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## Article

### GRATUITOUS PROMISES: OVERSEEING ATHLETIC ORGANIZATIONS AND THE DUTY TO CARE

SAM C. EHRLICH\*

*We find it odd and disconcerting that organizations such as the appellees, which undertake to enhance the quality and safety of high school football games, disclaim that they do so to provide a service to the athletes who participate in the games. Moreover, we find similarly incongruous the argument that organizations whose rules govern the contest and whose discussions determine the type of athletic equipment that the athletes are provided do not owe those athletes a duty of reasonable care in their activities. The fact that these organizations purport to act gratuitously and for noble purposes does not, ipso facto, absolve them of a legal duty of care toward the athletes.<sup>1</sup>*

#### I. INTRODUCTION

Imagine spending time at a pool where a lifeguard stands watch for safety. If a swimmer were to lose his or her bearings and begin to drown, the lifeguard would have a responsibility to jump into the water to save that person.<sup>2</sup> If the lifeguard shirked on that duty, he or she would be legally responsible for that patron's injury or death.<sup>3</sup> Similarly, the owners and supervisors of the pool who hired the lifeguard to protect their customers would also be responsible, and they would also be responsible if they promised to hire a

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1. *Wissel v. Ohio High Sch. Athletic Ass'n*, 605 N.E.2d 458, 465 (Ohio Ct. App. 1992).

2. See generally Daniel P. Connaughton & John O. Spengler, *Negligence Liability in Public Swimming Pool Operations: A Review of Case Law Involving Supervision*, 10 J. LEGAL ASPECTS SPORT 154 (2000).

3. See generally *id.*

lifeguard but failed to do so.<sup>4</sup> Those who take voluntary measures to protect others—either for consideration or simply as a gratuitous promise—are responsible for ensuring that those measures are carried out successfully and that no additional harm comes to those relying on those held duties.<sup>5</sup>

This concept, a legal theory known as the “voluntary undertaking doctrine,” comes from section 323 of the Restatement (Second) of Torts.<sup>6</sup> This rule has been adopted in a majority of states, including New York, California, Texas, and Florida.<sup>7</sup> But what happens when this doctrine is applied to overseeing athletic organizations who do not directly oversee sporting events but still promulgate safety rules, regulations, and policies in an effort to “enhance the quality and safety” of games for athletes and participants?<sup>8</sup> Would those organizations be held to the same duty of care if these athletes were injured by inconsistently applied or ineffective rules and policies?

Traditionally, under the voluntary undertaking doctrine as codified under section 323, such a duty would not exist as there must be an increase of harm or evidence of reliance on the voluntary undertaking to show a legal duty. However, a 1992 Ohio state appellate court case, *Wissel v. Ohio High School Athletic Association*,<sup>9</sup> showed that this duty could be enforced through other means. In this case, the court rejected the use of section 323 and instead applied section 324A—a “companion provision” to section 323—to find that a duty existed due to the connection and influence that the organization had over the host schools who do unequivocally have a duty to these athletes.<sup>10</sup> In this way, *Wissel* provided a

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4. See generally *Barnett v. Zion Park Dist.*, 665 N.E.2d 808 (Ill. 1996); *S & C Co. v. Horne*, 235 S.E.2d 456 (Va. 1977). This is assuming, of course, that sovereign immunity does not apply. See generally *Fluehr v. City of Cape May*, 732 A.2d 1035 (N.J. 1999).

5. RESTATEMENT (SECOND) OF TORTS § 323 (AM. LAW INST. 1965).

6. See *id.*

7. See *Coffee v. McDonnell Douglas Corp.*, 503 P.2d 1366, 1370 (Cal. 1972) (“The obligation assumed . . . is derived from the general principle expressed in section 323 of the Restatement Second of Torts, that one who voluntarily undertakes to perform an action must do so with due care.”); *Wallace v. Dean*, 3 So. 3d 1035, 1050–51 (Fla. 2009); *Nallan v. Helmsley-Spear, Inc.*, 407 N.E.2d 451, 460 (N.Y. 1980); *Colonial Sav. Ass’n v. Taylor*, 544 S.W.2d 116, 119–20 (Tex. 1979) (finding that voluntary undertaking doctrine, as “stated in the Restatement (Second) of Torts § 323” has “long been recognized by the courts of this State”).

8. See *Wissel v. Ohio High Sch. Athletic Ass’n*, 605 N.E.2d at 465.

9. *Id.* at 465–66.

10. *Id.* at 466.

blueprint for similar lawsuits against overseeing athletic organizations using this companion provision.

For the next twenty-five years, no plaintiff would attempt to sue an overseeing athletic organization for their injuries under a similar legal theory. But in a sixteen-month timespan between July 2015 and December 2016, seven opinions in six cases heard in five different courts have all attempted to pin a duty of care on overseeing athletic organizations based on the voluntary undertaking doctrine. These cases are:

*Mehr v. Fédération Internationale de Football Association*<sup>11</sup>

*Lanni v. NCAA*<sup>12</sup>

*Mayall v. USA Water Polo, Inc.*<sup>13</sup>

*Hill v. Slippery Rock University*<sup>14</sup>

*McCants v. NCAA*<sup>15</sup>

*Schmitz v. NCAA*<sup>16</sup>

In these six cases, the plaintiffs have argued that overseeing athletic organizations owe athletes a duty of care in: (1) ensuring that event organizers follow safety protocols;<sup>17</sup> (2) creating policies to safeguard against head injuries;<sup>18</sup> (3) uniformly enforcing safety policies;<sup>19</sup> and (4) confirming that policies ensuring student-athlete academic integrity are being enforced.<sup>20</sup> However, only one of these cases—*Hill v. Slippery Rock University*—was ultimately success-

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11. 115 F. Supp. 3d 1035 (N.D. Cal. 2015). While the Fédération Internationale de Football Association (FIFA) is the first named defendant in this case, the case disposition in regards to FIFA is irrelevant for the discussion in this Article as the claims against FIFA (a Swiss organization), were dismissed solely due to lack of personal jurisdiction, and FIFA's potential liability under negligence theories was never discussed. *See id.* at 1046–54. Thus for the purposes of this Article, this case will be referred to as *Mehr v. US Soccer, et al.* *See infra* notes 85–109 and accompanying text.

12. 42 N.E.3d 542 (Ill. App. Ct. 2015). *See infra* notes 110–128 and accompanying text.

13. 174 F. Supp. 3d 1220 (C.D. Cal. 2016). *See infra* notes 129–146 and accompanying text.

14. 138 A.3d 673 (Pa. Super. Ct. 2016). *See infra* notes 147–165 and accompanying text.

15. 201 F. Supp. 3d 732 (M.D.N.C. 2016). *See infra* notes 166–183 and accompanying text.

16. 67 N.E.3d 852 (Ohio Ct. App. 2016). *See infra* 184–194 and accompanying text.

17. *See, e.g., Lanni*, 42 N.E.3d 542; *Hill*, 138 A.3d 673.

18. *See, e.g., Mehr*, 115 F. Supp. 3d 1035; *Mayall*, 174 F. Supp. 3d 1220; *Schmitz*, 67 N.E.3d 852.

19. *See, e.g., Hill*, 138 A.3d 673.

20. *See, e.g., McCants*, 201 F. Supp. 3d 732.

ful in convincing the court that the defendant owed them a standard of care under traditional negligence theories.

This Article proposes a new theory of negligence liability for overseeing athletic organizations based on subsection (b) of section 324A of the Restatement and the precedent established by *Wissel*. While the courts in each of the discussed six cases had to decide whether such conduct did, in fact, create an enforceable duty of care or whether a broad duty to player safety simply amounted to “aspirational statements” that “do not rise to the level of an assumption of a legal duty,” the courts in most of these cases did not look at the relationship between the overseeing athletic organization and the athlete through the lenses established by the *Wissel* court.<sup>21</sup> But if the plaintiffs had argued based on these theories, the outcomes of these cases—and the consequent state of negligence liability in amateur sports—may have been vastly different.

Part II of this Article defines the current state of negligence theory in amateur sports and finds that *Wissel* “opened the door” to the possibility that overseeing athletic associations could be held to a duty of care to their athletes. Part III then summarizes the six recent negligence cases that have all debated the possibility of applying a duty of care to several such athletic associations. Finally, Part IV explores common threads between these cases and applies the legal theories advanced by *Wissel* to each case to determine whether such theories are potentially applicable in these contexts.

## II. NEGLIGENCE, DUTY, AND OVERSEEING ATHLETIC ORGANIZATIONS

### A. Negligence and Amateur Sports

The tort of negligence has four elements: a duty of care, a breach of that duty of care, proximate and actual causation, and an actual injury.<sup>22</sup> However, the first element, duty of care, is often seen an important “minimal threshold” that serves as a “legal requirement for opening the courthouse doors.”<sup>23</sup> As, for example,

21. *Hill v. Slippery Rock Univ.*, No. 14-10570, 2014 Phila. Cty. Rptr. LEXIS 2, at \*30 (Ct. Com. Pl. Butler Cty. Dec. 22, 2014). See *infra* note 201 and accompanying text.

22. See, e.g., *Ileto v. Glock Inc.*, 349 F.3d 1191, 1203 (9th Cir. 2003).

23. *McCain v. Florida Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992) (internal citation omitted) (emphasis in original). See RESTATEMENT (SECOND) OF TORTS § 281(a). See also *Maurer v. Cerkvenik-Anderson Travel, Inc.*, 890 P.2d 69, 71 (Ariz. 1994) (“To conclude there is ‘no duty’ is to conclude the defendant cannot be liable, no matter the facts.”); *Bily v. Arthur Young & Co.*, 834 P.2d 745, 760 (Cal. 1992) (“The threshold element of a cause of action for negligence is the existence

the New York Court of Appeals has stated, “[i]n the absence of duty, there is no breach and without breach there is no liability.”<sup>24</sup>

Analogously, in most states the existence of a duty is a question of law for the court—not the jury—and often cases are dismissed or granted summary judgment on this element even if the facts of the case would support the plaintiff on the other three elements.<sup>25</sup> For example, the Arizona Supreme Court ruled that finding a duty of care “is not a factual matter; it is a legal matter to be determined *before* the case-specific facts are considered.”<sup>26</sup> The Texas Supreme Court has found similarly, stating that the “existence of duty is a question of law for the court to decide from the facts surrounding the occurrence in question.”<sup>27</sup>

Different courts in different states have adopted various ways of determining whether the defendant has a duty of care. In Indiana, courts determine the existence of a duty based on three factors: “(1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy considerations.”<sup>28</sup> In Ohio, a duty “may be established by common law, statute, or by the particular facts and circumstances of a case.”<sup>29</sup> California courts balance a number of factors, including:

[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.<sup>30</sup>

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of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion.”); *Armstrong v. Best Buy Co.*, 788 N.E.2d 1088, 1091 (Ohio 2003); *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995) (“The threshold inquiry in a negligence case is whether the defendant owes a legal duty to the plaintiff.”) (internal citations and quotation marks omitted).

24. *Pulka v. Edelman*, 358 N.E.2d 1019, 1020 (N.Y. 1976) (internal citation omitted).

25. See *Steele v. City of Durham*, 782 S.E.2d 331, 334 (N.C. Ct. App. 2016); *Mussivand v. David*, 544 N.E.2d 265, 269–70 (Ohio 1989).

26. *Gipson v. Kasey*, 150 P.3d 228, 232 (Ariz. 2007) (citing *Markowitz v. Ariz. Parks Bd.*, 706 P.2d 364, 366 (Ariz. 1985)).

27. *Centeq Realty*, 899 S.W.2d at 197.

28. *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991).

29. *Schmitz v. NCAA*, 67 N.E.3d 852, 866 (Ohio Ct. App. 2016) (citing *Chambers v. St. Mary’s Sch.*, 697 N.E.2d 198, 201 (Ohio 1998)).

30. *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968).

The application of negligence to sports for entities hosting athletic events is well-founded.<sup>31</sup> Similarly, the topic of whether schools—especially big-money NCAA universities—owe their student-athletes a duty of care has been hotly debated,<sup>32</sup> and case law on the subject has both shifted over the years and has often varied based on jurisdiction.<sup>33</sup>

### B. *Wissel* Opens the Door

The first attempt to levy a duty of care onto an athletic association was in *Wissel v. Ohio High School Athletic Association*, an Ohio state court case.<sup>34</sup> The plaintiff in *Wissel* was a former LaSalle High School football player who had been rendered a quadriplegic during a game.<sup>35</sup> The plaintiff brought negligence and strict liability claims against a number of different defendants, including the manufacturer of the football helmet the student-athlete was wearing, the coach of the football team, the Archdiocese of Cincinnati, the Archbishop, and the Ohio High School Athletic Association (“OHSAA”).<sup>36</sup>

The Ohio Court of Appeals reviewed a granted motion for summary judgment by the OHSAA partially on the basis that because they were a “voluntary, non-profit organization[ ] whose rules, regulations and/or standards were not mandatory upon their members,” they did not owe a duty of care directly to the high school student-athlete.<sup>37</sup> This was in response to the plaintiff’s claim, which was based mostly on section 323 of the Restatement (Second) of Torts, also known as the “voluntary undertaking doc-

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31. See Joy Blanchard, *A Comparative Study of K-12 and Higher Education Sport-Related Negligence Litigation*, 6 J. STUDY SPORTS & ATHLETES EDUC. 201 (2012).

32. See James J. Hefferan, Jr., Note, *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 (2002); 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 (1999); Edward H. Whang, Comment, *Necessary Roughness: Imposing a Heightened Duty of Care on Colleges for Injuries of Student-Athletes*, 2 SPORTS LAW. J. 25 (1995).

33. See *Orr v. Brigham Young Univ.*, 108 F.3d 1388 (10th Cir. 1997); *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360 (3d Cir. 1993); *Moose v. Mass. Inst. of Tech.*, 683 N.E.2d 706 (Mass. App. Ct. 1997); *Kennedy v. Syracuse Univ.*, 1995 U.S. Dist. LEXIS 13539 (N.D.N.Y. Sept. 12, 1995).

34. 605 N.E.2d 458 (Ohio Ct. App. 1992).

35. See *id.* at 461.

36. See *id.*

37. *Id.* at 462.

trine.”<sup>38</sup> Under section 323 of the Restatement (Second) of Torts, in relevant part:

[O]ne who undertakes gratuitously or for consideration, to render services to another . . . is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other’s reliance on the undertaking.<sup>39</sup>

For this application, the court found that section 323 would not apply to defendants such as the OHSAA, as proving a duty of care under this doctrine requires proof that “the defendant’s alleged failure to exercise reasonable care either (a) increased the risk of harm, or (b) induced detrimental reliance.”<sup>40</sup>

Since the defendants’ alleged “failure to take certain steps to improve the safety of high school football” were “sins . . . of omission, not commission,” no duty of care could attach that purported voluntary undertaking under section 323.<sup>41</sup> The court found that simply attempting to make the game safer was not enough to show a voluntary undertaking, but instead, there must be evidence that the OHSAA “by undertaking to make the game safer, actually made it less safe than it was originally.”<sup>42</sup> In the same way, no detrimental reliance could be proven since there was no evidence that the high school student “affirmatively relied on the actions or representations” of the association and thus “chose not to wear another, safer helmet” or “played or tackled differently than he would normally have done” if not for the association’s actions or representation.<sup>43</sup>

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38. See *id.* at 464–65; see also John D. Risvold, *The Voluntary Undertaking Doctrine Explained*, RISVOLD LAW (Jan. 2, 2013), <https://risvoldlaw.com/2013/01/02/the-voluntary-undertaking-doctrine-explained/> [https://perma.cc/492Z-D674].

39. *Wissel v. Ohio High Sch. Athletic Ass’n*, 605 N.E.2d 458, 464–65 (quoting RESTATEMENT (SECOND) OF TORTS § 323 (AM. LAW INST. 1965)). While the court in *Wissel* found that § 323 had “not been expressly adopted by the Ohio Supreme Court,” it allowed its application as the Ohio Supreme Court had “cited [it] with approval by the court in at least two cases.” *Id.* at 465 (citing *Seley v. Searle & Co.*, 423 N.E.2d 831, 839 n.7 (Ohio 1981); *Briere v. Lathrop Co.*, 258 N.E.2d 597, 602 (Ohio 1970)). To date, the Ohio Supreme Court has not spoken definitively on § 323. See *Conte v. General Housewares Corp.*, 215 F.3d 628, 636 n.5 (6th Cir. 2000). The Ohio Court of Appeals recently analyzed a negligence claim based on § 323 in *Wheatley v. Marietta Coll.*, 48 N.E.3d 587, 617–18 (Ohio Ct. App. 2016), suggesting its continued applicability in Ohio courts.

40. *Wissel*, 605 N.E.2d at 465.

41. *Id.*

42. *Id.*

43. *Id.* at 465–66.



