[J-96-2018]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

AUGUSTUS FELECCIA AND JUSTIN T. RESCH,	:	No. 75 MAP 2017
Appellees	:	Appeal from the Order of the Superior Court at No. 385 MDA 2016 dated February 24, 2017, reconsideration denied April 26, 2017, Reversing the
v.	:	Judgment of the Lackawanna County Court of Common Pleas, Civil Division, at No. 12-CV-1960 entered
LACKAWANNA COLLEGE A/K/A LACKAWANNA JUNIOR COLLEGE, KIM A. MECCA, MARK D. DUDA, WILLIAM E. REISS, DANIEL A. LAMAGNA, KAITLIN M. COYNE AND ALEXIS D. BONISESE,	:	February 2, 2016 and Remanding for trial.
	:	ARGUED: December 5, 2018
Appellants	:	

OPINION

JUSTICE DOUGHERTY **DECIDED: August 20, 2019**

In this discretionary appeal arising from the dismissal of personal injury claims on summary judgment, we consider whether the Superior Court erred in 1) finding a duty of care and 2) holding a pre-injury waiver signed by student athletes injured while playing football was not enforceable against claims of negligence, gross negligence, and recklessness. After careful review, we affirm the Superior Court's order only to the extent it reversed the trial court's entry of summary judgment on the claims of gross negligence and recklessness, and we remand to the trial court for further proceedings consistent with this opinion.

I.

Appellees, Augustus Feleccia and Justin T. Resch, (collectively, appellees) were student athletes who played football at Lackawanna Junior College (Lackawanna), a non-profit junior college. *See* Complaint at ¶¶ 29, 30. At all times relevant to this matter, the following individuals were employed by Lackawanna and involved in its football program: (1) Kim A. Mecca, the Athletic Director for Lackawanna College who oversaw all of Lackawanna's athletic programs, including the football program (AD Mecca); (2) Mark D. Duda, the head coach (Coach Duda); (3) William E. Reiss, an assistant and linebacker coach (Coach Reiss); (4) Daniel A. Lamagna, an assistant and quarterback coach (Coach Lamagna); (5) Kaitlin M. Coyne, hired to be an athletic trainer (Coyne); and (6) Alexis D. Bonisese, hired to be an athletic trainer (Bonisese) (collectively with Lackawanna referred to as appellants). *Id.* at ¶¶31-34, 40, 41, 43, 44.

Lackawanna had customarily employed two athletic trainers to support the football program.[1] However, both athletic trainers resigned in the summer of 2009 and AD Mecca advertised two job openings for the position of athletic trainer. AD Mecca received applications from Coyne and Bonisese, recent graduates of Marywood University who had obtained Bachelor of Science degrees in Athletic Training. AD Mecca conducted telephone interviews with Coyne and Bonisese for the open athletic trainer positions at Lackawanna. *See Feleccia v. Lackawanna College*, 156 A.3d 1200, 1203 (Pa. Super. 2017).

[1] In Pennsylvania, in order to use the title "athletic trainer," an individual must be licensed pursuant to the Medical Practice Act. 63 P.S. §422.1, *et. seq*. (MPA). A duly licensed athletic trainer holds a valid certificate issued by the State Board of Medicine (the Board) after passing the national certification exam. 63 P.S. §422.51a(b.1)(1); 18 Pa Code § 18.506. Additionally, Pennsylvania's Administrative Code defines "licensed athletic trainer" as used in the MPA as "[a] person who is licensed to perform athletic training services by the Board." 49 Pa. Code §18.502. For purposes of clarity, throughout this opinion, we use the term "athletic trainer" to describe an individual who holds the required certificate and has been licensed by the Board.

At the time she applied and interviewed for the Lackawanna position, Coyne had not yet passed the athletic trainer certification exam, which she took for the first time on July 25, 2009, and was therefore not licensed by the Board. Bonisese was also not licensed, having failed the exam on her first attempt, and still awaiting the results of her second attempt when she applied and interviewed for the Lackawanna position. Nevertheless, Lackawanna hired both Coyne and Bonisese in August 2009 with the expectation they would serve as athletic trainers, pending receipt of their exam results, and both women signed "athletic trainer" job descriptions. *Id.* After starting their employment at Lackawanna, Coyne and Bonisese both learned they did not pass the athletic trainer certification exam. Coyne informed AD Mecca of her test results, and AD Mecca also learned Bonisese had failed her second attempt at certification. *Id.* at 1203-04.

AD Mecca retitled the positions held by Coyne and Bonisese from "athletic trainers" to "first responders." *Id.* at 1204. AD Mecca notified Coyne and Bonisese via email and written correspondence that due to their failure to pass the certification exam, they would function as "first responders" instead of "athletic trainers." However, neither Coyne nor Bonisese executed new job descriptions, despite never achieving the credentials included in the athletic trainer job descriptions they did sign. Appellants were also aware the qualifications of their new hires was called into question by their college professors and clinic supervisors. *See Id.* More specifically, Shelby Yeager, a professor for Coyne and Bonisese during their undergraduate studies, communicated to AD Mecca her opinion that Coyne and Bonisese were impermissibly providing athletic training services in September 2009. Professor Yeager was aware Lackawanna did not have any full-time

athletic trainers on staff[2] and noted Coyne and Bonisese, as recent graduates, were inexperienced and did not have the required Board license. Professor Yeager stated that Coyne in particular was "ill-equipped to handle the rigors of a contact sport (like football) as an athletic trainer on her own regardless of whether she managed to pass [the certification] exam and obtain her state license." *Id.*, *quoting* Affidavit of Shelby Yeager. With regard to Bonisese, Bryan Laurie, who supervised her as a student, rated her performance as "below average/poor" and provided his assessment that she was not qualified to act as an athletic trainer in March of 2010. *Id.*, *citing* Affidavit of Bryan Laurie.

Appellee Resch started playing football at the age of six, and continued playing through high school. *Id.* at 1204-05. Upon graduating from high school in 2008, Resch was accepted at Lackawanna and, hoping to continue playing football, met with Coach Duda prior to arriving for classes. Resch tried out for the Lackawanna football team in the fall of 2008. Resch not only failed to make the roster, but was also placed on academic probation, so he was ineligible to play football in the spring of 2009.

Appellee Feleccia also began playing football as a child at the age of ten, and played through high school. Feleccia was recruited by Coach Duda to play football at Lackawanna. *See id.* Feleccia did not make the team in the fall of 2008, but practiced with them during that time. During a scrimmage in the fall of 2008, Feleccia tore the labrum in his left shoulder, which was surgically repaired. Feleccia was also placed on academic probation after the fall 2008 semester and temporarily withdrew from Lackawanna. *See id.*

In mid-January 2010, Resch and Feleccia returned to Lackawanna for the spring semester with the aspiration to make the football team. *Id.* Lackawanna required

[2] Lackawanna did engage a part-time licensed athletic trainer in September 2009, but she did not attend football practices during the 2009-2010 academic year.

appellees to fill out and sign various documents in a "participation packet" before playing with the team, including a "Waiver of Liability and Hold Harmless Agreement" (the Waiver) and a form including an "Information/Emergency Release Consent" (the Consent). *See* Appellees' Brief in Opposition to MSJ at Exhibit 18(b). Appellee Resch "skimmed" and signed the Waiver on March 22, 2010. *Feleccia*, 156 A.3d at 1205. Feleccia also executed the Waiver on March 22, 2010. The Waiver provided as follows:

> 1. In consideration for my participation in _[Football]_____ (sport), I hereby release, waive, discharge and covenant not to sue Lackawanna College, its trustees, officers, agents, and employees from any and all liability, claims, demands, actions, and causes of action whatsoever arising out of or related to any loss, damage, or injury, including death, that may be sustained by me, or to any property belonging to me, while participating in such athletic activity.
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> 2. To the best of my knowledge, I am not aware of any physical disability or health-related reasons or problems which would preclude or restrict my participation in this activity. I am fully aware of the risks and hazards connected with __[Football]_____ (sport), and I hereby elect to voluntarily participate in said activity, knowing that the activity may be hazardous to me and my property. I voluntarily assume full responsibility for any risks of loss, property damage, or personal injury, including death, that may be sustained by me, or any loss or damage to property owned by me, as a result of being engaged in such activity.
>
> 3. I have adequate health insurance necessary to provide for and pay any medical costs that may directly or indirectly result from my participation in this activity. I agree to indemnify and hold harmless Lackawanna College, its trustees, officers, agents, and employees, from any loss, liability, damage or costs, including court costs and attorneys' fees that may be incurred, due to my participation in said activity.
>
> 4. It is my express intent that this Release and Hold Harmless Agreement shall bind my family, if I am alive, and my heirs, assigns and personal representative, if I am deceased, and shall be deemed as a release, waiver, discharge and covenant not to sue Lackawanna College, its trustees, officers, agents and employees. I hereby further agree that this Waiver of Liability and Hold Harmless Agreement shall be construed in accordance with the laws of the Commonwealth of Pennsylvania.

> In signing this release, I acknowledge and represent that I have read the foregoing Waiver of Liability and Hold Harmless Agreement, understand it and sign it voluntarily; no oral representations, statements, or inducements, apart from the foregoing written agreement, have been made; I am at least eighteen (18) years of age and fully competent; and I execute this Release for full, adequate and complete consideration fully intending to be bound by the same. Parent/Guardians' signature required for individuals under eighteen (18) years of age.

Waiver attached as Exhibit A to Appellants' Answer with New Matter.

Appellees also signed the Consent that provided, in pertinent part, as follows:

> (1) I do hereby off[er] my voluntary consent to receive emergency medical services in the event of an injury during an athletic event provided by the athletic trainer, team physician or hospital staff.

Consent attached as part of Exhibit 18(b) to Appellees' Brief in Opposition to MSJ.

On March 29, 2010, appellees participated in the first day of spring contact football practice. The team engaged in a variation of the tackling drill known as the "Oklahoma Drill." Appellees had previously participated in the Oklahoma Drill, or a variation of it, either in high school or at Lackawanna football practices, and were aware the drill would take place during practices. While participating in the drill, both Resch and Feleccia suffered injuries. Resch attempted to make a tackle and suffered a T-7 vertebral fracture. Resch was unable to get up off the ground and Coyne attended to him before he was transported to the hospital in an ambulance. *See Feleccia*, 156 A.3d at 1207. Notwithstanding Resch's injury, the Lackawanna football team continued practicing and running the Oklahoma Drill. Later that same day, Feleccia was injured while attempting to make his first tackle, experiencing a "stinger" in his right shoulder, *i.e.*, experiencing numbness, tingling and a loss of mobility in his right shoulder. *Id.* Bonisese attended Feleccia and cleared him to continue practice "if he was feeling better." *Id.* Feleccia

returned to practice and then suffered a traumatic brachial plexus avulsion while making a tackle with his right shoulder. *Id.*

Appellees filed suit against appellants, Lackawanna, AD Mecca, Coach Duda, Coach Reiss, Coach Lamagna and Coyne and Bonisese, asserting claims for damages caused by negligence, including negligence *per se*. The complaint also sought punitive damages, alleging appellants acted "willfully, wantonly and/or recklessly." Complaint at ¶¶82, 97, 98, 102 & 103. Appellants filed preliminary objections which were overruled, and filed an answer with new matter raising defenses, including that the Waiver precluded liability on all of appellees' claims.

At the close of discovery, appellants filed a motion for summary judgment, relying primarily on the Waiver; appellants argued they were entitled to judgment as a matter of law due to appellees' voluntary release of appellants from any and all liability for damages resulting from participation in the Lackawanna football program. *See* Appellants' Brief in Support of MSJ at 13. In response, appellees argued Lackawanna "ran its Athletic Training Department in a manner demonstrating a total disregard for the safety of its student-athletes or the laws of the Commonwealth of Pennsylvania." Appellees' Brief in Opposition to MSJ at 1. Appellees argued appellants had required appellees to sign the Consent for treatment by an "athletic trainer," thus taking on a duty to provide an athletic trainer, but then failed to provide an athletic trainer for its football team. *See id.* at 18-20.

The trial court granted summary judgment in favor of appellants. The court ruled the Waiver: (1) did not violate public policy; (2) was a contract between Lackawanna and college students relating to their own private affairs, and (3) was not a contract of adhesion. *See Feleccia v. Lackawanna College*, 2016 WL 409711, at *5-*10

(Pa..Com.Pl. Civil Div. Feb. 2, 2016), *citing Chepkevich. v. Hidden Valley Resort, L.P.*, 2 A.3d 1174 (Pa. 2010) (setting forth elements of valid exculpatory agreements).

