IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ENOCK PLANCHER, as Personal Representative of the ESTATE OF ERECK MICHAEL PLANCHER, II, Deceased,

Plaintiff,

Case No.: 2009-CA-007444-0

v.

UNIVERSITY OF CENTRAL FLORIDA BOARD OF TRUSTEES ("UCF TRUSTEES") and UCF ATHLETICS ASSOCIATION, INC. ("UCFAA"),

Defendants.
_____/

DEFENDANT'S MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT/MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, MOTION FOR NEW TRIAL, AND MOTION FOR REMITTITUR

COMES NOW the Defendant, UCF ATHLETICS ASSOCIATION, INC. ("UCFAA"), by and through its undersigned counsel, and files these Motions under Fla. R. Civ. P. 1.530, 1.480, and Fla. Stat. 768.74 as more fully articulated herein, and states:

1. On June 30, 2011, the jury returned a verdict for Plaintiff ENOCK PLANCHER, as Personal Representative of the ESTATE OF ERECK MICHAEL PLANCHER, II, Deceased ("PLANCHER"), finding UCFAA negligent for the alleged wrongful death of Ereck Plancher ("Ereck"), and awarding statutory survivors PLANCHER and Gisele Plancher compensatory damages in the amount of $5,000,000.00 each, for a total verdict of $10,000,000.00 against UCFAA. No punitive damages were awarded.

2. The verdict is against the manifest weight of the evidence. It is also excessive.

3. Accordingly, pursuant to Fla. R. Civ. P. 1.480, UCFAA moves to set aside the verdict and any judgment thereon and to enter judgment in accordance with its motions for directed verdict made during trial.

4. In the alternative, pursuant to Fla. R. Civ. P. 1.470 and 1.480, UCFAA moves this court to enter judgment, notwithstanding a jury verdict to the contrary, if the court determines that there is no legally sufficient evidentiary basis for the jury's findings.

5. In the alternative, pursuant to Fla. R. Civ. P. 1.530, UCFAA moves for a new trial as to liability and compensatory damages.

6. Without waiving its request for a judgment in accordance with its motions for directed verdict, judgment notwithstanding a verdict and its motion for a new trial, UCFAA also submits that it is entitled to a remittitur in accordance with Fla. Stat. §768.74.

I. MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTIONS FOR DIRECTED VERDICT

7. PLANCHER sued UCFAA for the (allegedly wrongful) death of Ereck during conditioning drills that occurred March 18, 2008, at UCFAA's Nicholson Fieldhouse. Plancher claimed that no water and trainers were present at the conditioning drills, and in his case-in-chief, put on witnesses who testified as much. In UCFAA's case, UCFAA put on witnesses who refuted such testimony, and who swore that water and trainers were present, specifically including a former student trainer, who testified that she was present during the workout, never heard any order to leave the

Fieldhouse, never left the Fieldhouse, and provided water to players in the Fieldhouse at a player's request.

8. The Plaintiff also put on medical and other expert testimony tending to show that: the March 18, 2008, workout was not appropriate for Sickle Cell Trait ("SCT")-positive athletes like Ereck; Ereck suffered "a sickling collapse" which was avoidable but not avoided; that the "sickling collapse" was not responded to either timely or appropriately; and that Ereck died as a result. Plaintiff also elicited some testimony tending to suggest—but not proving—that Ereck was not told by UCFAA that he had SCT. In this regard, PLANCHER offered evidence that UCFAA did not follow its own procedures in documenting the file to show that Ereck had been told that he had a positive SCT test.

9. At the close of PLANCHER's case, UCFAA moved for directed verdict, arguing that UCFAA was entitled to a directed verdict because PLANCHER had not proven his negligence claims since they were based on impermissibly stacked inferences; his claims were unproven since UCFAA had told Ereck that he had SCT and/or had proven it was of no legal significance whether they had told him; that Plaintiff had not proven that SCT could kill someone nor the mechanism or symptoms for or of same; and, most importantly, Ereck had died from Fibro Muscular Dysplasia of the sinoatrial nodal artery ("FMD").[1] The motion was denied, with the Court finding that PLANCHER had put on sufficient evidence to go to the jury.

[1] Thus, there was an alternate, equally plausible cause of death, with each inference (SCT, or FMD) being at least equally plausible.

10. UCFAA then put on its case, and called witnesses who testified that it was almost certain that Ereck was told by UCFAA's employee Mary Vander Heiden that he had SCT; in any event, the trait did not cause his death, but rather, FMD of the SA node artery did; even so, UCFAA and its trainers and coaches knew how to react to an alleged "sickling" event and did react in a timely manner to Ereck's emergency event; the head trainer, head coach, and strength coach all knew that Ereck was SCT-positive and reacted appropriately in terms of exercise modification and emergency management; and water and trainers were always available in the Nicholson Fieldhouse and were present and available on March 18, 2008, the day of Ereck's death.

11. At the end of its case, UCFAA renewed its motion for directed verdict on the negligence/wrongful death claim (and also moved for a directed verdict on the punitive damages claim), and the Court once again heard argument. The Court ultimately denied UCFAA's motions and presented the case to the jury.

12. UCFAA adopts and incorporates its motions for directed verdict made in open court, and its previously-filed Memorandum in Support of Directed Verdict Motion. For the reasons stated in those motions, final judgment should be entered in favor of UCFAA. UCFAA also adopts its earlier-filed Motions for Summary Judgment on punitive damages, sovereign immunity, and the waiver and release issues.

13. In determining a motion for directed verdict, a trial court is to view the evidence and all reasonable inferences in a light most favorable to the non-moving party; however, a trial court must direct a verdict when the evidence presented at trial and all reasonable inferences fail to prove a plaintiff's case. See Hartnett v. Fowler, 94 So. 2d 724, 725 (Fla. 1957). Woods v. Winn Dixie Stores, Inc., 621 So. 2d 710, 711

(Fla. 3d DCA 1993). Based on the evidence presented at trial, a jury could not lawfully render a verdict for PLANCHER against UCFAA, and as a result, this Court must direct a verdict for UCFAA which is entitled to judgment as a matter of law. Liggett Group, Inc. v. Davis, 973 So. 2d 467, 470 (Fla. 4th DCA 2007); See also Reaves v. Armstrong World Indus., Inc., 569 So. 2d 1307, 1309 (Fla. 4th DCA 1990).

14. When examining the evidence in a light most favorable to PLANCHER, the Court should enter a judgment in favor of UCFAA in accordance with its prior motions for directed verdict asserted at the close of Plaintiff's case and renewed at the close of the evidence. UCFAA is entitled to relief because Plaintiff did not carry his burden of proof as to his negligence/wrongful death claim.

15. The punitive damages claim, on which the jury found for UCFAA, is not expressly a subject of this Motion. However, the Defendant does not waive its objection to the punitive damages claim being part of the trial, as it colored the entire trial. Defendant would have called other and different witnesses without it. Plaintiff's own witnesses, and most notably expert Douglas Casa, Ph.D. testified in ways that directly contradicted the claim for punitive damages, and stated that water and trainers were available in the Fieldhouse on March 18, 2008. And Plaintiff basically abandoned the claim in closing argument, conceding that water and trainers were not ordered out of the Fieldhouse and were merely (according to PLANCHER, although not to UCFAA's witnesses) ordered away from the players. This was not the basis of the punitive damages claim; rather, the claim had always been premised upon the contention that water and trainers were "ordered out."

16. By allowing the punitive damages claim to remain in the case and go to the jury, the Court erroneously allowed the jury to "split the baby" and, in effect, render a punitive verdict. The punitive damages claim colored the entire case, including the verdict.

17. In order to sustain his negligence/wrongful death cause of action, PLANCHER bore the burden of demonstrating, by a preponderance of the evidence, that UCFAA's negligent actions or inactions caused Ereck's death as a result of SCT. PLANCHER failed to carry this burden and, accordingly, judgment for UCFAA is required.

