaintiff Keyton Sheely's claim for wrongful death must be dismissed because she is not a proper plaintiff in such an action.

Proposed orders and a supporting memorandum are attached.

Request for Hearing

Pursuant to Md. Rule 2-311(f), these Defendants request a hearing on this Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of November 2013, copies of the motion to dismiss filed by defendants Thomas Rogish, James Schumacher, and Michael Sweitzer, Jr., along with copies of the memorandum in support thereof, request for hearing and proposed order, were mailed, first-class, postage prepaid, to:

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* * * * * * * * * * * * *

FROSTBURG DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT

Defendants Thomas Rogish, James Schumacher, and Michael Sweitzer, Jr. (collectively the "Frostburg Defendants"), by undersigned counsel, file this Memorandum in support of their motion to dismiss the complaint.

I. INTRODUCTION

The plaintiffs, Kristen Sheely, Kenneth Sheely, and Keyton Sheely, sue the National Collegiate Athletic Association ("NCAA"), the Frostburg Defendants, and Kranos Corporation,[1] asserting wrongful death and survival claims[2] in connection with the death of Derek Sheely on August 28, 2011, allegedly as a result of injuries sustained

[1] The plaintiffs sue Kranos Corporation, d/b/a Schutt Sports ("Schutt Sports"), as the manufacturer, seller and distributor of the helmet Derek Sheely was wearing when injured. Compl. ¶¶ 9, 31.

[2] Kristin Sheely, Derek Sheely's mother, sues in her individual capacity and in her capacity as personal representative of her son's estate. Kenneth Sheely and Keyton Sheely, Mr. Sheely's father and sister, respectively, sue in their individual capacities.

during preseason football practice on August 22, 2011 at Frostburg State University ("the University").[3] Compl. ¶¶ 60-70.

Thomas Rogish is the University's head football coach, James Schumacher an assistant football coach, and Michael Sweitzer an assistant athletic trainer.

The plaintiffs assert the following claims against the Frostburg Defendants:

- Count I – Gross Negligence (survival action)
- Count II – Professional Gross Negligence in the Practice of Athletic Training (survival action) (against Sweitzer)
- Count XI – Intentional Infliction of Emotional Distress (survival action)
- Count XII – Gross Negligence (wrongful death action)
- Count XIII – Professional Gross Negligence in the Practice of Athletic Training (wrongful death action) (against Sweitzer)
- Count XXII – Intentional Infliction of Emotional Distress (wrongful death action)

RELEVANT FACTUAL ALLEGATIONS[4]

Plaintiff Kristen L. Sheely brings this action in her individual capacity and in her capacity as Personal Representative of the Estate of her son, Derek Thomson Sheely. (Compl. ¶ 1.) Plaintiff Kenneth B. Sheely is Derek Sheely's father. (Compl. ¶ 2.) Plaintiff Keyton S. Sheely is Derek Sheely's sister. (Compl. ¶ 3.) Defendant Jamie Schumacher is an assistant football coach at the University. (Compl. ¶ 5.) Defendant

[3] The University is not a defendant.

[4] For purposes of this motion and memorandum only, the Frostburg Defendants assume, without conceding, the accuracy of the plaintiffs' factual allegations.

Thomas Rogish is the head football coach at the University. (Compl. ¶ 6.) Defendant Michael Sweitzer, Jr. is an assistant athletic trainer at the University. (Compl. ¶ 7.) Defendant the National Collegiate Athletic Association ("NCAA") is "an unincorporated association of private and public colleges and universities which governs intercollegiate athletics." (Compl. ¶ 8.) Defendant Kranos Corporation, doing business as Schutt Sports, is a Delaware Corporation. (Compl. ¶9.)

Defendant NCAA has identified a standard of care for concussions, by which coaches are required to abide. (Compl. ¶ 17.) Defendants "created an environment where players would be punished if they disclosed their injuries. Indeed, players that were injured, including those that were diagnosed with a concussion, were required to clean the field after practice and ridiculed for being 'gripers.'" (Compl. ¶ 22.) The University football team's coaches "marginalized injuries, punished players for disclosing them and challenged players to play through them." (Compl. ¶ 23.) The football team's policies, drafted by Coach Rogish, stated, in part, that if a player is injured "cannot practice on Wednesday, he cannot start on Saturday" and that if a player "cannot practice on a Thursday, he probably will not dress." (Compl. ¶23.)