The court then considered whether the Waiver was enforceable, *i.e.,* whether it "spells out the intention of the parties with particularity and shows the intent to release [Lackawanna] from liability by express stipulation." *Id.* at *10, *quoting Chepkevich,* 2 A.3d at 1191 (additional citations omitted). The court noted the Waiver did not specifically use the word "negligence" or mention the Oklahoma Drill, but it was executed freely by appellees, and stated they were fully aware of the risks and hazards in the activity and "voluntarily assume[d] full responsibility for any . . . personal injury" resulting from it. *Id.* at *11, *quoting* the Waiver. The court found the Waiver immunized appellants from liability because it addressed the "risks and hazards" ordinarily inherent in the sport of football. *Id.* at *12.[3] Finding the negligence claims barred, the court ruled the claim for punitive damages also failed, and discussion of the Waiver's applicability to those allegations was unnecessary. *Id.* at *14 n.13. The court concluded there was no genuine issue of material fact and appellants were entitled to judgment as a matter of law on the basis of the Waiver.

Appellees filed an appeal and the Superior Court reversed.[4] Although the panel agreed with the trial court's holding the Waiver was valid under *Chepkevich*, the panel disagreed that the Waiver barred all of appellees' claims as a matter of law. The panel

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[3] Quoting 1960s Oregon case law with approval, the court observed: "Body contacts, bruises, and clashes are inherent in the game. There is no other way to play it. Nor [sic] prospective player need be told that a participant in the game of football may sustain injury. That fact is self evident. It draws to the game the manly; they accept its risks, blows, clashes and injuries without whimper." *Id.* at *7, *quoting Vendrell v Sch.Dist. No. 26C, Malheur Cty.* 376 P.2d 406 (Or. 1962).

[4] Judge Shogan authored the opinion, which was joined by P.J.E. Ford Elliott; P.J.E. Stevens, the third judge on the petit panel, did not participate.

first observed the Waiver was "not sufficiently particular and without ambiguity" to relieve appellants of liability for their own acts of negligence. *Feleccia*, 156 A.3d at 1212-13, *quoting Chepkevich*, 2 A.3d at 1189 (exculpatory clause is unenforceable "unless the language of the parties is clear that a person is being relieved of liability for his own acts of negligence.").

The panel also held the trial court erred in failing to address appellees' allegations underlying their claim for punitive damages, and whether the Waiver applied to preclude liability based on those allegations. *Id.* at 1213. The panel recognized this Court's jurisprudence holding exculpatory clauses are not enforceable to preclude liability for reckless conduct. *Id*. at 1214, *citing Tayar v. Camelback Skip Corp*., 47 A.3d 1190 (Pa. 2012).

Finally, the panel's "most important" reason for reversing the trial court's grant of summary judgment was that, after reviewing the record in the light most favorable to appellees as the non-moving parties, there were genuine issues of material fact as to "whether the College's failure to have qualified medical personnel at the March 29, 2010 practice constitute[d] gross negligence or recklessness," and whether that failure caused appellees' injuries or increased their risk of harm. *Id.* at 1214, 1219. The panel's determination in this regard was based on its view that Lackawanna had a "duty of care to its intercollegiate student athletes . . . to have qualified medical personnel available at the football tryout on March 29, 2010, and to provide adequate treatment in the event that an intercollegiate student athlete suffered a medical emergency." *Id.* at 1215. The panel relied in part on *Kleinknecht v. Gettysburg College*, 989 F.2d 1360 (3d Circ. 1993), where the Third Circuit predicted this Court "would hold that a special relationship existed

between the [c]ollege and [student-athlete] that was sufficient to impose a duty of reasonable care on the [c]ollege." *Id.* at 1367. The panel further held it was for a jury to decide whether appellees signed the Waiver "unaware that [Lackawanna's] athletic department did not include qualified athletic trainers." *Feleccia,* 156 A.3d at 1219. Accordingly, the panel remanded the matter for trial.

Upon petition by appellants we granted allowance of appeal to address following issues:

> a. 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?
>
> b. Is an exculpatory clause releasing "any and all liability" signed in connection with participation in intercollegiate football enforceable as to negligence?

Feleccia v. Lackawanna College, 175 A.3d 221 (Pa. 2017) (*per curiam)*.

This matter presents pure questions of law, over which our standard of review is *de novo* and our scope of review is plenary. *See In re Vencil*, 638 A.3d 1, 11-12 (Pa. 2017). "[A]n appellate court may reverse the entry of summary judgment only where it finds that the trial court erred in concluding that the matter presented no genuine issue as to any material fact and that it is clear that the moving party was entitled to [a] judgment as a matter of law." *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1004 (Pa. 2003), *citing Pappas v. Asbel*, 768 A.2d 1089 (Pa. 2001). We consider the parties' arguments with these standards in mind.

II.

A. 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?

Appellants argue the Superior Court created a brand new common law duty of care requiring colleges to have qualified medical personnel available to render treatment at every practice and every game. Appellants aver the Superior Court did so without attempting to analyze the factors set forth in *Althaus ex rel. Althaus v. Cohen*, 756 A.2d 1166, 1169 (Pa. 2000) (before recognizing new duty of care courts must analyze the relationship between the parties; the social utility of the actor's conduct; the nature of the risk imposed and foreseeability of the harm incurred; the consequences of imposing a duty upon the actor; and the overall public interest in the proposed solution). Appellants' Brief at 18-20, *citing Feleccia*, 156 A.3d at 1215. Appellants assert that, in creating this new duty of care, the Superior Court relied only on a decades-old, non-binding federal decision. *Id., citing Kleinknecht*, 989 at 1371. Appellants argue that, had the Superior Court applied the *Althaus* factors instead, it would not have created such a duty. Appellants' Brief at 20-22. Appellants argue a proper analysis of these factors either weighs against the creation of a new duty or is neutral. Accordingly, appellants request we reverse the Superior Court's decision to the extent it created a new duty.[5]

Appellees respond that the panel did not create a new, onerous duty, and that appellants actually failed to comply with existing common law and statutory duties to have

[5] The Association of Independent Colleges and Universities of Pennsylvania (AICUP) filed an *Amicus Curiae* Brief in support of appellants. AICUP notes there is no concrete and substantial justification for the Superior Court's imposition of a new affirmative duty to have qualified medical personnel physically present at all practices for all collegiate sports. *See* AICUP's Brief at 5-6, *citing Seebold v. Prison Health Servs.,* 57 A.3d 1232, 1245 (Pa. 2012). AICUP further notes there is not a "full and balanced" record upon which to base a new duty. *Id.* at 6.

qualified medical personnel available at intercollegiate athletic events. Appellees refer to MPA provisions that set forth the qualifications for an "athletic trainer" and the manner in which they must perform their duties. Specifically, appellees note the regulations implementing the MPA establish restrictions and protocols for licensed athletic trainers, and they also prohibit the use of the title "athletic trainer" by any person without a Board-issued license. *See* Appellees' Brief at 29-30, *quoting* 63 P.S. §422.51a ("An athletic trainer who meets the requirements of this section shall be licensed, may use the title 'athletic trainer' . . . and may perform athletic training services. A person who is not licensed under this section may not use the designation of licensed athletic trainer, athletic trainer or any of the listed abbreviations for that title, including 'L.A.T.' or 'A.T.L.,' or any similar designation."). Appellees thus argue the Superior Court's holding recognizes appellants have a duty to provide athletic trainers at practices, who, by statute, should be qualified medical personnel. Appellees' Brief at 31.

Appellees also submit appellants' claim the Superior Court ignored the *Althaus* factors is disingenuous. Appellees note the panel explicitly relied on *Kleinknecht* and, although the federal decision predated *Althaus*, the Third Circuit considered the same factors ultimately set forth in *Althaus*. Appellees' Brief at 39-40, *citing Feleccia*, 156 A.3d at 1215 (*Kleinknecht* court recognized: special relationship between college and student-athlete requiring college to act with reasonable care towards athletes; risk of severe injuries during athletic activities was foreseeable; and college acted unreasonably in failing to protect against risk). In any event, appellees reiterate, the Superior Court did not create a new common law duty, but rather recognized the "duty of care is necessarily

rooted in often amorphous public policy considerations[.]" Appellees' Brief at 38, *quoting* *Althaus*, 756 A.2d at 1169.

Finally, appellees observe appellants themselves undertook the duty to protect their student-athletes by customarily hiring licensed athletic trainers prior to 2009, and holding out Coyne and Bonisese as "athletic trainers" in the documentation regarding their employment, including executed job descriptions, where Coyne and Bonisese acknowledged they were required to have passed the national certification exam, which is a pre-requisite to use of the title "athletic trainer." *See* Appellees' Brief at 41-43, *quoting* Rstmt (2d) of Torts, §323 ("One who undertakes . . . to render services to another . . . is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking[.]"). Appellees argue the evidence presented was sufficient to raise factual jury questions regarding whether appellants breached this duty and whether that breach led to appellees' injuries.[6]

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[6] The Pennsylvania Association for Justice (PAJ) and The National Athletic Trainers' Association and Pennsylvania Athletic Trainer's Society, Inc. (Athletic Trainers) filed *Amicus Curiae* briefs in support of appellees. PAJ argues appellant undertook an obligation to provide athletic trainers for its student athletes participating in the football program, then recklessly provided unqualified personnel and failed to advise the student athletes it was not providing licensed athletic trainers. PAJ further notes Coyne and Bonisese falsely held themselves out to be athletic trainers, and this false representation was propagated by the coaching staff such that the student athletes reasonably relied on the misrepresentations. PAJ submits these actions by appellants were reckless, and the Waiver is unenforceable against reckless conduct. *See* PAJ's Brief at 11-12, *citing Tayar*.

The Athletic Trainers similarly seek affirmance of the Superior Court's decision and caution a failure to have licensed athletic trainers at practices would encourage unsafe practices, resulting in an increase in the frequency and severity of injuries to student-athletes. The Athletic Trainers note the Superior Court's decision does not impose a new standard on colleges, but rather follows basic, general practices for preventing and treating student athletic injuries. The Athletic Trainers submit it is common sense that a college or university's failure to adhere to established professional standards could violate a duty of care owed to its student-athletes. *Id.* at 15-16.

Having considered the parties' arguments and the opinion below, we acknowledge the Superior Court articulated a duty not previously recognized by Pennsylvania Courts: a college has a "duty of care to its intercollegiate student athletes requir[ing] it to have qualified medical personnel available at [athletic events, including] the football tryout, . . . and to provide adequate treatment in the event that an intercollegiate student athlete suffer[s] a medical emergency." *Feleccia*, 156 A.3d at 1215, *citing Kleinknecht*, 989 F.2d at 1369-70. We further recognize the Superior Court did not analyze the *Althaus* factors, as required when imposing a previously unarticulated common law duty. *Althaus*, 756 A.2d at 1169. Instead, the panel relied on non-binding federal case law to impose what it viewed as a new common law duty. In this specific regard, the panel erred.

Courts should not enter into the creation of new common law duties lightly because "the adjudicatory process does not translate readily into the field of broad-scale policymaking." *Lance v. Wyeth*, 85 A.3d 434, 454 (Pa. 2014), *citing Seebold*, 57 A.3d at 1245; *see also Official Comm. of Unsecured Creditors of Allegheny Health Educ. & Research Found. v. PriceWaterhouseCoopers, LLP*, 989 A.2d 313, 333 (Pa. 2010) ("Unlike the legislative process, the adjudicatory process is structured to cast a narrow focus on matters framed by litigants before the Court in a highly directed fashion"). We also acknowledge it "is the Legislature's chief function to set public policy and the courts' role to enforce that policy, subject to constitutional limitations." *Seebold,* 57 A.3d at 1245 & n.19 (additional citations omitted). "[T]he Court has previously adopted the default position that, unless the justifications for and consequences of judicial policymaking are reasonably clear with the balance of factors favorably predominating, we will not impose new affirmative duties." *Id.* at 1245 (citations omitted).

Applying the *Althaus* factors is not a mere formality, but is necessary when courts announce a new common law duty. *Althaus* requires consideration of the justifications for and the relevant consequences and policy concerns of the new duty of care. *See Althaus*, 756 A.2d at 1169 (setting forth factors for determination of new common law duty). Further, "determining whether to impose a duty often requires us to weigh 'amorphous public policy considerations, which may include our perception of history, morals, justice and society.'" *Walters v. UPMC Presbyterian Shadyside*, 187 A.3d 214, 223 (Pa. 2018), *quoting Althaus*, 756 A.2d at 1169 (additional citations omitted). The Superior Court did not engage these factors, nor did the summary judgment record include relevant data regarding, for example, injury rates at practices, the consequences of having (or not having) available qualified medical professionals, the budgetary or other collegiate resource impact, or the relative public policy concerns involved.[7]

[7] Even a cursory review of the *Amici* briefs here reveals a multitude of items that might be considered in such an analysis. *See, e.g.,* Athletic Trainers' Brief at 16-20 (discussing National Athletic Trainers Association (NATA) Recommendations and Guidelines); AICUP Brief at 7-14 (discussing Superior Court's failure to consider "injury rates, treatment data existing health care delivery systems, the costs of employing additional medical staff, or the degree of improvement (if any) of medical outcomes for injuries sustained on the practice field.").

