NOTE

HOW THE PROMISES OF RICHES IN COLLEGIATE ATHLETICS LEAD TO THE COMPROMISED LONG-TERM HEALTH OF STUDENT-ATHLETES: WHY AND HOW THE NCAA SHOULD PROTECT ITS STUDENT-ATHLETES' HEALTH

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INTRODUCTION

Bumps, bruises, and broken bones are common to all student-athletes. Unfortunately, many student-athletes endure more debilitating injuries. However, no student-athlete should suffer such an injury because of a team physician's misdiagnosis. In reality, student-athletes and team physicians experience conflicting personal and economic pressures, which collectively jeopardize the student-athlete's long-term health.

This Note considers a university's[1] liability when a student-athlete suffers an ambiguous injury that warrants the medical attention and skills of a team physician. In this situation, the team physician experiences pressure from the coaching staff and fans to return the injured student-athlete to the field. Caught between the student-athlete's best interest and the university's economic incentives, the team physician may succumb to this pressure by overlooking the player's mild symptoms and misdiagnosing the injury.[2] In this instance, who is responsi-

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[1] For purposes of this Note, "university" means all public and private colleges and universities.

[2] One example of an injury commonly overlooked is a concussion. The diagnosis of a concussion requires the use of a computed axial tomography (CT scan).

ble for the student-athlete's general health and welfare? Who should a court hold liable if the student-athlete suffers further injury as a direct result of the misdiagnosis? This Note analyzes the potential liability a university faces after a team physician misdiagnoses a student-athlete's injury and irresponsibly returns the athlete to the playing field.[3]

Part I of this Note discusses the large amounts of money generated by intercollegiate sports. Part II explains how the recruiting process establishes a relationship between a student-athlete and a uni-

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Another example of a serious injury requiring extensive medical testing is when a player experiences internal bleeding. In either situation, a team physician must conduct extensive tests away from the field of play to properly diagnose and treat these injuries. *Compare* Mike Cobb, *QB Chris Simms Will Make a Full Recovery from Spleen Surgery*, THE LEDGER.COM, Sept. 26, 2006, http://www.theledger.com/apps/pbcs.dll/article?AID=/20060926/NEWS/609260423 (last visited Mar. 18, 2008) (describing the events when a team physician medically cleared a NFL quarterback to return to the field of play, even though the complained of rib pain which was later diagnosed as a ruptured spleen), *with* Joe Mattis, *Athletes, Coaches Rush to Injured Athlete's Side: McDowell's Kimball Enjoys Non-Stop Visits in Hospital*, ERIE TIMES NEWS, Sept. 21, 2007, http://www.goerie.com/apps/pbcs.dll/article?AID=/20070921/VARSITY01/709210463/-1/VARSITYCOVER (last visited Mar. 18, 2008) (depicting the details of a team trainer's correct diagnosis of a spleen injury when a high school football player suffered from a lacerated spleen following an ordinary play during the course of a game). In these two instances, the medical staff diagnosed the symptoms differently, but if the potential problems were completely ignored, irreparable harm would have resulted to the athletes. In the NFL anecdote, the team physician cleared the athlete to continue to play because the physician did not recognize the injury was a ruptured spleen. This clearance could have proven lethal. Conversely, the diagnosis in the high school anecdote is an example of the subtle symptoms athletic trainers and team physicians face and the potential lethal results of a misdiagnosis.

[3] Student-athletes may experience other injuries associated with their participation in intercollegiate athletics. These occurrences, however, are outside the scope of this Note. One example of such an injury takes place when a student-athlete becomes injured severely enough to justify removal from competition. Here, the athlete is physically unable to continue performing and must watch the remainder of the game from the sideline. Foregoing a second medical diagnosis, the student-athlete later consults and relies upon the team physician for treatment of the injury.

Additionally, a student-athlete may experience an injury from an activity other than the athlete's participation in a sport. Typically, this injury occurs while the student-athlete is acting as a student, but not in the university-sponsored athletic setting. In this instance, the university's liability does not differ from the typical liability associated with the university's other students.

Likewise, a student-athlete may incur an injury while in transit to an intercollegiate particle or game. Here, the injury is related to the student-athlete's participation in intercollegiate athletics, but it occurs outside the context of the actual practice or game. For example, while the team is commuting to a competition, the team physician is the only available medical professional with whom the student-athlete may consult.

versity. Part III discusses the sacrifices a student-athlete makes, both physically and mentally, while participating in intercollegiate athletics. Part IV details how pressures on the university, student-athlete, and team physician compromise a student-athlete's long-term health. Part V discusses the general *prima facie* case for negligence and potential theories a student-athlete may use to establish that a university owes its student-athletes a heightened duty of care. Part VI makes use of the analysis in Parts I-V to address how future courts could find that universities owe their student-athletes a heightened duty of care. Part VII focuses on the employment status of the team physician and how this status affects the university's liability. Part VIII discusses the likelihood that universities will continue to jeopardize the health of student-athletes. Finally, Part IX provides my recommendations on steps the NCAA should take to protect the health of its student-athletes.

I. A BRIEF HISTORY OF THE ECONOMIC CHANGES IN COLLEGE SPORTS

The financial rewards associated with a successful athletic program are a motivating force for many universities. Therefore, an analysis about the relationship between student-athletes and their universities must begin with an overview of the economics of intercollegiate athletics.

A. The Formation of the NCAA and the Early Economic Surge in Intercollegiate Athletics

As early as the 1880's, universities began setting aside large sums of money to fund football programs to acquire a portion of the new revenue streams generated by intercollegiate football.[4] For the next two decades, universities competed to dominate this new market.[5]

In 1905, the ferocity of intercollegiate football prompted many universities to contemplate banning or reforming the sport.[6] Intercollegiate football had become so violent that between the years of

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[4] *See* ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 7 (2001) (1999) (citing WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 38 (1995)) (explaining that the yearly football game between Yale and Princeton generated over $25,000 and attracted 40,000 spectators).

[5] *Id.* at 7-8.

[6] Nat'l Collegiate Athletic Ass'n, History, http://www.ncaa.org/about/history.html (last visited Mar. 15, 2008) [hereinafter NCAA History]; ZIMBALIST, *supra* note 4, at 8.

1890 and 1905, 330 student-athletes died while representing their university on the football field.[7] Since the universities could not mutually agree upon appropriate changes to the sport, many universities maintained the status quo, thus risking the health of their student-athletes.[8]

Universities alone could not reform intercollegiate football. Accordingly, in 1906 President Theodore Roosevelt gathered college officials at the White House for a meeting centered on increasing the safety of intercollegiate football.[9] Subsequent meetings followed, culminating in the formation of the Intercollegiate Athletic Association of the United States (IAAUS).[10] By 1910, the IAAUS was the governing body for intercollegiate athletics and changed its name to the National Collegiate Athletic Association (NCAA).[11]

Six years after the formation of the NCAA, intercollegiate football continued to generate additional revenue streams for participating universities. In 1916, the first broadcast of an intercollegiate football game occurred at the University of Minnesota, which created a radio station for the sole purpose of transmitting the event.[12] Following the success of this radio broadcast, a decade later the first significant commercial radio broadcast of an intercollegiate football game occurred.[13]

Intercollegiate athletics continued to attract public interest and financial rewards for participating universities throughout the Great Depression. For example, in 1935, the University of Michigan signed a lucrative radio contract for $20,000 per year.[14] Accounting for inflation, the value of this contract in 2008, is roughly $308,000.[15] Similarly, in 1939 the first televised college sporting event took place – a baseball game between Columbia and Princeton.[16]

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[7] ZIMBALIST, *supra* note 4, at 8.

[8] *See id.* at 7.

[9] NCAA History, *supra* note 6.

[10] *Id.*

[11] *Id.*

[12] ZIMBALIST, *supra* note 4, at 91.

[13] *Id.* (describing that the first commercial radio broadcast utilized a telephone line from Chicago to New York, where a radio signal transmitted the frequency to local listeners).

[14] *Id.*

[15] U.S. Department of Labor, CPI Inflation Calculator, http://data.bls.gov/cgi-bin/cpicalc.pl (last visited Mar. 15, 2008).

[16] ZIMBALIST, *supra* note 4, at 92.

B. The Current Financial Status of Intercollegiate Athletics

The NCAA and intercollegiate athletics continued to increase in popularity throughout the twentieth century. As the popularity of intercollegiate athletics grew, so did the payouts for universities and the NCAA. For example, the University of Notre Dame contracted the exclusive rights to televise its football games to the National Broadcasting Company for $9 million per year.[17] In other words, the University of Notre Dame makes roughly $1.5 million per game in television revenue alone.[18] Of course, Notre Dame is not the only school cashing in on the mass appeal of collegiate sports. The Big Ten,[19] a collegiate athletic conference, launched its very own network on August 30, 2007 in order to broadcast programming directly related to its member schools.[20] The early success of the Big Ten Network illustrates that market demand continues for more programming involving intercollegiate athletics.

Additionally, the NCAA currently has a television deal that generates large streams of revenue for successful athletic programs. For example, during the 2003 football postseason, college football's "Bowl Championship Series" generated $104 million in revenue, which the NCAA in turn distributed among 64 universities.[21] Football is not the only collegiate sport generating large revenues through the sale of television rights. In fact, in 1999 the NCAA agreed to a $6 billion deal granting CBS Broadcasting, Inc. the exclusive rights to college basketball's postseason tournament for eleven years.[22]

In an effort to earn a portion of these lucrative post-season revenues, universities continually increase athletic department budgets, hoping for corresponding athletic success. For example, the University of Michigan's athletic department budgeted $68 million for

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[17] Richard Sandomir, *Irish and the Peacock, Through Thick and Thin*, N.Y. TIMES, Oct. 14, 2005, at D6.

[18] *Id.*

[19] The Big Ten conference includes the following universities: Illinois, Indiana, Iowa, Michigan, Michigan State, Minnesota, Northwestern, Ohio State, Penn. State, Purdue, and Wisconsin. *See* Big Ten Conference, http://bigten.cstv.com (last visited Sept. 20, 2008).

[20] Big Ten Network, Frequently Asked Questions, http://www.bigtennetwork.com/corporate/FAQ.asp (last visited Sept. 20, 2008).

[21] ROBERT H. FRANK, KNIGHT FOUND. COMM'N ON INTERCOLLEGIATE ATHLETICS, CHALLENGING THE MYTH: A REVIEW OF THE LINKS AMONG COLLEGE ATHLETIC SUCCESS, STUDENT QUALITY, AND DONATIONS 3 (2004), http://www.knightcommission.org/images/uploads/KCIA_Frank_report_2004.pdf.