The University purchased helmets from Schutt Sports, relying on a 2011 Virginia Tech study that ranked the helmet manufactured by Schutt Sports as a "leading helmet in its ability to 'protect against concussions.'" (Compl. ¶¶ 27, 28.) On August 13, 2011, Schutt Sports "improperly fitted Derek with the subject helmet. Derek chose the helmet after a Schutt Sports representative told the team, 'Schutt's new technology can prevent

head injuries.'" (Compl. ¶ 31.) Like all student-athletes, Mr. Sheely must "sign a statement in [he] accept[s] responsibility for reporting [his] injuries and illnesses to the institutional medical staff, including signs and symptoms of concussions." (Compl. ¶ 103.) Mr. Sheely was a 22-year-old, two-time Academic All-Conference senior at the University in August 2011, the beginning of his final season of collegiate football. (Compl. ¶¶ 13, 14.)

Beginning on August 19, 2011, "[w]ithin a three-and-a-half day period, Derek and his teammates were exposed to more than 13 hours of full-contact drills . . . ." (Compl. ¶ 33.) On the morning of August 19, 2011, "Defendant Schumacher instructed the fullbacks and tailbacks to engage in a drill that has been criticized by certain National Football League teams and other leagues as extremely dangerous, intolerable and meaningless." (Compl. ¶ 34.) During the drill, "each player takes approximately 30–40 subconcussive, or concussive, blows to the head." (Compl. ¶ 36.) Prior to the 2011 season, "the coaches knew that the drill increased the risks of concussions. At least one player during the 2010 season suffered a concussion while performing the Drill." (Compl. ¶ 38.) And a few days before Derek Sheely's injury, "two of Derek's teammates suffered concussions during the Drill." (Compl. ¶ 39.) Defendants "including the NCAA, coaches and athletic trainers allowed, condoned and/or demanded that the Drill continue without modification." *Id.* Coach Schumacher "demanded that the players 'lead with your head' and use your 'hat first.' If a player did not perform the Drill as Defendant Schumacher

ordered, the players, including Derek, would be berated and cursed at by Defendant Schumacher." (Compl. ¶ 41.)

During the course of the drill on August 20, 2011, "Derek's head began bleeding profusely." (Compl. ¶ 46.) Derek was examined by Defendant Sweitzer, a "certified" (Compl. ¶ 47) and "licensed athletic trainer" (Compl. ¶ 140) who was "the team's primary athletic trainer and was responsible for overseeing the care provided to Derek." (Compl. ¶ 47.) Defendant Sweitzer "and his staff merely bandaged Derek's forehead and allowed him to return to play. . . . Defendant Sweitzer and his staff did not perform a concussion evaluation or identify whether Derek's helmet was fitted improperly." (Compl. ¶ 48.) During the prior season, "Derek suffered a concussion during practice, which was diagnosed by Defendant Sweitzer and his staff." (Compl. ¶ 50.)

On August 21, 2011, Derek participated in the drill and his "head began bleeding, again." (Compl. ¶ 53.) Defendant Sweitzer and his staff examined again and did not perform a "concussion evaluation, examine the fitting of Derek's helmet or investigate why his forehead continued to bleed." *Id.* Defendant Sweitzer "bandaged Derek's forehead and, again, allowed him to return to full-contact practice." *Id.* "Shortly following lunch, Defendant Schumacher ordered the players to perform the Drill. Derek's forehead began bleeding, again" and Derek "sought help from Defendant Sweitzer and his staff." (Compl. ¶ 55.) Defendant Sweitzer "and his staff, once again, did not perform a concussion evaluation, investigate the cause of Derek's persistent bleeding, or

determine if his helmet was fitted properly." (Compl. ¶ 56.) Defendant Sweitzer "and his staff bandaged Derek's head and allowed him to return to play." (Compl. ¶ 57.)