However, the Ohio appellate court was not willing to let the OHSAA off the hook completely. In a notable instance of the judges taking the defendants to task in their decision, the court made it clear that they took issue with the OHSAA attempting to avoid owing a duty of care to their student-athletes, stating that it was “odd and disconcerting that organizations such as the appellees, which undertake to enhance the quality and safety of high school football games, disclaim that they do so to provide a service to the athletes who participate in the games.”<sup>44</sup>

The court also found it “similarly incongruous” that the defendant athletic association, “whose rules govern the contest and whose discussions determine the type of athletic equipment that the athletes are provided,” do not owe a “duty of reasonable care in their activities.”<sup>45</sup> According to the court, just because organizations like the OHSAA “purport to act gratuitously and for noble purposes,” they are not automatically “absolve[d] of a legal duty of care towards the athletes.”<sup>46</sup>

As such, the court found that while section 323 did not apply to the OHSAA’s actions towards the plaintiff high school student-athlete, this did not completely absolve the OHSAA from owing a duty of care. Instead, the court found that the plaintiffs simply used the wrong section of the Restatement.<sup>47</sup>

According to the court, because the plaintiffs brought up section 323 in trying to pin a duty of care on the OHSAA, it must “necessarily bring into consideration section 324A, the companion provision to section 323.”<sup>48</sup> Section 324A of the Restatement (Second) of Torts provides that:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) *he has undertaken to perform a duty owed by the other to the third person, or*

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44. *Id.* at 465.

45. *Id.*

46. *Id.*

47. *See id.* at 465–66.

48. *Id.* at 466.

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.<sup>49</sup>

Here, the court drew a line between the OHSAA and the plaintiff to find a duty of care under section 324A(b) of the Restatement.<sup>50</sup> The court found that the plaintiff was owed a general duty of care by his high school “in the conduct of its football program.”<sup>51</sup> In turn, the school “allowed the conduct of its football games to be largely governed by the policies and decisions” of the OHSAA.<sup>52</sup> As the association was “cognizant of the role they served and the degree to which their decisions were adopted,” a duty of care could thus be applied under section 324A(b).<sup>53</sup>

This connection made from the plaintiff’s school to the OHSAA was never tested further in this case, as the plaintiff and the OHSAA settled a few months later without an Ohio Supreme Court ruling on the subject or a remanded decision in the trial courts.<sup>54</sup> And oddly, the *Wissel* court’s novel application of section 324A(b) has been rarely cited, and has yet to be cited by any courts in the sports context.<sup>55</sup> Thus, for the next twenty-five years, the question of whether an overseeing body like the OHSAA could be responsible for a student-athlete’s injuries under section 324A would remain unsettled.

### C. Defining Overseeing Athletic Organizations

*Wissel* is illustrative of when high school athletic associations like the OHSAA can be held to a duty of care due to their influence

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49. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 324A (AM. LAW INST. 1965) (emphasis added)).

50. *See id.* at 466–67.

51. *Id.* at 466.

52. *Id.*

53. *Id.*

54. *See Wissel v. Ohio High Sch. Athletic Ass’n*, 595 N.E.2d 943 (Ohio 1992) (dismissing plaintiff’s appeal to Supreme Court of Ohio on joint application).

55. *See, e.g., Stevens v. Jeffrey Allen Corp.*, 722 N.E.2d 533, 538 (Ohio Ct. App. 1997) (citing *Wissel* to show that proof of any subsection of § 324A—including subsection (b)—is sufficient to impose liability). Notably, the Third Circuit cited *Wissel* in the context of showing its view that the Pennsylvania Supreme Court would find that a college owed its student-athlete a duty of care, but did not cite § 324A and in fact incorrectly stated that the *Wissel* court affirmed the trial court’s summary judgment ruling. *See Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1368–69 (3d Cir. 1993). Interestingly, this is not the only time that a court has misinterpreted the final ruling of *Wissel*. *See Alder v. Bayer Corp.*, 61 P.3d 1068, 1078 (Utah 2002) (citing *Wissel* as illustrative of § 324A but incorrectly stating the case held “under section 324A that state high school athletic association was not liable to athlete injured in football game”).

on those who are directly responsible for those athletes. But many other overseeing athletic organizations fit this same description.

In *Wissel*, the court found that the OHSAA did not create risk management protocols for member schools but did strongly influence their adoption.<sup>56</sup> The Ohio Court of Appeals took particular note of this, stating that since the plaintiff's school "allowed the conduct of its football games to be largely governed by the policies and decisions" and the OHSAA was "cognizant of the role they served and the degree to which their decisions were adopted," the OHSAA's influential policy-making role may constitute a voluntary undertaking required to institute a duty of care under section 324A(b) of the Restatement.<sup>57</sup>

Nearly twenty-five years after *Wissel* was decided, most high school athletic associations still serve similar roles as the OHSAA. The OHSAA continues to implement risk management policies that member schools must follow.<sup>58</sup> For example, the 2016–17 OHSAA football regulations includes rules regarding when practices with pads are and are not allowed, limitations for practicing in extreme heat conditions and inclement weather, and gameplay limitations for younger students.<sup>59</sup> Penalties for not following these bylaws can include suspension, forfeiture of games, forfeiture of championship rights, probation, fines up to \$10,000, or any other penalties "as the Commissioner deems appropriate."<sup>60</sup>

Other state high school athletic associations, including Alabama, Alaska, Arizona, Colorado, New York, and Washington have similar policies.<sup>61</sup> Dozens of other states, including the OHSAA,

56. See *Wissel*, 605 N.E.2d at 465.

57. *Id.* at 466.

58. See OHIO HIGH SCH. ATHLETIC ASS'N, BYLAWS, 38 (May 2016) [hereinafter "OHSAA BYLAWS"], available at <http://ohsaa.org/Portals/0/About-the-OHSAA/Bylaws.pdf> [<https://perma.cc/9PK4-ERLL>] ("Interscholastic competition shall be conducted using contest rules adopted by the [OHSAA] Board of Directors. Modifications or changes in sport rules are not permitted except those provided in the rule book and approved by the Board of Directors.")

59. See OHIO HIGH SCH. ATHLETIC ASS'N, FOOTBALL GENERAL REGS, 115–16, [hereinafter "OHSAA FOOTBALL GENERAL REGULATIONS"], available at <http://ohsaa.org/Portals/0/Sports/Football/ftregs.pdf> [<https://perma.cc/4678-2449>]. See OHSAA Lightning & Inclement Weather Policy, OHIO HIGH SCH. ATHLETIC ASS'N, <http://ohsaa.org/sports/inclementweatherpolicy> [<https://perma.cc/SC6L-5X96>].

60. OHSAA BYLAWS, *supra* note 58, at 11.

61. See ALABAMA HIGH SCH. ATHLETIC ASS'N, 2016-2017 SPORTS, 91, available at <http://www.ahsaa.com/Portals/0/Publications/2016-17/Online%20version%202016-17%20Handbook.pdf?ver=2017-02-15-151143-537> [<https://perma.cc/H6XV-CEVC>]. See ALASKA SCH. ACTIVITIES ASS'N, 2016-17 ASAA HANDBOOK, 36, 43, [hereinafter ASAA HANDBOOK] available at <http://asaa.org/wp-content/uploads/handbook/1617handbook/asaa/complete/2016-2017-ASAA-Handbook.pdf> [<https://>

also adopted the recommendations of the National Federation of State High School Associations (NFHS) and implemented rules requiring physical examinations and acclimation periods and restricting preseason and in-season practices in order to minimize the risk of concussions.<sup>62</sup> Because these private associations have some measure of control (either through imposed rules and regulations or by strong recommendations) over rules regarding player safety, this rule-making authority would thus create a duty of care if other courts were to follow section 324A(b) as applied by the *Wissel* court.<sup>63</sup>

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perma.cc/M4NG-3Y32]. Alaska also has various “mandatory” rules regulating participation, including regulations prohibiting baseball student-athletes from pitching more than ten innings in a three-day period prohibiting basketball and football student-athletes from participating in more than six quarters of play per day. *See id.* at 120, 124, 143. *See* ARIZONA INTERSCHOLASTIC ASS’N, AIA BYLAWS, 76, *available at* <http://aiaonline.org/files/73/article-23-football.pdf> [https://perma.cc/KN7E-KGKA]. *See* COLORADO HIGH SCH. ACTIVITIES ASS’N, CONSTITUTION OF THE COLORADO HIGH SCH. ACTIVITIES ASS’N § 3310, *available at* <http://rcasey.wpengine.netdna-cdn.com/wp-content/uploads/bylaws/2016-17-bylaws.pdf> [https://perma.cc/LYQ8-4JLM]. *See* NEW YORK STATE PUBLIC HIGH SCH. ATHLETIC ASS’N, HIGH SCH. SPORTS STANDARDS, *available at* [http://www.nysphsaa.org/Portals/0/PDF/Handbook/2016-17%20Handbook/Sports%20Standards\\_1.pdf](http://www.nysphsaa.org/Portals/0/PDF/Handbook/2016-17%20Handbook/Sports%20Standards_1.pdf) [https://perma.cc/LYL7-DF76]. *See* WASHINGTON INTERSCHOLASTIC ACTIVITIES ASS’N, SPECIFIC SPORT RULES AND REGS., 60–62, *available at* [http://www.wiaa.com/ConDocs/Con1629/Specific%20Sport-Activity%20Rules%20\(55-69\).pdf](http://www.wiaa.com/ConDocs/Con1629/Specific%20Sport-Activity%20Rules%20(55-69).pdf) [https://perma.cc/H5NH-T68D].

62. *See* Press Release, Ohio High Sch. Athletic Ass’n, OHSAA Adopts National Recommendations for Minimizing Concussion Risks in Football Practice (July 13, 2015), *available at* <http://ohsaa.org/Portals/0/Sports/Football/FootballPracticeGuidelines.pdf> [https://perma.cc/2QPD-XKRW]. *See also* 2016–17 ASAA HANDBOOK, 146–47, *supra* note 61 (stating ASAA “strongly recommends” to its member districts and schools to adopt the NFHS recommendations); Press Release, Fla. High Sch. Athletic Ass’n, FHSAA Concussion Action Plan (June 2013), *available at* [http://www.fhsaa.org/sites/default/files/orig\\_uploads/health/pdf/fhsaa\\_concussion\\_action\\_plan\\_2013.pdf](http://www.fhsaa.org/sites/default/files/orig_uploads/health/pdf/fhsaa_concussion_action_plan_2013.pdf) [https://perma.cc/J2ZF-CA7M].

63. This would not apply to high school athletic associations which are by statute given state legislative power, because these associations would be protected by sovereign immunity principles. *See* *Miulli v. Florida High Sch. Athletic Ass’n*, 998 So. 2d 1155, 1157 (Fla. Dist. Ct. App. 2008).

Section 1006.20 of the Florida Statutes, titled ‘Athletics in public K-12 schools,’ provides FHSAA with the exclusive authority to adopt bylaws relating to student participation in interscholastic athletic teams. Nothing in the statute indicates that the Florida Legislature intended to create a private cause of action for individuals based upon the FHSAA’s failure to enact or enforce bylaws.

*Id.* *Pierscionek v. Ill. High Sch. Ass’n*, 2015 Ill. Cir. LEXIS 24, at \*5–\*6 (Ill. Cir. Ct. Oct. 27, 2015) (finding that “no recognized cause of action for negligence by an individual against a governmental entity” and that “‘negligent rulemaking’ is not a cause of action” against such government entities). *See also* *Isler v. N.M. Activities Ass’n*, 893 F.Supp. 2d 1145, 1155–56 (D.N.M. 2012) (ruling that governing high school athletic association in New Mexico is a governmental entity for purposes of New Mexico Tort Claims Act and thus is protected by sovereign immunity); *Yanero v. Davis*, 65 S.W.3d 510, 530 (Ky. 2001) (finding that since Kentucky High School

Other amateur athletic associations like the National Collegiate Athletic Association (NCAA) and national Olympic sport governing bodies also fit these criteria.<sup>64</sup> While Article 2 of the NCAA bylaws pushes responsibility to “each member institution to protect the health of, and provide a safe environment for, each of its participating student-athletes,” the NCAA and its conferences have a number of safety provisions in their bylaws that member institutions must follow.<sup>65</sup> If these rules are not followed, the NCAA Committee on Infractions has the power to impose sanctions on the responsible individuals and schools.<sup>66</sup>

For example, Article 3.2.4.18 of the NCAA Bylaws requires member institutions to submit a Concussion Safety Protocol to the NCAA Concussion Safety Protocol Committee each year, and the bylaw also prescribes a number of different requirements for what

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Athletic Association is “an agent of the Kentucky Board of Education and, in that capacity, functions the same as if the Board had designated an individual . . . to manage interscholastic athletics . . . the KHSAA is entitled to the qualified official immunity available to officers and employees of the state”); *Univ. Interscholastic League v. Sw. Officials Ass’n*, 319 S.W.3d 952, 962 (Tex. App. 2010).

[W]e are dealing here with an entity that is required by statute to implement state education policies, granted rulemaking and enforcement power over such policies, subjected to extensive oversight from the legislative and executive branches, and statutorily classified as a component part of a governmental unit that was created by the Texas Constitution. For these reasons, we hold that the UIL is a governmental unit subject to sovereign immunity.

*Id.* Other state courts, including Iowa and Ohio, have definitively held that high school athletic associations are not sovereign entities. *See Coughlon v. Iowa High Sch. Athletic Ass’n*, 150 N.W.2d 660, 662 (Iowa 1967).

Even though it be conceded this unincorporated association is not a legal entity separate and apart from its members it is still a matter of common knowledge that various parochial schools, not enjoying governmental immunity, are members of and participate in the affairs of defendant organization. This alone would preclude any possible immunity by delegation or representation.

*Id.* *Wissel v. Ohio High Sch. Athletic Ass’n*, 605 N.E.2d 458, 462 (Ohio Ct. App. 1992) (finding that sovereign immunity is not applicable to a “quasi governmental body” like a high school athletic association).

64. Four of the cases discussed in this Article involve the NCAA as a defendant. Two of the cases discussed in this Article involve national Olympic governing bodies as a defendant.

65. NAT’L COLLEGIATE ATHLETIC ASS’N, 2016-17 DIVISION I MANUAL, art. 2.2.3 (2016) [hereinafter “2016–17 NCAA MANUAL”], available at <http://www.ncaapublications.com/productdownloads/D117.pdf> [<https://perma.cc/M6P3-MBBE>]. *See id.* at art. 19.01.2 (“The infractions program shall hold institutions, coaches, administrators and student-athletes who violate the NCAA constitution and bylaws accountable for their conduct, both at the individual and institutional levels.”).

66. *See Enforcement Process: Investigations*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://www.ncaa.org/enforcement/enforcement-process-investigations> [<https://perma.cc/3R4T-5Z9A>].

must be in that concussion safety plan.<sup>67</sup> The NCAA also requires football strength and conditioning coaches to be certified in first aid and cardiopulmonary resuscitation and forces member institutions to ensure that sports medicine staff members present during workouts have the authority to cancel or modify workouts at any time for health and safety reasons.<sup>68</sup>

Furthermore, the NCAA also has a Committee on Competitive Safeguards and Medical Aspects of Sports, whose duties include “(a) [p]romot[ing] and sponsor[ing] research to address relevant health and safety issues; (b) [p]romot[ing] education to enhance the health and safety of student-athletes . . . (e) [f]acilitat[ing] outreach activities to enhance student-athlete health and safety; and (f) [p]rovid[ing] a health and safety perspective on relevant legislation and policy.”<sup>69</sup> The NCAA also makes it clear on its website that its safety guidelines and playing rules are designed “to minimize risks and give student-athletes the opportunity to enjoy a healthy career.”<sup>70</sup>

NCAA conferences also have safety rules that would hold them to this definitional standard. At the urging of the NCAA, most NCAA Division I conferences have created rules and policies prohibiting court- and field-storming at basketball and football games to protect players and coaches who may still be present on the court or field.<sup>71</sup> The NCAA also has a similar rule prohibiting court- and field-storming during its Championship events.<sup>72</sup>

Many national Olympic sports governing bodies also hold their member institutions to similar standards. For example, USA Track and Field (“USATF”) sanctions competitive track and field, long-

67. See 2016–17 NCAA MANUAL, *supra* note 65, at art. 3.2.4.18.

68. See *id.* at art. 13.11.3.7.4; 13.11.3.8.2; 17.1.6; 17.1.7.2.1.4; 17.10.6.3.

69. *Id.* at art. 21.2.2.2.

70. Well-Being, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/health-and-safety> [<https://perma.cc/R2MU-7KRQ>] (last visited May 30, 2017).

71. See Joshua D. Winneker & Sam C. Ehrlich, *The Calm Before the (Court) Storm: Potential Fan Liability and the NCAA's Necessary Response*, 27 MARQ. SPORTS L. REV. 425, 433–34 (2017); Marcus Misinec, *When the Game Ends, the Pandemonium Begins: University Liability for Field-Rushing Injuries*, 12 SPORTS L.J. 181 (2005). For example, the Southeastern Conference (SEC) has the authority to impose fines of up to \$250,000 to member institutions who allow court storming. See David Ching, *Fines Could Reach \$250,000 for Fans Storming Competition Area*, ESPN (May 29, 2015), [http://espn.go.com/college-football/story/\\_/id/12977211/sec-passes-tougher-fines-court-storming](http://espn.go.com/college-football/story/_/id/12977211/sec-passes-tougher-fines-court-storming) [<https://perma.cc/D82X-Y25E>].