[22] Richard Sandomir, *CBS Will Pay $6 Billion for Men's N.C.A.A. Tournament*, N.Y. TIMES, Nov. 19, 1999, at D5.

the 2007 fiscal year.[23] In that same year, Michigan's largest intercollegiate rival, the Ohio State University, had an athletic budget close to $109.5 million.[24] Ohio State's 2007 athletic department budget was "the largest [athletic department budget] in the nation and the biggest in the history of college sports."[25]

II. RECRUITING IN COLLEGE SPORTS

Recruiting is a highly individualized process through which a university attempts to target and attract high school student-athletes and convince them to attend the university. Essentially, each university makes a sales pitch to the student, promising a college education in return for the student's participation in intercollegiate athletics. The recruiting process becomes intimate when the student-athlete and his or her family build a relationship with the university's coaching staff and personnel. College coaches routinely contact potential student-athletes to reiterate the school's interest in them. Additionally, athletic departments invite student-athletes to visit the university and attend intercollegiate sporting events. Throughout this process, a student can reasonably begin to trust that the university will provide for the student's best interests, both academically and athletically.

Recruiting, like collegiate sports, is a highly competitive process because of the potential for large payouts and public recognition for the university. Many universities find themselves vying for the same high school students due to the finite amount of premiere talent. Therefore, in order to acquire the best talent, college coaches fight to build stronger relationships with high school prospects. These strong relationships often guide a student-athlete to a specific university.[26] Indeed, many students choose a university based upon promises, prestige, or the opportunity to participate in intercollegiate athletics.

Another recruiting tactic is to provide student-athletes with financial aid in the form of athletic scholarships. These athletic scholar-

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[23] THE UNIVERSITY OF MICHIGAN REGENTS COMMUNICATION, FY 2007 UNIVERSITY OF MICHIGAN DEPARTMENT OF ATHLETICS OPERATING BUDGETS (JULY 2006), http://www.regents.umich.edu/meetings/07-06/07-06-X-15.pdf.

[24] Jon Weinbach, *Inside College Sports' Biggest Money Machine*, WALL ST. J. ONLINE., Oct. 19, 2007, http://online.wsj.com/public/article/SB119275242417864220-l9FByvUWY7rk_mJXuI_4TwAUy5w_20081018.html.

[25] *Id.* (explaining Ohio State "spends about $110,000 on each of its 980 athletes, which is triple the amount the university spends per undergraduate.").

[26] *See generally* Tim Keown, *#1 Priority: Recruiters, Fans, Profiteers – Everyone Wants a Piece of Hotshot QB Recruit Terrelle Pryor, but How Much Can He Be Expected to Give?*, ESPN THE MAG, Jan. 14, 2008, at 76 (depicting the recruiting process and personal demands placed on a highly touted football recruit).

ships are contingent upon the student-athlete's continued participation in intercollegiate athletics.[27] If athletic scholarships are not available, universities recruit students by promoting the personal benefits they will receive while participating in intercollegiate athletics. In either situation, the university attempts to portray athletics as a stepping-stone to a college education.

The foundation of the special relationship between the student-athlete and the university begins with the recruiting process. Students who do not participate in intercollegiate athletics rarely experience this special relationship with the university. While universities may recruit non-athletes for academic or other purposes, universities rarely recruit to the same degree as student-athletes.[28] Unlike traditional student recruitment, the personalized aspect of recruiting for intercollegiate athletics reasonably leads the student-athlete to expect that the university will provide for his or her health and well-being. Because a student-athlete must be healthy to perform, the university has a direct financial interest in ensuring that its student-athletes remain healthy. For this reason, many student-athletes may expect their universities to provide medical care in order to ensure that their athletes remain healthy.

III. A STUDENT-ATHLETE'S SACRIFICE: MORE THAN JUST PHYSICAL HEALTH AND WELL-BEING

Universities control many aspects of the student-athlete's life due to the physical and mental rigors of intercollegiate athletics. To perform at a high level, student-athletes must often allow the university to dictate how they pursue their education and spend their free time.[29] When student-athletes forfeit personal autonomy in this respect, they may reasonably expect and rely upon the university to provide for their medical well-being.

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[27] *See generally* Jake Grovum, *Scholarships Not a Guarantee for All Athletes*, MINNESOTA DAILY, Oct. 5, 2007, at 1, *available at* http://www.mndaily.com/articles/2007/10/05/72163688; Mark Quinn, *Spurrier Fields Controversy Over Letting Players Go*, WISTV.COM, http://wistv.com/Global/story.asp?S=3650307&nav=0RaMcfFv (last visited Feb. 2, 2008).

[28] One example of traditional students for which a university would compete are National Merit Scholars. *See generally* Nat'l Merit Scholarship Corp., Nat'l Merit Scholarship Program, http://www.nationalmerit.org/nmsp.php (last visited Sep. 13, 2008).

[29] *See generally* Monica L. Emerick, Comment, *The University/Student-Athlete Relationship: Duties Giving Rise to a Potential Educational Hindrance Claim*, 44 UCLA L. REV. 865, 891 (1997) (explaining the difficulties student-athletes face in balancing academics and athletics).

Indeed, the level of dedication and amount of time student-athletes put forth in order to participate in intercollegiate athletics equates to a full time job.[30] Consequently, many universities effectively control the academic lives of their student-athletes. The university does this by "exerting tremendous influence over its players' academic schedules and academic advising."[31] For example, whereas traditional students are typically free to choose their academic pursuits, universities often steer student-athletes toward less stringent academic majors.[32] In addition, university employees may encourage or require student-athletes to take less rigorous academic classes in order to minimize the amount of class-time that detracts from athletic preparation.[33] In essence, universities provide student-athletes with an education, but restrict the possible academic pursuits of the students. Thus, the student-athlete relinquishes his or her personal autonomy to the university. This restraint on academic freedom is further proof that student-athletes have forfeited personal autonomy for the university's athletic interest.

Furthermore, while in season, student-athletes estimate that they spend "at least thirty-five to forty hours per week on their sport." [34] This estimation includes the necessary time to prepare for games and the time associated with practicing, training, and traveling. But even when not in season, student-athletes must continually practice and train for their sport through pre- and off-season workouts as well as conditioning programs. Moreover, in order to maintain their scholarships, many student-athletes participate in demanding "optional" workouts.[35] The university controls these workouts and athletic activities in preparation for participation in intercollegiate athletics. Because a student-athlete's academic and athletic career are under the university's supervision, a student-athlete can reasonably presume that his or her health and well-being are also under the university's supervision.[36]

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[30] *Id.* at 894 (citation omitted).

[31] *Id.* at 891.

[32] *Id.* at 895-96.

[33] Michelle D. McGirt, Comment, *Do Universities Have a Special Duty of Care to Protect Student-Athletes From Injury?*, 6 VILL. SPORTS & ENT. L.J. 219, 227 (1999).

[34] Emerick, *supra* note 29, at 894.

[35] *See id.*

[36] *See* NAT'L. COLLEGIATE ATHLETIC ASS'N, THE SECOND-CENTURY IMPERATIVES: A REPORT FROM THE PRESIDENTIAL TASK FORCE ON THE FUTURE OF DIV. I INTERCOLLEGIATE ATHLETICS 50 (2006), http://www2.ncaa.org/portal/legislation_and_governance/committees/future_task_force/final_report.pdf (stating that the NCAA Manual "holds member institutions accountable for establishing and maintain-

IV. THE PRESSURES ASSOCIATED WITH INTERCOLLEGIATE ATHLETICS HAVE A DRAMATIC EFFECT ON A STUDENT-ATHLETE'S HEALTH

The symbiotic relationship between student-athletes and their universities is ripe for exploitation of the student-athlete's health. [37] The economic incentives associated with successful intercollegiate athletics tempt universities to sacrifice the long-term interests of student-athletes for immediate financial gain. Moreover, conflicts of interest arise when all three parties – the team physician, student-athlete, and university – possess incentives to sacrifice the student-athlete's long-term health.[38] Indeed, the significant financial stakes create a "perfect storm" of conflicts that could compromise the athlete's long-term health.

Universities have incentives to develop a successful athletic program in order to build civic pride, increase alumni contributions, create a positive revenue stream from intercollegiate athletics, and attract more applicants.[39] To fulfill these ends, many universities invest tens of millions of dollars, and in the case of the Ohio State University, over $100 million,[40] towards intercollegiate athletics. Understandably, the schools want a sizeable return on this investment, which directly depends on the athletic performance of its student-athletes. Therefore, universities have an incentive to prompt team physicians to return student-athletes to the playing field, regardless of any detrimental long-term effects.

Likewise, student-athletes face many other pressures to resume participation in an athletic event before their health warrants doing so. For example, scholarship athletes may lose their scholarship for a subsequent year if the university, via the student-athlete's coach,

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ing an environment that...[p]rotects the health and safety of and provides a safe environment for each of its participating student-athletes. . . .").

[37] The relationship between student-athletes and their universities is symbiotic since both parties are necessary for the other's survival. Universities could not engage in intercollegiate athletics without the participation of student-athletes. Likewise, those students wishing to achieve an undergraduate degree or hone their skills for a professional athletic career rely upon universities to provide the tools to reach these ends.

[38] Some pressures come from outside individuals' expectations and demands of a successful collegiate athletic department. Additionally, individuals may impose pressure upon themselves to succeed.

[39] ZIMBALIST, *supra* note 4, at 13.

[40] *See* Weinbach, *supra* note 24.

believes the player is dispensable.[41] To that end, injuries only magnify a student-athlete's concerns when they preclude the student-athlete from continued participation.[42] The fear of losing a scholarship and the economic hardship associated with expensive tuition incentivize injured student-athletes to resume playing before full recovery. For this reason, student-athletes have a significant incentive to discount their long-term health in order to achieve short-term success by requesting quick fixes, rather than proper treatment, from team physicians.[43]

Increasing the danger, team physicians face significant conflicts of interest when hired by a university to care for student-athletes.[44] The team physician must often choose between the interest of the employer and the patient. As one commentator explained this inevitable conflict, "the sports doctor is in a conflict of interest situation from the moment he or she contracts to serve a sports team, whether a private team or a university collegiate sports system . . . [because] [t]he team doctor wants to serve his patient's best interests and also his employer's best interests."[45]

Because the university, not the student-athlete, hires the team physician, "the traditional doctor-patient relationship is distorted."[46]

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[41] *See* Grovum, *supra* note 27; *see also* Quinn, *supra* note 27.

