

No. 04-08-00183-CV

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IN THE FOURTH COURT OF APPEALS  
SAN ANTONIO, TEXAS

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Midwest Employers Casualty Company  
On Behalf of Terry English,

Appellant

v.

Charles Harpole, Jim Carroll, Alan Kwast,  
Albert Lopez, and Brock Pittman,

Appellees

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**BRIEF OF AMICUS CURIAE  
NATIONAL ASSOCIATION OF SPORTS OFFICIALS, INC.  
IN SUPPORT OF APPELLEES**

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ORAL ARGUMENT REQUESTED

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## **PRELIMINARY STATEMENT AND STATEMENT OF FACTS**

This Amicus Curiae brief is respectfully submitted by The National Association of Sports Officials, Inc. (hereinafter, “Amicus”) on behalf of Appellees Charles Harpole, Jim Carroll, Alan Kwast, Albert Lopez, and Brock Pittman (hereinafter collectively “the Referees”).

Your Amicus incorporates by reference herein the Statement of Facts contained in Brief of Appellees filed January 13, 2009.

Amicus files this brief in support of the Referees’ opposition to Appellant Midwest Employers Casualty Company’s (hereinafter “Midwest”) appeal of an order of the trial court granting the Referees’ motions for Summary Judgment dismissing this subrogation claim. We note that Midwest’s application for reconsideration was likewise denied by the trial court.

At issue is Midwest’s claim that the trial court erred in granting summary judgment in favor of the Referees in this action which arose out of an sideline collision during a high school football game involving Appellee Charles Harpole, a game official, and Midwest’s subrogor, Terry English, an assistant coach of one of the competing teams. During the course of a play, Mr. English had walked into a restricted area of the playing surface – adjacent to his team’s sideline - known as the “Officials’ Box” under the playing rules, at which time he was accidentally knocked down by Mr. Harpole as the latter gentleman was running down the field to follow the play.

The Referees argued correctly in the trial court that the Referees violated no legal duty and that they were entitled to summary judgment as a matter of law.

### **INTEREST OF AMICUS CURIAE**

The National Association of Sports Officials, Inc. is a nonprofit membership organization comprising approximately 16,000 game officials – referees, umpires and “judges” of sports events. The Association’s membership ranges from youth league officials to officials employed in all major professional sports leagues - and at all levels in between.

Founded in 1980, NASO works with many state and local referees’ associations to provide seminars, books and manuals for educational purposes, and other programs and initiatives that promote sports officiating as a positive, rewarding and meaningful career. Its membership and volunteer roster contains persons of vast experience and knowledge the field of sports officiating, and high school athletics.

Amicus, whose staff, officers and members are active participants in the officiating avocations and professions, as well as in the administration of officiating programs and education, are well situated to apprise this Court as to the practical issues of significance to its decision here.

Pursuant to Rule 11 of the Texas Rules of Appellate Procedure Amicus states and affirms that all legal fees and costs for preparing the within brief are to be paid by Amicus Curiae National Association of Sports Officials, Inc.

### **ARGUMENT**

Amicus respectfully focuses the Court’s attention on the key issues dispositive of the

within matter. Midwest claimed below that the injury to English, its subrogor was proximately caused by (1) Mr. Harpole failing "...to keep a proper lookout and proceed in a safe and reasonable manner"; (2) the Referees' failure to inform "...coaches that they must remain outside of the officials' box at all times during play"; and (3) the Referees permitting coaches to remain in the officials' box area.(CR (Plaintiff's Response to Defendants' Request for Disclosure, p.2.).

In other words, Midwest avers that the Referees collectively were negligent for not verbally outlining rules and inherent risks regarding high school football to coaches who are charged with conducting the football programs at their school. Moreover, Midwest claims that Appellee Harpole was running aggressively, at high speeds and not looking where he was going. This is the essence of Midwest's case. This is why the trial court granted summary judgment dismissing Midwest's claims not once but twice and denied Midwest's motion for summary judgment dismissing the Referees' counterclaims for sanctions. For in the final analysis, at the time of this tragic collision involving Official Harpole and Coach English, Official Harpole was doing exactly what he should have been doing – running down the sideline following the play to officiate the game. In evaluating the actions of the Referees in the case *sub judice* the issue of legal duty is neither particularly esoteric nor obtuse, but rather demonstrably simple and obvious to anyone who has ever attended or participated in a sporting event: referees need to concentrate on the student athletes while the ball is "alive" – i.e. while the ball is in play in a football game. Simply stated, referees need to gauge their movement predicated on whether their positioning on or about the

