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LIABILITY NOT WAIVED FOR LACKAWANNA COLLEGE:
ATHLETIC PROGRAMS MAY NOT DISREGARD
MINIMAL STANDARDS OF CARE AND SAFETY

“Colleges are expected to put a priority on the health and safety of their students, especially student athletes engaged in dangerous sports.”¹

I. INTRODUCTION

Football is an inherently dangerous sport.² Given the potential for athletes to sustain injuries, liability waivers are one way in which colleges and other athletic or academic entities protect themselves from liability when athletes are injured while playing football.³ However, courts have established that colleges have a duty to provide a safe environment for college athletes.⁴ In *Feleccia v. Lackawanna College*, the Superior Court of Pennsylvania had to determine whether Augustus Feleccia and Justin Resch (hereinafter “Plaintiffs”) could sue Lackawanna College and other various, involved parties (hereinafter “Defendants”) for injuries sustained while playing football, even though both individuals each know-

1. See Daniel J. Siegel, *Superior Court Refuses to Apply Exculpatory Waivers to College Football Players Injured During Practice Drills – Attorneys Daniel Siegel and Nicole Kratzer Serve as Appellate Co-Counsel*, THE PA. LEGAL BLOG (Mar. 1, 2017), <http://palegalblog.com/2017/03/01/superior-court-refuses-to-apply-exculpatory-waivers-to-college-football-players-injured-during-practice-drills-attorneys-daniel-siegel-and-nicole-kratzer-serve-as-appellate-co-counsel/> [https://perma.cc/SYW4-SAYD] (noting Plaintiffs’ foundational position during trial and importance of protecting student-athletes from foreseeable risks of injury).

2. See *id.* (analyzing Judge Jacqueline Shogan’s statements about “Oklahoma Drill,” recognizing that “aside from the concern about this practice drill being an inherent risk of football, we are concerned with a release being used to excuse a college from having qualified medical personnel readily available,” and specifically for sport with such inherent risks).

3. See *Feleccia v. Lackawanna Coll.*, 156 A.3d 1200, 1209 (Pa. Super. Ct. 2017) (determining that Plaintiffs agreed to sign liability waivers that would traditionally have protected Lackawanna College from suit following any injuries sustained by student-athletes while participating in school’s athletic programs, and, ultimately, granting appeal to Supreme Court of Pennsylvania), *appeal granted*, 359 MAL 2017 (Pa. 2017).

4. See Andrew Rhim, *The Special Relationship Between Student-Athletes and Colleges: An Analysis of a Heightened Duty of Care for the Injuries of Student-Athletes*, 7 MARQ. SPORTS L.J. 329 (acknowledging that colleges have heightened duty of care to student athletes and recognizing that “special” relationship exists between student athletes and colleges).

ingly signed a liability waiver.⁵ *Feleccia* is a notable case because of its examination of the effectiveness of a liability waiver under the heightened standard of care present in the student athlete-college relationship.⁶

It is important to examine three different legal concepts in order to evaluate the potential ramifications of the *Feleccia* decision: the duty owed to college athletes, the heightened duty of care and minimal safety standards associated with such duty, and the limitations of a liability waiver's release from suit.⁷ This Comment analyzes the scope of a college's duty to student athletes and the issue of whether a liability waiver protects colleges from suit where the college failed to provide certain minimal standards of care and safety.⁸

In Section Two, this Comment examines the factual background of *Feleccia* and its pending Pennsylvania Supreme Court appeal.⁹ Next, in Section Three, this Comment examines factual issues surrounding the *Feleccia* case, including the liability waiver, Lackawanna College's knowledge of hiring two uncertified athletic trainers, and the injuries sustained by Plaintiffs *Feleccia* and *Resch* while participating in an "Oklahoma Drill."¹⁰ In Section Four, this Comment focuses on the duty of care owed to college athletes, the minimal care and safety standards required of colleges, and analyzes how reckless conduct is distinguishable from negligence, spe-

5. See *Feleccia*, 156 A.3d at 1206 (noting that Plaintiffs both knowingly signed liability waiver acknowledging that they would be unable to sue Lackawanna College in event of injuries incurred while playing football).

6. See *id.* at 1219–20 (reversing summary judgment in Plaintiffs' favor when liability waiver did not automatically release Lackawanna College from liability and reserving liability issue for presentation to jury).

7. See generally Andrew Rhim, *supra* note 4 (discussing these three legal concepts related to duty of care and the resulting liability analysis at issue in *Feleccia*).

8. See *Feleccia*, 156 A.3d at 1208–09 (holding that Plaintiffs were able to sue Lackawanna College because Lackawanna's hiring of uncertified athletic trainers failed to meet minimal standards of care and safety, including following Athletic Training Board Certification guidelines). For further discussion of colleges' duties to student-athletes and waiver protections, see *infra* notes 30–38 and accompanying text.

9. See generally *Feleccia v. Lackawanna Coll.*, 156 A.3d 1200 (Pa. Super Ct. 2017) (noting Superior Court decision, which is awaiting a Pennsylvania Supreme Court decision). For further discussion of the facts in the *Feleccia* case, see *infra* notes 19–26 and accompanying text. For further discussion of the issues on appeal, see *infra* note 115 and accompanying text.

10. See *Feleccia*, 156 A.3d at 1206–09 (recognizing key issues in *Feleccia* case and examining appellate court's treatment of those issues in determining that Plaintiffs could sue Lackawanna College for its conduct).

cifically in the *Feleccia* case.¹¹ Finally, in Section Five, this Comment advocates for the Plaintiffs' position that colleges owe a duty to provide safe playing environments for student athletes and determines that Lackawanna College breached its duty by hiring uncertified athletic trainers, Coyne and Bonisese.¹² This Comment posits that the Supreme Court should affirm the Superior Court's decision in favor of Plaintiffs *Feleccia* and *Resch*, because student athletes cannot assume the risk of a college's reckless or grossly negligent misconduct.¹³

II. THE FACTUAL AND LEGAL BACKGROUND OF THE *FELECCIA* CASE

A. The Basics of *Feleccia*

1. *The "Oklahoma Drills" at Issue*

Feleccia is a Pennsylvania Superior Court case involving two student football players who were injured while participating in an "Oklahoma Drill" during the first day of contact football practice.¹⁴ The "Oklahoma Drill" is a tackle drill in which players are instructed to engage in one-on-one tackles with their heads up.¹⁵ Plaintiffs were both injured during the drill and subsequently sued Lackawanna College for damages arising out of their injuries.¹⁶ The trial court in their case granted summary judgment in favor of Lackawanna College, but then the Superior Court reversed that de-

11. *See id.* (discussing how Plaintiffs were able to sue Lackawanna College when Lackawanna failed to hire certified athletic trainers to oversee contact football practices). For further discussion of the duty of care owed to college athletes, see *infra* note 133 and accompanying text.

12. *See Feleccia*, 156 A.3d at 1207–08 (recognizing that foreseeable injuries may occur when uncertified athletic trainers are unable to provide adequate medical attention to players during tackle drills). For further discussion of this Comment's position, see *infra* notes 74–102 and accompanying text.

13. *See also Feleccia*, 156 A.3d at 1215–16 (examining Lackawanna College's conduct and noting court's determination that grossly negligent or reckless misconduct is not shielded by Plaintiffs' signing of liability waiver). For further discussion of this Comment's stance that the Pennsylvania Supreme Court affirm the Superior Court's decision, see *infra* notes 223–257 and accompanying text.

14. *See Feleccia*, 156 A.3d at 1204–05 (stating that plaintiffs Justin Resch and Augustus Feleccia began playing football at ages six and ten, respectively).

15. *See id.* at 1205–08 (describing how both Plaintiffs were injured while participating in "Oklahoma Drill" during spring football practice at Lackawanna College).

16. *See id.* at 1205 (noting danger of "Oklahoma Drill" and potential for head injuries when players engage in head-on collisions); *see also* David Fleming, *Is the Oklahoma Drill a Rite of Passage or Everything to Fear About Football?*, ESPN (Aug. 19, 2015), http://www.espn.com/college-football/story/_/id/13348894/is-oklahoma-drill-just-rite-passage-everything-fear-football [https://perma.cc/V8GG-4U9H] (noting that Howie Long, rookie Villanova University football player, was "left battered, bloody, and flat on his back" while participating in drill).

cision.¹⁷ In doing so, it concluded that a jury should decide whether hiring uncertified athletic trainers increased the risk of harm to student athletes.¹⁸

Lackawanna College is a non-profit junior college in North-eastern Pennsylvania and a member of the National Junior College Athletic Association (“NJCAA”).¹⁹ Prior to the Spring 2010 football season, Plaintiffs signed a liability waiver ostensibly releasing Lackawanna College from liability and suit.²⁰ At trial, both Plaintiffs admitted to knowing that signing the waiver purportedly barred them from suing Lackawanna College in the event of an injury.²¹

Despite signing the waiver, Plaintiffs brought suit in Lackawanna County Court of Common Pleas for their personal injuries sustained on March 29, 2010.²² They contended liability arose because Lackawanna College decided to hire two individuals, Kaitlin Coyne and Alexis Bonisese, as athletic trainers who were uncertified at the time of hiring;²³ Lackawanna believed they would become certified at a future date.²⁴ However, Coyne and Bonisese had not been certified at the time of the Plaintiffs’ injuries; they were essentially hired with the future “intent to serve as Athletic Trainers.”²⁵

17. *See Feleccia*, 156 A.3d at 1209 (discussing Lackawanna College’s decision to hire two uncertified athletic trainers prior to 2010 spring contact football season as well as role of this decision in Superior Court’s liability determination).

18. *See* Terrie Morgan-Besecker, *Court Rules Football Players Can Sue Lackawanna College for Injuries*, THE TIMES TRIBUNE (Mar. 6, 2017), <https://www.thetimes-tribune.com/news/court-rules-football-players-can-sue-lackawanna-college-for-injuries-1.2163759> [<https://perma.cc/96CW-6CP2>] (analyzing *Feleccia* and impact of court’s holding on potential for future Plaintiffs to sue colleges even if they knowingly signed liability waivers); *see also Feleccia*, 156 A.3d at 1212–13 (recognizing Superior Court’s holding and resulting potential for future personal injury litigation created by unenforceability of Plaintiff’s liability waivers and Superior Court’s decision not to relieve Lackawanna of its liability towards Plaintiffs).

19. *See Feleccia*, 156 A.3d at 1203 (recognizing Lackawanna as member of National Junior College Athletic Association, not NCAA).

20. *See id.* at 1209–10 (noting purpose of liability waivers in collegiate sports activities).

21. *See id.* at 1206 (noting traditional function of liability waivers).

22. *See id.* at 1204–05.

23. *See id.* at 1203 (recognizing Coyne and Bonisese’s lack of training certification).

24. *See id.* at 1203–04 (examining factual circumstances of Lackawanna College hiring athletic trainers for 2010 football season and recognizing that Coyne and Bonisese were uncertified at time of hiring but had potential to become certified at some unspecified future date).

25. *See id.* at 1203–04 (acknowledging at trial that former professor of Coyne and Bonisese expressed concern to Lackawanna College Athletic Department that both women were “impermissibly providing athletic services”). Therefore, Lackawanna College had knowledge of potential safety concerns associated with Coyne

2. *The Feleccia Court's Use of Prior Case Law*

In analyzing the liability waiver, the Superior Court in *Feleccia* examined several prior cases involving liability waivers, the assumption of risk doctrine, and the relevant standard of care.²⁶ The Pennsylvania cases examined included *Valentino v. Philadelphia Triathlon, LLC*,²⁷ *Hughes v. Seven Spring Farms, Inc.*,²⁸ *Tayar v. Camelback Ski Corp.*,²⁹ and *Kleinknecht v. Gettysburg*,³⁰ most notably. In *Kleinknecht*, the Third Circuit Court of Appeals specifically examined the issue of a student athlete's relationship with the school he attended.³¹ In *Kleinknecht*, a Gettysburg College lacrosse player died following a cardiac arrest he sustained during lacrosse practice.³² The plaintiffs in *Kleinknecht* sued Gettysburg College and argued the school failed to protect student athlete Drew Kleinknecht when it improperly handled his medical emergency during the practice.³³ The case made it up to the Third Circuit Court of Appeals, which granted summary judgment in favor of the plaintiffs in the wrongful death lawsuit, reasoning that the Pennsylvania Supreme Court would likely recognize a "special relationship" between Kleinknecht and Gettysburg College that would impose a "duty of reasonable care on the [c]ollege."³⁴ Until *Kleinknecht*, a Pennsylvania case had not explicitly addressed a student athlete's

and Bonisese's instruction during football practice yet continued to employ both individuals as athletic trainers. *See id.*

26. *See id.* at 1210–15 (recognizing several key cases Superior Court used when evaluating liability issues and Lackawanna's conduct).