Justice Wecht criticizes our decision not to engage in an *Althaus* analysis, and asserts the "principles of tort law require us to go farther." *See* Concurring and Dissenting Opinion (Wecht, J.) at 2, 20. We respectfully disagree with our learned colleague's approach which would lead to the creation of a new duty under *Althaus* as it is unnecessary here, and thus contradicts our traditional reluctance to announce new common law duties. *See Walters,* 187 A.3d at 223 ("Our concern for the hazards of judicial policy-making has prompted our continuing restraint."). Restraint is particularly warranted here where the parties did not argue *Althaus* below, the courts did not consider it, and the advocacy in this Court is limited. *Cf. Id.* (recognizing *Althaus* analysis should be conducted with caution and with acknowledgment of lower court's findings and parties' arguments regarding *Althaus* analysis).

Importantly, however, an *Althaus* analysis was not necessary here because our review reveals the present circumstances involve application of existing statutory and common law duties of care. *See, e.g., Dittman v. UPMC*, 196 A.3d 1036, 1038 (Pa. 2018) (analysis of *Althaus* factors not required where case is one involving "application of an existing duty to a novel factual scenario"). In *Dittman*, for example, we recognized the legal duty of an employer (UPMC) "to exercise reasonable care to safeguard its employees' sensitive personal information stored by the employer on an internet-accessible computer system." *Id*. at 1038. We did so because UPMC had required its employees to provide sensitive personal information, and then collected and stored that information on its computer system without implementing adequate security measures, such as encryption, firewalls, or authentication protocols. *Id.* at 1047. We reasoned that this "affirmative conduct" by UPMC created the risk of a data breach, which in fact occurred. *Id*. We further determined that, in collecting and storing its employees' data on its computers, UPMC owed those employees a duty to "exercise reasonable care to protect them against an unreasonable risk of harm arising out of that act." *Id. Dittman* may have been our first opportunity to recognize this duty in the context of computer systems security, but there is longstanding jurisprudence holding that "[i]n scenarios involving an actor's affirmative conduct, he is generally 'under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act.'" *Id.* at 1046*, quoting Seebold,* 57 A.3d at 1246. This existing duty "appropriately undergirds the vast expanse of tort claims in which a defendant's affirmative, risk-causing conduct is in issue." *Id.* at 1047, *quoting Seebold,* 57 A.3d at 1246*, see also Dittman*, 796 A.3d at 1056-57 (Saylor, CJ, concurring and dissenting)

(requirement to provide confidential information as condition of employment created "special relationship" between employer and employees giving rise to duty of reasonable care to protect information against foreseeable harm).

Additionally, we have adopted as an accurate statement of Pennsylvania law the Restatement (Second) of Torts §323 (1965). *Gradel v. Inouye*, 421 A.2d 674, 677-78 (Pa. 1980) ("Section 323(a) of the Restatement of Torts has been part of the law of Pennsylvania for many years."). Section 323 provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> > (a) his failure to exercise such care increases the risk of such harm, or
> >
> > (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement. (Second) of Torts, §323 (1965). *See also Feld v Merriam*, 485 A.2d 742, 746 (Pa. 1984) (landlord that undertook duty to provide secured parking for tenants may be liable for damages arising from failure to exercise reasonable care in doing so).

In *Feld*, the plaintiffs were injured during a carjacking that began inside the garage of their apartment building. They filed a negligence lawsuit against their landlord, who had charged tenants additional rental fees to provide a gate and security guard for its parking garages. In discussing the viability of the plaintiffs' negligence action, the *Feld* Court first noted landlords do not generally owe a duty as insurer to protect the safety of their tenants. However, the Court noted such a duty might arise if the landlord undertook to provide secured parking and failed to exercise reasonable care in doing so, and the

tenants, who had relied on those services, were injured as a result. *Id.* at 746, *citing* Restatement (Second) of Torts, §323 (1965) (identifying discrete duty where a "landlord [who] by agreement or voluntarily offers a program to protect the premises, . . . must perform the task in a reasonable manner and where a harm follows a reasonable expectation of that harm, he is liable.").

Application of these legal principles to the present factual scenario supports a determination that "affirmative conduct" by appellants created a "special relationship" with and increased risk of harm to its student athletes such that appellants had a duty to "exercise reasonable care to protect them against an unreasonable risk of harm arising" from that affirmative conduct. *Dittman, supra*. In addition, the record supports a finding appellants undertook a duty to provide duly licensed athletic trainers for the purpose of rendering treatment to its student athletes participating in athletic events, including the football practice on March 29, 2010,[8] although it remains to be determined whether the steps actually taken by appellants satisfied that duty. *See Wilson v. PECO Energy Co.*,

[8] The Chief Justice challenges whether appellants undertook a duty to "provide" athletic trainers at the March 29, 2010 practice, and submits appellants were required only to "have qualified medical personnel **available**." Concurring and Dissenting Op. at 2-3, n.1 (emphasis added). The Chief Justice offers this distinction is material with respect to the duty at issue because the consent, upon which the duty is derived, is phrased in the disjunctive, and appellees received treatment by the team physician and hospital staff, potentially in accordance with the consent. *Id., citing* Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 5, *reprinted* in R.R. 4197a (medical services to be provided by "athletic trainer, team physician or hospital staff"). Although this particular distinction may be further elucidated at trial, we emphasize the consent expressly stipulates medical services "during an athletic event" will be "**provided** by the athletic trainer, team physician or hospital staff." Consent, *supra*. (emphasis added). Appellant thus stated it would "provide" medical treatment during the March 29, 2010 practice. Whether appellants breached that obligation by having Coyne and Bonisese as the only "athletic trainers" at the practice, or met that duty by having appellees treated by the team physician and hospital staff following the practice, is a question for the jury on remand.

61 A.3d 229, 233 (Pa. Super. 2012) (sufficient facts alleged to overcome summary judgment and reach jury on question of scope of duty undertaken and its breach).

Specifically, when we consider the record in the light most favorable to appellees as the non-moving parties, we observe the following: before hiring Coyne and Bonisese, Lackawanna customarily employed athletic trainers, who were licensed as required by applicable statutes and regulations; Lackawanna required its student athletes including appellees to execute the Consent to treatment by "athletic trainer, team physician or hospital staff" in the event of an emergency during participation in the football program; Lackawanna held out Coyne and Bonisese as athletic trainers to appellees and their teammates, despite its knowledge they lacked the statutorily required licenses; Lackawanna demonstrated its awareness that Coyne and Bonisese did not have the qualifications of athletic trainers by renaming them "first responders," but did not alter their job descriptions, which encompassed the duties of "athletic trainers"; Coyne and Bonisese were the only individuals present at the March 29, 2010 football tryout to provide treatment to injured student athletes; the coaching staff propagated the misrepresentation of Coyne and Bonisese as athletic trainers; and Coyne and Bonisese performed the role of athletic trainers by attending appellees when they were injured, and directing appellee Feleccia to return to practice when he was "feeling better."

Under these circumstances, appellants clearly created an expectation on which the student athletes might reasonably rely — *i.e*. in the case of injury during an athletic event, they receive treatment from a certified athletic trainer, as clearly outlined in the Consent they were required to sign. We thus easily conclude appellants undertook a duty to provide treatment by a certified athletic trainer at the March 29, 2010 practice. We

further conclude the record, taken in the light most favorable to appellees, demonstrates the existence of a genuine issue of material fact sufficient to overcome summary judgment regarding whether appellants breached this duty and caused appellees' injuries. Thus, we hold the trial court erred in entering summary judgment in favor of appellants.

B. Is the Waiver enforceable as to the negligence claims?

Notwithstanding the existence of a duty on the part of appellants, and factual allegations of a breach of that duty which would support a negligence claim, we must now consider whether the Waiver completely precludes any liability on such a claim, or on appellees' additional claims of gross negligence and recklessness. Appellants observe that by signing the Waiver appellees released "any and all liability, claims, demands, actions and causes of action whatsoever arising out of or related to any loss, damage, or injury, including death, that may be sustained" while playing football at Lackawanna. Appellants' Brief at 38. Appellants submit *Topp Copy Prod., Inc. v. Singletary*, 626 A.2d 98, 100 (Pa. 1993) held a Waiver of "any and all" liability was sufficiently clear to bar claims of all negligence, and the Superior Court erred in holding the Waiver is unenforceable because "it does not indicate that Lackawanna was being relieved of liability for its own acts of negligence." Appellants' Brief at 39, *quoting Topp Copy*, 626 A.2d at 100 ("[T]he word 'all' needs no definition; it includes everything and excludes nothing. There is no more comprehensive word in the language, and as used here it is obviously broad enough to cover liability for negligence.") (additional citations omitted). Appellants emphasize "Pennsylvania courts have consistently held that exculpatory clauses may bar suits based on negligence even where the language of the clause does

not specifically mention negligence at all." Appellants' Brief at 43, *quoting Chepkevich,* 2 A.3d at 1193 (emphasis added).

Appellees submit the only issue preserved by appellants with respect to the validity of the Waiver is whether it is enforceable as to negligence, and that in this regard, the Superior Court correctly determined the Waiver is not sufficiently explicit regarding appellants' own negligence to be enforceable. Appellees further assert the law is clear the Waiver is not enforceable to protect appellants from liability arising from gross negligence or recklessness, and the Superior Court properly remanded for further proceedings to determine whether appellants' conduct constituted gross negligence or recklessness. Appellees' Brief at 45-46, *citing Tayar, supra*, and *Chepkevich*, *supra.*

At the outset, we note appellants concede, as they must, that appellees' claims of liability arising from recklessness are not precluded by the Waiver. *See, e.g. Tayar*, 47 A.3d at 1203 (finding public policy prohibits pre-injury waivers from releasing reckless behavior). The issue before us is thus narrowed to whether the Waiver, which purports to release "any and all liability," precludes liability on appellees' claims of negligence and, relatedly, gross negligence.[9] We bear in mind that exculpatory contracts are generally

[9] As discussed in further detail *infra*, gross negligence is a rather amorphous concept — to the extent it is separate from ordinary negligence and recklessness, it appears to lie somewhere between the two. The parties have consistently referred to negligence, gross negligence and recklessness throughout this litigation, and the complaint included allegations of negligence and reckless conduct, the latter couched within the punitive damages claim. As noted, the trial court did not make pertinent rulings. *Feleccia*, 2016 WL 409711, at *14 n.13 (where Waiver bars negligence, claim for punitive damages necessarily fails). The Superior Court affirmatively held the record in this case supports a finding of "gross negligence or recklessness, the latter of which, pursuant to *Tayar*, cannot be waived in a pre-injury exculpatory release." *Feleccia*, 156 A.3d at 1214. Accordingly, the parties have presented arguments regarding the Waiver's enforceability against claims of gross negligence, which was not decided in *Tayar. See, e.g.,*

disfavored, and subject to close scrutiny. *See Employers Liability Assur. Corp. v. Greenville Bus. Men's Ass'n*, 224 A.2d 620, 623 (Pa. 1966) ("contracts providing for immunity from liability for negligence must be construed strictly since they are not favorites of the law"); *see also Tayar,* 47 A.3d at 1199. Accordingly, exculpatory contracts are valid and enforceable only when "certain criteria are met." *Tayar*, 47 A.3d at 1200 & n.8, *citing Chepkevich* and *Topp Copy*. Our case law provides "guiding standards" for assessing the enforceability of exculpatory contracts. *See, e.g., Topp Copy,* 626 A.2d at 99 (1) the contract language must be construed strictly, since exculpatory language is not favored by the law; 2) the contract must state the intention of the parties with the greatest particularity, beyond doubt by express stipulation, and no inference from words of general import can establish the intent of the parties; 3) the language of the contract must be construed, in cases of ambiguity, against the party seeking immunity from liability; and 4) the burden of establishing the immunity is upon the party invoking protection under the clause).

i. Ordinary Negligence

The Superior Court considered the Waiver to be unenforceable as to appellees' claims of negligence because its "language does not indicate that Lackawanna was being relieved of liability for its own acts of negligence." *Feleccia*, 156 A.3d at 1213. The court further found fault with the Waiver because it did not specifically include the word

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Appellants' Brief at 46-52 (waiver of "any and all" liability is enforceable against gross negligence claims); Appellee's Brief at 46-54 (waiver cannot be used as shield against gross negligence claims, which encompasses more egregious conduct than ordinary negligence). Therefore, unlike *Tayar,* 47 A.3d at 1199 n.7, we reach the question here.

