STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIRST JUDICIAL CIRCUIT
COUNTY OF ORANGEBURG	)	
	)	
ROBERT GEATHERS and	)	
DEBRA GEATHERS, h/w	)	Civil Action No. 2019-CP-38-00550
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
NATIONAL COLLEGIATE	)	
ATHLETIC ASSOCIATION	)	
	)	
Defendant.	)	
_____	)	

DEFENDANT'S MOTION AND BRIEF IN SUPPORT OF MOTION FOR NEW TRIAL

PLEASE TAKE NOTICE that Defendant National Collegiate Athletic Association ("NCAA"), by and through its undersigned counsel, hereby respectfully moves this Honorable Court for a new trial absolute pursuant to South Carolina Rule of Civil Procedure Rule 59 and all other applicable rules of South Carolina Rules of Civil Procedure and case law. The NCAA moves this Court for an Order granting a new trial absolute, or in the alternative, a new trial *nisi remittitur*. The Court should grant a new trial on the following grounds:

- The jury instructions on "increased risk of harm" and voluntary undertaking were inconsistent with the law;
- The Court erroneously admitted evidence that prejudiced the NCAA;
- The verdict was against the weight of the evidence; and
- The damages award is excessive.

I. Legal Standard For Granting A New Trial

Following a jury trial, a new trial may be granted to all or any of the parties and on all or part of the issues "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State." Rule 59(a), SCRCP. "The grant or denial of new trial

motions rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence, or the conclusions reached are controlled by error of law." *Swicegood v. Lott*, 665 S.E.2d 211, 216 (S.C. Ct. App. 2008).

II. A NEW TRIAL IS WARRANTED BECAUSE THE JURY INSTRUCTIONS WERE INCONSISTENT WITH THE LAW

The Court's instructions regarding "increased risk of harm" and voluntary undertaking were erroneous as a matter of law and misled the jury in reaching their verdict. Therefore, a new trial is warranted.

A. Standard Of Review For Jury Instructions

An abuse of discretion occurs when the trial court's ruling on jury instructions is based on an error of law or is not supported by the evidence. *Cole v. Raut*, 663 S.E.2d 30, 33 (S.C. 2008) (citing *Ellison v. Simmons*, 120 S.E.2d 209, 213 (S.C. 1961)). The trial court has a duty to "charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues." *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 697 S.E.2d 644, 652 (S.C. Ct. App. 2010). "A trial court must [also] charge the current and correct law." *McCourt by and through McCourt v. Abernathy*, 457 S.E.2d 603, 606 (S.C. 1995). A jury instruction error is harmless only if the court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict. *State v. Kerr,* 498 S.E.2d 212, 218 (S.C. Ct. App.1998).

B. The Court Erroneously Instructed the Jury On Increased Risk of Harm

The Court instructed the jury to determine "whether the NCAA unreasonably increased the risk of harm to Plaintiff over and above the inherent or expected risks of the game of football." *See* Final Jury Instruction, p. 5; *see also* Special Verdict Form, No. 1 ("Did the NCAA unreasonably increase the risk of harm of head impacts to Robert Geathers over and above the risks inherent in playing football?"). This instruction is contrary to South Carolina law and

constitutes legal error that prejudiced the NCAA.

First, there is no legal basis under South Carolina law to instruct the jury on the issue of "increased risk of harm." Under the doctrine of primary implied assumption of risk, "[w]here a person chooses to participate in a contact sport, whatever the level of play, he assumes the risks inherent in that sport." *Cole v. Boy Scouts of Am.*, 725 S.E.2d 476, 478 (S.C. 2011). Where primary implied assumption of risk applies, a plaintiff "fail[s] to establish a *prima facie* case of negligence by failing to establish that a duty exists." *Hurst v. E. Coast Hockey League, Inc.*, 637 S.E.2d 560, 562 (S.C. 2006).

In denying the NCAA's Motion for Summary Judgment, the Court held that the doctrine of primary implied assumption of risk does not apply if a defendant "increase[s] the risks to a participant over and above those inherent in the sport." *See* Court Order, May 8, 2024 (citing *Galardi v. Seahorse Riding Club*, 16 Cal. App. 4th 817, 822 (1993)). This holding constitutes legal error as there is no South Carolina case law supporting an exception to primary implied assumption of risk because a defendant allegedly "increased the risk of harm." Accordingly, the Court's instruction to the jury to determine whether the NCAA increased the risk of harm is contrary to law and highly prejudicial to the NCAA. It was particularly prejudicial because the jury determined that the NCAA increased the risk of harm to Robert Geathers, and this irrelevant determination was used to avoid application of primary implied assumption of the risk, which is a doctrine that eliminates the existence of a duty as a matter of law.

Second, even if South Carolina recognized an exception to primary implied assumption of the risk, the Court erred in instructing the jury on "increased risk of harm" because Plaintiffs failed to present any evidence that the NCAA increased the risk of harm above and beyond those risks inherent in college football. At trial, instead of identifying instances in which the NCAA *increased*

the inherent risks, Plaintiffs asserted a non-existent duty to *decrease* the inherent risks. *See* 10/23/25 Tr. at 107:9-11 (Plaintiffs' closing statement) ("[H]ow they heightened the risk was not what they did because they didn't do much, but it's what they didn't do."). Plaintiffs' entire case focused on assertions of what the NCAA might have done to *minimize or mitigate* the inherent risk of harm of head impacts in football, *e.g.*, sharing information about the alleged risks of long-term brain damage and implementing a mandatory concussion protocol. The NCAA's alleged failure to protect Mr. Geathers from the inherent risks of playing football falls squarely within primary implied assumption of the risk and outside of the purported exception for "increased risk of harm."

Finally, the Court compounded its error by not properly instructing the jury on the meaning of increased risk of harm. Under this doctrine, defendants have no legal duty to change the rules to address the inherent risks in a sport. *See, e.g.*, *Fortier v. Los Rios Cmty. Coll. Dist.*, 45 Cal. App. 4th 430, 437 (1996) ("No matter the level of play," the risks of football "always include accidental collisions between offensive and defensive players vying for possession of a passed football."). Instead, defendant unreasonably increases the risk of harm in a sport or activity when its actions create additional risks beyond those inherent in the sport or activity.[1] *See, e.g.*, *Coomer v. Kan. City Royals Baseball Corp.*, 437 S.W.3d 184, 188, 203 (Mo. 2014) (shooting hotdogs out of an air cannon into the stands is not an inherent risk of the game of baseball); *Wattenbarger v. Cincinnati Reds, Inc.*, 28 Cal. App. 4th 746, 754-56 (1994) (team negligently returning a pitcher to the game despite his complaint of an injured elbow).

Consistent with this law, the NCAA requested that the Court instruct the jury, *inter alia*, that "[t]]he risk of head impacts is inherent in the game of football" and that "a defendant has no

[1] *Fortier* aptly explained this distinction as follows: "Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm." 45 Cal. App. 4th at 435.

legal duty to change the rules of a sport or activity to protect against risks inherent in that sport or activity. Rather, a defendant unreasonably increases the risk of harm in a sport or activity when its actions create additional risks beyond those inherent in the sport or activity." The Court erred by rejecting this proposed language even though it was an accurate statement of the law and necessary to explain when the NCAA can be found to have increased the risk of harm above and beyond those inherent in the game of football. *See Burns v. S.C. Comm'n for the Blind*, 448 S.E.2d 589, 591 (S.C. Ct. App. 1994) ("If the requested charge states a sound principle of law that is applicable to the case, and not otherwise covered by the charge, refusal to charge it is error and requires a new trial. Moreover, when general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error.") (citations omitted).

The Court's decision to charge the jury on "increased risk of harm" without explaining the boundaries of that exception plainly impacted the jury's verdict. Plaintiffs presented no evidence that the NCAA increased the risk of harm above and beyond those inherent in playing college football; instead, Plaintiffs argued that the NCAA failed to mitigate or decrease the inherent risks of head impacts, which the jury necessarily credited in finding that the NCAA increased the risk of harm to Robert Geathers. *See* Jury Verdict Form No. 1. The Court's erroneous instruction, therefore, was outcome-determinative, and the NCAA is entitled to a new trial.

