Broken Promises and Broken Dreams: Should We Hold College Athletic Programs Accountable for Breaching Representations Made in Recruiting Student-Athletes?

I. INTRODUCTION

In August of 1993, Bryan Fortay brought suit against the University of Miami and its football coaches and officials for

alleged breach of contract and negligence.[1] Fortay settled the case out of court in June, 1996, yet the circumstances of the lawsuit exemplify the issues involved in the college recruitment and treatment of student-athletes.[2]

Under the lawsuit, Fortay sued for damages over breached oral promises and the negligent hiring and negligent supervision of a university athletic advisor.[3] More specifically, the complaint implicated an alleged broken promise of the starting quarterback position.[4] It also addressed supposedly unfulfilled assurances promised to Fortay that the football staff and the University of Miami would take care of him both on and off the field throughout his collegiate career.[5] The facts of the Bryan Fortay case are not unique; rather, they bring to light numerous issues involved in the recruitment and treatment of student-athletes at many large universities.

In December of 1988, Bryan Fortay, one of the most highly recruited high school quarterbacks in the country,[6] made a verbal commitment to the University of Miami and to Head Coach

---

1. Complaint at 1, Fortay v. University of Miami, (D.N.J. Aug. 4, 1993)(No. 93-3443)[hereinafter *Complaint*]. Fortay originally brought suit against the "University, its Athletic Department, Coaches, agents, servants and/or employees." *Id. But see* Ted Curtis, *Fortay Case Dismissed by Federal Court: The University of Miami Wins the Latest Round Against its Former Quarterback*, SPORTS LAW MONTHLY, Oct., 1994, Vol. I, Issue 12, at 5. All defendants to the suit, except for the University of Miami, itself, were dismissed as parties. *Id.*

2. Rudy Larini, *Sacking the Quarterback: Judge Sends Lawsuit by Rutgers' Fortay to Florida Courts*, STAR LEDGER (Newark, N.J.), Feb. 18, 1994 [hereinafter *Sacking the Quarterback*]. On February 17, 1994, the case was transferred to the Southern District of Florida. *Id.* The court concluded Florida has a greater interest in the outcome of the case. *Id.*; Curtis, *supra* note 1, at 5. On August 18, 1994, U.S. District Court Judge Frederico A. Moreno dismissed several counts from Fortay's complaint. *Id. See also College Football,* STAR LEDGER, June 25, 1996, at 56. The two sides settled June 24, 1996, terminating the case brought in the United States District Court for the Southern District of Florida. *Id.* Fortay and the University of Miami "resolved their differences on terms mutually satisfactory to all parties, and all claims are dismissed." *Id.*

3. Third Amended Complaint, *Fortay,* (S.D.Fl. Dec. 9, 1994)(No. 94-385). Fortay is claiming that the university negligently hired Anthony Russell as the Assistant Director of the Academics Athletic Department and negligently supervised him thereafter. *Id.* at 41-42.

4. Complaint, *supra* note 1, at 5-7.

5. Fortay Press Release (Aug., 1994). Fortay insists that the underlying reason for bringing suit was not merely that he was promised the starting quarterback job and then not given it. *Id.* He states that it is much more than that: "In order to convince me to stay [at the University of Miami], Dennis Erickson promised me that he would personally handle my development as a football player and take care of me like a son." *Id.*

6. Dennis Drazin Press Release at 2 (Aug., 1994)[hereinafter *Drazin Release*]. "He was, perhaps, the most eagerly sought after quarterback that year (1989-90)." *Id.* He was

Jimmy Johnson that he would attend Miami and accept a scholarship to play football.[7] In return, the university, through its coaches and officials, would provide Fortay with guidance both on and off the field.[8] Fortay's decision to attend Miami came after several communications with Johnson and other members of the Miami athletic department.[9] The central theme of these contacts was the promise that Fortay would be the next great quarterback at Miami and go on to have a successful National Football League (NFL) career.[10]

On February 8, 1989, Fortay signed a National Letter of Intent formalizing this agreement.[11] He accepted the univer-

---

designated as a high school All-American, and was the recipient of the Junior Heisman Trophy Award. *Id.*

7. Plaintiff's Aff. at Ex. L, *Fortay*, (D.N.J. Jan. 3, 1994)(No. 93-3443)[hereinafter *Fortay Aff.*]. Letter from Jimmy Johnson to Bryan Fortay. *Id.* Dec. 21, 1988. "Congratulations on your decision to become a Miami Hurricane!" *Id.*

8. Fortay Aff. at Ex. E., *Fortay*, (D.N.J. Jan. 13, 1994)(No. 93-3443). Oct. 20, 1988 letter from Kevin P. O'Neill, Head Athletic Trainer, to Bryan Fortay. *Id.* "We are very confident of . . . the quality of care we are able to afford our student-athletes." *Id. See also* Fortay Aff., *supra* note 7, at Ex. F. Nov. 8, 1988 letter from Anna Price, Academic Coordinator, to Bryan Fortay. *Id.* "I can assure you (Bryan's parents) that our staff will assist Bryan in making the transition from high school to college, as well as, to provide support services throughout his academic career." *Id.* "The Academic Support Center will ensure that he has all the support services required to attain his educational goals." *Id.*

9. Fortay Aff., *supra* note 8, at 3, 4. Fortay says he received at least 50 phone calls from representatives of the University of Miami. *Id.* He alleges that in a conversation with then Assistant Coach Gary Stevens, Stevens said that he "was perfect for the Miami system, that Miami puts out NFL quarterbacks every year, that [Bryan] would get no less than three years of playing time as the starting quarterback . . . " *Id.; see also* Fortay Aff., *supra* note 8, at Ex. H. Several letters were sent to Fortay from the Miami coaches which stressed the opportunity he would have, as Miami's starting quarterback, to become an NFL player. *Id.* An Oct. 21, 1988 letter from David Scott, Recruiting Coordinator, to Fortay stated: "Every young player's dream of playing in the N.F.L. can be better achieved by playing at Miami. You, too, have that opportunity awaiting you in the near future." *Id. But see* Gary Stevens Aff. at 1, *Fortay*, (D.N.J. Jan. 13, 1994)(No. 93-3443). Stevens denies any such promises: "At no time did I assure, promise or guarantee Bryan Fortay that he would get no less than three years of playing time as the starting quarterback for the Miami Hurricanes." *Id.*

10. *See* Fortay Aff., supra note 8, at 3, 4. *See also* Fortay Aff., *supra* note 8, at Ex. A. "It is very obvious that the University of Miami has enjoyed outstanding success during the 1980's while producing some of the NFL's premier quarterbacks like Jim Kelly, Bernie Kosar, and Vinny Testaverde." *Id.*

11. Peter Fortay Aff. (Bryan Fortay's father) at Ex. GG, *Fortay*, (D.N.J. Jan. 13, 1994)(No. 93-3443). The letter was signed on February 8, 1989. *Id.* A National Letter of Intent is the "official document admininstered by Collegiate Commissioners Association and utilized by subscribing member institutions to establish the commitment of a prospect to attend a particular institution." N.C.A.A. MANUAL §13.02.7, at 85 (1994-95). It creates a binding contract between the student-athlete and the college or university. Drazin Release, *supra* note 1, at 3.

sity's offer under the premise that Johnson would turn down any other coaching offers in the near future and remain as Miami's head coach throughout Fortay's stay.[12] Shortly thereafter, Johnson announced that he was leaving the university and taking an NFL job with the Dallas Cowboys.[13]

A few weeks later, Dennis Erickson was named as Miami's head coach.[14] After Fortay expressed a desire to leave the university because of the coaching change, and therefore avoid his obligations under the Letter of Intent, Erickson arranged a meeting with Fortay and his father to discuss matters.[15] Fortay alleges that at this meeting Erickson made an oral assurance that he would be the starting quarterback for at least his last two years at Miami if he chose to stay.[16] Fortay relied on this commitment and honored his Letter of Intent.[17]

---

12. Drazin Release, *supra* note 6, at 3. Johnson's intention to leave Miami for the NFL was "not known to Bryan at the time of the early commitment or the signing of the Letter of Intent in February, 1989 and certainly, Bryan wished to play for a program that included Coach Johnson . . . " *Id.*

13. Fortay Aff., *supra* note 8, at Ex. R. Feb. 26, 1989, letter from Jimmy Johnson to Bryan Fortay: "The opportunity to be the Head Coach of the Dallas Cowboys is something I dreamed of while growing up in Texas . . . I have accepted the position . . . " *Id.* *See also* Armando Salguero, *J.J.'s Final Request "Beat Notre Dame,"* MIAMI HERALD, Feb. 28, 1989, at 7D ("Jimmy Johnson bid his final farewell to the University of Miami players and football staff in an emotional 10-minute meeting Monday afternoon . . . Johnson is scheduled to appear at a Dallas news conference today and officially be introduced as the Dallas Cowboys' head coach.").