72. See Winneker & Ehrlich, *supra* note 71, at 434; Marc Tracy, *Storming the Court, a Cherished Rite, Can Be a Danger*, N.Y. TIMES (Mar. 4, 2016), [http://www.nytimes.com/2016/03/05/sports/ncaabasketball/storming-the-court-a-cherished-rite-can-be-a-danger.html?\\_r=0](http://www.nytimes.com/2016/03/05/sports/ncaabasketball/storming-the-court-a-cherished-rite-can-be-a-danger.html?_r=0) [<https://perma.cc/LUA8-KQ3A>].

distance running, and race walking events in the United States.<sup>73</sup> According to their website, a USATF sanction “is also a contract, which evidences the event’s commitment to follow national and international rules and regulations of the sport and to provide a safe environment for the participants and spectators.”<sup>74</sup> Such regulations include establishing that “proper medical supervision will be provided for athletes who will participate in the competition; and . . . proper safety precautions have been taken to protect the personal welfare of the athletes and spectators at the competition.”<sup>75</sup>

At the same time, the U.S. Olympic Committee would likely not fit into this category, as they do not promulgate rules for individual sports and instead leave it to each sport’s national governing body to create, enforce, and adjudicate safety rules.<sup>76</sup> Likewise, in-

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73. See Online Event Sanctioning, USA TRACK & FIELD, <http://www.usatf.org/Products—Services/Event-Sanctions.aspx> [<https://perma.cc/WTF7-8876>] (last visited May 30, 2017).

74. *Id.*

75. USA TRACK & FIELD, 2016 GOVERNANCE HANDBOOK, 96 (2016). As shown in *Lanni v. NCAA*, 42 N.E.3d 542, 544 (Ind. Ct. App. 2015), the U.S. Fencing Association has similar safety rules, including a requirement for a pipe-and-drape barrier to protect spectators that was not implemented in *Lanni*. See *infra* notes 110–128 and accompanying text. See also USA FENCING, RULES FOR COMPETITION, 8–9 (Aug. 1, 2016), available at <http://assets.ngin.com/attachments/document/0105/8552/2016-USA-Fencing-Rules.pdf> [<https://perma.cc/VHL4-WXAE>]. Other national Olympic sport governing bodies do not have these requirements for sanctioned events. For example, for its sanctioned events USA Water Polo provides medical insurance coverage, requires participants to sign a waiver, and requires that competitions follow certain playing rules, but they do not require adherence to any health and safety rules or guidelines aside from a suspended game policy requiring that games be halted in unsafe weather conditions. See USA WATER POLO, EVENT SANCTION TERMS AND CONDITIONS, available at [http://grfx.cstv.com/photos/schools/uswp/genrel/auto\\_pdf/2016-17/misc\\_non\\_event/EventSanction\\_Terms\\_Conditions.pdf](http://grfx.cstv.com/photos/schools/uswp/genrel/auto_pdf/2016-17/misc_non_event/EventSanction_Terms_Conditions.pdf) [<https://perma.cc/NW8P-N72H>]; Suspended Games, USA WATER POLO, <http://www.usawaterpolo.org/resources/suspended-games.html> [<https://perma.cc/QX4Y-SXC9>] (last visited May 30, 2017). In fact, on the “Safety” page of USA Water Polo’s website, the organization provides health guideline posters that merely “can” be posted at practices and game facilities or distributed to club members. See Safety, USA WATER POLO, <http://www.usawaterpolo.org/resources/head-injuries.html> [<https://perma.cc/VE7G-J9UC>] (last visited May 30, 2017). It is likely not a coincidence that USA Water Polo was recently a successful defendant in recent litigation where the mother of an athlete who suffered a concussion at one of these sanctioned events tried to hold the governing body to a duty of care based on “the general existence of a return-to-play policy.” *Mayall v. USA Water Polo*, No. 8:15-cv-00171-AG-KES, 2016 U.S. Dist. LEXIS 115047, at \*11 (C.D. Cal. 2016).

76. See UNITED STATES OLYMPIC COMMITTEE, BYLAWS OF THE U.S. OLYMPIC COMMITTEE, § 9.12, available at <http://www.teamusa.org/~media/Bios/USOC-Bylaws-effective-June-30-2016.pdf> [<https://perma.cc/NY6G-5P9K>] (“A decision concerning a safe sport rule violation adjudicated by the independent safe sport organization designated by the corporation to investigate and resolve safe sport violations shall not be reviewable through, or the subject of, these complaint procedures.”).

ternational organizations like international sport governing bodies (including Fédération Internationale de Football Association) and the International Olympic Committee would expect to have suits against them dismissed for a lack of personal jurisdiction.<sup>77</sup>

Also not held to this definition are professional sports leagues. Most professional sports leagues have a collective bargaining agreement (CBA).<sup>78</sup> Under § 301 of the Labor Management Relations Act, the rights and duties of labor and management that are created by collective bargaining “should ordinarily trump common law remedies.”<sup>79</sup> This preemption generally includes collectively bargained provisions involving health and safety.<sup>80</sup>

In fact, a California United States District Court analyzing this question in 2014 found “no case law that has imposed upon a sports league a common law duty to police the health-and-safety treatment of players by the clubs.”<sup>81</sup> The court held that to find out whether a professional sports leagues operating under a CBA breached duties to protect their athletes, the court “would need to consult, construe, and apply what was required by the CBA provision” involving the health and safety rule under dispute.<sup>82</sup>

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77. *See* Mehr v. US Soccer, et al., 115 F. Supp. 3d 1035, 1046–54 (N.D. Cal. 2015) (granting FIFA’s motion to dismiss for lack of personal jurisdiction on both general and specific jurisdiction theories).

78. *See, e.g.*, MAJOR LEAGUE BASEBALL AND MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, 2012-2016 BASIC AGREEMENT, *available at* [http://mlb.mlb.com/pa/pdf/cba\\_english.pdf](http://mlb.mlb.com/pa/pdf/cba_english.pdf) [<https://perma.cc/4ZT7-XENB>]; NAT’L FOOTBALL LEAGUE AND NAT’L FOOTBALL LEAGUE PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT, *available at* [https://nflpaweb.blob.core.windows.net/media/Default/PDFs/General/2011\\_Final\\_CBA\\_Searchable\\_Bookmarked.pdf](https://nflpaweb.blob.core.windows.net/media/Default/PDFs/General/2011_Final_CBA_Searchable_Bookmarked.pdf) [<https://perma.cc/JL7P-VQA5>]; MAJOR LEAGUE SOCCER AND MAJOR LEAGUE SOCCER PLAYERS UNION, COLLECTIVE BARGAINING AGREEMENT BETWEEN MAJOR LEAGUE SOCCER AND MAJOR LEAGUE SOCCER PLAYERS UNION, *available at* <https://www.mlssplayers.org/images/Collective%20Bargaining%20Agreement%20-%20February%201,%202015.pdf> [<https://perma.cc/85FC-KDT7>]; Budd Bailey, *NLL, Players Agree to Seven-Year Deal*, BUFFALO NEWS (Oct. 22, 2013), <http://buffalonews.com/2013/10/22/nll-players-agree-to-seven-year-deal/> [<https://perma.cc/A7YK-N3LV>] (reporting on collective bargaining agreement between National Lacrosse League and the Professional Lacrosse Players’ Association).

79. 29 U.S.C. § 185. *See* Dent v. NFL, No. C 14-02324 WHA, 2014 U.S. Dist. LEXIS 174448, at \*6–\*7 (N.D. Cal. Dec. 17, 2014). This could conceivably change, as this case is currently under review in the Ninth Circuit Court of Appeals. The Ninth Circuit heard oral arguments on December 15, 2016. Oral Arguments. Dent v. NFL, No. 15-15143 (9th Cir. Dec. 15, 2016) [http://www.ca9.uscourts.gov/media/view\\_video.php?pk\\_vid=0000010751](http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010751) [<https://perma.cc/9APM-Z7PW>].

80. *See* Dent, 2014 U.S. Dist. LEXIS 174448, at \*12 (“In evaluating any possible negligence by the NFL as alleged in the operative pleading, it would be necessary to take into account what the NFL has affirmatively done to address the problem, not just what it has not done.”).

81. *Id.* at \*11.

82. *Id.* at \*22.



Therefore, any negligence claim by a professional athlete covered by a CBA would likely be preempted by § 301. For this reason, the theories advanced by this Article will be limited to amateur sports.<sup>83</sup>

### III. RECENT NEGLIGENCE CASES INVOLVING OVERSEEING ATHLETIC ORGANIZATIONS AS DEFENDANTS

For almost twenty-five years after *Wissel*, no published decisions attempted to solve the question as to whether these overseeing athletic organizations owe their athletes a duty of care.<sup>84</sup> But in a sixteen-month span between July 2015 and December 2016, six opinions have all dealt with this very issue and have reopened the debate over overseeing athletic organization liability to athletes under their care. These opinions will be discussed in this section.

#### A. *Mehr v. Fédération Internationale de Football Association*

On August 27, 2014, a proposed class action lawsuit was filed by seven soccer players alleging Fédération Internationale de Football Association (FIFA), U.S. Soccer, the U.S. Youth Soccer Organization (“USYSA”), the California Youth Soccer Association (“CYSA”), the National Association of Competitive Soccer Clubs (“U.S. Club Soccer”), and the American Youth Soccer Organization (“AYSO”) had each failed to provide adequate concussion management to reduce the risk of preventable injuries resulting from concussions and repetitive heading.<sup>85</sup> In this class action, the plaintiffs asked the court to “compel defendants to adopt and enforce rules that would reduce” the risk of concussions in youth soccer.<sup>86</sup>

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83. This Article does not discuss the possibility of a duty of care owed by professional sports organizations whose athletes operate as independent contractors, not employees. See generally Mookie Alexander, *TJ Dillashaw: UFC ‘Treat Us like Employees, but They Don’t Give Us Benefits like Employees’*, SBATION (July 16, 2016), <http://www.bloodyelbow.com/2016/7/16/12206006/tj-dillashaw-ufc-treat-us-like-employees-but-they-dont-give-us-employee-benefits-mma-news> [https://perma.cc/74GL-S34K]. This is an interesting question that could be the subject of another article, though in most cases § 324A would likely not be necessary since such organizations have direct oversight over events and the athletes.

84. A 2008 Florida District Court of Appeals decision touched on this issue but was wholly decided on the Florida High School Athletic Association’s duties as a government legislative organization, not as a private athletic association. See *Miulli v. Florida High Sch. Athletic Ass’n*, 998 So. 2d 1155 (Fla. Dist. Ct. App. 2008). Another 2015 Illinois state court decision was dismissed on similar grounds. See *Pierscionek v. Illinois High Sch. Ass’n*, No. 14-CH-19131, 2015 Ill. Cir. LEXIS 24 (Ill. Cir. Ct. Oct. 27, 2015). See *supra* note 63 and accompanying text.

85. See *Mehr v. US Soccer*, et al., 115 F. Supp. 3d 1035, 1043 (N.D. Cal. 2015).

86. *Id.* at 1044 (citing Plaintiffs’ Complaint).

While the claims against FIFA, a Swiss organization, were quickly dismissed based on a lack of personal jurisdiction, the court analyzed the plaintiffs' negligence claims based on the seven defendants' motion to dismiss for a failure to state a claim.<sup>87</sup> For their negligence claim, the plaintiffs argued that “‘each defendant’ acted negligently in its position as a regulatory body for soccer and soccer players,” and U.S. Soccer, the governing body for soccer in the United States, “knew that through the power of the Laws of the Game they had the power to direct and influence how the rest of the defendants treat concussion management issues.”<sup>88</sup> By “failing to promulgate rules and regulations to adequately address the dangers of repeated concussions and accumulation of subconcussive hits,” the plaintiffs alleged that U.S. Soccer breached a duty of care owed to the plaintiffs as “[i]t was reasonable and foreseeable to FIFA and U.S. Soccer that their failures would flow downstream to the Rules and Laws of the Game enacted by other organizations, including the other [d]efendants in this action.”<sup>89</sup>

Here, the court found that the plaintiffs had pled “no facts showing that any defendant breached any legal duty of care owed to any plaintiff” and dismissed the complaint.<sup>90</sup> Citing the controlling sports negligence case in California, *Knight v. Jewett*,<sup>91</sup> the court held that there is “no duty to prevent risks that are ‘inherent in the sport itself,’ and that the duty owed by a defendant depends on the defendant’s role or relationship to the sport.”<sup>92</sup> Further, the court noted that the plaintiffs “have acknowledged that ‘injuries’ are a ‘part of soccer’” and that heading, which the plaintiffs claim causes “at least 30% of the concussions in soccer[,] . . . is ‘a legal and encouraged maneuver’ in soccer.”<sup>93</sup>

But beyond this, the court also noted the plaintiffs’ argument for negligence based on the voluntary undertaking doctrine under the theory that, by “failing to promulgate rules and regulations to adequately address the dangers of repeated concussions and accumulation of subconcussive hits,” the defendants breached a duty

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87. *See id.* at 1046–55 (discussing motion to dismiss for lack of personal jurisdiction); *id.* at 1061–62 (discussing motion to dismiss for failure to state a claim). *See also supra* note 77 and accompanying text.

88. *Mehr*, 115 F. Supp. 3d at 1062 (quoting Plaintiffs’ Complaint) (internal quotation marks omitted).

89. *Id.* (quoting Plaintiffs’ Complaint).

90. *Id.* at 1063.

91. 834 P.2d 696 (Cal. 1992).

92. *Mehr v. US Soccer, et al.*, 115 F. Supp. 3d 1035, 1063 (N.D. Cal. 2015) (citing *Knight*, 834 P.2d at 708).

93. *Id.* at 1064 (quoting Plaintiffs’ Complaint).

of care owed to the plaintiffs.<sup>94</sup> Here, the court conducted a claim for each defendant based on the plaintiffs' allegations and each defendant's specific conduct and defenses.<sup>95</sup>

For U.S. Soccer, the plaintiffs asserted that while the governing body had "created a 'Concussion Management Program' to provide education, evaluation, and management of concussions among 'national team players,'" this was inadequate due to their failure to "adopt the consensus guidelines promulgated by the 'International Conferences on Concussion in Sport'" and their failure to "mandate its Concussion Management Program beyond elite athletes to all participants."<sup>96</sup> According to the plaintiffs, U.S. Soccer had voluntarily assumed a duty of care because it "has undertaken broad responsibility for setting and enforcing the Laws of the Game, and because it has the power to direct and influence how the rest of the defendants treat concussion management issues."<sup>97</sup> However, the court found this argument insufficient to survive a motion to dismiss, as creating a Concussion Management Plan for its national team players did not create a duty to the rest of the sport, and thus the plaintiffs had "identified no facts in their opposition that support a claim that U.S. Soccer has specifically undertaken to take actions to eliminate risks inherent in the sport of soccer or to reduce the risk of injury from improper concussion management."<sup>98</sup>

For the USYSA, the plaintiffs argued that the organization's failure to "adopt any consensus guidelines (including its own protocol) for members or tournaments other than the Championship Series tournament" was a breach of duty to participants in USYSA events aside from the Championship Series tournament.<sup>99</sup> Further, the plaintiffs argued that even for the Championship Series tournament, the concussion management protocols adopted "fail[ed] to adopt the consensus guidelines" and the organization "at most, simply provide[d] informational links on its website" in substitute for an adequate concussion management plan.<sup>100</sup> Despite this inconsistency in applied policy, the court found that these facts were insufficient to support a voluntary undertaking claim, as the plaintiffs did not plead facts sufficient to show that the USYSA had "specifically undertaken to take actions to eliminate risks inherent in the

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94. *Id.* at 1064–65 (citing Plaintiffs' Complaint).

95. *See id.* at 1065–70.

96. *Id.* at 1065–66 (citing Plaintiffs' Complaint).

97. *Id.* at 1066 (citing Plaintiffs' Complaint).

98. *Id.*

99. *Id.* at 1066–67 (citing Plaintiffs' Complaint).

100. *Id.* at 1067 (citing Plaintiffs' Complaint).

sport of soccer” or “specifically assumed an obligation to change the Laws of the Game or other unspecified rules pertaining to the game, or to restrict heading.”<sup>101</sup>

For the AYSO, the plaintiffs argued that the organization had only adopted a concussion management policy in 2009 when they implemented a “‘national policy statement’ regarding concussion awareness and safety” and “partnered with the [Center for Disease Control] to create a Concussion Action Plan for coaches.”<sup>102</sup> The plaintiffs also argue that the AYSO’s policy was still “deficient because it fails to adopt the consensus ‘best practices’ of the International Conferences.”<sup>103</sup> The court found that these alleged actions were insufficient to support a voluntary undertaking claim, as the plaintiffs “identified no facts . . . that support a claim that AYSO has specifically undertaken to adopt or implement the consensus guidelines . . . or to take actions to eliminate risks inherent in the sport of soccer or to reduce the risk of injury from improper concussion management.”<sup>104</sup>

Finally, for U.S. Club Soccer the plaintiffs alleged that the organization had “failed to adopt any consensus guidelines promulgated by the International Conferences on Concussion in Sport” and the extent of their concussion management policy was “referenc[ing] a link to its concussion guidelines and provides links to informational materials” on its website.<sup>105</sup> Here, the court noted that U.S. Soccer only argued based on the inherent risk to the sport argument, and did not “specifically argue that plaintiffs have not alleged facts showing that it assumed a duty to enforce the recommendations in the Consensus Statements or to limit risks inherent in the sport of soccer.”<sup>106</sup> However, the court still found that the plaintiffs did not plead facts sufficient to support a claim of a voluntary undertaking by this defendant, as they had “identified no facts in their opposition that support a claim that U.S. Club Soccer has specifically undertaken to adopt or implement the consensus guidelines drafted by the International Conferences on Sport,” or to take any action to eliminate inherent risks of soccer or to change the

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101. *Id.*

102. *Id.* (citing Plaintiffs’ Complaint).