27. 150 A.3d 483 (Pa. Super. Ct. 2016) (noting Pennsylvania Superior court properly struck down plaintiff's claim against Philadelphia Triathlon when no evidence of outrageous behavior or conscious disregard for risks associated with triathlon event existed).

28. 762 A.2d 339 (Pa. 2000) (recognizing plaintiff could not recover for injuries from skiing accident because colliding with another skier is inherent risk that plaintiff assumed and no evidence of gross negligence or reckless conduct existed).

29. 47 A.3d 1190 (Pa. 2012) (noting pre-injury liability waiver may not cover reckless conduct).

30. *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1364 (3d Cir. 1993) (predicting potential future outcome for similar liability cases presented to Pennsylvania Supreme Court).

31. *See Kleinknecht*, 989 F.2d at 1365 (analyzing duty owed to student-athletes as largely undetermined by preceding cases in Pennsylvania courts); *see also Feleccia*, 156 A.3d at 1214–15 (recognizing *Kleinknecht* court analyzed several Florida and Indiana cases to show how other states have determined special duty of care under student athlete relationship).

32. *See Kleinknecht*, 989 F.2d at 1367 (noting Third Circuit's reasoning and its future applicability to cases involving negligent actions of college employees).

33. *See id.* at 1363–66 (providing facts of *Kleinknecht* case).

34. *See id.* at 1367 (holding reasonable duty of care existed between Gettysburg College lacrosse player and Gettysburg College and that this "special relation-

relationship with his or her college in a tort action.³⁵ However, the plaintiffs in *Kleinknecht* argued that colleges nonetheless owe athletes a duty to provide adequate medical services during instances involving medical emergencies, under the specific standard of a reasonable duty of care.³⁶ Lastly, the court in *Kleinknecht* distinguished between student athletes injured while participating as athletes and students injured engaging in activities that were more personal in nature.³⁷ The Third Circuit predicted the Pennsylvania Supreme Court would hold that in situations where student athletes participate in the athletic programs when their respective colleges sought their involvement, colleges have a duty to students, which exists under these special circumstances.³⁸

B. The Liability Waiver

One major issue through the *Feleccia* litigation has been the liability waiver issue; prior to spring football tryouts, Plaintiffs “skimmed” and signed” a “Waiver of Liability and Hold Harmless Agreement” for Lackawanna College.³⁹ The liability waiver released Defendants from any and all liability arising out of injury sustained while participating in contact football at Lackawanna College.⁴⁰ Both Plaintiffs admitted signing the waiver, which precluded suit against Lackawanna for any and all injuries they sustained.⁴¹

The liability waiver presented to the Plaintiffs essentially sought to protect Lackawanna from personal injury suits arising out of stu-

ship” was sufficient to potentially hold Gettysburg College liable for negligent actions of employees, which ultimately resulted in plaintiff’s death).

35. *See id.* at 1365–67 (addressing plaintiff’s argument to Third Circuit and recognition that colleges owed duty to student athletes—specifically in cases involving medical emergencies—even though Pennsylvania Supreme Court had not definitely decided on this issue in previous cases).

36. *See id.* at 1367 (discussing duty owed to student athletes and clearer distinction of college and student athlete relationship in *Kleinknecht*, specifically because previous Pennsylvania cases had not specifically examined this issue).

37. *See id.* at 1368–69 (noting duty imposed on college directly seeking participation of student athlete that had previously experienced cardiac arrest during its sponsored practice).

38. *See id.* at 1369 (explaining court’s reasoning for holding that duty existed between colleges and student athletes).

39. *See Feleccia*, 156 A.3d at 1205–06 (noting document produced by Lackawanna College and thereafter signed by Plaintiffs).

40. *See id.* at 1206 (examining liability waiver Plaintiffs signed in *Feleccia* and noting Plaintiffs acknowledged contractual language prior to participation in contact football at Lackawanna College).

41. *See id.* at 1206–07.

dent athletes' participation in contact football.⁴² While Plaintiffs admitted they skimmed and signed the waiver, releasing Lackawanna from liability, they later sued Lackawanna College for personal injuries sustained at football practice.⁴³ During trial, Lackawanna argued Feleccia and Resch understood the dangers of the Oklahoma Drill.⁴⁴ Plaintiffs challenged Defendant's assertion by arguing that when they signed the liability waiver, they were unaware of "Lackawanna's failure to take reasonable measures" to assure their safety.⁴⁵ Specifically, the "Lackawanna College Waiver of Liability and Hold Harmless Agreement" provided:

1. In consideration for my participation in (sport), I hereby release, waive, discharge, and covenant not to sue Lackawanna College . . . while participating in such athletic activity.

. . . .

4. It is my express intent that this Release and Hold Harmless Agreement . . . shall be deemed as a release, waiver, discharge, and covenant not to sue Lackawanna College, its trustees, officers, agents, and employees.⁴⁶

Both Plaintiffs acknowledged on the liability waiver they were participating in contact football at Lackawanna College.⁴⁷ Plaintiffs signed the liability waivers on March 22, 2010, prior to their partici-

42. *See id.* at 1206 (noting liability waiver would traditionally "release, waive, discharge, and covenant," individuals signing it "not to sue Lackawanna College for any and all liability arising out of or related to injury . . . that may be sustained while participating in such athletic activity").

43. *See id.* at 1206–08 (examining intent behind drafting and signing "Lackawanna College Waiver of Liability and Hold Harmless Agreement," and traditional purpose of liability waivers).

44. *See id.* (noting Plaintiff's acknowledgment of such risks by signing liability waiver).

45. *Id.* at 1219 (analyzing whether Plaintiffs understood types of risks released by liability waiver, which was point of contention during trial).

46. *See id.* at 1205–07 (quoting actual liability waiver signed by both players, which included language that mentioned participation in athletic activities at Lackawanna College). This waiver was presented at trial for the purpose of examining Lackawanna College's statements purporting to release them of any and all liability related to injuries sustained during contact football practice. *See id.*

47. *See id.* at 1205–06 (acknowledging Plaintiffs' material admissions regarding participation in Lackawanna College's contact football program); *see also* Brief for Appellees at *57, *Feleccia v. Lackawanna Coll.*, 156 A.3d 1200 (Pa. Super. Ct. 2017) (NO. 385 MDA 2016), 2016 Pa. Sup. Ct. Briefs LEXIS 794 (noting that briefs presented at trial are cross-referenced in the Superior Court Case); *see also Feleccia*, 156 A.3d at 1206 (recognizing that "Lackawanna College's Statement of Material Facts 12/2/15, at Exhibit E," was provided as evidence during trial to indicate that Feleccia and Resch did, in fact, admit to knowingly signing liability waivers in order to participate in contact football at Lackawanna College).

pation in the first day of spring football practice.⁴⁸ However, at trial they claimed while they knowingly signed the waiver, they were unaware Lackawanna hired uncertified trainers.⁴⁹ Plaintiffs argued that, therefore, Lackawanna College was grossly negligent in its failure to provide trainers with the requisite certifications, and that its Athletic Training Department completely disregarded the safety of its student athletes in violation of Pennsylvania law.⁵⁰

1. *Prior Unenforceability of Liability Waivers*

There is a robust body of scholarship examining the issue of the use of liability waivers in sports, noting specific instances in which liability waivers were invalidated due to the negligence of sports program organizers.⁵¹ The challenge in evaluating the validity of liability waivers is recognizing when negligent conduct prevails over the “assumption of risk doctrine.”⁵² Under the “assumption of risk” doctrine, injured players knowingly assume the risk of injury if they provide written consent.⁵³ The traditional example of written consent is signing a liability waiver.⁵⁴ There are two types of assumption of risk defenses that may be raised in instances of sports injuries.⁵⁵ These defenses include either an implied or express assumption of risk.⁵⁶ Either defense may prevail in

48. *See id.* at 1205 (examining when Plaintiffs signed liability waivers).

49. *See id.* at 1208–09 (noting Plaintiffs acknowledged liability waiver and contractual terms but did not knowingly acknowledge being trained by uncertified athletic trainers).

50. *See id.* at 1208 (stating Superior Court’s holding).

51. *See* Matthew S. Thor, *This is Not Sparta: The Extensive and Unknown Inherent Risks in Obstacle Racing*, 51 VAL U.L. REV. 251 (2016) (acknowledging case of obstacle races and arguing that obstacle racing liability waivers should be inherently invalid because participants are not aware of all potential risks involved); *see also* Devon Battersby, *Running on Empty or Water or Gatorade?*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 97 (2003) (examining whether participants fully understand all inherent risks involved when participating in “highly intensified” and arguably dangerous activities); Douglas Leslie, *Sports Liability Waivers and Transactional Unconscionability*, 14 SETON HALL J. SPORTS & ENT. L. 341 (2014) (explaining unenforceability of liability waivers in specific sports law cases, specifically where defendant’s conduct went beyond ordinary negligence).

52. *See* Thor, *supra* note 51, at 261–62 (noting distinction between acknowledgment of inherent risks and issues presented when participants are unable to understand and consent to all possible risks present in activity).

53. *See id.* (examining “assumption of risk” doctrine in tort lawsuits).

54. *See id.* at 261 (recognizing scope of assumption of risk doctrine and challenges presented when individuals are unaware of some inherent risks involved when participating in potentially dangerous activities but do not understand all risks).

55. *See id.* (discussing two types of defenses defendant schools may use when faced with tort lawsuits).

56. *See id.* (acknowledging defenses to assumption of risk doctrine).

cases where parties fully consented to all risks they will, or may, encounter during an activity.⁵⁷

However, Plaintiffs' arguments in *Feleccia* are unique on the liability waiver issue; *Feleccia* and *Resch* acknowledged that while they waived liability for inherent risks involved in contact football, they did not have explicit knowledge the athletic trainers were uncertified.⁵⁸ Therefore, the Superior Court's holding highlighted the difference between knowingly and unknowingly consenting to inherent risks.⁵⁹ Specifically, the court examined whether Plaintiffs knew Lackawanna College's athletic trainers were uncertified, and whether those risks were assumed when the Plaintiffs signed the liability waiver.⁶⁰

While not involving student athletes, *Sa v. Red Frog Events, LLC*⁶¹ is a factually similar case on the liability waiver issue.⁶² In *Sa*, a Federal Court sitting in Michigan determined a liability waiver was invalid because the defendant's conduct increased the inherent risks associated with participating in a racing competition, and the plaintiff did not consent to the amplifying conduct.⁶³ The plaintiff, James Sa, was paralyzed while participating in the Warrior Dash, a Michigan running race organized by Red Frog Events.⁶⁴ The Warrior Dash is a dangerous obstacle race wherein participants engage in challenges like climbing walls, jumping over fire, and running over a mud pit.⁶⁵ The plaintiff was severely injured and paralyzed during the race when he dove head first into a mud pit.⁶⁶ During the race, Red Frog Events' employees repeatedly coaxed the plaintiff to dive into the mud pit, and such conduct of yelling and pressuring individuals in this manner was atypical for participants while

57. *See id.* at 261–63 (explaining when plaintiffs have adequately assumed all potential risk of injury).

58. *See Feleccia*, 156 A.3d at 1219–20 (noting that Plaintiffs did not knowingly and voluntarily rely on, and Lackawanna did not disclose, that its college athletic trainers were uncertified).

59. *See id.* at 1218 (discussing known and unknown risks)

60. *See id.* at 1206–09 (explaining court's reasoning in decision not to immediately waive liability for Lackawanna College).

61. 979 F. Supp. 2d 767 (E.D. Mich. 2013).

62. *See id.* at 768–71 (noting *Sa*'s factual background).

63. *See id.* at 779–80 (holding that Red Frog Events, LLC was “grossly negligent” when telling competitors to jump into mud pit because such conduct amplified inherent risks associated with competition).

64. *See id.* at 769–70 (stating injuries suffered by plaintiff).

65. *See id.* at 770 (noting inherent risks associated with Warrior Dash racing competition and kinds of activities participants were engaged in during race).

66. *See id.* at 770–71 (discussing plaintiff's conduct, conduct of Red Frog Events' employees, and resulting injuries sustained from diving into mud pit).

running through the mud pit.⁶⁷ The Eastern District of Michigan concluded the defendant, Red Frog Events, was grossly negligent in encouraging the plaintiff to dive into the mud pit.⁶⁸ Additionally, such conduct depicted a substantial lack of concern for the plaintiff's care and safety.⁶⁹ Therefore, that court invalidated the liability waiver due to grossly negligent conduct.⁷⁰

2. *The Presence of Liability Waivers in College Sports Programs*

While colleges increasingly use liability waivers in today's collegiate and recreational sports programs, there are an increasing number of cases involving the refutability of pre-injury liability waivers in certain instances.⁷¹ The enforceability of a "liability waiver" has evolved over time as a response to previous court decisions holding colleges liable for the injuries of student athletes.⁷² While liability waivers previously released inherent risks of particular activities, various courts today are now re-examining the specific kinds of conduct liability waivers do not release.⁷³ Certain courts around the country, such as the Pennsylvania Superior Court in *Feleccia*, have held certain liability waivers are unenforceable in cases of recognizable gross negligence or reckless conduct.⁷⁴

67. *See id.* at 771–72 (noting that plaintiff sustained severe injuries following pressure from employees to jump into mud pit during race and finding this kind of conduct "grossly negligent" and atypical conduct).