14. Fortay Aff., *supra* note 8, at Ex. T. Mar. 8, 1989 letter from Dennis Erickson to Bryan Fortay. "Having just been named as the Head Football Coach, I would like to take this opportunity to introduce myself to you." *Id.*

15. Fortay Aff., *supra* note 8, at 9.

16. Third Amended Complaint, *supra* note 3, at 22-23. The following is the schedule of development which Erickson promised to Fortay: first year - red shirt; second year - second string QB; third year - starting QB; forth year - starting QB; fifth year - starting QB (if he didn't leave early to go to the NFL). *Id.* "We'll red shirt you the first year, you'll get experience the second year, then the job will be yours. Nothing's changed. When Walsh graduates, you'll have an opportunity to back up Craig [Erickson]; and when Craig graduates, you'll be the quarterback." *Id.* In an April 8, 1990, conversation outside Fortay's apartment, Erickson allegedly said to Fortay who was upset because he was not getting opportunities in practice: "You're going to backup this fall, you'll be #2 . . . you're gonna be Craig [Erickson's] backup. When he leaves, you'll take over." *Id.* at 29. In a spring 1990 conversation at Coach Erickson's office with Peter Fortay, Erickson allegedly stated: "I don't think things have changed,. .Bryan Fortay will be the next starter here. In the next two years, he'll play here and he'll have the opportunity to win the Heisman." *Id.* at 31. (Although there is no direct proof of any of these conversations, there is speculation that Bryan and his father secretly recorded 16 conversations with Coach Erickson. *Fortay Faces Accusations*, THE RECORD, Jan. 13, 1995, at S-7.

17. Fortay Aff., *supra* note 8, at 1. "Because [Coach] Erickson assured me and my father that my position as starting quarterback was still guaranteed, I relied upon those

Following two fairly unproductive years of red-shirting[18] and back-up status,[19] Fortay allegedly outperformed his competition for the starting quarterback job during spring practice immediately preceding his junior year.[20] Nevertheless, he was told that he would not be the starting quarterback in his third year as guaranteed.[21]

While promises were seemingly being broken on the field, certain events took place off the field which would affect Fortay's life with just as much impact, if not more.[22] While at Miami, law enforcement authorities implicated Fortay in financial aid fraud.[23]

Anthony Russell, a guidance counselor assigned by the university to assist the football team,[24] had developed a scheme to get illegal financial aid from the federal government through

---

representations and remained at the university even though previously I was determined to transfer." *Id.*

18. Telephone Interview with Rita K. Thomas, Senior Assistant Director of Athletics, Rutgers University (Apr. 23, 1996). "An athlete who is red-shirting is someone who is eligible to compete during a particular season, but who does not compete during that season, and therefore, does not use up any eligibility . . . The decision to red shirt is usually made by the coach . . . Contrary to popular opinion, the term red-shirt does not include non-participation due to medical reasons. Non-participation because of injury is labeled as "medical hardship" and involves different circumstances . . . Under N.C.A.A. regulations, a student-athlete is only allowed to compete for a total of four seasons, and he or she must complete those four seasons during a period of five years, unless the particular situation involves other unique circumstances such as medical hardship . . . Therefore, notwithstanding such unique cirumstances, if a student wants to participate for all four seasons, he can usually only red-shirt for a maximum of one season." *Id.*

19. Fortay Aff., *supra* note 8, at 9-11. Coach Erickson's promises in regard to Fortay's on the field development never materialized. *Id.* During Fortay's first season, the promised red-shirt season, Erickson decided to start him in one of the early games. *Id.* Fortay played sparingly in a couple of other games in a mop-up role during that season. *Id.* Nevertheless, Coach Erickson allegedly promised that Fortay was still on track to be the back-up in his second season, as planned, and the starter in his third season. *Id.* Thus, the coach said he would not red-shirt him in the second season. *Id.* However, when the next season came along, Erickson told Fortay that he would have to be red-shirted for that 1990 season (his second season), rather than compete for the back-up job as promised. *Id.*

20. Fortay Aff., *supra* note 8, at 11. In the spring of 1991, Fortay outplayed all other quarterback's, including Gino Toretta, and this apparently would not be refuted by the coaching staff and Coach Erickson. *Id.* Erickson, once again, allegedly promised Fortay that he would be the starter, as planned, for the upcoming season. *Id.* Nevertheless, when September arrived, Toretta was chosen as the starter. *Id.*

21. *Id.* at 11.

22. *See infra* notes 23-28 and accompanying text.

23. *Id.* at 12, 13.

24. *Id.* at 12.

Pell Grants[25] for Fortay and sixty-two other players and at the same time had profited from the scheme to support his own drug habit.[26] Russell ultimately pled guilty to the false and fraudulent obtainment of federal financial aid funds.[27] Fortay maintains his innocence in the matter notwithstanding the fact that he entered into a pre-trial diversion program as an alternative to a jail sentence.[28]

As a result of his experiences at Miami, Fortay transferred to Rutgers University in an attempt to salvage his future as a football player.[29] NCAA regulations required him to sit out his first year following the transfer.[30] With the aftermath of the

---

25. Indictment, *United States v. Anthony Russell*, (S.D.Fl. June 29, 1994)(No. 93-0307). The Pell Grant Program [hereinafter "Pell"] is a "federally funded education program administered by the United States Department of Education." [hereinafter "DOE"] *Id.*

> The purpose of the Pell Program was to assist financially needy students in eligible institutions of higher education to meet the cost of their post-secondary education by providing monetary grants, which need not be paid back to the government, to eligible students. Eligibility of a student for a grant was determined by an analysis of the financial condition of the student; the student's family, if dependent; and the student's spouse, if married; to determine the financial resources available to support the cost of the student's education. Educational institutions eligible to participate in the Pell Program disbursed grant funds received from DOE under the program on behalf of eligible students.

Id.

26. Ken Rodriguez, *Tony Russell Indicted on Fraud Charge,* MIAMI HERALD, Jun. 30, 1993, § D, at 1, 7. "The indictment says Russell submitted to the United States Department of Education 356 documents containing deliberate misrepresentations and forgeries to obtain Pell Grant money disbursed in amounts up to $2,300 per year to needy student-athletes. Russell, who said he charged students an $85 processing fee to support a cocaine habit, faces up to five years in prison, . . . " *Id.*

27. Plaintiff's Opposition to Defendant's Motion to Clarify or for Rehearing and Oral Argument on Plaintiff's Motion to Compel Production at Ex. A. U.S.D.C. So.D. of Fl. Judgment in Crim. Case, United States v. Anthony Andrew Russell. March 21, 1994. *See also Ex-Miami Official Gets Three Years in Pell Grant Scam,* STATE JOURNAL-REGISTER (Springfield, Il.), Mar. 18, 1994 ("Assistant U.S. Attorney Martin Goldberg said . . . Evidence shows that Russell also 'manipulated the Pell Grant system' at West Virginia State College and Kentucky State University.").

28. Rodriguez, *supra* note 26, at 7. The majority of the students, including Bryan Fortay, were admitted into "pre-trial diversion — a program, which if successfully completed, protects from prosecution." *Id.*

29. Fortay Aff., *supra* note 8, at 11. Fortay decided to transfer just five days after he learned that he would not be the starting quarterback. *Id.*

30. N.C.A.A. MANUAL § 14.5.5.1, at 162 (1994-95). "A transfer student from a four-year institution shall not be eligible for intercollegiate competition at a Division I, Division II or Division III institution until the student has fulfilled a residence requirement of one full academic year (two full semesters or three full quarters) at the certifying institution." *Id.*

Pell Grant scandal continually haunting him,[31] Fortay then only shared time at the quarterback position for two years at Rutgers, and was unable to become the dominating player that everyone had anticipated.[32]

The events surrounding Bryan Fortay and the University of Miami present a broader question: Should we hold college athletic programs accountable for representations made in recruiting student-athletes and for the treatment of those students while in attendance at those schools? The purpose of this Comment is to address that question. Part II sets forth the ramifications surrounding a student-athlete's claims for breach of contract and negligence against a university. Subsection A of Part II specifically analyzes the contractual argument and applies such issues to the specific facts of the Fortay case. Subsection B of Part II discusses the elements necessary for a successful negligence claim, particularly one for the negligent hiring or negligent supervision of university officials, and applies this framework to the Fortay situation. Finally, the Conclusion addresses this author's opinion on the pervasiveness of the problems surrounding the attempts of universities to attract student-athletes to their schools. The author concludes that a legal foundation exists to curtail the practices of these college recruiters.