18. "[A] claim of negligence requires the establishment of four elements in order for a claimant to prevail. The claimant must first demonstrate that the defendant owed a duty, or obligation, recognized by the law, requiring the [defendant] to conform to a certain standard of conduct, for the protection of others against unreasonable risks. Second, the claimant must establish that the defendant failed to conform to that duty. Third, there must be a reasonably close causal connection between the nonconforming conduct and the resulting injury to the claimant. Fourth, the claimant must demonstrate some actual harm." Williams v. Davis**,** 974 So. 2d 1052, 1056 (Fla. 2007) (citation omitted).

19. A cause of action for wrongful death is comprised of the same elements as a cause of action for negligence. See Coker v. Wal-Mart Stores, Inc., 642 So. 2d 774, 776 (Fla. 1st DCA 1994) ("Under Florida law, to state a cause of action for negligence, Coker was required to allege that: (1) Wal-Mart owed a legal duty that included within its ambit her husband, Billy Wayne Coker; (2) Wal-Mart breached that

duty; (3) the breach was a legal or proximate cause of her husband's death; and (4) Coker suffered damages as a result.") The second and third elements fail on PLANCHER's claim. He cannot prove that Ereck's death was proximately caused by anything UCFAA did or failed to do. Accordingly, UCFAA is entitled to a directed verdict on Plaintiff's wrongful death claim as a matter of law.

20. A verdict like this one cannot stand when it is based on the impermissible stacking of inferences that Ereck was not told he had SCT; if he had been told, he would have ceased playing football or realized that he was experiencing a "sickling" event and then even pulled himself from practice that day; either SCT, or football, caused or resulted in his death; and UCFAA is responsible for that death. The Plaintiff also supposes that Ereck looked a certain way, and that the way Ereck looked that day means specific medical treatment should have been provided targeted to SCT, yet none of the 80 players present recognized such a fact or called for a trainer earlier. Such speculation and conjecture are insufficient to establish causation, and amount to nothing more than an impermissible stacking of inferences. Petruska v. Smartparks-Silver Springs, Inc., 914 So. 2d 502, 505 (Fla. 5th DCA 2005); Reaves v. Armstrong World Indus., Inc., 569 So. 2d 1307, 1308-09 (Fla. 4th DCA 1990). Accordingly, UCFAA is entitled to entry of judgment in accordance with its motions for directed verdict.

II. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

21. In addition, UCFAA is also entitled to judgment notwithstanding the verdict in its favor for the same reasons stated herein in support of UCFAA's motions for directed verdict. A motion for judgment notwithstanding the verdict pursuant to Fla. R.

Civ. P. 1.480 is governed by the same standard as a motion for directed verdict. Stirling v. Sapp, 229 So. 2d 850, 852 (Fla. 1969); Cooper Hotel Servs., Inc. v. McFarland, 662 So. 2d 710, 712 (Fla. 2d DCA 1995). The Court must find that the record "conclusively demonstrates a total absence of facts or reasonable inferences to support the jury's verdict. Sunshine Bottling v. Tropicana Prods., 757 So, 2d 1231, 1232 (Fla. 3d DCA 2000); Easton-Babcock & Assoc. v. Fernandez, 706 So. 2d 916, 919 (Fla. 3d DCA 1998); Cooper Hotel Servs, Inc., Id., 662 So. 2d at 712; Woods v. Winn Dixie, Id., 621 So. 2d at 711; Stokes v. Ruttger, 610 So.2d 711, 713 (Fla. 4th DCA 1992). Here, no evidence or reasonable inferences exist to support PLANCHER's claims against UCFAA. Judgment notwithstanding the verdict should be entered in favor of UCFAA because the verdict is contrary to the manifest weight of the evidence

22. The manifest weight of the evidence established both that Ereck was told by Mary Vander Heiden that he had SCT, and that the trait did not cause his death. Coach George O'Leary said that she told him she told Ereck; she herself testified that she ordered two SCT tests for Ereck, and she would have told Ereck of the results, and is confident she did. The manifest weight of the evidence also established that the trait did not cause his death, but rather, FMD of the SA node artery (with up to a 90% occlusion) did. Even so, the evidence showed, UCFAA and its trainers and coaches knew how to react to a "sickling" event and did react in a timely manner to Ereck's emergency event; the head trainer, head coach, and strength coach all knew that Ereck was SCT-positive and reacted appropriately in terms of exercise modification and emergency management; the certified trainer on the field that day assumed every athlete was SCT-positive and acted accordingly; and water and trainers were always

available in the Nicholson Fieldhouse and were present and available on March 18, 2008.

23. Plaintiff put on no direct evidence—but only supposition—that Ereck's death was caused by UCFAA. There was *no* proof put on in the case that Ereck did not know he had SCT or that, taking that as true, if he had known, he would have reacted differently, would have quit playing football, would have pulled himself from that practice on March 18, 2008, or would be alive today. Simply put, there was no *evidence*, and only inference, that UCFAA caused Ereck's death. Accordingly, UCFAA is entitled to judgment notwithstanding the verdict.

III. MOTION FOR NEW TRIAL

24. If the Court does not grant UCFAA's motions for entry of verdict in accordance with UCFAA's motions for directed verdict or motion for judgment notwithstanding the verdict, UCFAA is entitled to a new trial because the jury's verdict is contrary to the law, was not supported by competent and substantial evidence, and fails to comport with the manifest weight of the evidence. Pierce v. Nicholson Supply Co., 676 So. 2d 70, 71 (Fla. 2d DCA 1996) ("Although a motion for new trial is addressed to the sound discretion of the trial court, the trial judge has a duty to grant such a motion when the jury has been influenced by extraordinary considerations, misled by the force and credibility of the evidence, or when the verdict fails to comport with the manifest weight of the evidence.") The verdict was also excessive. Collins v. Douglass, 874 So. 2d 629, 631 (Fla. 4th DCA 2004) ("A new trial may be ordered on the grounds that the verdict is excessive or inadequate when (1) the verdict shocks the judicial conscience or (2) the jury has been unduly influenced by passion or prejudice.")

25. The entire trial was erroneously predicated upon whether UCFAA had complied with a NATA consensus statement which ultimately concluded there is no evidence based proof that screening for SCT saves lives—yet Plaintiff was, in error, allowed to try UCFAA for the manner in which it screened Ereck for SCT.

26. Thus, a case based merely on anecdotal association, and lacking causative proof that SCT could even kill anyone—much less that it had killed Ereck—was allowed to go to the jury. The entire case was an impermissible stacking of inferences.

27. UCFAA argues, in the alternative to its motions for judgment notwithstanding the verdict and for judgment in accordance with motions for directed verdict, that it is entitled to a new trial pursuant to Fl. R. Civ. P. 1.530(a) for the reasons detailed below.

A. The Court Erred in Making a Pre-Trial Ruling that UCFAA Was Not Entitled to Sovereign Immunity, Could Not Put on Evidence that It was a Direct Support Organization, and Could not Limit its Liability for Torts, and In Not Allowing These Issues to be Tried.

28. The Court ruled prior to trial that Defendant UCFAA was not entitled to sovereign immunity subject to limited waiver in Florida Statute Section 768.28, and determined that this issue would not be decided at trial or submitted to the jury. This was in error.

29. The Florida Legislature has provided a limited waiver of the state's sovereign immunity for torts by enacting § 768.28, Fla. Stat., which states in part:

> Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the

> agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.
>
> § 768.28(1), Fla. Stat.