68. *See id.* at 779 (noting court's holding that "Defendant's actions amounted to willful and wanton misconduct").

69. *See id.* at 778–79 (holding that defendant's knowledge of plaintiff's intent to dive into mud pit was "immaterial" to establishing liability because defendant's conduct of encouraging James Sa to dive in pit showed substantial lack of care for his health and safety).

70. *See id.* at 779 (discussing Michigan court's holding that liability waiver was invalid where defendant engaged in grossly negligent conduct).

71. *See* Joshua D. Arters, *Kindly Remove My Child from the Bubble Wrap—Analyzing Childress v. Madison County and Why Tennessee Courts Should Enforce Parental Pre-Injury Liability Waivers*, 11 TENN. J. L. & POL'Y 8, 9–10 (2016) (examining instances where courts have determined that certain liability waivers are unenforceable). For further discussion on the recognition that it is uncommon to invalidate liability waivers, see *infra* notes 75–81 and accompanying text.

72. *See* Arters, *supra* note 71, at 9–10 (noting prior instances of unenforceability).

73. *See id.* at 49–51 (noting *Childress*, *Hawk*, and *Troxel* are California and Tennessee tort cases holding pre-injury liability waivers unenforceable when they "invade a parent's constitutional decision-making authority").

74. *See* *Feleccia v. Lackawanna Coll.*, 156 A.3d 1200, 1212–15 (Pa. Super. Ct. 2017) (noting Superior Court's analysis of Pennsylvania cases on similar liability issues).

Liability waivers in college sports programs have existed for decades and primarily arise out of the potential for litigation.⁷⁵ While Pennsylvania has limited caselaw on the issue of liability waivers and college athletes, an analysis of caselaw from another jurisdiction provides insight into the history of this issue.⁷⁶ In Wisconsin, the Seventh Circuit Court of Appeals not only acknowledged a duty between college athletes and colleges, but also defined the law concerning the validation of liability waivers in the presence of grossly negligent or reckless conduct.⁷⁷ For example, in *Ross v. Creighton University*,⁷⁸ the Seventh Circuit held that student athletes must show a college failed to honor an “identifiable promise” in order to recover damages.⁷⁹ This Seventh Circuit ruling on contractual issues is similar to cases involving liability waivers because both types of contracts may be invalidated when colleges have breached a “promise,” as in *Ross*, or their duty of care to particular individuals.⁸⁰ Therefore, the ruling in *Ross* shows how a previous case handled this issue, specifically by examining contractual obligations and negligent conduct that breach this duty of care.⁸¹

75. See Matthew J. Mitten, *Marquette University Faculty Perspectives: Seventh Circuit and Wisconsin Sports Law Jurisprudence*, 25 MARQ. SPORTS L. REV. 207, 208–10 (2014) (discussing previous cases involving liability waivers and college sports and noting colleges often utilize liability waivers due to potential for future tort actions from players who sustain injuries).

76. See *Feleccia*, 156 A.3d at 1214–15 (noting that while *Feleccia* court relied on Pennsylvania caselaw, issues in cases examined did not directly relate to specific facts of *Feleccia* case; *Kleinknecht*, where Gettysburg College student was killed during lacrosse practice due to gross negligence of coaching staff in obtaining medical personnel in time to treat plaintiff’s cardiac arrest, was factually closest).

77. See Mitten *supra* note 75, at 210 (recognizing existence and use of liability waivers in college athletic programs as means for colleges to evade future tort lawsuits).

78. 957 F.2d 420 (7th Cir. 1992) (recognizing similar case involving contractual liability issues).

79. See Mitten, *supra* note 75, at 218–19 (identifying Seventh Circuit’s recovery standard in cases involving breach of contract claims between student-athletes and colleges).

80. See *id.* (noting Seventh Circuit ruled on contract-related liability issues and that while both *Ross* and *Feleccia* discussed contract-related issues, treatment and discussion of contract’s language differed between cases).

81. See *id.* (examining court’s holding in *Ross* and comparing issues presented in *Ross* to those in *Creighton* and *Feleccia*).

C. The Uncertified Athletic Trainers

1. *Lackawanna's Trainers*

Lackawanna College typically employs two athletic trainers for its football program.⁸² Prior to the 2010 spring football season, Lackawanna hired two women, Kaitlyn Coyne and Alexis Bonisese, as athletic trainers.⁸³ Although they each had a B.S. in Athletic Training, neither was licensed nor certified, either at the time of hiring or at the time of Feleccia and Resch's injuries.⁸⁴ The underlying issue in *Feleccia* is whether the Coyne and Bonisese's hirings, despite the trainers' uncertified status, shows negligence on behalf of Lackawanna College, and whether the Plaintiffs' injuries were ultimately connected to the school's hiring decision.⁸⁵ On appeal, Plaintiffs argued Lackawanna College had a duty to provide certified athletic trainers under a reasonable standard of care in order to help ensure student athlete's safety during participation in contact football.⁸⁶

In August 2009, Lackawanna College hired Coyne and Bonisese with the knowledge both individuals were uncertified as athletic trainers.⁸⁷ When Coyne and Bonisese learned they had failed board certification, they informed Lackawanna's athletic director prior to the Spring 2010 football season.⁸⁸ After learning of their lack of certification, the athletic director at Lackawanna College actually re-titled Coyne and Bonisese as "First Responders."⁸⁹ However, even though both positions were re-titled, Lackawanna College did not alter their job descriptions to reflect the change in

82. *See Feleccia v. Lackawanna Coll.*, 156 A.3d 1200, 1203 (Pa. Super. Ct. 2017) (noting factual circumstances and examining Lackawanna College's conduct prior to Plaintiff's injuries, including Coyne and Bonisese's instruction and oversight during "Oklahoma Drill").

83. *See id.* at 1203–04 (recognizing lack of certification that was at issue in *Feleccia*).

84. *See id.* at 1204–05 (discussing impact of both Plaintiffs' injuries on their abilities to sue Lackawanna College).

85. *See id.* at 1204 (noting relevance of Coyne and Bonisese's lack of certification on underlying liability issues and Plaintiffs' resulting injuries).

86. *See id.* at 1210 (examining Plaintiffs' arguments on appeal).

87. *See id.* at 1203–04 (noting that despite known lack of certification of Lackawanna College's athletic trainers, Lackawanna College hired and allowed them to oversee contact football practice nonetheless).

88. *See id.* at 1203–04 (acknowledging hiring process and acknowledgement that Coyne and Bonisese failed to obtain athletic training board certification).

89. *See id.* (acknowledging Lackawanna knew trainers were uncertified, yet re-titled Coyne and Bonisese while allowing both to continue providing athletic training services).

title from “Certified Athletic Trainer” to “First Responder.”⁹⁰ Additionally, Lackawanna hired a third athletic trainer who did not attend football practices, yet had an identical job description to Coyne and Bonisese despite the different job titles.⁹¹ As such, the Plaintiffs in *Feleccia* allege that both individuals continually lacked the necessary certifications associated with their job titles at Lackawanna College.⁹²

2. *The “Oklahoma Drill” Injuries*

The “Oklahoma Drill” is a contact football drill usually “performed in a confined space.”⁹³ The drill is commonly used at the collegiate football level and is notorious for its high incidence of injury.⁹⁴ During trial, neither of the Plaintiffs’ experts testified about the specifics of the drill, nor did they define the drill itself or acknowledge its frequent use in football practice.⁹⁵

Colleges use the “Oklahoma Drill” as a tool to determine which players are not afraid to engage in contact.⁹⁶ During the tackle drill, “the fullback and linebacker are aligned on opposite

90. *See id.* at 1204 (recognizing Lackawanna College and knowledge of duties and proper training for Coyne and Bonisese’s respective positions, and that Lackawanna retitled those individuals knowing they lacked skills necessary to fulfill role of “athletic trainers”).

91. *See id.* (acknowledging hiring of third athletic trainer, yet recognizing Lackawanna College’s actions of having Coyne and Bonisese perform same duties as third certified athletic trainer).

92. *See id.* at 1204–05 (noting that Coyne and Bonisese continued to impermissibly provide same athletic training services even in their re-titled positions as “First Responders”).

93. *See id.* at 1206 (recognizing dangerousness of this tackle drill and noting previous injuries sustained by a football player who participated in drill).

94. *See* K. Adam Pretty, *Dropping the Ball: The Failure of the NCAA to Address Concussions in College Football*, 89 NOTRE DAME L. REV. 2359, 2360 (2014) (examining dangerous nature of “Oklahoma Drill,” and relationship between drill use in college athletic programs and failure of NCAA to address potential for concussions and other serious injuries during its use).

95. *See Feleccia*, 156 A.3d at 1205 (discussing instruction provided to Feleccia and Resch during tackling drill, and drill’s dangerous nature). Thus, there is arguably a clear, obvious relationship between having uncertified athletic trainers oversee a dangerous tackle drill, and the potential for injury that may occur as a result. *See id.* at 1205–06.

96. *See* Pretty, *supra* note 94, at 2359–60 (noting purpose of “Oklahoma Drill” and college football coaches’ use of it to determine which athletes would more likely engage in contact with other players—to analyze “who was not afraid to hit”); *see also Feleccia*, 156 A.3d at 1203–06 (noting specific intent of Coyne and Bonisese to instruct Lackawanna College football players to participate in “Oklahoma Drill” is unknown, as this was not identified at trial; however, the drill is prominently used during football practices to determine which players would engage in contact).

sides of the ball,” and are instructed to “collide at full speed.”⁹⁷ The drill is dangerous because of its hard, head-on collisions.⁹⁸ Notably, in 2011, Derek Sheely, a fullback at Frostburg State University, was severely injured during practice when he engaged in similar head-on collision drills.⁹⁹ The dangerous nature of the “Oklahoma Drill” cannot be overstated.¹⁰⁰

The Plaintiffs were injured while taking part in these “Oklahoma Drills.”¹⁰¹ Both Plaintiffs knew Lackawanna College used a variation of the “Oklahoma Drill.”¹⁰² While participating in the drill during spring contact football practice, Feleccia suffered a T-7 vertebral fracture.¹⁰³ Later that practice, Resch participated in two more “Oklahoma Drills” and was injured during both.¹⁰⁴ During the first drill, Resch experienced numbness and tingling, which radiated down his arms, and had significant difficulty moving his right shoulder.¹⁰⁵ After his first injury, Lackawanna’s “First Responder” Bonisese told Resch that he could continue practicing if he was “feeling better”; Resch continued, but was injured again during the second practice drill where he sustained significant injuries, including a traumatic brachial plexus avulsion on his right side.¹⁰⁶ However, the team continued to use the “Oklahoma Drill” in subsequent football practices despite Feleccia’s injury.¹⁰⁷ Following such conduct by Lackawanna College, Plaintiffs eventually filed suit in

97. See *Pretty*, *supra* note 94, at 2359 (recognizing dangerous nature of “Oklahoma Drill” and inherent risks associated with even proper instruction of drill, because of hard-collision nature of drill itself).

98. See *Feleccia*, 156 A.3d at 1205 (discussing “Oklahoma Drill” and its specific purpose during football practices).

99. See *Pretty*, *supra* note 94, at 2359 (recognizing seriousness of tackle drills and potential for injury that may occur when players are instructed to hit each other “head-on”).

100. See *Feleccia*, 156 A.3d at 1205–06 (describing inherent dangerousness of Oklahoma Drill).

101. For a discussion of Plaintiffs’ injuries, see *supra* notes 24–25 and accompanying text.

102. See *Feleccia*, 156 A.3d at 1206–07 (stating Plaintiffs were aware of drills when signing waivers).

103. See *id.* at 1207 (noting instruction of Lackawanna College’s athletic trainers and their impermissible conduct of overseeing dangerous tackle drills while being uncertified athletic trainers).

104. See *id.* at 1206–07 (examining nature of “Oklahoma Drill” and its associated risks).

105. See *id.* (recognizing seriousness of Plaintiff’s injuries due to “head-on” collisions).

106. See *id.* at 1207–08 (noting dangerousness of head-on collisions, which are likely to result in head and neck injuries due to positions of players and force of such collisions).

