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The Voluntary Practices: The Last-Gasp of Big Time College Football and the NCAA

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Eleven football players, ranging from high school to professional athletes, died during the rigors of the 2001 off-season.[2] Three of the eleven players died while practicing in collegiate "voluntary" practices.[3] Although, the summer off-season has historically been a time for college athletes to return home and escape from the grind of the college atmosphere,[4] the reality and recent trend is that college football is a year-round sport. While the NCAA has rules prohibiting off-season practices, these "voluntary" practices have emerged as football "boot camps."[5] The NCAA restriction regarding these workouts is that players' participation must be strictly voluntary.[6] Staff members are permitted to provide information to players regarding opportunities for voluntary practice.[7] In fact, this "information" translates into a coach setting

The Last Gasp of Big-Time College Football and the NCAA

- By Sarah Lemons*

times, scheduling practices and ultimately scripting the players' off-season workouts.[8] Many commentators are beginning to wonder what "voluntary" actually means.[9] Clearly, if a player fails to participate it hardly helps his chances of making the football team.[10] Therefore, collegiate football players are essentially forced to participate if they want to make the team or ensure a starting position. No choice exists for these athletes.

However, for the college football programs, these "voluntary" practices are simply the starting point on the long road to the ultimate goal: MONEY. While these college football programs strive for the national championship and the associated monetary awards, they are doing so at the expense of their student-athletes. Not only do millions of dollars in revenues from bowl games anxiously await these football programs at the end of the season,[11] the regular season ticket sales and television contracts allow the universities to reap huge cash benefits.[12] These revenues allow universities to retain successful coaches, to build extravagant new facilities, and to recruit top high school players.[13] Essentially, the Division I-A collegiate football players are cash cows for their universities.

Although the voluntary practices appear to be a necessary evil in order to contend for the national championship or achieve a winning season, there is a fatal difference between official practices and voluntary practices.[14] The fatal difference is that "the voluntary practices [take place] before the team physicals are given,"[15] meaning that "voluntary" practices are inherently more dangerous than sanctioned practices because players and coaches are unaware of special physical conditions and there is no medical supervision. The NCAA does not allow for proper medical supervision, nor does it admit the very fact that it knows colleges and universities violate these rules by allowing the coaches to directly dictate off-season activities. The NCAA professes its desire to maintain the physical and educational well being of the student-athlete, but the institution turns a blind eye every chance it gets.[16]

College football is desperately in need of new NCAA rules governing voluntary practices and the real problem is that coaches will always find a way to slip around the rules in order to seize the rewards of winning.[17] Therefore, the NCAA must perform its duty and reform the rules to protect the health and well being of the collegiate football player, because as a voluntary association of a coalition of 960 member colleges, it has been given the authority to adopt rules governing its member institutions' recruiting, eligibility, financial aid and admissions.[18] Part II of this Note

will begin by examining the factual circumstances surrounding three collegiate football deaths occurring during voluntary practices prior to the 2001 season. Part III will then explore how courts have imposed liability upon colleges and universities for injuries to their students. Part VI will delve into the NCAA's current regulations and expose their weaknesses. Part V of this Note will argue that the NCAA has disregarded its founding principles to protect the welfare of the student-athlete. Part IV calls for reformation of the NCAA and its regulation of voluntary football practices, demanding that the NCAA should change the rules regulating voluntary football practices to reflect the high-risk nature of collegiate football and the reality that such practices are in effect quasi-mandatory. It will argue that the NCAA ban all forms of off-season "voluntary" practices or, in the alternative, recognize and allow such workouts to continue, but require that proper medical supervision be provided. Part VII of this Note offers the counterarguments to such proposals and the problems they create. Lastly, Part VIII will argue that if the NCAA chooses to sit idly upon the current regulations, it, as well as its member universities, should be held liable for allowing practices without proper medical supervision to protect football players. It will argue that the special relationship between the college and the student-athlete not only exists to impose liability and a heightened duty of care upon the college, but also extends to reach the governing body, the NCAA.

> "WHETHER we love football or hate it, the game is so deeply embedded in the American psyche of competition that it's with us forever, the good and the bad."[1]

Dying to Play

The off-season "voluntary" practices of 2001 traumatized college campuses around the nation. Devaughn Darling of Florida State University, Eraste Autin of University of Florida, and Rashidi Wheeler of Northwestern University died during off-season 2001 voluntary practices. These deaths have brought the issue of off-season voluntary practices to the forefront of the college football debate.

Devaughn Darling, a freshman at Florida State University, reported to his off-season scheduled, but "voluntary," practice at 5:45 a.m. on Monday, February 26, 2001,[19] and at 7:14 a.m. he collapsed and died during the workout.[20] Darling was doing mat drills, so called because they are physical exercises conducted on the mats indoors, including straight running, specialized running through ropes or side to side, and rolling and tumbling agility exercises.[21] Four assistant coaches and sixteen training staff members were present that morning.[22] After Darling complained of chest pains to his teammates, he was called to complete the drill.[23] Devaughn "dropped to his left, got up, dropped to his right, got up, hit the floor chest first, got up and made his way over to a nearby wall where he collapsed."[24] Darling's fellow players did not find it alarming that he had collapsed because it was commonplace to see players vomit or collapse in practice.[25] The Darling family has since filed a negligence suit against Florida State University, asserting that the coaches and university employees conducting the mat drills "did not know how to respond to people obviously in some type of distress and that it should be the position" of the university to take action and stop the drills so it can assess and treat a player in need.[26]

Eraste Autin, a freshman at the University of Florida, collapsed during a voluntary practice on July 19, 2001, as a result of what was initially heatstroke.[27] Autin's heatstroke progressed to a heart attack, to a coma, and six days later, ultimately to death.[28] Autin's body temperature was reportedly 108 degrees when he was admitted to the hospital.[29] The fatal workout consisted of a ten-minute warm-up, followed by five-minutes of stretching and then a rotation between four agility stations.[30] The fifty-minute series ended with fifteen minutes of sprints, called gassers.[31] Autin collapsed at 5:00 p.m., when the temperature outside was 88 degrees with humidity at 72 percent and heat index of 102 degrees.[32]

Likewise, Rashidi Wheeler collapsed and died during a "voluntary" summer practice. Wheeler's fatal workout consisted of ten 100-yard sprints, eight 80-yard sprints, six 60-yard sprints, and four 40-yard sprints under an allotted time.[33] Rashidi Wheeler collapsed, lay on his side, struggled to catch his breath, and told his Northwestern teammates he was dying.[34] His teammates did not consider this collapse seri-

ous because Wheeler suffered from asthma and experienced more than 30 attacks in his three years playing football at Northwestern; therefore, he often laid on his side, struggling with the rigorous workouts.[35] The videotape created by the coaching staff shows the events that lead to Wheeler's death.[36] The tape showed that after "Wheeler collapsed, the drill kept going. As he lay struggling to breathe, the drill kept going. When several teammates toppled over from exhaustion, the drill kept going. [And] as emergency workers tried to revive the dying Wheeler, the drill kept going."[37] Someone went to a phone near the field to call paramedics, but the phone was not functioning so they had to use a player's cell phone.[38] Despite his asthma, Wheeler was in such great shape that he was a frequent starter as a defensive back.[39] Nevertheless, asthma was listed as the official cause of his death.[40]

Linda Will, Wheeler's mother, filed a negligence action against Northwestern University, the football coach, Randy Walker, and others connected to the university and the incident claiming their negligence resulted in Rashidi's death.[41] Linda Will sued because she believes her son's death could have been prevented.[42] Northwestern was running and taping official conditioning drills without adequate medical supervision and labeling them "voluntary" practices, in violation of NCAA rules.[43] Wheeler's parents argue that the failure of Northwestern to provide proper medical assistance during the voluntary practice killed Rashidi, while Northwestern places the blame upon the banned substance containing Ephedra, found in Wheeler's system.[44] Wheeler's parents do not deny that their son took a banned supplement, but rather, they simply assert that Rashidi was in need of medical attention and he never received it, no matter what the cause.[45] Regardless of the effect of the supplement, Wheeler's parents believe Northwestern was negligent and should be held liable.[46]