On August 22, 2011, Derek again performed the drill and his head began bleeding again. (Compl. ¶ 62.) Defendant Schumacher and his staff examined Derek, bandaged his forehead, and he resumed the drill. (*Id.*) Derek also performed another drill, which "involved a significant amount of contact. Shortly after one play, Derek walked back to the huddle and explicitly informed Defendant Schumacher that he 'didn't feel right' and that he had a 'headache.'" (Compl. ¶ 64.) "With Defendant Rogish, and on information and belief other members of the coaching staff, standing right next to Defendant Schumacher and thus clearly hearing Derek's disclosure, Defendant Schumacher yelled, 'Stop your bitching and moaning and quit acting like a pussy and get back out there Sheely!'" (Compl. ¶ 65.) The coaches "forced [Derek] to return to play." (Compl. ¶ 66.) The players then "began the 7-on-7 drill" and Derek was "involved in a collision with a defensive back." (Compl. ¶ 67.) Derek "walked back to the sidelines in a lucid state, and within a few minutes following the collision, Derek collapsed and never regained consciousness." (Compl. ¶ 68.) Derek's "final collision caused brain herniation, an acute subdural hematoma, and massive vascular engorgement." (Compl. ¶ 69.) Derek died on August 28, 2011, "due to complications from massive brain swelling caused by second-impact syndrome." (Compl. ¶ 70.)

LEGAL STANDARD

This Court properly grants a motion to dismiss pursuant to Rule 2-322(b) when the plaintiffs can prove no set of facts in support of their claims that would entitle them to relief. *Sharrow v. State Farm Mutual Auto Ins. Co.*, 306 Md. 754, 768-69 (1986); *accord Unger v. State*, 63 Md. App. 472, 479 (1985), *cert. denied,* 475 U.S. 1066 (1986); *see also Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Morley v. Cohen*, 610 F. Supp. 798, 806 (D. Md. 1985).[5] In ruling on a motion to dismiss, a trial court must decide whether the plaintiff has presented well-pleaded facts which, when assumed to be true, state a cause of action. *Zion Evangelical Lutheran Church v. State Highway Admin.*, 276 Md. 630, 634 (1976); *accord Dick v. Mercantile-Safe Deposit & Trust Co.*, 63 Md. App. 270, 273 (1985). In making this determination, the court cannot supply by assumption that which is necessary by way of allegation in order to support a cause of action. *Culotta v. Raimondi*, 251 Md. 384, 389 (1968). Moreover, any ambiguity or uncertainty in the allegations bearing on whether the complaint states a cause of action must be construed against the pleader. *Sharrow v. State Farm Mutual Auto Ins. Co.*, 306 Md. 754, 768 (1986).

When considering a motion to dismiss, this Court is not bound to accept conclusory allegations concerning the legal effect of events set out in the complaint if

[5] Maryland Rule 2-322(b) was modeled on its counterpart in the Federal Rules of Civil Procedure, Fed. R. Civ. Proc. 12(b)(6), and, therefore, interpretations of Rule 12(b)(6) are persuasive authority in interpreting Maryland's rule. *Metropolitan Mtg. Fund, Inc. v. Basiliko*, 288 Md. 25 (1980); *White v. Friel*, 210 Md. 274 (1956); *Frush v. Brooks*, 204 Md. 315 (1954).

those conclusions do not reasonably follow from the plaintiff's description of what happened. *Bobo v. State*, 346 Md. 706, 708-09 (1997); *Ficker v. Chesapeake & Potomac Tel. Co.*, 596 F. Supp. 900, 902 (D. Md. 1984). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and internal quotation marks omitted).

In interpreting the federal counterpart to Rule 2-322(b), Fed. R. Civ. Proc. 12(b)(6), federal courts have found that while the court must "draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion," *Sylvia Development Corp. v. Calvert County,* 48 F.3d 810, 817 (4th Cir. 1995) (*quoting Tuck v. Henkel Corp.,* 973 F.2d 371, 374 (4th Cir. 1992), *cert. denied,* 507 U.S. 918 (1993)), all inferences must be firmly based upon established facts. *Carroll v. United Steel Workers of Am.*, 498 F. Supp. 976, 978 (D. Md.), *aff'd*, 639 F.2d 788 (4th Cir. 1980). The party who bears the burden of proving a claim must support factually each element of his claim. Moreover, "a scintilla of evidence is not enough to create a fact issue." *Barwick v. Celotex Corp.*, 736 F.2d 946, 958-59 (4th Cir. 1984) (*quoting Seago v. North Carolina Theaters, Inc.,* 42 F.R.D. 627, 640 (E.D. N.C. 1966)). Finally, to survive a motion to dismiss, a claim must contain sufficient factual context, such that entitlement to relief is plausible, rather than merely conceivable. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

I. COUNTS I AND XII AGAINST THE FROSTBURG DEFENDANTS MUST BE DISMISSED BECAUSE THE COMPLAINT DOES NOT ADEQUATELY PLEAD GROSS NEGLIGENCE.