107. See *id.* at 1207 (analyzing injuries that occurred when participating in “Oklahoma Drill,” which was well-known to many collegiate football programs).

the Lackawanna County Court of Common Pleas, which was subsequently appealed to both the Pennsylvania Superior Court and Supreme Court.¹⁰⁸

III. PROCEDURAL HISTORY OF *FELECCIA V. LACKAWANNA COLLEGE*

On February 2, 2016, the Lackawanna County Court of Common Pleas granted Defendant's Motion for Summary Judgment.¹⁰⁹ In reviewing the Lackawanna County Court of Common Pleas' decision, the Superior Court examined several issues, including whether Lackawanna College's conduct constituted recklessness or gross negligence, and whether the trial court erred by finding that the liability waiver "barred" both Feleccia and Resch's personal injury claims.¹¹⁰ The trial court's ruling in favor of Lackawanna College was based on a "determination that Plaintiffs claims [were] barred by the waiver and assumption of risk."¹¹¹

On appeal, Plaintiffs argued the Superior Court should reverse the Order on the basis that Lackawanna College's conduct was that "of such . . . egregious nature" needed in order to bring a successful tort suit.¹¹² On February 24, 2017, the Pennsylvania Superior Court reversed the trial court's Order for Summary Judgment, and remanded the case for trial due to the Superior Court's decision that general issues of material fact existed.¹¹³

On November 29, 2017, Lackawanna College filed for *certiorari*, and the Pennsylvania Supreme Court granted Lackawanna Col-

108. For a discussion on the *Feleccia* case's appellate history, see *supra* notes 5–8 and accompanying text.

109. See Brief of Appellants at *2, *Feleccia v. Lackawanna Coll.*, 156 A.3d 1200 (Pa. Super. Ct. 2017) (No. 385 MDA 2016), 2016 Pa. Sup. Ct. Briefs LEXIS 793 (noting trial court's decision in favor of Lackawanna College and subsequent appeal to Pennsylvania Superior Court by Plaintiffs Feleccia and Resch).

110. See *id.* at *3 (adding that several additional important questions needed to be examined by Superior Court, including whether "defendants limited their defense to assumption of risk" and "whether the court erred by failing to submit the disputed factual questions to a jury").

111. See *id.* at *54–55 (examining both trial court and appellate court decisions).

112. See *id.* (noting that in Plaintiffs' Brief, Plaintiffs argued that "[a] plaintiff must have actual subject knowledge of the risk he faces for assumption[-]of[-]risk to bar recovery. In this case, the student-athletes reasonably relied upon the advice and treatment of unqualified individuals when they decided to resume their participation in the tackling drill which caused them catastrophic injuries").

113. See *Feleccia*, 156 A.3d at 1220 (noting Pennsylvania Superior Court's final decision in *Feleccia*, holding that gross negligence and reckless conduct was not waiveable, even when Plaintiffs knowingly signed liability waiver but submitting liability issue of hiring uncertified athletic trainers to oversee contact football practices to jury).

lege's *per curiam* appeal.¹¹⁴ The Supreme Court granted the Defendant's appeal to determine:

1. Is a Pennsylvania college required to have qualified medical personnel present at intercollegiate athletic events to satisfy a duty of care to the college's student athletes?
2. Is an exculpatory clause releasing "any and all liability" signed in connection with participation in intercollegiate football enforceable as to negligence?¹¹⁵

Lackawanna's appeal followed the Pennsylvania Superior Court's decision not to enforce the liability waiver under the assumption of risk doctrine.¹¹⁶ While the Superior Court, one of Pennsylvania's intermediate appellate courts, validated the assumption of risk defense, the court ultimately determined that issues of material fact were present for a jury to decide, although no jury determination was actually made in the Superior Court case.¹¹⁷ In its appeal, Lackawanna College argued the Superior Court "improperly imposed a new duty of care" to provide certified medical care to student athletes.¹¹⁸ Furthermore, during oral argument at the Supreme Court, Defendants argued the Superior Court failed to apply previous state precedent for negligence claims.¹¹⁹ On appeal, Defendants argued previous Pennsylvania courts had enforced liability waivers in factually similar cases.¹²⁰

114. See *Feleccia v. Lackawanna Coll.*, No. 359 MAL 2017 (Pa. 2017) (noting Supreme Court's granting of Defendant's petition for appeal).

115. See *id.* (explaining issues on appeal to Pennsylvania Supreme Court, which have not yet been addressed, that oral argument is yet to be heard, and that Supreme Court will decide this case at unspecified future date).

116. See Daniel E. Cummins, *Pennsylvania Superior Court Addresses Waiver Form and Assumption of Risk Defense in Context of Football Injuries*, TORTTALK, (Mar. 16, 2017) <http://www.torttalk.com/2017/03/pennsylvania-superior-court-addresses.html> [<https://perma.cc/FKE9-WUSW>] (analyzing Superior Court's decision in *Feleccia*).

117. See *id.* (establishing reason for presenting liability waiver issue to jury, rather than ruling on summary judgment motion).

118. See Matt Fair, *Pa. Justices Urged to Ax Duty of Care for Student-Athletes*, LAW360 (Feb. 9, 2018), <https://www.law360.com/articles/1011221/pa-justices-urged-to-ax-duty-of-care-for-student-athletes> [<https://perma.cc/HZ28-DTCM>] (analyzing Defendant's argument on appeal to Pennsylvania Supreme Court, stating that appellate court failed to follow recognized principles of negligence tort law when submitting liability waiver issue to jury instead of ruling on Motion for Summary Judgment).

119. See *id.* (noting issues raised on appeal to Pennsylvania Supreme Court).

120. See *id.* (examining Defendants' arguments in their Supreme Court appeal).

Defendants made several statements during trial refuting the negligence claims in order to bolster their contention that they did not act negligently.¹²¹ Defendants argued Feleccia witnessed Resch's injuries during the first Oklahoma Drill, yet Feleccia "elected" to continue participating in the tackle drills.¹²² Then, following Feleccia's injuries during his participation in the drill, Coyne and Bonisese immediately attended to his injuries and called Emergency Medical Services to the scene.¹²³ Finally, Defendants argued Coyne and Bonisese never misrepresented their respective positions as uncertified trainers, and they never performed duties outside the scope of their employment at Lackawanna College.¹²⁴

During oral argument at the Supreme Court, Lackawanna College will likely argue that the liability waiver should not be treated differently solely because of a collegiate football context.¹²⁵ The Pennsylvania Supreme Court will address these issues at a future date.¹²⁶

IV. DUTY OF CARE AND LIABILITY ANALYSIS

A. Colleges Have a Duty to Student Athletes

1. *Employer-Employee Theory of Liability*

Caselaw, including in Pennsylvania, suggests that colleges may hold a duty to provide a safe environment for college athletes.¹²⁷

121. See Brief of Appellants at *4–5, *Feleccia v. Lackawanna Coll.*, 156 A.3d 1200 (Pa. Super. Ct. 2017) (No. 385 MDA 2016), 2016 Pa. Sup. Ct. Briefs LEXIS 793 (examining the medical treatment and attention to Plaintiffs injuries immediately following the injuries).

122. See *id.* at *4 (describing Defendants' arguments during trial).

123. See *id.* (recognizing contested issues between both parties).

124. See *id.* at *7 (noting that Coyne and Bonisese were "serving as First Responders" during Plaintiff's injuries, positions they would serve until they became certified athletic trainers).

125. See Fair, *supra* note 118 (recognizing potential arguments in future court appearances on this case, based on Defendants' appeal brief to Pennsylvania Supreme Court).

126. See Matt Fair, *Pa. Justices Question College's Duty in Football Injury Row*, LAW360 (Dec. 5, 2018), <https://www.law360.com/articles/1102981/pa-justices-question-college-s-duty-in-football-injury-row> [<https://perma.cc/MB42-35H6>] (noting potential outcome of Supreme Court case following oral argument in Harrisburg, Pennsylvania on December 5, 2018).

127. See Andrew Rhim, *supra* note 4, at 331 (examining cases addressing duty of care colleges should provide for student-athletes); see also Monica L. Emerick, *The University/Student Athlete Relationship: Duties Giving Rise to a Potential Educational Hindrance Claim*, 44 UCLA L. REV. 865, 884–85 (1997) (discussing nine factors courts examine to determine whether duty of care exists between college or university and its students, including "the likelihood of injury from the existence of the activity" and "the closeness of a connection between the defendant's conduct and the injury" suffered by student); *Hill v. Slippery Rock Univ.*, 138 A.3d 673 (Pa.

One way to examine the liability relationship is under the theory that colleges derive benefits from student athletes, and therefore colleges have a “special relationship” with their student athletes.¹²⁸ Caselaw suggests several ways to further examine this relationship and determine the standard of care colleges owe students.¹²⁹ For example, there is the “employer-employee theory” of liability, which has largely been rejected by courts.¹³⁰ Instead, courts more recently have examined the duty of care owed to student athletes under a heightened principle of liability.¹³¹ The Pennsylvania Superior Court first examined this heightened principle of care in *Hill v. Slippery Rock University*, by addressing NCAA liability to student athletes.¹³² The *Feleccia* court explicitly referenced this duty of care when evaluating Lackawanna College’s conduct of hiring uncertified athletic trainers.¹³³

The “employer-employee” relationship theory posits that college athletes are, essentially, employees of their respective universities in this context.¹³⁴ This concept of the employer-employee relationship is especially relevant in discussions involving the liability of colleges to NCAA athletes.¹³⁵ However, several courts re-

Super. Ct. 2016) (examining relationship between NCAA and student-athletes, where appellants in *Hill* argued that “the NCAA owned a duty of care to Plaintiff because he was a student at Slippery Rock University,” not because plaintiff was “employee” of school).

128. See Rhim, *supra* note 4, at 334–35 (discussing several theories of liability for student-athletes and colleges, noting that “special relationship” theory has been examined by courts, and stating that although it is widely recognized that colleges are not “custodians” of students, heightened duty of care existing between colleges and its students “justified because students generate both economic and non-economic benefits for colleges . . . and colleges have a ‘special relationship’ characterized by mutual dependence”).

129. See *id.* at 335 (discussing nature of college athletes and colleges’ respective “mutual dependence,” and several theories of liability established as result).

130. See *id.* (discussing applicable theories of liability, where employer-employee relationship theory has largely been rejected by United States courts). For further discussion of the employer-employee relationship, see *infra* notes 133–137 and accompanying text.

131. For further discussion of several applicable cases, see *infra* notes 134–138 and accompanying text.

132. See Rhim, *supra* note 4, at 336–37 (discussing “special duty of care” relationship between college athletes and students); see also *Hill*, 138 A.3d at 676 (noting Plaintiff’s argued “NCAA [had] duty to Mr. Hill,” who was student-athlete at Slippery Rock University).

133. See *Feleccia*, 156 A.3d at 1203–05 (examining *Feleccia* court’s treatment of this liability issue).

134. See Rhim, *supra* note 4, at 336 (recognizing why such “special” duty of care exists).

135. See *id.* at 333–37 (noting heightened duty of care requirement for student-athletes, resulting from “special relationship” between student-athletes and colleges).

jected this employer-employee theory, in favor, instead, of arguments that colleges owe a heightened duty of care to students under principles of tort liability.¹³⁶ In rejecting the employer-employee theory, the United States District Court for the Northern District of California explicitly found that there is simply no legal basis for finding student athletes to be “employees” under the Fair Labor Standards Act, and the NCAA is not an applicable “employer.”¹³⁷ In certain jurisdictions, courts have decided a heightened duty of care exists to protect students from foreseeable risks of injury while playing collegiate sports; further, other courts have decided that the employer-employee theory of liability is inapplicable in cases involving similar heightened standards of care.¹³⁸

2. *Liability in Heightened Duty-of-Care Cases*

Since football is an inherently dangerous sport with a heightened probability of injuries and a correspondingly high liability potential for colleges, the scope of the colleges’ duty is to provide reasonable care.¹³⁹ There is a strong argument, supported by caselaw, in favor of finding a duty for colleges to provide a reasonable standard of care to its athletes, notably because colleges have traditionally benefited from their students’ participation in athletic programs.¹⁴⁰ Thus, proponents argue, there should be a legally

136. See *id.* at 336 (analyzing theories of liability under analysis of “special relationship” between student-athletes and college and recognizing several justifications for recognizing that “special relationship” exists in this context); see also Paul Cannon, *NCAA Liability to Student Athletes*, TEX. PERS. INJURY LAW BLOG, (Apr. 30, 2016) <https://www.simmonsandfletcher.com/blog/ncaa-liability-injuries-student-athletes/> [<https://perma.cc/V92J-W6BB>] (recognizing tort lawsuits against NCAA have been unfolding in recent cases). This blog also examines a specific class action lawsuit against NCAA, where former Texas A&M football player sued NCAA for residual concussion affects he sustained while playing football for Texas A&M, which potentially violated college’s duties to student-athletes, including “establishing certain medical protocols for member schools to adhere to when players suffer certain injuries.” See *id.* Plaintiff Julius Whittier argued that the NCAA “failed to warn players of these risks,” and that he sustained severe concussion-related injuries as a result. See *id.*

137. See *Dawson v. NCAA*, 250 F. Supp. 3d 401, 408 (N.D. Cal. 2017) (recognizing that, while this case is concerned with Fair Labor Standards Act, NCAA was not college athletes’ “employer”); see also Rhim, *supra* note 4, at 405 (noting “student athletic ‘play’ is not ‘work,’” thus removing NCAA athletes from any liability claims under potential employer-employee relationship).