Theories of Recovery

Historically, courts have been reluctant to impose liability on colleges and universities for injuries suffered by student-athletes.[47] Negligence has been the most popular tort claim against colleges.[48] However, under the basic elements of negligence,[49] courts have found it difficult to recognize the threshold element: the legally recognized duty of care to the student.[50]

A. In Loco Parentis

Courts have applied three theories of liability on colleges and universities for student injuries. The first legal theory advanced was the in loco parentis doctrine, which is based upon the notion that educational institutions have a paternal duty to protect their students from harm.[51] Student plaintiffs had brief success with this theory because when it was originally advanced, college students were regarded as "children requiring guidance and protection, which colleges were generally expected to provide, in addition to education."[52] During the 1960s, social and political views shifted in the United States with respect to individual freedom and the doctrine was found to no longer apply.[53] The effects of the Vietnam War, the Civil Rights Movement, and the new reality that college was becoming an economic necessity, led to the change in the judicial perspectives on the relationship between a college and its students.[54] The courts "altered the balance of power between colleges and students by recognizing the increased rights of students."[55]

Today, courts, society and students no longer consider colleges and universities as standing in the shoes of parents.[56] College students are now viewed as fully capable adults and are held responsible for their own decision-making.[57] The landmark decision wiping away the in loco parentis doctrine, as a theory for recovery, was *Bradshaw v. Rawlings*.[58] In *Bradshaw*, an 18-year-old Delaware Valley College student and a friend, while returning from an off-campus sophomore class picnic, were in a near fatal car accident that left Bradshaw paralyzed.[59] The majority of the students attending the picnic were between nineteen and twenty years of age.[60] The students were drinking at this annual school-sponsored event.[61] Bradshaw sued the college claiming negligence, "specifically alleging that the college owed him a duty of care to control the drinking of its students."[62] The District Court held in favor of Bradshaw, but the Court of Appeals for the Third Circuit reversed the decision.[63] The Court found the college owed no duty of care to the plaintiff, stating, "the modern American college is not an insurer of the safety of its students ... college students ... are no longer minors; they are now regarded as adults in almost every phase of community life."[64] The Bradshaw court concluded the college students had reached the age of maturity and were capable of protecting their own self-interests; therefore, a duty of care no longer existed from the college.[65] Bradshaw

argued that because there was drinking by underage students, that event, in itself created the special relationship between the college and the student.[66] The *Bradshaw* court found imposing such a duty of safeguarding every student who engaged in underage drinking would place an impossible burden on the university.[67] The court further expressed that the modern college's role is not that of a watchdog over the private lives of its students, thus such a duty does not exist.[68]

Since the *Bradshaw* decision, other courts have extended the *Bradshaw* reasoning and have held that universities owe no duty of care to college students in the context of injuries resulting from any underage drinking, recreational sports or criminal acts.[69]

B. Landowner-Invitee Theory

Since the increase in students' rights and the impact of the *Bradshaw* decision, courts have rejected the *in loco parentis* doctrine as a valid basis for tort liability against colleges.[70] Therefore, students advancing claims against these institutions were forced to search for a new basis of liability.[71] Student-plaintiffs sought to impose liability under a theory courts were more willing to apply, namely the landowner-invitee theory of recovery.[72] Some courts have found that colleges have an affirmative duty to prevent any on-campus injuries because they recognize the special relationship of "landowner-invitee" between the college and its students.[73] When a student suffers an injury on-campus, the university can be found liable due to its status as a landowner, which imposes a duty to protect invitees, including students.[74] However, the scope of the landowner-invitee theory is very limited. Courts are not willing to impose liability for injuries on-campus unless the plaintiff can establish the university landowner's knowledge of the risk for injury.[75] The university must be aware of the dangerous condition or the condition must have existed for a period of time such that the university should have known it existed.[76] In *Stockwell v. Bd. of Trustees of Leland Stanford Junior University*,[77] the plaintiff was injured when struck in the eye by a BB gun while riding in the back of a pickup truck.[78] The plaintiff was returning from the university's annual clean-up day, held on university grounds.[79] The *Stockwell* court held for the plaintiff because the university had known for two years that boys in the local community used BB guns on campus and the university's policy prohibiting any type of gun on the premises was not consistently enforced.[80] While a duty was found and liability was imposed upon the university in *Stockwell*, courts have not allowed for the landowner-invitee theory of liability to translate into automatic or strict liability whenever a foreseeable injury occurs, even if it is highly foreseeable injury, such as an alcohol-related injury.[81]

The landowner-invitee theory does not extend to cover all off-campus injuries. Because more than fifty percent of a student-athlete's contests may occur away from the college campus and college maintained premises, the landowner-invitee theory is an illogical theory to advance when attempting to impose liability for injuries to student-athletes. Likewise, it may be an implausible theory because it can be argued that there is a highly foreseeable probability of sports-related injuries, like an alcohol related injury.

C. Special Relationship

Because the landowner-invitee theory of liability will not extend to cover off-campus injuries, student-plaintiffs again searched for other theories to impose liability and began to argue that the relationship between the college and the student was itself special and therefore inherently imposed a heightened duty of care on the college.[82] Under common law, colleges have no duty to protect students unless the court finds a special relationship.[83] The Restatement (Second) of Torts enumerates the special relationships, which impose a duty to protect.[84] Section 314A lists the special relations giving rise to a duty to aid or protect;[85] however, the list under the § 314A is not exhaustive.[86] Comment b states that the relations listed in § 314A "are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action can be found."[87] The heightened duty under § 314A only applies when there is a special relationship between the parties and the risk of harm arises out of the relationship.[88] For the most part, courts have failed to recognize the general relationship between college and student as special and therefore no heightened duty of care has been imposed. The courts' reluctance to find a special relationship has been based upon the courts' rationale that "students are autonomous adults able to take care of themselves, and that colleges are not 'insurers of the safety of their students.'"[89] In the eyes of the courts, colleges are educational institutions, not babysitters.[90]

Revisiting *Bradshaw v. Rawlings*, the court ruled that students will no longer be viewed as incapable

minors, but rather mature adults fit to make responsible decisions, protecting their own self-interests.[91] The court refused to find a duty of care or special relationship between the college and the private student.[92]

THE degree of control a college exercises over the student-athlete far exceeds that of the private student. The athletic department controls nearly every aspect of the student-athlete's college experience.

II. The Student-Athlete

Although many plaintiffs have argued that the NCAA's treatment of student-athletes as amateurs is outdated and should take on the professional model of an employment relationship, courts have refused to characterize the relationship between colleges and their student-athletes as employer-employee.[93] Student-athletes have attempted to advance workers' compensation claims to receive benefits after being injured in an intercollegiate athletic program.[94] For example, scholarship players have advanced claims by arguing that their scholarship constitutes an employment agreement and because their injuries arose out of the course of their employment, playing football, they are entitled to benefits under the Workers' Compensation Act.[95] While initially courts found for the student-athlete,[96] recently courts have rejected students' workers compensation claims because scholarships cannot be viewed as employment agreements.[97] Furthermore, courts are no longer willing to recognize such arguments, because they refuse to "professionalize" amateur collegiate athletics.[98] In *Coleman v. Western Michigan University*,[99] the plaintiff-student entered into a scholarship agreement with the university, for which he would receive tuition, room and board and payment for his books in return for playing football.[100] Due to cutbacks, Coleman's scholarship was reduced, which forced him to leave the university.[101] However, at the time of his departure, Coleman, injured and no longer able to play football, asserted a claim that he was entitled to workers' compensation benefits.[102] Coleman claimed that in return for his services as a football player, he received certain items of compensation, which were measurable in money.[103] The *Coleman* court found that the plaintiff-student was not an employee, but rather a scholarship student-athlete.[104] Likewise, the *Coleman* court did not find the scholarship agreement to be an employment contract because the college was not in the football business and did not receive any direct benefit from the student-athlete's participation in the sport.[105] It then follows that because courts are no longer willing to find an employment relationship for a scholarship athlete, there is little support for a claim that a student-athlete is an employee of the university because he plays football, despite his direct relationship to the university's revenue.