playing surface places them at the most advantageous angle to observe play. Only in this way are game officials able to rule on technical matters involving including, but not limited to, (1) permissible playing techniques and maneuvers – including legal and illegal maneuvers by players that might yield an advantage not intended by the rules; (2) scoring plays; (3) equipment violations; (4) fouls and other infractions (especially those infractions implicating player safety); (5) substitutions; (6) timing issues (starting and stopping the game clock, administering time out and intermission periods); and (7) penalty enforcement. Imposing liability on game officials such as Referees in the case *sub judice* would be an unprecedented perversion of traditional tort law principles that is without any justification and serve no rational purpose. Making referees and other game officials liable in tort to plaintiffs whose own careless actions in the vicinity of the playing surface cause their injuries is unconscionable and unwarranted.

In this subrogation matter, Midwest abuses the process of this Court by advancing groundless arguments that fly in the face of well-established principles of tort law. Midwest advocates imposing a duty that requires game officials to abrogate their responsibilities to the student athletes in favor of policing the out of bounds area during live play to insure that they do not come into contact any onlookers standing around the playing surface. Manifestly, this is a “duty” that does not exist and had never existed. Midwest advocates subjecting athletic game officials to liability in negligence for running down the sideline at high speed to keep up with the play -- i.e. for doing exactly what they need to do to "call" a game -- and all because the coach did not adhere to basic principles that would apply to

ANYONE whose finds himself or herself in close proximity to the sideline in a high school football game in the State of Texas.

To state that this tortured concept of tort liability would have severely deleterious consequences on sports is a gross understatement. And, to state without authority that a football official needs to “keep a lookout,” as Midwest suggests, to avoid support personnel who may be in the dead ball area while running down the field is more than preposterous.

As Midwest frames the argument, it was the duty of the Referees to officiate the game, involving 22 energetic high school athletes playing in an area some 120 by 50 yards with five officials responsible for the entire playing surface and also to have their eyes focused on the out of bounds area while running. Under such circumstances, it would be impossible for any official to do his or her job. Officials are responsible for watching the players’ interactions, the football, and the incidents of contact between opponents, as well as determining whether a player is in possession of the ball at any given time during the game, whether a pass or fumble is caught or recovered, and whether any one or more of dozens of rules infraction is committed on any particular play. In addition thereto, the dictates as to equipment, facilities, uniforms, and playing times are contained in a 200-page rule book – all of which came under the direct jurisdiction of Harpole and his four partners working the game in suit.

Amicus feels compelled, therefore to address the pernicious consequences of the fanciful liability standard Midwest would like this Court to adopt. Clearly, this is a standard which would disregard all traditional concepts of tort law -- all because Midwest's subrogor

carelessly and negligently disregarded his own safety and the safety of others involved with the game – including students under his charge – albeit with tragic results. Nevertheless, the damages Midwest seeks to recover in this subrogation action are simply not chargeable to Referees under any theory of recovery or reasonable argument for the extension of tort liability.

The National Federation of State High School Associations, the national governing body for high school athletics in the United States; and of which the University Interscholastic League (UIL) is a constituent member, describes the avocation:

[Officials] are requested to render decisions in rather technical matters and in an atmosphere charged with prejudice and emotion. --“So Now You’re An Official,” National Federation of State High School Associations, Kansas City, MO, 1969.

Thus, although the Referees have demonstrated ably in their appellate briefs that Coach English essentially caused his own tragic injury by standing, reading from his clipboard in a "restricted area" during live ball play in the subject football game, the pitfalls of sideline deportment go beyond a coach simply standing in the "officials' box."

Coaches in all sports know or should know that they need to practice appropriate sideline management at all times during a game such as football. Given that it is common knowledge that very large high school boys who play football and are equipped with substantial equipment strapped or otherwise affixed to their persons very often run, stumble, trip or fall out of bounds.