138. See Rhim, *supra* note 4, at 337 (addressing foreseeable risks of injury present in college football).

139. See *id.* at 341–42 (noting that this relationship is inherently “special” because heightened standard applies to duty of care between student-athletes and colleges).

140. See *id.* at 342 (identifying heightened standard of care between colleges and student-athletes, and analyzing its application in tort cases); see also *Hill v.*

recognized duty that college athletes are afforded reasonable care, even when those same college athletes have presumably “assumed” the risks of playing an inherently dangerous sport.¹⁴¹

Knapp v. Northwestern University, decided prior to *Feleccia* and further examined in the Superior Court case, is a notable case deciding the “duty of care” colleges owe student athletes.¹⁴² In *Knapp*, Northwestern University recruited an athlete, Nicholas Knapp, out of high school to play college basketball.¹⁴³ However, Knapp suffered a cardiac arrest while playing basketball during his senior year of high school and received a cardioverter-defibrillator to prevent future cardiac arrests.¹⁴⁴ Following this cardiac episode, Northwestern University determined Knapp was unable to participate in collegiate basketball.¹⁴⁵ Knapp filed suit against Northwestern due to

Slippery Rock Univ., 138 A.3d 673, 676 (Pa. Super. Ct. 2016) (reasoning that liability may arise when defendant fails to “exercise reasonable care to perform his undertaking,” and that “at all material times hereto, the NCAA had an irrevocable duty to establish and enforce protocols relating to student athlete safety”). This case highlighted the important relationship between college athletes and the NCAA, acknowledging that the NCAA may be liable when it fails to provide reasonable safety measures to protect student-athletes. *See id.* (noting potential for liability as result); *see also* *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1367–68 (3d Cir. 1993) (stating Pennsylvania Supreme Court would likely recognize this “special duty of care” to college athletes, and that “[t]here is a distinction between a student injured while participating as an intercollegiate athlete in a sport for which he was recruited and a student injured while pursuing his private interests”). This distinction is arguably inherently applicable to Pennsylvania student-athletes injured while participating in collegiate athletic activities. *See id.* at 1368 (noting instances where this “special duty of care” is applied to relationship between student-athletes and colleges).

141. *See* Rhim, *supra* note 4, at 342 (discussing concept that colleges owe students heightened duty of care to protect student-athletes against foreseeable risks of injury, based on both existence of “special relationship” and recognition that collegiate sporting events are sponsored by colleges themselves and colleges profit from student athlete involvement).

142. *See* *Knapp v. Northwestern Univ.*, 101 F.3d 473, 474–78 (7th Cir. 1996) (noting factual and legal background of the *Knapp* case including its analysis of duty of care owed to student-athletes); *see also* Rhim, *supra* note 4, at 344–45 (discussing legal duty of care colleges have to protect students with known medical risks from playing collegiate sports).

143. *See* Rhim, *supra* note 4, at 345 (analyzing Northwestern’s decision to prevent Knapp from playing basketball given his condition and potential for future cardiac arrest). Northwestern ultimately made this decision while being mindful of safety concerns about Knapp’s participation. *See id.* (examining Northwestern’s underlying decision to prevent Knapp from playing basketball, amidst health and safety concerns).

144. *See id.* at 345–46 (noting Knapp’s medical conditions prior to his involvement on Northwestern University’s basketball team and analyzing Northwestern University’s awareness of these conditions prior to Knapp’s participation in athletics at Northwestern).

145. *See id.* at 346 (recognizing Knapp’s medical condition and Northwestern’s underlying safety concerns).

its determination that he was ineligible to play basketball.¹⁴⁶ Ultimately, the Seventh Circuit Court of Appeals held that there was an “implied duty of care” imposed on colleges on behalf of their college athletes, and thus Northwestern had a duty to Knapp to protect him from future injury, especially when Northwestern had knowledge of his prior cardiac arrest.¹⁴⁷ Thus, the Seventh Circuit has already established that colleges owe student athletes a duty of care, especially when the potential for future injury is well-known.¹⁴⁸

3. *Public School vs. Private School Liability*

Lastly, there is a difference in the required duty of care between a public school versus a private school.¹⁴⁹ While previous caselaw held public schools have an implied duty of care, private school liability is more complicated.¹⁵⁰ Debate centers over whether private schools, specifically ones operating as “charitable institutions,” enjoy greater immunity from tort suits as compared to their public counterparts.¹⁵¹ Because private schools may operate in both non-profit and charitable capacities, courts examine liabil-

146. See *Knapp*, 101 F.3d at 486 (holding Northwestern University presented enough evidence to validate its reasoning for determining Knapp was ineligible to play basketball, including evidence Knapp was not “physically qualified” to participate, because there was significant risk of injury due to his prior cardiac arrest while playing high school basketball).

147. See Rhim, *supra* note 4, at 345–46 (discussing the duty-of-care issue); see also *Knapp*, 101 F.3d at 474 (acknowledging that Seventh Circuit overturned lower court’s decision finding Northwestern University discriminated against Knapp in determining he was ineligible to play basketball). The Seventh Circuit reasoned that Northwestern University was allowed to make its own independent determinations of substantial risk of injury, specifically when the school had evidence to support the possibility of future harm. See *id.* at 485–86 (recognizing court’s holding for Northwestern University).

148. See *Knapp*, 101 F.3d at 478 (discussing student athlete relationship, and recognizing both that Northwestern owed duty to Knapp to show concern for his safety and that Northwestern responded accordingly given Knapp’s cardiac condition).

149. For a discussion on liability for public schools versus private schools, see *infra* notes 153–157 and accompanying text.

150. See Rhim, *supra* note 4, at 330–35 (noting that heightened duty of care exists because of need to protect students from foreseeable risks of injury, specifically when colleges have special relationship with student athletes). For further discussion of previous cases that have examined this duty of care, see *supra* notes 30–31 and accompanying text.

151. See Allan E. Korpela, *Immunity of Private Schools and Institutions of Higher Learning from Liability in Tort*, 38 A.L.R.3d 480, *2a (2019) (recognizing some jurisdictions have assessed tort liability of private charitable schools based on whether plaintiff was beneficiary of charity, while other courts have imposed liability on private charitable schools for tort actions arising out of noncharitable activities).

ity based on the school's "profit-making facilities."¹⁵² Furthermore, independent businesses, owned by private schools, often are the subject of tort lawsuits involving students.¹⁵³ Therefore, courts have analyzed whether the actions of independent businesses associated with private schools constitute non-charitable activities, which would allow plaintiffs to bring suit.¹⁵⁴ The issues illustrate the difficulties in assessing private school tort liability, largely due to the differences in profit-motives for private schools.¹⁵⁵ Lackawanna College is a non-profit institution, so the Pennsylvania Superior Court did not address these issues in the *Feleccia* decision.¹⁵⁶ However, issues of variance in public versus private and for-profit versus non-profit may be present in future cases assessing liability waivers and the student athlete-college relationship.¹⁵⁷ Therefore, it is important to recognize that while the *Feleccia* decision addressed one area of liability, as future cases come to Pennsylvania courts, liability may be examined differently depending on the institutions.¹⁵⁸

B. Reckless Disregard is Distinguishable from Negligence

1. *Minimal Standards of Care and Safety*

In *Feleccia*, reckless disregard is distinguishable from negligence when colleges have a duty to student athletes, but consciously disregard risks involved when athletes sign liability waivers without knowing their athletic program's trainers are uncertified.¹⁵⁹ The

152. *See id.* (analyzing cases involving private school liability, where generally courts must first examine school's profit-making enterprise, or whether it receives charitable donations from outside organizations, and then must next examine relationship between victim and school, before court is able to make liability determination).

153. *See id.* (recognizing independent businesses operating within private schools are often subject of tort lawsuits).

154. *See id.* (discussing how tort actions involving noncharitable activities are generally not immune from suit).

155. *See id.* (noting challenges involved in assessing private school tort liability compared to public schools).

156. *See generally* *Feleccia v. Lackawanna Coll.*, 156 A.3d 1200, 1201 (Pa. Super. Ct. 2017) (recognizing Lackawanna College is non-profit).

157. *See id.* at 1201 (noting that while Lackawanna College is non-profit institution, there may be future cases where student-athletes are injured at private institutions).

158. *See generally* *Feleccia*, 156 A.3d 1200 (recognizing potential for varied future outcomes in Pennsylvania courts).

159. *See id.* at 1210–11 (reasoning "reckless disregard" requires "conscious action or inaction" which potentially results in harmful or injurious situations, where negligence alone suggests only "conscious inadvertence"); *see also* *Fitsko v. Gaughenbaugh*, 69 A.2d 132, 135 (1949) (discussing "conscious inadvertence"); *see also* *Interassociation Consensus: Independent Medical Care for College Student-Athletes Best Practices*, NCAA SPORT SCI. INST., available at <http://www.ncaa.org/sites/default/>

NCAA Interassociation Consensus, which outlines the standards for medical attention provided to student athletes participating in NCAA sports, provides that “an active institution should designate a director of medical services to oversee the institution’s athletic health care administration and delivery.”¹⁶⁰ The NCAA Interassociation Consensus is probably applicable to *Feleccia* because these standards similarly align with the types of care required by NJCAA athletic programs.¹⁶¹ Lackawanna College is a member of the NJCAA, which arguably has similar “minimal standards” that its member colleges must meet.¹⁶²

The *Feleccia* court noted the Plaintiffs “raised genuine issues of gross negligence and recklessness” because several NCAA College Athletic Directors opined that Lackawanna College’s conduct in hiring Coyne and Bonisese fell below the applicable standards of care.¹⁶³ It is important to note that NJCAA’s standards were not explicitly defined by the *Feleccia* court; however, the NJCAA Handbook and its applicable requirements for athletic training were ad-

files/2017SSI_IndependentMedicalCare_20170626.pdf [https://perma.cc/CS2J-PYBH] (last visited Mar. 8, 2019) (discussing minimal standards of care and safety for NCAA athletic programs). Given similarities between the NCAA and NJCAA, it is recognized that NCAA standards would apply to the NJCAA. *See id.* (recognizing applicability of NCAA standards to Lackawanna College’s athletic program). However, it must be noted that these standards only apply during the season, off-season practices are excluded. *See id.*

160. *See Feleccia*, 156 A.3d at 1217 (analyzing NCAA safety standards and applicability to NJCAA). Arguably, NCAA and NJCAA safety standards are likely very similar. *See id.* (recognizing that the NJCAA has not published similar guidelines); *see also Feleccia*, 156 A.3d at 1211 (quoting *Fitsko v. Gaughenbaugh*, 363 Pa. 132 (1949) (stating that failure to take precautions against potential medical emergencies may constitute reckless misconduct, as previously examined in *Fitsko*)).

161. *See Feleccia*, 156 A.3d at 1213–18 (recognizing potential applicability for NCAA Interassociation Consensus’ written policies for ensuring adequate medical attention for student-athletes). The NJCAA does not have an applicable consensus, but the Athletic Training Board Certification guidelines suggest that trainers adhere to similar standards for providing medical attention. *See id.* (noting Superior Court’s recognition of minimum athletic training standards).

162. *See id.* at 1214–15 (discussing medical assistance in the context of sports, noting that *Kleinknecht* has previously addressed medical care standards for student-athletes, and NCAA similarly requires colleges to provide such medical personnel).

163. *See Feleccia*, 156 A.3d at 1213–14 (noting that Lackawanna College must adhere to “minimal standards of care and safety” as recognized by NJCAA and Board Certification Guidelines for collegiate athletic training). During practice, Coyne and Bonisese were required to adhere to the Board Certification Guidelines for providing permissible athletic training, which were not met because both individuals were uncertified. *See id.* In addition, expert Richard Slocum stated that he had “never seen the drill run as it was at Lackawanna,” and that such conduct was definitely a “systematic oversight” by Lackawanna. *See id.* at 1214.

dressed at trial.¹⁶⁴ The NCAA Interassociation Consensus is a recent effort by the NCAA to better determine the safety standards for college athletic programs.¹⁶⁵ Although the NJCAA has not established a similar consensus, it is logical to assume the NJCAA requires Junior Colleges to comply with similar standards of hiring qualified individuals to oversee the care and training of its athletic trainers, which would apply to Lackawanna, as a junior college intercollegiate athletic program.¹⁶⁶ This logical determination of the NCAA's intersection and applicability comes from an evaluation of the NJCAA 2017-2018 Handbook, which has a "Safety" section that outlines similar NJCAA guidelines for trainers, including that "the NJCAA requires that a certified/licensed athletic trainer be provided at all NJCAA postseason events," and that NJCAA "recommends, at a minimum, a certified athletic trainer or EMT be available at all regular season practices."¹⁶⁷ Plaintiffs' experts M. Scott Zema, Associate Athletic Director at Stevenson University, and Betsey Mitchell, Director of Athletics at the California Institute of Technology, testified that hiring uncertified athletic trainers was not in accordance with collegiate athletic programs' safety guidelines.¹⁶⁸

164. *See id.* at 1210–13 (recognizing that appellate court's focus was on Athletic Training Board Certification guidelines, rather than specific NJCAA rules and regulations); *see also* Brief for Appellees, *supra* note 47, at *7–8 (addressing NJCAA 2016–2017 Handbook and arguments made regarding Handbook's applicability to the 2010 football season).