103. *Id.* (citing Plaintiffs’ Complaint).

104. *Id.* at 1068 (citing Plaintiffs’ Complaint).

105. *Id.* (citing Plaintiffs’ Complaint). Not all of the representative plaintiffs sued all of the defendants. Here, only Rachel Mehr, the lead plaintiff, asserted claims against US Club Soccer. *Id.*

106. *Id.* at 1068–69.

Laws of the Game to better manage the risk of harm from concussions.<sup>107</sup>

Based on these analyses for each defendant, the court dismissed all of the negligence claims.<sup>108</sup> The court did not cite section 324A nor consider any arguments based on that theory.<sup>109</sup>

### B. *Lanni v. NCAA*

In March 2010, Lydia Lanni, a fencing student-athlete for Wayne State University, competed in a fencing competition at Notre Dame University.<sup>110</sup> After the conclusion of one of her bouts, she stood in a designated waiting area next to a fencing strip where another bout was taking place.<sup>111</sup> While standing in this designated area, Lanni was struck by one of the other fencer's sabres across the bridge of her nose, resulting in a severe injury to her eye.<sup>112</sup>

In February 2012, Lanni sued the NCAA, the United States Fencing Association ("USFA") and Notre Dame for negligence.<sup>113</sup> While the competition was not run specifically by the NCAA, Lanni charged that the NCAA, acting through its "agents, including, but not limited to[,] the NCAA Men's and Women's Fencing Committee and regional advisory committees, were responsible . . . for the operations" of the competition.<sup>114</sup> She further charged that the NCAA was negligent by "failing to undertake hazard and risk analys[e]s" before the competition and by failing to supervise qualified officials and the competition hosts.<sup>115</sup> The court also pointed out that a "Visiting Team/Club Guide" published by Notre Dame

107. *Id.* at 1069.

108. *See id.* at 1071. The judge did dismiss the voluntary undertaking claims with leave to amend "to the extent that plaintiffs can allege facts as to each defendant showing that the defendant voluntarily assumed a duty with respect to a specific plaintiff or plaintiffs." *Id.* Before any amended complaint was filed, however, the dismissal was appealed to the Ninth Circuit Court of Appeals, and subsequently voluntarily dismissed by joint stipulation of the parties about one month after the notice of appeal was filed. USCA Mandate at 1, *Mehr v. Fédération Intern. de Football Ass'n*, 115 F. Supp. 3d 1035, 1043 (N.D. Cal. 2015) (No. 14-cv-3879-PJH).

109. Nor did the court cite the California Supreme Court cases that adopted § 324A as California law. *See Artiglio v. Corning Inc.*, 957 P.2d 1313, 1314 (Cal. 1998) ("California courts, including this court, have long recognized section 324A's negligent undertaking theory, the general viability which is not at issue."); *Paz v. State*, 994 P.2d 975, 977 (Cal. 2000) ("[T]he section 324A theory of liability . . . is a settled principle firmly rooted in the common law of negligence.").

110. *See Lanni v. NCAA*, 42 N.E.3d 542, 545–46 (Ind. App. Ct. 2015).

111. *See id.* at 546.

112. *See id.*

113. *See id.*

114. *Id.* at 546–47 (quoting plaintiff's complaint).

115. *Id.*

displayed the NCAA logo, and that the competition scoresheets and rosters carried the NCAA logo.<sup>116</sup>

In arguing that the NCAA owed her a duty of care, Lanni pointed to the NCAA Constitution, which states that NCAA competition rules “shall apply to all teams in sports recognized by the member institutions as varsity intercollegiate sports.”<sup>117</sup> She also referred the court to the NCAA website, where the NCAA states that it “takes appropriate steps to modify safety guidelines, playing rules[,] and standards to minimize those risks and provide student[-]athletes with the best opportunity to enjoy a healthy career.”<sup>118</sup> Lanni also cited testimony by NCAA Coordinator of Championships and Alliances, Eric Breece, who said that “‘any serious injury’ at an NCAA event ‘is unacceptable if reasonable safety measures could prevent’ the injury.”<sup>119</sup> Finally, the plaintiff argued that the safety document in question, the USFA Rules, was simply the NCAA Fencing Rule Book “with some modifications,” and since the USFA Rules “as adopted by the NCAA were required to be followed for the purposes of intercollegiate fencing competitions, including the subject competition for which Lanni was injured,” the NCAA should be held to a duty of care to enforce those rules.<sup>120</sup>

In its analysis, the court cited that under the NCAA’s “Fencing Meet Procedures,” “member institutions shall conduct all of their intercollegiate competition[s] in accordance with the playing rules of the [NCAA] in all sports for which the NCAA develops playing rules.”<sup>121</sup> In this case, the NCAA adopted the playing rules of the USFA, including a diagram of a fencing area with a border around each of the four fencing strips that represent, according to USFA Executive Director, Robert Dilworth, in his testimony, “a series of pipes that delineate where spectators may or may not go.”<sup>122</sup>

The court found that like the USFA, the NCAA also required a pipe-and-drape barrier in order to “provide[ ] space around the strip so that only the fencer[s] and the referee are in [the fencing] area,” and according to Breece’s testimony, the NCAA also through the NCAA Fencing Committee conducted inspections and walk-

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116. *Id.* at 545–46.

117. *Id.* at 544 (quoting Plaintiff’s Appendix).

118. *Id.* (quoting Plaintiff’s Appendix).

119. *Id.* (quoting Plaintiff’s Appendix).

120. Consolidated Reply Brief of Appellant at 16–17, *Lanni v. NCAA*, 42 N.E.3d 542 (Ind. Ct. App. June 8, 2015) (No. 49A02-1409-CT-649).

121. *Lanni v. NCAA*, 42 N.E.3d 542, 544 (Ind. App. Ct. 2015) (quoting Plaintiff’s Appendix).

122. *Id.* at 545 (quoting Plaintiff’s Appendix).

throughs of each competition site to “make sure the facility was set up the way . . . that [the NCAA had] instructed the host [member institution] to set it up.”<sup>123</sup> In fact, Breece testified that his specific event responsibilities “included site inspections to ensure compliance by the member institution with NCAA mandates,” including “verifying the placement of the pipe-and-drape barrier.”<sup>124</sup>

Despite all of this, the Indiana Court of Appeals affirmed a summary judgment ruling for the NCAA, finding that “the NCAA’s conduct does not demonstrate that it undertook or assumed a duty to actually oversee or directly supervise the actions of the member institutions and the NCAA’s student-athletes.”<sup>125</sup> In making this decision, the court compared Lanni’s case to two suits brought in the Indiana courts against national fraternities, finding that “the specific duties undertaken by the NCAA with respect to the safety of its student-athletes was simply to provide information and guidance to the NCAA’s member institutions and student-athletes.”<sup>126</sup>

According to the court, while the NCAA’s actions to “actively engage its member institutions and student-athletes in how to avoid unsafe practices” are “commendable,” they “do not rise to the level of assuring protection of the student-athletes from injuries that may occur at sporting events.”<sup>127</sup> Further, the court found “actual oversight and control cannot be imputed merely from the fact that the NCAA has promulgated rules and regulations and required compliance with those rules and regulations.”<sup>128</sup>

### C. *Mayall v. USA Water Polo*<sup>129</sup>

In another lawsuit involving concussions in amateur sports, plaintiff Alice Mayall filed a series of claims against USA Water Polo after her sixteen-year-old daughter suffered a concussion “while playing water polo for a team governed by [USA Water Polo’s] rules

123. *Id.* (quoting Plaintiff’s Appendix).

124. *Id.* at 553 (citing Plaintiff’s Appendix).

125. *Id.* (citing *Smith v. Delta Tau Delta, Inc.*, 9 N.E.3d 154, 163 (Ind. 2014)).

126. *Lanni*, 42 N.E.3d at 553 (Ind. App. Ct. 2015) (citing *Yost v. Wabash College*, 3 N.E.3d 509, 521 (Ind. 2014); *Smith*, 9 N.E.3d at 163). See *infra* notes 212–213 and accompanying text.

127. *Lanni*, 42 N.E.3d at 553.

128. *Id.*

129. This section discusses two separate opinions issued by the United States District Court, Central District of California in the *Mayall* case: *Mayall v. USA Water Polo, Inc.*, 174 F. Supp. 3d 1220 (C.D. Cal. 2016) [hereinafter “*Mayall I*”] and *Mayall v. USA Water Polo, Inc.*, No. 8:15-cv-00171-AG-KES, 2016 U.S. Dist. LEXIS 115047 (C.D. Cal. 2016) [hereinafter “*Mayall II*”]. *Mayall I* was a decision based on a motion to dismiss the First Amended Complaint, while *Mayall II* was based on a motion to dismiss the Second Amended Complaint.

and policies.”<sup>130</sup> After the plaintiff’s daughter was hit in the face with a ball, neither the referee nor the coach stopped the game and the coach—who was neither trained nor educated in concussion management—allowed her to keep playing both in that game and in subsequent matches in the USA Water Polo-sanctioned tournament.<sup>131</sup> Following the tournament, the plaintiff’s daughter “suffered physical symptoms, including headaches, excessive sleepiness, and dizziness” and “continues to experience physical symptoms and to struggle socially and academically.”<sup>132</sup>

In her First Amended Complaint, the plaintiff sought both compensatory and injunctive relief, asking the court to require USA Water Polo to change its policies and implement new rules and procedures to better manage concussions in the future.<sup>133</sup> The request for injunctive relief was denied, as the plaintiff’s daughter was no longer playing water polo and thus was no longer subject to USA Water Polo’s rules and policies.<sup>134</sup>

Additionally, the court was not convinced by the plaintiff’s argument that USA Water Polo “ha[d] a duty ‘to take reasonable steps to recognize, manage, and appropriately treat head injuries and concussions’ and ‘to provide players with rules, information, and best practices that protect them as much as possible from short-term and long-term health risks.’”<sup>135</sup> Like *Mehr*, the court here cited California’s controlling sports negligence case, *Knight v. Jewett*, and found that concussions resulting from getting hit in the head with a ball was an inherent risk of water polo, and thus no duty was owed to the plaintiff’s daughter by USA Water Polo since the defendants did nothing to increase the risks of concussions.<sup>136</sup>

Further analyzing the plaintiff’s claim that the defendant owed a duty based on the voluntary undertaking doctrine, the court ruled that the plaintiff had not “adequately alleged facts showing that Defendant undertook a *specific* duty to prevent or manage players’ head injuries.”<sup>137</sup> The court found that USA Water Polo, in this case had, at most, “voluntarily tried to minimize the inherent risks

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130. *Mayall I*, 174 F. Supp. 3d at 1224.

131. *See id.*

132. *Id.*

133. *See id.* (“Plaintiff sues on behalf of her sixteen-year old daughter, H.C., and others similarly situated, seeking compensatory and injunctive relief.”).

134. *Id.* at 1225.

135. *Id.* at 1227 (quoting plaintiff’s First Amended Complaint).

136. *See id.* at 1227–28 (citing *Knight v. Jewett*, 834 P.2d 696 (Cal. 1992)).

137. *Id.* at 1229.



of injury in water polo.”<sup>138</sup> However, under California law, “voluntary efforts at minimizing risk do not demonstrate defendant bore a legal duty to do so,” and thus the court dismissed the voluntary undertaking claim.<sup>139</sup>

In her Second Amended Complaint, the plaintiff dropped her request for injunctive relief and narrowed her focus on the negligence claim, focusing instead on “the risk of *secondary injuries* that can occur if a player returns to the game prematurely following a concussion.”<sup>140</sup> However, the court found the plaintiff’s attempts at distinguishing secondary concussions from primary concussions in this “untenable,” as “Plaintiff shows that secondary injuries are also a prevalent, related occurrence.”<sup>141</sup> Further, the court noted that even if there was a distinction between primary and secondary head injuries, “the distinction wouldn’t make a difference here because the Court is not persuaded that the risk of secondary concussions is not inherent to the sport.”<sup>142</sup>

Comparably, the court found the plaintiff’s added attempts to apply the voluntary undertaking doctrine unpersuasive, stating that the plaintiff “continue[d] to base Defendant’s purported voluntary undertaking on a broad notion of health and safety.”<sup>143</sup> The court ruled that notions that the defendants “undertook both gratuitously and as a result of the payment of fees” the duty to “creat[e] a healthy and safe environment” for participants too broad, and that “internal and external communications concerning the general existence of a return-to-play policy” do not establish a specific undertaking.<sup>144</sup> Additionally, the court found that the plaintiff had not pled facts sufficient to show that her daughter had “detrimentally relied on any action taken by” USA Water Polo, causing her claim to fail on both prongs required under California’s voluntary undertaking doctrine: an increase of harm or detrimental reliance.<sup>145</sup> Based on this analysis, the court dismissed the plaintiff’s Second Amended Complaint.<sup>146</sup>

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138. *Id.* at 1230.

139. *Id.* (citing *Nalwa v. Cedar Fair, L.P.*, 290 P.3d 1158, 1167 (Cal. 2012)).

140. *Mayall II*, No. 8:15-cv-00171-AG-KES, 2016 U.S. Dist. LEXIS 115047, at \*6 (C.D. Cal. 2016) (citing Plaintiff’s Second Amended Complaint).

141. *Id.*

142. *Id.* at \*7.

143. *Id.* at \*11.

144. *Id.* (quoting Plaintiff’s Second Amended Complaint).

145. *Id.* at \*12 (citing *Paz v. State*, 994 P.2d 975, 980 (Cal. 2000)).

146. *Id.* at \*15. This time, the court did not grant leave to amend, finding that a third amended complaint “would be futile.” *Id.* at \*14–\*15. The plaintiff has appealed this case to the Ninth Circuit, with the final reply brief due on Sep-

D. *Hill v. Slippery Rock University*

On September 9, 2011, Slippery Rock University (“SRU”) basketball player, Jack Hill, Jr., was playing “in a late-night, high-intensity basketball practice” when he collapsed to the floor, suffering from respiratory and cardiac arrest.<sup>147</sup> Soon after being transported to the hospital, the young student-athlete passed away from his ailments.<sup>148</sup> An autopsy found that Hill had marked red blood cell sickling in his lungs and liver consistent with Sick Cell Trait (SCT).<sup>149</sup> Hill had not been tested for SCT by his college, and the NCAA at the time did not require Division II schools like SRU to test their student-athletes for SCT.<sup>150</sup>

Hill’s parents as executors of his estate sued SRU and the NCAA for negligence, alleging that the two entities were negligent “for not testing for or requiring testing on [Hill] for SCT prior to allowing [him] to participate in athletic activities,” as well as for not providing prompt medical care or for failing to adequately train or supervise the staff on emergency first aid procedures.<sup>151</sup> Additionally, the plaintiffs alleged that the NCAA was negligent “for failing to require Division II schools, such as [SRU], to screen its athletes for SCT prior to their participation in athletic activities.”<sup>152</sup>

As evidence of the NCAA’s alleged breach of duty, the Hills cited the fact that while the NCAA required SCT testing for Division I athletes beginning in 2010, they did not require such testing for Division II athletes until 2012, and their son had passed away during that gap in enforcement.<sup>153</sup> According to the Hills, “[i]f a school failed to abide by the NCAA mandates for student[-]athlete safety, that school would face sanctions;” thus, if the NCAA had instituted SCT testing across all three levels at the same time, the young Hill’s condition would have been caught in time to avoid his death.<sup>154</sup>

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tember 25, 2017. Order Granting Motion to Extend Time to File Brief, *Mayall v. USA Water Polo, Inc.*, No. 16-56389 (9th Cir. 2016) (No. 31).

147. *Hill v. Slippery Rock Univ.*, 138 A.3d 673, 675 (Pa. Super. Ct. 2016) (quoting *Hill v. Slippery Rock Univ.*, No. 14-10570, 2014 Phila. Cty. Rptr. LEXIS 2, at \*2 (Ct. Com. Pl. Butler Cty. Dec. 22, 2014)).

148. *See id.* (citing *Hill*, No. 14-10570, 2014 Phila. Cty. Rptr. LEXIS, at \*2).

149. *See id.* (citing *Hill*, No. 14-10570, 2014 Phila. Cty. Rptr. LEXIS, at \*2).

150. *See id.* (citing *Hill*, No. 14-10570, 2014 Phila. Cty. Rptr. LEXIS, at \*2-\*3).

151. *Id.* (quoting *Hill*, No. 14-10570, 2014 Phila. Cty. Rptr. LEXIS, at \*2).

152. *Id.* (quoting *Hill*, No. 14-10570, 2014 Phila. Cty. Rptr. LEXIS, at \*3).

153. *See id.* at 678.