C. The Court Erroneously Instructed The Jury On Voluntary Undertaking

The Court erred by instructing the jury on the issue of voluntary undertaking and compounded its error by refusing to instruct the jury on what constitutes a voluntary undertaking under the law.

Under Restatement (Second) of Torts § 323, "a voluntary undertaking does not create a duty of care unless (a) the undertaker's failure to exercise reasonable care in performing the

undertaking increased the risk of harm to the plaintiff, or (b) the plaintiff suffered harm because she relied upon the undertaking." *Wright v. PRG Real Est. Mgmt., Inc.*, 826 S.E.2d 285, 291 (S.C. 2019). Further, any duty of care is limited to the specific undertaking in question. *See Wright v. PRG Real Estate Mgmt.*, 775 S.E.2d 399, 405 (S.C. Ct. App. 2015), *rev'd on other grounds* at *Wright*, 826 S.E.2d 285 (S.C. 2019) (quoting 65 C.J.S. Negligence § 40 (2010)) ("A person's duty to exercise reasonable care in performing a voluntarily assumed undertaking is limited to that undertaking . . . A duty assumed because of a voluntary undertaking must be strictly limited to the scope of that undertaking."); *see also Wright*, 826 S.E.2d at 290 ("The landlord's duty can be limited and will apply only to the extent of the landlord's undertaking."); *Hammond v. AlliedBarton Sec. Servs., LLC*, No. 3:10-cv-02441-JFA, 2011 WL 5827604, at *6 (D.S.C. Nov. 16, 2011) ("The Court is in no way undermining the duty to exercise due care in a voluntary undertaking; rather, the Court suggests that an undertaker cannot be held to duties beyond those that it voluntarily undertook.").

Plaintiffs presented no evidence of a voluntary undertaking by the NCAA to protect Mr. Geathers' health and safety. To the contrary, the evidence demonstrated that the member institutions, including S.C. State, retained for themselves the direct responsibility for the health and safety of their student athletes. *See* DX 2.9, 2.16; Testimony of Jeffries (10/14/25)[2], Ridpath (10/17/25). The evidence further demonstrated that the NCAA's relationship is with its members, not the student athletes. *See* Testimony of Jeffries (10/14/25), Ridpath (10/17/25). The evidence shows that the NCAA's Committee on Competitive Safeguards Medical Aspect of Sports ("CSMAS") was only charged with the responsibility to collect pertinent information, disseminate that information which might be brought appropriately to the attention of member institutions, and

[2] The parties have not yet received transcripts for the first week of trial, and therefore, NCAA cites the testimony generally for that week. The NCAA cites to the unofficial daily transcripts for the second week of trial.

adopt recommendations for the member institutions. *See* DX 2.94, Testimony of Ridpath (10/17/25). The NCAA did not provide this information to student athletes generally, or to Mr. Geathers specifically, and there is no evidence that the NCAA was directly involved in the care of student athletes, including Mr. Geathers. *See* Testimony of Jeffries (10/14/25), Carson (10/15/25), Ridpath (10/17/25), Pough (10/21/25 Tr. at 220:10-260:9).

The NCAA cannot be found to owe a duty to Mr. Geathers to protect his health and safety when the NCAA, at most, allegedly undertook to provide assistance to the ***member schools*** regarding health and safety. *See Johnson v. Robert E. Lee Acad., Inc.*, 737 S.E.2d 512, 512-14 (S.C. Ct. App. 2012) (accountant did not voluntarily undertake a duty to a school bookkeeper when accountant assisted school and police department in embezzlement investigation; "Even assuming Quigley acted voluntarily, he assisted the Bishopville Police Department in its investigation. He did not render a service to Johnson; he assisted authorities."); *Oulla v. Velazques*, 831 S.E.2d 450, 458-59 (S.C. Ct. App. 2019) (defendant seed company was entitled to judgment as a matter of law because any duty assumed by the seed company in placing sod on a customer's trailer was a duty to the customer, not to third parties injured when the sod fell off).

Critically, South Carolina has specifically declined to adopt Section 324A of the Restatement (Second) of Torts, which means that South Carolina does not extend voluntary undertaking liability to defendants that render services to others (*i.e.*, the member schools) that the defendant allegedly should recognize as necessary for the protection of third parties (*i.e.*, Mr. Geathers). *See Oulla*, 831 S.E.2d at 458 ("In contrast to section 323, South Carolina has specifically rejected section 324A."); *see also Miller v. City of Camden*, 494 S.E.2d 813, 815, n.2 (S.C. 1997) ("We decline to adopt the expanded liability of Restatement 2d of Torts § 324A (1965).").

Given this law and the evidence presented at trial, the Court erred by instructing the jury on voluntary undertaking. The Court further erred by denying the NCAA's request to instruct the jury that "a voluntary assumption of a duty can be found only where the defendant acts to undertake the specific duty at issue" and "[a] defendant does not voluntarily undertake a duty to the plaintiff where the defendant undertakes to provide services to a third party, as opposed to the plaintiff." This language was necessary to properly instruct the jury on what constitutes an undertaking under South Carolina law. Without this guidance, the jury was misled to believe that the NCAA could undertake a voluntary duty to Mr. Geathers by exclusively providing services to the member schools, which is contrary to South Carolina law (and particularly its rejection of Restatement § 324A), and/or could find that the NCAA voluntarily undertook a duty to protect the health and safety of Mr. Geathers based on the provision of ***any*** services to him instead of this specific undertaking.

The Court's erroneous decision to charge the jury on voluntary assumption of duty without explaining what constitutes a voluntary undertaking directly impacted the verdict because the jury found that the NCAA voluntarily assumed a duty to protect Mr. Geathers' health and safety, despite no evidence that NCAA rendered any services to Mr. Geathers, let alone services directed to protecting his health and safety. Had the Court properly instructed the jury on voluntary undertaking, they would not have found that the NCAA voluntarily undertook a duty to Mr. Geathers to protect his health and safety. Accordingly, the NCAA should be granted a new trial.

III. A NEW TRIAL IS WARRANTED DUE TO EVIDENTIARY ERRORS

The Court made a number of evidentiary errors that reasonably influenced the verdict: (1) admitting evidence of the NCAA's knowledge and conduct after 1980; (2) admitting evidence of subsequent remedial measures; (3) prohibiting the NCAA from arguing that Plaintiffs adduced no evidence that warnings would have influenced Mr. Geathers' decision to play college football; (4)

prohibiting the NCAA from arguing that no other member of the Geathers family (except Plaintiff Mrs. Geathers) testified at trial; (5) admitting evidence of chronic traumatic encephalopathy ("CTE"); (6) admitting evidence of traumatic encephalopathy syndrome ("TES"); (7) admitting legal opinion testimony from witnesses; (8) allowing Plaintiffs to argue that the NCAA valued the business of football over safety; and (9) admitting evidence of injuries to other players and failing to enforce its order precluding evidence of other settlements and lawsuits These errors, individually and collectively, warrant a new trial.

A. Standard Of Review For Evidentiary Error

"The admission of evidence is within the [circuit] court's discretion." *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 540 S.E.2d 113, 121 (S.C. Ct. App. 2000). The court's ruling to admit or exclude evidence will be reversed if it constitutes an abuse of discretion amounting to an error of law." *Id.* To prove an error of law, a party "must prove both the error of the ruling and the resulting prejudice, *i.e.*, that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields v. Reg'l Med. Ctr. Orangeburg*, 609 S.E.2d 506, 509 (S.C. 2005).

B. The Court Improperly Admitted Evidence Of The NCAA's Knowledge And Conduct After 1980

The NCAA's Motion *in Limine* No. 5 sought to exclude evidence regarding the NCAA's knowledge and conduct after Robert Geathers finished playing college football in 1980. The Court denied the NCAA's motion (*see* 9/29/25 Order) and allowed Plaintiffs to present extensive testimony and documentary evidence regarding the NCAA for the 40-year time period after Mr. Geathers finished playing college football. The erroneous admission of this evidence substantially prejudiced the NCAA.

