This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A25-1838

Josh Campion, et al.,
Appellants,

vs.

National Collegiate Athletics Association,
Respondent,

The Big Ten Conference, Inc.,
Respondent,

The University of Minnesota,
Respondent.

Filed July 27, 2026
Affirmed
Reyes, Judge
Concurring in part, dissenting in part, Bratvold, Judge

Hennepin County District Court
File No. 27-CV-21-10480

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Considered and decided by Reyes, Presiding Judge; Larkin, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

Appellants challenge the district court's summary-judgment dismissal of their claims for breach of fiduciary duty, negligence, and loss of consortium. Appellants also challenge the district court's exclusion of expert testimony. We affirm the dismissal of the claims on grounds that do not require us to resolve the evidentiary dispute.

FACTS

The action underlying this appeal involves appellants Josh Campion, a former college football player, and his wife Ciera Campion,[1] as well as respondents National Collegiate Athletics Association (NCAA), the Big Ten Conference, Inc., and the University of Minnesota. The facts, viewed in the light most favorable to the Campions, are as follows.

Josh became a student at the University in January 2011 and played football there as an offensive lineman through October 2015. Between August 2011 and August 2015, Josh received three concussion diagnoses. Josh began dating Ciera shortly before the third concussion diagnosis.

[1] Because appellants share the same last name, we refer to them by their first names.

The University is a member of both the NCAA and the Big Ten. The University had a Concussion Management Plan (CMP) in effect in 2015, which complied with requirements of the NCAA and the Big Ten.

On October 3, 2015, Josh played in a football game at Northwestern University and sustained a head collision toward the end of the first half of the game. At halftime, Josh experienced vision issues and a headache, he was "moaning and groaning," and he had tears "streaming down his face." Josh told a fellow player, C.M., that he was concussed. C.M. then "told [a coach] that Josh was concussed" by "mouth[ing] those words" to the coach. The coach and an athletic trainer spoke with Josh in the locker room, but none of them recall the conversation. At the end of the conversation, C.M. overheard the coach ask Josh, "do you think you can go?" and Josh responded that he was "fine to go" back in the game. The University did not diagnose Josh with a concussion during halftime. Josh played the second half and sustained a second head collision. The following day, Josh saw a doctor and received his fourth concussion diagnosis.

Josh stopped playing football following his fourth concussion diagnosis and married Ciera in June 2016. Josh now suffers from various mental and physical issues.

The Campions' second amended complaint sets forth three claims relevant to this appeal: (1) breach of fiduciary duty; (2) negligence; and (3) loss of consortium.[2] Respondents each moved to dismiss the complaint for failure to state a claim upon which relief could be granted under Minnesota Rule of Civil Procedure 12.02(e), and the

[2] The Campions do not challenge the district court's rule 12 dismissal of their three fraud claims or the rejection of their joint-venture theory.

University also moved for dismissal based on "the doctrine of governmental immunity." Following a hearing, the district court denied the rule 12 motions with respect to the three above claims, determined that immunity protected the University from legal challenges based on the content of its CMP, and determined that immunity did not protect the University from claims that it violated its CMP.

Respondents then each moved for summary judgment. The University also moved to exclude the opinions of the Campions' expert witnesses. The Campions moved for partial summary judgment on each respondent's legal duty to Josh. After a hearing, the district court granted respondents' motions and denied the Campions' motions.

This appeal follows.

DECISION

The Campions argue that the district court erred by dismissing their claims of breach of fiduciary duty, negligence, and loss of consortium at the summary-judgment stage. They also argue that the district court abused its discretion by excluding their expert testimony.

Appellate courts "review the grant of summary judgment de novo to determine whether there are genuine issues of material fact and whether the district court erred in its application of the law." *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quotation omitted); *see also* Minn. R. Civ. P. 56.01 (describing summary judgment). "When conducting this review, [appellate courts] view the evidence in the light most favorable to the nonmoving party and resolve all doubts and factual inferences against the moving parties." *Henson v. Uptown Drink, LLC*, 922 N.W.2d 185, 190 (Minn. 2019) (quotation omitted).

I. The district court did not err by granting summary judgment for respondents on Josh's breach-of-fiduciary-duty claim because it fails as a matter of law for lack of duty.

Josh argues that the district court erred by dismissing his breach-of-fiduciary-duty claim against respondents at the summary-judgment stage because a fact-finder needs to resolve "factual matters" about the existence of a fiduciary relationship and a "fiduciary duty of health and safety." We are not persuaded.

"To prevail on a claim of breach of fiduciary duty, a plaintiff must prove four elements: duty, breach, causation, and damages." *TCI Bus. Cap., Inc. v. Five Star Am. Die Casting, LLC*, 890 N.W.2d 423, 434 (Minn. App. 2017). Whether the "duty" element of this claim exists "is a question of law, which we review de novo." *In re Trs. A & B of Divine*, 672 N.W.2d 912, 918 (Minn. App. 2004). We will affirm the summary-judgment dismissal of a breach-of-fiduciary-duty claim if no fiduciary relationship exists. *See, e.g.*, *Harris v. Mardan Bus. Sys., Inc.*, 421 N.W.2d 350, 353 (Minn. App. 1988) (affirming summary judgment when parties' relationship was "not controlled by fiduciary principles"), *rev. denied* (Minn. May 18, 1988).