"negligence." *Id.* at 1212-13. Although our cases have directed that exculpatory clauses must clearly provide "a person is being relieved of liability for his own acts of negligence[,]" we have not prescribed specific language. *Chepkevich*, 2 A.3d at 1189, *quoting Topp Copy*, 626 A.2d at 99. In this case, the Waiver purported to protect appellants from "any and all liability" arising out of "any injury" sustained by student athletes while playing football at Lackawanna. We have determined such language is sufficient to express the parties' intention to bar ordinary negligence claims. *See Topp Copy*, 626 A.2d at 99, 101 (lease agreement releasing lessor from '"any and all liability" clearly and unambiguously covered negligence claims'); *see also Cannon v. Bresch*, 160 A. 595, 596 (Pa. 1932) (lease releasing landlord from "all liability" was sufficient to cover liability for negligence).

The Superior Court, in reaching the opposite result, failed to acknowledge the trial court did not find the mere existence of the Waiver automatically extinguished all potential claims of liability. Rather, the trial court applied the *Topp Copy* guiding standards to determine "whether the [exculpatory] clause 'spells out the intention of the parties with particularity and shows the intent to release [appellants] from liability by express stipulation.'" Trial Court op. at 19, *quoting McDonald v. Whitewater Challengers, Inc.*, 116 A.3d 99, 121 (Pa. Super. 2015), *quoting Chepkevich*, 2 A.3d at 1191. The trial court examined the facts of record, including the parties' intentions related to the execution of the Waiver as well as whether the risks undertaken by appellees and injuries suffered were encompassed within its terms. Trial Court op. at 18-22. The trial court determined it could not "say that the risks associated with Lackawanna's Oklahoma Drill are so far beyond those risks ordinarily inherent to the sport of football and addressed in the Waiver as 'risks and hazards' typical of the sport that we must, as a matter of law, invalidate the

Waiver." *Id.* at 21-22. The trial court thus found the Waiver was enforceable and entered summary judgment in favor of appellants. We conclude that the Superior Court's reversal of this holding with respect to appellees' claims of ordinary negligence was error.[10] *See, e.g., Chepkevich*, 2 A.3d at 1194-95 (release enforceable to preclude liability for general claims of negligence); *see also, Topp Copy*, 626 A.2d at 101 (release of "any and all" liability sufficient to preclude liability resulting from landlord's negligence); *see also Cannon*, 160 A. at 597 ("The covenant in this lease against liability for acts of negligence does not contravene any policy of the law.").

ii. Gross Negligence

As we have seen, appellees' claims of ordinary negligence are barred by the Waiver, their claims of recklessness are not, and the allegations of recklessness will be tested at trial on remand. We have yet to rule on whether appellees may also proceed to trial on their allegations of gross negligence, or whether such claims are precluded by the Waiver. *See Tayar*, 47 A.3d at 1199 n.7 ("[A]s gross negligence is not implicated in the instant matter, we leave for another day the question of whether a release for gross negligence can withstand a public policy challenge.").

[10] The Superior Court also found appellees' allegations that appellants violated applicable statutory licensing requirements and these violations constituted negligence *per se* should be remanded for trial. *Feleccia*, 156 A.3d at 1217. In their brief to this Court, appellants recognize "negligence *per se* is simply a variant of ordinary negligence." *See* Appellants' Reply Brief, at 17, *quoting Echeverria v Holley*, 142 A.3d 29, 37-38 (Pa. Super. 2016) (additional citations omitted). To the extent appellants' conduct constituted ordinary negligence, either through a breach of duty or through failure to comply with statutory requirements, the Waiver is enforceable to bar liability for such claims.

Appellants consider gross negligence to be more closely aligned with negligence than recklessness, describing it as a form of negligence where there is a more significant departure from the standard of care, but without the "conscious action or inaction" that characterizes recklessness. *See* Appellants' Brief at 52. Appellants view gross negligence as a type of negligence that is covered by the Waiver and precludes appellees' action for damages. *Id.* at 53-54.

Appellees respond that gross negligence is "more egregiously deviant conduct than ordinary carelessness, inadvertence, laxity, or indifference. . . . The behavior of the defendant must be flagrant, grossly deviating from the ordinary standard of care." Appellees' Brief at 50, *quoting Bloom v. Dubois Reg'l Med. Ctr.,* 597 A.2d 671, 679 (Pa. Super. 1991); *accord Albright v. Abington Mem'l Hosp.,* 696 A.2d 1159, 1164 (Pa. 1997) ("We believe that this definition is a clear, reasonable, and workable definition of gross negligence[.]"). Here, appellees assert, there were sufficient facts presented for the jury to conclude appellants' conduct was grossly negligent, and public policy compels the conclusion such conduct should not be immunized by the Waiver. Appellees' Brief at 52-53.

A determination that a contract is unenforceable because it contravenes public policy "requires a showing of overriding public policy from legal precedents, governmental practice, or obvious ethical or moral standards." *See Tayar*, 47 A.3d at 1199, *citing Williams v. GEICO Gov't Employees Ins. Co.,* 32 A.3d 1195, 1200 (Pa. 2011). "It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring. . . ." *Id.*, *quoting Williams*, 32 A.3d at

1200. Our law is clear that pre-injury exculpatory contracts purporting to protect a party from liability arising from recklessness are unenforceable on this public policy basis.

Although we have equated "gross negligence" with "recklessness" in the criminal law context, we have not expressly applied that equation in the civil context. *See Com. v. Huggins*, 836 A.2d 862, 867 (Pa. 2003) (gross negligence equates with recklessness for purpose of establishing *mens rea* for manslaughter). In the civil context, there is some difficulty in ascertaining the term's precise meaning. *See In re Scheidmantel*, 868 A.2d 464, 484-85 (Pa. Super. 2005) (recognizing "gross negligence" is frequently invoked but is not well defined in the civil context and "Pennsylvania Courts have struggled to provide a workable definition for 'gross negligence' when faced with the need to apply the concept."). In *Albright*, 696 A.2d at 1164, we defined gross negligence in the context of the Mental Health Procedures Act[11] as a "form of negligence where the facts support substantially more than ordinary carelessness, inadvertence, laxity, or indifference. The behavior of the defendant must be flagrant, grossly deviating from the ordinary standard of care." *Id.* at 1164, *quoting Bloom*, 597 A.2d at 679.

Thus, although we have not previously settled on a definitive meaning of the term "gross negligence" as compared to "ordinary negligence" in the civil context, we have recognized there is a difference between the two concepts, and they are distinguished by the degree of deviation from the standard of care. *See, e.g., Albright, supra*; *Ratti v. Wheeling Pittsburgh Steel Corp.*, 758 A.2d 695, 703 (Pa. Super. 2000), *appeal denied*, 785 A.2d 90 (Pa. 2001). *See also* Pa. Suggested Standard Civil Jury Instructions 13.50

[11] 50 P.S. §7101-7503. The public policy rationale underlying the Mental Health Procedures Act policy is to assure availability of adequate treatment to mentally ill persons, and the Act provides procedures to effectuate that policy. 50 P.S. §7102.

("Gross negligence is significantly worse than ordinary negligence" requiring proof actor "significantly departed from how a reasonably careful person would act under the circumstances"). To the extent our courts have used the term, the "general consensus finds gross negligence constitutes conduct more egregious than ordinary negligence but does not rise to the level of intentional indifference to the consequences of one's acts." *Id.* Other Pennsylvania sources have observed:

> In essence, gross negligence is merely negligence with a vituperative epithet. It constitutes conduct more egregious than ordinary negligence but does not rise to the level of intentional indifference to the consequences of one's acts. It may also be deemed to be a lack of slight diligence or care comprising a conscious, voluntary act or omission in reckless disregard of a legal duty and the consequences to another party. The term has also been found to mean a form of negligence where the facts support substantially more than ordinary carelessness, inadvertence, laxity, or indifference. The behavior of the defendant must be flagrant, grossly deviating from the ordinary standard of care.

2 Summ. Pa. Jur. 2d Torts §20:5 (internal citations omitted).

Gross negligence has thus been consistently recognized as involving something more than ordinary negligence, and is generally described as "want of even scant care" and an "extreme departure" from ordinary care. *Royal Indem. Co. v. Sec. Guards, Inc.*, 255 F.Supp.2d 497, 505 (E.D. Pa. 2003), *quoting Williams v. State Civil Serv. Comm'n*, 306 A.2d 419, 422 (Pa. Cmwlth. 1973), *aff'd* 327 A.2d 70 (Pa. 1974); *see also Scheidmantel*, 868 A.2d at 485 (gross negligence is "a lack of slight diligence or care comprising a conscious, voluntary act or omission in 'reckless disregard' of a legal duty and the consequences to another party"). *See also* Black's Law Dictionary 1057 (7th ed. 1999) (gross negligence is a "lack of slight diligence or care" and a "conscious, voluntary act or omission in reckless disregard of a legal duty and the consequences to another

party"). With these principles in mind, we now proceed to consider whether a pre-injury exculpatory waiver is valid to preclude claims of gross negligence.[12]

In *Tayar*, we held an exculpatory clause was not valid to preclude liability arising from reckless conduct because allowing such waivers would permit parties to "escape liability for consciously disregarding substantial risks of harm to others[.]" *Tayar*, 47 A.3d at 1203. We recognized such pre-injury releases are unenforceable in circumstances where they "would jeopardize the health, safety, and welfare of the people by removing any incentive for parties to adhere to minimal standards of safe conduct." *Id.*

As we have seen, gross negligence does not rise to the level of the intentional indifference or "conscious disregard" of risks that defines recklessness, but it is defined as an "extreme departure" from the standard of care, beyond that required to establish ordinary negligence, and is the failure to exercise even "scant care." *Royal Indem. Co.*, 255 F.Supp.2d at 505. *See also* 2 DAN B. DOBBS, THE LAW OF TORTS § 140 (gross negligence is "a high, though unspecified degree of negligence, or as courts sometimes say, the failure to use even slight care.") Thus, gross negligence involves more than a

[12]Chief Justice Saylor articulates a concern that common pleas courts will have difficulty deciding when challenged action rises to the level of gross negligence in order to determine the applicability of an exculpatory agreement. *See* Concurring and Dissenting Op. at 7 (Saylor, C.J.). We observe, however, that courts of common pleas are routinely charged with determining when conduct reaches the level of gross negligence. In fact, we have recognized the question of "whether an act or failure to act constitutes gross negligence is for a jury, but may be removed from consideration by a jury and decided as a matter of law only where the case is entirely free from doubt and there is no possibility that a reasonable jury could find gross negligence." *Albright*, 696 A.2d at 1165 (emphasis omitted). We further note juries may be aided in their consideration of the concept with a specifically tailored jury instruction. *See* Pa. Suggested Standard Civil Jury Instructions 13.50 ("Gross negligence is significantly worse than ordinary negligence" requiring proof that actor "significantly departed from how a reasonably careful person would act under the circumstances").

simple breach of the standard of care (which would establish ordinary negligence), and instead describes a "flagrant" or "gross deviation" from that standard. *Bloom*, 597 A.2d at 679 (gross negligence involves behavior that is "flagrant, grossly deviating from the ordinary standard of care"). As such, the same policy concerns that prohibit the application of a waiver in cases of recklessness — *i.e.*, allowing it would incentivize conduct that jeopardizes the signer's health, safety and welfare to an unacceptable degree requires a similar holding with regard to gross negligence.[13] Accordingly, we hold the Waiver is not enforceable to preclude liability arising from appellees' claims of gross negligence, and the allegations supporting such claims should be tested at trial on remand.