Evidence and argument regarding the NCAA's conduct and knowledge after 1980 should

have been excluded because it is irrelevant to Plaintiffs' claims against the NCAA. To prove their claims, Plaintiffs had to establish that the NCAA had a duty to protect the health and safety of Robert Geathers while he played college football at S.C. State from 1977 to 1980, and the NCAA breached that duty by failing to warn Mr. Geathers about the latent risks of playing football and/or failing to implement return-to-play protocols based on what was known at that time. The relevant period for evaluating the NCAA's alleged duties, its policies and procedures, or its knowledge of any risks, was the time period that Mr. Geathers played football at S.C. State: 1977-1980.

Obviously, the NCAA had no duty to Mr. Geathers after 1980. Thus, what the NCAA did (or did not do) or knew after 1980 was irrelevant to Plaintiffs' claims and should have been excluded. *See* SCRE 402. But even if evidence of the NCAA's conduct after 1980 had some minimal relevance to this case, any relevance was substantially outweighed by the dangers of undue prejudice to the NCAA, confusing the issues, and misleading the jury. *See State v. Phillips*, 844 S.E.2d 651, 655-56 (S.C. 2020) ("Unfair prejudice is the tendency of the evidence to suggest a decision based on something ***other than*** the legitimate probative force of the evidence.") (emphasis added); *In re Campbell*, 830 S.E.2d 14, 19 (S.C. 2019) (quoting *Wilson*, 545 S.E.2d 827, 830 (S.C. 2001)) ("Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one."); *see also* 29 Am. Jur. 2d Evidence § 326 ("Unfair prejudice may arise from evidence that arouses the jury's hostility or sympathy for one side, confuses or misleads the trier of fact, or unduly distracts the jury from the main issues.").

The Court's ruling allowed Plaintiffs to present extensive post-1980 evidence to argue (i) the NCAA's statements after 1980 establish that the NCAA undertook a duty to protect the health and safety of student athletes (Testimony of Ridpath (10/17/25); Deposition Designation

Testimony of Emmert, Parsons, Gronau, and Klossner[3]; PX 1, PX 372); (ii) the NCAA's publications after 1980 show that the NCAA possessed information about the alleged risks of head impacts (Testimony of Ridpath (10/17/25), Casper (10/15-16/25); PX 364); and (iii) the NCAA's failure to take certain actions after 1980 establish its breach of the duty to protect the health and safety of student athletes (Testimony of Ridpath (10/17/25; PX 193, PX 217, PX 219, PX 244, PX 256, PX 455, PX 456). Specifically, in closing, Plaintiffs cited the NCAA's website, a 2016 letter from the NCAA's chief legal officer, and recent deposition and trial testimony of NCAA employees to argue that the NCAA had admitted to an alleged duty to Mr. Geathers in 1977-1980. *See* 10/23/25 Tr. at 22:24-23:2, 23:25-24:7, 24:18-23, 105:16-106.1, 108:10-11. Plaintiffs also referenced the NCAA's alleged failure to adopt a concussion protocol in 1983, as well as its alleged failure to adopt an injury timeout rule until 2002, as evidence of the NCAA's breach of the standard of care to Mr. Geathers. *See id.* at 43:2-15. And Plaintiffs argued that the NCAA alleged knew that CTE is neurodegenerative disease caused by repeated concussive and subconcussive hits based on the contents of a 2012 NCAA Sports Medicine Handbook. *See id.* at 44:9-20.

The admission of this evidence and argument was highly prejudicial to the NCAA because it improperly allowed the jury to assess the NCAA's knowledge and conduct at the time Mr. Geathers played football, 1977-1980, based on evidence that the NCAA took certain actions or knew certain information *after* 1980, which directly led to the jury finding that the NCAA breached a duty to Mr. Geathers to protect his health and safety.

C. The Court Erroneously Admitted Evidence of Subsequent Remedial Measures

The NCAA's Motion *in Limine* No. 6 sought to preclude Plaintiffs from offering any evidence or argument regarding NCAA rules or policies after 1980 because it is barred by SCRE

[3] The deposition designation testimony of Mark Emmert, David Klossner, John Parsons, and Terri Steeb-Gronau played and/or read at trial is not reproduced in the draft trial transcript for October 20, 2025.

407 regarding subsequent remedial measures. After taking the motion under advisement, the Court denied the NCAA's motion, ruling that Plaintiff's post-1980 evidence is not evidence of subsequent remedial measures. Court Order, Oct. 8, 2025. The Court reasoned that Plaintiffs' "evidence is not remedial, but proof of an ongoing dereliction of duty by a defendant." *See id*. ("Plaintiff contends that the proffered evidence demonstrates a continued pattern of willfully and knowingly failing to meaningfully address concussion risks from 1933 to 2010."). The Court analogized the present case "to a toxic tort case, whereby the environmental exposure is ongoing and continuous for years or decades, which slowly and ultimately results in injury to a plaintiff." *Id.* ("Such cases present unique challenges in that there are often a series of numerous or ongoing causal events occurring over an extended period of time. In such cases, evidence of continuing omissions, failures to act, or feasibility of alternate actions are relevant to issues of causation and feasibility of preventative measures."). Finally, the Court held that Plaintiff may introduce evidence of rule changes and policies after 1980 to "argue that rule changes should have come sooner." *Id.*

The Court's rationale for admitting evidence of NCAA rules or policies after 1980 is erroneous. First, the NCAA could, at most, only owe a duty to Robert Geathers to protect his health and safety during the years he played college football, 1977-1980. Any evidence of NCAA action or inaction after 1980 cannot establish a breach of duty, or a "continued dereliction of duty" to Mr. Geathers. Whether the NCAA breached a duty to other student athletes after 1980 is irrelevant and highly prejudicial to Mr. Geathers' negligence claim.

Second, the Court's analogy to toxic tort cases is misplaced. Unlike a toxic tort plaintiff who is slowly poisoned over time eventually resulting in injury, Mr. Geathers' alleged injuries exclusively occurred when he sustained head impacts while playing college football. While his

alleged latent injuries did not manifest until later, Mr. Geathers plainly did not sustain head impacts from playing college football after his career ended in 1980. Thus, evidence of NCAA's actions after 1980 has no bearing on Mr. Geathers' personal claims.

Finally, the Court's suggestion that Plaintiffs can use evidence of post-1980 NCAA rules and policies to argue that they should have come sooner is directly barred by SCRE 407. Under Rule 407, "[w]hen, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event."[4] SCRE 407. The rule is broad. It bars "***any*** change, repair, or precaution that under the plaintiff's theory would have made the accident [causing injury] less likely to happen[.]" *Webb v. CSX Transp., Inc*., 615 S.E.2d 440, 448 (S.C. 2005) (emphasis added).

The rule has two purposes. First, it "rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety." *Carson v. CSX Transp., Inc.*, 734 S.E.2d 148, 155 (S.C. 2012) (citing Fed. R. Evid. 407, Advisory Committee's Note). Second, evidence of subsequent remedial measures "has no legitimate tendency to prove that the defendant had been negligent before the accident happened[.]" *Bolen v. Strange*, 6 S.E.2d 466, 469 (S.C. 1939); *see also Columbia & P.S. R. Co. v. Hawthorne*, 144 U. S. 202, 207 (1892)) ("[T]he taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant.").

[4] Rule 407 permits admission of subsequent remedial measure evidence "only when necessary to demonstrate such things as ownership, control, impeachment, or feasibility of precautionary measures, if contested." *Webb*, 615 S.E. 2d at 448. None of these exceptions apply here.

The Court's ruling allowed Plaintiffs to present evidence regarding actions the NCAA took (or failed to take) after 1980 with respect to warning posters in locker rooms (PX 193), the publication and contents of Sports Medicine Handbooks (PX 219, PX 256, PX 364), changes to the playing rules (PX 455, PX 456), the implementation of mandatory concussion protocols (Testimony of Ridpath (10/17/25)), and the NCAA's purported knowledge of CTE (PX 364). Relying on this evidence, Plaintiffs argued in closing that the NCAA breached the standard of care to Mr. Geathers in 1977-1980 because the NCAA did not require posters in locker rooms until 1982, did not adopt an injury timeout until 2002, and did not adopt a concussion protocol until 2010. *See* 10/23/25 Tr. at 42:12-18, 43:10-21, 115:21-116:1. Plaintiffs also argued, based on the contents of a 2012 NCAA Sports Medicine Handbook, that the NCAA knew and should have warned Mr. Geathers about CTE in 1977-1980. *See id.* at 44:9-12.