The arguments driving courts to impose a duty of care upon colleges for student-athletes result from a belief that the NCAA is allowing professionalization of college sports.[106] The theory is as follows: if colleges refuse "to compensate athletes financially," then, at minimum, the college should owe a duty to its student-athletes that reaches beyond what is owed to general private students.[107] The majority of intercollegiate football is the same as professional football.[108] Coaches are paid million dollar salaries, like professional coaches, and college football is marketed as a professional entertainment activity.[109] The only missing professional element in college football is the payment of the players.[110] For example, in 1998 the total revenues taken in by all twelve SEC member universities, was $224,289,263, with the lowest earning school, Mississippi State University, drawing revenues over $7.3 million.[111] Colleges should grant a heightened duty of care to protect the student-athlete due to the enormous economic and non-economic benefits colleges receive from the student's participation in athletic programs.[112]

As explained above, the Restatement § 314A does not foreclose the possibility of finding a special relationship outside those explicitly listed, but the court must find that the risk of harm stems from the special relationship in order to impose such a duty.[113] "Special relationships," according to the Restatement, are most likely established upon the finding of "the existence of mutual dependence among the parties."[114] There is little doubt that colleges, especially Divi-

sion I [115] colleges, are dependent upon the generation of economic and non-economic benefits by their athletic departments and conferences. [116] Likewise, the student-athlete is dependent upon his college to provide education, scholarships, and for some, the opportunity to compete professionally. [117]

The relationship between a college and private student versus the relationship between a college and a student-athlete is distinguishable by examining the degree of control the college exercises over them. [118] The degree of control a college exercises over the student-athlete far exceeds that of the private student. [119] The athletic department controls nearly every aspect of the student-athlete's college experience. [120] This control can extend as far as to dictate his academic schedule. [121] Likewise, the revocation power of the coach over the athletic scholarship compels the student-athlete to surrender to the demands of the college. [122]

While the majority of cases imposing the heightened duty of care for the student-athlete deal with pre-college level sports, it is equally applicable to form a special relationship between the college and the student-athlete at the collegiate level. [123] For example, in *Beckett v. Clinton Prairie School Corp.* [124] and *Leahy v. School Bd. of Hernando County*, [125] the courts held that that since school officials had the authority to control the school's football players, the high school had the duty to exercise reasonable care to protect the health and safety of the student-athletes under their supervision. [126] Like high schools, colleges and universities have authority to conduct and control their football team. Therefore, the special relationship and duty is just as necessary at the collegiate level. It is largely argued that since colleges reap such substantial economic and non-economic benefits from the student-athlete's performance, it is "grossly unfair that colleges" receive the benefits from the student-athlete "without incurring a corresponding duty to provide a reasonable level of care toward the athletes." [127]

In 1993, *Kleinknecht v. Gettysburg College* [128] was the first case to specifically decide whether a special relationship exists between a college and its student-athletes, thereby imposing a duty of reasonable care based on the relationship. [129] In *Kleinknecht*, Gettysburg College actively recruited the student-athlete to play for its lacrosse team. [130] During a practice, the lacrosse player suffered a fatal heart attack. [131] Although coaches supervised the practice, there were no medical trainers present. [132] The student-athlete's parents filed a wrongful death action against Gettysburg College. [133] The District Court found in favor of the college, finding that the student-athlete's heart attack was not reasonably foreseeable and therefore the college had no duty to protect against such harm. [134] On appeal, the Third Circuit reversed, holding Gettysburg College owed the student-athlete a duty of care rising out of the special relationship formed when a student-athlete participates in a college-sponsored event in which the college recruited his participation. [135]

The Third Circuit made the distinction between private students and student-athletes, stating that there would be no duty of care if Kleinknecht had been participating in his own private affairs. [136] It stated, "[w]e cannot help but think that the College recruited Drew for its own benefit, probably thinking that his skill at lacrosse would bring favorable attention and so aid the College in attracting other students." [137] The *Kleinknecht* court also held that foreseeability is a factor in determining whether the duty exists, but it stated that foreseeability, in the context of duty, "means the likelihood of the occurrence of a general type of risk rather than the likelihood of the occurrence of a precise chain of events leading to the injury." [138] Although the college is not required to protect against every minute risk, it must take precautions to protect against generally foreseeable harms. [139] Ample evidence exists to show that life-threatening injuries occur during intercollegiate athletic events, and therefore, the Kleinknecht court held a fatal injury was foreseeable; accordingly, the college had a duty to protect against the risk of death. [140] Gettysburg College had a duty to be reasonably pre-

ULTIMATELY a court must decide "whether there is a duty on the basis of the mores of the community, 'always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and keeping with the general understanding of mankind.'"

pared to handle medical emergencies that would foreseeably arise within the athlete's participation in his recruited sport.[141] Lastly, the court recognized there are instances where public policy reasons insist that it also view such a special relationship and impose a duty of care on the college.[142] Ultimately, a court must decide "whether there is a duty on the basis of the mores of the community, 'always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and keeping with the general understanding of mankind.'"[143]

While the Third Circuit appears to have found that universities have a special relationship with their student-athletes and therefore owe them a higher duty of care, an issue surrounds the *Kleinknecht* court's holding. It is argued that *Kleinknecht*'s holding isolates recruited athletes from those that are not recruited, putting those recruited in their own category in which the college owes a heightened duty of care.[144] Therefore, courts may now assess whether the student-athlete was recruited or not, as a factor in deciding whether the college has a duty of care.[145] They may focus upon whether the student participated voluntarily or whether he was recruited for that particular sport.[146] Consequently, the question left open by *Kleinknecht* is: what duty of care is owed to a non-recruited student-athlete participating in the same sport as the recruited athletes?[147] One may argue that the Third Circuit has implied that a non-recruited student-athlete is owed a lesser duty of care simply because he was not recruited.[148]

The most recent court to address this issue was the North Carolina Court of Appeals in *Davidson v. University of North Carolina at Chapel Hill*.[149] In Davidson, a Junior Varsity ("JV") cheerleader fell thirteen feet, off the top of a stunt pyramid and suffered permanent brain damage and serious bodily injury.[150] Evaluating the evidence that the University did not provide a coach for either the varsity or the JV cheerleading squad, the JV cheerleaders received no safety training or instruction and safety concerns had been expressed but not communicated to the cheerleaders, the *Davidson* court held that a special relationship existed and the University owed the plaintiff student-athlete a duty of care.[151] The *Davidson* court premised its finding of a special relationship upon the existence of a mutual dependence between the parties, which then imposed a duty of care upon the University.[152] The court held that the University of North Carolina ("UNC") depended on its JV cheerleading squad for a variety of benefits, such as cheering at basketball games, wrestling events and representing the university at trade shows.[153] The cheerleaders, in turn, benefited from UNC by receiving uniforms, transportation, use of the University's facilities and equipment and one hour of physical education credit.[154] The *Davidson* court not only premised its finding of a special relationship upon a theory of mutual dependence, but also upon the degree of control UNC exercised over its cheerleaders. Lastly, the court imposed an independent duty of care, due to UNC's voluntary undertaking to advise and educate its cheerleaders on safety.[155]

THE *Davidson* court imposed a duty of care on the University of North Carolina, finding a special relationship premised on a theory of mutual dependence and the degree of control the University exercised over its cheerleaders.