The Maryland Tort Claims Act "provides statutory immunity to insulate State employees generally from tort liability if their actions are within the scope of employment and without malice or gross negligence." *Board of Educ. v. Marks-Sloan*, 428 Md. 1, 30 (2012) (internal quotations omitted). *See also* Md. Code Ann., Courts & Jud. Proc. § 5-522(b) (2013 Repl. Vol.). On their face, then, negligence claims cannot proceed against State employees. Claims can be maintained, however, *only* if they adequately plead malice or gross negligence. Counts I and XII, although characterized as gross negligence claims, do not adequately plead malice or gross negligence and so must be dismissed.

A. Head Coach Rogish.

The complaint does not even adequately plead negligence, let alone gross negligence, against Coach Rogish. To plead negligence, the plaintiffs much allege facts supporting the elements of "duty, breach, foreseeability, and causation." *Collins v. AMTRAK*, 417 Md. 217, 251-52 (2010). As to duty in the context of a coach's possible negligence, the Court of Special Appeals has made clear that plaintiffs "'shoulder a formidable burden in establishing a coach's negligence'" because "[i]f the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed [his] duty." *Kelly v. McCarrick*, 155 Md. App. 82, 102 (2004) (quoting Thomas R. Hurst & James M. Knight, *Coaches' Liability for Athlete's Injuries*

and Deaths, 13 Seton Hall J. Sports L. 27, 37 (2003)). Further, "[i]n practice, liability of coaches and athletic leagues has been restricted to instances in which the alleged misconduct not only directly resulted in injury, but also reflected an unusual disregard for a player's well-being." *Kelly*, 155 Md. App. at 102; *see also Hammond v. Bd. of Educ. of Carroll Cnty.*, 100 Md. App. 60, 67 (1994) ("courts have been extremely inhospitable to claims . . . for injuries sustained during an ordinary, voluntary contact sport").

Accordingly, the *Kelly* court held that coaches "have a duty not to increase the risk of harm beyond what is inherent in the sport." *Kelly*, 155 Md. App. at 104. And while conceding the dangers of football in "the violent forces at play during football practice," (Compl. ¶ 40), the complaint alleges nothing to show that Mr. Rogish did anything to increase this inherent danger.

The supposed breach of a duty by Mr. Rogish (and Messrs. Schumacher and Sweitzer as well) centers on a particular drill, which the plaintiffs claim led to Derek Sheely's death. But the closest their complaint comes to connecting this drill to any breach of duty are the vague, conclusory allegations that (1) "the coaches knew that the drill increased the risks of concussions" (Compl. ¶ 38), (2) "Defendants including the NCAA, coaches and athletic trainers allowed, condoned and/or demanded that the Drill continue without modification" (Compl. ¶ 39), and (3) because Mr. Rogish was standing next to Mr. Schumacher, he "thus clearly hear[d] Derek's disclosure" of a headache. (Compl. ¶65.) This Court should disregard such conclusory statements (especially the last, which requires an inferential leap) with no actual facts to support them. *See Forster*

v. Public Defender, 426 Md. 565, 604 (2012) ("well-pleaded facts setting forth the cause of action must be pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice") (quoting *Parks v. Alpharma, Inc.*, 421 Md. 59, 72 (2011)). Further, any contention by the plaintiffs that further allegations that "[a]t least one player during the 2010 season suffered a concussion while performing the Drill" (Compl. ¶ 38) and that a few days before his injury, "two of Derek's teammates suffered concussions during the Drill" (Compl. ¶ 39) provide any sufficient factual underpinning are without merit. The complaint makes no allegation that Coach Rogish had any knowledge of these concussions, let alone knowledge that they were caused by participation in this particular drill. The complaint is also clear that participation in the drills was at the direction of Mr. Schumacher, not Mr. Rogish.