165. *See Interassociation Consensus: Independent Medical Care for College Student-Athletes Best Practices*, *supra* note 159 (explaining recent developments in NCAA safety guidelines).

166. *See Feleccia*, 156 A.3d at 1213–14 (noting relevant safety standards, including requirements for board certified athletic trainers).

167. *See* NAT'L JUNIOR COLL. ATHLETIC ASS'N 2017–2018 HANDBOOK & CASEBOOK (2017), E.1-E.1a, *available at* https://d2o2figo6ddd0g.cloudfront.net/a/1/o4bxsuaw8aficy/2017-18_NJCAA_Handbook_Jan_4_2018.pdf [<https://perma.cc/BAQ3-YSMG>] (examining relevant safety portions of NJCAA Handbook and noting minimum requirements to have certified athletic trainers or EMT personnel at NJCAA practices); *see also* Brief for Appellees, *supra* note 47, at *57 noting Athletic Training Board Certification Guidelines, applicable in *Feleccia* case, and connection to NCAA Interassociation Consensus, which—while not directly applicable—highlights treatment of similar issues by collegiate athletic associations; *Obtain Certification*, NAT'L ATHLETIC TRAINERS ASS'N, <https://www.nata.org/about/athletic-training/obtain-certification> [<https://perma.cc/PE6V-XG9U>] (last visited Mar. 23, 2019) (noting athletic training guidelines for Coyne and Bonisese's respective employment positions at Lackawanna College).

168. *See Feleccia*, 156 A.3d at 1213 (recognizing that Lackawanna's Athletic Trainers must adhere to Board Certification Guidelines for permissible athletic training).

The standards for the practice of collegiate athletic training are well known and widely available.¹⁶⁹ The “Board Certification for Athletic Trainers,” which outlines all necessary steps to obtaining certification status for athletic trainers, provides that: to become a Certified Athletic Trainer, an individual must complete an accredited athletic education program in addition to passing a comprehensive national exam.¹⁷⁰ When analyzing the safety standards for contact football, the athletic training rules apply because the injuries occurred during spring football practice, not during the regular season.¹⁷¹ Plaintiffs’ counsel noted this distinction in the appellate briefs and during trial, because the NJCAA by-laws recognize that the same NCAA rules apply during the *playing* of a football game, but not necessarily during football practices.¹⁷²

2. Duty to Provide Against Foreseeable Risks of Injury

The Superior Court acknowledged liability waivers are generally considered valid if the individuals signing the documents were

169. See Brief for Appellees, *supra* note 47, at *57 (noting board certification standards for athletic training and explaining significance in relation to lack of certification in *Feleccia*, as well as inherent safety risks associated with training provided by Coyne and Bonisese during contact football practice); see also *Obtain Certification*, NAT’L ATHLETIC TRAINERS ASS’N, *supra* note 167 (examining standards for obtaining Athletic Training Certification, including working in “collaboration with a physician and within their state practice act,” continuing education, and completing competency requirements, all which assist in ensuring athletes receive adequate care during athletic events).

170. See Brief for Appellees, *supra* note 47, at *57–58 (recognizing resulting consequences of improper athletic training, and potential for injury as result of failing to meet board certification standards); see also NAT’L JUNIOR COLL. ATHLETIC ASS’N 2017–2018 HANDBOOK & CASEBOOK, *supra* note 167 at E.1–E.1a (stating that the NJCAA requires, “at a minimum, that certified athletic trainers or EMT be available at regular season practices”); see also Brief for Appellees, *supra* note 47, at *7–8 (acknowledging that during trial, it was contested whether current NJCAA Handbook is applicable to 2010 football season). Plaintiffs cited to information requiring certified athletic trainers from 2016–2017 version of handbook, but Defendants’ argued those standards were inapplicable to the 2010 football season. See *id.* at *8 (discussing applicability of 2010 handbook).

171. See Brief for Appellees, *supra* note 47, at *57 (noting arguments made regarding the spring 2010 football season and underlying handbook rules); see also *Feleccia*, 156 A.3d at 1200 (noting that Plaintiffs’ injuries occurred during spring football practice, or “spring training,” not during regular football season, and, because of this, “Board Certification” standards would likely be more applicable, whereas NCAA rules would apply during regular football season).

172. See Brief for Appellees, *supra* note 47, at *57–58 (analyzing relationship between NJCAA and NCAA and noting that during regular football season NCAA rules of conduct would apply to NJCAA athletic games, while NCAA rules were not applicable during practices).

aware of the risks involved.¹⁷³ However, the Plaintiffs in *Feleccia* did not know Lackawanna College hired two uncertified athletic trainers.¹⁷⁴ Additionally, colleges have a duty to provide reasonable protection against a foreseeable risk of injury.¹⁷⁵ Such risks could arise when the athletic trainers overseeing football practices are not qualified for their respective positions.¹⁷⁶

The *Feleccia* court relied on *Tayar* to determine that “liability waivers are unenforceable in claims of gross negligence or reckless conduct.”¹⁷⁷ In *Tayar*, the Pennsylvania Supreme Court held a ski resort’s pre-printed release did not absolve the resort of liability when a patron was injured snow-tubing.¹⁷⁸ The Pennsylvania Supreme Court reviewed the liability release used by Camelback Ski Corporation, and ultimately concluded the release failed to include the actions of employees.¹⁷⁹ The release notified patrons of the “risk of collision” related to the “common receiving area” of the resort, largely monitored by resort employees.¹⁸⁰ However, the court also noted that Camelback selectively avoided including its employees in the release, and made a “deliberate decision” not to warn the public of the dangers associated with negligent employee monitoring of the receiving area.¹⁸¹ This omission illustrates types

173. See Morgan-Besecker, *supra* note 18 (acknowledging court’s holding in *Feleccia*, which arose out of Lackawanna College hiring uncertified athletic trainers, and conduct of withholding that information from student athletes).

174. See *Feleccia*, 156 A.3d at 1214 (noting major distinction in *Feleccia*, and analyzing how both Plaintiffs lacked any knowledge that Lackawanna College’s athletic trainers were uncertified, even though they knowingly signed liability waivers releasing Lackawanna College from liability).

175. See *id.* at 1215 (recognizing Lackawanna’s duty of reasonable care).

176. See *Kleinknecht v. Gettysburg Coll.*, 989 F.2d. at 1360, 1370 (3d Cir. 1993) (discussing adequacy of college athletic program’s medical assistance and its failure to protect student-athletes from injury).

177. See Siegel, *supra* note 1 (analyzing Plaintiffs’ arguments made during trial in *Feleccia* and noting potential for foreseeable risks of injury due to hiring uncertified athletic trainers to oversee contact football practices, especially well-known injurious tackle drills); see also *Tayar v. Camelback Ski Corp.*, 47 A.3d 1190, 1196 (Pa. 2012) (holding Camelback Ski Corp. liable for making “deliberate decision” to remove employees from protection of its liability release).

178. See *Tayar*, 47 A.3d at 1193 (Pa. 2012) (noting that patrons of Camelback Ski Corp. were required to sign liability waiver before snow-tubing, which traditionally would release Camelback from liability, in comparable manner to liability waiver at issue in *Feleccia*).

179. See *id.* at 1195–96 (finding release unenforceable).

180. See *id.* at 1196 (discussing that Camelback’s release notified patrons of potential risks of collision but failed to include potential negligent acts of employees who monitored receiving area).

181. See *id.* at 1196–97 (noting liability waiver does not release liability for negligent acts of employees). This is relevant to *Feleccia*, where Plaintiffs were unaware that Lackawanna College hired uncertified athletic trainers to oversee contact

of conduct that will not absolve a defendant from liability, even when plaintiffs have signed liability waivers.¹⁸²

Similarly, Plaintiffs Resch and Feleccia knowingly signed liability waivers regarding potential injuries sustained while playing football.¹⁸³ However, the *Feleccia* court, in part relying on *Tayar* to determine whether liability for recklessness can be released in a pre-injury waiver, determined Lackawanna College could be held liable for failing to warn Plaintiffs that Coyne and Bonisese lacked athletic training certification.¹⁸⁴ The court relied on *Tayar* to decide that a liability waiver could be invalidated for public policy implications, specifically relating to waiving reckless conduct.¹⁸⁵

3. *Heightened Duty of Care*

A “heightened duty of care” may be present when student athletes may, or are likely to, incur injuries from foreseeable risks.¹⁸⁶ As demonstrated by this Comment, courts have previously imposed this heightened duty of care owed to students on colleges because the risk of a foreseeable injury alone does not automatically determine liability.¹⁸⁷ Colleges may be found liable for athletes’ injuries, even though athletes may understand some risks associated with

football practice. See *Feleccia*, 156 A.3d at 1219 (noting Plaintiffs lack of awareness relating to Lackawanna’s uncertified trainers).

182. See *Tayar v. Camelback Ski Corp.*, 47 A.3d 1190, 1196–97 (Pa. 2012) (recognizing Superior Court’s holding).

183. See *Feleccia*, 156 A.3d at 1205 (discussing Lackawanna College’s decision to hire uncertified athletic trainers, and examining Plaintiff’s lack of knowledge regarding that particular issue, even when choosing to knowingly sign liability waiver involving any injuries sustained while participating in contact football at Lackawanna College).

184. See *id.* (recognizing Lackawanna College’s conduct in knowingly hiring uncertified trainers).

185. See *Tayar*, 47 A.3d at 1206 (holding that deliberate omission of potential risk associated with employee monitoring of property did not waive liability for Camelback when the patron was injured but signed release, and similarly that Lackawanna College’s actions of knowingly hiring uncertified trainers to oversee contact football practices should not be released).

186. See Rhim, *supra* note 4, at 331–34 (noting the relationship between certain sports activities and the heightened duty of care, and recognizing the intersection of providing *different*, albeit heightened, care for dangerous sports); see also Edward Whang, *Necessary Roughness: Imposing a Heightened Duty of Care on Colleges for Injuries of Student-Athletes*, 2 SPORTS L.J. 25, 44 (1995) (analyzing *Kleinknecht* and determining colleges have heightened duty to provide “reasonable care” for athletes’ injuries that occur on college campuses and during collegiate sports practices).

187. For a discussion on cases involving liability waivers, see *supra* notes 26–29 and accompanying text.

playing sports.¹⁸⁸ Therefore, a liability waiver synthesizes both issues, specifically an athlete's acknowledgment of the risks and a college's adherence to safety.¹⁸⁹ First, a waiver requires athletes to acknowledge the potential for foreseeable risks of injury.¹⁹⁰ Second, the waiver requires schools to adhere to the minimal safety requirements imposed by a heightened duty of care.¹⁹¹

There are several ways to analyze where the standard for a heightened duty of care arises.¹⁹² First, the heightened duty that colleges owe to student athletes goes beyond what colleges would ordinarily owe its non-athlete students.¹⁹³ This heightened duty exists when colleges are not financially compensating athletes, and are therefore required to go beyond the standard duties of care owed to private students.¹⁹⁴ Second, the relationship between college athletes and colleges themselves is considered "special."¹⁹⁵ While not all courts acknowledge this special relationship, in *Feleccia*, the Superior Court essentially implied this relationship exists.¹⁹⁶ Importantly, the court reasoned that Lackawanna College may be

188. See Rhim, *supra* note 4, at 331–33 (discussing heightened duty of care requirement, and its divorce from idea that liability exists solely based on highly foreseeable risk of injury).

189. See *id.* at 331 (noting how liability waiver attempts to undermine potential for future lawsuits when individuals recognize risks involved in certain activities).

190. See *id.* at 335–36 (recognizing that by signing liability waiver, individuals acknowledge risks involved in certain activities, and seemingly consent to those risks).

191. See *id.* at 336–37 (acknowledging both that colleges have duty to protect students from foreseeable risks of injury, but also that colleges are not custodians of students—students themselves have some level of personal responsibility in ensuring their own safety).

192. See Whang, *supra* note 186, at 27 (discussing several reasons why colleges owe heightened duty of care to student-athletes, including fact that college athletes provide substantial amount of both economic and noneconomic benefits to colleges).