30. The statute defines "state agencies or subdivisions" as including "executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state, including **state university boards of trustees**; counties and municipalities; and **corporations primarily acting as instrumentalities or agencies of the state,** counties, or municipalities, including the Florida Space Authority." § 768.28(2), Fla. Stat. The statute also sets recovery limits against the state and its agencies and subdivisions as follows:

> Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $200,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to $100,000 or $200,000, as the case may be; and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature.
>
> § 768.28(5), Fla. Stat.

31. The University of Central Florida ("UCF" has ultimate authority and control over UCFAA and its operations, and thus UCFAA must be deemed a corporation primarily acting as an instrumentality or agency of the state pursuant to § 768.28(2), Fla.

Stat.[2] Prison Rehabilitative Indus. and Diversified Enter. v. Betterson, 648 So.2d 778, 780 (Fla. 1st DCA 1995); Shands Teaching Hosp. & Clinics, Inc. v. Lee, 478 So.2d 77, 79 (Fla. 1st DCA 1985). UCF and UCF Trustees' authority to control UCFAA arises from the Florida Constitution[3] and is further defined by Florida Statutes, UCF Regulations, UCFAA's Articles of Incorporation and Bylaws, NCAA Constitution and Bylaws, and the Intercollegiate Athletics Services Agreement between UCF and UCFAA. These sovereign powers and contractual authority, as well as the undeniable facts that UCFAA:

1) exists and operates at the pleasure and direction of UCF;

2) is funded primarily by UCF; and

3) is subject to the ultimate control and authority of Dr. John Hitt, President of UCF in his position as Chairman of UCFAA Board of Directors;

[2] Florida courts citing common law agency principles when interpreting § 768.28, Fla. Stat., often make the determination of whether an entity is an agent of the state based on the degree of control *retained* or exercised by the state or state agency over the entity. Stoll v. Noel, 694 So.2d 701, 703 (Fla. 1997). One Florida court deciding whether an entity was a corporation primarily acting as an instrumentality or agency of the state analyzed factors including legislative intent, statutory constraints, senate committee reports and *the existence of* control over the day-to-day operations of the entity. Shands Teaching Hosp. and Clinics, Inc. v. Lee, 478 So.2d 77, 79 (Fla. 1st DCA 1985). A concurring opinion from another Florida court determined that a corporation [can] be acting primarily as an instrumentality or agency of a sovereignly immune entity *without* that entity exercising actual control over the day-to-day operations of the corporation. Pagan v. Sarasota County Public Hosp., 884 So.2d 257, 270 (Fla. 2d DCA 2004).

[3] The authority for the creation of UCFAA by the UCF Board, which includes six citizen members appointed by the Governor of Florida and five citizen members appointed by the statewide Board of Governors of the state university system, is derived from Section 7, Article IX of the State Constitution and § 1001.74(2)(l), 1004.28, Fla. Stat.. Thus, the creation of UCFAA to act on behalf of UCF and UCF Board to further the best interests of the state university system would not have been possible if it were not for the Florida Legislature.

establish that UCFAA acts as an instrumentality or agency of the state under § 768.28(2), Fla. Stat. Betterson, 648 So.2d 778, 780 (Fla. 1st DCA 1995); Pagan v. Sarasota County Public Hosp., 884 So.2d 257 (Fla. 2d DCA 2004); Skoblow v. Ameri-Manage, Inc., 483 So.2d 809, 810-12 (Fla. 3d DCA 1986); Shands, 478 So.2d at 79.

32. As a matter of law, the United States District Court, Middle District of Florida, held that a university direct-support organization (the "Sun Dome") for the University of South Florida ("USF") was operated as an arm of the state and, therefore, entitled to Eleventh Amendment Immunity. Elend v. Sun Dome, Inc. et al., 2005 U.S. Dist. LEXIS 35264 *28 (M.D. Fla. 2005)(citing Regents of the Univ. of California v. Doe, 519 U.S. 425, 429 (1997) for the proposition that the Eleventh Amendment bars suits in federal court brought against ***state agents and instrumentalities***). USF's operation of the Sun Dome as a direct-support organization through USF's Trustees is virtually identical to UCF's operation of UCFAA as a direct-support organization through UCF's Trustees.

33. UCFAA was entitled to immunity and, pursuant to Fla. Stat. Sec. 768.28, it is further entitled to a cap on damages, limiting them to no greater and amount than $200,000.00, as further noted in the Motion for Remittitur, below. It was error for the Court not to allow this issue to be tried simply because it denied UCFAA's summary judgment motion on sovereign immunity, and that error requires a new trial.

B. The Court Erred in Not Allowing in Evidence of the Release of Liability nor the Medical Examination and Authorization Waiver Agreements.

34. On January 7, 2007, and April 10, 2007, 18-year-old Ereck executed Medical Examination and Authorization Waiver Agreements which contained a Release

of Liability paragraph.[4] Based upon the language contained within the Medical Examination & Authorization Waiver Agreements, PLANCHER should have been estopped from bringing a lawsuit against UCFAA. However, the Court denied UCFAA's summary judgment motion in this regard, then compounded that error by not letting the issue be tried, in effect holding that the issue had been decided against UCFAA as a matter of law, even though all the denial of a summary judgment motion should have done was deny a summary adjudication to UCFAA and allowed the matter to be tried.

35. The pertinent language contained within the Medical Examination & Authorization Waiver Agreement is located in paragraph M entitled, "Agreement to Participate," which states as follows:

> AGREEMENT TO PARTICIPATE
>
> I am aware that playing, practicing, training, and/or other involvement in any sport can be a dangerous activity involving many risks of injury, including but not limited to, the potential for catastrophic injury. I understand that the dangers and risks of playing, practicing, or training in any athletic activity include, but are not limited to, death… Furthermore, I understand that the possibility of injury, including catastrophic injury, does exist even though proper rules and techniques are followed to the fullest….
>
> I hereby voluntary assume all risks associated with participation and agree to exonerate, save harmless and release the UCF Athletic Association, Inc., its agents, servants, trustees, and employees from any and all liability, any medical expenses not covered by the UCF Athletic Association's medical insurance coverage, and all claims, causes of action or demands of any kind and nature whatsoever which may arise by or in connection with my participation in any activities related to intercollegiate athletics.

[4] Please see Medical Examination & Authorization Waivers attached as Exhibit 2.

> The terms hereof shall serve as release and assumption of risk for my heirs, estate, executor, administrator, assignees, and all members of my family.

36. The Agreement released UCFAA from liability in regard to any injury to Ereck resulting from his participation in any intercollegiate athletics. Exculpatory clauses are valid and enforceable when clear and unequivocal. Theis v. J & J Racing Promotions, 571 So.2d 92 (Fla. 2d DCA1990). The foundation for recreational liability releases is the doctrine of assumption of the risk, and by signing a Release, the participant acknowledges that he is assuming the risks inherent in the activity. Because football involves a heightened risk of physical injury to the participants, players are often asked to execute a written "release" of liability for any injury the player may sustain as a result of engaging in the activity. In this instance, Ereck executed a Release not once, but twice, voluntarily assuming all risks associated with participation and agreed to exonerate, save harmless and release UCFAA, its agents, trustees, and employees from any and all liability, medical expenses, all claims, causes of action or demands of any kind and nature whatsoever. Not only should the matter have been decided summarily in UCFAA's favor, it was a compounded error—once the summary judgment motion was denied—for this Court to determine that the issue would not be tried to the jury. A new trial in which the Release and Waiver can be presented to the jury must be ordered.

C. The Court Erred in Rejecting an Assumption of the Risk Jury Instruction Proposed by UCFAA, by Allowing a Jury Instruction that Robert Jackson Was an Agent of UCFAA, and in its Manner of Instructing the Jury on the Plaintiff's Claims Against UCFAA.

37. The Court erred because the jury instructions contained errors that swayed the jury's perception heavily in favor of Plaintiff. Dikun v. John Crane-Houdaille, Inc., 581 So. 2d 910, 911 (Fla. 4th DCA), *review denied*, 592 So.2d 680 (Fla. 1991).