And, given the speed at which high school football is played, the ensuing collisions

with nonplayers in the area adjacent to the playing surface can be violent and can cause, as here, serious injuries. Thus, persons who choose to stand near the sideline of a high school football field during a game, and especially coaches and other team personnel, are on constructive notice that they are in a place where violent collisions sometimes occur. As such, negligence is not presumed when such persons are injured. A fortiori, with coaches who are ostensibly specially educated in the rules and culture of the sport they are engaged to coach, *it is incumbent upon coaches to simply stay out of the way of game officials* - period. Any football coach knows full well that players and officials often find themselves on the “out of bounds” side of the sideline – and sometimes well out of bounds. When players travel out of bounds, officials go with them. It is axiomatic that officials need to be where they can observe players actions and interactions with opponents at all times during the game. Amicus respectfully urges this Court to take notice that officials need to have free range to call the game. Without officials having the latitude to get where they need to go without fear of a lawsuit every time bodily contact occurs because onlookers have placed themselves in harm’s way, interscholastic sports could not exist. Only the foolhardy would referee high school football or any other team sport under such circumstances.

The Supreme Court of Oregon acknowledged the nature of high school football:

The game demands that players come into contact with each other constantly, frequently with great force. The linemen charge the opposing line vigorously, shoulder to shoulder. The tackler faces the risk of leaping at the swiftly moving legs of the ball-carrier and the latter must be prepared to strike the ground violently. Body contacts, bruises, and clashes are inherent in the game. There is no other way. *Vendrell v. School District No.*

26C, *Malheur County*, 233 OR 1, 376 P2d 406 (1962).

That said, it is without any reasonable doubt, imperative for nonplaying personnel, such as coaches, to keep an alert not to get in the way of any player or official whose actions during a game take him to an area outside the boundary lines that denote the playing field parameters.

Moreover, it is imperative for school and facility administration to police these activities.

Amicus would urge this Court to take notice that game officials need to officiate -- to call the game fairly -- and to discharge the referees' first responsibility: the safety of the student athletes. They absolutely cannot do so if they are required by some perverse theory to "look where they are going" when in the "wing" or sideline area of any field or court. This is elementary and anyone who has ever stood on a sideline of a team sport knows well the potential for unintended collisions attendant thereto.

Nor has Midwest adduced any reason, in fact or in law, that would permit this Court to ascribe a duty to stop a game at innumerable instances to do the job of site administration and keep the field and immediate environs clear of coaches with their heads buried in their clipboards within a few feet of the football field's boundary. This sophistry engaged in by Midwest is so far removed from any legal principle of tort law or argument for an extension of same that it is manifestly frivolous.

The authorities are legion in sharply limiting sideline collision liability in the context of high school football. In *Turner v. Caddo Parish School Bd.*, 252 La. 810, 214 So.2d 153

LA 1968, a spectator was injured while standing approximately six feet from the sideline at her grandson's high school football game. Against this factual scenario, the court concluded as follows:

It is knowledge common to all who have watched football games, or viewed such games on television, that oftentimes as a result of momentum generated in executing plays, players cannot avoid running beyond the limits of the playing field and as a result accidents may occur. Many times have we seen photographers and others who ventured too close to the side lines knocked head over heels by players overrunning the boundary. *Anyone who has had even a minimal knowledge or exposure to football as played today is aware of the risk that is involved in staying too close to the sidelines.*

We do not believe, in this day of constantly televised football events at all levels, that it might reasonably be anticipated by school officials that among the family and friends of schoolboy athletes would be persons unaware of the fact that plays are often called which carry the players off-field and they sometimes run into persons standing close to the sidelines-camera men, officials, other players, spectators, etc.

We think, too, that school officials might reasonably assume that the very nature of the sport itself would indicate to any reasonable person, who has observed only a few minutes of the playing, the possible risk involved in standing near the sidelines, even if we knew nothing of the game previously. Under these circumstances we think that it would be unreasonable to require such school officials to ascertain which spectators had no knowledge of the activity and to give them special warnings. *Turner* at p. 819. (emphasis supplied)

Amicus is also aware of the issue of imposing fanciful duties on game officials that ascribe culpability for any injury that occurs on the field or court based simply on (1) the severity of the injury, or (2) the mere fact of a collision between participants in the game and

onlookers or, (3) in the case *sub judice*, the mere fact of a collision between an official and nonplaying team personnel. Nevertheless, none of these factors is an indicium that *any*, let alone all, of the criteria necessary to sustain a cause of action for negligence is present.

Game officials need to concentrate on the game and not on doing the job of event staff and team personnel. The manufacturing of a legal duty that does not exist, based on an imagined standard that any official's failure to enforce a rule about where coaches may stand during game would be the proximate cause of an injury defies both common sense and any principle of tort law.