III. Conclusion

For all the foregoing reasons, we hold appellants had a duty to provide duly licensed athletic trainers for the purpose of rendering treatment to its student athletes participating in athletic events, including the football practice of March 29, 2010, and there is a genuine issue of material fact regarding whether appellants breached this duty. Moreover, although the Waiver bars recovery for appellees' damages arising from ordinary negligence, we hold the Waiver does not bar recovery for damages arising from

[13] We reach this conclusion notwithstanding our recognition that gross negligence does not involve the "conscious" disregard of risks that defines recklessness. *Compare* Pa. Suggested Standard Civil Jury Instructions 13.60 ("Reckless conduct is significantly worse than negligent conduct" requiring proof that actor "intentionally acted or failed to act in conscious disregard of the likelihood of harm to others") *with* Pa. Suggested Standard Civil Jury Instructions 13.50 ("Gross negligence is significantly worse than ordinary negligence" requiring proof that actor "significantly departed from how a reasonably careful person would act under the circumstances").

gross negligence or recklessness, and there remain factual questions regarding whether appellants' conduct constituted gross negligence or recklessness. Accordingly, we affirm the Superior Court's order only to the extent it vacated the trial court's entry of summary judgment on these claims specifically, and we remand this matter to the trial court for further proceedings consistent with this opinion.

Jurisdiction relinquished.

Justices Baer, Todd, Donohue and Mundy join the opinion.

Chief Justice Saylor and Justice Wecht file concurring and dissenting opinions.

[J-96-2018][M.O. - Dougherty, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

AUGUSTUS FELECCIA AND JUSTIN T. RESCH,	:	No. 75 MAP 2017
Appellees	:	Appeal from the Order of the Superior Court at No. 385 MDA 2016 dated 2/24/17, reconsideration denied 4/26/17, reversing the judgment of the Lackawanna County Court of Common Pleas, Civil Division, at No. 12-CV-1960 entered 2/2/16 and remanding for trial
v.	:	
LACKAWANNA COLLEGE A/K/A LACKAWANNA JUNIOR COLLEGE, KIM A. MECCA, MARK D. DUDA, WILLIAM E. REISS, DANIEL A. LAMAGNA, KAITLIN M. COYNE AND ALEXIS D. BONISESE,	:	
Appellants	:	ARGUED: December 5, 2018

CONCURRING AND DISSENTING OPINION

CHIEF JUSTICE SAYLOR **DECIDED: August 20, 2019**

I join the majority opinion to the extent it reverses the Superior Court's creation of a generalized duty of care owed by Pennsylvania colleges to student athletes to have medical personnel available at all football practices. *See* Majority Opinion, *slip op*. at 14. I respectfully differ, however, with the majority's follow-on holding that, under an assumption-of-duty theory as reflected in Section 323 of the Second Restatement of Torts, Lackawanna College definitively owed a duty of care to Plaintiffs on the date in question.

As a general matter, whether a defendant owed a duty of care to another person at the relevant time is a legal issue to be decided on the underlying facts. *See, e.g.*, *Dittman v. UPMC*, ___ Pa. ___, ___, 196 A.3d 1036, 1046 (2018); *accord Kukis v.*

Newman, 123 S.W.3d 636, 639 (Tex. Ct. App. 2003) ("The existence of a duty is a question of law for the court to decide based on the specific facts of the case."). Because the complaint was dismissed on a defense motion for summary judgment, the majority appropriately "consider[s] the record in the light most favorable to [Plaintiffs] as the non-moving parties[.]" Majority Opinion, *slip op*. at 19. In doing so the majority recites certain facts which remain in dispute. This alone is not problematic given that, again, the record is being viewed favorably to Plaintiffs. The difficulty arises when the majority holds, in definitive terms, that a duty existed in light of such circumstances.

For example, the majority states, "Lackawanna held out Coyne and Bonisese as athletic trainers to [Plaintiffs] and their teammates," and that these same two individuals "performed the role of athletic trainers by attending [Plaintiffs] when they were injured[.]" *Id*. Notably, Appellees expressly denied that Coyne and Bonisese held themselves out as athletic trainers or Lackawanna College held them out as such. *See* Defendants' Answer and New Matter at ¶¶40, 42, 43, 44 (averring that, at all relevant times, Coyne and Bonisese were held out by themselves and the college as first responders). Thus, I would frame the holding in more abstract terms and allow the common pleas court to determine, after resolution of any necessary factual disputes, whether Appellees' affirmative conduct created a duty under the circumstances – and if so, the scope that duty.[1]

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[1] For example, the majority states that Appellees had a duty to "provide" athletic trainers, whereas the Superior Court indicated that the college was required to "have qualified medical personnel available" for the practice. While the difference between "providing" an athletic trainer and having medical personnel "available" may seem formal, Plaintiffs agree such personnel need not be physically present on the field if they are available for immediate consultation via telecommunications. *See* Brief for Appellees at 27-28, 31-33. The difference may be material because, in their responsive pleading, Appellees deny Plaintiffs' allegations that such personnel were unavailable. They have also noted that the consent is phrased in the disjunctive and asserted that (continued…)

In terms of the second question accepted for review – whether the exculpatory clause is valid as to negligence – I also respectfully differ with the majority's conclusion that the clause is unenforceable as contrary to public policy relative to a claim based on gross negligence.[2]

> It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring. There must be a positive, well-defined, universal public sentiment, deeply integrated in the customs and beliefs of the people and in their conviction of what is just and right and in the interests of the public weal.

Shick v. Shirey, 552 Pa. 590, 600, 716 A.2d 1231, 1235-36 (1998) (quoting *Mamlin v. Genoe*, 340 Pa. 320, 325, 17 A.2d 407, 409 (1941)); *see also Tayar v. Camelback Ski Corp.*, 616 Pa. 385, 399, 47 A.3d 1190, 1199 (2012) (recognizing that "avoidance of contract terms on public policy grounds requires a showing of overriding public policy

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(…continued)
Plaintiffs were, in fact, treated by the team physician and hospital staff as the consent requires. *See* Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 5, *reprinted in* R.R. 4197a.

[2] Appellants argue that the question is not before the Court. They contend the only issue relating to gross negligence is whether the waiver's language encompasses gross negligence. Appellants reason the Superior Court determined that the waiver would not violate public policy even if applied to claims based on gross negligence, *see Feleccia v. Lackawanna Coll.*, 156 A.3d 1200, 1212 (Pa. Super. 2017), and Plaintiffs did not file a protective cross-appeal from that ruling. *See* Brief for Appellants at 47. It should be noted, however, that "protective cross-appeals are disfavored and that 'a successful litigant need not file a protective cross-appeal on pain of waiver.'" *Meyer, Darragh, Buclker, Bebenek & Eck, P.L.L.C. v. Law Firm of Malone Middleman, P.C.*, 635 Pa. 427, 448, 137 A.3d 1247, 1260 (2016) (Saylor, C.J., concurring) (quoting *Lebanon Valley Farmers Bank v. Commonwealth*, 623 Pa. 455, 464, 83 A.3d 107, 113 (2013)). Thus, I have little difficulty construing the question framed by Appellants, concerning whether the waiver is "valid" as to gross negligence, as subsuming the issue of whether its enforcement relative to a proven claim of gross negligence would violate public policy.

from legal precedents, governmental practice, or obvious ethical or moral standards"). *Tayar* cited *Williams v. GEICO Government Employees Insurance Co.*, 613 Pa. 113, 32 A.3d 1195 (2011), for this position, and continued as follows:

> Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest. As the term "public policy" is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy[.] . . . Only dominant public policy would justify such action. In the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, the Court should not assume to declare contracts . . . contrary to public policy. The courts must be content to await legislative action.

Tayar, 616 Pa. at 399-400, 47 A.3d at 1199 (quoting *Williams*, 613 at 120-21, 32 A.3d at 1200) (alterations made by *Tayar*).

In this vein, it seems to me that, to invalidate the waiver relative to gross negligence claims as contrary to public policy, the concept of gross negligence would, at a minimum, have to be well understood and defined. Apart from a clear notion of what constitutes gross negligence as distinguished from ordinary negligence, it seems difficult to contend that laws, legal precedents, long governmental practice, or other recognized indicators of longstanding, dominant public policy are so firmly entrenched in this Commonwealth against such waivers as to permit this Court to declare, as the majority presently does, that they are judicially prohibited.

Yet, as the majority explains, it is difficult even to ascertain the precise meaning of gross negligence, as that term represents an "amorphous concept," that is, at its essence, "merely negligence with a vituperative epithet." The majority proceeds to describe gross negligence as "appear[ing] to lie somewhere between" negligence and recklessness. Majority Opinion, *slip op*. at 21 n.9, 27.

This type of uncertainty in discerning just what gross negligence consists of, in my view (and for reasons more fully explained below) undermines the concept that liability waivers should be deemed unenforceable as against claims of gross negligence although they can be valid and enforceable in relation to claims of ordinary negligence.

In terms of the competing interests involved, it should go without saying that athletic and other recreational pursuits by Pennsylvania residents are in the public interest and should be encouraged. *See, e.g.*, *Chepkevich v. Hidden Valley Resort, L.P.*, 607 Pa. 1, 30, 2 A.3d 1174, 1191 (2010) (reviewing cases). On the other hand, it is plainly contrary to public policy to enforce releases which would allow individuals intentionally to harm others with impunity. *Accord Tayar*, 616 Pa. at 401, 47 A.3d at 1200. In *Tayar*, this Court extended that understanding to harm stemming from recklessness, that is, conduct in which the actor knowingly disregards an unreasonable risk of harm. *Tayar* reasoned that the conscious act of ignoring such a risk "aligns . . . closely with intentional conduct." *Id*. at 403, 47 A.3d at 1201. Still, this Court should not overlook the competing policy grounds underlying the enforceability of liability waivers relative to inherently risky athletic activities.

Generally speaking, an exculpatory clause is a renunciation of a right and, as such, it constitutes a means of allocating risk as between contracting parties. *See generally* Anita Cava & Don Wiesner, *Rationalizing a Decade of Judicial Responses to Exculpatory Clauses*, 28 SANTA CLARA L. REV. 611, 648 (1988). Because incurring risks is costly, shifting risks from the organizer of the athletic endeavor (the "supplier") to the participant (the "consumer") allows the supplier to lower the price of the activity, particularly where there is market competition and/or where, as here, the provider is a non-profit organization. *Cf. Carnival Cruise Lines v. Shute*, 499 U.S. 585, 594, 111 S. Ct. 1522, 1527 (1991) (applying similar reasoning to a contractual forum-selection

clause). *See generally* Brief for *Amicus* Ass'n of Indep. Colls. & Univs. of Pa. at 12-14 (detailing that complying with the generalized duty imposed by the Superior Court would be likely to impose significant costs on the Association's member institutions). A lower price, in turn, serves the public interest because, on the margin at least, recreational opportunities become available to lower-income residents who would otherwise be excluded from such events.

It may be assumed that another factor favoring enforcement is the recognition that, subject to limiting principles, parties are generally at liberty to enter into contracts of their choosing. *See Cent. Dauphin Sch. Dist. v. American Cas. Co.*, 493 Pa. 254, 258, 426 A.2d 94, 96 (1981). This is reflected in the test for enforceability, one element of which asks whether each party is a "free bargaining agent." *Tayar*, 616 Pa. at 399, 47 A.3d at 1199 (citing *Emp'rs Liab. Assur. Corp. v. Greenville Business Men's Ass'n*, 423 Pa. 288, 224 A.2d 620 (1966)).

Conversely, enforcing waivers of liability based on any kind of fault – including ordinary negligence – diminishes incentives for the supplier to manage risks which it is in a better position than the consumer to control.

None of the above is to suggest that negligent or grossly negligent conduct is in any sense socially beneficial. Rather, it is offered solely for the purpose of illustrating that multiple competing interests are at stake when a litigant requests that we judicially invalidate an otherwise binding contractual provision on public policy grounds. Presumably, this Court's line of decisions enforcing waivers as to ordinary negligence reflects a balancing of these considerations.

Certainly, and as noted, a weighing of such policies favors unenforceability where intentional or reckless conduct is concerned. In such instances, not only are there obvious reasons based on enduring societal mores which support such a result,

but – and perhaps less obvious – any competing interest in cost reduction is not unduly compromised. This is because, absent some proof of intentional conduct or conscious disregard, the common pleas court can, in a given case, be expected to act as a gatekeeper so that the supplier need not incur the cost of litigating the case to the conclusion of a jury trial and, perhaps, post-trial motions.

The same cannot be said for gross negligence precisely because of its "amorphous" nature. After today it will be difficult for common pleas courts to decide – when the defendant is in possession of a validly-executed waiver covering the activity in question – whether the complaint should be dismissed on the grounds that it only alleges ordinary negligence and not gross negligence. As a consequence, litigants can be expected to argue, with regard to any supportable allegation of negligence, that they are entitled to have a jury decide whether the defendant's negligence was, in fact, "gross." Absent thorough and detailed appellate guidance as to the types of facts that must be pled to allege gross negligence, such an argument is likely to prevail in many if not most cases.