38. UCFAA requested, at the beginning of the case, a jury instruction based on Standard Jury Instruction 401.22g to read:

> If, however, the greater weight of the evidence supports Enock Plancher's claim, then you shall consider the defense raised by UCFAA. On the defense, the issue for you to decide is whether Ereck Michael Plancher, II knew of the existence of the danger complained of; realized and appreciated the possibility of injury as a result of such danger; and, having a reasonable opportunity to avoid it, voluntarily and deliberately exposed himself to such danger.

39. The Court denied the instruction, but noted that, if at the close of the case sufficient evidence had been presented to bear out the instruction, it might so instruct the jury at the close of the case.

40. However, not only did the Court erroneously not allow in evidence of Ereck's express assumption of the risk in January and April 2007 (in twice signing executed Medical Examination and Authorization Waiver Agreements which contained a Release of Liability and express assumption of the risk), at the close of the case the Court still would not instruct the jury on Ereck's assumption of the risk, even given the implied assumption of the risk Ereck undertook in playing and conditioning for football. This was error, and warrants a new trial where the appropriate instruction can be given.

41. Additionally, the Court compounded that error by instructing the jury—over UCFAA's objection and despite evidence that Robert Jackson was an employee of the University of Central Florida (Board of Trustees)— that certified trainer Robert Jackson was an agent of UCFAA. Indeed, over objection, the Court directed a verdict that Robert Jackson was a UCFAA agent, then instructed the jury based on this finding.

42. Thus, the jury was allowed to apportion the fault of a non-party as to whom there is indisputably a cap on damages (UCF) onto a party for whom the Court erroneously found the damages cap in Fla. Stat. § 768.28 does not apply.

43. Moreover, the Court erred in giving its 401.2 and 401.18a instructions on claims and defenses and the issues on Plaintiff's claims, by describing the claims exactly as they appeared in the Second Amended Complaint, instead of giving a short and plain statement of the claimed negligence.[5] There was no need to describe Plaintiff's claims in the exact same detailed, prejudicial manner as they were described in the Second Amended Complaint, and UCFAA objected to the description.

44. These erroneous rulings on jury instructions warrant a grant of a new trial where the jury can be properly instructed. Butz v. Rineheart, 88 So. 2d 125, 126 (Fla. 1956).

[5] The standard instruction simply states to "describe alleged negligence."

D. The Court Erred in Improperly Limiting UCFAA's Peremptory Strikes And Leaving on The Jury A Juror Who Had Unequivocally Stated She Would Have A Hard Time Finding For The Defense, and Who Did Not Find for the Defense, and in Leaving on the Jury a Juror Whose Veracity Defense Counsel Had Unwittingly Called Into Question and Who Therefore Had a Potential Bias Against Defendant or its Counsel.

45. As a venire member, Juror Hamilton unequivocally stated that, if both sides proved their case equally, she would have a hard time finding for the defense, and it simply would not seem logical or fair to her that the defense would win in such a situation. She said she would have a difficult time saying "defense" wins if there were a "tie," and that "I personally, I sort of feel like the defense should prove that they're not guilty." Meanwhile, due to confusion (created by the juror) as to where Ms. Jones worked, since she had put "Swan and Dolphin" on her juror questionnaire, but then verbally responded in voir dire that she worked at Disney, counsel for the Defendant was placed in the unenviable position of openly questioning her veracity.

46. For these reasons, UCFAA moved to strike Ms. Hamilton and Ms. Jones for cause, which was denied in each instance. Thereafter, and before the jury was sworn, UCFAA attempted to use one of its peremptory strikes on Ms. Hamilton, and one on Ms. Jones, but the attempts were disallowed after Plaintiff's counsel raised Neil[6] challenges, arguing the strikes were racially-motivated since Ms. Hamilton and Ms. Jones are African American (even though UCFAA responded with several race-neutral reasons for the strikes). The Court sustained the Neil challenges. UCFAA was then forced to accept jurors it tried to strike, as to whom it had remaining strikes, one of whom had said she would have a hard time finding for the defense, and who did not find

[6] State v. Neil, 457 So. 2d 481 (Fla. 1984).

for the defense, the other of whom defense did not fully question or developed a dialogue with, since there was a chilling effect due to Defendant's counsel having unwittingly questioned her integrity, due to an error on her questionnaire.[7] There were more than sufficient other jurors so that the peremptory strikes would not have depleted the panel. Moreover, it must be noted that there were other African American venire members jurors, including a seated alternate juror, as to whom no cause or peremptory challenges were made. The refusal to allow the strikes furnishes the basis for a new trial, as Ms. Hamilton's and Ms. Jones' inclusion on the jury over UCFAA's objection (renewed before the jury was sworn) undoubtedly prejudiced the Defendant.

47. Peremptory challenges may be used to strike minority jurors. Spillis Candela & Partners, Inc. v. Assoc. of Sch. Consultants, 586 So. 2d 351, 351 (Fla. 3d DCA 1990). When UCFAA's counsel offered at least three race-neutral grounds for Ms. Hamilton's exclusion (her inability to find for the defense; her acquaintance with the daughter of a witness, Coach O'Leary, and possibly with the witness; and her status as a mother in a wrongful death case involving a surviving mother) and three for Ms. Jones (her questionable fluency in the English language, which had been the basis for a cause strike of another juror; her knowledge of Sickle Cell, unlike any other venire member; and her status as a mother of six, in a wrongful death case involving a surviving mother) the strikes should have been allowed. "Florida Rule of Civil Procedure 1.431, which deals with peremptory challenges, contains no requirement that a 'reason' be established for the exercise of a peremptory challenge. A party litigant, whether plaintiff or defendant, is entitled to consider the panel as a whole at any time that litigant has

[7] The Swan and Dolphin are not Disney properties.

peremptory challenges remaining, and exercise those challenges at any time until the jury is sworn." Florida Rock Indus., Inc. v. United Bldg. Sys., Inc., 408 So. 2d 630, 632 (Fla. 5th DCA 1981). It is indisputable that UCFAA had remaining peremptory strikes when it moved to peremptorily strike Ms. Hamilton and Ms. Jones; that the jury had not been sworn; and that the Court was (properly) allowing backstriking.

48. "It has been held repeatedly that the trial court's failure to allow a party to exercise a remaining peremptory challenge before the jury is sworn constitutes reversible error." Van Sickle v. Zimmer, 807 So. 2d 182, 184 (Fla. 2d DCA 2002). "The trial court's refusal to permit a party to exercise its peremptory challenges is not harmless error when the jury returns a verdict against that party." Id. "Indeed, the Fifth District Court of Appeal has held that disallowing the exercise of a peremptory challenge by way of a backstrike, prior to the jury being sworn, is reversible error per se." Id. at 184- 85 (citing Peacher v. Cohn, 786 So.2d 1282, 1283 (Fla. 5th DCA 2001)). It was reversible error for the Court here to disallow the striking of Ms. Hamilton and Ms. Jones, and that should be cured in this Court by the granting of a new trial to UCFAA.

E. The Court Erred in Improperly Limiting UCFAA From Presenting Evidence that Other SCT-Positive Athletes Were on the Field the Day Ereck Plancher Died, While Allowing Plaintiff's Experts to Opine on the Standard of Care of "SCT Athletes" in General, after Plaintiff had Pleaded the Breach of a Duty to "SCT Athletes" in General.