Similarly, even assuming that it alleges facts sufficient to support a claim for a breach of duty, the complaint fails to allege facts showing that the injuries that led to Derek Sheely's death were foreseeable. In order to allege that the injuries were foreseeable, the complaint would have to allege that Coach Rogish not only directed Mr. Sheely to participate in the drill, but that he also knew that merely having Mr. Sheely participate in practice drills (without any knowledge that these drills had caused concussions or any injury to Mr. Sheely or others) would lead to serious injury or death. The complaint pleads no such knowledge. Additionally, any notion of such foreseeability is all the more implausible considering that the complaint admits that Mr. Sheely was wearing a helmet that the University purchased from Schutt Sports, relying on a 2011

Virginia Tech study that ranked the helmet manufactured by Schutt Sports as a "leading helmet in its ability to 'protect against concussions'" (Compl. ¶ 27, 28) and that he chose the helmet after a Schutt Sports representative told the team that "'Schutt's new technology can prevent head injuries.'" (Compl. ¶ 31.)

Even assuming that any of the allegations against Mr. Rogish were sufficient to establish negligence, they are not even close to establishing malice or gross negligence, either of which is necessary to defeat Mr. Rogish's immunity from suit. The Court of Appeals has defined malice as "conduct 'characterized by evil or wrongful motive, intent to injure, knowing and deliberate wrongdoing, ill-will or fraud.'" *Barbre v. Pope*, 402 Md. 157 (2007) (quoting *Lee v. Cline*, 384 Md. 245, 268 (2004)). The complaint contains no well-pleaded factual allegations that Mr. Rogish's conduct even begins to meet this standard. This is confirmed by viewing any allegations against Mr. Rogish next to conduct which the Court of Appeals actually judged malicious.

In *Barbre*, the court found malice when the plaintiff Pope alleged that the defendant "shot him in the neck when Pope's hands were raised in surrender." 402 Md. at 186. In *Sawyer v. Humphries*, 322 Md. 247, 261 (1991), the Court of Appeals found that when a defendant, "without provocation or cause, throws rocks at two other persons, he is obviously demonstrating ill will towards those persons. Wrestling another to the ground, pulling his hair, and hitting him on the face, again without cause or provocation, is certainly malicious conduct." In *Okwa v. Harper*, 360 Md. 161, 182 (2000), the plaintiff

was dragged, thrown to the ground, and struck in the back of the head and neck. The allegations against Mr. Rogish fall well short of the standard set by these decisions.

Likewise, the complaint fails to adequately plead gross negligence. In *Barbre*, the Court of Appeals described gross negligence as "an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and also implies a thoughtless disregard of the consequences without the exertion of any effort to avoid them." 402 Md. at 182 (quoting *Liscombe v. Potomac Edison Co.*, 303 Md. 619, 635 (1985)). The Court went on to reference its earlier decision in *Boyer v. State,* 323 Md. 558 (1991), in which the allegations were insufficient to show gross negligence. In that case, the plaintiff had alleged gross negligence on the part of a state trooper:

> in pursuing Farrar, a suspected drunk driver, at an excessively high rate of speed through a heavy traffic area; in continuing to recklessly pursue defendant Farrar at extremely high and dangerous rates of speed; in failing to activate immediately all of the emergency equipment on his police car so as to warn other motorists of the foreseeable dangers to their health and safety created by defendant Titus's negligent and reckless pursuit; and in otherwise failing to adhere to the acceptable police procedures and policies in attempting to apprehend defendant Farrar.

Boyer, 323 Md. at 579-80. The Court of Appeals concluded that the allegations were "somewhat vague" and did not "support the conclusion that [Trooper Titus] acted with gross negligence." *Id.*

Here, the plaintiffs' allegations pale in comparison. The conduct alleged is far less egregious and the allegations include almost no specifics in comparison to the "somewhat vague" allegations in *Boyer* that the Court rejected. Moreover, the plaintiffs' reliance on

§ 7-433 of the Education Article to support a claim of gross negligence (Compl. ¶ 136) is unavailing. That section of the statute applies only to youth sports programs and "public schools," and the latter does not include colleges and universities. Md. Code Ann., Educ. § 7-433 (2013 Supp.); Educ. § 1-101(k) ("'Public schools' means the schools in the public elementary and secondary education system of this State."). The complaint has not pleaded negligence, let alone gross negligence. Consequently, these claims against Mr. Rogish must be dismissed.