II. The Legal Issues: A Foundation Exists

At first glance, an individual's claim that a university ruined a lifelong dream of playing in the NFL might seem a bit tenuous. However, the basic issues are familiar ones for which the law has cleared a fairly defined path over the years.[33]

The foundation for bringing lawsuits against universities lies in both contract and negligence.[34] Bryan Fortay's case was the first of its kind, because a student-athlete sought damages based on a more speculative and distant claim: ruining an ath-

31. Drazin Release, *supra* note 6, at 9. During the 1992 football season, while at Rutgers, "Bryan was subjected to constant pressure that, if he did not enter a pretrial diversion program, he would be indicted and suspended from playing football as well as being subjected to severe criminal penalties of fines and/or time in jail." *Id.*

32. *Sacking the Quarterback*, *supra* note 2. "During both of his seasons at Rutgers, Fortay shared quarterbacking duties with [Ray] Lucas as the team posted records of 7-4 and 4-7." *Id.*

33. *See infra* notes 36-181 and accompanying text.

34. *See infra* notes 36-181 and accompanying text.

lete's chances at a professional career.[35] Speculation about damages aside, this case was about broken promises, and the law allows recovery for certain broken promises.[36] Case law only needs to be extended to encompass certain extenuating yet foreseeable circumstances like those presented in the case of Bryan Fortay.

A. Principles of Contract Law

Several issues surround a student-athlete's claim for breach of contract against a university: (1) a contractual relationship must exist between the student and the university;[37] (2) both sides are obligated to uphold the relationship;[38] (3) oral solicitations by the university to attract the student, along with the student's reliance upon these solicitations, can evidence the existence of the relationship;[39] (4) the university must have breached the relationship;[40] and (5) the relationship might be deemed as one between employer and employee.[41] The *Fortay* case provides a practical application of each of these issues.[42]

1. The Relationship Between a Student and a University is Contractual in Nature.

Courts have upheld lawsuits by a student against a university based on contractual issues.[43] An important case in this area is *Ross v. Creighton University*.[44] In *Ross,* the Seventh Circuit addressed a claim brought by a Creighton University

---

35. *See supra* notes 4, 8 and accompanying text.

36. *See infra* notes 37-103 and accompanying text.

37. *See, e.g.,* Ross v. Creighton Univ., 957 F.2d 410 (7th Cir. 1992) (contractual relationship exists between a student and a university).

38. *See, e.g.,* Taylor v. Wake Forest Univ., 191 S.E.2d 379 (N.C. Ct. App. 1972) (not only must a university abide by agreed upon obligations, but so too must the particular student).

39. *See, e.g.,* Malone v. Academy of Court Reporting, 582 N.E.2d 54 (Ohio Ct. App. 1990) (solicitations from an academic institution to a potential student can serve as the basis for a valid breach of contract cause of action against that institution).

40. *Id.*

41. *See, e.g.,* Van Horn v. Industrial Accident Comm'n, 33 Cal. Rptr. 169 (2d Dist. 1963) (a scholarship athlete can be deemed an employee of university, thereby entitling him to damages in the form of workers' compensation if injury occurs within the scope of that employment arrangement).

42. *See infra* notes 89-106 and accompanying text.

43. *See infra* notes 43-106 and accompanying text.

44. 957 F.2d 410 (7th Cir. 1992).

student who was on scholarship to play on the men's basketball team.[45] The student sued the university based on the breach of an alleged promise that he would receive certain academic benefits by attending the school.[46] The court in *Ross* acknowledged that a contractual relationship exists between a student and a university.[47] In reaching its decision, the court stressed that if a university fails to abide by certain ascertainable promises,[48] a student to whom those promises are made has an adequate factual foundation upon which to bring a valid cause of action.[49]

A decade earlier, the Ohio Supreme Court in *Barile v. University of Virginia*[50] defined the relationship between a student and a university in greater detail. In *Barile*, the court stated that the contractual alliance between a college and one of its students becomes more evident when that student is an athlete who is on scholarship or receives some sort of financial aid from the institution.[51]

Courts have gone further than the university setting to enforce a contractual obligation.[52] The Nevada Supreme Court,

---

45. *Id.* at 411.

46. *Id.* at 411-12. Plaintiff alleged that since he was not of sufficient academic caliber to succeed at the university, the school had promised that it would provide him with certain special academic programs and services if he would attend the school and play basketball. *Id.* Plaintiff claimed that the university did not fulfill these promises. *Id.*

47. *Id.* at 416. The court stated that "the basic relation between a student and a private university or college is contractual in nature." *Id.*

48. *Id.* The court labeled such a promise as an "identifiable contractual promise." *Id.*

49. *Ross*, 957 F.2d at 416-17. The court based these and other statements on the earlier decision of *DeMarco v. University of Health Sciences*, 352 N.E.2d 356 (Ill. App. Ct. 1976) (relationship between medical student and medical school is contractual in nature and denial of M.D. degree based upon issues not related to academic status is evidence of a breach of such a contract). In *DeMarco*, the court stated that "a contract between a private institution and a student confers duties upon both parties which cannot be arbitrarily disregarded and may be judicially enforced." *Id.* at 361-62.

50. 441 N.E.2d 608 (Ohio Ct. App. 1981). In *Barile*, a student at the University of Virginia was on scholarship to play football. *Id.* at 612. Prior to signing his Letter of Intent, he was promised at some unspecified time that he would receive proper medical attention for any injuries taking place on the football field. *Id.* Nevertheless, when Barile broke his wrist while playing, the training staff for the university merely taped it up and offered no further medical assistance. *Id.* Barile continued to play, and was later forced to have an operation. *Id.* As a result, the plaintiff was permanently disabled. *Id.*

51. *Id.* at 615. The court stated that the relationship between a college and a student-athlete is "governed by the law of contract where the evidence reveal[s] that the college promised to provide monetary aid in exchange for the athlete's promise to abide by NCAA regulations and to participate in the college's intercollegiate" program." *Id.* (quoting Begley v. Corp. of Mercer Univ., 367 F. Supp. 908 (E.D.Tenn. 1973)).

52. *See infra* notes 55-57 and accompanying text.

in *Squires v. Sierra Nevada Educational Foundation Inc.*,[53] extended this premise to the elementary school level.[54] The court in *Squires* stated that a contractual relationship exists between a student and an elementary school, and that a contract claim can be brought under such circumstances.[55] In *Squires*, the parents of a child attending a private elementary school brought suit against the school alleging that the school had breached several promises that it would provide the student with an education far superior to any provided by a public school.[56] The court held that these identifiable promises from the school to the child's parents provided the basis of a contract, and that because these promises had not been fulfilled, a breach had occurred.[57]

2. Both Sides Must Abide by the Contractual Obligation

The courts' insistence on enforcing contractual agreements between students and institutions is bolstered by the premise that not only must a university abide by the agreed upon obligations, but so too must the particular student.[58] In *Taylor v. Wake Forest University*[59], plaintiff, a football player, decided he would abstain from playing during his sophomore season for reasons unrelated to his athletic obligations.[60] As a result, the school retracted his scholarship.[61] The North Carolina Court of Appeals held that Taylor had no cause of action for incurred expenses and other damages because he failed to fulfill his end

53. 823 P.2d 256 (Nev. 1991).

54. *Id.* at 257.

55. *Id.*

56. *Id.* at 258. The child's parents alleged that certain school officials had promised that the school would provide certain "diagnostic and remediation services" if the child should develop reading problems. *Id.*

57. *Id.*

58. *See infra* notes 59-63 and accompanying text.

59. 191 S.E.2d 379 (N.C. Ct. App. 1972).