The Court's admission of this evidence and argument constitutes legal error that warrants a new trial. *See Webb*, 615 S.E.2d at 653-54 (finding reversible error where the Court permitted evidence that the defendant railroad clear cut vegetation at a rail crossing after a fatal accident).

D. The Court Erred By Precluding The NCAA From Arguing That Plaintiffs' Adduced No Evidence That Warnings Would Have Influenced Robert Geathers' Decision To Play Football.

Prior to trial, Plaintiffs moved *in limine* to preclude the NCAA from presenting evidence or argument that Mr. Geathers would have participated in NCAA football even if he had received warnings from the NCAA. The Court granted this motion over the NCAA's opposition, finding that "the evidence calls for speculation and Plaintiff is not competent to testify." Court Order, Sept. 30, 2025. During argument, the NCAA informed the Court that it does not agree that Mr. Geathers is incompetent. At trial, the NCAA presented evidence that Mr. Geathers was competent to testify at trial. Prior to closing, the NCAA asked the Court to revisit its ruling to permit the NCAA to argue that Plaintiffs had failed to establish that Mr. Geathers would not have played football if he

had received a warning. The Court denied the NCAA's request. The Court's rulings constitute legal error, which prejudiced the NCAA.

In reaching its decision, the Court improperly determined an issue of fact disputed at trial – whether Mr. Geathers was competent to testify at trial. The Court has no power to make such a factual determination in ruling on a motion *in limine*, particularly in light of the extensive evidence that Mr. Geathers was competent to testify at trial. "[A] witness is presumed competent and the party opposing the witness's competency has the burden of proving the witness is incompetent," and the Court did not hold a hearing to determine whether Mr. Geathers was, in fact, competent. *See State v. Reyes*, 853 S.E.2d 334, 338 (S.C. 2020) ("[I]t is the duty of the court to make such examination as will satisfy it as to the competency or incompetency of the person to testify.").

The Court also improperly relieved Plaintiffs of their burden to establish an essential element of negligence – causation. "Negligence is not actionable unless it is a proximate cause of the injury." *Khautisen v. BHG Holdings LLC*, 2024 WL 3925178, at *5 (D.S.C. Aug. 23, 2024) (failure to warn case) (quoting *Madison ex rel. Bryant v. Babcock Ctr., Inc*., 638 S.E.2d 650, 662 (S.C. 2006)). A plaintiff must prove that ***but for*** the "failure to warn," the plaintiff "would not have sustained injury." *Singleton v. Sherer*, 659 S.E.2d 196, 206 (S.C. Ct. App. 2008). Thus, the burden is on a plaintiff to come forward with evidence to show that a particular warning would have caused the plaintiff to alter his behavior to avoid the injury in question. *Khautisen*, 2024 WL 3925178, at *6 (citing *Baughman v. General Motors Corp*., 627 F. Supp. 871, 877 (D.S.C. 1985) (failure to warn was not proximate cause of plaintiff's injuries where plaintiff was already aware of the danger); *Carnes v. Eli Lilly and Co*., 2013 WL 6622915, at *4 (D.S.C. Dec. 16, 2023) (same); *Melton v. Medtronic, Inc*., 698 S.E.2d 886, 894 (S.C. Ct. App. 2010) (same)).

At trial, Plaintiffs presented no evidence of "but for" causation—*i.e.*, that Mr. Geathers

would not have played college football if the NCAA had given the warnings that Plaintiffs allege were necessary.[5] Absent such proof, Plaintiffs failed to show the required element of causation. By preventing the NCAA from addressing this failure of evidence in closing, the Court effectively inverted the burden of proof when Plaintiffs could not carry that burden on their own. *See* 10/22/25 Tr. at 74:5-10 (The Court: "And to speculate that a warning would have made no difference specifically to Mr. Geathers is a bridge too far, especially if you're trying to bootstrap the fact that we don't have his testimony."). As a result, the NCAA could not argue against causation, which the jury found when it found that the NCAA's negligence proximately caused Mr. Geathers' damages.

E. The Court Erred By Precluding The NCAA From Arguing That No Member Of Robert Geathers' Family, Other Than Debra Geathers, Testified At Trial

Prior to trial, Plaintiffs moved *in limine* to preclude the NCAA from arguing any inference based on Plaintiffs' decision not to call witnesses which were equally available to the NCAA. Over the NCAA's opposition, the Court tentatively granted this motion, finding "that this request has merit, but the Defendant may inform the Court before the closing of their case-in-chief if they wish to present such an argument to the jury." Court Order, Sept. 29, 2025. Prior to closing, the NCAA requested that the Court allow it to argue to the jury that no member of Robert Geathers' family, other than Debra Geathers, testified at trial. The Court erroneously denied this request, which prejudiced the NCAA.

During trial, Plaintiffs presented extensive expert testimony that Mr. Geathers suffered from major cognitive impairment as a result of playing college football. *See* Testimony of Greenwald (10/15/25), Ewert (10/16/25), White (10/16/25), Gaskins (10/16/25). Plaintiffs also

[5] In fact, the only evidence presented at all on this issue was the testimony of Harry Carson and Keith Moore, who both testified that they would have still played football if they had been warned about the alleged long-term risks of head impacts.

presented both fact and expert testimony that Mr. Geathers' cognition was severely limited. *See* Testimony of Greenwald (10/15/25), Ewert (10/16/25), White (10/16/25), Gaskins (10/16/25), Moore (10/14/25), Kennedy (10/15/25), Armstrong (10/15/25). In response, the NCAA presented evidence to show that Mr. Geathers did not suffer from major cognitive impairment. Specifically, the NCAA presented evidence that Mr. Geathers' treating physician was unaware of any alleged cognitive issues, that the results of the cognitive tests that Mr. Geathers had taken, which were relied upon by Plaintiffs' experts, were invalid, and that Mr. Geathers was able to appear in public and give an interview at an S.C. State Hall of Fame Dinner. *See, e.g.,* Testimony of Williams (10/21/25 Tr. at 65:21-66:19, 68:13-70:2), Barr (10/21/25 Tr. at 162:2:165:14, 171:1172:1, 173:24-174:17, 175:8-180:5).

During closing argument, Plaintiffs argued that the jury should disregard the opinions of treating doctors and the NCAA's expert medical witnesses and instead, look at the testimony of those closest to Robert Geathers:

> So for anyone to tell you that Dr. Mann prior to two weeks ago had no inkling that something was wrong with Robert Geathers, you can use your own judgment. Because that – the question asks are you having memory – any problems with your memory compared to five years ago. This was in 2023, and what was the answer? Are your family members saying you're having problems with your memory compared to five years ago? What was the answer?

10/23/25 Tr. 101:2-9 (Plaintiffs' closing argument); *see also id.* at 103:1-4 ("You've got to get the total picture. [Dr. Williams] never talked to Debra Geathers. He never talked to Glenn Kennedy. He never talked to teammates about him."). As counsel's closing argument continued:

> They all get confusing, but what the NCAA experts all have in common is they ain't never talked to them… They never talked to Debra Geathers. They never talked to his teammates…. So when it says that if you decide the reasons given in support of the opinion are not sound, if they've given you a half-assed picture, you can give it a half-assed value. Because that's what they did. They did not give you the full picture because they didn't even try to go out and get the full picture.

Id. at 103:12-25.

Due to the Court's ruling, the NCAA was unable to effectively respond to this argument by emphasizing that Mr. Geathers has seven siblings and three sons, yet Plaintiffs called none of these witnesses to testify on his behalf. Plaintiffs' failure to call these family members bears directly on the issue of whether Mr. Geathers in fact suffers from major neurocognitive impairment. Plaintiffs had the burden to prove that Mr. Geathers suffers from major neurocognitive impairment from playing college football, and the NCAA should have been permitted to challenge Plaintiffs' failure to carry this burden, including Plaintiffs' failure to offer testimony from close family members regarding Mr. Geathers' condition.

F. The Court Improperly Admitted Evidence Of CTE

Prior to trial, the NCAA moved to exclude the opinions of Plaintiffs' experts, Matthew Gaskins, Brian Greenwald, and Marshall White, that Robert Geathers had CTE. The NCAA also filed a motion *in limine* to exclude evidence and argument regarding CTE. The Court denied the NCAA's motions regarding CTE. *See* 2/5/24 Tr. at 103; Order, Sept. 29, 2025. The Court's rulings constitute an abuse of discretion which prejudiced the NCAA.