[42] *See* NAT'L COLLEGIATE ATHLETIC ASS'N, 2007-2008 NCAA DIV. I MANUAL, §§ 15.3.3.1 & 15.3.3.1.3 (2007), *available at* http://grfx.cstv.com/photos/schools/stan/genrel/auto_pdf/2007-08_d1_manual.pdf (explaining athletic scholarships may not be awarded for more than one year and prohibiting NCAA member schools from promising an athlete that a scholarship will automatically renew following an injury that prevents him from participating in intercollegiate athletics); *See also* Matthew J. Mitten, *Emerging Legal Issues in Sports Medicine: A Synthesis, Summary, and Analysis*, 76 ST. JOHN'S L. REV. 5, 59 (2002) ("If an injury prevents a student-athlete from participating in intercollegiate athletics, however, a university may continue his scholarship in order to enable the student to complete his education.").

[43] Justin P. Caldarone, *Professional Team Doctors: Money, Prestige, and Ethical Dilemmas*, 9 SPORTS LAW. J. 131, 142-43 (2002) (describing the athlete's mentality that leads to a willingness to sacrifice his or her body for athletic purposes).

[44] Barry R. Furrow, *The Problem of the Sports Doctor: Serving Two (Or is it Three or Four?) Masters*, 50 ST. LOUIS U. L.J. 165, 166 (2005) (citing Craig A. Isaacs, Comment, *Conflicts of Interest for Team Physicians: A Retrospective in Light of Gathers v. Loyola Marymount University*, 2 ALB. L.J. SCI & TECH. 147, 159 (1992) ("The doctor is a super-fan who is part of the team. His decisions are greatly influenced by the need of the team and the desire of the patient to play.").

[45] *Id.* at 168; *See also* Craig Isaacs, Comment, *Conflicts of Interest for Team Physicians: A Retrospect in Light of Gathers v. Loyola Marymount University*, 2 ALB. L.J. SCI. & TECH. 147, 157-63 (1992) (discussing the naturally occurring problems in a team physician's "dual relationship with the team and the athlete.").

[46] Isaacs, *supra* note 45, at 158.

The university's authority over the team physician compels the physician to consider the university's interest, sometimes at the expense of the student-athlete patient. As discussed above, the university has an economic incentive to have its best athletes healed as quickly as possible. Consequently, team physicians often believe that they are expected to return injured players to the field as soon as possible.[47] Accordingly, "[m]any team physicians believe that they may lose their job if they keep players out too long."[48] In turn, the team physician's fear of losing his or her job can color the diagnosis of a student-athlete. Thus, with an incentive to clear injured student-athletes, team physicians find themselves catering to the university's athletic expectations.[49]

Furthermore, student-athletes pressure team physicians to allow them to continue playing. Thus, "[team] [p]hysicians find themselves caught in the middle of safeguarding an athlete's health and an athlete's desire."[50] When both the university and the student-athlete push for medical clearance, many team physicians will not preclude a student-athlete from participation. Alternatively, student-athletes may pressure a physician to diagnose them as medically unfit to perform, thereby providing evidence of a medical hardship.[51] If a student-athlete receives a medical hardship from the NCAA, he or she continues to receive the scholarship without the requirement of athletic participation. With this incentive, student-athletes may exaggerate symptoms of injury or illness. In either situation, the student-athlete has an incentive to manipulate the information provided to the team

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[47] Ken Fine, *Being a Team Physician: The How's and Why's*, 11 U. OF PA. ORTHOPEDIC J. 40 (1998), *available at* http://www.uphs.upenn.edu/ortho/oj/1998/oj11sp98p40.html (last visited Mar. 15, 2008).

[48] *Id.* at 43.

[49] The team physician's conflict is similar to the conflict faced by lawyers employed by an insurance company. Following an accident or litigation arising under an insurance policy, a lawyer working for an insurance company technically represents the policyholder, *not* the insurance company. Frequently, the insurance company's interest takes precedent over the policyholder's interest.

[50] Michael Landis, *The Team Physician: An Analysis of the Causes of Action, Conflicts, Defenses, and Improvements*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 139, 149 (2003) (citing Mathew J. Mitten, *Team Physicians and Competitive Athletes: Allocating Legal Responsibility for Athletic Injuries*, 55 U. PITT. L. REV. 129 (1993)).

[51] In order to receive a medical hardship from the NCAA, a student-athlete must suffer from "an injury or illness for a portion of a season and have documentation from a medical doctor." USATODAY, *NCAA Grants Medical Hardship Waiver for Oklahoma's Dvoracek*, Dec. 14, 2004, *available at* http://www.usatoday.com/sports/college/football/big12/2004-12-14-oklahoma-dvoracek_x.htm (last visited Mar. 15, 2008).

physician. Without accurate medical information, team physicians cannot properly treat student-athletes.

Finally, team physicians impose pressures upon themselves. Doctors may become team physicians for reasons beyond the financial benefits. For example, some doctors have become team physicians "because they are fans and enjoy competitive sports."[52] In addition, many doctors enjoy the intrinsic rewards of working with young, healthy, and motivated patients.[53] Consequently, if a doctor becomes too intertwined with the competitive atmosphere of intercollegiate athletics, he or she will likely lose the medical perspective required to properly diagnose and treat a student-athlete's injury.

In addition, the varying financial benefits bestowed upon a doctor involved in team sports exert further pressures on team physicians. Many team physicians' compensation packages include "perks," such as tickets to sporting events and free travel.[54] Also, a connection to a university's athletic department provides the doctor with visibility in the community, which equates to a large amount of professional advertising if the physician treats private patients. [55] Thus, the team physician has a financial incentive to appease the university-employer in order to retain the fringe benefits associated with the doctor's status as a team physician.

Assume that a team physician succumbs to these pressures and returns an injured student-athlete to the playing field before the athlete's injury has properly healed. This premature return can have long-lasting and potentially devastating effects on the student-athlete's health. If a student-athlete suffers further injury because of the team physician's improper medical clearance, then the student-athlete has the option of suing the team physician and/or the university for negligence.

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[52] Scott Polsky, Comment, *Winning Medicine: Professional Sports Team Doctors' Conflicts of Interest*, 14 J. CONTEMP. HEALTH L. & POL'Y 503, 517 (1998) (citing Thomas H. Murray, *Divided Loyalties in Sports Medicine*, THE PHYSICIAN AND SPORTS MED., Aug. 1984 at 136).

[53] Fine, *supra* note 47, at 41 ("Being a team physician can be an enjoyable experience. The opportunity to work with young, motivated patients and to participate in the successes (and failures) of a team can be tremendously rewarding. The variety of supplementing one's office and operative practice with activities on the court or field is often enough reason to become a team physician.").

[54] *Id.* at 41.

[55] If a team physician maintains a private practice, affiliation with a university's athletic department denotes the university's endorsement of the physician's skills. Therefore, many patients, not affiliated with the university, may seek the team physician's services. This influx of patients allows the team physician to reap financial benefits outside of the compensation the university provides. *See* Polsky, *supra* note 52, at 518-19.

V. THE STUDENT-ATHLETE'S NEGLIGENCE CLAIM

A student-athlete suing a university for negligence bears the burden to prove that: (1) the university owed the student a duty of care; (2) the university breached this duty; (3) the university caused the student-athlete's injury; and (4) damages subsequently resulted.[56] An inability to establish any of these four elements warrants dismissal of the student-athlete's claim.[57]

A. What Standard of Care Do Universities Owe Their Athletes?

Historically, plaintiffs have argued that a university owes a heightened duty of care to its students under one of three theories:[58] (1) the *in loco parentis* doctrine; (2) the landowner-invitee theory; and (3) the existence of a special relationship between the student-athlete and the university.[59] For the most part, the *in loco parentis* doctrine and landowner-invitee theories are severely limited and parties attempting to use them have generally been unsuccessful in establishing a university's negligence towards a traditional student.[60] Until recently, courts rejected any claim of negligence based upon the presence of a special relationship between the student-athlete and university. Nevertheless, a student-athlete suing a university for negligence must rely upon the existence of this special relationship in order to establish that the university owes the student-athlete a heightened duty of care.

1. The Rise and Fall of the *In Loco Parentis* Doctrine

In the early 1900's, universities owed their students a duty of protection because of the common-law doctrine of *in loco parentis*.[61]

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[56] *See generally* DAN B. DOBBS, THE LAW OF TORTS 269 (2000).

[57] *Id.*

[58] *See* McGirt, *supra* note 33, at 221.

[59] *Id.*; *See also* Morrison v. Kappa Alpha Psi Fraternity, 31805 (La. App. 2 Cir. 5/7/99); 738 So.2d 1105, 1114 (describing student attempt to prove duty of care was present due to *in loco parentis* doctrine); Univ. of Maryland Eastern Shore v. Rhaney, 858 A.2d 497 (Md. Ct. Spec. App. 2004) (student, as a dorm room resident, claimed the defendant-university owed a duty of care based upon landowner-invitee theory); Kleinknecht v. Gettysburg Coll., 989 F.2d 1360 (3d Cir. 1993); Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920 (N.C. Ct. App. 2001).

[60] *See* discussion *infra* Part V.A.1.-A.2.

[61] BLACK'S LAW DICTIONARY 803 (8th ed. 2004) (defining *in loco parentis* as a "temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent."); James Heffren, *Taking One for the Team: Davidson v. University of North Carolina and the Duty of Care Owed by Universities to their Student-Athletes*, 37 WAKE FOREST L. REV. 589, 597 (2002) ("[T]he school owed its students a

The common societal and judicial views at the time portrayed the college student as a child, which granted universities the authority to regulate "students' mental training, moral and physical discipline, and general . . . welfare."[62] This "paternalistic" relationship placed a duty on the university to protect its students from harm.[63]

Following changes in the political landscape and campus protests in the 1960's, the *in loco parentis* doctrine began to fall out of favor with courts.[64] During this era, students continually fought for, and won, freedom from university control. Consequently, courts began to see "universities . . . as educational, rather than custodial institutions."[65] This newly acquired autonomy relieved universities of their

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duty of protection because it stood 'in place of the parents.'").

[62] Andrew Rhim, *The Special Relationship Between Student-Athletes and Colleges: An Analysis of a Heightened Duty of Care for the Injuries of Student-Athletes*, 7 MARQ. SPORTS L.J. 329, 332 (1996).