193. See *id.* (noting that special duty exists).

194. See *id.* at 27–28 (reasoning that duty owed to student-athletes is heightened compared to non-athlete students, specifically because of economic and noneconomic benefits student-athletes provide to colleges).

195. See *id.* at 33–34 (stating that Second Restatement of Torts examines these special relationships under tort liability and noting that “[c]ourts are not foreclosed from recognizing special relationships other than those specifically listed in section 314A” of the Second Restatement of Torts, and that “if courts are willing to recognize the student-college relationship itself as a special one, it is possible to impose a duty of care on colleges for student injuries”).

196. See *Feleccia v. Lackawanna Coll.*, 156 A.3d 1200, 1215 (Pa. Super. Ct. 2017) (recognizing the court's reliance on *Kleinknecht*, and the Third Circuit's prediction that the Pennsylvania Supreme Court would find “a special relationship existed between the [c]ollege and Drew that was sufficient to impose a duty of reasonable care on the [c]ollege”; the Superior Court relied on this prediction in their holding).

liable for hiring uncertified athletic trainers and for Plaintiffs' resulting injuries, in affirming that a special relationship exists between colleges and student athletes.¹⁹⁷ Third, a "mutual dependence" may characterize the relationship between student athletes and colleges.¹⁹⁸ For example, colleges depend on student athletes to fill stadiums and provide other economic benefits, while student athletes depend on colleges for tuition scholarships, as well as education.¹⁹⁹ Lastly, the "foreseeability" of harm is greater in a student athlete and college relationship, especially when student athletes are engaged in dangerous sports, and therefore the duty of care is subjected to a heightened standard.²⁰⁰

4. *The Difference Between Reckless Misconduct and Negligence*

The Pennsylvania Supreme Court has previously held that there is a distinct difference between reckless misconduct and negligence.²⁰¹ In *Tayar*, the Court defined "recklessness" as requiring "conscious action" thus creating a "substantial risk of harm."²⁰² In contrast, "negligence" consists of "failure to take precautions" and other actions that may lack conscious decision-making, but are still

197. *See id.* at 1215–16 (recognizing that while liability waiver does not waive grossly negligent or reckless conduct, factual liability issues presented were submitted to jury to determine whether Lackawanna College's conduct constituted gross negligence or reckless behavior).

198. *See Whang, supra* note 186, at 43–45 (reasoning that while courts and NCAA have refused to acknowledge possible employer-employee relationship between colleges and student athletes, both are considered mutually dependent on one another for certain economic reasons and thus college-student athlete relationship "is characterized by mutual dependence" and is special because colleges must take extra steps to ensure safety of students participating in off-campus co-curricular activities such as sports).

199. *See id.* at 40–41 (explaining mutual dependency relationship).

200. *See id.* at 50 (noting that in *Kleinknecht*, "foreseeability was the second" element of duty of care analysis, which is significant in analyzing its relation to heightened standard of care). Given that student-athletes are likely to incur foreseeable injuries while participating in college athletics, colleges should be subjected to a heightened standard of care in order to protect student-athletes from harm. *See id.* (recognizing court's reasoning in *Kleinknecht*).

201. *See Tayar v. Camelback Ski Corp.*, 47 A.3d 1190, 1200 (Pa. 2012) ("Recklessness is distinguishable from negligence on the basis that recklessness requires conscious action or inaction which creates a substantial risk of harm to others, whereas negligence suggests unconscious inadvertence."); *see also Hinkal v. Pardoe*, 133 A.3d 738, 746 (Pa. Super. Ct. 2016) (holding that appellant's claims were "centered on mere negligence," not recklessness and therefore distinguishing between both).

202. *See Tayar*, 47 A.3d at 1198–1200 (discussing Pennsylvania Supreme Court's treatment of "recklessness" as distinguishable from "negligence" and recognizing that *Tayar* court cites to Second Restatement of Torts in analysis of distinguishing negligence from recklessness).

contributory to future injuries.²⁰³ The *Tayar* court observed that out of twenty-eight states that addressed the enforcement of liability releases in cases involving reckless conduct, only two states release reckless conduct alone.²⁰⁴ In contrast, a majority of states do not release reckless conduct, even in cases involving “voluntary recreational activities.”²⁰⁵ Specifically, twenty-three states concluded that releasing recklessness is against public policy.²⁰⁶ In addition, it can be inferred that these same twenty-three states also invalidate releases involving negligence; such are important considerations given that *Feleccia* is awaiting a Pennsylvania Supreme Court decision.²⁰⁷ In Pennsylvania, the *Tayar* court also concluded that releasing recklessness would allow parties to “escape liability for consciously” failing to protect against potential injury.²⁰⁸ In analyzing the *Tayar* decision, the *Feleccia* court most likely correctly decided not to release Lackawanna College from liability, because hiring personnel knew Coyne and Bonisese were uncertified athletic trainers, but consciously ignored the risks that lack of certification posed to student athletes.²⁰⁹ The Pennsylvania Supreme Court will need to go further than the Superior Court in determining whether Lackawanna’s conduct constituted recklessness.²¹⁰

In other cases, Pennsylvania courts previously allowed plaintiffs to recover when defendants acted with “reckless disregard” for safety concerns.²¹¹ For example, in *Wikert v. Kleppick*, the plaintiff

203. *See id.* at 1220 (noting standard for conduct that would not release Lackawanna College from liability in action).

204. *See id.* at 1201–03 (analyzing that recklessness is not released in majority of states that have addressed liability waiver issue, specifically in cases involving reckless or negligent conduct).

205. *See id.* at 1194–98 (noting distinction between reckless and negligent misconduct).

206. *See id.* at 1202–03 (examining states that have addressed this intersection between conduct and liability waivers).

207. *See id.* (noting that twenty-three out of twenty-eight states have decided against releasing both reckless and negligent care, and that federal courts applying Pennsylvania law have not enforced releases where reckless conduct is involved).

208. *See id.* at 1194–98 (noting different treatment of recklessness and negligent conduct among states).

209. *See Feleccia v. Lackawanna Coll.*, 156 A.3d 1200, 1211–12 (Pa. Super. Ct. 2017) (discussing decision not to release Lackawanna College from liability when it consciously disregarded “minimal standards of care and safety” and noting that, on appeal, Pennsylvania Supreme Court will have to analyze whether impermissibly providing uncertified athletic trainers to oversee contact football constituted gross negligence or reckless behavior); *see also Tayar*, 47 A.3d at 1198–99 (discussing “minimal standards of care and safety” which were also addressed in *Feleccia*).

210. *See Feleccia*, 156 A.3d at 1216 (recognizing limitations in lower court’s holding in submitting the liability waiver issue to jury).

211. *See Wikert v. Kleppick*, 8 Pa. D. & C.4th 193, *10–11 (C.P. Allegheny 1990) (noting problematic approach to relying on “assumption of risk” doctrine

was participating in a hockey game when he collided with the defendant and was struck in the face with a hockey stick.²¹² The plaintiff suffered injuries as a result and filed suit against the defendant for negligent conduct.²¹³ The plaintiff based his negligence claim on the theory that the defendant failed to “exercise reasonable care and control over the existing circumstances.”²¹⁴ The Court of Common Pleas determined that reckless conduct is different from negligence in that the degree of risk is substantially different.²¹⁵ Given Lackawanna College’s active role in hiring uncertified athletic trainers to oversee potentially dangerous tackle drills, Lackawanna College should be found grossly negligent, or even reckless, in impermissibly allowing those uncertified trainers to provide athletic training services to student athletes.²¹⁶ Similarly, the Pennsylvania Supreme Court should consider the factors present in *Kleinknecht* and *Tayar* when making its final liability determination.²¹⁷

D. Future Cases: Liability Waivers Are Not the Ultimate Protection

1. *Impact on Pennsylvania Cases Following Feleccia v. Lackawanna College*

In future Pennsylvania cases, a liability waiver may not automatically waive liability for colleges that consciously disregard minimal standards of care and safety when those colleges have a duty to provide a safe playing environment for students.²¹⁸ However, the “minimal standards of care and safety” should be better defined so colleges have notice of the required safety standards, and a judge is

when evaluating plaintiffs’ liability claims, specifically in event of inherently dangerous activities, because in those instances courts will simply presume plaintiff has assumed all risks of that particular activity).

212. *See id.* at *1–2 (recognizing when assumption of risk doctrine applies and examining its treatment by courts when defendants’ conduct constitutes gross negligence or reckless behavior).

213. *See id.* at *2 (explaining that plaintiff’s suit contained two counts, one for assault and battery—claiming that Defendant intentionally struck Plaintiff with hockey stick—and another for negligence).

214. *See id.* at *1 (reasoning that Defendant acted with “reckless disregard for Plaintiff’s safety,” creating likelihood that Plaintiff could sustain injuries as result).

215. *See id.* at *6–7 (analyzing degrees of risk between negligence and reckless misconduct).

216. *See Feleccia v. Lackawanna Coll.*, 156 A.3d 1200, 1217–20 (Pa. Super. Ct. 2017) (providing Superior Court’s reasoning).

217. *See id.* at 1214–15 (noting Superior Court’s focus on *Tayar* and *Kleinknecht*, which were persuasive for Superior Court’s reasoning and liability analysis).

218. *See id.* at 1200–05 (discussing Lackawanna College’s reckless disregard for Feleccia and Resch’s safety during football practices).

better able to determine such required minimal safety standards.²¹⁹ The *Feleccia* court largely relied on *Tayar* to determine that a valid liability waiver will not prevent an individual from bringing suit against a college when that college's conduct constituted gross negligence or recklessness.²²⁰ Future Pennsylvania cases involving fact patterns similar to *Feleccia* and *Tayar* will likely make similar determinations.²²¹

Daniel J. Siegel, Esq. represented the Plaintiffs in *Feleccia*.²²² In his online publication, Siegel argued that "enforcing a release and granting summary judgment in a situation where the availability of qualified medical personnel is called into question would jeopardize the health and safety of such student athletes."²²³ Specifically, he advocates that allowing a liability waiver to release a college from such egregious conduct "removes at least one incentive for colleges to adhere to minimal standards of care and safety."²²⁴ Therefore, Siegel supports the *Feleccia* court's holding that a college may be liable for certain reckless actions when it knowingly hires uncertified athletic trainers to oversee an inherently dangerous sport.²²⁵

2. A Win for Plaintiffs in Cases Involving a Special Duty of Care

Feleccia is the first Pennsylvania case to specifically address the issue of the relationship between student athletes and colleges, and

219. See *id.* at 1220 (noting that in *Feleccia*, court submitted issues of liability waiver, and Lackawanna College's conduct in hiring two, uncertified athletic trainers to oversee contact football practices to jury as opposed to judge making final liability determination).

220. See Siegel, *supra* note 1 (recognizing duty owed to college athletes, and importance of adhering to minimal safety standards); see also *Tayar v. Camelback Ski Corp.*, 47 A.3d 1190, 1202–03 (Pa. 2012) (noting Pennsylvania Supreme Court's decision to hold individuals liable for grossly negligent or reckless behavior).

221. For further discussion of the holding of *Feleccia* based on an analysis of previous caselaw, see *infra* note 249 and accompanying text. For further discussion of how a California Superior Court has addressed similar liability issues and determined that a specific duty of care exists between colleges and student-athletes, while also noting that other states may move in a similar direction, see *infra* note 228 and accompanying text. For further discussion of how *Tayar* predicted the Pennsylvania Supreme Court would acknowledge a similar duty of care, see *supra* note 30 and accompanying text.

222. See *Feleccia*, 156 A.3d at 1200–01 (recognizing attorneys on record).

223. See Siegel, *supra* note 1 (noting reasons why colleges should be held liable for failing to meet minimal safety standards, even when student-athletes sign liability waivers releasing colleges from personal injury lawsuits).

224. See *id.* (recognizing importance of upholding minimal standards of care and safety, especially in case of student-athletes); see also *Feleccia*, 156 A.3d at 1208–09 (addressing minimal standards of care and safety arguments).