In all events, the type of policy making this Court presently undertakes is best suited to the General Assembly. We have observed on multiple occasions that the legislative branch is the appropriate forum for the balancing of social policy considerations and interests and the making of social policy judgments, and that it has the tools to perform these tasks – tools which the courts lack. *See*, *e.g.*, *Seebold v. Prison Health Servs., Inc.*, 618 Pa. 632, 653 & n.19, 57 A.3d 1232, 1245 & n.19 (2012).

Accordingly, I respectfully dissent from the holding reached in Part II(b) of the majority opinion. I note, however, that I do not foreclose reconsidering my position if, in the future, the concept of gross negligence in Pennsylvania is made subject to a more

precise definition which allows for some measure of consistency and predictability in litigation.

[J-96-2018] [MO:Dougherty, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

AUGUSTUS FELECCIA AND JUSTIN T. RESCH,	:	No. 75 MAP 2017
Appellees	:	Appeal from the Order of the Superior Court at No. 385 MDA 2016 dated February 24, 2017, reconsideration denied April 26, 2017, Reversing the
v.	:	Judgment of the Lackawanna County Court of Common Pleas, Civil Division, at No. 12-CV-1960 entered
LACKAWANNA COLLEGE A/K/A LACKAWANNA JUNIOR COLLEGE, KIM A. MECCA, MARK D. DUDA, WILLIAM E. REISS, DANIEL A. LAMAGNA, KAITLIN M. COYNE AND ALEXIS D. BONISESE,	:	February 2, 2016 and Remanding for trial.
	:	ARGUED: December 5, 2018
Appellants	:	

CONCURRING AND DISSENTING OPINION

JUSTICE WECHT **DECIDED: August 20, 2019**

I. Introduction

Like the Majority, I believe that Lackawanna College had a duty to ensure that certified athletic trainers were available to treat student-athletes injured during the March 29, 2010 football tryouts. Considering the record in the light most favorable to Feleccia and Resch, as we must, it is clear that Lackawanna College assumed this duty through its own actions and representations.[1] As a general matter, I agree as well with the Majority's analysis regarding the enforceability of the liability waiver that Feleccia and

[1] *See* Maj. Op. at 19.

Resch signed. Specifically, I join in the conclusion that the waiver was enforceable as to ordinary negligence, and not enforceable as to gross negligence.[2]

I write separately because, while the Majority limits Lackawanna College's duty to the obligation it undertook through its own actions and representations, *see* Maj. Op. at 18-19, principles of Pennsylvania tort law require us to go farther. Based upon the factors that this Court articulated in *Althaus ex rel. Althaus v. Cohen*, 756 A.2d 1166 (Pa. 2000), as well as the persuasive opinion of the United States Court of Appeals for the Third Circuit in *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360 (3d Cir. 1993), colleges owe a duty to their student-athletes to ensure that qualified medical personnel[3] are available to

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[2] *See* Maj. Op. at 22-29. Notwithstanding my agreement with the Majority's ultimate conclusions regarding the enforceability of the waiver as to ordinary negligence, I would have serious reservations about this particular waiver's validity were that question properly before us. Feleccia and Resch chose to attend Lackawanna College in order to participate in its football program. Eight weeks into the spring semester, after participating in various pre-season conditioning sessions, each was required to sign a waiver in order to play on the football team. Under such circumstances, I cannot help but think that Feleccia and Resch had no genuine choice but to sign these waivers, a circumstance that suggests an invalid contract of adhesion. *See Galligan v. Arovitch*, 219 A.2d 463, 465 (Pa. 1966) (in a contract of adhesion, one party "simply adheres to a document which he is powerless to alter, having no alternative other than to reject the transaction entirely"). Moreover, in light of Lackawanna College's repeated representations that athletic trainers would be available to treat injured football players, and in view of the College's failure to deliver on that promise, it seems unconscionable to hold Feleccia and Resch to their own promises not to sue the College for their injuries. Nonetheless, before the Superior Court, Feleccia and Resch failed to challenge the trial court's determination that the waiver was not a contract of adhesion, thus waiving the issue. *See* Pa.R.A.P. 302; *Feleccia v. Lackawanna Coll.*, 156 A.3d 1200, 1212 (Pa. Super. 2017). Additionally, neither party advances an adhesion argument before this Court, thereby excluding any such claims from the scope of our review.

[3] A note on terminology: My analysis focuses on Lackawanna College's failure to ensure that "qualified medical personnel" were available during its football tryouts in the form of certified athletic trainers. I adopt this usage notwithstanding the fact that trainers generally are not physicians, inasmuch as the parties have done so, apparently because the Superior Court chose to employ this language. *See, e.g.*, *Feleccia*, 156 A.3d at 1214-15; Brief for Lackawanna College at 18, 22-23, 28-29; Brief for Feleccia and Resch at 22, 24. Moreover, under the Medical Practice Act of 1985 and its implementing regulations,

render needed assistance during school-sponsored and supervised intercollegiate contact sport activities.

II. Legal Backdrop

A. *Kleinknecht*

While this Court previously has rejected the doctrine of *in loco parentis* as a basis for finding that colleges owe a duty of care to their students,[4] we have not addressed whether colleges owe any duty to their student-athletes. In a case with similar facts, the Third Circuit predicted that this Court would indeed conclude that a college's relationship with its student-athletes created a duty of care to these athletes during their participation in intercollegiate contact sports. *Kleinknecht*, 989 F.2d at 1367-69. In *Kleinknecht*, a college lacrosse player suffered cardiac arrest during practice and ultimately died. No medical personnel were present at the practice, and the coaches lacked any immediate means to contact emergency services.

Distinguishing prior cases in which courts held that colleges owed no duty to their students, the *Kleinknecht* court explained that, unlike in those cases, the lacrosse player

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in order to use the title "athletic trainer" and perform athletic training duties, an individual must be licensed by the State Board of Medicine. 63 Pa.C.S. § 422.51a(c); 49 Pa. Code § 18.503 (a)-(b). My use of the term "qualified medical personnel" here also is in recognition of both this legislative and regulatory scheme and the possibility that colleges could fulfill their duty to student-athletes by ensuring that other qualified medical personnel, who possess the requisite certification or licensure in an area specializing in the treatment of injured athletes, are on hand in lieu of certified athletic trainers. Additionally, I note that, throughout this opinion, I refer to Bonisese's and Coyne's requisite (though not attained) qualification as a "certification." At the time of the football tryouts in question, athletic trainers were "certified" rather than "licensed." In 2011, the General Assembly changed the term "certification" to "licensure," but noted that anyone who held a valid athletic training certification prior to the amendment qualified as a licensed athletic trainer under the new law. 63 Pa.C.S. § 422.51a.

4 *See Alumni Ass'n v. Sullivan*, 572 A.2d 1209, 1213 (Pa. 1990).

was not acting as a private student engaged in his own affairs when he collapsed.[5] Instead, the student was participating in a scheduled practice for an intercollegiate, school-sponsored team under the supervision of coaches employed by the college. The court also found the college's recruitment of the lacrosse player significant, noting that it could not "help but think that the College recruited [the athlete] for its own benefit, probably thinking that his [athletic skill] would bring favorable attention and so aid the College in attracting other students." *Id.* at 1368.

Additionally observing that the imposition of a duty is justified when the foreseeable risk of harm is unreasonable, the *Kleinknecht* court considered the foreseeability and magnitude of the risk at the lacrosse practice. The court found that it is "clearly foreseeable that a person participating [in an intercollegiate contact sport] will sustain serious injury requiring immediate medical attention." *Id.* at 1371. The court also opined that the "magnitude of foreseeable harm—irreparable injury or death to [a student-athlete] as a result of inadequate preventative emergency measures—is indisputable." *Id.* at 1370. Accordingly, in light of the relationship between a college and its student-athletes and the foreseeability of grave injury during athletes' participation in contact sports, the

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[5] Specifically, the Third Circuit distinguished *Sullivan*, 572 A.2d 1209, and *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979). In *Sullivan*, an underage student became intoxicated during an on-campus fraternity party and then started a fire. Although the student claimed that the university should have known that alcohol was being served to underage students at the party, and, therefore, should be liable for the damage caused by the fire, this Court declined to find that the college owed the student any custodial duty. We emphasized that there was no evidence demonstrating that the university was involved in planning the party or in serving, supplying, or purchasing the alcohol. Similarly, in *Bradshaw*, an underage student attended a school-sponsored picnic, became intoxicated, and later was involved in a car accident. The Third Circuit determined that the college's knowledge that underage drinking might occur did not create a duty of care to the student.

court opined that the college owed a duty "to provide prompt and adequate emergency medical services" to its intercollegiate athletes when they are "engaged in a school-sponsored athletic activity for which [they] ha[ve] been recruited." *Id.* at 1371.

B. *Althaus*

Seven years after the Third Circuit decided *Kleinknecht*, this Court compiled earlier approaches to the duty inquiry and distilled them into a five-factor framework.[6] Observing that the concept of duty is "necessarily rooted in often amorphous public policy considerations," *Althaus*, 756 A.2d at 1169, we acknowledged that discerning a "previously unrecognized duty" is an inherently difficult task. *See Walters v. UPMC Presbyterian Shadyside*, 187 A.3d 214, 222 (Pa. 2018). To assist in this undertaking, we identified the following five factors for courts to consider: "(1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution." *Althaus*, 756 A.2d at 1169. We also have noted that "[n]o one of these five factors is dispositive. Rather, a duty will be found to exist where the balance of these factors weighs in favor of placing such a burden on a defendant." *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1008-09 (Pa. 2003).

III. Analysis

Although some twenty-six years have passed since the Third Circuit's prediction in *Kleinknecht*, this Court has yet to resolve whether colleges owe any duty to their

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[6] Although *Kleinknecht* predated *Althaus*, the *Althaus* framework was a distillation of previously developed approaches to the duty analysis, and the *Kleinknecht* court considered many of those same preexisting factors. In a modest divergence from the approach taken by *Althaus*, the *Kleinknecht* court appeared to treat each factor as independently sufficient to impose a duty, whereas *Althaus* requires courts to weigh each factor as part of a unitary inquiry.

student-athletes. Allowing for argument's sake that this is a new duty, a principled weighing of the *Althaus* factors leads to the conclusion that colleges owe a duty to ensure that qualified medical personnel are available to student-athletes participating in school-sponsored and supervised intercollegiate contact sports.[7]

A. *Althaus* (1): The relationship between the parties[8]

A party's duty of care to another can arise from the parties' relationship. *See Morena v. S. Hills Health Sys.*, 462 A.2d 680, 684 (Pa. 1983). In light of the increased

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[7] For the purpose of clarity, throughout the remainder of this opinion, I refer to school-sponsored and supervised intercollegiate contact sports simply as "intercollegiate contact sports." I incline toward the view that the presence of school sponsorship and supervision are necessary limiting factors upon a college's duty to its student-athletes, but I need not consider the necessity of these qualifications in this case because sponsorship and supervision are not disputed here and presumably are inherent in most (if not all) intercollegiate sports. Based upon the facts and briefing of this case, I also recognize a duty only in the context of contact sports, to wit, those in which participants frequently make physical contact with other participants or inanimate objects. I do not opine as to the presence or absence of a duty in sports in which contact is infrequent or inadvertent.

[8] I disagree with the Majority that an *Althaus* analysis is unwarranted, ostensibly because the parties did not argue *Althaus* below, and because the lower courts did not conduct an explicit *Althaus* analysis. *See* Maj. Op. at 15 n.7. Feleccia and Resch responded to Lackawanna College's motion for summary judgment by asserting that Lackawanna owed them a duty of care based upon the reasoning of the Third Circuit in *Kleinknecht*. As discussed *supra*, *Kleinknecht* analyzed many of the same considerations that this Court later identified as factors in the *Althaus* framework. Although Feleccia and Resch understandably did not suggest that Lackawanna College's duty was new, given the challenges presented by proposing a new affirmative duty as such, they relied upon several *Althaus* factors in support of the duty they asserted. The trial court rejected this argument, finding instead that the College owed no duty based upon the athletes' assumption of the risk. Accordingly, it was not until the Superior Court concluded that Lackawanna College owed its athletes a duty of care that Lackawanna became an appellant and had the opportunity and the occasion to argue that the court imposed a new duty requiring an *Althaus* analysis. Moreover, as even Feleccia and Resch admit, by relying heavily upon *Kleinknecht* to support its holding, the Superior Court implicitly applied the *Althaus* factors when articulating Lackawanna College's duty. *See* Brief for Feleccia and Resch at 36. The proposed duty at issue in this case has not previously been recognized by a Pennsylvania court. The lower courts and the parties recognize as much, and the *Althaus* factors have been discussed and advocated at length throughout

autonomy afforded to college students in modern times, courts have rejected the notion that colleges act *in loco parentis* or as "insurer[s] of the safety of [their] students." *See Sullivan*, 572 A.2d at 1213 (quoting *Bradshaw*, 612 F.2d at 138). However, despite widespread agreement among courts on this general principle, courts differ as to whether colleges owe any duty to their student-athletes.[9] In recent decades, scholars have opined that the unique relationship between colleges and their student-athletes justifies the imposition of a duty upon the college when the athletes participate in intercollegiate contact sports. These commentators observe that, unlike the relationship between a college and its average student, the relationship between colleges and their student-athletes is characterized by mutual benefits and by the college's assertion and exercise of significant control over the athletes' lives, thereby justifying the recognition of a duty of care.[10]

In the case before us today, the relationship between Lackawanna College and its intercollegiate football players weighs in favor of recognizing a duty similar to the one that

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these proceedings. Accordingly, it elevates form over substance to suggest that an *Althaus* analysis is unwarranted for want of advocacy.