The *Davidson* court is the first to begin to answer the question left open by *Kleinknecht*. *Davidson* held a special relationship existed between a university and its student-athletes regardless of whether they were recruited for the sport. The court fashioned its holding, imposing a duty of care due to the special relationship, around the existence of mutual dependence between both the university and its student-athlete, as well as the degree of control the university exercised over the student-athlete.[156] *Davidson* is simply the first state court to address this issue and find that a university and its student-athletes possess a special relationship that calls for a duty of care to protect their safety. Likewise, *Davidson* may shed light on the pending negligence lawsuits filed by Rashidi Wheeler's mother and Devaughn Darling's family, indicating that courts may be shifting their views and finding a special relationship exists and a duty of care must be imposed.

The NCAA's Current Stance on "Voluntary" Practices

The NCAA currently prohibits coaches from conducting off-season practices. However, voluntary athletically related activities are allowed if certain requirements are satisfied. [157] The student-athletes must initiate and request the workouts and reports of players participating and performance during the workouts cannot be reported by either a student-athlete or any staff member who observes the activity. [158] According to the rules, players cannot be rewarded or punished for participation in such workouts. [159] While coaches are not allowed to attend the workouts, training staff and strength and conditioning coaches may, but are not required, to be present. [160] A coach is allowed to devise a voluntary, general workout program for student-athletes, but not a specific daily-scheduled workout. [161] However, during the off-season, strength and conditioning coaches are allowed to design and conduct specific programs for the athletes, if the workouts are voluntary and organized solely at the request of the student-athlete. [162] While these rules are clear-cut, they leave much room for discretion by the university's athletic department and coaches. The fact remains that although the rules are clear, very few college football programs follow them.

The rules state that these voluntary workouts may not be scheduled activities; but players are told where to be and when, such as Devaughn Darling was told to be at the gym at 5:45 a.m. for mat drills on February 26, 2001. These players face the threat of being cut from the team or not starting at their specified position. Under the NCAA Bylaws, practices are defined to be,

> any meeting, activity or instruction involving sports-related information and having athletic purpose, held for one or more student-athletes at the direction of, or supervised by, any member or members of an institution's coaching staff. Practice is considered to have occurred if one or more coaches and one or more student-athletes engage in any of the following activities: (1) Field, floor or on-court activity; (2) Setting up offensive or defensive alignment; (3) Chalk talk; (4) Lecture on or discussion of strategy related to the sport; (5) Activities using equipment related to the sport; (6) Discussions or review of game films, motion pictures or videotapes related to the sport, except for the observation of an officiating clinic related to playing rules that is conducted by video conference and does not require student-athletes to miss any class time to observe the clinic; or (7) Activities conducted under the guise of the physical education class. [163]

It is possible to fit the majority of the off-season "voluntary" workouts within this definition. In fact, Devaughn Darling, Eraste Autin, and Rashidi Wheeler's voluntary workouts all fit within this definition of practice. All three of the deceased players engaged in field activities that were conducted by coaches. While these voluntary workouts are conducted so as to appear to conform with the voluntary practice rules, it is simply the norm for coaches to break the rules or to stretch the rules by ensuring the workout is slightly beyond the defined and prohibited practice. Likewise, although the head coach, coordinators or specific position coaches may not be present, their presence is felt when the strength and conditioning trainers or captains relay the coach's orders for that day's practice. Therefore, regardless of the rules set out by the NCAA, the coach designs and essentially conducts practices in which the player must participate in order to protect his place on the team. The bottom line is that players know their performance at these practices and during the drills impact the coach's decision to play them in a game; therefore, the players are compelled to attend the practices and to "complete the drills at any cost, no longer making the attendance voluntary." [164]

The NCAA Fails to Protect the Student-Athlete

A. Purpose and Basic Principles of NCAA

The NCAA reports the purpose of its voluntary organization as one "to initiate, stimulate and improve intercollegiate athletics programs for student-athletes and to promote and develop educational leadership, physical fitness, athletics excellence and athletics participation as a recreation pursuit." [165] Likewise,

the NCAA seeks "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by doing so, retain a clear line of demarcation between intercollegiate athletics and professional sports." [166] These college athletic programs "shall be conducted in a manner designed to protect and enhance the physical and educational welfare of student-athletes." [167] and it is the responsibility of each member institution "to protect the health of and provide a safe environment for each of its participating student-athletes." [168]

B. Purpose and Principles Are No Longer Priority for NCAA

The NCAA continues to stand behind the shield that these student-athletes are merely amateurs and a basic principle of the organization is to maintain participation in intercollegiate athletics that is "motivated primarily by education and by the physical, mental and social benefits to be derived," [169] protecting the student-athletes from "exploitation by professional and commercial enterprises." [170] While the NCAA may have this principle in its constitution, it does not follow it in practice. In 2000, The Knight Foundation Commission on Intercollegiate Athletics warned that the commercialization of college sports had worsened and beckoned the NCAA to refocus upon the student-athlete. [171] Nevertheless, the NCAA not only allows colleges to pump more and more money into the programs, but both the NCAA and the universities contract with the television networks and commercial product companies, such as Gatorade and Nike, making the college football season a huge commercialized entertainment industry. With the constant revenue coming from major network television contracts and the equipment and apparel contracts with such companies as Reebok and Nike, "big-time college sports today more closely resemble the commercialized model appropriate to professional sports than they do to the academic model." [172]

The revenues pulled in by the large and dominant conferences and individual powerhouse football universities keep the motivating factor of money the driving force behind the coach, the university and, ultimately, the NCAA. Coaches' salaries continue to feed the need for success. The more a coach wins, the more money he earns for the university; therefore his thoughts of "[j]ob retention and salary bonuses are increasingly tied to winning, not graduation rates." [173]

This type of culture and atmosphere "creates a 'win-at-all-costs' mentality that can threaten the educational pursuits [and physical welfare] of student-athletes." [174] It appears that the student-athlete has been forgotten. [175] The "academic mission" of the universities has now been exchanged for the "athletic mission." [176] The painful reality, from a coach's point of view, mimics Bobby Bowden's [177] words, "[y]ou slack up too much, you're going to let the other team win ... and then they'll hire a new coach." [178] In this reality, it is not surprising to see violations of the NCAA rules and regulations.

> THE focus must be readjusted and shifted back to uphold the NCAA founding principles and protect the interests and welfare of the student-athlete, rather than have that focus rank "second to the athletic department's [and the NCAA's] financial interest in an athletic program."

The Knight Foundation Commission on Intercollegiate Athletics has been calling for NCAA reform for over a decade. [179] It believes breaking the rules is just part of the status quo. [180] In the 1980s, it found that 54 percent, or 57 out of 106, colleges and universities in Division I-A had to be "censured, sanctioned or put on probation for major violations of NCAA rules." [181] Unfortunately, the violations continued in the 1990s where 52 percent, or 58 of the 114 colleges and universities broke the rules. [182] For a span of twenty years and presumably continuing today, as college football becomes an even larger game, "more than half of the institutions competing at the top levels continue to break the rules. Wrongdoing as a way of life represents the status quo." [183]

C. NCAA Lacks Necessary and Essential Focus on Student-Athletes

The NCAA does not stand strong and purport that no off-season workouts can occur, they simply just do not want coaches to attend.[184] The NCAA is merely worried about cheating.[185] It is worried that if the coaches attend they may begin to run plays and have scripted practices.[186] It appears "that NCAA rules place a higher priority on stopping cheating than keeping players alive."[187] Therefore, they desire to prohibit the attendance of the small amount of experienced individuals, who have conducted practices and observed players in these conditions. The emphasis of athletic programs and the NCAA is no longer to foster the educational and physical welfare of the student-athlete. The focus has shifted to coaches and universities and what they do for the program, as opposed to how it all affects the student-athlete.