CTE is a pathological finding that can only be made on autopsy by examining a patient's brain under a microscope. Mr. Geathers is alive and cannot be diagnosed with CTE. CTE "is only diagnosable post-mortem" because it "requires examining sections of a person's brain under a microscope to see if abnormal tau proteins are present and, if so, whether they occur in the unique pattern associated with CTE." *In re NFL Concussion Injury Litig.*, 821 F.3d 410, 422 (3d Cir. 2016). CTE cannot be diagnosed clinically: "the only way currently to diagnose CTE is a post-mortem examination of the subject's brain." *Id*. at 441; *see also* 8/28/25 NCAA Br. In Support of MILs, Ex. 42 (Patricios, et al., *Consensus Statement of Concussion in Sport: the 6th International Conference on Concussion in Sport – Amsterdam, October 2022*, 57 Br. J. Sports Med. 695, 705 (2023)) (CTE "is not a clinical diagnosis").

For this reason, courts have precluded living plaintiffs like Mr. Geathers from introducing evidence and argument regarding CTE. In *Onyshko v. NCAA*, the trial court precluded plaintiffs from introducing opinion testimony that Matthew Onyshko, a former college football player, had CTE. *See Onyshko v. NCAA*, No. 2014-3620, 2019 WL 4131852, at *9 (Pa. Com. Pl. Apr. 12, 2019). In excluding this testimony under *Frye*, the *Onyshko* court observed that CTE is an "autopsy diagnosis" and concluded that the relevant literature established that CTE could only be diagnosed post-mortem through autopsy.[6] *Id.* at *11. Two more trial courts followed suit last year by excluding plaintiffs from introducing evidence and argument regarding CTE in *Schretzman v. NCAA* on August 5, 2024, and in *Berton v. NCAA* on October 15, 2024. *See* 8/28/25 NCAA Br. In Support of MILs, Ex. 1 (Order, August 5, 2025, *Schretzman v. NCAA*), Ex. 2 (Order, Oct. 15, 2024, *Berton v. NCAA*).

Plaintiffs' experts concede that CTE ***cannot be confirmed*** in a living person. *See, e.g.*, *id.* at Ex. 3 (Gaskins Rpt. at 15) ("The diagnosis of CTE, like many neurological conditions, cannot be confirmed until the cells can be observed under a microscope in a pathology lab."); *id.* ("Because the risks of performing a brain biopsy far outweigh its benefits, this means confirmation of these diagnoses ***cannot be done until after the person dies***.") (emphasis added); *id.* at Ex. 4 (Gordon Dep. at 25:14-19) ("Q. C.T.E., on the other hand, can only be diagnosed by autopsy after death, true? A. Yes."); *id.* at 26:25-27:2 ("So while definitively, you know, pathologically obviously it can only be determined after the person is no longer living."); *id.* at Ex. 5 (White Dep. at 41:5-7) ("In order to confirm [CTE] pathologically, you have to have an autopsy…").

The NCAA's experts also agree: CTE can only be diagnosed post-mortem through autopsy of the brain. *See* 8/28/25 NCAA Br. In Support of MILs Ex. 6 (Williams Rpt. at 36) ("[T]here are

[6] This decision was challenged on appeal and affirmed in all respects. *See Onyshko v. NCAA*, No. 1611 WDA, 2021 WL 73954 (Pa. Super. Jan. 8, 2021), *reargument denied* (Mar. 17, 2021), *appeal denied*, 262 A.3d 1249 (Pa. 2021).

still no generally accepted criteria for physicians to make a clinical diagnosis of CTE. An autopsy remains necessary for the pathological identification of tau accumulations consistent with CTE[.]"); *id.* at Ex. 7 (Barr Rpt. at 10) ("With respect to CTE, it is a neuropathological condition that can only be diagnosed post-mortem via autopsy… The diagnosis of CTE cannot be made in a living individual. There are no generally accepted tools for diagnosing CTE definitively in trauma victims prior to death… At this point, it is not possible to define CTE clinically with confidence."); *id.* at Ex. 8 (Milano Rpt. at 8) ("Chronic traumatic encephalopathy (CTE) is the subject of active study, but the research of this disorder is in its early stages. CTE is a pathologic diagnosis, meaning its diagnosis is based on what abnormalities are seen in the brain at autopsy or based on the examination of brain tissue. There is no currently accepted clinical criteria to diagnose a patient with CTE in living adults and we do not yet understand its clinicopathologic correlations."); *id.* at Ex. 9 (Sze Rpt. at 11) ("[I]t is well-established in the scientific community that CTE can only be diagnosed post-mortem, namely at autopsy.").

As a result, CTE is not a generally accepted clinical diagnosis for living patients, and any testimony that Mr. Geathers has CTE should have been excluded under Rule 702. *See* SCRE 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise"); *see also State v. Wallace*, 892 S.E.2d 310, 313 (S.C. 2023) (Under Rule 702, expert testimony must (1) assist the trier of fact, (2) be provided by a qualified expert, and (3) be based on reliable methods or principles).

The Court's rulings on CTE allowed Plaintiffs to present expert testimony that Mr. Geathers has CTE, a condition that Mr. Geathers cannot be diagnosed as having, and that Mr.

Geathers' CTE was caused by playing college football. *See* Testimony of Greenwald (10/15/25), Gaskins (10/16/25), White (10/16/25). This evidence was unfounded, unreliable, and inadmissible speculation. *See, e.g.*, *Turner v. Am. Motorists Ins. Co.,* 180 S.E. 55, 57 (S.C. 1935) (scintilla of evidence on which case should be sent to the jury must be real, material, pertinent, and relevant evidence, and not speculative and theoretical deductions); *id.* at 56 ("The meaning of the rule is that there must be some evidence arising out of the testimony which elucidates the issues of fact, and which enables the jury to form an intelligent conclusion. It does not authorize the admission of speculative, theoretical, and hypothetical views."). The admission of this evidence prejudiced the NCAA at trial because the jury necessarily credited Plaintiffs' expert testimony regarding CTE when it found that the NCAA's negligence proximately caused Mr. Geathers' injuries.

G. The Court Improperly Admitted Evidence Of TES

Prior to trial, the NCAA moved to exclude the opinions of Plaintiffs' experts that Mr. Geathers has TES. The NCAA also moved *in limine* to exclude evidence and argument regarding TES. The Court denied the NCAA's motions, finding that the issue of whether Mr. Geathers has TES is a matter for the jury. *See* 2/5/24 Tr. at 103; Order, Sept. 29, 2025. The Court's rulings on TES constitute error which prejudiced the NCAA.

TES is not a generally accepted clinical diagnosis. Instead, scientific researchers formulated TES as a ***research*** tool. The purpose of TES is to establish uniform criteria to select living patients for ongoing research studies to identify whether there are, in fact, any clinical symptoms of CTE.

TES was first conceptualized in 2014. *See* 8/28/25 NCAA Br. In Support of MILs, Ex. 10 (Montenigro, et al., *Clinical subtypes of chronic traumatic encephalopathy: literature review and proposed research diagnostic criteria for traumatic encephalopathy syndrome*, 8 Alzheimer's Research & Therapy 68 (2014)). In 2021, the National Institute of Neurological Disorders and

Stroke (NINDS) evaluated the 2014 criteria, discarded them as unreliable, and identified the need to reassess the criteria and "develop evidence-informed, expert consensus **research diagnostic criteria** for traumatic encephalopathy syndrome (TES)." *See id.* at Ex. 11 (Katz, et al., *National Institute of Neurological Disorders and Stroke Consensus Diagnostic Criteria for Traumatic Encephalopathy Syndrome*, 96 Neurology 848 (2021) (emphasis added)).

As the authors of the 2021 NINDS criteria stated:

> The criteria are meant for use in research settings to facilitate investigations into the clinical features associated with CTE pathology and to fill other knowledge gaps, including the development of biomarkers for antemortem diagnosis of CTE.