49. It is undisputed that Plaintiff pleaded a breach of the standard of care by UCFAA as to other Sickle Cell Trait athletes and "SCT athletes" in general. Indeed, at trial, PLANCHER's experts Dr. Casa and Dr. Eichner testified as to the breach of the standard of care for SCT athletes, not limiting their opinions to Ereck. Plaintiff's counsel also elicited other testimony from other witnesses (including Robert Jackson, Mary

Vander Heiden and Coach O'Leary) as to "SCT athletes" and/or individuals in general. Despite these facts, and over objection, UCFAA was continually and repeatedly kept from countering any of this by putting on evidence that at least two other SCT athletes were present on March 18, 2008, in the Nicholson Fieldhouse, and participated without adverse effect in the same workout that Dr. Casa and Dr. Eichner testified was inappropriate and possibly deadly for SCT athletes.

50. It was wholly improper to allow Plaintiff to knowingly put on evidence that the workout was inappropriate for SCT athletes, and to elicit testimony that UCFAA mistreated or fell below the standard of care for SCT athletes, all while knowing that at least two other SCT athletes (whose identities Plaintiff never timely sought by way of interrogatory) were present and involved, fully participated in the practice/conditioning drill, and were under UCFAA's care and supervision, all exactly similar to Ereck.

51. This was particularly egregious because it is contradicted by the very evidence UCFAA was prohibited, at PLANCHER'S behest and in response to his Motion in Limine, from offering. See Carnival Corp. v. Pajares, 972 So. 2d 973, 978 (Fla. 3d DCA 2007) (condemning comments regarding the lack of evidence where plaintiff's counsel succeeded in excluding the evidence he argued was lacking). Thus, Plaintiff sought to use the identities and existence of the other SCT players as both a sword and a shield, offensively and defensively against UCFAA. This was despite the fact that UCFAA gave PLANCHER the name of every player who was on the field on March 18, 2008, relatively early in the case in the course of discovery; PLANCHER could have, but did not, seek to find out which of those players was SCT-positive; PLANCHER did not, e.g., ever file a motion with the Court to set aside HIPAA

protections with any showing of extraordinary need.

52. In addition, it must be noted that UCFAA did not ever seek to introduce the names/identities of the other SCT-positive players at trial, but merely their existence. And the Court never found that their identities or existence were immaterial, or more prejudicial than probative—the Court did not undertake a Rule 403 analysis at all. Instead, the Court found that UCFAA was precluded from referencing or introducing evidence of the existence of these other SCT-positive players as a form of discovery sanction, stating (incorrectly and mistakenly) that UCFAA had "withheld" the names of the players from PLANCHER and, therefore, could not refer to the players at trial. No affirmative showing was made other than the Court simply adopting the Plaintiff's argument that the defense had withheld the names of the players. This adoption was in error. A new trial where the full, complete, and true picture can be put before the jury is warranted.

F. The Court Erred in Placing Arbitrary, Unreasonable and More Importantly, Inconsistent Time Limitations Upon the Trial, Cross-Examination, and Closing Argument, and In Continually Changing the Rules About Such Time Limitations.

53. Partway into the trial, the Court began arbitrarily keeping track of time on a "chess clock," and advised both parties they would only have a limited number of hours to present their case, including direct examination, cross-examination and argument. The Defendant objected, repeatedly, to this procedure. Later, the Court changed the rules, and said that if Due Process concerns arose, it might enlarge the time for either cross-examination or closing argument. UCFAA objected to the prospective and midtrial "rule change." Thereafter, the Court announced that it had done its own research and was not inclined to extend the time for cross-examination, but would allow

additional time for closing argument. Finally, however, not only did the Court allow Plaintiff additional time for closing argument—though Plaintiff's counsel had used up his time allotment, and Defendant had, in reliance on the Court's announcements, saved enough time for closing argument—but the Court *also* then came up with additional time to allow counsel for PLANCHER to cross-examine a witness, Mary Vander Heiden, whom Plaintiff should not have been allowed time to cross-examine. In this way, and in others, the time limitation was applied un-evenhandedly. This is perhaps best exemplified by the fact that Plaintiff had eight-and-a-half days to put on his case, while Defendant had two-and-a-half. The timekeeping method was never discussed with the parties before it was suddenly implemented, and the Defendant had even tried to raise a fair division of time and trial days at the start of the case, but the matter was ignored by the Court, who thereafter instituted its arbitrary and midtrial stopwatch technique.

54. The continual, midstream rule changes affected UCFAA's trial strategy, as did the very time limitation itself. UCFAA did not call witnesses it would otherwise have called due to the Court's arbitrary and midtrial time restraints, and curtailed some witness examinations and cross-examinations in reliance on the time restraints (which thereafter changed). For example, Defendant would have called Coach O'Leary as its own witness and would also have called its expert witness John Kark, M.D.; would have spent more time on the direct examinations of Mary Vander Heiden, Bruce Miller, and Jamar Newsome among others; would have spent more time on the cross-examinations of Gisele Plancher, Daniel Spitz, M.D., and Barry Maron, M.D., among others, and would have finished its closing argument (instead of being cut off mid-sentence by the Court).

55. Moreover, the Court's method was arbitrary and improper in that it made the time remaining for closing argument contingent upon how much time was expended on witness examination (until the Court reversed itself for Plaintiff's benefit and allowed Plaintiff's counsel additional time). This was all error.

56. "For a court to set arbitrary time limits on counsel's closing argument to the jury is an abuse of discretion and therefore reversible error." Strong v. Mt. Dora Growers Coop., 495 So. 2d 1238, 1240 (Fla. 5th DCA 1986) (noting further, "the court's error in making the length of closing argument contingent upon counsel waiving the charge conference was reversible error"). Justice cannot be "administered arbitrarily with a stopwatch," and justice was not done here. See Woodham v. Roy, 471 So. 2d 132, 134 (Fla. 4th DCA 1985). UCFAA objected many times to the Court's unique method of running the trial, and moved for mistrial several times on the basis of the arbitrariness of the method, its late application, its un-evenhanded application, its deleterious effect on strategy and planning, and its Due Process implications. Those motions for mistrial should have been granted, and a new trial should be granted in their place. See, e.g., Sykes v. State, 329 So. 2d 356 (Fla. 1st DCA 1976) (a mistrial should be granted when such a fundamental or prejudicial error has been committed as would require the granting of a new trial later). De La Cova v. State, 355 So. 2d 1227 (Fla. 3d DCA 1978) (the granting of a mistrial is appropriate where has been a disregard of fundamental fairness to one of the parties). A new trial is the only cure here.

G. The Court Erred in Not Questioning the Jury About Juror Misconduct Including Note-Sharing and Discussions in the Jury Box.

57. Although several of the attorneys for UCFAA observed improper jury

conduct in the jury box over the course of several days—including jurors[8] sharing notes and discussing, apparently, evidence while testimony was occurring—the Court declined to question the jurors about the misbehavior. Instead, the Court said it would simply ask the jury members if they had been talking to each other about the case (and not specifically question them about note-sharing or conversations in the jury box). However, the Court did not even conduct the questioning it said it would. Moreover, rather than the procedure the Court contemplated—calling the entire jury into the box and asking them, all together, if they had been talking—the Court should have asked each juror separately and perhaps in private whether he or she (a) had been talking or sharing notes or (b) had observed other jurors talking or sharing notes.

58. A trial court has broad discretion in awarding a new trial for juror misconduct, and a new trial may be required in some instances and under some circumstances as a matter of public policy for the purpose of maintaining confidence in the integrity of jury trials. Flowers v. East Coast Ry. Co., 237 So. 2d 803, 804 (Fla. 1st DCA 1970). This is such a case, and a new trial is warranted, especially since one of the misbehaving jurors is the one who said she was not sure she could find for the defense even if the Plaintiff did not prove his case, and there is the possibility she influenced her fellow jurors—including the jury foreman with whom she was sharing notes—to this point of view.