B. Assistant Coach Schumacher.

The most that the plaintiffs allege factually to show that Mr. Schumacher knew that the drill was dangerous or that Mr. Sheely had been injured by participation in the drill is the allegation that Mr. Sheely told him that he did not feel well and had a headache and Coach Schumacher responded by telling him to continue playing. (Compl. ¶ 65.) What it does not allege, however, is telling. As is the case with Mr. Rogish, the plaintiffs make no allegation that Mr. Schumacher had any knowledge that Derek Sheely was bleeding, or that he had ever suffered any other injuries, including a concussion. Based on the plaintiffs' allegations, the only thing that Mr. Schumacher allegedly knew was that Mr. Sheely had a headache and did not feel well. But such symptoms are not necessarily indicative of a concussion and persons often have headaches or do not feel well for reasons that have nothing to do with physical activity or injury. And as the plaintiffs acknowledge, there is a long list of concussion symptoms (Compl. ¶ 16) and,

based on the allegations in the complaint, Mr. Sheely had none of them other than headache and not "feeling right."

Additionally, as made clear above, the University purchased helmets from Schutt Sports because they were the "leading helmet in its ability to 'protect against concussions'" (Compl. ¶¶ 27, 28), and a Schutt Sports representative told the team that "'Schutt's new technology can prevent head injuries.'" (Compl. ¶ 31.) Putting Mr. Sheely back in the game with a headache and not "feeling right" but displaying no other symptoms of concussion and wearing a "leading helmet" in "prevent[ing] head injuries" does not amount to gross negligence: "an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another" or a "thoughtless disregard of the consequences without the exertion of any effort to avoid them." *Barbre*, 402 Md. at 182. The gross negligence claims against Mr. Schumacher do not adequately allege gross negligence and must be dismissed.

C. **Assistant Athletic Trainer Sweitzer.**

The claims against Mr. Sweitzer in Counts I and XII likewise fail to adequately allege gross negligence. The complaint contains no allegation that Mr. Sweitzer had anything to do with directing or approving the drills or other practice activities, which means any liability for Mr. Sweitzer would have to come from his treatment of any of Mr. Sheely's injuries. According to the Complaint, however, the most that Mr. Sweitzer knew of any injuries to Mr. Sheely was that his head was bleeding. But, as the plaintiffs acknowledge, bleeding is not among the long list of the "classic symptoms" of

concussion. (Compl. ¶ 16.) Moreover, as the plaintiffs imply repeatedly (Compl. ¶¶ 48, 53, 56, 62), the bleeding could have been caused by the helmet not fitting properly, not because of any injury. The plaintiffs make no allegation that Mr. Sheely told Mr. Sweitzer or anyone else that the bleeding was caused by anything, let alone a head injury.

Clearing Mr. Sheely to continue practicing after bandaging his forehead and after Mr. Sheely made no complaint to Mr. Sweitzer of any symptoms of concussion or any other injury does not even begin to adequately plead "an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another" or a "thoughtless disregard of the consequences without the exertion of any effort to avoid them." *Barbre*, 402 Md. at 182. The gross negligence claims against Mr. Schumacher do not adequately allege gross negligence and must be dismissed.

With regard to all three of the Frostburg Defendants, the plaintiffs seek to hold them liable when "the risks of the activity are fully comprehended" and "perfectly obvious." *Kelly*, 155 Md. App. at 102. Derek Sheely's death was tragic because he was young, but it came while participating voluntarily in an inherently violent sport – helmets that prevent head injuries are necessary equipment for participation – whose dangers where obvious to Mr. Sheely as someone who had played football for years and had allegedly suffered a concussion the previous season. *See Hammond*, 100 Md. App. at 66 ("football is a rough and hazardous game and . . . anyone playing or practicing such a game may be injured") (quoting *Hale v Davies*, 70 S.E.2d 923, 925 (Ga. Ct. App. 1952)). Mr. Sheely knowingly participated in a dangerous sport while wearing equipment that he

and the Frostburg Defendants were told would prevent the very head injury that the plaintiffs allege he suffered. In doing so, Mr. Sheely assumed the risk of injury while participating in an inherently violent and dangerous sport. Consequently, although his death was tragic, the Frostburg Defendants cannot be held liable for it based on the allegations in the complaint.