[63] Edward H. Whang, *Necessary Roughness: Imposing a Heightened Duty of Care on Colleges for Injuries of Student-Athletes*, 2 SPORTS LAW. J. 25, 29 (1995); *See* John B. Stetson Univ. v. Hunt, 102 So. 637, 638 (Fla. 1924) ("[C]ollege authorities stand in loco parentis and in their discretion may make any regulation for their government which a parent could make for the same purpose."); Baskett v. Crossfield, 228 S.W. 673, 675 (Ky. Ct. App. 1920) (finding the president of a university "was in loco parentis to" a student).

[64] *See generally* Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979) (rejecting in loco parentis doctrine applied to university for injury to student); Baldwin v. Zoradi, 176 Cal. Rptr. 809 (Cal. Ct. App. 1981) (determining that the college regulation prohibiting the consumption of alcohol did not establish that the college voluntarily assumed a custodial relationship with its students for purposes of imposing a duty of protection); Beach v. Univ. of Utah, 726 P.2d 413, 419 (Utah 1986) ("[C]olleges and universities are educational institutions, not custodial.").

[65] Heffren, *supra* note 61, at 598; *See Bradshaw*, 612 F.2d at 139-40 (3d Cir. 1979) (explaining that "[t]he campus revolutions of the late sixties and early seventies were a direct attack by the students on rigid controls by the colleges and were an all-pervasive affirmative demand for more student rights. In general, the students succeeded, peaceably and otherwise, in acquiring a new status at colleges throughout the country. . . . A dramatic reapportionment of responsibilities and social interests of general security took place. Regulation by the college of student life on and off campus has become limited. Adult students now demand and receive expanded rights of privacy in their college life. . . . At one time, exercising their rights and duties *in loco parentis*, colleges were able to impose strict regulations. But today students vigorously claim the right to define and regulate their own lives. Especially have they demanded and received satisfaction of their interest in self-assertion in both physical and mental activities, and have vindicated what may be called the interest in freedom of the individual will.").

See also Barbara J. Lorence, Comment, *The University's Role Toward Student-Athletes: A Moral or Legal Obligation?*, 29 DUQ. L. REV. 343, 346-53 (1991) (providing a thorough analysis regarding *Bradshaw v. Rawlings* as "[t]he seminal decision rejecting the university's role as substitute parent to its students."); Cathy J. Jones, *College Athletes: Illness or Injury and the Decision to Return to Play*, 40 BUFF. L. REV. 113, 128-30 (1992) (providing the social context in the late 1960's changing the

duty to protect students from harm, thus invalidating the *in loco parentis* doctrine as applied to the student-university relationship.[66] Generally, student autonomy defeats the *in loco parentis* doctrine, however, no student-athlete has claimed that the university's paternalistic control over the student-athlete justifies the re-application of the *in loco parentis* doctrine.

2. The Landowner Liability Theory Provides Limited Recovery for Injured Student-Athletes

Similarly, students have achieved limited success in establishing that universities owe them a duty of care through a landowner-invitee theory. Under this theory, landowners owe an affirmative duty to aid and protect those individuals invited onto their land.[67] Thus, a relationship creating liability exists between the university as landowner and the student as an invitee. Nevertheless, courts do not hold universities strictly liable as landowners for all injuries students incur while on campus.[68]

Furthermore, under the theory of landowner liability, courts would not hold a university liable if the injury occurred off the university's property. Basing recovery upon the distinction between on-campus and off-campus injuries greatly limits the ability of a student-athlete to recover for a sports-related injury. Essentially, a university

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relationship between students and their universities); McGirt, *supra* note 33, at 222 (citation omitted) (describing that the decline in the loco parentis doctrine resulted from both social change in the United States and "from the emergence of the German system of higher education which provided for 'large and diversified institutions, and exhibited little concern for the private life of the student.'").

[66] *See* Rabel v. Ill. Wesleyan Univ., 514 N.E.2d 552, 560-61 (Ill. App. Ct. 1987) (declining to apply the *in loco parentis* doctrine because "the university . . . [did not] voluntarily assum[e] or plac[e] itself in a custodial relationship with its students, for purposes of imposing a duty to protect its students from the injury. . . . The university's responsibility to its students, as an institution of higher education, is to properly educate them. It would be unrealistic to impose upon a university the additional role of custodian over its adult students and to charge it with the responsibility for assuring their safety. . . ."); Alumni Ass'n v. Sullivan, 572 A.2d 1209, 1213 (Pa. 1990) (rejecting to impose *in loco parentis* doctrine when a university neither planned a party nor served, supplied, or purchased alcohol that resulted in a student's injury).

[67] Restatement (Second) of Torts § 314A(3) (1965).

[68] Univ. of Maryland E. Shore v. Rhaney, 858 A.2d 497, 504-05 (Md. Ct. Spec. App. 2004) (holding university-landowner not liable for student-invitee's injury in dormitory room because of lack of foreseeability that previously violent roommate would assault the student-invitee); Coletta v. Univ. of Akron, 550 N.E.2d 510, 512 (Ohio Ct. App. 1988) (university not liable for student's injury that occurred from natural accumulation of snow in university owned parking lot).

is immune from liability for a student-athlete's injury so long as the injury occurs on property owned by another individual or entity. This immunity incentivizes the university to conduct intercollegiate athletic events on premises other than those owned by the university.[69] Ultimately, this limitation based on location, coupled with many courts' unwillingness to hold universities liable for foreseeable injuries, makes recovery based upon landowner liability ineffective for an injured student-athlete.

3. Jurisdictions Begin to Recognize the Existence of a Special Relationship Between Student-Athletes and Their University

Generally, universities do not have a duty to "aid or protect their students unless the relationship between the [student and the university] can be characterized as 'special.'"[70] Many students have filed lawsuits that inevitably were doomed by the lack of a special relationship between the student and the university.[71] Without a special relationship, courts are unwilling to hold a university liable for a student's injury. Even though traditional students brought most of the claims in

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[69] An example of such premises includes fields and gyms owned by other universities, or by a city or municipality.

[70] Whang, *supra* note 63, at 33 (referencing RESTATEMENT (SECOND) OF TORTS § 314 cmt. b (1965)).

[71] *See generally* Bash v. Clark Univ., No. 200600745, 2007 WL 1418528, at *2 (Mass. Super. Ct. Apr. 5, 2007) (holding a special relationship did not exist between a university and a student following the student's overdose of heroin because to "[recognize] a special relationship . . . would impose on university officials and staff an unreasonable burden that would be at odds with contemporary social values."); Vistad v. Bd. of Regents of Univ. of Minnesota, No. C4-04-600932, 2005 WL 1514633 at * 3-4 (Minn. Ct. App. June 28, 2005) (finding a special relationship between student-cheerleader and university did not exist because the university had minimal control of the cheerleaders, the university did not profit from cheerleading, and the cheerleader was not placed in a position of harm); Orr v. Brigham Young Univ., 960 F. Supp. 1522, 1526-28 (D. Utah 1994) (rejecting a student-athlete's claim "that duties are owed to him on the basis of a special relationship with the university by virtue of his football player status."); Swanson v. Wabash Coll., 504 N.E.2d 327, 330-31 (Ind. Ct. App. 1987) (denying a student-athlete's contention that the university owed him a heightened duty of care, via a special relationship, when the student-athlete suffered an injury during a recreational baseball practice); Fisher v. Northwestern Univ., 624 So. 2d 1308, 1311 (La. App. Ct. 1993) (holding that the university "owed no duty to its cheerleaders to provide adult supervision to monitor their activities and tell them what stunts they could safely try next."); Beach v. Univ. of Utah, 726 P.2d 413, 415-16 (Utah 1983) (refusing to impose a duty on a university, due to a lack of a special relationship, where an intoxicated student sustained injuries after falling from a cliff during a university sponsored field trip. The Utah Supreme Court explained the essence of a special relationship is dependence by one party upon the other or mutual dependence between the parties.).

question, courts did not distinguish between a traditional student-university relationship and a student-athlete-university relationship.

However, three prominent cases, *Kleinknecht v. Gettysburg College*,[72] *Pinson v. Tennessee*,[73] and *Davidson v. University of North Carolina*,[74] may change the way subsequent courts view the relationship between student-athletes and universities. *Kleinknecht*,[75] *Pinson*,[76] and *Davidson*[77] all found that the defendant-universities had a special relationship with their student-athletes. From this finding, it follows that a university breaches its duty of care if it prematurely rushes a student-athlete back onto the playing field following an injury. An analysis of the facts and reasoning in all three cases indicates that future courts should recognize the existence of a special relationship and hold a university liable for a team physician's medical negligence.

The seminal case recognizing a special relationship between a university and a student-athlete is *Kleinknecht v. Gettysburg College*.[78] Drew Kleinknecht was a twenty-one year old student-athlete who died from cardiac arrest while practicing for Gettysburg College's varsity lacrosse team.[79] Gettysburg College recruited Kleinknecht specifically for the purpose of playing lacrosse for the private school's Division III intercollegiate lacrosse team.[80]

On the day of Kleinknecht's cardiac arrest, Gettysburg College did not have any medical personnel[81] at the lacrosse team's fall practice.[82] The training staff's policy was to attend only in-season

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[72] Kleinknecht v. Gettysburg Coll., 989 F.2d 1360 (3d Cir. 1993).

[73] Pinson v. State, No. 02A01-9409-BC-00210, 1995 WL 739820 (Tenn. Ct. App. Dec. 12, 1995).

[74] Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920 (N.C. Ct. App. 2001).

[75] *Kleinknecht*, 989 F.2d at 1367.

[76] *Pinson*, 1995 WL 739820, at * 4.

[77] *Davidson*, 543 S.E.2d at 927.

[78] *Kleinknecht*, 989 F.2d 1360.

[79] *Id.* at 1362-63.

[80] *See* Nat'l Collegiate Athletic Ass'n, NCAA Div. III Comms. Homepage, http://www2.ncaa.org/portal/legislation_and_governance/committees/division3.html (last visited Sep. 13, 2008) [hereinafter NCAA Div. III] (stating that "Division III athletics feature athletes who receive no financial aid related to their athletic skills and athletic departments that are staffed and funded like any other department in the university."). In other words, Division III student-athletes are not given athletic scholarships. However, many student-athletes are recruited to participate in Division III athletics but receive no money directly connected to their participation in the sport.