H. The Court Erred in Inserting Itself and Its Opinions into the Case.

59. Plaintiff's expert witness cardiologist, Barry Maron, M.D., was the second

[8] Foreman Mr. Fucci; Ms. Hamilton; Ms. Gross; and alternate Ms. Watson were observed talking in the jury box during the presentation of evidence, and Ms. Hamilton and Mr. Fucci were observed sharing notes. These facts were brought to the Court's attention.

witness called by Plaintiff, on the first day of trial. He was called to present and bolster PLANCHER's theory of what caused Ereck's death—a crucial issue in the case. During Dr. Maron's testimony, the court instructed defense counsel, in front of the jury, on how to question a witness. Moreover, at 5:00 P.M., the Court abruptly ended the effective cross-examination of Dr. Maron (who essentially contradicted all of the other medical witnesses and the Medical Examiner). After the defense obtained favorable concessions from Dr. Maron, the Court cut off the exam, reproving UCFAA's attorney:

> THE COURT: You've had two hours on a one-hour direct, **and I don't think you've used your time wisely**. You're done. I warned you. I warned you at least on three occasions to use your time wisely. I'm not going to take a trial that's scheduled for three weeks and turn it into three months. I've warned you and warned you.
> (p. 96 of transcript of June 16, 2011, proceedings) (emphasis supplied)

60. This criticism of defense counsel, and his skills, technique, and Defendant's strategy in front of the jury, could only have caused the Defendant to lose credibility in the eyes of the jury, in front of whom the instruction and criticism took place.

61. "In the mind of the average juror the trial Judge is the arbiter and 'final word' on any matter upon which he expresses an opinion." Gendzier v. Bielecki, 97 So. 2d 604, 607 (Fla.1957). Because of this, the Judge's instructions to defense counsel on how to question a witness, and his comments on the wisdom of UCFAA's attorney's cross-examination of a crucial medical causation witness, would necessarily be imbued with a high degree of importance in the jurors' minds.

62. "In his conduct of the trial, the presiding judge must make every effort to remain fair and impartial. Inasmuch as the trial judge has, or at least should have, the absolute confidence and respect of the jury, he should be extremely careful in his remarks and actions to insure that nothing he says or does might be construed by the jury as being either critical of an attorney or of the attorney's case." Seaboard Coast Line R. Co. v. Wiesenfeld Warehouse Co., 316 So. 2d 567, 569 (citation omitted) (reversing for new trial).

63. "**When the thinking of a jury is prejudiced against a lawyer the probability is that the lawyer's client suffers accordingly** . . . This is especially so when, as here, there was no justification whatever for the castigation **and the sharply conflicting evidence could be swayed in one direction or another by the evident attitude of the trial judge. Remarks of the judge during the course of a jury trial can have much more influence on the result than the actual evidence presented**." Giglio v. Valdez, 114 So. 2d 305, 307 (Fla. 2d DCA 1959) (reversing for a new trial) (emphases supplied) (citations omitted). The criticism of defense counsel's techniques warrants a new trial here.

64. Additionally, of course, wide latitude should be allowed in cross-examination. See, .e.g. Music v. Hebb, 744 So. 2d 1169, 1171 (Fla. 2d DCA 1999); Del Monte Banana Co. v. Chacon, 466 So. 2d 1167, 1173 (Fla. 3d DCA 1985). When it is not, a new trial is the solution. See Dade County v. Midic Realty, Inc., 551 So. 2d 499, 501 (Fla. 3d DCA 1989) (reversing and remanding for new trial on sole basis of truncated cross-examination in the presence of the trier-of-fact).

65. Moreover, the entire issue was Court-created. The false sense of urgency driving the Court to both cut off the cross-examination, and to direct its course, was entirely a result of the Court's decision to "time-keep" the trial and to apply arbitrary time limits. A new trial is the only solution.

I. Additional Grounds of Error Requiring a New Trial

These grounds are not raised as an attack as upon the trial court, but rather as factual and legal grounds for a new trial. It is expected, however, that this Motion will be cast as a pejorative and pedantic attack on the trial Court, which it is not intended to be, and should not be taken as.

66. The Court erred in permitting any verdict as to UCFAA because the verdict was excessive, cumulative, speculative, and the product of improper appeals to the emotions or prejudices of the jury. Brafman v. Rybalka, 673 So.2d 525, 526 (Fla. 3d DCA 1996).

67. In addition, the Court erred in allowing a verdict for UCFAA because Plaintiff's counsel made improper comments or argument to or in front of the jury. Murphy v. Int'l Robotics Sys., Inc., 710 So.2d 587 (Fla. 4th DCA 1998), *approved*, 766 So.2d 1010 (Fla. 2000). Repeatedly, Plaintiff's counsel made appeals to passion and sympathy; bolstered his own witnesses; stated that he was "told one thing [by defense counsel] and another thing is happening" in relation to witness order; made disallowed value of human life arguments in voir dire and in closing; in voir dire made Golden Rule arguments to a panel on which the eventual foreman of the jury sat; made disparaging comments about the defense, its counsel, and its decision to defend, in particular, but not only, in closing argument; and made reference to the economic disparity between

the Planchers and UCFAA's agent Coach O'Leary in closing argument.[9] Moreover, counsel for the Plaintiff repeatedly and improperly referenced damages during his rebuttal closing argument, despite the fact that counsel for UCFAA did not mention damages during defense closing argument. This was all in addition to PLANCHER'S counsel's repeated speaking objections and characterizations of UCFAA's counsel and arguments (in front of the jury) as improper, dishonest, out of line, etcetera. This included, but was not limited to, PLANCHER's counsel characterizing the defense as a defense of last resort.

68. The Court erred in repeatedly permitting speaking objections by Plaintiff's counsel.

69. The Court erred in requiring counsel for Defendants to question witnesses and/or make argument under threat of sanction or censure.

70. The Court erred, specifically, in telling counsel for UCFAA that he had three strikes or he was out on the use of deposition testimony to refresh a witness' recollection and/or impeach a witness, and in making such remarks before the jury.

71. The Court erred in threatening defense counsel with monetary sanctions, several times, and in requiring him to proceed with witnesses questioning with the threat of monetary sanctions over his head.

72. The Court erred in not recusing itself before trial when it became clear that UCFAA had a well-founded fear of not receiving a fair trial, and actually moved for disqualification.

[9] Plaintiff's counsel had objected to defense counsel making a similar argument in voir dire.

73. The Court erred in allowing Plaintiff to make "experts" out of the Defendant's team doctors and coaches, questioning them about SCT, its risk and association with sudden death knowing that medical-based proof has established such causative association. Plaintiff was allowed to question team doctors and trainers around standard operating procedure, their opinions regarding SCT as to cause of death for other college football players, and their thoughts and beliefs as to whether SCT policies and procedures were followed or violated in response to hypothetical situations and questions. Such questioning of these fact witnesses was wholly impermissible and should not have been allowed by the trial Court.

74. These questions were legally irrelevant to Plaintiff's case, since team doctors were not on the field and their own expert testified need not be, yet Plaintiff was allowed to question the team doctors about the standard operating procedure.

75. The Court erred in repeatedly cutting off Defendant's witnesses and/or stating that they were being evasive or not answering and/or overruling objections to witnesses badgering.

76. The Court erred in allowing Plaintiff's witnesses to expand upon answers and be non-responsive to defense questioning and explain or explain away inconsistencies, and in overruling defense objections to non-responsive answers.

77. The Court erred in making non-verbal and verbal reactions to Defendant, its witnesses, its arguments, and its case, including laughter and facial expressions.[10]

78. The Court erred in making non-verbal reactions to Plaintiff's witnesses and argument, including nodding and smiling.

[10] Unlike most other proceedings, the proceedings here were taped and any reviewer will be able to observe the conduct and mannerisms for him- or herself.

79. The Court erred in allowing Plaintiff's counsel to openly and verbally challenge the court to sanction him, and then not sanctioning Plaintiff's counsel.