154. *Id.*

The case was dismissed by the Court of Common Pleas of Butler County, which found that while the Hills had shown that the NCAA had assumed a duty over their son, they had “failed to sufficiently plead liability on the part of the NCAA” and thus concluded that “no recovery was possible.”<sup>155</sup> According to the trial court, the plaintiffs did not “allege any specific representation made by the NCAA which induced [the plaintiff’s son’s] reliance on the NCAA to provide necessary medical conditions or sports participation protocols, or which induced [the plaintiff’s son] to forgo alternative means of protecting himself.”<sup>156</sup> As such, the trial court found that the plaintiffs “failed to plead that the NCAA’s actions put [the plaintiff’s son] in a worse situation than if the NCAA had never undertaken to research and establish medical condition testing and sports participation protocols,” and thus it could not be established that the NCAA had breached any duty of care to the Hills’ son.<sup>157</sup>

The plaintiffs appealed this ruling to the Superior Court of Pennsylvania, arguing that the trial court “erred in concluding that an increased risk of harm, as required by section 323A of the Restatement (Second) of Torts, can be based only on an affirmative act.”<sup>158</sup> The Superior Court noted that in their rationale dismissing the case, the trial court had specifically cited *Wissel* and the Ohio Court of Appeals’ analysis regarding the necessity of finding an increased risk of harm to impose liability under section 323, and had found that unlike in *Wissel*, the plaintiffs in the present case had pled “sins of omission, rather than commission.”<sup>159</sup>

However, the Superior Court ruled that *Wissel* was not binding authority on the courts in Pennsylvania, and, more importantly, even if *Wissel* was binding authority, the trial court applied *Wissel* incorrectly.<sup>160</sup> The Superior Court reasoned that in Pennsylvania, “an increased risk of harm can occur through a failure to act, or a ‘sin of omission.’”<sup>161</sup>

Citing the Supreme Court of Pennsylvania, the Superior Court found that so long as the plaintiff can demonstrate “that defen-

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155. *Id.* at 676 (interpreting the trial court’s holding in *Hill*, No. 14-10570, 2014 Phila. Cty. Rptr. LEXIS, at \*37-\*38).

156. *Hill*, No. 14-10570, 2014 Phila. Cty. Rptr. LEXIS, at \*35.

157. *Id.* at \*36.

158. *Hill v. Slippery Rock Univ.*, 138 A.3d 673, 675 (Pa. Super. Ct. 2016). *See supra* notes 38–39 and accompanying text.

159. *Id.* at 678–79 (quoting *Hill*, No. 14-10570, 2014 Phila. Cty. Rptr. LEXIS, at \*34).

160. *See id.* at 679.

161. *Id.* at 680.

dant's acts or omissions, in a situation to which section 323(a) applies, have increased the risk of harm to another," it is enough to find a basis for the court to move forward and allow a jury to determine whether or not the acts or omissions were the proximate cause and cause-in-fact of the plaintiff's injuries.<sup>162</sup> Further, the Superior Court noted *Wissel's* interpretation of section 324A to find a link between schools and overseeing organizations, and found that similarly to *Wissel*, the Hills had "alleged the NCAA owed a duty of care to Mr. Hill because he was a student at Slippery Rock University."<sup>163</sup>

Here, the Superior Court found that the Hills had sufficiently pled that the NCAA had assumed a duty to their son and that the NCAA, by not testing for SCT at Division II schools like SRU, could reasonably be found by a jury to have breached that duty by increasing the risk of harm.<sup>164</sup> As a result, the Superior Court overruled the trial court's order removing the NCAA from the case and allowed the Hills' case against the NCAA to move forward.<sup>165</sup>

#### E. *McCants v. NCAA*

In late 2012, former North Carolina governor, James G. Martin, released a report (the "Martin Report") detailing "'serious anomalies' related to the course offers and methods of instruction" within the Department of African and Afro-American Studies ("AFAM") at the University of North Carolina (UNC).<sup>166</sup> According to these allegations, UNC "enrolled a number of students in independent studies classes . . . which involved no instruction, no faculty supervision, and required no class attendance."<sup>167</sup>

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162. *Id.* (citing *Hamil v. Bashline*, 392 A.2d 1280, 1288 (Pa. 1978)).

163. *Id.* at 679 (citing Plaintiff's Fourth Amended Complaint).

164. *See id.* at 680.

165. *See id.* An appeal by the NCAA to the Pennsylvania Supreme Court was denied on January 4, 2017. Appeal Docket Sheet at 7, *Hill v. Slippery Rock University*, 138 A.3d 673 (No. 180 WDA 2015) (Pa. Super. Ct. 2017), available at <https://ujportal.pacourts.us/DocketSheets/AppellateCourtReport.ashx?docketNumber=180+WDA+2015> [<https://perma.cc/B7SL-A7YD>]. The case is currently pending remanded action at the trial court level. *See Zack Needles, Justices Clear Path for Suit Against NCAA Over Student Death*, LEGAL INTELLIGENCER (Jan. 6, 2017), <http://www.thelegalintelligencer.com/id=1202776260180/Justices-Clear-Path-for-Suit-Against-NCAA-Over-Student-Death?mcode=0&curindex=0&curpage=ALL> [<https://perma.cc/FN8R-Z5GP>].

166. James G. Martin, *The University of North Carolina at Chapel Hill Academic Anomalies Review Report of Findings*, UNIV. N.C. CHAPEL HILL ii (Dec. 19, 2012), <http://carolinacommitment.unc.edu/files/2013/01/UNC-Governor-Martin-Final-Report-and-Addendum-1.pdf> [<https://perma.cc/2GED-76QY>].

167. *McCants v. NCAA*, 201 F. Supp. 3d 732, 736 (M.D.N.C. 2016) (quoting Plaintiff's Complaint).

Two of these students, former UNC basketball player, Rashanda McCants, and football player, Devon Ramsay, filed a class action lawsuit in 2015 against the NCAA for negligence and breach of fiduciary duty for failing in their alleged duty to “protect the education and educational opportunities of student-athletes (including the provision of academically sound courses) participating in NCAA-sponsored athletic programs at NCAA member institutions.”<sup>168</sup> These former UNC student-athletes alleged that because “[t]he NCAA . . . has made a firm promise and commitment to college athletes—that it will protect the education and educational opportunities of men and women participating in college athletics”—and it “has held itself out as the principle guardian of college athletes’ academic welfare,” the NCAA’s failure to prevent UNC’s academic fraud was a breach of its duty to the purported class of former UNC students.<sup>169</sup>

The court in this case was skeptical from the start of the plaintiffs’ allegations, noting that the “Plaintiffs’ Complaint spans 100 pages and contains 259 paragraphs” which contain “broad, sweeping assertions that are neither specific to the NCAA nor specific to the plaintiffs in this case” and, in the court’s view, were “perhaps intended for public consumption” rather than as a legal complaint.<sup>170</sup> While attempting to narrow down the plaintiffs’ arguments to legal issues specific to the claims alleged, the court stated that it had asked the plaintiffs’ counsel at oral arguments “to state the specific facts that they contend demonstrate a voluntary undertaking by the NCAA.”<sup>171</sup> However, the court noted that the plaintiffs’ counsel “failed to address the Court’s inquiry,” instead relying on “generalized, sweeping assertions” which are “not sufficient as a matter of law to show that the NCAA undertook any specific, affirmative tasks that would amount to a voluntary undertaking recognized by North Carolina law.”<sup>172</sup>

The court inferred that based on “[a] careful reading of the Complaint,” the plaintiffs’ allegations of the NCAA’s voluntary undertaking came from alleged “promises” the NCAA has made to “protect the education and educational opportunities of men and women participating in college athletics” through NCAA governing documents, public speeches by NCAA officials, and documents on

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168. *Id.* at 738 (quoting Plaintiffs’ Complaint).

169. *Id.* at 740 (quoting Plaintiffs’ Complaint).

170. *Id.*

171. *Id.*

172. *Id.* at 740.

the NCAA website.<sup>173</sup> The court also inferred the plaintiffs' argument that the NCAA had voluntarily undertaken a duty of care in this area through the passage of "various rules and procedures promulgated by the NCAA that concern academics, including its eligibility requirements for student-athletes."<sup>174</sup>

Addressing these areas one-by-one, the court first analyzed whether the NCAA's public statements, Constitution, Bylaws, and websites constituted the voluntary undertaking necessary to assume a held duty of care to its student-athletes.<sup>175</sup> Here, the court noted that the plaintiffs had "provided no North Carolina court decisions that would support their claim that public statements espousing aspirational goals, statements of generic intent, or statements vowing or acknowledging that it has a duty . . . constitute promises that would create a legal duty based on a voluntary undertaking."<sup>176</sup> The court reasoned that the NCAA's public statements, Constitution, Bylaws, and websites were mere "promises that it has now 'broken,'" which "cannot form the basis of their claim of negligence based on a voluntary undertaking."<sup>177</sup>

For the NCAA's purported duty based on their rules, policies, and procedures, the court found that even though "rules and regulations promulgated by the NCAA may be relevant to the issue of breach of the standard of care," such evidence is "irrelevant to the threshold issue of whether a legal duty exists in the first instance."<sup>178</sup> The court based its reasoning on the fact that the plaintiffs never alleged that the NCAA actually engaged in the "*specific tasks*" to "institute, supervise, monitor, and provide adequate mechanisms to ensure the 'academic soundness' of classes" at UNC.<sup>179</sup>

Indeed, the court found that the plaintiffs' Complaint in fact alleged the opposite: that "NCAA member schools ultimately provide the education" and that "the NCAA does not and has never conducted any regular review of college courses taken or majors selected by or for student athletes, or required its member schools to submit course catalogues, lists and descriptions of courses taken by student-athletes, or descriptions of those courses."<sup>180</sup> As such,

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173. *Id.* (quoting Plaintiffs' Complaint).

174. *Id.* at 741 (citing Plaintiffs' Complaint).

175. *See id.*

176. *Id.*

177. *Id.* at 742.

178. *Id.* at 745.

179. *Id.*

180. *Id.* at 746 (quoting Plaintiffs' Complaint).

the court found these actions insufficient as a voluntary undertaking required to impose a duty of care.

While the court noted the plaintiffs' argument that "a voluntary undertaking can 'arise . . . from a gratuitous promise, unenforceable in contract'" based on sections 323 and 324A of the Restatement (Second) of Torts, the court did not find this argument persuasive in this context.<sup>181</sup> Mentioning that the North Carolina Supreme Court "has emphasized that the Second Restatement of Torts is not the law of North Carolina, though it may be persuasive in certain contexts," the court found that court decisions in North Carolina have repeatedly held that "*any* undertaking, irrespective of its source, requires affirmative conduct by the alleged tortfeasor."<sup>182</sup>

Based on this reasoning, the court found that the plaintiffs had "failed as a matter of law to allege a plausible claim of negligence based on the voluntary undertaking theory under North Carolina law" and thus dismissed their negligence claim.<sup>183</sup>

#### F. *Schmitz v. NCAA*

Adding to a trend of lawsuits filed against the NCAA regarding concussions and head injuries, former University of Notre Dame football player, Steven Schmitz, sued the NCAA in October 2014 for negligence and fraudulent concealment claims.<sup>184</sup> Schmitz had played running back and receiver at Notre Dame from 1974–78 and was diagnosed with chronic traumatic encephalopathy (CTE) in December 2012.<sup>185</sup> By that time, "Schmitz was 57 years old and unemployable, suffering from severe memory loss, cognitive decline, early onset Alzheimer's disease, traumatic encephalopathy, and dementia."<sup>186</sup>

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181. *Id.* at 742 (quoting Plaintiffs' Complaint).

182. *Id.* at 742–43 (emphasis in original) (citing *Cassell v. Collins*, 472 S.E.2d 770, 772 (N.C. 1996)) ("We reemphasize yet again that the Restatement of Torts is not North Carolina Law.").

183. *Id.* at 746. The breach of fiduciary duty claim was dismissed as well. *Id.* at 749.

184. *See Schmitz v. NCAA*, 67 N.E.3d 852, 857 (Ohio Ct. App. 2016). Schmitz's estate and wife (acting both as an individual and as fiduciary for Schmitz's estate) took over as plaintiffs after Schmitz passed away in February 2015. *Id.* *See NCAA Facing 43 Concussion Lawsuits After Latest Filings*, ESPN (Oct. 5, 2016), [http://www.espn.com/college-football/story/\\_/id/17722844/ncaa-facing-43-concussion-lawsuits-latest-filings](http://www.espn.com/college-football/story/_/id/17722844/ncaa-facing-43-concussion-lawsuits-latest-filings) [<https://perma.cc/3Y3B-PFMY>].

185. *See Schmitz*, 67 N.E.3d at 856–57 (citing Plaintiff's First Amended Complaint).

186. *Id.* at 857 (citing Plaintiff's First Amended Complaint).

After overruling the trial court's dismissal of the complaint on statute of limitations grounds, the Ohio Court of Appeals discussed Schmitz's claim that the NCAA and Notre Dame had "failed to notify, educate, and protect the plaintiff Steve Schmitz (and others) regarding the debilitating long term dangers of concussions, concussion-related impacts, and sub-concussive impacts that result every day from amateur athletic competition in the form of football at the collegiate level."<sup>187</sup> In regards to the NCAA, Schmitz argued that the Association's failure to promulgate rules to protect student-athletes from concussions despite knowing of "the risks of concussive and subconcussive impacts" constituted a breach of a duty of care owed to Schmitz and other student-athletes under their jurisdiction.<sup>188</sup>

In response, the NCAA relied heavily on the recently decided *Lanni* case, arguing that like in *Lanni*, there were "no set of facts to show that the NCAA took affirmative and deliberate steps to assume a duty recognized by law specifically to prevent the injuries" alleged by Schmitz and that like in *Lanni*, "[t]he NCAA's conduct does not demonstrate that it undertook or assumed a duty to actually oversee or directly supervise the actions of the member institutions and the NCAA's student-athletes."<sup>189</sup>

However, the Ohio Court of Appeals felt differently, finding that even if *Lanni* was a controlling decision in Ohio, the facts of the present case make *Lanni* materially distinguishable.<sup>190</sup> The court found "a number of factual distinctions between the two cases," including the facts surrounding the foreseeability of harm and the public policy foundations of the two cases, along with the simple fact that the *Lanni* court was deciding a motion for summary judgment instead of a motion to dismiss.<sup>191</sup>

Unlike in *Lanni*, the court, interpreting the plaintiff's complaint, saw a scenario where the NCAA "voluntarily oversees and

187. *Id.* (quoting Plaintiff's First Amended Complaint).

188. *Id.* at 867 (citing Plaintiff's First Amended Complaint).

189. Brief of Appellee National Collegiate Athletic Association at 27, *Schmitz v. NCAA*, 2016-Ohio-8041 (Ohio Ct. App. 2016) (No. CA-15-103525) (citing *Lanni v. NCAA*, 42 N.E.3d 542 (Ill. App. Ct. 2015)). For a further discussion of *Lanni*, see *supra* notes 110–128.

190. See *Schmitz*, 67 N.E.3d at 867. Schmitz and the NCAA had disagreed about the controlling law in this case, with the NCAA arguing that Indiana law should apply, while Schmitz felt that the conflict was governed instead by Ohio law. See *id.* at 865. The court found that since the elements of Schmitz's claims were "substantially similar under Indiana and Ohio law" (as the NCAA conceded), a choice of law determination was unnecessary and thus applied Ohio law. *Id.*

191. *Id.* at 867.



promulgates the rules and regulations for college football for the purpose of providing a competitive environment that is safe and ensures fair play,” “knew of the risks of concussive and subconcussive impacts yet failed to warn or disclose such risks to Schmitz,” and yet “failed to promulgate rules to protect against such risks . . . plac[ing] economic interests over Schmitz’s safety.”<sup>192</sup> While the court was careful to state that they were not deciding whether the plaintiff could actually prove the allegations pled in the complaint, it found that based on the facts pled in the complaint, a duty of care may exist, and thus it could not say “that there is no set of facts consistent with plaintiffs’ complaint that would impose a legally recognized duty upon the NCAA.”<sup>193</sup>

Finding that the plaintiff had pled sufficient facts to show that the NCAA had a duty of care—at least under “Ohio’s liberal pleading standard”—the court found that the trial court erred in dismissing the plaintiffs’ negligence claim and allowed the negligence claim to continue at least through discovery.<sup>194</sup>

#### IV. APPLYING A DUTY OF CARE TO OVERSEEING ATHLETIC ORGANIZATIONS

##### A. Common Themes

These six cases present common themes that may represent a burgeoning legal issue moving forward for these overseeing athletic organizations. Each claim discusses the possibility that overseeing athletic organizations can be liable for their actions under the voluntary undertaking doctrine. Together, these decisions create a spectrum of precedent that gives a guideline of how courts may decide similar cases in the future.

In each of these cases, the plaintiff argued that the organization in question owed a duty of care based on its voluntary actions of creating rules and policies for player safety (or, for *McCants*, for the players’ promised academic integrity).

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192. *Id.* (citing Plaintiff’s First Amended Complaint).

193. *Id.* at 868.

194. *Id.* The appellate court remanded the case back to the trial court for further proceedings. *Id.* at 871. The NCAA appealed the appellate court’s decision to the Ohio Supreme Court on January 20, 2017. Case Information, THE SUPREME COURT OF OHIO, <http://www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2017/0098> [<https://perma.cc/L2PZ-FVGB>]. However, the basis for the NCAA’s appeal does not touch the negligence claims; its argument in support of Ohio Supreme Court jurisdiction is solely based on statute of limitations concerns. See Memorandum in Support of Jurisdiction of Appellants NCAA and Univ. of Notre Dame du Lac, No. 2017-0098 (Ohio Jan. 20, 2017).