Id. at 860. The purpose behind the TES research criteria is to investigate whether there are clinical symptoms associated with CTE (which also further confirms why a diagnosis of CTE should have been excluded). *See id. at* Ex. 6 (Williams Rpt. at 37-40, 42-43) ("It bears reiterating, however, that the most recently proposed NINDS criteria are limited to proposed use for diagnosing TES in research settings and are not for use in diagnosing CTE in a clinical setting… TES is only for research purposes and not clinical or diagnostic purposes and Mr. Geathers does not even meet the research criteria for inclusion into TES…"); *id.* at Ex. 7 (Barr Rpt. at 10) ("With respect to TES, while diagnostic criteria have been developed to help define it, such criteria at present are meant for use in research settings to facilitate investigations, and are not generally accepted for use in diagnosing TES clinically... [T]here is no scientific or methodological basis for the clinical diagnosis of TES that have been offered as an explanation for Mr. Geathers' reported cognitive and behavioral decline."); *id.* at Ex. 8 (Milano Rpt. at 9, 12-13) ("TES has been proposed as research criteria to further study CTE… TES is not designed to be used clinically because researchers are still studying whether the symptoms in this syndrome are caused by CTE pathology or not.").

Because TES is not a generally accepted medical condition, any testimony that Mr.

Geathers has TES should have been excluded under Rule 702. *See* SCRE 702. By allowing evidence of TES, the Court permitted Plaintiffs to present testimony that Mr. Geathers has TES, which was caused by playing college football. *See* Testimony of Greenwald (10/16/25), White (10/16/25). This testimony misled the jury to believe that TES is a recognized medical condition that Mr. Geathers can be diagnosed with, as opposed to a research principle. The admission of this evidence prejudiced the NCAA at trial because the jury necessarily credited Plaintiffs' expert testimony when it found that the NCAA's negligence proximately caused Mr. Geathers' injuries.

H. The NCAA Improperly Admitted Legal Opinion Testimony From Fact And Expert Witnesses

Prior to trial, the NCAA moved to exclude the opinions of Plaintiffs' experts to the extent they offered improper legal conclusions. In ruling on the NCAA's motions, the Court noted that Plaintiffs' experts were not permitted to testify regarding legal issues, like duty and breach. *See* 2/5/24 Tr. at 108-10, 117-19. The NCAA's Motion *in Limine* No. 36 sought to preclude all expert and other witness testimony as to whether a legal duty exists or as to any other legal conclusion in this case. The Court denied this motion, finding that "such evidence is appropriate for presentation in the Plaintiff's case." Order, Sept. 29, 2025. At trial, the Court permitted Plaintiffs to present fact and expert testimony regarding the NCAA's legal duty to student athletes like Mr. Geathers, in violation of South Carolina law.

Expert testimony on issues of law is inadmissible. *Dawkins v. Fields*, 580 S.E.2d 433, 437 (S.C. 2003) (holding that the trial court properly refused to consider an expert affidavit because it primarily contained legal arguments and conclusions); *O'Quinn v. Beach Assocs.*, 249 S.E.2d 734, 739-40 (S.C. 1978) (where expert testimony was offered to establish a conclusion of law, the court held that the trial court properly excluded testimony because that was within exclusive province of the trial court); *Carter v. Bryant*, 838 S.E.2d 523, 531 (S.C. Ct. App. 2020) (affirming trial

court's exclusion of plaintiff's expert's testimony as legal opinion). This includes expert testimony regarding the existence of the NCAA's legal duty, if any, to student athletes like Mr. Geathers. *See, e.g.*, *Dawkins*, 580 S.E.2d at 437 (citing *Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir. 1997)) (the court disallowed a legal expert's opinion on whether corporate officers and directors breached fiduciary duties because "such testimony is a legal opinion and inadmissible."). The same holds true for non-experts.

The Court did not decide whether a duty existed before trial but rather left the question of duty for the jury. The Court's erroneous ruling permitted Plaintiffs to present opinion testimony from its expert Dr. Ridpath (who is not even a lawyer) on the question of whether the NCAA had a legal duty to protect the health and safety of Robert Geathers. *See* Testimony of Ridpath (10/17/25). Over the NCAA's objections,[7] the Court also permitted Plaintiffs to present testimony from NCAA employees regarding the NCAA's alleged duties to student athletes, whether student athletes can rely on the NCAA for health and safety information, whether student athletes are "intended beneficiaries" of the health and safety rules enacted by the FRC, whether student athletes are "intended beneficiaries" of the work of CSMAS, whether student athletes are intended beneficiaries of the fiduciary responsibility the NCAA Board of Governors owe to the member schools. *See* Deposition Designation Testimony of Emmert, Parsons, Gronau, and Klossner. In closing, Plaintiffs referenced these improper legal conclusions to assert that NCAA owed a duty to student athletes like Robert Geathers. *See* 10/23/25 Tr. at 22:19-23:2 (student athletes are "the ultimate beneficiaries" of the FRC and CSMAS); *id*. at 24:2-7 ("There were many, many different depositions and trial testimony. They admit repeatedly the NCAA was founded to keep college athletes safe. That's what it's supposed to do. So all those officers, even the president, admitted

[7] *See* 10/17/25 Defendant's Trial Objections To Plaintiffs' Deposition Designations; 9/23/25 Defendant's Supplemental Objections To Plaintiffs' Deposition Designations.

that they have a duty.")

This testimony constitutes inadmissible legal opinions, to which the witnesses are not competent to testify. The Court's improper admission of this evidence is deemed prejudicial as a matter of law. *Mali v. Odom*, 367 S.E.2d 166, 170 (S.C. Ct. App. 1988) ("[T]he admission of incompetent evidence having some probative value upon a material issue of fact in the case is ordinarily presumed to be prejudicial."). In any event, these improper legal opinions influenced the verdict and prejudiced the NCAA, as the jury found, in the absence of any evidence regarding a voluntary undertaking, that the NCAA assumed a duty to protect the health and safety of Robert Geathers.

I. The Court Erroneously Admitted Opinion Evidence That The NCAA Valued The Business Of Football Over The Safety Of Student Athletes

Prior to trial, the NCAA moved *in limine* to prevent Plaintiffs' experts from offering opinions regarding the NCAA's intentions and motivations, including accusing the NCAA of intentionally failing to act to protect student athletes and/or emphasizing profits over health and safety. The Court denied the NCAA's motion, finding that "such evidence is permissive for the Plaintiff's experts' consideration." Order, Sept. 29, 2025. Based on this ruling, the Court permitted Plaintiffs' expert, Dr. Ridpath, to testify that NCAA valued the business of football over the safety of student athletes. *See* Testimony of Ridpath (10/17/25). The admission of the evidence constitutes an abuse of discretion which prejudiced the NCAA.

Dr. Ridpath's subjective opinion regarding the NCAA's perceived values or motivations is irrelevant to any issue presented at trial. It was also entirely speculative and provided no assistance to the jury. Instead, it was intended only to ignite the passions of the jury and cause unfair prejudice to the NCAA. Plaintiffs capitalized on this improper opinion testimony to the prejudice of the NCAA by repeatedly arguing that college football was a "product" that the NCAA valued over

health and safety of student athletes. *See*, *e.g.*, 10/23/25 Tr. 42:2-5 (closing argument) ("And what David Ridpath said, rightly so, big-time college football, it's a product. They're protecting their product. They love that stuff. They love those collisions. Those collisions put people in the seats…"); *id.* at 49:21-22 ("As Dr. Ridpath said, you're protecting the product, not the player…").