In *Perry v. Seattle School Dist. No. 1*, 66 Wash.2d 800, 405 P.2d 589 WASH 1965, plaintiff and her daughter were at a high school football game, standing about 1-2 feet behind the boundary line and engaged in conversation with another spectator when two opposing players propelled the ball carrier out of bounds and into the plaintiff. The court concluded that

Even, conceding the ignorance of the game of football claimed by the plaintiff wife, some objective standard of negligence must be applied. She cannot be heard to say that she did not comprehend a risk which would be apparent to a reasonably prudent and cautious person. (At p. 807).

In accord is *Ingerson v. Shattuck School*, 185 Minn. 16, 18, 239 N.W. 667 (1931);

and a Louisiana Court of Appeals case, *Colclough v. Orleans Parish School Board*, 166 So.2d 647 (La.Ct.App.1964):

Football, as it is played in America, is a rough and rugged game requiring much brawn and physical effort and contact on the part of the players. Strategy demands on some offensive plays

that the ball carrier intentionally run out of bounds; on some plays defensive players force the ball carrier over the boundary line so that the ball will become 'dead' and the particular play ended. It is knowledge common to all who have watched football games, or viewed such games on television, that oftentimes as a result of momentum generated in executing plays, players cannot avoid running beyond the limits of the playing field and as a result accidents may occur. Many times have we seen photographers and others who ventured too close to the side lines knocked head over heels by players overrunning the boundary. In many cases, too, we have seen momentum carry football players headlong into the team 'benches' paralleling each side of the field about mid-field and scatter those occupying them. Such benches are located at a greater distance from the playing field than was plaintiff. We have also observed the linesmen (those who handle the 10-yard measuring chain) scurry for safety when plays appear headed in their direction. *Colclough, supra* at p. 649

Indeed, Midwest has failed to advance one good reason why this court should decline to take notice of matters of common knowledge and perception in the case at bar.

Here, to extend unbounded state tort liability to football officials predicated on the not uncommon occurrence of a coach-official out of bounds collision -- on the ground that the officials should have absolutely prevented all persons from standing too close to the sideline on every play -- would pervert the tort system and make officiating an obsolete avocation in light of the specter of "strict liability" that does not exist in this context for any other class of participant.

Not only would referees and umpires in virtually all sports be incessantly subjected to costly and uncertain litigation nationwide, but the sports programs throughout the country would suffer as a result of the decreased participation by men and women of good character

and sound judgment who will not continue in the avocation due to the omnipresent threat of specious liability claims.

Midwest cites the Restatement (2<sup>nd</sup>) of Tort §323 (1965) for the proposition that “Harpole knew or should have known that his services were necessary to ensure the safety of the players and coaches.” From that proposition, Midwest recites that the “Referees’ . . . services were necessary to ensure the ‘safety of not only the players, but the sideline observers, as well as the officials.’” Brief of Appellant p.13.

Notwithstanding the legal fallacy that officials or anyone is required to “ensure the safety of the players and the coach,” Harpole’s uncontroverted testimony, quoted by Midwest was that he warned everyone to get back “pretty much every play.” 3 CR 872. Thus, all of the arguments made to impose tort liability on Harpole for doing exactly what he was supposed to be doing are, in fact, reasons why Coach English should have gotten himself out of an area that he knew, or should have known, that officials regularly patrol in the course of officiating the game.

Indeed, the law is well settled that *all* persons and not only coaches, need to stay out of the way of officials and players during live play in a football game. It is hardly an obscure fact that high school football is often played outside the sidelines as players frequently go out of bounds and, on those occasions, officials go with them. It is well known, or should be known, to any football coach that officials frequently traverse the area outside of the sidelines so as to get an appropriate angle on out of bounds plays and to avoid unnecessary contact with players. They should not, nor does the law require them to, be

hampered by coaches who need to encroach on the field of play or the officials' box – oblivious to everything that is going on around them except for charting their plays or devising their strategies, or communicating with players and substitutes.

Where plaintiff, a doctor, who, on invitation of his son, one of the football players on a high school team, goes to City Park to watch his son's team at football scrimmage, positions himself on or at the side line of the playing field, a position of known or obviously apparent danger, and is injured when five boys engaged in an end run play in ordinary course of playing the game, run out of bounds into plaintiff injuring him, plaintiff has no right of recovery as he assumed the risk. See *Lorino vs. New Orleans Baseball & Amusement Co., Inc.*, 16 La.App. 95, 133 So. 408.

Notwithstanding the repeated quotations from the testimony in this matter offered by Midwest to the effect that game officials always caution coaches to stay out of the area adjacent to the sidelines, Midwest would have this Court believe that there is no corresponding duty on the part of coaches to keep the area, where they know officials traverse, clear. Quare: Why should each and every coach not be chargeable with following the play, knowing where players and game officials are, and at least staying out of the way while the game is in progress?