225. See generally *Feleccia*, 156 A.3d 1200 (analyzing reckless actions Lackawanna College knowingly took when hiring uncertified athletic trainers).

whether a liability waiver releases colleges from negligent or reckless conduct; however, other Pennsylvania cases have addressed similar duty of care issues.²²⁶ While this case is pending Pennsylvania Supreme Court review, student athletes in Pennsylvania have an improved chance of prevailing in personal injury suits, even in the event of signing a liability waiver, where colleges blatantly disregarded minimal standards of care and safety.²²⁷ Pennsylvania, following the Superior Court's decision in *Feleccia*, is moving towards recognizing this duty of care; California, as a point of comparison, already expressly recognizes that college students are entitled to a special duty of care.²²⁸ In *UCLA v. Rosen*, a female student was badly injured during a school chemistry course when a classmate attacked her with a knife.²²⁹ In this case, while the attacker had not previously exhibited signs of aggression and violent tendencies, the court found UCLA failed to take action to protect its students when it had knowledge of the individual's schizophrenic issues and targeting of a particular student at UCLA.²³⁰ The Superior Court of Los Angeles explicitly defined the duty owed to students, reason-

226. *See id.* at 1206–09 (examining liability waiver issue under analysis of student athlete-college relationship and recognizing that liability waiver cannot waive reckless conduct by colleges, which inadvertently places student-athletes at greater risk of harm). For further discussion of previous cases which have assessed a similar duty of care and liability analysis, including *Tayar*, which is a Pennsylvania Supreme Court case that examines the liability waiver issue, although the case does not present issues involving college athletes, see *supra* notes 27–31 and accompanying text.

227. *See Feleccia*, 156 A.3d at 1200–05 (analyzing that future plaintiffs will have to show colleges acted recklessly or with gross negligence, and that such conduct was not assumed by plaintiffs who knowingly consented to inherent risks of participating in collegiate athletics).

228. *See Regents of Univ. of Cal. v. Superior Court of L.A.*, 240 Cal. Rptr. 3d, 675, 683 (Cal. Ct. App. 2018) [hereinafter *UCLA v. Rosen*] (noting Appellate Court's holding, emphasizing “we simply hold that they have a duty to act with reasonable care when aware of a foreseeable threat” to students' safety); see also Marilyn Z. Kutler and Karen Baillie, *United States: California Creates Special Duty for Colleges to Protect Students*, MONDAQ (Apr. 3, 2018), <http://www.mondaq.com/unitedstates/x/687624/Education/California+Court+Creates+Special+Duty+for+Colleges+to+Protect+Students> [<https://perma.cc/P66E-FRGH>] (recognizing establishment of new duty-of-care that California colleges owe students).

229. *See id.* at 683 (recognizing how California has become one of first states to explicitly recognize special relationship between colleges and students, placing duty on schools to “take reasonable steps to protect students when [the school] becomes aware of foreseeable threat to their safety”) (emphasis in original).

230. *See id.* (establishing that UCLA was aware of attacker's schizophrenia and had knowledge that this individual was targeting Plaintiff during school). The factual background of *UCLA v. Rosen* led the court to establish a recognizable duty of care that colleges owe students. *See id.*

ing that colleges must take “reasonable steps” to ensure students’ safety, specifically in the event of foreseeable injury.²³¹

Similarly, the *Feleccia* case followed the California Superior Court’s recognition of the special duty of care owed to students.²³² However, the California Superior Court has better defined that duty of care, specifically concluding UCLA acted unreasonably when it ignored a student’s violent behavior, subsequently putting other UCLA students at risk.²³³ Thus, in future tort cases, state courts may find colleges liable for conduct that falls outside of this “reasonableness” standard, or similarly constitutes reckless or grossly negligent conduct that is not waiveable by an exculpatory clause.²³⁴ While “reasonable conduct” is a California standard, college athletes in Pennsylvania and across the United States may similarly argue that a college’s conduct falls outside the assumption of risk doctrine, and thus is amenable to suit.²³⁵ The cases examined in this Comment, including *Tayar, Sa v. Red Frog Events LLC*, and *Knapp* illustrate that United States courts are already moving in this direction.²³⁶

In *Feleccia*, the Supreme Court will decide whether Lackawanna’s conduct of hiring two uncertified athletic trainers was negligent, and whether such negligence was waived when Plaintiffs knowingly signed a liability waiver.²³⁷ Ultimately, Lackawanna College’s conduct should not be waiveable; hiring uncertified athletic trainers to oversee contact football and allowing them to instruct

231. See *id.* (noting California Court of Appeal for the Second District’s determination that colleges must take reasonable steps to ensure students’ safety).

232. See *Feleccia*, 156 A.3d at 1217–20 (noting that Superior Court invalidated the liability waiver, but submitted the issue of negligence to a jury, in contrast to *UCLA v. Rosen* case discussed above).

233. See *UCLA v. Rosen*, 240 Cal. Rptr. 3d at 687–89 (defining reasonableness standard for special duty of care cases involving California universities).

234. See Kutler and Baillie, *supra* note 228 (recognizing future impact of California’s reasonableness approach to liability, and Pennsylvania Superior Court’s similar analysis regarding Lackawanna College’s conduct and Plaintiffs’ abilities to bring suit).

235. See *id.* (recognizing applicability of *Feleccia* and *Rosen* cases to future plaintiffs in factually similar circumstances who may be able to sue colleges whose conduct falls outside assumption of risk doctrine).

236. For further discussion of these cases, which held in favor of plaintiffs whose conduct arguably fell under the assumption-of-risk doctrine because of the egregious and reckless nature of the defendants’ conduct, see *supra* notes 29, 63, and 146 and accompanying text, respectively.

237. See *generally* *Feleccia v. Lackawanna Coll.*, 156 A.3d 1200 (Pa. Super. Ct. 2017) (recognizing “knowing” conduct by Plaintiffs within negligence action). For further discussion of the Pennsylvania Superior Court’s holding and determination that a liability waiver does not automatically waive liability, see *supra* note 110 and accompanying text.

college athletes on a notoriously dangerous tackle drill puts students directly at risk of harm in an already inherently dangerous sport.²³⁸ While students consent to known risks of playing football under the assumption of risk doctrine, colleges must adhere to minimal safety standards because students rely on those standards to protect them in an injury-prone environment.²³⁹

In total, *Feleccia* reminds colleges of their legal obligation to students to provide the minimal standard of care.²⁴⁰ While the *Feleccia* ruling does not change the assumption of risk doctrine, future college athletes injured while participating in college athletic programs as a result of a college's negligent or reckless conduct now have a better opportunity to sue, even when they knowingly signed a liability waiver.²⁴¹ A liability waiver may no longer automatically shield colleges from all personal injury liability.²⁴² Given that the Board of Athletic Training has specific guidelines in place to protect students, and Lackawanna College knew its athletic trainers were impermissibly providing athletic safety services, the *Feleccia* Superior Court decision evens the playing field for students' rightful legal interests in bringing suit.²⁴³

V. CONCLUSION: WHY SAFETY SHOULD NOT BE WAIVABLE

Feleccia was correctly decided on the basis of a liability waiver not waiving the college's reckless disregard for its student athletes' safety.²⁴⁴ Ultimately, the Superior Court determined that Plaintiffs

238. *See id.* at 1205–07 (analyzing how Lackawanna's uncertified athletic trainers, Coyne and Bonisese, recklessly provided tackling instruction during Oklahoma Drill and also instructed Resch to continue participating immediately following his injuries, which ultimately resulted in Resch sustaining additional serious cervical and lumbar injuries).

239. *See id.* (recognizing potential for injury when participating in high risk activities, as well as nexus between defendants' reckless conduct and plaintiffs' injury).

240. *See id.* at 1208–09 (noting that while jury in *Feleccia* determined liability, Superior Court still recognized that Lackawanna College had duty to provide minimal standards of care and safety to its students participating in athletic programs).

241. *See id.* at 1209 (recognizing court's holding and its potential effects on future Pennsylvania personal injury cases involving grossly negligent or reckless conduct by college athletic programs).

242. *See id.* (noting court's reasoning). For further discussion of the impact of *Feleccia* on future athletes, see *supra* note 18 and accompanying text.

243. For further discussion of Lackawanna College's conduct, how Defendants argued to have this conduct waived under the assumption of risk doctrine, and the fact that Plaintiffs knowingly signed a liability waiver, see *supra* note 217 and accompanying text.

244. For further discussion of the court's reasoning for determining why Lackawanna College may be liable for reckless disregard for the minimal standards of care and safety owed to college athletes, see *supra* notes 216–219 and accompa-

could sue Lackawanna College, despite the presence of a liability waiver, and concluded that Lackawanna College may not disregard minimal standards of care and safety when providing athletic training.²⁴⁵ In his online legal publication, Siegel reasoned that because many schools benefit from student athletes, enforcing a release that risks their health and safety is troublesome.²⁴⁶ Therefore, following the Pennsylvania Superior Court's decision in *Feleccia*, athletic institutions should be incentivized to specifically adhere to athletic training certification guidelines.²⁴⁷ Colleges must continue to follow athletic training guidelines because athletic programs must provide qualified medical personnel under the minimal standards for care and safety.²⁴⁸ In reviewing the factual circumstances in *Feleccia*, the Pennsylvania Supreme Court should be persuaded by Plaintiffs' expert's testimony during trial, offering evidence that providing qualified medical personnel is a duty of care requirement.²⁴⁹

Pennsylvania colleges may find themselves liable for student athletes' injuries, even when those athletes sign liability waivers.²⁵⁰ Under *Feleccia*, most recently, liability is not waived when colleges have disregarded the minimal standards of care and safety, and also did not take necessary action to prevent foreseeable risks of injury

nying text; *see also* *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1363 (3d Cir. 1993) (analyzing special duty of care standards, and reasoning that because student-athletes are participating in school sponsored athletic programs, colleges have special relationship with student-athletes).

245. *See Feleccia*, 156 A.3d at 1204, 1210–11 (noting Lackawanna College had knowledge Coyne and Bonisese were “impermissibly providing athletic services” and determination that liability waivers cannot release such conduct); *see also* Brief for Appellees, *supra* note 47, at *57–58 (analyzing Board of Athletic Training Certification, and recognizing that by failing to hire athletic trainers with board certification status, Lackawanna put its students at risk of inadequate athletic training services, increasing their chances for injury).

246. *See Siegel*, *supra* note 1 (“Enforcing a release and granting summary judgment in a situation where the availability of qualified medical personnel is called into question would jeopardize the health and safety of such student-athletes by removing at least one incentive for colleges to ‘adhere to minimal standards of care and safety.’”).

247. *See Feleccia*, 156 A.3d at 1205–06 (noting that even though impact of Bonisese and Coyne's conduct on *Feleccia* and *Resch*'s injuries was ultimately submitted to jury, Pennsylvania Superior Court did not automatically excuse Lackawanna College's conduct in hiring uncertified athletic trainers).

248. *See Siegel*, *supra* note 1 (explaining relationship between providing qualified medical personnel and minimal standards of care and safety, which colleges must be required to adhere to in order to preserve their student athletes' safety).

249. *See Feleccia*, 156 A.3d 1213–14 (recognizing that expert testimony during trial provided specific evidence that Lackawanna College breached its duty of care by impermissibly providing substandard medical care).

250. *See generally id.* (holding that colleges may be liable to student-athletes when those colleges are reckless in failing to meet minimal safety standards).

to student athletes.²⁵¹ While football is an inherently dangerous sport, the assumption of risk doctrine should not be applicable in cases involving gross negligence or reckless disregard for safety procedures.²⁵² In examining the facts of the *Feleccia* case and the subsequent Superior Court decision, the conduct by Lackawanna College should not be excused.²⁵³ Plaintiffs Feleccia and Resch did not assume the risk of being supervised by uncertified trainers, who were supervising football players without the certification required to do so.²⁵⁴

Knowingly permitting uncertified athletic trainers to oversee contact football practices, in addition to providing instruction on a well-known, dangerous tackle drill, should not be covered under a college's liability waiver.²⁵⁵ The Supreme Court of Pennsylvania should hold accordingly upon review of the Superior Court's decision in *Feleccia*.²⁵⁶ Lastly, the Supreme Court should go further than the Superior Court and hold that impermissibly providing uncertified athletic trainers to oversee inherently dangerous activities constitutes gross negligence or reckless conduct.²⁵⁷

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251. *See id.* (noting Superior Court's holding and most recent decision, but recognizing this case is currently awaiting Pennsylvania Supreme Court decision).

252. *See* Brief for Appellees, *supra* note 47, at *54–55 (discussing assumption of risk doctrine and its applicability in various tort cases).

253. *See Feleccia*, 156 A.3d at 1204–05 (recognizing that Lackawanna College was notified that Coyne and Bonisese were “impermissibly providing athletic services” during spring contact football practice, as brought to Lackawanna College’s attention prior to Feleccia and Resch’s injuries).

254. *See id.* at 1204 (providing Superior Court’s reasoning).

255. *See id.* (recognizing significance of finding Lackawanna College liable if its decision to hire uncertified athletic trainers was grossly negligent or reckless conduct, which would satisfy liability threshold even when Plaintiffs knowingly signed liability waivers).

256. *See id.* at 1200–04 (analyzing court’s holding and recognizing that Pennsylvania Supreme Court should affirm Superior Court’s decision in *Feleccia* accordingly).

257. For further discussion of the Superior Court’s decision, its analysis of the appropriate standard of care for Lackawanna College, and how the Pennsylvania Supreme Court should hold in examining the *Tayar* decision, see *supra* notes 29–50 and accompanying text.

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