For these reasons, courts have repeatedly excluded similar editorializing and subjective commentary by experts. *See State v. Commander*, 721 S.E.2d 413, 420 (S.C. 2011) ("Of the many courts in other jurisdictions that have considered where to draw the line in these cases, we tend to agree with those courts that have found that expert testimony addressing the state of mind or guilt of the accused is inadmissible.") (criminal case); *see also SEC v. Ambassador Advisors, LLC*, 576 F. Supp. 3d 250, 261 (E.D. Pa. 2021) ("Experts may not testify to a party's state of mind."; "Expert testimony as to intent, motive, or state of mind offers no more than the drawing of an inference from the facts of the case... and permitting expert testimony on this subject would be merely substituting the expert's judgment for the jury's and would not be helpful to the jury."); *Tyree v. Boston Scientific Corp.*, 54 F. Supp. 3d 501, 553, 564 (S.D. W.Va. 2014) (noting that "defendant's knowledge, state of mind, or other matters related to corporate conduct and ethics are not appropriate subjects of expert testimony because opinions on these matters will not assist the jury"); *In re C.R. Bard, Inc.*, 948 F. Supp. 2d 589, 607 (S.D. W.Va. June 2013) ("To the extent that Dr. Altenhofen might opine on Bard's knowledge, motive, or intent based on corporate documents, such opinions are not properly the subject of expert testimony because these are lay matters."); *In re Ethicon, Inc. Pelvic Repair Sys. Prod. Liab. Litig.*, MDL No. 2327, 2016 WL 8788207, at *7 (S.D. W. Va. Aug. 26, 2016) (holding that state-of-mind and legal conclusion expert testimony is not appropriate and such testimony "usurp[s] the jury's fact-finding function"). Permitting these improper, irrelevant, and inflammatory opinions influenced the verdict and

prejudiced the NCAA.

J. The Court Erroneously Admitted Evidence Of Injuries To Other Players And Failed To Enforce Its Ruling On Other Settlements And Lawsuits

The NCAA's Motion *in Limine* No. 16 sought to preclude Plaintiffs from introducing evidence and argument regarding injuries to other college football players and other lawsuits and settlements. While the Court precluded evidence of other settlements and lawsuits, it found that evidence of injuries of other players was relevant at trial. *See* Order, Sept. 29, 2025. Based on this ruling, Plaintiffs offered testimony from Glenn Kennedy, a former teammate of Robert Geathers at S.C. State, Harry Carson, who played at S.C. State years before Mr. Geathers, and Keith Moore, who played football at entirely different school during a different time period, regarding the injuries they sustained playing football. *See* Testimony of Moore (10/14/25), Carson (10/15/25), Kennedy (10/15/25). The Court's admission of this evidence constitutes error that prejudiced the NCAA.

To succeed on their claims, Plaintiffs had to prove that NCAA's alleged negligence proximately caused Mr. Geathers' condition. The fact that other players suffered different injuries during different time periods and in different circumstances has no bearing on whether Mr. Geathers was injured as a result of playing college football. Even if this evidence had some minimal relevance, any relevance was substantially outweighed by the dangers of undue prejudice to the NCAA. The Court's admission of evidence regarding injuries to other players predisposed the jury to view the NCAA as a "bad actor" and created a substantial risk that the jury would base its verdict on bias or emotion against the NCAA, not the specific facts of the case. This evidence also confused the issues at trial and misled the jury to believe that Mr. Geathers was more likely to have been injured playing college football because other college football players had suffered injuries playing college football. The erroneous admission of evidence, therefore, influenced the

jury's verdict and caused prejudice to the NCAA.

The Court also erred when it failed to enforce its ruling that evidence of other settlements and lawsuits was inadmissible. Plaintiffs' expert witness, Dr. Ridpath, testified on direct examination that the NCAA made no effort to enforce health and safety rules "until the *Arrington* Settlement." *See* Testimony of Ridpath (10/17/25). Although the Court sustained the NCAA's objection, it did not provide a limiting instruction to the jury. This uncured reference to the "*Arrington* Settlement" unduly prejudiced the NCAA by improperly suggesting that the NCAA's settlement of another lawsuit makes it more likely the NCAA is liable for negligence in this case. *See generally* SCRE Rule 404(b) ("Evidence of other… acts is not admissible to prove the character of a person in order to show action in conformity therewith."); *Branham v. Ford Motor Co.,* 701 S.E.2d 5, 19 (S.C. 2010) (evidence of similar acts has the potential to be exceedingly prejudicial).

IV. A NEW TRIAL IS WARRANTED BECAUSE THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE

The Court should exercise its discretion as the thirteenth juror to hang the jury and grant a new trial absolute because the jury's answers to the special verdict form are not justified by the evidence presented at trial. In its role as the thirteenth juror, under Rule 59, the Court should grant a new trial absolute because Plaintiffs failed to adduce evidence sufficient for a reasonable jury to conclude that (1) the NCAA unreasonably increased the risks of harm of head impacts to Mr. Geathers over and above the risks inherent in playing football; (2) the NCAA voluntarily assumed a duty to protect the health and safety of Mr. Geathers; and (3) the NCAA negligently breached its alleged duty to Mr. Geathers proximately causing him damages.

A. Standard Of Review For Weight Of The Evidence Challenges

"South Carolina's thirteenth juror doctrine is well established as the standard for granting

a new trial in state law actions." *Norton v. Norfolk Southern Ry. Co.*, 567 S.E.2d 851, 854 (S.C. 2002). The Thirteenth Juror doctrine is so named "because it entitles the trial judge to sit, in essence, as the thirteenth juror when he finds 'the evidence does not justify the verdict,' and then to grant a new trial based solely 'upon the facts.'" *Id.* (citing *Folkens v. Hunt*, 387 S.E.2d 265, 267 (S.C. 1990)). In sitting as the Thirteenth Juror, the Court "need not view [the evidence] in the light most favorable to the opposing party." *McEntire v. Moore Exterminating Servs., Inc.*, 578 S.E.2d 746, 748 (S.C. Ct. App. 2003). Put differently, if the Court finds, in its discretion, that the verdict is "contrary to the fair preponderance of the evidence," then "the trial court should not hesitate to set aside the verdict in his favor." *Id.*

B. The Evidence Does Not Support An Increased Risk of Harm

The evidence does not justify the jury's "Yes" answer to the question "Did the NCAA unreasonably increase the risk of harm of head impacts to Robert Geathers over and above the risks inherent in playing football?" At trial, Plaintiffs identified no NCAA act nor omission that increased the risks of head impacts beyond those inherent in football—let alone that the NCAA did so *unreasonably*.

On the contrary, the evidence at trial repeatedly established that the risk of head injuries is inherent in football (*see* Testimony of Moore (10/14/25), Jeffries (10/14/25), Carson (10/15/25), Kennedy (10/15/25), Pough (10/21/25 Tr. at 238:20-239:1)), and the NCAA's member institution committees took substantial steps to decrease the risk. Indeed, Plaintiffs' own expert, Dr. David Ridpath confirmed that throughout the 70-year history of the NCAA between its inception and Mr. Geathers starting at S.C. State, the NCAA Football Rules Committee passed dozens of rules which improved the safety of the game for college football players. *See* Testimony of Ridpath (10/17/25). The evidence at trial also showed that CSMAS consistently compiled medical information and made recommendations to the member institutions, including recommendations specifically aimed

at physicians and athletic trainers being on the sidelines for practices and games. *See* DX 96, 108, 110, 300, 329.

Plaintiffs' theory insisted the NCAA *increased* risk by not *decreasing* risk even more. *See* 10/23/25 Tr. at 107:9-11 (Plaintiffs' closing argument) ("[H]ow they heightened the risk was not what they did because they didn't do much, but it's what they didn't do."). This point fails for two reasons. First, the exception to the primary implied assumption of risk requires an affirmative step taken by an actor to create more risk than was inherent in an activity. *See, e.g.*, *Fortier*, 45 Cal. App. 4th at 437 ("No matter the level of play," the risks of football "always include accidental collisions between offensive and defensive players vying for possession of a passed football."). That affirmative step is what creates the duty; non-conduct does not cut it.

But that is all Plaintiffs introduced and argued. According to Plaintiffs, the NCAA should have reduced or mitigated inherent risks by mandating concussion protocols or delivering generalized warnings. That is not an increase in risk. At best, the evidence presented by Plaintiffs is a policy disagreement about whether and how to ***lessen*** risks that are part of the sport. The record confirms that S.C. State staffed personnel and followed medical processes at games and practices (*see* Testimony of Jeffries (10/14/25), Pough (10/21/25 Tr. at 233:23-236:5), and there is no evidence of an NCAA directive, rule, or omission that augmented risks beyond the inherent risks of football. As the thirteenth juror, the Court is free to weigh the evidence and conclude that Plaintiffs' proof does not support the jury's finding of increased risk.