80. The Court erred in allowing in opinion evidence from Dr. Eichner and others as to when or if Ereck should have been removed from the drills, despite the fact that there was no competent medical evidence that had he been pulled out of the drill earlier that it would have made a difference. Thus, Dr. Eichner had no evidence to support his opinions, meaning no observations or proof, and they were mere speculation, yet he was allowed to share them with the jury. This was error.

81. It was error for the Court to sustain objections that were baseless, such as Plaintiff's counsel's objections to emails he knew would come into evidence. The Court erred in allowing Plaintiff to make objections to items that were public record, by allowing Plaintiff's counsel to object to demonstrative aides, by allowing Plaintiff's counsel to object to the use of depositions, and allowing him to object merely to interrupt defense argument and questioning.

82. The Court erred in failing to prohibit the Plaintiff from creating an atmosphere that was inflammatory and allowed Plaintiff's counsel to demonize the lawyers to the detriment of UCFAA.

83. The Court erred in allowing Plaintiff to cross-examine witnesses with Robert Jackson's sworn statement even though Plaintiff's counsel had argued in opening that it was hearsay and had objected to defense using it in its opening statement.

84. The Court erred in allowing Plaintiff to create an issue out of its own copy of a Spring 2008 (March 17, 2008) workout sheet that Coach Ed Ellis was testifying to,

and Plaintiff's counsel disingenuously argued was "redacted" or different from the copy given to Plaintiff, when in fact Plaintiff had redacted the exhibit.

85. The court erred in not allowing Defendant to make completeness designations under Fla. R. Civ. P. 1.330(a)(4) for the depositions of Cody Minnich, Robert Jackson, Mary Vander Heiden and Drs. Krummins, Monnette, and Meuser. This was made more egregious by the Court allowing Plaintiff's completeness designations of depositions read in Defendant's case, whereas in the case of Cody Minnich, Robert Jackson, Mary Vander Heiden and Drs. Krummins, Monnette, and Meuser, the Court stated that Defendant could read the completeness portions in Defendant's case. However, the jury was entitled to hear the entire portion, in the context in which it was given, and to evaluate the testimony in context, yet it was prevented from doing so.

86. This was extremely prejudicial in not permitting the defense to put in the portions of the depositions they believed they were entitled to.

87. This issue was particularly troublesome when Plaintiff's counsel jumped up and accused the defense of violating the rule of completeness on a document in opening statement (the NCAA Sickle Cell Trait guideline).

88. The Court erred in that, although Dr. Maron testified that he agreed with the Death Certificate, defense could not cross-examine the witness regarding how cause of death was arrived at, in relation to Dr. Stephany's emails with Plaintiff's retained expert (retained on July 1st or 2nd of 2008), Dr. Randy Eichner.

89. The Court erred in allowing Dr. Spitz to opine as an SCT expert, even though he had never performed an autopsy finding that method of death, and had not identified himself as such an expert in his deposition.

90. The Court erred in allowing Plaintiff's counsel to refer to the applicable standard of care, the NCAA Guidelines, as old and obsolete, allowing him to misrepresent the standard of care.

91. This coincided with the Court allowing Plaintiff's counsel to talk about the post-2008 standard of care via witness Robert Jackson.

92. The Court erred in, outside the presence of the jury, calling the defense a conspiracy theory, and referring to "spin," in relation to the Eichner/Stephany relationship, showing his possible bias which, together with the non-verbal responses of the Court, called the Court's decision-making into question.

93. The court erred in allowing Plaintiff's counsel to vouch for the independence of Dr. Stephany, but then not allowing defense counsel to cross-examine Dr. Stephany fully with his emails with Dr. Eichner.

94. The Court erred in not allowing Defendant to use demonstrative exhibits, including demonstrative aids (slides and other demonstratives) with Drs. Myerberg and Steinberg, and not allowing the use of a demonstrative aid (poster board) with Dr. Casa.

95. The Court erred in not allowing the demonstrative aid of video of a football practice under similar circumstances. The video would have assisted the jury, as a demonstrative aide, to understand the different drills, and was not a "recreation" as the Court erroneously held.

96. The Court erred in allowing Plaintiff's counsel to improperly align himself with the Court.

97. The Court erred in setting trial in June 2011 over objection.

98. The Court erred in setting trial before the twenty-day period from the time the Plaintiff had noticed the case for trial had expired.

99. The Court erred in orally setting trial before the twenty-day period from the time the Plaintiff had noticed the case for trial had expired, even if it signed the trial order more than twenty days after the case was noticed for trial or notice was given that it was at issue.

100. The Court erred in saying that Defendant's experts' (including Dr. Kark's and Dr. Steinberg's) could not discuss their opinions on the heart exam, particularly when the heart exam was delayed by Plaintiff. This was particularly egregious where the Court did not find the opinions were disclosed too late, which they were not. The denial of the opinions was in effect a sanction for behavior that was not improper. Instead, the Court did not permit the opinions because of the "timeliness" with which the defense requested the heart exam (which was thereafter opposed by Plaintiff).

101. The Court erred in denying the defense motion for continuance of trial, and then not even allowing defense witnesses to offer opinions regarding the new information obtained.

102. The Court erred in offering his opinion on the evidence, including in stating it did not recall hearing any evidence of the fact that the March 18, 2008, workout was a normal workout.

103. The Court erred in allowing Plaintiff's counsel to state the football program had "made" $30,000,000.00, when its profits are not that amount.

104. The Court erred in permitting Plaintiff to talk about millions of dollars that the football program made or received as opposed to "profits." The Court erroneously

said Defendant “opened the door” to such argument and evidence by pointing out it was a not-for-profit organization.

105. The Court erred in allowing in irrelevant information about Coach O’Leary’s contract, and remuneration.

106. This was in clear contravention of the general rule not allowing financial information to go to the jury before the second phase of a punitive damages trial.

107. The Court erred in allowing Plaintiff additional time to cross-examine Mary Vander Heiden on an issue discussed and covered in her deposition, the medical alert list.

108. The Court erred in allowing voir dire on hypothetical issues, and in allowing the use of hyoptheticals to pre-try the case, including statements like “you have to follow your policies and procedures” to one juror, Ladnier, who was one of the jurors that ultimately was on the jury that decided the case.

109. The Court erred in allowing Plaintiff’s counsel to use highly inflammatory language in voir dire, including the use of the loaded phrase “reparations.”

110. The Court erred in allowing Plaintiff’s counsel to refer to Ereck as “Young Plancher,” “Ereck Plancher, Jr.,” and in allowing him to refer to witness Anthony Davis as a Christian man knowing we had highly religious jurors.

111. The Court erred because PLANCHER failed to satisfy his burden of demonstrating his entitlement to damages.

112. The Court committed legal error in failing to grant UCFAA’s motions for directed verdicts, as discussed above.

113. The Court erred in permitting the testimony of Plaintiff's witness Dr. Joshua Stephany to be improperly bolstered by reference to his status as "an independent witness," and having other doctors, including Dr. Daniel Spitz, vouch for Dr. Stephany and make commentary upon Dr. Stephany's credibility and skills, when those issues went to the heart of the case. Dr. Spitz was impermissibly allowed to testify about the standard of care for medical examiners. He came in under the guise of being an expert witness pathologist, but was allowed to bolster (over objection) the testimony and methods of another witness, Dr. Stephany. The Court erred in allowing Dr. Spitz to opine on the appropriateness of Dr. Stephany's autopsy methods.

114. The Court erred in permitting the cumulative testimony of Plaintiff's experts Douglas Casa, Ph.D., E. Randolph Eichner, M.D., and Barry Maron, M.D. on the same subjects (causation, Sickle Cell Trait, exercise modification, and the appropriateness of the March 18, 2008, workout), since that testimony was cumulative.