[9] *Compare Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383, 392-93 (Cal. 2006) (holding that a college that hosted an athletic event owed a duty to both its own athletes and visiting athletes based upon the college's relationship with them and the benefits it received from intercollegiate competition), *and Davidson v. Univ. of N.C. at Chapel Hill*, 543 S.E.2d 920, 927-28 (N.C. Ct. App. 2001) (finding that a college owed its cheerleaders a duty during their participation in a school-sponsored intercollegiate team based upon the mutual benefits that the cheerleaders' participation on the team generated and upon the "considerable degree of control" that the college exercised over their lives), *with Orr v. Brigham Young Univ.*, 108 F.3d 1388 (10th Cir. 1997) (unpublished table decision) (determining that the college owed no duty to prevent a student-athlete from playing football when his participation would exacerbate an existing injury), *and Fisher v. Northwestern State Univ.*, 624 So.2d 1308, 1311 (La. Ct. App. 1994) (declining to find that the university owed a duty to its cheerleaders to provide adult supervisors to monitor practice and approve the stunts that they attempted).

[10] *See, e.g.*, Michelle D. McGirt, *Do Universities Have a Special Duty of Care to Protect Student-Athletes from Injury?*, 6 VILL. SPORT & ENT. L.J. 219, 227-29 (1999)

the Third Circuit articulated in *Kleinknecht*. Like the student-athlete in *Kleinknecht*, at the time of their injuries, Feleccia and Resch both were engaged in something other than their own private affairs. Rather, Feleccia and Resch were participating in tryouts for the intercollegiate, school-sponsored football team under the supervision of coaches employed by the college. Like the Third Circuit in *Kleinknecht*, I would find that the college expected its relationship with the student-athletes to benefit the college. Before Feleccia and Resch enrolled at Lackawanna College, its head football coach contacted both of them about playing football for the school's intercollegiate team, presumably because the college expected to gain favorable attention or other benefits from their participation in the program. Moreover, as the Majority aptly observes, Feleccia's and Resch's relationship with Lackawanna College rested in part upon their reasonable expectation, based upon the college's actions and representations, that a certified athletic trainer would treat them if they were injured during athletic activities. *See* Maj. Op. at 19.

Accordingly, like the school-athlete relationship at issue in *Kleinknecht*, the relationship between Lackawanna College and its intercollegiate football players weighs in favor of recognizing a duty.

(discussing the intensive time commitment required of student-athletes and colleges' encouragement and/or selection of certain majors and classes for athletes); 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, 338-41 (1996) (detailing student-athletes' limited autonomy and the benefits that the relationship between colleges and their student-athletes generate, including revenue, donations, media attention, and increased enrollment); Edward H. Whang, *Necessary Roughness: Imposing a Heightened Duty of Care on Colleges for Injuries of Student-Athletes*, 2 SPORTS L.J. 25, 43-46 (1995) (noting that "athletic departments exert a high degree of control over almost every aspect of a student-athlete's college life," and that the benefits colleges receive from intercollegiate athletic programs make "the need to impose a duty of reasonable care on colleges with respect to foreseeable injuries suffered by student-athletes . . . equally or more compelling" than the duty courts have imposed upon high schools in favor of their students).

B. *Althaus* (2): The social utility of the actor's conduct

The conduct at issue in any negligence case is the "act or omission upon which liability is asserted." *Walters*, 187 A.3d at 234. In cases in which an actor's omission is at issue, courts must consider not only the social utility of the actor's conduct, but also the utility of the individual's failure to act. For example, in *Walters*, this Court weighed the social utility of UPMC providing health care services to the community against the utility of UPMC's failure to report a former employee's theft of fentanyl to the appropriate authorities. Although we concluded that UPMC's provision of health care was beneficial to society, we found that its failure to take "steps to enhance public safety" by ensuring that its former employee did not "repeat his dangerous and criminal conduct" lacked any social utility. *Id.* at 235.

Similarly, in *Phillips*, 841 A.2d 1000, this Court weighed the social utility of a company manufacturing butane lighters against the utility of the company's failure to manufacture these lighters with child safety features. After opining that the lighters had obvious social utility, we observed:

> [T]he evidence does not show that the utility of the lighter is increased when a child safety device is lacking. Conversely, it is readily apparent that a device which would prevent small children, who lack the discretion and caution of the average adult, from creating a flame would have great utility in our society.

Id. at 659-60. Therefore, we concluded that this factor weighed in favor of imposing a duty.[11]

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[11] *See also Citizens Bank of Pa. v. Reimbursement Tech., Inc.*, 609 F. App'x 88, 92 (3d Cir. 2015) ("[T]he social utility factor weighs in favor of finding a duty, given that whatever social utility is gleaned from [the company's] data management services would be seriously undermined by its inability to safeguard the personal and financial information it receives to deliver those services."); *Thomas v. Staples, Inc.*, 2 F. Supp. 3d 647, 660-61 (E.D. Pa. 2014) (conducting an analysis similar to the *Phillips* Court regarding

Here, we must weigh the social utility of Lackawanna College maintaining an intercollegiate athletic program against the utility of the college's failure to ensure that qualified medical personnel were available to its student-athletes during football tryouts. Unquestionably, intercollegiate athletics furnish many benefits. As the Supreme Court of California observed in *Avila*, "[i]ntercollegiate competition allows a school to, on the smallest scale, offer its students the benefits of athletic participation and, on the largest scale, reap the economic and marketing benefits that derive from maintenance of a major sports program." *Avila*, 131 P.3d at 392. Intercollegiate athletic programs provide numerous revenue sources for colleges. In addition to the money colleges earn from ticket sales at intercollegiate athletic events, successful athletic programs serve as magnets for corporate sponsorships and substantial donations from alumni and fans.[12] These programs also exponentially increase the sales of merchandise bearing the school's name, mascot, and logo, generating significant profits for schools.[13]

Intercollegiate athletic programs also may increase the school's marketability and enrollment.[14] These programs inevitably facilitate the recruitment of other athletes, who desire to play for a reputable team. Intercollegiate athletics attract media attention,

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the manufacture of shredders without child safety features and finding that this factor weighed in favor of imposing a duty); *Barton v. Lowe's Home Ctrs., Inc.*, 124 A.3d 349, 359 (Pa. Super. 2015) ("[T]he utility of lawnmowers is obvious, but a lawnmower outfitted with safeguards against overheating has even greater utility. This weighs in favor of the existence of a duty . . . .").

12 *See* Whang, *supra* note 10, at 40-41; *see also* Rhim, *supra* note 10, at 339-40.

13 *See* Whang, *supra* note 10 at 40-41.

14 *See, e.g.*, *id.* at 41-42 (discussing the increased enrollment of students at Georgetown University and Boston College during and following the careers of Patrick Ewing and Doug Flutie, a college basketball and football star, respectively).

expanding the school's visibility to prospective students. Further, the culture surrounding intercollegiate athletic programs improves the quality of students' college experience by fostering and enhancing school spirit, and by offering students the opportunity to participate in a variety of social activities that attend these sports. Thus, by improving the quality of campus life, such programs enhance the school's appeal to athletes and non-athletes alike. Additionally, cheering for or participating in intercollegiate sports often creates a lasting connection between students and their universities, increasing the likelihood that they will donate to the school as alumni, recommend the school to potential students, or otherwise volunteer their services in order to help the school succeed.

In contrast, Lackawanna's failure to ensure that certified athletic trainers were available during football tryouts lacks any social utility. Undoubtedly, the availability of qualified medical personnel such as certified athletic trainers increases the social utility of intercollegiate programs by providing athletes with proper medical care, and by preventing injuries like Feleccia's and Resch's. Moreover, as discussed more fully *infra*, the college's failure to ensure that qualified medical personnel were available severely undermined the benefits that intercollegiate athletics generate.

Thus, because the social utility of maintaining intercollegiate athletic programs is great, and because the failure to ensure that qualified medical personnel are available to student-athletes during intercollegiate contact sports lacks any social utility, this factor weighs in favor of imposing a duty.

C. *Althaus* (3): The nature of the risk imposed and foreseeability of the harm incurred

In addition to identifying the nature of a college's relationship with its student-athletes as a basis for imposing a duty of care upon the college, the *Kleinknecht* court also found that the college owed its athletes a duty of care based upon the foreseeability of severe injury at a practice for a contact sport. Here, the risk of injury exceeded the risk at issue in *Kleinknecht*. As observed by *amicus curiae*, the National Athletic Trainers' Association ("NATA"), collegiate football has one of the highest injury rates of all collegiate sports, and the preseason practice injury rate is over twice the rate during in-season practices. *See Amicus* Brief for NATA at 8. Moreover, college football players routinely suffer severe injuries. The drill that led to Feleccia's and Resch's injuries was a variation of the once-prevalent Oklahoma Drill, a tackling drill that has been the subject of extensive criticism during recent concussion litigation.[15] Two experts, including the former head football coach at Texas A&M University and a certified athletic trainer at Stevenson University, also opined that Lackawanna College ran a particularly dangerous variant of the drill.[16]

The foreseeability of the risk of the exacerbation of practice injuries was only enhanced when Lackawanna College employed Alexis Bonisese and Kaitlin Coyne to fulfill the roles of athletic trainers, despite the school's awareness that these two

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[15] *See* Trial Ct. Op., 2/2/2016, at 21; *see also* Mike Florio, *NFL Bans Certain Old-School Training-Camp Drills*, NBC SPORTS (posted May 22, 2019), https://profootballtalk.nbcsports.com/2019/05/22/nfl-bans-certain-old-school-training-camp-drills/ (last reviewed July 10, 2019).

[16] *See* Expert Report of Richard C. Slocum, 4/13/15, at 3-4; Expert Report of M. Scott Zema, 9/28/15, at 2 (unnumbered).

individuals possessed neither the athletic training certifications nor the skills necessary to perform the duties of athletic trainers. *See* Maj. Op. at 3-4, 19. By employing Bonisese and Coyne, Lackawanna College not only failed to ensure that qualified medical personnel were available to care for injured football players, but also created an additional risk for the College's athletes by allowing them to receive care and advice from unqualified individuals whom the athletes believed to be certified trainers. The athletes thus were unable to make an informed decision as to whether to consult or follow the recommendations of (uncertified) staff, exposing those athletes to the hidden risk of greater injury arising from bad advice.[17]

Given the magnitude and frequency with which players sustain serious injury in contact sports, and football in particular, and given the likelihood that uncertified individuals undertaking the responsibilities of athletic trainers will render bad advice that further endangers athletes, the harm that Feleccia and Resch suffered was entirely foreseeable. In light of these considerations, Lackawanna College's failure to protect against these risks was unreasonable, and this factor weighs in favor of imposing a duty on colleges in favor of student-athletes.

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[17] Indeed, as "first responders" (so designated by Lackawanna College), Bonisese and Coyne were unqualified to make return-to-play decisions. However, when Feleccia sought advice from Bonisese after suffering a shoulder injury during tryouts, she told him that he could return to the drill if he was feeling better. Feleccia did so, and then suffered a brachial plexus avulsion of his right shoulder immediately after returning to play. As one expert opined, this more serious injury could have been avoided had a certified athletic trainer been present to assess Feleccia's injury, or, alternatively, to ask that the coaches modify the drill to make it safer. Expert Report of M. Scott Zema, 4/9/15, at 11-13 (unnumbered).