The plaintiff in *Lanni* argued that by adopting the safety rules of the USFA specific to her injury, the NCAA through its Fencing Committee assumed a responsibility to ensure that those rules were being followed.<sup>195</sup> The *Mehr* plaintiffs alleged that by taking a position as “a regulatory body for soccer and soccer players,” the various defendants failed in their duty to protect youth soccer players by not conforming to the best practice guidelines adopted by the International Conferences on Concussions in Sport.<sup>196</sup> Similarly, the plaintiff in *Mayall* argued that USA Water Polo had taken on a duty “to take reasonable steps to recognize, manage, and appropriately treat head injuries and concussions” by taking entry fees and by undertaking a general duty to “creat[e] a healthy and safe environment.”<sup>197</sup>

The *Hill* plaintiffs argued that by creating a health and safety policy for Division I athletes, the NCAA assumed a duty to all of its student-athletes to enforce the same policy.<sup>198</sup> The *McCants* plaintiffs alleged that the NCAA had voluntarily undertaken a duty to protect student-athlete academics through its rules, governing documents, public speeches by NCAA officials, and documents on the NCAA website concerning its commitment to protect student-athlete academic integrity.<sup>199</sup> Finally, Steven Schmitz argued that the NCAA had assumed a duty by “voluntarily oversee[ing] and promulgat[ing] the rules and regulations for college football for the purpose of providing a competitive environment that is safe and ensures fair play” and failed in this duty by “fail[ing] to promulgate rules to protect against such risks.”<sup>200</sup>

In each case, the courts had to decide whether such conduct did, in fact, create an enforceable duty of care, or whether a broad duty to player safety simply amounted to “aspirational statements” that “do not rise to the level of an assumption of a legal duty.”<sup>201</sup>

195. See *Lanni v. NCAA*, 42 N.E.3d 542, 544 (Ind. App. Ct. 2015). See *supra* notes 121–123 and accompanying text.

196. Complaint at 425–26, *Mehr v. Fédération Intern. de Football Ass’n*, 115 F. Supp. 3d 1035 (N.D. Cal. 2014) (No. 14-cv-3879-PJH). See *Mehr v. US Soccer*, et al., 115 F. Supp. 3d 1035, 1065–69 (N.D. Cal. 2015). See *supra* notes 96–107 and accompanying text.

197. *Mayall I*, 174 F. Supp. 3d 1220, 1227 (C.D. Cal. 2016); *Mayall II*, No. 8:15-cv-00171-AG-KES, 2016 U.S. Dist. LEXIS 115047, at \*11 (C.D. Cal. 2016).

198. See *Hill v. Slippery Rock Univ.*, 138 A.3d 673, 675 (Pa. Super. Ct. 2016). See *supra* notes 153–154 and accompanying text.

199. See *McCants v. NCAA*, 201 F. Supp. 3d 732, 740–41 (M.D.N.C. 2016). See *supra* notes 173–174 and accompanying text.

200. *Schmitz v. NCAA*, 67 N.E.3d 852, 867 (Ohio Ct. App. 2016).

201. *Hill v. Slippery Rock Univ.*, No. 14-10570, 2014 Phila. Cty. Rptr. LEXIS 2, at \*30 (Ct. Com. Pl. Butler Cty. Dec. 22, 2014). See also *McCants*, 201 F. Supp. 3d at

And while the facts of each case differed, the court reached its differing conclusions based on parallel criteria.

At one end of the spectrum, the decisions in *Mehr* and *Mayall* establish that under the traditional voluntary undertaking doctrine found in section 323, organizations that merely take a “broad responsibility” to promote safety in their sport cannot be held as having “specifically undertaken a duty” to keep players safe.<sup>202</sup> The organization must undertake a “specific task” towards reducing the risk of the injury in question; showing the defendant undertook a duty based on a “broad notion of health and safety” is not enough.<sup>203</sup> Further, *Mehr* and *Mayall* both establish that when the injury results from an “inherent risk of the game,” proving the existence of a breached duty of care becomes even harder.<sup>204</sup>

At the other end of the spectrum, the *Hill* decision shows that courts will entertain claims where a plaintiff can show that a health and safety policy that is in place but is inconsistently applied may, in fact, be sufficient to find a voluntarily undertaken duty of care.<sup>205</sup> The court in *Hill* found that since an increased risk of harm could

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741 (finding that “public statements espousing aspirational goals, statements of generic intent, or statements vowing or acknowledging that it has a duty” do not “constitute promises that would create a legal duty based on a voluntary undertaking”); *Mehr v. Fédération Intern. de Football Ass’n*, 115 F. Supp. 3d 1035, 1066 (N.D. Cal. 2015) (“US Soccer . . . argues that broad statements and generalizations about US Soccer’s role in the sport and references to its enforcement of the Laws of the Game are not enough to establish a voluntary undertaking.”); *Mayall I*, 174 F. Supp. 3d at 1229 (“Plaintiff bases Defendant’s purported voluntary undertaking on vague, sweeping allegations . . . Those actions and statements don’t support that Defendant undertook any specific task to prevent or care for head injuries.”). *But see* *Wissel v. Ohio High Sch. Athletic Ass’n*, 605 N.E.2d 458, 465 (Ohio Ct. App. 1992) (“The fact that these organizations purport to act gratuitously and for noble purposes does not, ipso facto, absolve them of a legal duty of care toward the athletes.”).

202. *Mehr*, 115 F. Supp. 3d at 1066. *See also* *Mayall II*, 2016 U.S. Dist. LEXIS 115047 at \*11–\*13 (finding that liability under the voluntary undertaking doctrine must come from the organization either increasing the risk of harm causing detrimental reliance on the organization’s actions).

203. *Mayall II*, 2016 U.S. Dist. LEXIS 115047, at \*11. *See also* *Mehr*, 115 F. Supp. 3d at 1066–69 (finding that plaintiffs had identified no facts that support a claim that any of the four defendants had specifically undertaken to adopt the best practice guidelines or to take any specific action to eliminate risks of concussions).

204. *Mayall II*, 2016 U.S. Dist. LEXIS 115047, at \*11 (“At most, Defendant’s efforts show that Defendant voluntarily tried to *minimize* the inherent risks of secondary injuries in water polo.”) (emphasis in original); *Mehr*, 115 F. Supp. 3d at 1066–69 (“Plaintiffs have alleged no basis for imputing to any defendant a legal duty to reduce the risks inherent in the sport of soccer.”). *See also* *Paz v. State*, 994 P.2d 975, 981 (Cal. 2000) (“[A] failure to alleviate a risk cannot be regarded as tantamount to increasing that risk.”).

205. *See* *Hill v. Slippery Rock Univ.*, 138 A.3d 673, 679 (Pa. Super. Ct. 2016) (“Had the NCAA’s protocols tested for SCT at Division II schools, Mr. Hill may not have suffered the event that caused his death. Thus, Appellants claimed that the

be found through this “sin of omission,” it should be up to the jury to find whether “such increased risk was in turn a substantial factor in bringing about the resultant harm.”<sup>206</sup>

*Lanni* and *Schmitz* both fall towards the middle of this spectrum, as in both cases the NCAA was accused of failing in its responsibility to either enforce rules it had already adopted, or to create rules based on risks that they allegedly knew about but “placed its economic interests” over student-athletes’ safety instead of creating rules to guard against these risks.<sup>207</sup> While the two cases had different outcomes, *Schmitz* helpfully cites and distinguishes *Lanni* in depth, allowing for a meaningful look at the differences between the two cases.<sup>208</sup>

According to the *Schmitz* court, *Lanni* is distinguishable not only due to the differences in law and the stage of the proceedings but also due to “a number of factual distinctions between the two cases.”<sup>209</sup> Based on the complaint, the *Schmitz* court saw a scenario where:

- (1) the NCAA voluntarily oversees and promulgates the rules and regulations for college football for the purpose of providing a competitive environment that is safe and ensures fair play, (2) that it knew of the risks of concussive and subconcussive impacts yet failed to warn or disclose such risks to Schmitz, (3) that it failed to promulgate rules to protect against such risks, and (4) that it placed its economic interests over Schmitz’s safety, who in turn devel-

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inadequate pre-participation physical, which allowed Mr. Hill to play basketball, increased his risk of harm.”).

206. *Id.* at 680 (citing *Hamil v. Bashline*, 392 A.2d 1280, 1288 (Pa. 1978)).

207. *Schmitz v. NCAA*, 67 N.E.2d 852, 867 (Ohio Ct. App. 2016). *See Lanni v. NCAA*, 42 N.E.3d 542, 545 (Ill. App. Ct. 2015).

208. *See Schmitz*, 67 N.E.2d at 867–68 (finding procedural differences between cases as paramount distinction).

209. *Id.* at 867. *Lanni* was a motion for summary judgment, *Schmitz* was a motion to dismiss. The court found this distinction to be a vital difference. *See id.* (“Although we believe that there are a number of factual distinctions between the two cases . . . we find the most significant distinction is a procedural one: the *Lanni* court was reviewing a trial court’s grant of summary judgment—not a motion to dismiss.”); *see also supra* note 191 and accompanying text. It is conceivable that the *Schmitz* court would have found differently if the decision was based on a motion for summary judgment, but unfortunately this will remain unknown for some time as *Schmitz* is currently under appeal to the Ohio Supreme Court for issues based entirely on the statute of limitations discovery rule and not at all on the voluntary undertaking doctrine. Memorandum in Support of Jurisdiction of Appellants National Collegiate Athletic Association and University of Notre Dame du Lac, *Schmitz v. NCAA*, No. 2017-0098 (Ohio Jan. 20, 2017); *see also supra* note 194 and accompanying text.

oped the latent brain disease of CTE. The complaint further alleges that “Schmitz relied upon the guidance, expertise, and instruction” of the NCAA regarding “the serious and life-altering medical issue of concussive and sub-concussive risk in football.”<sup>210</sup>

In essence, the *Schmitz* decision turned on the fact that the plaintiff was able to allege in the complaint that the NCAA had complete oversight of health and safety rules and yet failed to do anything about it.<sup>211</sup>

By contrast, *Lanni* hinged on the issue of direct oversight; that is, whether the NCAA’s specific undertaking extended to “*actual oversight and control*” over student-athletes.<sup>212</sup> The *Lanni* court compared the NCAA’s actions to those of a national fraternity, relying on two similar Indiana Supreme Court decisions about whether national fraternities owe a duty of care to their individual student members to prevent injuries caused by hazing.<sup>213</sup>

The one outlier here is *McCants*, where the NCAA has established itself as a guardian of student-athlete academic integrity, and yet allegedly failed to protect the plaintiffs from UNC’s actions.<sup>214</sup>

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210. See *Schmitz*, 67 N.E.2d at 867–68.

211. See *id.* The court was careful to note its decision was based on “Ohio’s liberal pleading standard” and emphasized its decision held that it “cannot say that there is no set of facts consistent with plaintiffs’ complaint that would impose a legally recognized duty upon the NCAA.” *Id.* at 868.

212. *Lanni v. NCAA*, 42 N.E.3d 542, 551 (Ind. App. Ct. 2015) (citing *Yost v. Wabash Coll.*, 3 N.E.3d 509, 521 (Ind. 2014)).

213. See *id.* at 550–53 (citing *Yost*, 3 N.E.3d 509; *Smith v. Delta Tau Delta, Inc.*, 9 N.E.3d 154 (Ind. 2014)).

214. At the time the *McCants* Complaint was filed, however, the NCAA did not have clear rules against the type of academic misconduct that UNC has been accused of, forcing the plaintiffs to rely on “broad, sweeping assertions” obtained from the NCAA Bylaws and NCAA officer statements. *McCants v. NCAA*, 201 F. Supp. 3d 732, 740–41 (M.D.N.C. 2016). See Complaint at 9, *McCants v. NCAA*, 201 F. Supp. 3d 732 (M.D.N.C. Feb. 27, 2015) (No. 1:15-cv-176) (“Moreover, the NCAA’s Operating Bylaw 19 prohibits ‘academic fraud’ by DI athletes or their schools and identifies that conduct as a breach of NCAA rules subject to the most severe penalties.”); DIVISION I MANUAL—APRIL 2011–12, NAT’L COLLEGIATE ATHLETIC ASS’N, art. 19.5.2 (2012), available at [http://www.ncaapublications.com/productdownloads/D1\\_2012\\_01.pdf](http://www.ncaapublications.com/productdownloads/D1_2012_01.pdf) [<https://perma.cc/VY72-3RFK>]. Since *McCants* was filed, however, the NCAA has instituted new bylaws (adopted on Apr. 28, 2016 and effective Aug. 1, 2016) that are seemingly specifically designed to combat the type of academic misconduct that the *McCants* plaintiffs alleged. See DIVISION I MANUAL – AUGUST 2016–17, NAT’L COLLEGIATE ATHLETIC ASS’N, art. 14.9.2.2 (2016), available at <http://www.ncaapublications.com/productdownloads/D117.pdf> [<https://perma.cc/U7TY-WHGE>] (“A current or former institutional staff member or a representative of an institution’s athletics interests shall not be involved (with or without the knowledge of the student-athlete) in: (a) Academic misconduct related to a student-athlete; or (b) The alteration or falsification of a student-athlete’s transcript or academic record.”); see also ACADEMIC MISCONDUCT,

However, this case's position outside of the established spectrum can be established for two reasons. First, North Carolina law is in the minority of jurisdictions that does not recognize section 324A as binding precedent, and thus they did not analyze whether a connection of oversight existed between UNC and the NCAA.<sup>215</sup> Adding to this, the state's version of the voluntary undertaking doctrine requires that any undertaking requires "affirmative conduct by the alleged tortfeasor," contrary to the NCAA's passive creation of rules and statements.<sup>216</sup>

Second, *McCants* is outside the spectrum because North Carolina courts "finding negligent performance of a duty assumed have done so only in cases involving physical injury or property damage."<sup>217</sup> By contrast to the other cases, where the injuries involved were physical in nature, the *McCants* plaintiffs suffered only economic damages.<sup>218</sup> As such, and as the court noted, "even if, for the sake of argument, the Court found that Plaintiffs' Complaint sufficiently alleged a voluntary undertaking, their negligence claim would still fail."<sup>219</sup>

But for most overseeing athlete organizations like the NCAA, national governing bodies, and private high school athletic associations, these six cases share common facts and legal theories, thus defining a spectrum whereby these associations may or may not have a held duty of care to their athletes.

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NAT'L COLLEGIATE ATHLETIC ASS'N (April 2016), *available at* [https://www.ncaa.org/sites/default/files/DIENF\\_AcademicIntegrityAt-a-GlanceGraphic\\_20160721.pdf](https://www.ncaa.org/sites/default/files/DIENF_AcademicIntegrityAt-a-GlanceGraphic_20160721.pdf) [<https://perma.cc/KW7C-VPCK>]. It would be interesting to see a new case adjudicated based on a similar scandal that occurs after this bylaw's adoption, as a more lenient jurisdiction could conceivably see these new rules as a voluntary undertaking by the NCAA to prevent the very harm that the *McCants* plaintiffs claimed to have suffered.

215. *See McCants*, 201 F. Supp. 3d at 742 ("[T]he North Carolina Supreme Court has emphasized that the Second Restatement of Torts is not the law of North Carolina, though it may be persuasive in certain contexts."). *See also* Cassell v. Collins, 472 S.E.2d 770, 772 (N.C. 1996) ("We reemphasize yet again that the Restatement of Torts is not North Carolina law."); Dawkins *ex rel.* Estate of Dawkins v. United States, 226 F. Supp. 2d 750, 755–56 (M.D.N.C. 2002) (refusing to recognize a duty under § 324A of Second Restatement of Torts, explaining that "[i]t is unlikely that the North Carolina Supreme Court would impose on a defendant any tort duty based on the Second Restatement of Torts").

216. *McCants*, 201 F. Supp. 3d at 743.

217. *Id.* at 743–44 (citing *McFadyen v. Duke Univ.*, 786 F. Supp. 2d 887, 998 (M.D.N.C. 2011)) (holding that North Carolina would not recognize a claim of negligence based on the voluntary undertaking doctrine where the injury is economic in nature).

218. *See id.*

219. *Id.* at 743.

## B. Section 324A: The Companion Provision

While all six recent cases discussed overseeing athletic organization liability based on the traditional voluntary undertaking doctrine (section 323), only two of these cases went as far as *Wissel* and discussed the organizations' potential liability based on the doctrine's companion provision: section 324A. The plaintiffs in all six recent cases discussed above could have arguably made use of section 324A(b) to attach a duty of care to the defendant overseeing athletic association, yet just one of these cases—*Hill v. Slippery Rock University*—was successful without making this argument.<sup>220</sup>

Section 324A of the Restatement (Second) of Torts, also known as the “Good Samaritan Doctrine,” provides that those who “render services to another which he should recognize as necessary for the protection of a third person or his things” may be liable to that third person for a “failure to exercise reasonable care to protect his undertaking.”<sup>221</sup> If that person's failure to exercise reasonable care increases the risk of harm, he undertakes “to perform a duty owed by the other to the third person,” or harm is suffered by the other or third person in reliance of the undertaking.<sup>222</sup>

Section 324A has been said to extend “identical liability” as section 323 to third persons, essentially holding the third party to the same duty of care as the overseeing party in a normal voluntary undertaking case.<sup>223</sup> Subsection (b) goes further and finds that entities who take over a duty owed by another to that third person can be liable to that third person for a failure to exercise reasonable care.<sup>224</sup> Put in context, the *Wissel* court found that since a high school student-athlete was owed a duty of care by his school, and the school “allowed the conduct of its football games to be largely governed by the policies and decisions” of the OHSAA, the OHSAA had a duty of care through its policies and decisions to protect the student-athlete.<sup>225</sup>

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220. See *Hill v. Slippery Rock Univ.*, 138 A.3d 673, 679 (Pa. Super. Ct. 2016). See *supra* note 163 and accompanying text. The only case where the plaintiffs did invoke § 324A, *McCants*, did so in a jurisdiction that has not adopted the rule as state law. See *infra* note 235.