II. COUNTS II AND XIII AGAINST DEFENDANT SWEITZER MUST BE DISMISSED BECAUSE THE COMPLAINT DOES NOT ADEQUATELY PLEAD GROSS NEGLIGENCE.

In Counts II and XIII, Plaintiffs seek to hold Mr. Sweitzer liable for violating a duty they purport to find in a statute. The crux of the claim is the assertion that Mr. Sweitzer, a certified and licensed athletic trainer, "failed to exercise reasonable care in evaluating, monitoring, detecting and treating Decedent's injuries." (Compl. ¶ 144.) Assuming that Mr. Sweitzer owed such a duty to Mr. Sheely, these claims fail for largely the same reasons that the other gross negligence claims against Mr. Sweitzer fail.

The first clear failing is that these claims are couched in overly broad, purely conclusory statements, devoid of any specific factual allegations showing how Mr. Sweitzer breached a duty of care he owed to Mr. Sheely. Putting aside this failing, the plaintiffs' allegations show that the most that Mr. Sweitzer knew of any injuries to Mr. Sheely was that his head was bleeding. But, as the complaint indicates, bleeding is not a symptom of a concussion and the bleeding could have been caused by the helmet not fitting properly, not because of any injury. Mr. Sweitzer sent Mr. Sheely back into practice after bandaging his forehead and after Mr. Sheely made no complaint to Mr.

Sweitzer of any symptoms of concussion or any other injury. Not only does such conduct not breach any duty of care (and again, the plaintiffs make no effort to explain how it does), it does not constitute the gross negligence that is necessary for these claims to survive a motion to dismiss.

Gross negligence is all the more implausible given the complete absence of any allegation of disciplinary proceedings against Mr. Sweitzer because of his alleged conduct. As the complaint states, Maryland law "requires licensed athletic trainers to be professionally competent, lest they will have their license revoked." (Compl. ¶ 141.) Surely, if Mr. Sweitzer had been grossly negligent there would have been disciplinary proceedings at least initiated against him. Yet the complaint mentions none, let alone any finding that he had violated any duties he may have as an athletic trainer.

III. COUNTS XI AND XXII AGAINST THE FROSTBURG DEFENDANTS MUST BE DISMISSED BECAUSE THE COMPLAINT DOES NOT ADEQUATELY PLEAD THE ELEMENTS OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

The Court should dismiss Counts XI and XXII, in which the plaintiffs allege that the Frostburg Defendants (and all defendants) intentionally inflicted emotional distress upon them. The plaintiffs have failed to state a plausible claim for relief under that "rarely viable" tort theory. *See Bagwell v. Peninsula Regional Med. Ctr.*, 106 Md. App. 470, 514 (1995) (citing *Kentucky Fried Chicken Nat'l. Mgmt. Co. v. Weathersby*, 326 Md. 663, 670 (1992)).

The four elements of a cause of action for intentional infliction of emotional distress under Maryland law are well established: "(1) The conduct must be intentional or

reckless; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between the wrongful conduct and the emotional distress; (4) the emotional distress must be severe." *Manikhi v. Mass Transit Admin.*, 360 Md. 333, 367 (2000) (quoting *Harris v. Jones*, 281 Md. 560, 566 (1977)). And "'each of these elements must be pled and proved with specificity.'" *Manikhi*, 260 Md. at 367 (quoting *Foor v. Juvenile Servs. Admin.*, 78 Md. App. 151, 175 (1989)). In the complaint, the plaintiffs have not pleaded specific facts showing that the Frostburg Defendants acted recklessly or intentionally, that the alleged conduct was extreme and outrageous, and that it was causally connected to emotional distress on the part of the Mr. Sheely or the plaintiffs. Consequently these claims against the Frostburg Defendants must be dismissed.