The thesis of Midwest's argument appears to be that the officials did not act as reasonable persons by enforcing a rule to keep coaches from being in an area where officials run.

Clearly, this Court need not sit blind to matters of common knowledge. Particularly matter of high school football in the State of Texas. Anyone who has so much as watched a

football – no less an experienced coach of high school athletes – knows full well that the area immediately adjacent to the sidelines on a football field is dangerous territory due to the fact that student athletes and officials often traverse the out of bounds area. Quere: Where is the duty of the coach to act as a reasonable coach? Where is the duty of the coach to avoid impeding game officials on whom the safety of the student athletes depend during a game?

Finally, Midwest repeats over and over again that Harpole “. . . ran down the sideline ‘a little more aggressive’ than he would normally run.” 4 CR 1184. Appellant indicates that Harpole attributed this faster speed to covering for another official who had some knee problems. In a redundant frenzy to ascribe negligent conduct to Harpole by virtue of the speed at which he was running, Midwest discards the fact that this testimony underscores that *Harpole was doing exactly what he should have been doing*. There is no reason on earth why Harpole needed to be impeded by English who was not paying attention to the game. To suggest that any reasonable trier of fact could find otherwise is grossly distorting the law of negligence in each and every of its elements. No reasonable trier of fact could find otherwise.

Further, Coach English’s actions in entering the “officials’ box” in close proximity to the sideline during a live ball was not only a violation of the playing rules which Coach English was chargeable with knowing, but also an indicium of a careless action. His tragic injury was the result of his own carelessness and violation of the rules of football and he clearly knew, or should have known, that student athletes and officials running at high speed and sometimes wearing equipment, frequently find themselves in the area in which he was standing looking down at his clipboard. His own carelessness is what precipitated his injury,

not the action of Harpole or any other official on the game or anyone else.

Nor were coaches and players not warned by Harpole and other officials repeatedly during the game to stay back. It is undisputed that this was done.

Clearly, one of the inevitable consequences of the playing of sports is that a small percentage of participants, coaches and onlookers suffer injuries. No official is required under the law to "ensure" that no one in and about the game venue will not sustain an injury from an accidental collision.

That the injury in suit in this subrogation matter befell an experienced coach who failed to keep a proper lookout and negligently and carelessly placed himself in an area that he knew or should have known is the situs of frequent collisions and contact with others is unfortunate. It does not however, occasion a finding of negligence on the part of any of the Referees and no reasonable trier of fact could so find. Indeed such a finding would have more than a chilling effect on literally hundreds of thousands of game officials around the nation.

Amicus and its members therefore have a significant interest in the outcome of this litigation. Nearly all of Amicus' members do now or will in the future face the prospect of tort litigation concerning any sideline collision, or indeed any collision with a wayward coach, substitute player, athletic trainer, team physician, school employee, security officer, spectator or any other person who may be in close proximity to a sideline at an athletic event.

The cost in terms of attrition of officials; and ancillary costs in the form of self-insurance or insurance premiums to cover the potential risks of holding officials liable anytime such a collision occurs would represent an unconscionable and unjust burden on

officials, whose compensation is modest relative to the effort they expend in officiating high school and other sports.

The official-members of your Amicus are committed to "calling the plays" to make sports safe, fair and fun. Through its members NASO is committed to enhancing the skills, effectiveness, and professionalism of game officials throughout sports in America. Because of this commitment, Amicus seeks to address issues of importance to these goals and to the sports industry.

## CONCLUSION

Midwest's arguments represent a twisted perversion of well established tort law principles in the State of Texas. To bring an action against an official who was doing exactly what he should have been doing, i.e., following the play and officiating the game, under these circumstances is patently frivolous. And, to bring an action against the entire crew of officials is similarly frivolous – and more so when the action is to recoup insurance benefits paid on behalf of a gentleman who was an experienced football coach and well aware of the pitfalls of standing in close proximity to any sideline in any football game.

For all of the foregoing reasons, the decision of the trial court should be upheld.

Respectfully submitted,

**GOLDBERGER & GOLDBERGER**

Dated: April 10, 2009

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**CERTIFICATE OF SERVICE**

This is to certify that the above and foregoing document was served in accordance with Rule 9.5 of the Texas Rules of Appellate Procedure on April 10, 2009 to the following counsel of record via facsimile transmission.

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