221. RESTATEMENT (SECOND) OF TORTS § 324A (AM. LAW INST. 1965). See *supra* note 49.

222. *Id.*

223. *Tollenaar v. Chino Valley Sch. Dist.*, 945 P.2d 1310, 1312 (Ariz. Ct. App. 1997) (“Section 323 provides . . . Section 324A extends identical liability to third persons.”).

224. See RESTATEMENT (SECOND) OF TORTS § 324A(b) (AM. LAW INST. 1965).

225. *Wissel v. Ohio High Sch. Athletic Ass'n*, 605 N.E.2d 458, 465–66 (Ohio Ct. App. 1992). See also *supra* notes 50–53 and accompanying text.

It must be noted that the language of section 324A(b) has been interpreted “to reach not the situation in which one undertakes to perform functions coordinate to—or even duplicative of—activities imposed on another by a legal duty, but rather the situation in which one actually undertakes to perform for the other the legal duty itself.”<sup>226</sup> Interpreting the language of subsection (b), the United States District Court in *Blessing v. United States*<sup>227</sup> found that all of the examples given by the Restatement authors seem to suggest that “the one held liable when he negligently performed his undertaking and injury to a third person resulted had undertaken to perform tasks *on behalf* of another and *in lieu* of that other.”<sup>228</sup> This would likely not apply in cases with overseeing athletic organizations who make rules and influence the actions of schools under their charge but rarely undertake these duties directly. However, the broad application in *Wissel* suggests a much wider application in the amateur sports context, especially in combination with the sharp public policy concerns addressed by the *Wissel* court and given that most of the rules promulgated by the overseeing athletic organizations are punishable mandates rather than mere recommendations.<sup>229</sup>

The courts of forty-four states have adopted or applied section 323, 324A, or both.<sup>230</sup> Section 324A alone has been expressly adopted by the high courts of thirty-six states.<sup>231</sup> Two other states

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226. *Blessing v. United States*, 447 F. Supp. 1160, 1193–94 (E.D. Pa. 1978). This case was cited in the *Hill v. Slippery Rock Univ.* trial court decision to dismiss the plaintiff’s claim under § 324A(b). *Hill v. Slippery Rock Univ.*, No. 14-10570, 2014 Phila. Cty. Rptr. LEXIS 2, at \*37–\*38 (Ct. Com. Pl. Butler Cty. Dec. 22, 2014). The appellate court did not address this argument in vacating the trial court decision. *See generally Hill*, 138 A.3d at 673.

227. 447 F. Supp. 1160 (E.D. Pa. 1978).

228. *Id.* at 1194–95 (emphasis added). Indeed, the Fifth Circuit in *Davis v. Liberty Mut. Ins.*—one of the cases cited in *Blessing*—declined to apply § 324A(b) after finding that the employer “used [the defendant] for recommendations as an aid to the company in fulfilling its own duty to provide a safe place to work” rather than having the defendant assume the duty directly. *Davis v. Liberty Mut. Ins.*, 525 F.2d 1204, 1207–08 (5th Cir. 1976). This interpretation does appear to be on point with the actions of the overseeing athletic organizations in many of the cases discussed in this Article, though the fact that most of the safety rules in these contexts are punishable mandates rather than mere recommendations is likely a reason why *Wissel* distinguished this interpretation.

229. *Wissel*, 605 N.E.2d at 465–66. *See supra* notes 1, 60, 74, 74, and 228 and accompanying text.

230. *See* Brief for Respondent at 13, *Bragg v. United States*, 230 W. Va. 532 (Sept. 5, 2012) available at <http://www.courts.wv.gov/supreme-court/calendar/2012/briefs/oct12/12-0850respondent.pdf> [<https://perma.cc/6QRA-BBSY>].

231. *See, e.g., Paz v. State*, 994 P.2d 975, 977 (Cal. 2000) (“[T]he section 324A theory of liability . . . is a settled principle firmly rooted in the common law of negligence.”); *Wallace v. Dean*, 3 So. 3d 1035, 1051 (Fla. 2009) (“[T]he under-



have “adopt[ed] a common law cause of action containing language similar to the language used in [section] 324A.”<sup>232</sup>

While the Ohio Supreme Court has not expressly adopted section 324A, the Ohio Court of Appeals has affirmatively adopted the provision.<sup>233</sup> On the other hand, the Connecticut Supreme Court

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taker’s doctrine is a well-developed, entrenched aspect of Florida tort law. . . . section 324A supplies additional insight concerning the type of harm that the tortfeasor’s alleged negligent undertaking must have caused for the courts to recognize a duty of care.”); *Huggins v. Aetna Cas. & Sur. Co.*, 264 S.E.2d 191, 192 (Ga. 1980) (“We here adopt the majority rule as stated in the Restatement 2d Torts § 324A.”); *Espinal v. Melville Contrs.*, 98 N.Y.2d 136, 140 (N.Y. 2002) (referring to three conditions of § 324A: “[t]hese principles are firmly rooted in our case law, and have been generally recognized by other authorities”); *Seay v. Travelers Indemnity Co.*, 730 S.W.2d 774, 777 (Tex. App. 1987); Kathryn Michele Glegg, *Negligent Inspection: Texas Expressly Adopts the Restatement (Second) of Torts Section 324A in Seay v. Travelers Indemnity Co.*, 41 Sw L.J. 1041 (1987); Nicole Rosenkrantz, *The Parent Trap: Using the Good Samaritan Doctrine to Hold Parent Corporations Directly Liable for Their Negligence*, 37 B.C. L. REV. 1061, 1061 (1996) (citing *Heinrich v. Goodyear Tire & Rubber Co.*, 532 F. Supp. 1348, 1354 (D. Md. 1982), *Ray v. Transamerica Ins.*, 208 N.W.2d 610, 657 (Mich. 1973), and *Wright v. Schuam*, 781 P.2d 1142, 1144 (Nev. 1989) as examples of courts that have expressly adopted § 324A).

232. Rosenkrantz, *supra* note 231, at 1061–62 (citing *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 336 n.10 (Mass. 1983)) (stating that Massachusetts’s version of § 324A differs from Restatement). Rhode Island is another state that has its own common law version of § 324A. *See Gushlaw v. Milner*, 42 A.3d 1245, 1259–60 (R.I. 2012).

[T]his Court has not adopted the more “relaxed” standards set forth in §§ 323 and 324 of the restatement . . . and we decline to do so in the context of this appeal. . . . Thus, we will not review plaintiff’s voluntary-assumption-of-duty argument under the standard of § 324A as urged by plaintiff, but instead we proceed to do so through the lens of our existing case law.

*Id.*

233. *See Wissel v. Ohio High Sch. Athletic Ass’n*, 605 N.E.2d 458, 466 n.3 (Ohio Ct. App. 1992) (“Although we have found no cases in which the Ohio Supreme Court has expressly adopted Section 324A, the court [has] . . . cited Section 324A. Other Ohio appellate courts have either cited or employed Section 324A in such manner as to assume, *sub silentio*, its place in Ohio law.”); *see also Hill v. Sonitrol of Sw. Ohio, Inc.*, 521 N.E.2d 780, 786 (Ohio 1988) (“Even if we were to adopt Section 324A(c), the present case is clearly distinguishable.”). As discussed above, § 323 has also not been expressly adopted by the Ohio Supreme Court. *See supra* note 39. The law in Indiana is similarly situated, as while the Indiana Supreme Court has not yet definitively adopted § 324A, a number of Indiana Court of Appeals cases have applied it favorably. *See Light v. NIPSCO Indus., Inc.*, 747 N.E.2d 73, 75 (Ind. Ct. App. 2001) (finding that two prior Indiana Court of Appeals cases had “equated Indiana law with the provisions of RESTATEMENT (SECOND) OF TORTS, § 324A (1977)” (citing *Baker v. Midland-Ross Corp.*, 508 N.E.2d 32 (Ind. Ct. App. 1987); *Harper v. Guarantee Auto Stores*, 533 N.E.2d 1258, 1262 (Ind. Ct. App. 1989)). The *Light* court noted that while the *Harper* court had “added the requirement that the evidence establish that the defendant should have recognized the careful execution of its undertaking was necessary for the protection of the injured party,” more recent decisions “simply have asserted that Indiana law parallels § 324A.” *Id.*; *see also Medtronic, Inc. v. Malander*, 996 N.E.2d 412, 420–21 (Ind. Ct. App. 2013). However, these interpretations have been limited in cases of gratuitous promises rather than contractual obligations, as the Indiana Supreme

has adopted section 324A only in limited factual circumstances, and the Michigan Supreme Court has limited application of section 324A to cases where the adoption of a duty creates a “separate and distinct” obligation apart from the duty adopted by contract.<sup>234</sup>

Only three states have definitively rejected section 324A. As discussed in *McCants*, North Carolina has refused to adopt section 324A at all.<sup>235</sup> The South Carolina Supreme Court has also definitively “decline[d] to adopt the expanded liability of [section] 324,” as has the Supreme Court of Appeals of West Virginia.<sup>236</sup>

Similarly, other states have adopted section 324A as persuasive, but not binding, authority. The New Mexico Supreme Court has stated that the Restatement—including section 324A—is “merely persuasive authority” that is “entitled to great weight” but is not binding.<sup>237</sup> The Delaware Supreme Court has also not yet “expressly adopted [section] 324A,” but it has “referred to it in considering potential liability.”<sup>238</sup> Section 324A has also been expressly applied recently in an unpublished Delaware Superior Court opin-

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Court has ruled that “judicially impos[ing] liability under a theory of gratuitously assumed duty is unwise policy and should be cautiously invoked only in extreme circumstances involving a negligently performed assumed undertaking.” *Yost v. Wabash Coll.*, 3 N.E.3d 509, 518 (Ind. 2014). See *infra* note 251 and accompanying text.

234. *Fultz v. Union-Commerce Assoc.*, 683 N.W.2d 587, 592 (Mich. 2004) (“We believe that the ‘separate and distinct’ definition of misfeasance offers better guidance in determining whether a negligence action based on a contract and brought by a third party to that contract may lie because it focuses on the threshold question of duty in a negligence claim.”). See *Gazo v. Stamford*, 765 A.2d 505, 510 (Conn. 2001) (“We adopt § 324A(b), at least in the circumstances of the present case, in which it is clear that the service was performed for consideration and in a commercial context.”).

235. *McCants v. NCAA*, 201 F. Supp. 3d 732, 738, 742 (M.D.N.C. 2016) (citing *Cassell v. Collins*, 472 S.E.2d 770, 772 (N.C. 1996)). The *McCants* court did note, however, that the Restatement “may be persuasive in certain contexts.” *Id.* See *supra* note 182 and accompanying text.

236. *Miller v. City of Camden*, 494 S.E.2d 813, 815 n.2 (S.C. 1997). See also *Triad Insulation, Inc. v. Nationwide Mut. Fire Ins.*, No. 12-1110, 2013 W. Va. LEXIS 768, at \*9–\*10 (W. Va. 2013) (“We summarily reject petitioners’ request to adopt [§ 324A] in this case.”).

237. *Blake v. Pub. Serv. Co. of N.M.*, 82 P.3d 960, 967 (N.M. 2003) (citing *Gabalton v. Erisa Mortg. Co.*, 990 P.2d 197, 203 (N.M. 1999)).

238. *Patton v. Simone*, 626 A.2d 844, 849 (Del. Super. Ct. 1992) (citing *Furek v. Univ. of Del.*, 594 A.2d 506, 515–16, 520 (Del. 1991)). The District of Columbia Court of Appeals treats § 324A similarly. See *Presley v. Commercial Moving & Rigging Inc.*, 25 A.3d 873, 889 (D.C. 2011) (applying § 324A directly while comparing the present facts to *Haynesworth*); *Haynesworth v. DH Stevens Co.*, 645 A.2d 1095, 1097 (D.C. 1994) (“Although the Restatement has not been formally adopted by this court, it is clear that the particular concept advanced by [the plaintiff] is well known and has been readily applied, where appropriate.”); *but see Gilbert v. Midownik*, 990 A.2d 983, 994 n.15 (D.C. 2010) (“We have not adopted § 324A in this jurisdiction.”).

ion which perhaps suggests a more favorable view of the provision by the state in general.<sup>239</sup> The Mississippi Supreme Court has not yet “ruled definitively” on section 324A’s application, though the court has not heard a case on the provision in a few decades.<sup>240</sup> Oregon has also “not formally adopted” section 324A, though a federal court recently noted that the Oregon courts “have not otherwise indicated that the rule itself is unsound or would not be applied under the right circumstances.”<sup>241</sup>

In *Wissel*, the Ohio Court of Appeals found that the OHSAA owed a duty of care to the injured student-athlete due to its rule- and policy-making influence over the conduct of the student-athlete’s school, which owed “a general duty of reasonable care” to the student-athlete “in the conduct of its football program.”<sup>242</sup> This safety equipment was governed by the policies of the OHSAA.<sup>243</sup> Thus, the court applied section 324A(b) to show that by influencing the school’s commission of this duty, the OHSAA assumed that

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239. See *Buyse v. Colonial Sec. Serv., Inc.*, No. N10C-08-012, 2012 Del. Super. LEXIS 350, at \*6 (Del. Super. Ct. July 19, 2012). The New Jersey Supreme Court has also not expressly adopted § 324A, but has denied appeals in two cases where the New Jersey Appellate Division applied § 324A. See *Fackelmann v. Lac d’Amiante du Que.*, LTEE, 942 A.2d 127, 131–32 (N.J. Super. Ct. App. Div. 2008) (citing *Jackson v. N.J. Mfrs. Ins. Co.*, 400 A.2d 81, 85–86 (N.J. Super. Ct. App. Div.), *cert. denied*, 81 N.J. 330 (N.J. 1979)); *Viducich v. Greater N.Y. Mut. Ins.*, 192 A.2d 596, 598–99 (N.J. Super. Ct. App. Div. 1963), *cert. denied*, 41 N.J. 129, (N.J. 1963). Similarly, a 2000 Washington Court of Appeals case noted that § 324A “has not yet been adopted by a Washington court.” *Meneely v. SR Smith, Inc.*, 5 P.3d 49, 58 n.4 (Wash. Ct. App. 2000). The Washington Supreme Court, however, has cited the provision twice since then (once in the majority opinion, once in dissent), suggesting at least a tolerance for the application of the doctrine. See *Donatelli v. DR Strong Consulting Eng’rs, Inc.*, 312 P.3d 620, 624 (Wash. 2013); *Osborn v. Mason Cty.*, 134 P.3d 197, 204 (Wash. 2006) (Chambers, J., dissenting).

240. *Hartford Steam Boiler Insp. & Ins. v. Cooper*, 341 So. 2d 665, 667 n.1 (Miss. 1977) (“The facts do not bring the present case within Rule 324A and we do not decide whether or not the rule should be adopted in whole or in part.”). See also *Trosclair v. Bechtel Corp.*, 653 F.2d 162, 163 (5th Cir. 1981) (“Although Mississippi courts have not ruled definitively, this circuit, following the predictive course required of it in diversity cases, has held that its courts would impose those duties on contractors expressed in the Restatement (Second) of Torts § 324A, and commonly called the Good Samaritan Doctrine.”); *Goodwin v. Jackson*, 484 So. 2d 1041, 1044 (Miss. 1986) (rejecting plaintiff’s assertion that Mississippi Supreme Court adopted § 324A).

241. *Bixby v. KBR, Inc.*, 893 F. Supp. 2d 1067, 1092 n.6 (D. Or. 2012). Thus, according to this court’s reasoning, “nothing in Oregon law precludes plaintiffs from relying upon § 324A to establish the existence of a duty owed to them as third parties.” *Id.*

242. *Wissel v. Ohio High Sch. Athletic Ass’n*, 605 N.E.2d 458, 465–66 (Ohio Ct. App. 1992). See *supra* notes 50–53 and accompanying text.

243. See *id.* at 465.

standard of care and owed a duty to the student-athlete to ensure that its policies were reasonably enacted and applied.<sup>244</sup>

Had section 324A been applied in *Lanni* similarly to *Wissel*, the outcome could conceivably have changed.<sup>245</sup> Like in *Wissel*, the fencing event organizers in *Lanni* “allowed the conduct of [the event] to be largely governed by the policies and decisions” of the NCAA.<sup>246</sup> The NCAA required all fencers seeking to be eligible for the Regional Championships to have “a minimum of eighteen bouts ‘played in accordance with NCAA rules,’” and the event in question was indeed played “in accordance with the NCAA’s rules for the sport of fencing.”<sup>247</sup> These NCAA rules adopted the USFA rules as the “applicable rules for intercollegiate [fencing] competitions,” and these rules did include requirements for a pipe-and-drape barrier that were not followed, and thus led to plaintiff Lanni’s injury.<sup>248</sup> With a heavier reliance on section 324A(b), these facts could be used to show that the NCAA and USFA, by imposing USFA rules on the fencing competition, adopted the fencing competition’s duty to keep the athletes safe by properly promulgating and enforcing these rules.<sup>249</sup>

At the same time, it must be noted that Indiana’s interpretation of section 324A has a key difference from the text of the Restatement. According to the Restatement text, section 324A applies to anyone “who undertakes *gratuitously* or for consideration, to render services. . . .”<sup>250</sup> But shortly before *Lanni* was decided by the Indiana Court of Appeals, the Indiana Supreme Court stated their belief that: “[t]o judicially impose liability under a theory of gratuitously assumed duty is unwise policy and should be cautiously in-

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244. *See id.* at 465–66.