[81] Medical personnel include the college's head athletic trainer, student trainer, or team physician.

[82] *Kleinknecht*, 989 F.2d at 1363.

lacrosse practices, which took place in the spring.[83] Additionally, the school's two lacrosse coaches did not have an established protocol for emergency situations.[84] Neither coach had a CPR certification or an easily accessible means to communicate with medical personnel during an emergency.[85]

Nothing out of the ordinary occurred during the practice in which Kleinknecht's cardiac arrest occurred.[86] Accordingly, "no person or object struck" Kleinknecht, but "[he] simply stepped away [from the team's lacrosse drill] and dropped to the ground."[87] Confused and concerned, lacrosse coaches and players rushed to Kleinknecht's aid.[88] After recognizing the severity of the situation, a handful of teammates ran throughout campus in search of medical personnel.[89] Although medical personnel subsequently reached the scene and temporarily resuscitated Kleinknecht, he died less than an hour after ambulances arrived.[90]

Devastated by the manner in which the college handled their son's medical emergency, Kleinknecht's parents sued Gettysburg College for negligence.[91] The parents asserted three theories under which Gettysburg College owed a heightened duty of care to their son: (1) the "existence of a special relationship" between a student-athlete and Gettysburg College; (2) the "foreseeability that a student athlete may suffer cardiac arrest while engaged in [intercollegiate athletics]"; and (3) public policy warranted a heightened duty.[92] The Third Circuit Court of Appeals considered the forseeability and public policy arguments superfluous after establishing that a special relationship existed between the college and Kleinknecht.[93] Thus, according to the court, the college had a duty to provide "preventative measures in the event of a medical emergency."[94]

The college established the special relationship by actively recruiting Kleinknecht to participate in intercollegiate lacrosse.[95] The court also found that it was essential that Kleinknecht was not "en-

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[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.* at 1363-64.
[89] *Id.* at 1364.
[90] *Id.*
[91] *Id.* at 1362.
[92] *Id.* at 1366.
[93] *See id.* at 1369-72.
[94] *Id.* at 1366.
[95] *Id.*

gaged in his own private affairs as a student," but instead was "participating in a scheduled athletic practice for an intercollegiate team sponsored by the college under the supervision of college employees."[96] To limit its holding, the court emphasized that Kleinknecht was not acting as a traditional student when the incident occurred, but rather was acting as a recruited student-athlete participating in a school sponsored athletic event during the time of the injury.[97] After establishing that the college owed Kleinknecht a heightened duty of care, the appellate court remanded the case back to the district court to determine whether the college breached its duty of care.

The court in *Kleinknecht* attempted to limit the "class of students" to whom universities owe a heightened duty of care to avoid reviving the *in loco parentis* doctrine.[98] The court specifically limited the duty it recognized to recruited intercollegiate athletes.[99] While the opinion appears limited to the facts of the case, the court's reasoning can be applied to extend this heightened duty more generally. The court justified this heightened duty of care by appealing to the fact that the college "actively sought [Kleinknecht's] participation in [lacrosse]."[100] Therefore, recruited student-athletes comprise the class of students mentioned in *Kleinknecht*. Specifically, the student-athletes at Gettysburg College participated at the Division III level, where the NCAA prohibits athletic scholarships.[101] Consequently, these student-athletes received no financial aid as a direct result of their athletic participation. Therefore, *Kleinknecht* establishes that universities owe a heightened duty of care to all *individuals* specifically recruited to engage in activities upon the university's behalf, regardless of whether a university provides a scholarship to the individual.[102]

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[96] *Id.*

[97] *Id.* at 1368 ("There is a distinction between a student injured while participating as an intercollegiate athlete in a sport for which he was recruited and a student injured at a college while pursuing his private interests. . . . ").

[98] *Id.*

[99] *Id.* at 1370.

[100] *Id.* at 1368.

[101] NCAA Div. III, *supra* note 80.

[102] Presumably, following *Kleinknecht*, a university may owe a heightened duty of care to traditional students personally recruited to attend the university for academic purposes.

4. Tennessee Broadens *Kleinknecht's* Holding to Include a Larger Class of Student-Athletes

Two years after the *Kleinknecht* decision, *Pinson v. Tennessee* reiterated the holding that universities have a special relationship with their student-athletes.[103] In *Pinson*, a football player suffered a head injury that rendered him unconscious during a football practice.[104] While Pinson lay unconscious, the university's athletic trainer examined the player, noticing a multitude of serious symptoms.[105] The athletic trainer called an ambulance to take Pinson to the hospital.[106] Rather than joining Pinson in the ambulance, the athletic trainer sent a student trainer without any of the specific information gathered from the athletic trainer's examination.[107] At the hospital, the treating physicians were unable to locate any neurological damage to Pinson.[108] The physicians' inability to locate such damage likely arose from the absence of the serious symptoms the athletic trainer observed immediately following the injury.[109] A few weeks after Pinson's release from the hospital, he experienced another severe head trauma during football practice, which required brain surgery.[110] While in surgery, doctors found "a chronic subdural hematoma of three to four weeks duration."[111] These injuries caused Pinson "severe and permanent neurological damage."[112] Medical experts testified that if the athletic trainer had informed the treating physicians of Pinson's condition and symptoms after the first injury, the information would likely have led to immediate brain surgery.[113] Following this brain surgery, experts believed Pinson could have led a normal life without the neurological disabilities he ultimately suffered.[114]

Following these injuries, Pinson sued the university for the athletic trainer's negligence in not reporting Pinson's symptoms to the treating physician.[115] The trial court and a Tennessee Court of

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[103] Pinson v. State, No. 02A01-9409-BC-00210, 1995 WL 739820, at *4 (Tenn. Ct. App. Dec. 12, 1995).
[104] *Id.* at *1.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.* at *1.
[109] *Id.* at *2.
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.* at *3.
[114] *Id.*
[115] *Id.*

Appeals found the university liable for Pinson's injuries.[116] The Tennessee appellate court explained that the university and its athletic trainer had a duty to convey medical information about an injured student-athlete to the treating physicians at the emergency room.[117] The *Pinson* court cited *Kleinknecht*, stating, "a duty arose from the fact that, as a college athlete, Pinson enjoyed a 'special relationship' with the [university]."[118] As a result, the university and the team trainer "had a duty to exercise reasonable care under the circumstances."[119] The court said that the duty of care arose because Pinson was engaged in intercollegiate athletics sponsored by the university and supervised by university employees.[120] Unlike the *Kleinknecht* court, the *Pinson* court did not mention recruitment as a key element in finding that a special relationship existed between the university and the student-athlete. In other words, the *Pinson* court implicitly considered Pinson's status as a recruited athlete as irrelevant. *Pinson* thereby ignores the *Kleinknecht* court's requirement that a student-athlete must be recruited in order for a special relationship to exist between the student-athlete and the university. *Pinson* stands for the proposition that universities and their employees owe all student-athletes a heightened duty of care during their participation in intercollegiate athletics.

Additionally, *Pinson* extends the university's duty to care for student-athletes beyond the duty established in *Kleinknecht*. In *Kleinknecht*, Gettysburg College breached its duty of care by failing to have any medical personnel at a school sponsored lacrosse practice. Conversely, the university in *Pinson* provided medical treatment at the football practice where the player was injured. The breach in *Pinson* occurred when the onsite medical personnel failed to inform an outside physician about the injured student-athlete's neurological symptoms. Thus, the university in *Pinson* not only had an affirmative duty to provide appropriate medical personnel, but also had an affirmative duty to ensure that its medical personnel acted reasonably in assisting the subsequent physicians' treatment. In holding the university liable for its trainer's negligence, the *Pinson* court relied upon the employer-employee relationship between the university and its trainer.

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[116] *Id.* at *3, *7.

[117] *Id.* at *4-5.

[118] *Id.* at *4 (citing *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1372 (3d Cir. 1993).

[119] *Id.*

[120] *Id.* It appears that the *Pinson* court holding would extend a duty of care to student-athletes engaged in intercollegiate athletics, regardless of whether the particular student-athlete was recruited by the university to participate in the specific sport.

5. North Carolina Continues the Expansion of the Class of Student-Athletes That Have a Special Relationship with Their University

A third case, *Davidson v. University of North Carolina at Chapel Hill*, combined the holdings from *Pinson* and *Kleinknecht*, creating a relatively broad interpretation of the duty that universities owe their student-athletes.[121] In *Davidson*, a sophomore cheerleader and member of the University of North Carolina's junior varsity cheerleading squad suffered a series of severe injuries while performing at a school-sponsored event.[122] Davidson fell from atop a cheerleading pyramid onto the hardwood floor below.[123] While the junior varsity squad used fellow junior varsity cheerleaders as spotters, the spotters "were unable to prevent [Davidson's] shoulders and head from hitting the hardwood floor."[124] Moreover, the junior varsity cheerleading squad did not use any mats or other safety devices while performing this stunt.[125] As a result of the accident, Davidson suffered serious bodily injury and permanent brain damage.[126]

Following the injury, Davidson sued the university, claiming that it was vicariously liable for the negligence of nine different employees.[127] Davidson alleged that these employees were guilty of several omissions,[128] which established negligence on the part of the university.[129] The Court of Appeals of North Carolina ultimately held that the university had a special relationship with its student-athletes, and thus owed Davidson "an affirmative duty to exercise that degree of care which a reasonable and prudent person would exercise under the same or similar circumstances."[130]

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[121] Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920, 927 (N.C. Ct. App. 2001).

[122] *Id.* at 921-22.

[123] *Id.* at 922.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.* at 925.

[128] Davidson's parents alleged the university committed the following omissions: (1) "failure to train [the junior varsity squad] in safety techniques and cheerleading skills;" (2) "failure to provide [the junior varsity squad with] a coach or supervisor;" (3) "failure to provide [the junior varsity squad with] safety equipment (including but not limited to mats);" (4) "failure to evaluate the skill level of the squad members each year to determine the stunts to be performed;" (5) "failure to evaluate the physical condition of the [junior varsity] squad members before practices and games;" (6) "failure to institute cheerleading guidelines;" and (7) "failure to specifically prohibit pyramids above a certain height." *Id.* at 928.