60. *Id.* at 381. In order to participate in athletics at Wake Forest, each student-athlete was obligated to attain certain grade point averages at different points in their collegiate career. *Id.* At the end of plaintiff's first semester of his freshman year, he had obtained a 1.0 out of a possible 4.0 which was below the required GPA for that time of 1.35. *Id.* Therefore, plaintiff had to sit out from playing football until he raised his GPA. *Id.* By the end of his freshman year, plaintiff had raised his GPA to a 1.9 which was above the requisite 1.35. *Id.* Plaintiff chose to sit out from football during his sophomore season because he wanted to raise his grades even higher. *Id.* The school removed his scholarship because he had already improved his marks to above the required level. *Id.*

61. *Id.*

of the obligation.[62] The court sent the message that each side in a student-university agreement must abide by respective promises because such promises form a contractual relationship.[63]

3. Oral Solicitation Can Evidence the Existence of the Relationship

In *Malone v. Academy of Court Reporting*,[64] the Ohio Court of Appeals noted that certain specific solicitations from an academic institution to a potential student, whether written or oral, can serve as the basis for a valid breach of contract cause of action against that institution.[65] In *Malone*, officials of the academy made several promises to the potential students through continuous telephone calls, mailings, advertising presentations, and personal interviews.[66] Former students of the academy brought suit for the breach of such assurances and promises made to them when they were solicited to enroll.[67] *Malone* demonstrates that courts will observe material promises made through incessant solicitations, in whatever form, to be guarantees which must be kept.[68]

4. Breach of Promises May Trigger Liability

Courts which have found that a contractual relationship exists between a student and a school or institution have upheld claims based upon breaches of such relationships.[69] In *Ma-*

62. *Id.* at 382. Plaintiff brought this action for damages in the amount of $5500. *Id.* He argued that this was the amount that he was forced to pay for tuition during the two years after the university had taken away his scholarship. *Id.*

63. *Id.*

64. 582 N.E.2d 54 (Ohio Ct. App. 1990).

65. *Malone,* 582 N.E.2d at 56.

66. *Id.* "The academy solicited students by mail, telephone, advertising presentations, and door-to-door canvassing, all in an effort to schedule potential students for enrollment interviews." *Id.*

67. *Id.* at 56. "During the course of these interviews and presentations, the academy represented that successful completion of its paralegal curriculum would yield an associate's degree in paralegal studies, that the school had job placement services, and that commencing salaries upon completion of the course work were guaranteed at or around $20,000 to $25,000 per year." *Id.* The students later learned, after they had already completed the curriculum and paid the full tuition, that the school was neither accredited nor certified to grant such a degree. *Id.*

68. *Id.*

69. *See infra* notes 70-72 and accompanying text.

lone,[70] the students learned that successful completion of the academy's paralegal curriculum would not yield an associate's degree, even though the school officials had represented during recruitment of these students that it would.[71] The Ohio Court of Appeals held that, based upon the evidence of these alleged promises and given the obvious breach of such assurances, the students stated valid claims for breach of contract.[72]

5. Are Student-Athletes Employees of a University?

Courts have created a slight variation and extension upon the idea that contractual relationships exist between students and universities.[73] Some courts permit an awarding of damages based upon an employer-employee rationale.[74]

In *Van Horn v. Industrial Accident Commission*,[75] the California Court of Appeals held that a scholarship athlete can be deemed an employee of a university, thereby entitling him to damages in the form of workers' compensation if injury occurs within the scope of that employment arrangement.[76] The court in *Van Horn* found that petitioner, a football player on scholarship at California State Polytechnic College who was killed in a plane crash while returning from an intercollegiate game,

---

70. 582 N.E.2d 54 (Ohio Ct. App. 1990).

71. *Id.* at 56.

72. *Id.* at 59. In reaching its decision, the court relied on the earlier decision of *Behrend v. State*, 379 N.E.2d 617 (Ohio Ct. App. 1977): "In Behrend, this court held that an action would lie for an implied contract to provide accredited academic training where a state university closed down its school of architecture after losing accreditation. Moreover, we recognized in that case that an action for misrepresentation would lie for untrue or misleading statements about accreditation." *Malone*, 582 N.E.2d at 59 (citing *Behrend*, 379 N.E.2d 617).

73. *See infra* notes 75-88 and accompanying text.

74. *See infra* notes 75-88 and accompanying text.

75. 33 Cal. Rptr. 169 (Cal. Ct. App. 1963).

76. *Id.* at 170-71. The court based its findings of the existence of an employment relationship primarily upon the idea that petitioner had received scholarship money from the college to play football. *Id.* at 170-71. Technically speaking, petitioner was not on scholarship because he did not directly and automatically receive payments or reimbursements on a regular and agreed upon basis. *Id.* The court inferred such a scholarship agreement based upon the circumstances and existing evidence. *Id.* First, petitioner was paid for various jobs such as working in the cafeteria and lining the football field. *Id.* But, more importantly, what led the court to contrue the agreement as a scholarship was the fact that he received certain $50 payments at the end of each trimester which were specifically denoted as "athletic scholarship." *Id.* In addition, during one year of participation, petitioner received a total of $75 directly from the coach from a specific account entitled "Special Account—Cal Poly Athletics Dept." *Id.*

was an employee of the college.[77] The court also held that the student rendered services to the school.[78] The court's holding that petitioner qualified for workers' compensation benefits entitled his parents to collect on such benefits upon their son's death.[79] Although the court in *Van Horn* did not address the additional question of whether the particular injuries had occurred within the student's capacity of employment, it rested its authority to rule on this particular issue of "scope of employment" on the earlier decision of *University of Denver v. Nemeth*.[80]

In *Nemeth*, a student seriously injured his back during football practice. The student, Nemeth, consequently asserted that he was entitled to workers' compensation benefits because an employment relationship existed between the university and him. Nemeth asserted that the argument rested on his capacity as a paid football player.[81] The Colorado Supreme Court expressed little difficulty in finding that Nemeth was an employee of the university.[82] More importantly, the court focused its attention on whether or not Nemeth's back injury had indeed occurred as an outgrowth of his purported employment.[83]

The court in *Nemeth* looked at the circumstances in which

77. *Id.* at 172-73. "After careful review of the evidence, we are of the opinion that the finding of the commission that there was no contract of employment is not supported by the evidence. The fact that academic credit is given for participation in the activity is immaterial. It has been held that one may have the dual capacity of student and employee in respect to an activity." *Id.* at 173.

78. *Id.* at 173. "There is authority for the proposition that one who participates for compensation as a member of an athletic team may be an employee within the statutory scheme of the Workmen's Compensation Act." *Id.*(citing Metropolitan Casualty Ins. Co. of New York v. Huhn, 142 S.E. 121 (Ga. 1928)).

79. *Van Horn*, 33 Cal.Rptr. at 173-74. The record reveals that petitioners established a prima facie case for benefits upon the presentation of evidence showing the alleged contract of employment." *Id.*

80. *Id.* (citing University of Denver v. Nemeth, 257 P.2d 423 (Colo. 1953)).

81. *Nemeth*, 257 P.2d at 425.

82. *Id.* at 425-26. Nemeth, technically speaking, was not a "scholarship athlete." *Id.* Nevertheless, the court seemed to impute such a play-for-pay relationship. *Id.* When Nemeth successfully became a member of the team, he was immediately given free meals and a job. *Id.* An unspecified witness testified that "the man who produced in football would get the meals and a job." *Id.* And the coach testified that "meals and the job ceased when the student was 'cut from the football squad.'" *Id.* In other words, the court concluded that the football players were "paid" with free food and the best jobs, and that this constituted a scholarship and employment-type relationship. *Id.*

83. *Id.* at 426.

the player's injuries occurred,[84] and in doing so, found them within the parameters of his employment.[85] The court employed a fairly lenient standard to reach this conclusion.[86]

The status of the case law suggests that it is possible for a student-athlete on scholarship, or receiving some sort of financial aid, to recover damages against a university under a workers' compensation claim based upon the existence of an employer-employee relationship.[87] However, this argument will be difficult in certain states which exclude students as eligible claimants.[88]

---

84. *Id.* at 430.

85. *Id.* The court first decided that Nemeth was an "employee" of the university because he working at a job that would have only been given to him as long as he was playing football, therefore implying the fact that he was really getting paid to play football. *Id.* at 426. The court then determined that since Nemeth had been injured while playing football, and since he was theoretically getting paid to be an "employee" on the football team, his injury had indeed "ar[isen] out of and in the course of his employment." *Id.* at 430.