The focus must be readjusted and shifted back to uphold the NCAA founding principles and protect the interests and welfare of the student-athlete, rather than have that focus rank "second to the athletic department's [and the NCAA's] financial interest in an athletic program."[188] The chairman of the NCAA Committee on Competitive Safeguards and Medical Aspects of Sports also calls for change recognizing "[w]orkouts that don't have appropriate medical coverage jeopardize student-athlete safety ... Band-Aids are not the solution. There needs to be significant change."[189]

A Call for Reform: The NCAA Rules Must Change

The stakes are high for the student-athlete, and he must balance his athletic activities with his educational pursuits. He depends on the NCAA to protect his interests; however, the NCAA allows the colleges and universities to break the rules at the student-athletes' expense and therefore fosters the year-round college football program. In order to avoid liability and to refocus its governance upon its founding principles of maintaining a clear demarcation between professional and collegiate athletics and protecting the health and safety of the student-athlete, the NCAA must rewrite the rules governing voluntary football practices. The NCAA must either ban voluntary workouts completely or, in the alternative, allow voluntary practices, but require proper medical supervision.

A. NCAA Should Ban Voluntary Workouts Completely

The NCAA should create a rule that states that any designed off-season workout, general or specific, is prohibited. This would make the individual student-athlete responsible for his own strength and conditioning workouts prior to the start of preseason practices. The student-athlete would be free to conduct his own workouts and to condition himself with other student-athletes; however, the rule must make clear that it is "solely" a student-athlete's actions that are conducting the group activity and it is not the conditioning and strength coaches, head coach, or any other coach that is scheduling, monitoring or providing these athletes with the quasi-mandatory practices. The student-athlete may request advice or access to information from the conditioning coach or trainer, as to what would be a suggested workout, but he is responsible for designing his own workout schedule. The student-athlete must be prohibited from reporting his progress or physical condition to any coach or trainer.

This rule protects the university and the NCAA from being held liable for injuries that may occur during an off-season workout. If the football program is no longer conducting such workouts and the NCAA prohibits any coordination of workouts between the coaches and student-athletes, it is solely the student-athlete's private affairs and his choice to undertake a workout and therefore, he assumes the risk and responsibility for his own injuries. While this rule would likely reduce the number of deaths due to the inherently dangerous atmosphere of the unmonitored but scripted voluntary practice, it in no way prevents any possibility of a death due to strenuous workouts. A complete ban would also decrease the pressure upon the player to push himself to dangerous limits when he knows he can progress and workout at his own pace and schedule.

The issue that arises with such a rule is at what point does this group activity constitute a designated practice under the NCAA rules? The NCAA would have to design such a rule with very specific requirements, for example, that no more than fifteen student-athletes may workout together. This type of rule would return college football programs to seasonal sports programs, where the players use the off-

PLAYERS explain that they spend from thirty to sixty hours per week practicing "because coaches schedule plenty of so-called voluntary workouts, which don't count against the limits. But athletes know if they don't show up, they'll have no shot at playing... they're pretty much mandatory."

season to condition themselves and further their economic and educational pursuits, rather than focus on football as they currently do, as a year-round job. Likewise, by protecting the physical and educational well being of student-athletes and maintaining a clear division between professional and intercollegiate athletics, this rule would conform to the purposes and fundamental policy of the NCAA.[190] It would also comply with the principle of student-athlete welfare.[191]

B. Alternatively, NCAA Shall Allow Voluntary Practices, Requiring Medical Supervision

In today's collegiate football atmosphere, a complete ban on off-season practices may not be a practical or realistic solution. However, coaches, commentators and most importantly, student-athletes are calling for the NCAA to fulfill its obligations and reform the current rules regarding off-season voluntary practices. While NCAA reform will require the institution to admit that it allows and ultimately profits from the violations of the off-season voluntary practice rules, it will permit the voluntary practices to be conducted with proper medical supervision. College football coaches desire a change in the NCAA voluntary workout rules to allow for the attendance of medical personnel.[192] The coaches argue that while the rules currently do not allow enough contact between the players and the coaches during off-season workouts, they believe contact should be maintained between players, trainers and other medical personnel who are the most qualified to be supervising the players.[193]

Similarly, the student-athletes are challenging the NCAA to admit that Division I-A college football is a year-round sport by forming the Collegiate Athletes Coalition (hereinafter,"CAC").[194] Although, the NCAA rulebook states that a college player cannot devote more than 20 hours of mandatory service a week, realistically, players' workouts range from thirty to sixty hours per week.[195] Players explain that they spend such a great amount of time practicing,"because coaches schedule plenty of so-called voluntary workouts, which don't count against the limits. But athletes know if they don't show up, they'll have no shot at playing... they're pretty much mandatory."[196] The CAC represents the student-athlete's interests and is challenging the NCAA to meet its demands. For example, the NCAA takes medical coverage away from the players during the summer/off-season, but the CAC is fighting to keep the necessary coverage because, truthfully, the student-athletes are required to remain on-campus and continue practicing.[197] The policy now stands that if a player is hurt in a voluntary workout, the NCAA prohibits a university from paying his medical expenses; however, these student-athletes are working out on-campus, at school facilities, and doing programs prescribed by the coach.[198] For those reasons, the student-athletes demand that the NCAA rules reflect the current practices by the collegiate football programs and reform the rules to allow for voluntary practices so long as they are conducted with proper supervision.

If the NCAA's concern rests with cheating by the coaches it can prescribe a rule that continues to ban coaches from scripting and attending the practices. The current rule preventing coaches from monitoring, scheduling and attending should continue, as well as the rules preventing any reports by the players, strength and conditioning coaches, or trainers back to the head-coach, assistant coaches or coordinators. Similarly, the rule should maintain that the student-athlete may not be penalized for not participating in the activity. The rule simply should allow voluntary practices to be conducted at the request of the student-athletes and if they are conducted, medical personnel and trainers must be present as if it were any sanctioned practice. Such a rule would protect the physical health and welfare of the student-athlete and reflect the status quo of football programs across the nation. The rule would also protect the university

and the NCAA from any liability for injuries suffered during the voluntary workouts. Lastly, the rule would comply with the Third Circuit's holding in *Kleinknecht*, recognizing there is a special relationship between the student-athlete and the university because fatal injuries are foreseeable in college football workouts and the university has a duty to protect against such injuries by providing proper medical attention.

Problems Surrounding Reformation: A Student-Athlete's Drive and Assumption of Risk

Many commentators argue that, "when an athlete participates in a sport he does so with the knowledge that injuries are very common and there is a certain degree of risk involved." [199] Therefore, he, like a private student, assumes the risk of his decisions. Similarly, it is argued that it is the student-athlete's drive, not the coaches', which puts his physical health in jeopardy. For example, Hank Gathers, one of the best college basketball players in the country in 1990, collapsed in a game after making a huge two-handed dunk. [200] Gathers was pronounced dead just 105 minutes after "dazzling the crowd with his slam dunk" and it was not the first time he had collapsed during a Loyola basketball game. [201] Gathers suffered from a cardiac arrhythmia, an irregular heartbeat, and chose to continue playing. [202] Many players who have physical conditions sign waivers, agreeing to not hold the university liable, and many state that they would rather die participating in their respective college sport because they will die doing something they love.