[129] *Id.*

[130] *Id.* The court specifically limited its holding to situations where the

The court's reasoning in *Davidson* allows for a broad spectrum of instances in which a student-athlete can successfully sue a university for negligence. The *Davidson* court attempted to narrow the scope of its holding to student-athletes "practicing as part of a school-sponsored, intercollegiate team."[131] Nevertheless, the court established a precedent under which all student-athletes can argue that their university owes them a duty of care, because of the special relationship between a university and its student-athletes.[132]

Initially, the court analyzed whether a special relationship existed between the student-athlete and the university. To determine whether such a relationship existed, the court turned to "a leading treatise on the law of torts."[133] Using this treatise, the court equated the relationship between Davidson and the University of North Carolina to the relationship between a school and a pupil. According to Prosser and Keaton, a school owes its students a duty of care because of the two parties' special relationship. Based on this, the *Davidson* court determined that "the factual circumstances and policy considerations in this case" justified finding a special relationship between this particular student-athlete and her university.[134]

"plaintiff was injured while practicing as part of a school-sponsored, intercollegiate team." *Id.* Furthermore, the court determined that this holding did not establish a special relationship between all students and their university. *Id.* The court agreed with previous holdings from other jurisdictions that a university is not generally "an insurer of its students' safety" and that the university does not automatically owe its students a duty of care because the students attend the university. *Id.*

[131] *Id.*

[132] *See* Heffren, *supra* note 61, at 611-12 ("Despite the fact that the [Davidson] court attempted to narrow the holding, however, the facts of the case and the manner in which the court framed the issue make the ruling overbroad, with troubling implications for universities.").

[133] *Davidson*, 543 S.E.2d at 926-27 (referring to W. Page Keaton et al., *Prosser and Keeton on the Law of Torts § 56*, at 373-74, 376-77 (5th ed. 1984)). "During the last century, liability for [omissions] has been extended still further to a limited group of relations, in which custom, public sentiment and views of social policy have led the courts to find a duty of affirmative action. In such relationships the plaintiff is typically in some respect particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over the plaintiff's welfare. In addition, such relations have often involved some existing or potential economic advantage to the defendant. Fairness in such cases thus may require the defendant to use his power to help the plaintiff, based upon the plaintiff's expectation of protection, which itself may be based upon the defendant's expectation of financial gain...There is now respectable authority imposing the same duty upon a shopkeeper to his business visitor, upon a host to his social guest, upon a jailor to his prisoner, *and upon a school to its pupil.*" *Id.*

[134] *Davidson*, 543 S.E.2d at 927.

The *Davidson* court established a list of three factors to consider in determining whether a relationship between a student-athlete and a university creates a duty of care.[135] According to the court, public policy mandates that a defendant has a "duty of affirmative action" towards a plaintiff when: (1) the plaintiff is vulnerable and dependent upon a defendant who has considerable power over the plaintiff's welfare; (2) the defendant stands to prosper economically from the relationship with the plaintiff; or (3) the plaintiff has an expectation of protection from the defendant.[136] Specifically, the *Davidson* court recognized that a special relationship existed between the student-athlete and her university because both parties were mutually dependent upon one another and the university exerted its control over the junior varsity cheerleading squad.[137]

Regarding the mutual dependence of the parties, the court recognized that the university and the cheerleaders on the junior varsity squad relied upon each other. The university benefited from the cheerleaders' performances and entertainment at sporting events, trade shows, and social events.[138] Additionally, the cheerleaders acted as representatives of the university to the public at large. Similarly, the cheerleaders received benefits provided by the university in the form of uniforms, transportation to sporting events, facilities and equipment for practice, and physical-education credits toward graduation.[139]

Furthermore, the court found that a special relationship existed because the university "exerted a considerable degree of control over its cheerleaders."[140] The university exerted this control by mandating that cheerleaders abide by certain standards of conduct, such as maintaining a minimum GPA and refraining from consuming alcohol in public. Because of this element of control, the cheerleaders may expect and rely upon the protection of their university. This expectation, combined with forfeited autonomy, motivated the court to hold that the special relationship between the university and its cheerleaders requires a heightened duty of care.

The precedent established by *Davidson* extends the holdings in both *Kleinknecht* and *Pinson*. In *Davidson*, the court found that a special relationship existed between a university and its un-recruited voluntary junior varsity cheerleaders. This finding uprooted

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[135] *Id.* at 926-27.

[136] *Id.* (referring to W. PAGE KEATON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 373-74, 376-77 (5th ed. 1984)).

[137] *Id.* at 923, 927.

[138] *Id.*

[139] *Id.*

[140] *Id.* at 927.

Kleinknecht's requirement that the university must actively recruit the student-athlete to create the special relationship. Additionally, although intimated in *Pinson*, the *Davidson* decision explicitly makes a student-athlete's recruitment status irrelevant. Consequently, *Davidson* provides a foundation for all student-athletes, both recruited and un-recruited, to a claim that universities owe them a heightened duty of care.

VI. CARRYING THE *DAVIDSON* DECISION INTO FUTURE CLAIMS BY INJURED STUDENT-ATHLETES

Applying the analysis from *Kleinknecht*, *Pinson*, and *Davidson*, future courts are likely to find the presence of a special relationship between student-athletes and their universities. When considering the public policy behind recognizing a special relationship, student-athletes have a compelling argument that their schools owe them a heightened duty of care.

Regardless of the university's size, intercollegiate athletics provides both direct and indirect benefits to the sponsoring university. Whether generating money for the university, boosting civic pride within the student body and alumni base, or providing free advertising for the university through athletic endeavors, student-athletes provide a sizeable number of benefits to their university. For these reasons, courts will likely follow the foundation *Kleinknecht* built and require universities to adopt a heightened duty of care with respect to their student-athletes.

As previously mentioned, courts historically disfavored the *in loco parentis* doctrine because universities no longer exert a great deal of control over their students. However, student-athletes' loss of personal independence justifies expanding the duty of care that universities owe their student-athletes. Student-athletes forfeit the personal autonomy gained by traditional students during the 1960's political movement.[141] Without personal autonomy, universities play a paternalistic role in the student-athletes' lives – demanding and controlling almost all of their time and energy. This element of control supports the notion that a special relationship exists between a university and its student-athletes.

Furthermore, many student-athletes experience a relationship with the university, which differs from the relationship between the university and traditional students. Both the university and the student-athlete realize that the student-athlete's health equates to a financial

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[141] *See* discussion *supra* Part V.A.1.

investment for the university. Accordingly, the student-athlete-university relationship is based upon the student's ability to physically perform in intercollegiate athletics. Therefore, it is reasonable to assume that the university will provide the tools necessary for the student-athlete to remain healthy.

Assuming future courts find that a university owes its student-athletes a heightened duty of care, what sort of protection might universities seek to minimize this potential liability? One option is to change the employment status of its team physicians. Alternatively, in order to entice student-athletes to attend, universities may simply incur the cost of any potential judgment as a cost of doing business.

VII. TEAM PHYSICIANS AS EMPLOYEES OR INDEPENDENT CONTRACTORS?

The employment status of a team physician might affect a university's liability for that team physician's negligence. Therefore, a university has an important decision when hiring a team physician.

A. Team Physician as Employee

If a university directly hires a team physician as an employee,[142] the university is liable, via vicarious liability, for actions that fall within the scope of the physician's employment.[143] Treating a student-athlete is clearly an act within the scope of the physician's employment.[144] Therefore, a court can hold a university vicariously liable for negligent care provided by a team physician. In other words, when a team physician improperly diagnoses an injury, the student-athlete has the ability to sue either the team physician, or the team physician's employer – the university. Likewise, when a team physician acts negligently in rushing a student-athlete back onto the

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[142] *See* RESTATEMENT (SECOND) OF AGENCY § 220 (1958) (defining the qualities and characteristics of an employee).

[143] *See generally* RESTATEMENT (SECOND) OF AGENCY § 219 (1958). According to the Restatement, an employer is liable for the torts of an employee committed while acting within the scope of employment. *Id.* Likewise, an employer is liable for an employee's actions outside of the scope of employment when the employer was negligent or reckless in hiring the employee, the employee was engaged in a conduct considered a non-delegable duty on behalf of the employer, or the employer intended the conduct or the consequences of the employee's act. *Id.*

[144] Typically, a team physician is a physician who is given authority by a team or school to make medical judgments relating to the participation and supervision of athletes on the team or in the school. *See generally* Fine, *supra* note 47 (citations omitted).

playing field and an injury results, the student-athlete has the ability to sue the university.

Unlike an employee, an independent contractor is an individual hired for a specific project "but who is left free to do the assigned work and to choose the method for accomplishing it."[145] Typically, an employer is not liable for physical harm caused by an independent contractor.[146] For these reasons, universities may be tempted to avoid liability for injuries caused by medical negligence by hiring their team physicians as independent contractors.

B. Team Physician as Independent Contractor

According to the Restatement (First) of Agency, a team physician remains an independent contractor if the university "contracts with [the physician] to [provide medical services] for [the university] but . . . is not controlled by the [university] nor subject to the [university's] right to control with respect to [the physician's] physical conduct in the performance of the undertaking."[147] The fact that the university hired the team physician as an independent contractor is not "dispositive of the issue of whether [the] physician is an independent contractor, as opposed to an employee."[148] Rather, to determine the status of the team physician, courts will assess the relationship between the university and team physician through the degree of control exercised by the university over the team physician's conduct.[149]

While the university does not directly mandate which procedures the physician should recommend, the pressures the university places upon the team physician undoubtedly influence the physician's diagnosis. As discussed, team physicians may believe that their employment with the university depends on their ability to heal injured athletes as quickly as possible. This pressure may compromise the methods used by the team physician. But this ability to compromise the team physician's diagnosis does not alter the team physician's status

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[145] BLACK'S LAW DICTIONARY 785 (8th ed. 2004).

[146] RESTATEMENT (SECOND) OF TORTS § 409 (1965).

[147] RESTATEMENT (FIRST) OF AGENCY § 2 (1933); *See also* RESTATEMENT (SECOND) OF AGENCY § 2 (1958) (explaining a similar definition of an independent contractor).

[148] Mize v. Van Meter, M.D. & Assocs., No. 2007-CA-0616 (La. Ct. App. 12/19/07); 973 So. 2d 947, 949.