86. *Nemeth*, 257 P.2d at 426. The court stated that "an injury arises out of the employment if it arises out of the nature, conditions, obligations or incidents of the employment; in other words, out of the employment looked at in any of its aspects." *Id.* The court went on to say that "where an employee is doing something which, though not strictly in the line of his obligatory duty, is still doing something incidental to his work, and while doing the same is injured, the accident causing the injury may properly be held to arise out of and in the course of employment . . . . " *Id.* at 427.

87. *See supra* notes 77-88 and accompanying text.

88. *See, e.g.*, N.Y. WORK. COMP. § 2(4) (West 1996). New York has deliberately excluded student-athletes from its definition of an employee. *Id.* "The term 'employee' shall not include persons who are members of a supervised amateur athletic activity operated on a non-profit basis." *Id. See also* CAL. LAB. CODE § 3352(k) (West 1996). Under California labor law, the definition of an employee does not include "any student particpipating as an athlete in amateur sporting events sponsored by any public agency, public or private nonprofit college, university or school, who receives no remuneration for the participation other than the use of athletic equipment, uniforms, transportation, travel, meals, lodgings, scholarships, grants-in-aid, or other expenses incidental thereto." *Id.*

But see N.J. STAT. ANN. tit. 34, § 19 (West 1996). New Jersey has no deliberate exclusion for student athletes as employees. *Id.* "For compensation purposes, the term 'employee' should be given neither a mechanical nor overly restrictive interpretation; rather, the term must be construed liberally in order to bring as many cases as possible within coverage of the Workers' Compensation Act." *Id.*; FL. STAT. ANN. tit. 31, § 440.02(13)(a). Under Florida's Workers' Compensation Law, "'employee' means any person engaged in any employment under any appointment where contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed." *Id.* The same Florida law has a subsection devoted entirely to individuals who are not deemed employees, and that subsection makes no mention of student-ahtletes. FL. STAT. ANN. tit. 31, § 440.02(13)(d).

6. Application to the Fortay Case: A Foundation Existed to Support Fortay's Breach of Contract Claim

Based upon existing case law and statutory authority, it appears that Bryan Fortay had a valid claim against the University of Miami for its breach of certain undeniable promises[89] which induced Fortay to sign the Letter of Intent and to agree to attend the school as a scholarship athlete.[90] Even though issues surrounding alleged promises to Fortay of specific playing time and a future professional career were in dispute, concrete evidence showed that certain promises were made by university officials that Fortay would be well taken care of both on and off the field.[91] These unfulfilled obligations support a legitimate breach of contract claim.

The decision in *Ross v. Creighton University*[92] demonstrates that a contractual relationship can, and often does, exist between a student and a university.[93] In *Ross,* the university had made certain promises of academic support if plaintiff agreed to attend the school and play basketball.[94] The court held that these promises established a contractual bond between the university and plaintiff.[95] Similarly, the University of Miami made certain promises to Fortay in its attempt to lure him into attending the school.[96] The promises made by Miami officials included promises of academic support, and went even further.[97]

The decision in *Barile v. University of Virginia*[98] further supports the idea that a contractual relationship exists between a university and a student.[99] The court in *Barile* recognized that the existence of a contractual relationship is more evident when the student is on scholarship.[100] Fortay accepted a scholarship when he signed the Letter of Intent.[101] There-

89. *See supra* notes 4, 7-12, 16-20 and accompanying text.
90. *Id.*
91. *Id.*
92. 957 F.2d 410 (7th Cir. 1992).
93. *See supra* notes 44-49 and accompanying text.
94. Ross v. Creighton University, 957 F.2d 410, 411-12 (7th Cir. 1992).
95. *Id.* at 416.
96. *See supra* notes 4, 7-12, 16-20 and accompanying text.
97. *Id.*
98. 414 N.E.2d 608 (Ohio Ct. App. 1989).
99. Id.
100. *Id.* at 615.
101. *See supra* note 11 and accompanying text.

fore, the *Barile* decision bolsters Fortay's argument for the enforcement of the promises made to him.[102]

Further case law shows that solicitation of a student to attend a university or other institution establishes even more of a contractual bond between that institution and the particular student.[103] In *Malone v. Academy of Court Reporting*,[104] the court stressed that solicitation in any form, whether by mail, telephone, or in person, amplifies the existence of such a bond.[105] This bond was clearly present in Fortay's case.[106]

B. Negligence Issues

The issues surrounding a student-athlete's negligence claim against a university include whether: (1) the university owes the student a duty of care based on a special relationship;[107] and (2) the injury suffered by the student is an outgrowth of that relationship and reasonably foreseeable to the university.[108] Specifically, within the context of a negligent hiring claim, the university's duty to the student often obligates the university to investigate a particular employee's history prior to hiring that employee.[109] In the realm of a negligent supervision claim, the university may be required to discover an employee's wrongful acts which take place during the term of employment and to take whatever action is necessary to prevent or alleviate harm to the student.[110] The *Fortay* case provided practical examples of each of these issues.[111]

1. Duty of Care Based on a "Special Relationship"

In order to bring a negligence claim against a certain en-

---

102. *See supra* notes 50-51 and accompanying text.
103. *See supra* notes 64-68 and accompanying text.
104. 582 N.E.2d 54 (Ohio Ct. App. 1990).
105. Malone v. Academy of Court Reporting, 582 N.E.2d 54, 59 (Ohio Ct. App. 1990).
106. *See supra* notes 9-18 and accompanying text.
107. *See, e.g.*, Kleinknecht v. Gettysburg College, 989 F.2d 1360 (3d Cir. 1993)(university owes its student-athletes a duty of due care based on a special relationship).
108. *Id.*
109. *See, e.g.*, Jackson v. Drake Univ., 778 F. Supp. 1490 (S.D. Iowa 1991)(foundation of a negligent hiring cause of action arises when an employer hires a person who may come into contact with a third person to whom the employer owes a special duty of due care).
110. *See, e.g.*, McCrink v. City of New York, 71 N.E.2d 419 (N.Y. 1947)(City of New York was negligent in retaining a police officer when they should have foreseen that he was a danger to the public).
111. *See infra* notes 165-81 and accompanying text.

tity, in this case a university, a student must first establish that the university is responsible for an adequate and requisite duty of care to that particular student.[112] In the university setting, and especially in the realm of intercollegiate athletics, courts have been willing to recognize such a requisite duty.[113]

In *Kleinknecht v. Gettysburg College*,[114] the parents of a former student lacrosse player brought a negligence action against the college after their son suffered a fatal heart attack during a team practice.[115] The Kleinknechts alleged that Gettysburg breached a duty of care owed to their deceased son based on his status as a student-athlete and on his participation in a school sponsored and supervised athletic event.[116] First, no trainers were in attendance at the practice session at which the Kleinknecht's son had collapsed and died.[117] Also, the proper safety and medical procedures were allegedly not carried out.[118]

In *Kleinknecht*, the United States Court of Appeals for the Third Circuit cited case law which established a duty of care owed by a school to its student-athletes.[119] These cases based a

---

112. Kleinknecht v. Gettysburg College, 989 F.2d 1360, 1367 (3d Cir. 1993).

113. *Id.*

114. 989 F.2d 1360 (3d Cir. 1993).

115. *Id.* at 1363. The deceased student, Drew Kleinknecht, was a sophomore at Gettysburg when the fatal injury took place. *Id.* He was participating in fall lacrosse practice when he suddenly collapsed and stopped breathing. *Id.* He died of cardiac arrest on the way to the hospital after several attempts to resuscitate him. *Id.* Teammates testified that Kleinknecht had neither been struck by another player nor by any object prior to his collapse. *Id.*

116. *Id.* at 1365.

117. *Id.* Normally, during the regular season in the spring, two full-time student trainers would be stationed in the training room, and twelve student trainers would be located at the playing field. *Id.* Nevertheless, since the fall season was allegedly only for players to brush up on their "skills and drills," no student trainers were situated at the field when Kleinknecht collapsed. *Id.* The facts regarding how much time had elapsed, and whether or not the school officials had taken proper action in addressing the situation, are in dispute. *Id.* at 1364-65. As a result, the United States Court of Appeals for the Third Circuit reversed the district court's grant of summary judgment. *Id.* at 1371.