Aside from the normal risks of injury that come from playing an intercollegiate sport, student-athletes with physical abnormalities, illnesses or existing injuries, such as Rashidi Wheeler with his asthma, are constantly willing to "assume an enhanced risk" to play football. [203] It may not be the coaches pushing the student-athlete, but rather the joy of competition, prestige, reputation, potential economic gain or peer pressure that persuades collegiate athletes to seriously risk their health to participate in the game. [204] Likewise, pressure from the fans, community or a student-athlete's own inability to evaluate the health risks of playing while injured may also influence a player's choice to push himself regardless of the outcome. [205]

However, like professional athletes, student-athletes may experience a coach's pressure to play when injured. For example, renewable annual scholarships provide leverage for college football coaches to pressure a student-athlete to play while hurt or seriously risk his health. [206] For players, "[i]t takes an inordinate amount of courage to say stop" because to a coach "failure is not an option." [207] The macho culture of football also discourages a collegiate player from approaching his coach or his teammates and saying "I can't go on." [208] The student-athlete's admission of failure is nearly impossible within the culture of Division I-A, big-time, college football. [209] Therefore, adhering to their coach's instructions, comments and behavior, these players may not be able to appreciate the risks inherent in the activity and thus have not assumed the risk. [210]

ASIDE from the normal risks of injury that come from playing an intercollegiate sport, student-athletes with physical abnormalities, illnesses or existing injuries are constantly willing to "assume an enhanced risk" to play football.

NCAA's Failure to Act Results in Liability and a Duty Imposed by the Courts

Liability for death or injuries of student-athletes during such "voluntary" practices can only be imposed when the courts recognize a special relationship exists between the university and the student-athlete. The special relationship exists because the relationship is one of mutual dependence and a high degree of control, which calls for such a duty to be imposed. The college or university depends on its student-athletes as a result of "the institution's need for the athletic abilities and services that student-athletes bring to the relationship." [211] Essentially, universities depend on student-athletes to perform and generate

large revenues from their intercollegiate competition.[212] In turn, student-athletes are dependent on the university for education, guidance, and protection of their physical and emotional welfare.[213]

The university's dependency upon the student-athlete does not rest solely in the athletic context, but extends to the social realm as well. Most collegiate student-athletes are required to attend athletically related social activities, such as booster functions.[214] Such activities consume what little time the student-athlete has for studying and social activities of his choosing.[215] Nevertheless, the student-athletes must attend such functions because of the college's tremendous dependence on "their student-athletes to generate ticket sales, alumni gifts, television coverage and post-season bowl bonuses."[216] The university depends on their student-athletes to provide successful athletic programs, which raise school spirit, appeal to prospective applicants, warrant national media attention, as well as to recruit other student-athletes.[217]

Similarly, the degree of control and influence the college and the coach have over the student-athlete dictates imposition of a heightened duty of care and liability by the courts. Coaches are mentors, guidance counselors and, many times, "surrogate parents" for their players.[218] These roles provide coaches the latitude to significantly influence the student-athlete's social identities and both the academic and non-academic decisions made by the student-athlete.[219] Therefore, a student-athlete's position within the university can be described as one of "institutionalized powerlessness."[220] The amount of dominion and control that a college can exercise over the student-athlete creates a quasi-fiduciary relationship, which instructs courts to impose a duty to protect the welfare of the student-athlete and commands that institutions turn their attention to protecting the interests of the student-athlete and not simply its own interests.[221]

The mutual dependency theory creates a special relationship and imposition of a duty not only upon the college or university, but also upon the NCAA. The NCAA, like the universities, is dependent upon the athletic programs to generate the funds for its governance. As the NCAA is dependent upon the student-athlete for revenues, the student-athlete is dependent upon the NCAA to protect its interests. The student-athletes depend upon the NCAA to create rules that stress amateurism, protect the student-athletes' health and safety and that strike a balance between academic and athletic pursuits. Because the mutual dependency exists between the NCAA and the student-athlete, a fiduciary duty and special relationship should also be found, thereby imposing a duty to protect. Consequently, if the NCAA fails to act, refocus and reform its current rules, liabilities for injuries should not only be imposed upon the university, but also upon the NCAA, the governing institution. As one commentator stated, "It's time we stop shuffling around [the universities'] culpability for the sake of protecting this cherished notion of football's tough-guy culture. When that culture turns deadly, we must hold accountable its keepers."[222] Such commentary indicates it is time to point the finger and demand change from the ultimate keeper, the NCAA.

Conclusion

The demand to perform placed upon today's college football player in a big-time Division I-A football program is driven by the universities' desire to reap the large revenues coming from the end-of-the-season bowl games. As a result of money becoming the ultimate goal of these college football programs, the pursuit of the national championship comes at the expense of the student-athlete. Such a pursuit has changed college football from a seasonal sport to a year-round job. The student-athlete is required to practice year round, attending so called "voluntary" practices. However, for Devaughn Darling, Eraste Autin and Rashidi Wheeler, their participation in the universities' year-round pursuit for money became a fatal one.

Because the landscape of college football has changed and more demands have been placed upon the student-athlete, more protections must follow. It is the duty of the NCAA, as the governing body, to reform the rules surrounding the demands on the college football player to reflect the nature of the sport. In particular, it must reform the rules on voluntary practices to recognize that they are no longer voluntary, but rather quasi-mandatory. Given the changing nature of college football programs and the enormous revenues universities and the NCAA receive, a special relationship must be recognized that imposes upon both the university and the NCAA a heightened duty of care to protect the health and safety of the student-athlete and to prevent fatal injuries from occurring. This special relationship between the university and the student-athlete has recently been recognized by *Kleinknecht v. Gettysburg College*, in which the court

required the university to have proper medical supervision at all practices or be held liable for injuries that occur. This special relationship not only exists between the university and its student-athlete, but also between the NCAA and the student-athlete. Therefore, in order to reflect the *Kleinknecht* court's holding and uphold its fundamental principles, the NCAA must reform its rules or, like a university, be exposed to liability for injuries incurred during practice.

ENDNOTES

* Juris Doctor Candidate, May 2003, Vanderbilt University Law School; Bachelor of Arts, May 2000, Vanderbilt University. The author wishes to thank Robb and Emily Bigelow for their wonderful support, comments and, of course, a great note topic.

[1] David Kindred, *Football is War, After All*, THE SPORTING NEWS, Sept. 3, 2001, at 88.

[2] Mike Penner, *Summer of Tragedy: Rash of Player Deaths Prompts Reexamination of Our Obsession with Football*, L.A. TIMES, Sept. 3, 2001, at D1.

[3] *Id.*

[4] Kindred, *supra* note 1.

[5] Penner, *supra* note 2.

[6] Jack McCallum, *The Gang's All Here*, SPORTS ILLUSTRATED, Aug. 13, 2001, at 74.

[7] *Id.*

[8] *Id.*

[9] Ira Berkow, *Sports of the Times: A Deadly Toll is Haunting Football*, N.Y. TIMES, July 28, 2001, at D1.

[10] *Id.*

[11] The 2001 postseason college bowl games produced approximately $150 million in revenue for colleges and universities. *60 Minutes: Where's Ours? College Athletes Band Together to Insist on a Cut of Profits Made from their Sporting Events* (CBS News television broadcast, Jan. 6, 2002) [hereinafter *60 Minutes*].

[12] *60 Minutes*, *supra* note 11 (From ticket sales alone, Notre Dame takes in $3 million for every home football game.); Jon Morgan, *Coaches Run Up the Salary Score*, BALT. SUN, Jan. 25, 2002, at 1D (According to a 2000 NCAA study, the revenues from Division I-A college football ranged from $411,000 to $32 million and expenses varied from $1.6 million to $8.8 million. The chief source of revenues to the NCAA and its member universities is "the $71 million a year ABC is paying to televise the nation's four premier postseason games, dubbed the Bowl Championship series.").

[13] Barry Tempkin, *Education vs. Athletics Gets a Serious Look*, CHI. TRIB., Jan. 11, 2002, at 12.

[14] Kindred, *supra* note 1.

[15] *Id.*

[16] Matt Hayes, *Pushing Student Athletes Like Professionals*, THE SPORTING NEWS, March 8, 2001, *available at* http://www.sportingnews.com.

[17] Kindred, *supra* note 1.