Second, the Plaintiffs do not argue that Mr. Geathers developed dementia as a result of concussions. They could not argue that, because the evidence established that concussions are functional—not structural—injuries from which players heal completely. As Plaintiffs' expert Dr. Michael Lipton explained, the current understanding is that CTE is caused by repeated hits

that do not rise to the level of concussions. *See* 10/20/25 Tr. at 53:25-54:3 ("And that's because chronic traumatic encephalopathy is *not* from one or even a few severe events. It's the *cumulative process* of multiple impacts."). He further explained that this is a new understanding of what might cause CTE and the dementia of which Mr. Geathers complained. *Id.* at 57:18-23. As a matter of law, the NCAA could not have unreasonably increased the risk of repeated, subconcussive hits when neither the NCAA nor any scientist knew or believed in 1977-1980 (when Mr. Geathers played football at S.C. State) that repeated, subconcussive hits could lead to CTE. And, as a matter of fact, the Plaintiffs did not introduce any evidence that the NCAA took any step (let alone an unreasonable one) to increase the number or frequency of such hits. To the contrary, the evidence established that in the years before Mr. Geathers played college football, the NCAA passed rules specifically designed to *decrease* the number of head hits (i.e., spearing), passed rules limiting the number of practices players could play, and passed a rule allowing for medical timeouts without loss of a team's timeout.

In all, under the law in South Carolina, and on this record, the jury's verdict on Question 1 cannot stand.

C. The Evidence Does Not Support A Voluntary Undertaking

The evidence does not justify the jury's "Yes" answer to the question "Did the NCAA voluntarily assume a duty to protect the health and safety of Robert Geathers?" South Carolina confines voluntary-undertaking duties to the scope of the actual undertaking and generally to those to whom the undertaking is directed. The record at trial shows the NCAA's health-and-safety activities were limited to collecting and disseminating information to member institutions. *See* DX 2.9, 2.16, 2.94; Testimony of Jeffries (10/14/25), Ridpath (10/17/25). The member institutions, in this case S.C. State, retained for themselves the direct responsibility for the health and safety of their student athletes and to direct their care. *Id.* South Carolina only recognizes a duty based on a

voluntary undertaking when the defendant volunteers services specifically for the benefit of the plaintiff, not volunteering services to a different person or entity (here, the member institutions). *Oulla*, 831 S.E.2d at 457-58.

Moreover, Plaintiffs did not introduce any evidence whatsoever that Mr. Geathers relied on NCAA undertakings or that any NCAA undertaking increased his risk. *See id.* (quoting Restatement (Second) of Torts § 323 (1965)). The thirteenth juror role permits the Court to weigh credibility and the scope of any undertaking. On the evidence presented at trial, the plaintiffs did not establish any sort of voluntary assumption of a duty.

D. The Evidence Does Not Support A Negligent Breach Or Proximate Cause

The evidence does not justify the jury's "Yes" answer to the question "Did the NCAA negligently breach their duty to Plaintiff Robert Geathers proximately causing him damages?" At trial, the evidence showed that the member institution's medical staff managed injury evaluation and return-to-play decisions, with physicians and certified athletic trainers present and in control. Plaintiffs cited no prevailing standard during 1977–1980 that required the NCAA to implement nationwide concussion protocols or to warn student athletes directly. Plaintiffs also cited no prevailing standard violated by S.C. State with respect to the treatment of any injuries.

More to the point, Plaintiffs offered no proof that Mr. Geathers sustained a diagnosed concussion or significant head injury in college that would have triggered a concussion protocol. This alone renders the verdict unreasonable because the alleged absence of a mandatory protocol could not be a but-for cause of his claimed condition if he would not have been subject to it. Plaintiffs did not link any specific NCAA action or inaction to a particular injury or medical decision. Their theory rested instead on cumulative head impacts inherent in football.

Finally, the state of medical knowledge undercuts foreseeability for the 1977–1980 period. The undisputed evidence at trial was that CTE was not identified until 2005 and the TES criteria

were not published until 2021. As the thirteenth juror, the Court may conclude that Plaintiffs' proof of breach and proximate cause was insufficient and that the "Yes" to Question 3 is not justified by the evidence.

For these reasons, the Court should exercise its discretion as the thirteenth juror and grant a new trial absolute because the jury's answers to the special verdict form are not justified by the evidence presented at trial.

V. THE DAMAGES AWARD SHOULD BE REDUCED BECAUSE IT IS EXCESSIVE

The trial court has the authority to grant a new trial when it finds the amount of the verdict to be inadequate or excessive. *Jolly v. Fisher Controls Int'l, LLC*, 905 S.E.2d 380, 386 (S.C. 2024). "When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *Nestler v. Fields*, 824 S.E.2d 461, 464-65 (S.C. Ct. App. 2019) (quoting *Riley v. Ford Motor Co.*, 777 S.E.2d 824, 828 (S.C. 2015)).

"When the verdict indicates that the jury was unduly liberal or conservative in its view of the damages, the trial judge *alone* has the power to [alter] the verdict by the granting of a new trial *nisi.*'" *Id.* (quoting *Riley*, 777 S.E.2d at 828). "A motion for new trial *nisi remittitur* asks the trial court to reduce the verdict because the verdict is merely excessive." *Smalls v. S.C. Dep't of Educ.*, 528 S.E.2d 682, 686 (S.C. Ct. App. 2000).

"However, when the verdict is so grossly excessive or inadequate that the amount awarded is so shockingly disproportionate to the injuries as to indicate the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence, it becomes the duty of the trial judge and this Court to set aside the verdict absolutely." *Nestler*, 824 S.E.2d at 464-65

(quoting *Riley*, 777 S.E.2d at 828); *see also Smalls*, 528 S.E.2d at 686 ("If the amount of the verdict is *grossly* inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute, not a new trial nisi remittitur.").

The terms "passion and prejudice" do not "necessarily imply bad faith, wrongful purpose, or moral delinquency," but rather, results when "a verdict ... is against the overwhelming weight of the evidence." *Beasley v. Ford Motor Co.*, 117 S.E.2d 863, 867 (S.C. 1961). "Ordinarily the only means of discovering the existence of passion and prejudice as influencing the verdict is by comparing the amount of the verdict with the evidence before the trial court." *Nelson v. Charleston & W. C. Ry. Co.*, 98 S.E.2d 798, 802 (S.C. 1957). However, "[t]he size of the verdict alone may show that it must have been the result of passion or prejudice[.]" *Id.*

Here, a new trial should be granted because the jury's verdict is grossly excessive and could not be reached without the influence "of passion, caprice, prejudice, partiality, corruption or some other improper motives" and is "against the overwhelming weight of the evidence." Plaintiffs' only evidence of damages was testimony from Sarah Lustig and Oliver Wood regarding costs of a life care plan to cover future medical costs for Robert Geathers and the value of "retrospective care" previously provided by Debra Geathers to Mr. Geathers. *See* Testimony of Lustig (10/17/25), Wood (10/17/25). This testimony showed that the present-day value of the life care plan for Mr. Geathers is $6,626,606, while the value of the services previously provided by Mrs. Geathers was $3,974,597. *See* Testimony of Wood (10/17/25). Despite this evidence, the jury awarded Mr. Geathers $10 million and awarded Mrs. Geathers $8 million. The jury's damages awards cannot be reconciled with the evidence and represent an undeniable shock to the conscience. The Court, therefore, should find that the jury's damages awards were influenced by passion, caprice,

prejudice, or other considerations not found in the evidence and set aside the verdict completely.[8]

Should the Court not order a new trial absolute, it should, at a minimum, exercise its power to order a new trial *nisi remittitur*. In light of Plaintiffs' evidence, the Court should remit the verdict in favor of Mr. Geathers in the amount of $6,626,606, representing the present-day value of the life care plan, and remit the verdict in favor of Mrs. Geathers in the amount of $3,974,597, which is the value of the services previously provided by Mrs. Geathers to Mr. Geathers.[9]

VI. CONCLUSION

For the reasons set forth above, the Court should grant the NCAA's Motion For New Trial and order a new trial on all issues.

[8] The NCAA submits that the jury's determination of 47 occurrences further demonstrates that the jury's damages awards were influenced by passion, caprice, prejudice, or other considerations not found in the evidence.

[9] The NCAA has contemporaneously filed a separate motion to enforce the statutory caps on damages under the Solicitation of Charitable Funds Act.

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Dated: November 2, 2025

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2025, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and electronic service.

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