118. *Id.* at 1364-65. The Kleinknechts allege that at least a minute-and-a-half had passed before the coach even approached their son after his collapse. *Id.* The Kleinknechts further assert that the evidence shows that as long as twelve minutes had probably elapsed before CPR had been administered by the head trainer. *Id.* And furthermore, they maintain that it wasn't until ten minutes after that that the ambulance finally arrived. *Id.*

119. *Kleinknecht*, 989 F.2d at 1367 (citing Beckett v. Clinton Prairie Sch. Corp., 504 N.E.2d 552 (Ind. 1987) (high school officials owe duty of reasonable care to students under their supervision and authority); Leahy v. Sch. Bd. Of Hernando County, 450 So. 2d 883 (Fla. Dist. Ct. App. 1984) (school board, through its high school football coaches,

finding of a duty of care on the existence of a special relationship between a school and its student-athletes.[120] The court in *Kleinknecht* realized that the majority of these cases concerned situations where the academic setting was below the collegiate level, and was therefore indicative of an obligation of a duty of care because of the close-knit relationship between the school and the student.[121] Although the court recognized that the relationship between a student and a university is somewhat more distant, it acknowledged that when a student is participating as a student-athlete of that university, especially when that student had been actively and continually recruited, the same requisite duty of care is instilled.[122]

2. Foreseeablility of Injury

The court in *Kleinknecht* noted that although a duty of care may bind a university and one of its student-athletes, this does not end the inquiry as far as a negligence action is concerned.[123] In order to prevail under a negligence theory, an injured student-athlete must prove that the defendant university was able to foresee the injury.[124]

The decision of the Court of Appeals in *Kleinknecht* had overruled the district court's finding that the student's death was not foreseeable because he had been diagnosed with an unblemished health record prior to participation.[125] In particular, the appellate court found that the district court's definition of foreseeability was too narrow.[126] Accordingly, it was not significant that the student had been diagnosed as perfectly healthy.[127] Rather, the focus was more appropriately

---

owed a duty of care and supervision to students participating in football drills run by those coaches)).

120. *Id.* The court in *Kleinknecht* concluded that a "special relationship" existed based on the fact that Kleinknecht "was not engaged in his own private affairs as a student at Gettysburg College . . . He was participating in a scheduled athletic practice for an intercollegiate team sponsored by the college under the supervision of College employees." *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 1369.

124. *Kleinknecht*, 989 F.2d at 1369. "The test of negligence is whether the wrongdoer could have anticipated and foreseen the likelihood of harm to the injured person, resulting from his act." *Id.*

125. *Id.* at 1370.

126. *Id.*

127. *Id.*

aimed at whether it would be reasonably foreseeable to conclude that a life-threatening injury would occur in such a violent game as lacrosse, regardless of the perception of a particular participant's apparent health.[128]

3. Negligent Hiring

In *Jackson v. Drake University*,[129] the United States District Court for the Southern District of Iowa addressed the issue of negligent hiring. The court in *Jackson* recognized that the foundation for a negligent hiring cause of action arises when an employer hires a person who may come into contact with a third person to whom the employer owes a special duty of care.[130] The case involved a student, Jackson, who decided to attend Drake University and play on the men's basketball team in exchange for certain promises of stardom on the team and a valuable education.[131] After circumstances developed involving the head coach's apparent attempts to interfere with his chances of receiving this education, Jackson quit the team.[132] Jackson later brought suit, alleging on one count that the school had been negligent in hiring its basketball coach because it had failed to investigate his tainted past.[133] Although

128. *Id.* The court stated, "Although the specific risk that a person like Drew would suffer a cardiac arrest may be unforeseeable, the Kleinknechts produced ample evidence that a life-threatening injury occurring during participation in an athletic event like lacrosse was reasonably foreseeable." *Id.*

129. 778 F. Supp. 1490 (S.D. Iowa 1991).

130. *Id.* at 1495 (citing D.R.R. v. English Enter., 356 N.W.2d 580 (Iowa Ct. App. 1984). The court in *Jackson* stated that the basis for a negligent hiring cause of action exists when "the employer owes a special duty to a third party." *Id. But see* Ross v.Creighton Univ., 957 F.2d 410, 414 (7th Cir. 1992). Certain courts have been unwilling to recognize a cause of action for negligent hiring of a school official by an injured student where it is felt that such a cause of action is merely a guise for an educational malpractice suit. *Id.* In *Ross,* the plaintiff brought one of his claims specifically as "educational malpractice." *Id.* The court stated that the Illinois court system has never ruled on such a tort, and that "at least eleven states have considered and rejected claims for educational malpractice: Alabama, Alaska, California, Florida, Idaho, Iowa, Kentucky, Maryland, New Jersey, New York, and Wisconsin." *Id.*

131. *Jackson*, 778 F. Supp. at 1492. Plaintiff claimed that the school had promised him stardom on the basketball team and a "high quality of education." *Id.*

132. *Id.* Plaintiff had been advised by the coaching staff to take "easy" courses, and to hand in term papers which had been prepared by someone else. In addition, the coaching staff frequently held practice during plaintiff's assigned tutoring and studying time. *Id.*

133. *Id.* at 1495. Plaintiff alleged that the athletic department should have, by reading a certain Sports Illustrated article, realized that the coach they hired had a reputation of "underhandedness, academic impropriety, and player abuse" and that the school's allegedly negligent hiring of this coach led to plaintiff's injury. *Id.* Plaintiff based this

the court held that Jackson did not have a valid negligent hiring claim,[134] it based this holding primarily on a failure of proof.[135]

Questions of whether an employer has an obligation to investigate an employee's past conduct prior to hiring him must be answered on a case by case basis.[136] Several courts have concluded that where an employer is hiring a prospective employee who will be in close contact on a regular basis with parties to whom the employer owes a special duty of care, the employer appears to have an obligation to investigate that prospective employee's background.[137] This obligation is stronger than it would be in situations where the employee would not be coming into close contact with third persons.[138]

In *Garcia v. Duffy*,[139] the Florida District Court of Appeals held that in order to determine whether an employer is required to do a proper background investigation prior to hiring a prospective employee, and whether in fact that proper investigation has been accomplished, the court must scrutinize the particular facts of each case.[140] In *Garcia*, a driver for the de-

---

claim primarily on an earlier Sports Illustrated article which the school's athletic director read prior to making the decision to hire the coach. *Id.* The topic of the Sports Illustrated article is unclear from the opinion, but the court eventually decided that there was nothing in this article that was severely damaging enough to the coach's reputation that would warrant not hiring him. *Id.*

134. *Id.* The court held that plaintiff had no valid basis for a negligent hiring cause of action. *Id.* The court based this decision primarily on the idea that plaintiff had not presented enough verifiable evidence suggesting that the athletic department and the university should have been aware of the coach's allegedly and notoriously bad reputation. *Id.*

135. *Id.* The court went further in *Jackson* to state that even if there had been enough evidence that the university should have been aware or the coach's tainted past, the plaintiff would not have a cause of action for negligent hiring because plaintiff did not suffer physical injury. *Id.* at 1495 n. 2 (citing D.R.R. v. English Enterprises, 356 N.W.2d 580 (Iowa Ct. App. 1984)). *But see D.R.R.*, 356 N.W.2d 580. Nowhere in the *D.R.R.* decision did it mention anything about a restriction or requirement that there be a physical injury. *Id.*

136. *See* Garcia v. Duffy, 492 So. 2d 435, 440-41 (Fla. Dist. Ct. App. 1986)(in order to determine whether an employer is required to do a proper background investigation prior to hiring a prospective employee, and whether in fact that proper investigation has been accomplished, the court must scrutinize the particular facts of each case).

137. *Id.* at 441.

138. *Id.* The court stated that "where the employee's duties include outside work with only incidental contact with others, . . " there is "no obligation on the part of the employer to make an independent inquiry into an employee's past." *Id.*

139. 492 So. 2d 435, 440-41 (Fla. Dist. Ct. App. 1986).