[18] Nat'l Collegiate Ass'n v. Tarkanian, 488 U.S. 179 (1988); *see also* Robert C. Berry & Glenn M. Wong, 2 LAW AND BUSINESS OF THE SPORTS INDUSTRIES 67 (1986).

[19] Steve Springer, *Family Plans to Sue Over Darling Death; College Football: Florida State Accused of Negligence in Overseeing Rigorous Drill in February*, L.A. TIMES, Aug. 30, 2001, at D1.

[20] Jason Schneider & Alex Andujar, *Florida State Football Player Dies After Drills*, FSVIEW & FLORIDA FAMBEAU, March 1, 2001, *available at* University Wire.

[21] Springer, *supra* note 19.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] Howard Troxler, *So Much to Lose for the Gridiron Glory*, ST. PETERSBURG TIMES, Aug. 1, 2001, at 1B.

[28] *Id. See also* Joe Schad, *Autin's Family Questions the Quality of Care; His Father, a Doctor, Said the Cardiac Arrest Should Not Have Occurred*, ORLANDO SENTINEL, Oct. 10, 2001, at C4.

[29] *Id.*

[30] Jeff Darlington & Alan Schmadtke, *When is Enough Enough?; Following the Death of UF's Eraste Autin, State Schools are Reviewing their Training Procedures – But Don't Expect to See Changes Any Time Soon*, ORLANDO SENTINEL, July 27, 2001, at B1.

[31] *Id.*

[32] *Id.*

[33] Luke Cyphers & Michael O'Keeffe, *Making a Case: Relatives Face Tough Legal Battles After Players' Deaths*, DAILY NEWS, Dec. 16, 2001, at 110.

[34] Nancy Armour, *Player's Death Raises Questions*, THE RECORD, Aug. 16, 2001, at S05.

[35] *Id.*

[36] *Nightline: Getting to the Top: Is the Need to Win Putting Some Athletes at Risk; Death of Football Player Raises Questions* (ABC News television broadcast, Aug. 27, 2001) [hereinafter *Nightline*].

[37] Alan Abrahamson, *Drive to Excel Brings Death to the Gridiron*, L.A. TIMES, Aug. 27, 2001, at A1.

[38] Cyphers, *supra* note 33.

[39] Nightline, *supra* note 36.

[40] *Id.*

[41] Skip Myslenski, *Cause of Death Disputed, NU Exonerates Staff in Wheeler Case*, CHI. TRIB., Oct. 10, 2001, at N1.

[42] *World News Now: Athletes Pushing Themselves to the Limit Using Performance-Enhancing Drugs, Sometimes with Disastrous Consequences* (ABC News television broadcast Aug. 28, 2001).

[43] John Kass, *Player's Death is Just Fair Game to Assorted Flies*, CHI. TRIB., Aug. 21, 2001, at N2. (Northwestern University was clearly in violation of NCAA Bylaw, Art. 17, § 17.02.13(c), due to videotaping of the practice. See Nat'l Collegiate Athletic Ass'n, 2001-02 NCAA Division I Manual, Art. 17, section 17.02.13(c)) [Hereinafter "NCAA Bylaws"].

[44] Cyphers, *supra* note 33 (Wheeler had taken Ultimate punch and xenadrine to enhance his performance.).

[45] *Id.*

[46] *Id.*

[47] Edward H. Whang, *Necessary Roughness: Imposing a Heightened Duty of Care on Colleges for Injuries of Student-Athletes*, 2 SPORTS LAW J. 25, 28 (1995).

[48] *Id.*

[49] The legally recognized duty of care on the part of the defendant, breach of the duty, actual causation, proximate causation and injury to plaintiff.

[50] Whang, *supra* note 47, at 29.

[51] *Id. See also* Michelle G. McGirt, *Do Universities Have a Special Duty of Care to Protect Student-Athletes from Injury?*, 6 VILL. SPORTS & ENT. L.J. 219, 222 (1999).

[52] Whang, *supra* note 47, at 29-30.

[53] *Id.* at 30.

[54] *Id.*

[55] *Id.*

[56] Barbara J. Lorence, *The University's Role Toward Student-Athletes: A Moral or Legal Obligation?*, 29 DUQ. L. REV. 343, 346 (1991).

[57] *Id.*

[58] 612 F.2d 135 (3rd Cir. 1979); see *also* Lorence, *supra* note 56.

[59] *Bradshaw*, 612 F.2d at 137.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 137-38; see *also* Lorence, *supra* note 56, at 347.

[63] *Bradshaw*, 612 F.2d at 137.

[64] *Id.* at 138.

[65] *Id.* at 138-40.

[66] *Id.* at 142.

[67] *Id.*

[68] *Id.* at 138.

[69] Lorence, *supra* note 56, at 350; see *also* Baldwin v. Zoradi, 176 Cal. Rptr. 809 (Cal. Ct. App. 1981) (A student brought a negligence action against the college after suffering injuries due to recreational activities. The court stated that the proper role of postsecondary education was the maturation of the students, and concluded that students are responsible for their own decisions); see *also* Beach v. Univ. of Utah, 726 P.2d 413 (Utah 1986) (A student sued the college for injuries sustained on a school-sponsored field trip. The student was intoxicated at the time of injury. The court held there was no duty because (a) the college does not take the place of the parent, and (b) the university does not regulate the lives of its students, on or off-campus.).

[70] Whang, *supra* note 47, at 31.

[71] *Id.*

[72] *Id.*

[73] *Id.* See *also* McGirt, *supra* note 51, at 223.

[74] Tia Miyamoto, *Liability of Colleges and Universities During Extracurricular Activities*, 15 J.C. & U.L. 149, 170 (1988).

[75] *Id.*

[76] *Id.*

[77] 148 P.2d 405 (1944).

[78] *Id.* at 406; see *also* Miyamoto, *supra* note 74, at 171.

[79] 148 P.2d at 406; see *also* Miyamoto, *supra* note 74, at 171.

[80] *Id.*

[81] Whang, *supra* note 47, at 32; see *also* Baldwin v. Zoradi, 176 Cal. Rptr. 809 (Cal. Ct. App. 1981) (the court refused to hold college liable for on-campus injuries and found no duty to control student consumption of alcohol).

[82] *Id.* at 33.

[83] *Id.*

[84] *Id.*

[85] RESTATEMENT (SECOND) OF TORTS § 314A, Special Relations Giving Rise to a Duty to Aid or Protect: (1) a common carrier is under a duty to its passengers to take responsible actions (a) to protect them against unreasonable risk of physical harm, and (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others. (2) An innkeeper is under a similar duty to his guests. (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation. (4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

[86] *Id.* at cmt. b; see *also* Whang, *supra* note 47 at 34.

[87] *Id.*

[88] *Id.* at cmt. c.

[89] Whang, *supra* note 47, at 35.

[90] *Id.*

[91] *Bradshaw*, 612 F.2d at 140.

[92] *Id.* at 141-43.

[93] Whang, *supra* note 47, at 37.

[94] *Id.* at 37-38.

[95] See Coleman v. W. Michigan Univ., 336 N.W.2d 224, 225 (Mich. Ct. App. 1983).

[96] See Univ. of Denver v. Nemeth, 257 P.2d 423, 426-27 (Colo. 1953) (the court holds that the student-athlete, injured at a spring football practice, was entitled to workers' compensation benefits because the injury occurred within the scope of employment); Van Horn v. Indus. Accident Comm'n, 33 Cal. Rptr. 169, 174 (Cal. Ct. App. 1963) (the court awarded workers' compensation benefits to the decedent student-athlete because the scholarship agreement between the student-athlete and the university constituted an employment agreement).

[97] Whang, *supra* note 47, at 37-38.

[98] *Id.*

[99] See *Coleman*, 336 N.W.2d at 224.

[100] *Id.* at 225.

[101] *Id.*

[102] *Id.*

[103] *Id.* at 226.

[104] *Id.* at 225-28.