115. To the extent that Daniel Spitz, M.D., Douglas Casa, Ph.D., Barry Maron, M.D., and Randy Eichner, M.D., were permitted to talk about causation, Sickle Cell Trait, exercise modification, or the appropriateness of the March 18, 2008, workout, the Court erred in allowing that cumulative evidence and testimony, as well.

116. The Court erred in allowing all of Plaintiff's experts to testify about the same things and to offer cumulative testimony.

117. The Court erred in allowing in, over objection, new, changed, additional, and surprise opinions and testimony from Daniel Spitz, M.D., who was deposed shortly before trial but then changed his opinion and testimony on cause of death, post-mortem sickling and post-mortem histological studies, and announced at trial his expertise as a

Sickle Cell Trait expert. (Dr. Maron also described himself in this way; thus, the Court erred in allowing in the new opinion testimony of Dr. Maron, as well, and erred in allowing in cumulative "Sickle Cell Trait expert" testimony.)

118. Dr. Spitz never disclosed himself as an SCT expert in deposition, and then offered new opinions and a new expertise at trial, which the Court erred in allowing in.

119. The court erred in limiting the opinions that Defendant's expert Azorides Morales, M.D. could offer, while not similarly limiting the opinions Plaintiff's expert Daniel Spitz, M.D., could offer, to only those he was questioned about in his deposition.

120. The court erred in limiting the opinions that Defendant's expert Robert Myerberg, M.D. could offer, while not similarly limiting the opinions Plaintiff's expert Daniel Spitz, M.D., could offer, to only those he was questioned about in his deposition.

121. The court erred in allowing in testimony from Robert Jackson about post-2008 SCT testing standards at Georgia Southern University, in direct violation of a ruling on a motion in limine. The error was not cured by the requested curative instruction.

122. The court erred in allowing in testimony that UCFAA did not tell Ereck's parents that he had tested positive for SCT, in direct violation of a ruling on a motion in limine and in violation of HIPAA. The error was not cured by the requested curative instruction. '

123. The Court erred in allowing, pre-trial, the second deposition of Robert Jackson.

124. The Court erred in allowing, at trial, the deposition of Robert Jackson to be used (read and played) as a "party" deposition, even though Robert Jackson was not a party and was not even an agent of any party, including UCFAA.

125. The Court erred in denying the pretrial Motion for Disqualification.

126. The Court erred in accepting the verdict form as submitted by PLANCHER and rejected the proposed form submitted by UCFAA.

127. The Court erred in not placing Ereck Plancher on the verdict form for, among other things, his assumption of the risk.

IV. MOTION FOR REMITTITUR

128. Florida Statues Section 768.74 provides in part:

> (1) In any action to which this part applies wherein the trier of fact determines that liability exists on the part of the defendant and a verdict is rendered which awards money damages to the plaintiff, it shall be the responsibility of the court, upon proper motion, to review the amount of such award to determine if such amount is excessive or inadequate in light of the facts and circumstances which were presented to the trier of fact.
>
> (2) If the court finds that the amount awarded is excessive or inadequate, it shall order a remittitur or additur, as the case may be.
>
> ****
>
> (5) In determining whether an award is excessive or inadequate in light of the facts and circumstances presented to the trier of fact and in determining the amount, if any, that such award exceeds a reasonable range of damages or is inadequate, the court shall consider the following criteria:
>
> (a) Whether the amount awarded is indicative of prejudice, passion, or corruption on the part of the trier of fact;
>
> (b) Whether it appears that the trier of fact ignored the evidence in reaching a verdict or misconceived the merits of

the case relating to the amounts of damages recoverable;

(c) Whether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation and conjecture;

(d) Whether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered; and

(e) Whether the amount awarded is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons.

129. Meanwhile, Florida Statutes Section 768.28 provides in part that:

(5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $200,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to $100,000 or $200,000, as the case may be; and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature. Notwithstanding the limited waiver of sovereign immunity provided herein, the state or an agency or subdivision thereof may agree, within the limits of insurance coverage provided, to settle a claim made or a judgment rendered against it without further action by the Legislature, but the state or agency or subdivision thereof shall not be deemed to have waived any defense of sovereign immunity or to have increased the limits of its liability as a result of its obtaining insurance coverage for tortious acts in excess of the $100,000 or $200,000 waiver provided above. The limitations of liability set forth in this subsection shall apply to the state and its agencies and subdivisions whether or not

> the state or its agencies or subdivisions possessed sovereign immunity before July 1, 1974.

130. "Remittitur cannot be granted unless the amount of damages is so excessive that it shocks the judicial conscience and indicates that the jury has been influenced by passion or prejudice." City of Hollywood v. Hogan, 986 So. 2d 634, 647 (Fla. 4th DCA 2008) (*quoting* Weinstein Design Group, Inc. v. Fielder, 884 So. 2d 990, 1002 (Fla. 4th DCA 2004)); Brown v. Estate of Stuckey, 749 So. 2d 490, 498 (Fla. 1999).

131. PLANCHER advanced a very emotionally-charged case that resulted in a verdict that has no reasonable relation to the "proof" of liability. See Harbor Ins. Co. v. Miller, 487 So. 2d 46, 48 (Fla. 3d DCA 1986) (jury award reversed "as being a product of passions and emotions rather than the evidence presented"); Odoms v. Travelers Ins. Co., 339 So. 2d 196, 198 (Fla. 1976); see also Florida Patient's Comp. Fund v. Von Stetina, 474 So. 2d 783, 790 (Fla. 1985) ("[m]ere sympathy cannot sustain a judgment").

132. Here, UCFAA should not have been subjected to any liability because PLANCHER failed to meet his burden of demonstrating, by a preponderance of the evidence, that UCFAA caused Plaintiff's damages. Specifically, PLANCHER did not show that Ereck's death was caused by SCT or that UCFAA failed to tell Ereck that he had SCT (or that Ereck would have quit playing football if UCFAA had told him he had SCT, assuming UCFAA did not tell him). Absent such proof, it is evident that the jury rendered its verdict based, at least in part, on emotion and sympathy for PLANCHER due to his son's death and the highly emotional testimony from his mother, father, aunt and friends as to what type of person Ereck was and the effect of his death on his family

and teammates. Insofar as the jury's verdict was based on such emotions, it was improper. Therefore, this Court should order a remittitur to a reasonable alternative, to be determined by an honest, sincere purpose to do justice to both parties. Normus v. Eckerd Corp., 813 So. 2d 985, 988 (Fla. 2d DCA 2002).

133. The verdict amount should be remitted to an amount not to exceed $500,000.00 to $1,000,000.00 per surviving parent, which should then subsequently be remitted to a reasonable total amount not to exceed $200,000.00, consistent with the provisions of Fla. Stat. Sec. 768.26, which provides sovereign immunity protection, including a recovery limit in tort actions, to UCFAA as an agency or subdivision of the state.

CONCLUSION

Based on the foregoing, UCFAA requests that this Court enter judgment in accordance with UCFAA's prior motions for directed verdict or a judgment notwithstanding the verdict, or alternatively, grant a new trial. Lastly, UCFAA requests a remittitur of the verdict amount.

CERTIFICATE OF SERVICE

We hereby certify that on this 11th day of July 2011, we electronically filed the foregoing with the Clerk of the Courts by using the ECF system which will send a notice of electronic filing to the following: **J.D. Dowell, Esq.**, Pitisci, Dowell, Markowitz & Murphy, 101 S. Moody Avenue, Tampa, Florida 33609 (Counsel for Plaintiff) and **C. Steven Yerrid, Esq**., and **David D. Dickey, Esq**., The Yerrid Law Firm, P.A., 101 E. Kennedy Blvd., Suite 3910 Tampa, FL 33602, (Co-Plaintiff's Counsel).

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