"To meet the 'intentional or reckless' criterion of the first element, the plaintiff must allege and prove that the defendant either desired to inflict severe emotional distress, *knew* that such distress was *certain or substantially certain* to result from his conduct, or acted recklessly in deliberate disregard of a *high degree of probability* that the emotional distress will follow." *Foor*, 178 Md. App. at 175; *see also Harris*, 281 Md. at 567. The plaintiffs make no effort to allege, even in conclusory statements, that the Frostburg Defendants either desired to inflict emotional distress upon Mr. Sheely or the plaintiffs or knew that distress was certain or substantially certain to result from any alleged conduct or that they deliberately disregarded a high probability of emotional distress. Further, there is no allegation that Mr. Sheely actually suffered any emotional distress as a result of any defendant's actions. To the extent the plaintiffs suffered

emotional distress, such distress was caused by Mr. Sheely's death, not by any conduct on the part of any defendant.

Moreover, any alleged conduct on the part of the Frostburg Defendants falls well short of the kind of conduct recognized in Maryland as sufficient to support such a claim.

The tort of intentional infliction of emotional distress is "'to be used sparingly and only for opprobrious behavior that includes truly outrageous conduct.'" *Weathersby*, 326 Md. at 670 (citation omitted). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Restatement (Second) of Torts §46, cmt. d; *see Harris*, 281 Md. at 567 (quoting Restatement with approval). The conduct alleged in the complaint does not even begin to meet this standard. This is all the more obvious when one compares the conduct alleged here to the types of conduct that do suffice. In *Bozman v. Bozman*, 376 Md. 461 (2003), the Court of Appeals set out such examples, including: (1) a psychologist retained to improve a marital relationship facilitates a romantic, sexual relationship with the spouse of a patient, (2) a father's voluntary manslaughter of his children's mother, and (3) a father shoots his child's mother in the child's presence, keeps the child with the body for six days, then shoots himself in front of the child. *Id.* at 466 n.3. Any conduct of the Frostburg Defendants alleged by the plaintiffs does not begin to compare to such outrageous conduct.

The most that the complaint pleads is that the Frostburg Defendants were responsible for Mr. Sheely's participation in football drills that resulted in his injury and death. Even had they done so knowing that he was injured, which the complaint does not adequately assert, such conduct hardly qualifies as "utterly intolerable in a civilized society." The intentional infliction of emotional distress claims must be dismissed.

IV. PLAINTIFF KEYTON SHEELY'S WRONGFUL DEATH ACTION MUST BE DISMISSED BECAUSE SHE IS NOT A PROPER PARTY TO SUCH AN ACTION.

In Counts XII, XIII, and XXII, Keyton Sheely, sister of Derek Sheely, brings wrongful death claims. A wrongful death action is a "creature of statute." *State v. Copes*, 175 Md. App. 351, 376 (2007). And Maryland's wrongful death statute restricts plaintiffs in such an action to "the wife, husband, parent, and child of the deceased person." Md. Code. Ann., Cts. & Jud. Proc. § 3-904(a)(1). Siblings, such as Keyton Sheely, may only bring wrongful death actions if the deceased has no living spouse, parent, or child, and the sibling is "substantially dependent upon the deceased." *Id.*, § 3-904(b); *see also Flores v. King*, 13 Md. App. 270 (1971); *Wittel v. Baker*, 10 Md. App. 531 (1970). Because Derek Sheely has living parents as plaintiffs, and because the complaint makes no allegation that Keyton Sheely was dependent upon her brother, she cannot be a party to this wrongful death action and all of her claims must be dismissed.

CONCLUSION

The complaint should be dismissed with prejudice as to Defendants James Schumacher, Thomas Rogish, and Michael Sweitzer, Jr.

Respectfully submitted,

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KRISTEN L. SHEELY, et al.,	*	
Plaintiffs,	*	IN THE
v.	*	CIRCUIT COURT FOR
THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,	*	MONTGOMERY COUNTY
	*	Civil No. 380569-V
Defendants.	*	

* * * * * * * * * * * * *

ORDER

Upon consideration of the motion to dismiss complaint filed by Defendants Thomas Rogish, James Schumacher, and Michael Sweitzer, Jr., and any opposition thereto, it is this _____ day of _____, 2013

ORDERED that the motion to dismiss is GRANTED; and it is further

ORDERED that the complaint is DISMISSED WITH PREJUDICE as to Defendants Thomas Rogish, James Schumacher, and Michael Sweitzer, Jr.

_____
David A. Boynton
Judge