[105] *Id.* at 227-28

[106] One commentator believes that other than payment for services, collegiate players and professional players are no different. Professional players are required to work year-round, but the NCAA is not willing to allow or consider the stark reality that professionalism of college football exists through the voluntary off-season practices, summer conditioning, and film study. These college players put in enormous amounts of overtime and schools make immense amounts of money. See Hayes, *supra* note 16.

[107] Whang, *supra* note 47, at 39.

[108] *60 Minutes*, *supra* note 11.

[109] *Id.*

[110] *Id.*

[111] DOPKE.com, *1998 Division I College Football Revenues*, *available at* http://chronicle.com/stats/genderequity/.

[112] Whang, *supra* note 47, at 39.

[113] RESTATEMENT § 314A, cmt. b.

[114] *Id.*

[115] NCAA member university's sports programs are divided up according to divisions. There is a Division I-A, I-AA and I-AAA, as well as Division II and Division III sports programs. Division I-A is the most competitive and highest ranking division. Accordingly, it is the most highly regulated division.

[116] Whang, *supra* note 47, at 40.

[117] *Id.*

[118] *Id.* at 43.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.* at 43-44.

[123] *Id.* at 46.

[124] 504 N.E.2d 552 (Ind. 1987).

[125] 450 So.2d 883 (Fla. Dist. Ct. App. 1984).

[126] 504 N.E.2d at 553; 450 So.2d at 885.

[127] Whang, *supra* note 47, at 45.

[128] 989 F.2d 1360 (3rd Cir. 1993).

[129] Whang, *supra* note 47, at 46.

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

[131] *Id.* at 1362.

[132] *Id.* at 1363.

[133] *Id.* at 1362.

[134] *Id.*

[135] *Id.* at 1367.

[136] *Id.* at 1367-68.

[137] *Id.* at 1368.

[138] *Id.* at 1369-70.

[139] *Id.* at 1370.

[140] *Id.*

[141] *Id.* at 1371.

[142] *Id.* at 1372.

[143] *Id.*

[144] Kerry L. Hollingsworth, *Kleinknecht v. Gettysburg College: What Duty Does a University Owe Its Recruited Athletes?*, 19 T. MARSHALL L. REV. 711, 712 (1984).

[145] *Id.* at 715.

[146] *Id.*

[147] *Id.* at 721.

[148] *Id.*

[149] 543 S.E.2d 920 (N.C. Ct. App. 2001).

[150] *Id.* at 922.

[151] *Id.* at 922-23.

[152] *Id.* at 927.

[153] *Id.*

[154] *Id.*

[155] *Id.* at 927-29. (The court found that UNC required the cheerleaders to "abide by certain standards of conduct, such as maintaining a minimum GPA and refraining from drinking alcohol in public." UNC also "voluntarily undertook to advise and educate the cheerleaders regarding safety." The court then found that UNC's voluntary undertaking "established a separate duty of care . . . independent of the duty of care arising from the special relationship.")

[156] *See id.* at 927-28.

[157] NCAA Bylaws, *supra* note 43, at Art. 17, § 17.02.13.

[158] *Id.* at § 17.02.13 (a)-(b).

[159] *Id.* at § 17.02.13(d); *see also* Armour, *supra* note 34.

[160] Armour, *supra* note 34.

[161] NCAA Bylaws Art. 17, § 17.02.1(b).

[162] *Id.*

[163] *Id.* at 17.02.1(a).

[164] Roya A. Hekmat, *Malpractice During Practice: Should NCAA Coaches Be Liable For Negligence?*, 22 LOY. L.A. ENT. L. REV. 613, 636 (2002). *See also* Jeff Call, *Summer Off? Not for BYU Football Team*, DESERT NEWS', July 2, 2002, at D01 (One player is quoted, saying "I feel like I have to be here. I don't have a choice." And the "players understand very well the expectations placed upon them by coaches. The only thing I have to say about the voluntary part is, it's voluntary whether the coaches put you on the field in the fall.").

[165] NCAA Const. Art. 1, § 1.2(a).

[166] *Id.* at § 1.3.1.

[167] *Id.* at Art. 2, § 2.2

[168] *Id.* at § 2.2.3.

[169] *Id.* at § 2.9.

[170] *Id.*

[171] Morgan, *supra* note 12.

[172] Knight Foundation Commission on Intercollegiate Athletics Report (June 2001), *available at* http://www.ncaa.org/databases/knight_commission/2001_report [hereinafter Knight Commission].

[173] Monica L. Emerick, *The University/Student-Athlete Relationship: Duties Giving Rise to a Potential Educational Hindrance Claim*, 44 UCLA L. REV. 865, 876 (1997).

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] Bobby Bowden is a 42-year veteran college football coach and presently is the head coach at Florida State University.

[178] Steve Springer, *Bowden Takes Long Look at Conditioning Football*, L.A. TIMES, Aug. 11, 2001, at D8.

[179] Knight Commission, *supra* note 172, at 14.

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] Diane Pucin, *NCAA Rules Should Benefit Athlete*, L.A. TIMES, Aug. 10, 2001, at D1.

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] Emerick, *supra* note 173 at 874.

[189] Brian W. Smith, *Time to Restructure Voluntary Workouts*, THE NCAA NEWS, Mar. 4, 2002, *available at* http://www.ncaa.org/news/2002/20020304/editorial/3905n48.html.

[190] See NCAA Const. Art. 1, § 1.2 (a)-(b), *supra* note 159; §1.3.1, *supra* note 160.

[191] See *id.* at Art 2, § 2.2, *supra* note 161.

[192] Tim Griffin, *Coaches Plan to Prevent Workout Deaths; Ongoing Program Would Be Watched*, SAN ANTONIO EXPRESS-NEWS, Jan. 10, 2002, at 01C.

[193] *Id.*

[194] See *60 Minutes*, *supra* note 11; see *also Challenges Facing Amateur Athletics, Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection*, 107th Cong. 41-46 (2002) (statement of Mr. Ramogi D. Huma, Chairman, Collegiate Athletes Coalition, "CAC") (The CAC is not only pursuing changes in the rules surrounding voluntary practices & medical coverage for injuries during such practices. They are also pursuing reform by the NCAA to increase full grant in aid scholarships to reflect the cost of attendance and elimination of employment restrictions. The CAC was formed because its members believed that the generations of promises to change the rules by the NCAA was no longer enough. Feeling that the lack of fundamental protections for the student athlete for almost a century is too long, the CAC seeks immediate reform by the NCAA.).

[195] *60 Minutes*, *supra* note 11.

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] Hollingsworth, *supra* note 144, at 711.

[200] Lorence, *supra* note 56, at 343

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] Matthew J. Mitten, *Team Physicians and Competitive Athletes: Allocating Legal Responsibility For Athletic Injuries*, 55 U. PITT L. REV. 129, 133-34 (1993).

[205] *Id.*

[206] *Id.* at 135.

[207] *Nightline*, *supra* note 36.

[208] *Id.*

[209] *Id.*

[210] Hekmat, *supra* note 164, at 623.

[211] Timothy Davis, *Examining Educational Malpractice Jurisprudence: Should a Cause of Action be Created for*

Student-Athletes?, 69 DENV. U. L. REV. 57, 92 (1992).

[212] *Id.*

[213] *See id.*

[214] *Id.* at 93.

[215] *Id.*

[216] Lorence, *supra* note 56, at 353.

[217] James F. Hefferan, Jr., *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, 605 (2002) ("undergraduate applications rose twenty-two percent at Northwestern University the year after the perennial doormat of college football made an unlikely trip to the Rose Bowl.").

[218] Davis, *supra* note 211, at 94.

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] Hekmat, *supra* note 164, at 641 (quoting Bill Plaschke, *It's Time to Start Turning Up the Heat on Demanding, Tough-Guy Coaches*, L.A. TIMES, Aug. 5, 2001 at D1).