[149] *Id.*; *See* Nelson v. Bosley Med. Group, P.C., Civil Action No. 05-1684-E, 2007 WL 3244635 at * 1 (Mass. Super. 2007) (mem.) (citations omitted) ("It is generally accepted that a physician performing medical services acts as an independent contractor unless the hospital has the power to control or direct the physician's professional conduct.").

as an independent contractor. The team physician will remain an independent contractor and the university will remain immune from liability, so long as the university does not dictate the physician's conduct.[150] Likewise, the fact that the team physician must answer to the university for the health of the student-athletes does not alter the team physician's status as an independent contractor.[151]

However, three exceptions exist to the general rule that employers are not responsible for the actions of an independent contractor.[152] Specifically, an employer is vicariously liable for the actions of an independent contractor when: (1) the employer is negligent "in selecting, instructing, or supervising the independent contractor"; (2) the employer contracts away a "non-delegable dut[y] . . . arising out of some relation toward . . . [a] particular plaintiff"; or (3) the contracted work is inherently dangerous.[153] The first two exemptions may provide the means for a student-athlete to argue that a university is vicariously liable for the negligent actions of an independently contracted team physician.

1. When a University is Negligent in Hiring, Selecting, or Supervising a Team Physician

If a student-athlete suffers an injury from a team physician's negligence, the student-athlete may sue the university, even if the university employs the physician as an independent contractor. The team physician's employment status as an independent contractor does not insulate the university from liability when the university acted negligently in hiring, selecting, or supervising the team physician. Therefore, to bring forth a successful claim against a university for acts of an independently contracted team physician, the student-athlete must prove that both the team physician and the university acted negligently.

Specifically, the student-athlete must prove that the team physician failed to "conform to the standard of care corresponding to [the

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[150] Cochran v. George Sollitt Constr. Co., 832 N.E.2d 355, 361 (Ill. App. Ct. 2005) ("[T]he general contractor, by retaining control over the operative details of its subcontractor's work, may become vicariously liable for the subcontractor's negligence.").

[151] *See* Snell v. C.J. Jenkins Enterprises, Inc., 881 N.E.2d 1088, 1092 (Ind. Ct. App. 2008) ("When an individual is answerable to another for results only, rather than for the particulars of how the assigned task is accomplished, this factor weighs in favor of the individual's having independent contractor status.").

[152] RESTATEMENT (SECOND) OF TORTS § 409 cmt. B (1965).

[153] *Id.*

team physician's] actual specialty training."[154] Unfortunately, determining a uniform standard of care may prove difficult because of the inherent vagueness of the sports medicine practice. For example, the American Board of Medical Specialties does not consider the field of sports medicine a specialized practice.[155] Rather, it considers sports medicine a subspecialty, requiring additional training and examination for certification.[156] In addition, some sports medicine practitioners claim that physicians in their field haphazardly administer care.[157] For these reasons, courts have historically failed to recognize "sports medicine as a separate medical specialty, presumably because no national medical specialty board certification or standardized training previously existed."[158] Without an established or accepted uniform standard of care, injured student-athletes will likely struggle to prove that a team physician failed to meet the applicable standard. And without such proof, student-athletes cannot hold universities liable for their negligently caused injuries.

Moreover, a doctor is not liable for an honest mistake of judgment when there is a reasonable doubt regarding the correct diagnosis.[159] Consequently, courts may prove sympathetic to the difficulties a team physician faces when attempting to make an accurate diagnosis during the pressure-filled setting of intercollegiate competition. With the difficulty in establishing a standard of care within sports medicine and

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[154] Using an example that an "orthopedic surgeon should be held to the standard of an orthopedist providing sports medicine care." Mitten, *supra* note 42, at 10 (citing Mikkelson v. Haslan, 464 P.2d 1384, 1686 (Utah Ct. App. 1998)); Jay M. Zitter, Annotation, *Standard of Care Owed to Patient by Medical Specialist as Determined by Local, "Like Community," State, National or Other Standards*, 18 A.L.R. 4th 603, 607 (1982 & Supp. 1992).

[155] *See* American Board of Medical Specialties, *available at* http://www.abms.org/Who_We_Help/Physicians/specialties.aspx (considering sports medicine a subsection of emergency medicine, family medicine, internal medicine, orthopedic surgery, pediatrics, physical and medicine and rehabilitation); *but see* American Osteopathic Association, *available at* http://www.osteopathic.org/index.cfm?PageID=crt_speclist (explaining that a certification process for sports medicine qualifies as an "added qualification." Furthermore, "certification of an added qualification may be achieved through satisfactory completion of additional formal training in a field of interest after achieving general certification and completion of requirements for added qualifications.").

[156] *Id.*

[157] Lawrence K. Altman, *College Star's Death Puts Team Physicians Under New Scrutiny*, N.Y. TIMES, May 1, 1990, at C3 (quoting Dr. E. Lee Rice, a family doctor and team physician for the San Diego Chargers of the NFL and San Diego State University, who believes "[a] lot of team doctors are practicing by trial and error").

[158] Mitten, *supra* note 42, at 10.

[159] *Id.* at 19.

the physician's ability to claim an honest mistake in judgment, many injured student-athletes will likely struggle to establish the team physician's medical negligence.

The difficulties of establishing medical negligence on the part of the team physician may carry over to a student-athlete's attempt to prove that the university acted negligently in hiring, selecting, or supervising the physician. Without a recognized sports medicine specialty, courts will likely sympathize with the difficulty universities face when assessing a team physician's competence to practice. Consequently, a university must simply make a good faith effort to evaluate a physician's ability to act as a team physician. The inability to objectively evaluate a physician's credentials, coupled with a university's good faith effort in hiring, will likely defeat a claim that the university negligently hired or selected the physician.

2. The Student-Athlete's Health and Safety Is a Nondelegable Duty

If a court finds that a special relationship exists between a student-athlete and a university, then the student-athlete can argue that this special relationship precludes the university from delegating its duty of care to an independent contractor. Indeed, courts have created and imposed a nondelegable duty when a special relationship exists between two parties.[160] For the most part, "[i]t is generally accepted that one who has a duty to a third party by . . . special relationship may not avoid that duty by hiring an independent contractor to perform the duty."[161] Importantly, student-athletes rely upon team physicians for medical care, especially during intercollegiate athletic competition. In some instances, "nondelegable duties have been determined to be of a personal nature whenever the performance depends upon a special relationship . . . upon which the other party is entitled to rely."[162] This reliance upon the expectation of medical care by student-athletes creates a nondelegable duty within the university to provide medical care. Therefore, the employment status of the team physician as an independent contractor is irrelevant in this context, since the university cannot delegate away the duty of care owed to its student-athletes.

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[160] *See* Jewitt v. Marc Plaza Corp., No. 89-1419, 1990 WL 100389, at *4 (Wis. Ct. App. 1990) (finding that a duty of care is nondelegable); *See also In re* Rooster, Inc., 100 B.R. 228, 233 (Bankr. E.D. Pa.,1989) ("Generally speaking, nondelegable duties have been determined to be of a personal nature whenever the performance depends upon a special relationship. . . ."); Rivers v. New York, 537 N.Y.S.2d 968, 972 (N.Y. Ct. Cl. 1989) (stating that a special relationship may create a nondelegable duty).

[161] *Jewitt*, 1990 WL 100389, at *4.

[162] *In re Rooster*, 100 B.R. at 233.

In other words, a university is liable for the medical negligence of an independently contracted team physician due to the existence of the special relationship between the university and its student-athletes.

VIII. INEVITABLY, UNIVERSITIES WILL WEIGH POTENTIAL LAWSUITS BROUGHT BY STUDENT-ATHLETES AGAINST THE CHANCES OF MAKING MILLIONS THROUGH INTERCOLLEGIATE ATHLETICS

Despite the potential liability for a team physician's medical negligence, many universities will continue operating their athletic departments under the status quo. Universities will always face the economic temptations of a successful athletic program. So long as large sums of money await successful athletic departments, universities will perceive potential lawsuits brought by severely injured student-athletes as a cost of doing business. Until the cost of the lawsuits exceeds the potential for profit, universities may have an incentive to sacrifice the long-term health and well-being of their student-athletes to increase the likelihood of achieving the riches associated with intercollegiate athletics.

IX. RECOMMENDATIONS

NCAA intervention is necessary to protect all student-athletes because universities have an incentive to continue making large amounts of money at the expense of their student-athletes' health. Litigation is not an effective vehicle for student-athletes to recover for the negligence of a team physician on a consistent basis.[163] In light of these shortcomings, the NCAA should take the following actions to ensure that student-athletes receive proper medical care from team physicians. First, the NCAA should establish a committee whose sole responsibility is certifying, instructing, and monitoring team physicians. This certification process will help ensure that competent team physicians treat student-athletes. Second, the NCAA should lift its prohibition against guaranteed, multi-year scholarships. A multi-year scholarship will help reduce many of the pressures leading to compromised care for student-athletes. Third, the NCAA should require universities to provide supplemental insurance that covers many common athletic injuries, particularly concussions. This insurance, in

[163] Even though the three plaintiffs discussed in Sections V(A)(3) - (5) were successful, the lack of case law suggests that very few student-athletes successfully sue their universities.

conjunction with the NCAA's Catastrophic Injury Insurance Program,[164] will help ensure that student-athletes receive the necessary medical care if a team physician makes a misdiagnosis that results in a serious injury.

A. Injured Student-Athletes Cannot Rely Upon Litigation for Recovery

There is a lack of lawsuits involving student-athletes suing their university for negligent medical treatment for three reasons. First, some injuries student-athletes experience do not have immediate side effects. Unlike the immediate pain associated with a broken bone, some serious injuries have benign symptoms.[165] In fact, many athletes neglect potential injuries without an immediate sense of pain. Without an injury to reference, many student-athletes may struggle to link current medical ailments with a previous injury. Second, injured student-athletes may fear a lawsuit will result in a loss of scholarship or impair their ability to obtain an education from the university. The NCAA's prohibition of guaranteed scholarships only reinforces this fear. Third, courts may disregard a negligence claim by presuming that the student-athlete assumed the risk by participating in intercollegiate athletics.

Unfortunately, not all of a student-athlete's injuries are visible. Concussions, specifically, have become a common injury for both professional and amateur athletes.[166] The medical community, understanding the seriousness of traumatic brain injuries, has begun documenting the number of brain injuries that occur during athletics.[167]

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[164] For the details of the NCAA's Catastrophic Injury Insurance Program, *see* NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA CATASTROPHIC INJURY INS. PROGRAM BENEFIT SUMMARY FOR 8/1/07 THROUGH 7/31/09, http://www1.ncaa.org/membership/insurance/07-09_CAT_benefit_summary.pdf [hereinafter NCAA CATASTROPHIC INJURY INS. PROGRAM] (last visited Oct. 11, 2008).