140. *Id.* at 441-42. The court ruled in favor of the defendant. *Id.* The court ultimately based its decision on the fact that the defendant employer never owed any duty of care to

fendant employer struck plaintiff who consequently brought suit, alleging negligent hiring of the driver because the defendant failed to consider past criminal acts of the employee prior to hiring him.[141] The court noted that although certain factors are addressed in such a claim,[142] the test is nothing more than an analysis and an examination into whether the employer acted as a reasonable person under the particular circumstances.[143] The court opined that, although no per se obligation exists to investigate,[144] such an obligation would seem more requisite in circumstances where the job responsibilities of the prospective employee bring him into everyday contact with third parties to whom the employer owes a duty of

---

plaintiff to "exercise reasonable care in hiring" employees: "There was no connection between the employment and the plaintiff from which flowed a legal duty on the part of the employer to the plaintiff." *Id.* at 442. The plaintiff was neither an actual or potential customer of defendant, and the only reason the employee and plaintiff came into contact was because plaintiff accidentally struck the employee's dog. *Id.* The court went further to state that even if plaintiff established that defendant owed him a reasonable duty of care, the facts in this case failed prove that defendant breached such a duty. *Id.* at 442. The employee was hired merely to do "outside" work such as delivering boats, thereby limiting contact with third parties to nothing more than "incidental" and therefore unforeseeable. *Id.* The court felt that defendant's routine of merely questioning past employers listed on the job applications was more than adequate. *Id.*

141. *Id.* at 441. Plaintiff, while driving, accidently struck and killed a dog owned by an employee of the defendant. *Id.* The defendant, as employer of the particular employee, gave the employee permission to keep the dog on board the delivery truck while doing his job of delivering boats. *Id.* The employee, upon seeing his dog get hit, jumped out of the truck and punched plaintiff, thereby knocking him unconscious. *Id.* The court ruled that plaintiff was "neither an actual nor potential customer, licensee or invitee" of the defendant employer. *Id.* The employee was charged with assault and battery in the 1960's and been convicted in the 1970's of "night-prowling." *Id.* at 437.

142. *Id.* at 440. The court relied upon a note on negligent hiring from the Chicago-Kent Law Review which set forth three requisite elements of a valid negligent hiring claim: (1) "both the plaintiff and the employee have been in places where each had a right to be when the wrongful act occurred"; (2) "the plaintiff met the employee as the direct consequence of the employment"; and (3) "the employer would receive some benefit . . . from the meeting of the employee and plaintiff had the wrongful act not occurred." *The Responsibility of Employers for the Action of Their Employees: The Negligent Hiring Theory of Liability*, 53 CHI.-KENT L. REV. 717 (1977). The court stated that, although such criteria are significant in considering whether a particular employer was negligent in hiring a certain employee, all three elements need not be present in order to have a valid or successful claim; "We recognize that an employer cannot necessarily escape liability because one of the three elements is not present." *Garcia*, 492 So. 2d at 440.

143. *Id.* at 440. The court stated that the test is whether the particular employer "exercised the level of care which, under all the circumstances, the reasonably prudent man would exercise in choosing . . . an employee for the particular duties to be performed." *Id.*

144. *Garcia*, 492 So. 2d at 441 (citing Williams v. Feathersound, Inc., 386 So. 2d 1238, 1240 (Fla. Dist. Ct. App. 1980)).

care.[145]

4. Negligent Supervision

The main difference between a cause of action for negligent hiring and one for negligent supervision is the moment in time upon which the foundation of the particular claim materializes.[146] Negligent supervision, or negligent retention as it is sometimes labeled, is based upon the assumption that during employment, an employer fails to detect certain behavior by the particular employee that should have been discovered and should have prompted some further investigation or reprimand.[147] Just as in a negligent hiring case, a negligent supervision suit rests on the premise that the particular employer owes a duty of reasonable care to a third party to protect him from foreseeable danger or risk because the employer and that third party share a special relationship.[148]

The negligent supervision cause of action was recognized as early as 1947 in *McCrink v. City of New York*.[149] In *McCrink*, an off-duty police officer who had been out drinking, shot two people, killing one and wounding the other.[150] This officer had been disciplined on three other occasions for incidences of intoxication.[151] The wounded victim and a representative for the deceased brought personal injury and wrongful death claims respectively.[152] Both causes of action were founded primarily on the idea that the City of New York, as the officer's employer, should have realized that the officer was a foreseeable risk to society, and therefore, should have taken safety precautions or dismissed him.[153] The crux of the argument was that the city

145. *Id.* (citing Williams v. Feathersound, Inc., 386 So. 2d 1238, 1240 (Fla. 2d Dist. Ct. App. 1980)). This conclusion is consistent with the requirements of bringing a valid negligence cause of action: (1) existence of a special relationship between employer and injured plaintiff therefore creating a requisite duty of care; and (2) foreseeability of injury. *Id.* at 439.

146. *Id.* at 438.

147. *Id.* at 438-39. Negligent supervision, or negligent retention, is based on the idea that "during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action such as investigating, discharge, or reassignment." *Id.*

148. *Id.* at 440-441.

149. 71 N.E.2d 419 (N.Y. 1947)

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 420. Plaintiffs claimed that the city should have known that defendant

breached a duty of reasonable care which it owed to the civilians of New York by not dismissing the officer when city officials knew of his uncontrollable drinking problems.[154] Based on city officials' awareness of the officer's previous problems with alcohol, the New York Court of Appeals in *McCrink* concluded that the city was negligent in retaining him when these officials should have foreseen the ultimate and fatal outcome.[155]

A modern case in the area of negligent supervision or retention is *Haddock v. City of New York*.[156] In *Haddock*, plaintiff, a nine-year-old girl who was raped in a city playground by a city employee with an extensive criminal background, brought a negligence action against the city.[157] Johnson, the individual who committed the rape, had become a Parks Department utility worker pursuant to the Work Relief Employment Program.[158] This was a fairly unsupervised position at a public park where young children often played.[159] Although city officials were apparently unaware of the extent of Johnson's violent past when they initially hired him, the evidence showed that they became informed months prior to the date of the rape.[160]

---

was a risk to society based on his recurring problems with alcohol, combined with the fact that rule 288 of the Rules and Regulations of the Police Department required him as a patrolman to carry a gun "at all times." *Id.*

154. *McCrink*, 71 N.E.2d at 420-21. On three previous dates in 1928, 1936, and 1937, defendant had been found guilty for being intoxicated while on the job. *Id.* Nevertheless, he was only put on probation each time. *Id.* The court stressed a conversation which took place between the police commissioner and defendant centering around his third, 1937, conviction for intoxication. *Id.* In that conversation, the commissioner first stated, "no, you don't get another chance" to defendant's incessant pleas for "another chance." *Id.* Finally, after continual requests by defendant for a mere probationary punishment, the commissioner gave in and put him on a one year probation. *Id.* The court stressed the idea that this conversation was evidence that the commissioner was definitely "aware" of defendant's problem and the fact that he was a risk to society, and still only put him on another term of probation rather than dismissing him. *Id.* at 421.

155. *Id.* at 422.

156. 553 N.E.2d 987 (N.Y. 1990).

157. *Id.* at 989-90. Johnson was convicted of several serious crimes in the past such as rape, robbery, grand larceny, assault, as well as other convictions for breaking and entering, conspiracy in attempting a prison break and hoboing. *Id.*

158. *Id.* at 989. This program was created by the Legislature in 1971 in order to give such people as "employable home relief recipients" and ex-convicts a second chance, while at the same time give them a chance to "work off their public assistance benefits and also receive training for ultimate self-sufficiency . . . . " *Id.*

159. *Id.* at 989.

160. *Id.* at 989-90. The city required all applicants to appear before the Department

The city responded to plaintiff's allegations by claiming that municipal corporations like the Parks Department are afforded a special governmental immunity from liability in order to give them valuable discretion in making certain informed policy decisions.[161] Nevertheless, the New York Court of Appeals held the city liable for negligent retention.[162] The court reasoned that although a shield from liability often exists for these types of governmental entities, the city in this case could not be afforded immunity because none of the Parks Department supervisors made such informed decisions.[163] In addition, the supervisors were disorganized and careless in processing the criminal background check.[164]

5. Application to the Fortay Case: A Foundation Existed to Support Fortay's Claims of Negligent Hiring and Negligent Supervision

The particular facts in Bryan Fortay's case established valid claims for negligent hiring and negligent supervision. Based on the principles announced in *Kleinknecht v. Gettys-*

---

of Social Serivces for an "intake interview" and speak of any past criminal conduct. *Id.* When Johnson appeared for this interview, he stated that he had no past arrests. *Id.* In addition, on a report containing his fingerprints, he further conveyed that he had no past convictions or problems with the law. *Id.* Nevertheless, when Johnson's fingerprint analysis was finally processed after five months, the report showed that he had been convicted of several crimes in the past. *Id.* The department received the report nearly three months before Johnson's rape of plaintiff. *Id.* A second report showed that Johnson was released from prison seven months prior to the attack. *Id.* (This second report was not seen before plaintiff was attacked.) *Id.*

161. *Haddock*, 553 N.E.2d at 990-91. The court acknowledges that most governmental entities, especially when their action involves "the exercise of discretion or expert judgment in policy matters," are afforded somewhat of a qualified immunity from damages which result from that action. *Id.*

162. *Id.* at 990.