245. Section 324A was not referred to at all in the Court of Appeals decision in *Lanni*. *See Lanni v. NCAA*, 42 N.E.3d 542 (Ill. App. Ct. 2015). The provision was referred to in the appellant’s Reply Brief, but only in the context of pointing out that Indiana (or at least the Indiana Court of Appeals) has recognized the rule as Indiana law. *See Consolidated Reply Brief of Appellant* at 16–17, *Lanni v. NCAA*, 42 N.E.3d 542 (Ind. Ct. App. June 8, 2015) (No. 49A02-1409-CT-649); *see also supra* note 233 and accompanying text. The NCAA appellee brief does not discuss § 324A, nor did either party during oral arguments. *See Brief of Appellee NCAA, Lanni v. NCAA*, 42 N.E.3d 542 (Ind. Ct. App. May 20, 2015) (No. 49A02-1409-CT-649); Oral Argument, *Lanni v. NCAA*, 42 N.E.3d 542 (Ind. Ct. App. July 27, 2015) (No. 49A02-1409-CT-649), *available at* <http://mycourts.in.gov/arguments/default.aspx?id=1826&view=detail> [<https://perma.cc/2HF5-X2E8>].

246. *Wissel*, 605 N.E.2d at 541–42. *See Lanni*, 42 N.E.3d at 553.

247. *Lanni*, 42 N.E.3d at 552–53.

248. *Id.* at 545.

249. *See supra* note 163 and accompanying text.

250. RESTATEMENT (SECOND) OF TORTS § 324A (AM. LAW INST. 1965) (emphasis added).

voked only in extreme circumstances involving a negligently performed assumed undertaking.”<sup>251</sup> This language was cited specifically by the NCAA, and the case containing this statement was relied upon heavily by the Indiana Court of Appeals.<sup>252</sup>

Further, a major issue for the plaintiff in *Lanni* was whether, at the time of her injury, the plaintiff was in her role as a student-athlete or as a “mere spectator.”<sup>253</sup> While the court did not give a judgment on this question, if she had been found to have been injured as a spectator her argument would have been weakened significantly.<sup>254</sup> Based on the facts relied upon by the court and the questions asked of the plaintiff’s attorney by the judges in oral argument, it seems fairly clear the court saw the plaintiff’s role as a spectator more than as a student-athlete.<sup>255</sup>

251. *Yost v. Wabash College*, 3 N.E.3d 509, 518 (Ind. 2014).

252. *See Lanni v. NCAA*, 42 N.E.3d 542, 549–53 (Ill. App. Ct. 2015); Brief of Appellee NCAA at 27, *Lanni v. NCAA*, 42 N.E.3d 542 (Ind. Ct. App. May 20, 2015) (No. 49A02-1409-CT-649). *See also supra* notes 126–128.

253. *Lanni*, 42 N.E.3d at 546 n.4 (“The parties debate whether Lanni was a student-athlete or a mere spectator. Lanni’s designated evidence plainly shows that she was a student-athlete participating in the March 2010 competition, although, at the time of her injury, she was not actively engaged in a bout.”).

254. It is likely the court did not rule on this question because this would be an issue of fact, and the ruling was on a motion for summary judgment. However, the judges on oral argument probed this question extensively. *See infra* note 255.

255. *See Lanni*, 42 N.E.3d at 545 (“According to Robert Dilworth, the Executive Director of the USFA in March of 2010, this border ‘[u]sually . . . represents a series of pipes that delineate where spectators may and may not go.’”); *id.* at 546 (“The Committee ‘suggested that[,] whenever possible, . . . we limit spectators from walking between the corrals. Spectators could be allowed on the competition floor around the perimeter of the corrals[ ] but not allowed between the corrals.’”); *id.* at 554 (“The USFA rules, adopted by the NCAA, define a fencing area to include a ‘Removable Area,’ which ‘usually represents a series of pipes that delineate where spectators may and may not go.’”); *id.* (“Shortly after Lanni’s injury, in May of 2010 the Fencing Committee ‘discussed the layout’ at fencing competitions, ‘expressed concern that the [fencing] strips were too close together,’ and ‘suggested that[,] whenever possible, . . . we limit spectators from walking between the corrals.’”). The plaintiff through her allegations was also not terribly effective at arguing that her role at the time of her injury was as a student-athlete rather than as a spectator. *See id.* at 546 (“In particular, Lanni alleged that the NCAA had acted negligently as follows . . . On or before March 7, 2010, Defendant NCAA was negligent . . . by failing to undertake hazard and risk analys[e]s prior to the commencement of the Midwest Regional Fencing Competition to insure adequate safety of *spectators* watching an event.”) (emphasis added). In oral arguments, Judge Ezra H. Friedlander asked the plaintiff’s attorney whether the NCAA would similarly have a duty to an injured spectator at an Indiana University basketball game. Oral Argument at 9:42, *Lanni v. NCAA*, 42 N.E.3d 542 (Ind. Ct. App. July 27, 2015) (No. 49A02-1409-CT-649), *available at* <http://mycourts.in.gov/arguments/default.aspx?id=1826&view=detail> [<https://perma.cc/R4YX-FAZS>]. Lanni’s attorney responded by stating that her situation was different, because of her relationship with the NCAA as a student-athlete, and thus she is under the rules of the NCAA. *Id.* at 10:22. Later, the plaintiff’s attorney would concede that at the time of her injury Lanni was acting as a spectator. *Id.* at 10:58.

On the other hand, while *Mayall* and *Mehr* have similar weaknesses that would preclude effective application of the traditional voluntary undertaking doctrine, their facts suggest that application of section 324A(b) may have been more appropriate. As mentioned above, the *Mayall* plaintiff could not—and actually did not even attempt to—prove detrimental reliance on USA Water Polo’s rules and oversight, which is a necessary element of the voluntary undertaking doctrine in California in the absence of a showing that the defendant’s voluntary undertaking increased the risk of harm.<sup>256</sup> Unless they could show that USA Water Polo voluntarily undertook a duty owed to Mayall’s daughter through section 324A, the *Mayall* plaintiff would also have to show either detrimental reliance or an increased risk of harm resulting from USA Water Polo’s conduct under section 323.<sup>257</sup>

But unlike Indiana, California has expressly adopted section 324A in whole—including subpart (b) of the rule as relied upon by the Ohio Court of Appeals in *Wissel*.<sup>258</sup> In her Second Amended Complaint, Mayall did cite section 324A and stated that USA Water Polo “undertook both gratuitously and as a result of the payment of fees by Plaintiff and the Class members to ‘creat[e] a healthy and safe environment for our participants.’”<sup>259</sup> However, Mayall’s argument on this theory was based on an alleged “failure to exercise reasonable care [which] increased the risk of harm” to her daughter and other purported class members.<sup>260</sup> As shown by the dismissal of the Second Amended Complaint, this is likely a losing argument; a better theory would be to show that by promulgating health and safety rules—even in a broad sense—USA Water Polo undertook a general duty of care owed by the event organizers by sanctioning the events and thereby governing the events through their policies and decisions.<sup>261</sup>

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256. See *Mayall II*, No. 8:15-cv-00171-AG-KES, 2016 U.S. Dist. LEXIS 115047, at \*12 (C.D. Cal. 2016). See also *supra* note 145 and accompanying text.

257. See RESTATEMENT (SECOND) OF TORTS § 323 (AM. LAW INST. 1965).

258. See *Paz v. State*, 994 P.2d 975, 977 (Cal. 2000); *Artiglio v. Corning Inc.*, 957 P.2d 1313, 1317 (Cal. 1998). In fact, the dissent in *Paz* dissented primarily based on the majority’s failure to consider § 324A(b) in their analysis. See *Paz*, 994 P.2d at 983 (George, C.J., dissenting) (“[U]nlike the majority I believe that the developer . . . reasonably could be found to have undertaken to perform a duty that the city owed to the users of the intersection . . . thus supporting liability of the developer under the second condition set forth in 324A.”).

259. Second Amended Complaint at 49, *Mayall II*, No. 8:15-cv-00171-AG-KES, 2016 U.S. Dist. LEXIS 115047 (C.D. Cal. 2016).

260. *Id.* at 50.

261. See *Wissel v. Ohio High Sch. Athletic Ass’n*, 605 N.E.2d 458, 465 (Ohio Ct. App. 1992). See also *supra* notes 50–53 and accompanying text. USA Water

The same could apply to *Mehr*, though it would be a much weaker argument. Hypothetically, based on the wide array of relationships between the various defendants and unnamed event organizers, a connection could be found between the plaintiffs and defendants. The issues in *Mehr* are very similar to those in *Mayall*'s Second Amended Complaint, as the *Mehr* plaintiffs' arguments also skirt very close to the inherent risk of the game argument.<sup>262</sup> Additionally, like *Mayall*, *Mehr* was filed in California, meaning that section 324A(b) is adopted law in the governing state.<sup>263</sup>

But while the *Mehr* plaintiffs cited section 324A in their pleading documents, like in *Mayall*, they argued that the defendants' actions "have increased the risk of harm to [the plaintiffs] and members of the putative class" rather than arguing that their conduct constituted an adoption of the duty owed by event organizers through their influence over the game.<sup>264</sup> Granted, the plaintiffs in *Mehr* would have significant difficulties establishing a *Wissel*-like link between the plaintiffs and U.S. Soccer, since their argument is

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Polo does not have specific health and safety rules for its sanctioned events. *See supra* note 75. The *Mayall* plaintiff-appellant did not cite § 324A in her opening brief at the Ninth Circuit, and instead is thus far continuing to rely on the § 323 voluntary undertaking doctrine on appeal. *See* Appellant's Opening Brief at 55–60, *Mayall v. USA Water Polo, Inc.*, No. 16-56389, 2017 WL 1356242 (9th Cir. Apr. 5, 2017) (No. 11).

262. *See* Plaintiffs' Opposition to Defendant FIFA's Motion to Dismiss at 21–22, *Mehr v. Fédération Intern. de Football Ass'n*, 115 F. Supp. 3d 1035 (N.D. Cal. Mar. 20, 2015) (No. 14-cv-3879-PJH).

This is an issue about what happens after a concussion or likely concussion occurs. FIFA misses the point when it cites inapposite cases solely focused on an activity itself, not medical care issues that occur after the activity. This is a fundamental distinction that undermines all Defendants' motions to dismiss.

*Id.*

263. *See Paz*, 994 P.2d at 977 ("[T]he section 324A theory of liability . . . is a settled principle firmly rooted in the common law of negligence."). *See supra* note 241.

264. Plaintiffs' Opposition to Defendant US Soccer Federation Inc.'s Motion to Dismiss at 20, *Mehr v. Fédération Intern. de Football Ass'n*, 115 F. Supp. 3d 1035 (N.D. Cal. Mar. 20, 2015) (No. 14-cv-3879-PJH). *See also* Plaintiffs' Opposition to Defendant USYSA's Motion to Dismiss at 10–11, *Mehr v. Fédération Intern. de Football Ass'n*, 115 F. Supp. 3d 1035 (N.D. Cal. Mar. 20, 2015) (No. 14-cv-3879-PJH).

Plaintiffs also adequately allege that USYSA's actions have increased the risk to them and members of the putative class by, as discussed in more detail above, knowingly disregarding medical research and best practices regarding treatment of concussions and sub-concussive hits. So Plaintiffs stated a valid claim for breach of voluntary undertaking under both theories of voluntary undertaking.

*Id.* The opposition briefs for the other defendants refer back to these two briefs for these arguments, and focus more on issues more directly applicable to those defendants.

based on the rather weak argument that “[i]t was reasonable and foreseeable to . . . U.S. Soccer that their failures would flow downstream to the Rules and Laws of the Game enacted by other organizations, including the other [d]efendants in this action.”<sup>265</sup> But given the successful arguments made in *Wissel* and the fact that plaintiffs’ main argument was based entirely on the defendants’ influence on event organizers and the downstream defendants, relying on section 324A(b) would have likely been the stronger argument.

Finally, even though the plaintiffs in *Hill* did not win based on section 324A, their victory adds to the flexibility of this theory. The court in *Hill* found a direct relationship between the deceased student-athlete and the NCAA because the testing was directly mandated and conducted by the NCAA, but the court’s analysis shows that the plaintiffs likely could have prevailed on section 324A as well.<sup>266</sup> The court noted in their analysis that the plaintiffs had pleaded that “the NCAA owed a duty of care to Mr. Hill because he was a student at Slippery Rock University,” thus showing a likelihood that the plaintiffs could have survived a motion to dismiss based on section 324A(b).<sup>267</sup> *Hill* also shows the potential applicability of section 324A(a), as it establishes precedent in Pennsylvania that when overseeing athletic organizations inconsistently apply policy and initiate medical and physical evaluations that do not test for everything that they are expected to test for, it may constitute an increased risk of harm as well.<sup>268</sup>

## V. CONCLUSION

Even though the analysis of *Wissel v. Ohio High School Athletic Association* is now twenty-five years old, the six cases presented in this Article show that the case’s unique use of section 324A(b) was well ahead of its time. After over two decades without a similar case to test these theories, six cases in a sixteen-month span all presented facts conducive to potentially holding overseeing athletic organizations to a duty of care based on their promulgation of health and safety rules.

While these six cases have yet to force a court to apply section 324A(b), the analysis presented in this Article shows the flexibility of this theory. While the application of section 324A(b) will likely

265. *Mehr v. US Soccer, et al.*, 115 F. Supp. 3d 1035, 1062 (N.D. Cal. 2015).

266. *See Hill v. Slippery Rock Univ.*, 138 A.3d 673, 680 (Pa. Super. Ct. 2016).

267. *Id.* at 679.

268. *Id.* at 679–80.



not be successful in states where the applicability of section 324A(b) has been limited (like Indiana and North Carolina), the analysis established in *Wissel* may have been a better option for the plaintiffs in *Mehr* and *Mayall*.<sup>269</sup> An application of this theory can take the facts of a case outside of the spectrum of applicability of the traditional voluntary undertaking doctrine established in these cases, and thus allow a plaintiff to prevail despite not being able to show an increased risk of harm or detrimental reliance—as required by section 323.<sup>270</sup>

Moreover, as time passes more cases will present opportunities to test these theories. As more plaintiffs continue to attempt to hold various different defendants accountable for failures in drafting and enforcing concussion protocols and policy, many will look to more creative theories.

Further, health and safety issues will always continue to arise in unexpected ways, and plaintiffs will look to hold overseeing entities accountable for either not foreseeing the potentialities of these issues or for creating an increased risk through action or inaction. For example, it is seemingly only a matter of time before a student-athlete is seriously injured due to a lack of a cohesive policy to control fans storming the court after a major victory, or for ensuring that the field or court is safe.<sup>271</sup> As these issues arise, the courts will need to decide whether section 324A(b) can apply to hold the overseeing athletic organizations who take on the role of promulgating health and safety rules to a duty of care for this responsibility.

Much of the court's analysis in *Wissel* was based on the judges' disbelief that the "organizations whose rules govern the contest and whose discussions determine the type of athletic equipment that the athletes are provided do not owe those athletes a duty of rea-

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269. See *supra* notes 258–265. For a discussion of section 324A(b)'s applicability in Indiana, see *supra* notes 250–252. For a discussion of section 324A(b)'s applicability in North Carolina, see *supra* note 235.

270. RESTATEMENT (SECOND) OF TORTS § 323 (AM. LAW INST. 1965).

271. See *Lanni v. NCAA*, 42 N.E.3d 542, 553 (Ill. App. Ct. 2015) (discussing safety of student-athletes at athletic events); *Winneker & Ehrlich*, *supra* note 71, at 27 (discussing risk of injuries to student-athletes due to fans storming court). Further, the NCAA's continued allowance of cameramen to sit a few feet from the sidelines during basketball games may result in injuries, as it has in NBA games. Matt Zemek, *College Basketball in Focus: Cameras Are Too Close to the Court*, COMEBACK (June 12, 2015), <http://thecomeback.com/thestudentsection/basketball/college-basketball-in-focus-cameras-are-too-close-to-the-court.html> [https://perma.cc/7GZC-7RL4]. See also Joshua D. Winneker, Philip Schultze & Sam C. Ehrlich, *Lights, Camera, . . . Injury! The NBA Needs to Ban Courtside Cameramen*, 23 JEFFREY S. MOORAD SPORTS L.J. 437 (2016).

sonable care in their activities.”<sup>272</sup> The precedent established by that skepticism has not yet been tested further. But as the relationship between athletes and these overseeing athletic organizations continues to evolve, it is only a matter of time before a court decides definitively whether these rules and policy is an assumption of a duty of care under section 324A, or whether they are simply promises to “act gratuitously and for noble purposes” in keeping their athletes safe from harm.

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272. *Wissel v. Ohio High Sch. Athletic Ass’n*, 605 N.E.2d 458, 465 (Ohio Ct. App. 1992).