D. *Althaus* (4): The consequences of imposing a duty upon the actor

Requiring colleges to ensure that qualified medical personnel are available to student-athletes participating in intercollegiate contact sports undoubtedly imposes a financial burden upon colleges and universities, particularly small colleges lacking the resources of larger institutions. Some schools may be hard-pressed to find the money to fulfill this obligation, and could face a difficult decision between cutting spending in other areas of their budgets and reducing the number of intercollegiate sports that they offer. Additionally, it may be difficult for some colleges to find qualified medical personnel who are willing to work for their schools, depending upon the individual's salary requirements and the location of the college. However, for several mitigating reasons, these burdens weigh only modestly, if at all, against imposing a duty upon colleges.

First, this duty is limited. Like Lackawanna College, the college in *Kleinknecht* contended that imposing a duty of care would create a slippery slope, requiring colleges to provide medical personnel for all sports, irrespective of whether the sport posed a substantial risk of injury or whether the college sponsored or supervised the athletic event. The Third Circuit rejected this argument as an "unwarranted extension" of its holding, explaining that the duty it imposed was limited to the particular facts of the case in which an athlete suffered a medical emergency while participating in an intercollegiate contact sport for which the college had recruited him. *Kleinknecht*, 989 F.2d at 1370-71. I agree generally with the *Kleinknecht* court's suggested limitation,[18] such that the duty in

[18] Unlike the *Kleinknecht* court, I do not understand this duty as limited to athletes whom the college affirmatively recruited to play the sport. The Third Circuit emphasized

question should extend only to intercollegiate contact sports. At least for present purposes, other athletic activities, such as intramurals, necessarily fall outside the scope of this duty.[19]

Second, Lackawanna College and colleges like it are tuition-dependent for the bulk of their revenue. *See* Deposition of Suellen Musewicz, 11/11/14, at 15. For all the reasons discussed above, maintaining an intercollegiate athletic program attracts more students, increasing tuition revenue. Indeed, Feleccia and Resch both averred that they attended Lackawanna College because they wanted to participate in its football program.[20] Furthermore, although hiring qualified medical personnel such as certified athletic trainers increases the cost of colleges' athletic programs, it also can increase the appeal of these programs to prospective student-athletes, in additional service of the above-stated benefits. By contrast, developing a reputation for employing unqualified individuals to treat injured players has the potential to decrease the number of students willing to participate on a college's sports teams. Failing to ensure that injured athletes

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recruitment because it was an indication that the college expected to benefit from the athlete's presence on the team. *See Kleinknecht*, 989 F.2d at 1368. Because all colleges expect to benefit from student-athletes' participation on intercollegiate teams, I see no material distinction based upon the route a given athlete traveled before ultimately earning a spot on the roster.

[19] This is consistent with the Superior Court's recent decision in *Kennedy v. Robert Morris Univ.*, 133 A.3d 38 (Pa. Super. 2016). In that case, the court held that the university owed no duty to a student-athlete because, unlike in *Kleinknecht*, the cheerleader was injured while attending a camp off-campus that was conducted, controlled, and supervised by an independent contractor.

[20] Here, I observe further that Lackawanna College's gross revenue from the tuition of its football players in the 2009-10 season alone exceeded $2 million. *See* Lackawanna College's Responses and Objections to Plaintiff's Requests for Admission, 7/25/14, at 47.

have access to proper medical care during athletic events increases injury rates, decreasing the college's ability to capitalize on the benefits that successful programs generate. Additionally, such failures can result in litigation (as evidenced by the present case), which presents its own financial and reputational challenges for colleges.

Third, hiring qualified medical personnel is hardly cost-prohibitive. This is particularly true because the number of medical personnel a college must employ to cover its intercollegiate contact sports is dependent upon a variety of factors unique to each college. As one example, NATA has promulgated worksheets to assist colleges in calculating an appropriate amount of medical coverage for their athletic programs. These worksheets incorporate many factors, including the intercollegiate sports that the college offers, the injury rates of those sports, the length of each sport's season, and the number of participating athletes.

Using Lackawanna College as an example, to be staffed adequately in-season for all sports during the 2009-10 academic year according to NATA's recommendations, one expert opined that the college needed to hire approximately 2.27 full-time athletic trainers. *See* Expert Report of M. Scott Zema, 9/28/15, at 4 (unnumbered). This number is roughly consistent with the two full-time certified athletic trainers that Lackawanna College had on staff prior to employing Bonisese and Coyne, an expense that evidently was deemed cost-effective at the time. Thus, requiring Lackawanna College to meet NATA's suggestion would require it to do little more than restore the staffing it had prior to creating the dubious "first responder" positions for the uncertified Bonisese and Coyne.

In short, the consequences of recognizing this duty are not *de minimis*, but this impact is offset by the aforementioned considerations, particularly when considering the

facts of this case. Thus, in my view, the fourth *Althaus* factor weighs only slightly, if at all, against imposing a duty.

E. *Althaus* (5): The overall public interest in the proposed solution

In cases in which we have considered whether one party owed a duty to another, this Court time and again has observed that the concept of duty amounts to "the sum total of those considerations of policy which led the law to say that the particular plaintiff is entitled to protection." *See Sinn v. Burd*, 404 A.2d 672, 681 (Pa. 1979) (quoting *Leong v. Takasaki*, 520 P.2d 758, 764 (Haw. 1974)). Accordingly, like Dean Prosser, we have recognized:

> These are shifting sands, and no fit foundation . . . . The word serves a useful purpose in directing attention to the obligation to be imposed upon the defendant, rather than the causal sequence of events; beyond that it serves none. In the decision whether or not there is a duty, many factors interplay: The hand of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall. In the end the court will decide whether there is a duty on the basis of the mores of the community, "always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind."

Gardner v. Consol. Rail Corp., 573 A.2d 1016, 1020 (Pa. 1990) (quoting William L. Prosser, Palsgraf *Revisited*, 52 MICH. L. REV. 1, 14-15 (1953)). Thus, a duty arises, in part, from society's interest in protecting the plaintiff from a certain harm.

In *Kleinknecht* and in the present case, the public has a substantial interest in protecting the health and well-being of intercollegiate athletes. As the Superior Court observed, "[c]olleges are expected to put a priority on the health and safety of their students, especially student[-]athletes engaged in dangerous sports." *Feleccia*, 156 A.3d at 1219. As discussed *supra*, student-athletes participating in intercollegiate contact sports face a significant and foreseeable risk of acute injury, and colleges benefit

considerably from students' participation in their athletic programs. The receipt of such benefits at the expense of these athletes' health and well-being is, as one scholar opined, "grossly unfair."[21]

Colleges are best positioned to ensure that their athletes receive timely, competent medical attention when they participate in contact sports. In theory, one might suggest that student-athletes could seek out their own treatment when they are injured and decide for themselves when they feel well enough to return to play. The wisdom of imposing such a responsibility on student-athletes is questionable, at best. Scholars have observed that, when allowed to make their own decisions regarding injuries and returning to play, collegiate athletes often are willing to sacrifice their bodies in pursuit of their athletic goals, and to take great risks because they believe themselves to be impervious to injury.[22] Further, in addition to the pressure that they place upon themselves, student-athletes also experience pressure from coaches, teammates, parents, sponsors, and the media to perform despite their injuries.[23] This pressure can cause athletes to return to play before recovering fully from an illness or injury or to play through pain rather than

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[21] *See* Whang, *supra* note 10, at 45; *see also* Rhim, *supra* note 10, at 342 ("[C]olleges receive both substantial economic and non-economic benefits from student-athlete participation in intercollegiate athletic programs. From a health standpoint, it is not equitable for a college to reap these benefits from student-athletes without having a duty to provide a reasonable level of care for those athletes.").

[22] *See, e.g.*, Michael Landis, *The Team Physician: An Analysis of the Causes of Action, Conflicts, Defenses and Improvements*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 139, 149 (2003); Cathy Jones, *College Athletes: Illness or Injury and the Decision to Return to Play*, 40 BUFF. L. REV. 113, 150-58 (1992).

[23] *See, e.g.*, Landis, *supra* note 22, at 148-52; Jones, *supra* note 22, at 150-58.

receiving necessary medical attention.[24] These considerations are only amplified in the context of a competitive tryout, when an athlete may fear losing the chance to play entirely. Moreover, the extensive training and certification required of an athletic trainer demonstrates just how unqualified student-athletes are to make their own decisions regarding whether they need medical attention and when they can return to play.[25]

Our Commonwealth's imposition of rigorous requirements on those wishing to claim the title "athletic trainer" also demonstrates the interest of our citizens, expressed through their General Assembly, in ensuring that athletes who seek athletic training services receive a certain standard of care. The Medical Practice Act of 1985 and its implementing regulations prohibit unlicensed individuals from using the title "athletic trainer" or providing athletic training services, and allow the imposition of injunctions and penalties on those who violate the Act.[26] As these laws indicate, the interest of

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[24] *See* Landis, *supra* note 22, at 150 ("The mottos 'no pain, no gain' and 'winning is everything' are attitudes extending past the competition and the locker room."); Jones, *supra* note 22, at 152-55 (noting that these pressures incentivize players to return to play either too soon after experiencing an illness or injury, or, in the cases of serious illnesses or injuries, when they should not do so at all).

[25] *See* 49 Pa.Code §§ 18.503-18.506 (requiring athletic trainers to graduate from an approved athletic training education program, pass a certification exam, apply for a license, document any practice as an athletic trainer and any disciplinary action against them, be at least twenty years old, and not be addicted to alcohol or any drugs that impair judgment or coordination).

[26] 63 P.S. § 422.51a provides: "A person who is not licensed under this section may not use the designation of licensed athletic trainer, athletic trainer or any of the listed abbreviations for that title, including 'L.A.T.' or 'A.T.L.,' or any similar designation." *Id.* § 422.51a(c). Similarly, 49 Pa. Code § 18.503 prohibits unlicensed individuals from using the title "athletic trainer" and from performing athletic training duties. 49 Pa. Code § 18.503(a)-(b). 63 P.S. § 422.38 states that the "practice, or attempt to offer to practice" any area or practice "requiring a license, certificate or registration from the board" without a valid license, certificate, or registration is unlawful, and, upon proof of unlawful practice, requires the court to enjoin the individual from continuing to practice. 63 P.S. § 422.38.

Pennsylvania and its citizens in the health and safety of student-athletes is particularly great when a college affirmatively purports to provide its athletes with care from certified athletic trainers while in fact allowing uncertified individuals to masquerade in performing athletic training duties. In such circumstances, an athlete's decision-making ability regarding his medical care and return to play not only is compromised by the aforementioned pressures, but also is impaired by his ignorance of the caregiver's lack of qualification to deliver advice.

Lackawanna College's conduct makes clear that the public's interest in protecting the health and safety of intercollegiate athletes cannot be entrusted categorically to colleges based upon the assumption that they will in all instances ensure that their athletic departments are staffed adequately to provide treatment to injured student-athletes. Judicial recognition of this duty is necessary to ensure that colleges take the necessary precautions to protect their athletes from injury by holding them accountable for failing to fulfill this obligation.

Because the public has a strong interest in protecting collegiate athletes from injury, and from receiving athletic training services from uncertified individuals, this factor also weighs in favor of imposing a duty.

IV. Conclusion

Based upon this analysis of the *Althaus* factors, the better view of Pennsylvania law is that colleges and universities bear a duty to ensure that qualified medical personnel

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Section 422.39 provides that "[a]ny person . . . who violates any provisions of this act or any rule or regulation of the board commits a misdemeanor in the third degree" and is subject to fines and imprisonment. *Id.* § 422.39. This section also allows the Board of Medicine to impose civil penalties in addition to any criminal penalties imposed. *Id.*

are available to student-athletes when the athletes participate in intercollegiate contact sports. Whether Lackawanna College breached this duty, and whether this breach caused Feleccia's and Resch's injuries, remain questions for the jury.[27] Thus, while I agree with the Majority to the extent that it concludes that Lackawanna College owed a duty to Feleccia and Resch in this case, I disagree with the Majority's choice to limit its holding to this case-specific evaluation of this school's particular representations and these parties' course of conduct. Unintentionally, but in practical effect, such limitation may create a perverse incentive for institutions like Lackawanna College to do less rather than more to protect their athletes by encouraging the institutions to make no representations at all.

[27] The Majority and the Chief Justice express somewhat differing views on the question of whether the availability of qualified medical personnel is satisfied by immediate telecommunication access or instead requires actual physical presence. *See* Maj. Op. at 18 n.8; Concurring and Dissenting Op. (Saylor, C.J.) at 2-3 n.1. While I agree that the former is satisfactory with respect to physician availability, I incline toward the view that the latter is required for licensed athletic trainers. Whether a game or practice is "at home" or "away," an on-campus presence of a licensed athletic trainer is a manifestly reasonable requirement. *See generally Amicus* Brief for NATA.