163. *Id.* at 991. The court came to this decision based on the fact that the city officials barely flinched, even after they learned of Johnson's extensive background of rape and other violent criminal behavior. *Id.*

164. *Id.* The city was especially shoddy in processing the criminal background check considering the fact that they were placing this individual in a position where he would be freely interacting with the public for the most part unsupervised. *Id.* Nevertheless, the city refuted the idea that the job was unsupervised and involved heavy public contact. *Id.* They believed that since Johnson would not be interacting with the public who attended the park, and that since he would be under the observation of three supervisors, he would not be left unattended. *Id.* at 989-90. The court seemed to believe that the job involved contact with the public, but felt it did not need to address that issue since the primary issue was the fact that "uninformed" decisions were being made. *Id.* As far as the supervision of the job was concerned, the record shows that on the day of plaintiff's rape, those responsible to supervise Johnson were either off-duty or on vacation. *Id.*

burg College,[165] the University of Miami owed Fortay a special duty of due care, and it breached that duty through the hiring of Anthony Russell and subsequent failure to adequately supervise him during his involvement with Fortay.[166]

The decision in *Jackson v. Drake University*[167] legitimized that a negligent hiring cause of action can be brought by a student-athlete against his or her university.[168] Although plaintiff in that case failed to provide the necessary proof in establishing that Drake University had an obligation to investigate its employee's past conduct prior to hiring him, the court in *Jackson* stressed that negligent hiring is a viable cause of action when an employer owes a special duty of due care to a third party.[169]

The principles relied upon in *Garcia v. Duffy*[170] are equally applicable to a university. In that case, the court noted that a school has a strong obligation to investigate the background of a prospective employee prior to hiring him or her when that employee will interact closely with a student to whom the school owes a special duty of due care.[171]

Furthermore, the majority in *McCrink v. City of New York*[172] recognized that when an employer should have reasonably foreseen an inherent risk by retaining a particular employee, but takes no precautions to alleviate such a risk, that employer is negligent when an eventual harm takes place.[173]

In a similar manner, the court in *Haddock v. City of New York*[174] found an employer negligent when that employer failed to take precautions against a foreseeable danger resulting from the actions of one of its employees.[175]

Based upon this legal precedent, Bryan Fortay had legitimate claims for negligent hiring and negligent supervision against the University of Miami. The university appeared to

---

165. 989 F.2d 1360 (3d Cir. 1993)
166. *See supra* notes 107-64 and accompanying text.
167. 778 F. Supp. 1490 (S.D. Iowa 1991).
168. *See supra* notes 129-35 and accompanying text.
169. Jackson v. Drake Univ., 778 F. Supp. 1490, 1495 (S.D. Iowa 1991) (citing D.R.R. v. English Enter., 356 N.W.2d 580, 583 (Iowa Ct. App. 1984)).
170. Garcia v. Duffy, 492 So. 2d 435 (Fla. Dist. Ct. App. 1986).
171. *See supra* notes 139-45 and accompanying text.
172. 71 N.E.2d 419 (N.Y. 1947).
173. *Id.*
174. 553 N.E.2d 987 (N.Y. 1990).
175. *Id.* at 990-91.

have owed a duty of due care to Fortay because of the special relationship that emerged once Fortay signed the Letter of Intent.[176] Fortay had a valid claim for negligent hiring[177] because, through an adequate investigation, Miami officials should have discovered that Anthony Russell engaged in scandalous behavior in the past, and therefore, should have seriously considered such behavior prior to hiring him.[178] The university should have reasonably foreseen that Russell would be working closely with the football players, including Fortay, and therefore, should have realized it was under an obligation to examine Russell's background.[179] Moreover, Fortay's additional claim for negligent supervision rested on the premise that the Miami coaches and officials should have discovered that Russell was inducing these football players into illegal conduct.[180] Therefore, the university should have taken immediate action in preventing the foreseeable harm.[181]

III. Conclusion: What Needs to be Done?

The preceding analysis of relevant case law illustrates that successful claims can be brought by a student-athlete against his or her university for negligence and breach of contract. Although no such cases have reached the United States Supreme Court, it is evident that lower courts are willing to allow these suits when founded on arguments of breach of express promises and of failure to exercise due care in a special relationship. The only issue which precedent fails to address is that based upon a college football coach's failure to abide by an alleged promise of stardom. Nevertheless, such a promise was not the sole basis for Bryan Fortay's suit.

---

176. *See supra* notes 106-64 and accompanying text.

177. *See supra* notes 129-45 and accompanying text.

178. *See supra* note 26 and accompanying text. *See also* Garcia v. Duffy, 492 So. 2d 435 (Fla. Dist. Ct. App. 1986)(in order to determine whether an employer is required to do a proper background investigation prior to hiring a prospective employee, and whether in fact that proper investigation has been accomplished, the court must scrutinize the particular facts of each case).

179. *See supra* notes 26, 129-45 and accompanying text.

180. *See* McCrink v. City of New York, 71 N.E.2d 419 (N.Y. 1947) (court concluded that city was negligent in retaining officer when city officials should have foreseen the ultimate and fatal outcome). *See also* Haddock v. City of New York, 553 N.E.2d 987 (N.Y. 1990) (city is negligent when it retains employee even after city officials apparently knew of employee's tainted past).

181. *See supra* notes 22-28 and accompanying text.

Although such an alleged promise is inevitably what may have triggered Fortay's cause of action and what the media portrayed as being paramount to the lawsuit,[182] it was not deserving of such a label. Fortay's quest for fairness was not about some spoiled and egotistical college quarterback's whining that the coach did not put him in the game.

Fortay was each young, naive high school phenom in America who had worked hard at what he did best, with hopes and aspirations of running out onto the field every weekend and spilling his heart out for the name of that institution written across the front of his jersey. He was each young superstar who became nothing more than a commodity who was long forgotten when his value to the institution declined. He was each gifted, young athlete who was showered with promises; promises of guidance, promises of protection, promises of a home away from home. He was a pawn in the business of college athletics.

Should we continue to allow big-time college recruiters to lure young men and women to their universities with promises of stardom when these universities might possibly have no factual basis upon which to support these promises and no true intentions of absolutely fulfilling them? Should we permit them to play with young people's lives? Should we let them lie? If we do nothing and allow such activities to go on, the ramifications will undoubtedly continue to be drastic. The universities will still profit, and these young men and women who have devoted their respective lives to a dream will be left unprotected. What is the answer? Are NCAA sanctions enough?[183] They will not help Bryan Fortay. His chances of a future in football are over. Perhaps the settlement of the

182. *Fortay Faces Accusations*, THE RECORD, Jan. 13, 1995, at S-7. This article is an example of the frequent representation by the media of the fact that this case was primarily based on broken promises by the university that Fortay would be the starting quarterback. *Id.*

183. N.C.A.A. MANUAL § 10.01.1, at 49 (1994-95). "HONESTY AND SPORTSMANSHIP. Individuals employed by (or associated with) a member institution to administer, conduct or coach intercollegiate athletics and all participating student-athletes shall deport themselves with honesty and sportsmanship at all times so that intercollegiate athletes as a whole, their institutions and they, as individuals, shall represent the honor and dignity of fair play and the generally recognized high standards associated with wholesome competitive sports. *Id. See also* N.C.A.A. MANUAL § 10.4, at 50 (1994-95). " . . . Institutional staff members found in violation of the provisions of this regulation shall be subject to disciplinary or corrective action . . . ." *Id.*

Fortay case is a step in the right direction. Even so, a legal precedent in the form of a court opinion must be set. This is not to say that the floodgates should be left wide open to reward every non-meritorious, frivolous allegation of unfair opportunities on the playing field. Rather, big-time college recruiters should not be permitted to make open-ended promises for the mere sake of enticing high school athletes to attend their schools. The legal basis exists to reprimand schools who engage in these activities. Something must be done.

James Kennedy Ornstein