[165] According to the Mayo Clinic, common symptoms of a concussion are headache, dizziness, ringing in the ears, nausea, vomiting, or slurred speech. MAYO CLINIC, CONCUSSION: CONCUSSION SYMPTOMS (2007), http://www.mayoclinic.com/health/concussion/DS00320/DSECTION=symptoms (last visited Sept. 19, 2008).

[166] *See* Luke M. Gessel et al., *Concussions Among United States High School and College Athletes*, 42 J. ATHLETIC TRAINING 495, 495 (2007) (explaining that 300,000 sport related traumatic brain injuries occur on a yearly basis, with concussion as the predominant form of these injuries).

[167] James P. Kelly, *Traumatic Brain Injury and Concussion in Sports*, 282 JAMA 989, 990 (1999) ("An estimated 300,000 cases of [traumatic brain injury] occur each year in the setting of sports and recreation."); *See also* Michael W. Collins et al., *Relationship Between Concussion and Neuropsychological Performance in College Football Players*, 282 JAMA 964, 964 (1999) (portraying "systematic research examining risk factors" associated with "short- and long-term" outcomes fol-

The numbers used to analyze the total amount of concussions are often skewed due to a lack of reporting.[168] In the academic year of 2005–2006, university medical personnel reported 482 concussions.[169] However, some experts estimate that 3,750 college athletes receive a concussion each year.[170] Moreover, experts estimate that one in three college football players have experienced a concussion before or during their collegiate careers.[171]

Since "symptoms of sports-related concussion are not always obvious," team physicians have difficulty accurately diagnosing them.[172] Often, a student-athlete and the medical staff do not realize that the athlete has experienced a concussion until prolonged cognitive impairments arise.[173] For this reason, an athlete may not realize that a team physician has compromised his or her health. Without this realization, the possibility of filing a lawsuit never materializes.

Additionally, a student-athlete may decide not to bring a lawsuit out of fear of losing an athletic scholarship and permanently jeopardizing the ability to obtain a college degree. Note that a student-athlete who receives an athletic scholarship does not automatically receive

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lowing concussions in intercollegiate football players).

[168] Univ. of Pittsburgh Med. Ctr., Sports Concussion Fact Sheet, http://sportsmedicine.upmc.com/PDF/Sports%20Concussion%20Fact%20Sheet.pdf ("Because many mild concussions go undiagnosed and unreported, it is difficult to estimate the rate of concussion in any sport.") (last visited Oct. 11, 2008).

[169] *See generally* Gessel et al., *supra* note 166, at 500 (analyzing concussions occurring during both men's and women's intercollegiate soccer and basketball plus men's football, wresting, and baseball, along with women's volleyball and softball).

[170] David Agrell, *Concussions Common Among Injuries In College Sports*, GOLDEN GATE [X]PRESS, Mar. 13, 2008, http://xpress.sfsu.edu/archives/sports/010550.html; *See also* Univ. of Pittsburgh Med. Ctr., *supra* note 168 ("Studies estimate that approximately 10 percent of all athletes involved in contact sports, such as football, have a concussion each season.").

[171] ScienceDaily, First Link Demonstrated Between Multiple Concussions, Neuropsychological Deficits in College Athletes, Sept. 10, 1999, http://www.sciencedaily.com/releases/1999/09/990910080015.htm (discussing Michael W. Collins et al., *Relationship Between Concussion and Neuropsychological Performance in College Football Players*, 282 JAMA 964 (1999)).

[172] *See* Univ. of Pittsburgh Med. Ctr., *supra* note 168. For an instance where a player with a concussion was mistakenly permitted to participate, *see generally* Matt Winkeljohn, *Hewitt Unhappy with ESPN Over Causey Injury Comments*, ATLANTA J. CONST., Feb. 28, 2008, http://www.ajc.com/gatch/content/sports/gatech/stories/2008/02/28/techhoops_0229.html (discussing an incident where a collegiate basketball player was permitted to return to a game after previously suffering a concussion earlier in the night).

[173] *See* Agrell, *supra* note 170 (discussing the symptoms a college soccer player experienced days after receiving a concussion); *See also* Collins et al., *supra* note 167, at 964-70 (showing the correlation between concussions and learning disabilities in student-athletes).

this scholarship for the duration of his or her education.[174] An injured student-athlete must tread carefully when accusing a university of wrongdoing because the power to renew the athletic scholarship rests solely with the university.[175] Even if a student-athlete does not receive an athletic scholarship, the student-athlete may fear that an allegation against the university would: (1) jeopardize a possible financial aid award; or (2) hinder his or her ability to pursue an education at the university.

Furthermore, in some jurisdictions, a university can contest an injured student-athlete's negligence claim with the argument that the student-athlete assumed the risk of injury.[176] The assumption of risk doctrine holds that a student-athlete accepts the risk of physical injury by choosing to participate in athletics.[177] Therefore, damages for some injuries caused by a team physician's misdiagnosis are unrecoverable because the athlete assumed the risk of injury by voluntarily participating in the sport.

B. The NCAA Needs to Establish a Medical Advisory Committee to Guide Team Physicians

Because litigation is not the appropriate choice for many student-athletes, the NCAA should step in and provide protective measures to promote student-athlete health. Towards this end, the NCAA should form a committee to establish: (1) a process to certify all team physicians; and (2) treatment guidelines for team physicians. To ensure that student-athletes receive sufficient care, the committee members should consist of experienced sports medicine practitioners. Additionally, the NCAA should mandate that every university's team physicians comply with both the certification process and treatment guidelines. The certification process would represent an attempt to ensure that every team physician treating a student-athlete is competent in the field of sports medicine. The ability to grant and deny cer-

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[174] NAT'L COLLEGIATE ATHLETIC ASS'N, 2007-2008 GUIDE FOR THE COLLEGE-BOUND STUDENT-ATHLETE 24 (2007), http://www.ncaa.org/library/general/cbsa/2007-08/2007-08_cbsa.pdf ("Most people think a 'full ride' is good for four years, but athletics financial aid is available on a one-year, renewable basis.").

[175] *See id.*

[176] *See* Avila v. Citrus Cmty. Coll. Dist., 131 P.3d 383, 393 (Cal. 2006) (holding that by the very nature and history of baseball, a junior college baseball player could not recover for an injury because the student-athlete assumed the risk that an opposing pitcher would intentionally throw pitches at him).

[177] PROSSER ET AL., PROSSER AND KEATON ON TORTS 114 (West Group 5th 1984) ("One who enters into a sport, game or contest may be taken to consent to physical contacts consistent with the understood rules of the game.").

tification allows the NCAA to monitor and evaluate the treatment these team physicians provide. If a team physician makes a misdiagnosis or mistake, then the medical advisory committee could review these actions to assess and discipline improper conduct. In addition, creating treatment guidelines for team physicians helps ensure that student-athletes' health is the priority of every team physician.

This NCAA medical advisory committee would force team physicians to be accountable to an entity other than the employing university. Accountability to the committee should alleviate some of the pressure the university's financial objectives create for the team physician. In order to retain their NCAA certification, team physicians would be required to follow the guidelines established by the NCAA. Therefore, team physicians would have to consider interests other than the university's financial stakes when treating injured student-athletes.

C. The NCAA Should Permit Universities to Provide Guaranteed, Multi-Year Scholarships to Student-Athletes

The NCAA's prohibition of guaranteed, multi-year scholarships pressures student-athletes to continue playing while injured. If student-athletes received guaranteed scholarships for a set number of years, then universities could not withhold the scholarship when an athlete refuses to play while injured. Likewise, guaranteed scholarships would potentially eliminate the incentive for student-athletes to pressure team physicians to provide a quick fix. Student-athletes under scholarship would no longer have to worry about whether the university intended to renew the yearly scholarship. Therefore, a guaranteed, multi-year athletic scholarship would provide student-athletes with time to heal from injuries without the concern of losing their scholarship.

D. The NCAA Should Require All Universities to Carry Additional Health Insurance

Currently, the NCAA provides insurance in the event that a student-athlete suffers from an injury causing "total disability."[178] This insurance only assists an injured student-athlete in the worst of circumstances. Unfortunately, many student-athletes with serious injuries do not qualify for the coverage. Since universities prosper financially while many student-athletes suffer serious physical injuries not covered by this medical plan, justice requires that universities

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[178] *See* NCAA CATASTROPHIC INJURY INS. PROGRAM, *supra* note 164 (describing the payouts for a total disability and limited payouts for a partial disability).

provide supplemental insurance to all student-athletes to cover injuries not considered "catastrophic" under the NCAA's insurance plan.

X. CONCLUSION

Many universities participate in intercollegiate athletics with the hopes of obtaining increased wealth. Universities with a successful athletic program receive such wealth via increased alumni contributions, commercial revenue streams, an increased student applicant pool, and free advertising. Regardless of the university's motivation, the competitiveness of intercollegiate athletics jeopardizes the student-athlete's health.

In an attempt to achieve athletic success, universities recruit gifted student-athletes in a highly personalized manner. Relationships are established and strengthened between the student-athlete and the university. Once the student-athlete arrives on campus, he or she makes several sacrifices, specifically with respect to education and social autonomy. In return for these forfeited rights, many student-athletes expect that the university will provide for their best interests.

Unfortunately, a university's desire to achieve athletic success often creates problematic incentives for team physicians and student-athletes alike. These incentives ultimately diminish the medical care the student-athlete receives.

Sometimes, the team physician provides medical care that directly causes a student-athlete's injury. Under these circumstances, the student-athlete has the option to file a negligence claim against the university and the team physician. While litigation is a possibility, filing such a suit may provide little relief for many injured student-athletes. For this reason, the NCAA must install protective measures to help prevent compromised medical care for student-athletes. First, the NCAA should enact a certification process and establish a set of treatment guidelines to ensure that team physicians provide adequate medical care. Second, the NCAA should allow universities to guarantee multi-year scholarships to student-athletes. These scholarships provide injured student-athletes an opportunity to defer participation until the student-athlete is healthy. Additionally, guaranteed scholarships prohibit universities from withdrawing a scholarship when an injured student-athlete refuses to participate. Third, the NCAA should mandate that all universities provide supplemental health insurance to their student-athletes in the event of an injury. With this insurance, injured student-athletes can receive the medical care necessary to recover from athletic injuries.

Student-athletes will continue to receive compromised medical care from team physicians until the NCAA intervenes. Because

student-athletes are the individuals generating the wealth associated with college athletics, justice requires that the recipients, in turn, provide the student-athletes with proper medical care.