Minnesota recognizes two types of fiduciary relationships: (1) "relationships of a fiduciary nature per se," and (2) "relationships in which circumstances establish a de facto fiduciary obligation." *Swenson v. Bender*, 764 N.W.2d 596, 601 (Minn. App. 2009), *rev. denied* (Minn. July 22, 2009). If the parties are "not in a fiduciary relationship, there [can] be no breach of fiduciary duty." *Id.* at 603. Josh does not argue that he had a per se fiduciary relationship with any of the respondents. Josh therefore must identify a basis for a de facto fiduciary relationship, which is a relationship in which "one person trusts and confides in another who has superior knowledge and authority." *Id.* at 601.

The district court stated that Josh "did not reasonably place his trust and confidence" in the University and that "there is no evidence that [Josh] placed his trust or confidence in either the NCAA or [the] Big Ten."[3] As a result, the district court granted respondents' summary-judgment motions on Josh's breach-of-fiduciary duty claim.

To the extent that Josh argues that a district court may never dismiss a breach-of-fiduciary-duty claim at summary judgment, this argument is belied by our caselaw. *See Harris*, 421 N.W.2d at 353 (affirming summary-judgment dismissal of breach-of-fiduciary-duty claim due to lack of duty); *see also Harvet v. Unity Med. Ctr., Inc.*, 428 N.W.2d 574, 579 (Minn. App. 1988) (explaining appropriateness of summary judgment when allegations underlying claim "are based on conjecture and speculation and are insufficient to create a jury question").

And to the extent that Josh asserts that a de facto fiduciary relationship can exist between a student-athlete and a university, athletic association, or athletic conference, he presents no binding caselaw to support this assertion. In fact, he presents no caselaw supporting the existence of a fiduciary relationship in any athletic context. Josh also does not explain what constitutes a "fiduciary duty *of health and safety*," or what caselaw

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[3] In a footnote, the district court also determined that Josh "waived" his fiduciary-duty claim related to the Big Ten by not addressing it in his memorandum opposing respondents' summary-judgment motions. But because the district court ultimately entered summary judgment on this claim on other grounds, we do not address waiver. *See Hunter v. Anchor Bank, N.A.*, 842 N.W.2d 10, 17 (Minn. App. 2013) (affirming entry of summary judgment when justified by independent and sufficient ground), *rev. denied* (Minn. Mar. 18, 2014).

supports the existence of that specific duty in Minnesota. (Emphasis added.) Because Josh fails to present legal arguments and binding authorities to support his fiduciary-duty assertions, we decline to consider them. *See In re Civ. Commitment of Kropp*, 895 N.W.2d 647, 653 (Minn. App. 2017) ("Minnesota appellate courts decline to reach an issue in the absence of adequate briefing."), *rev. denied* (Minn. June 20, 2017). We therefore affirm the district court's grant of summary judgment for respondents on Josh's breach-of-fiduciary-duty claim.

II. The district court did not err by granting summary judgment for respondents on Josh's negligence claim because it fails as a matter of law for lack of duty.

Josh also argues that the district court erred by dismissing his negligence claim at the summary-judgment stage because respondents undertook "a voluntary duty of care" under the Restatement (Second) of Torts section 323 (Am. L. Inst. 1965).[4] We disagree.

"To recover for a claim of negligence, a plaintiff must prove (1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) that the breach of the duty of care was a proximate cause of the injury." *SECURA Ins. Co. v. Deere & Co.*, 12 N.W.3d 103, 110 (Minn. App. 2024) (quotation omitted), *rev. denied* (Minn. Dec. 17, 2024). "[W]hen the record reflects a complete lack of proof on any one of these four elements,"

[4] This section of the Restatement is sometimes referred to as the "Good Samaritan doctrine." *Appley Bros. v. United States*, 7 F.3d 720, 728 (8th Cir. 1993). Josh does not present any other duty arguments and, in fact, specifically asserts in his reply brief that special-relationship cases are "not relevant here." We therefore do not address whether a special relationship exists here. *See* Restatement (Second) of Torts § 314A (Am. L. Inst. 1965).

summary judgment is appropriate. *Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017) (quotation omitted).

The relevant inquiry here centers on duty. Both the district court and the parties focused on the common-law doctrines of primary assumption of risk and enlargement of the risk. The former "precludes liability for negligence," *Soderberg v. Anderson*, 922 N.W.2d 200, 203 (Minn. 2019), while the latter may negate a plaintiff's primary assumption of risk, *Grady v. Green Acres, Inc.*, 826 N.W.2d 547, 552 (Minn. App. 2013). But "[b]efore a court considers assumption of risk, it should first determine whether the defendant owed a duty to the plaintiff. *If no duty exists there is no need to determine whether a person assumed the risk* thus relieving the defendant of the duty." *Baber v. Dill*, 531 N.W.2d 493, 495 (Minn. 1995) (emphasis added); *see also Grady*, 826 N.W.2d at 550 ("The first step in determining whether primary assumption of the risk applies is to determine whether the defendant owed a duty to the plaintiff." (quotation omitted)). We therefore begin by considering whether respondents owed a duty to Josh.

As an initial matter, we note that the existence of duty is a question of law that appellate courts review de novo. *Doe 169 v. Brandon*, 845 N.W.2d 174, 177 (Minn. 2014); *see also Bjerke v. Johnson*, 742 N.W.2d 660, 664 (Minn. 2007) (stating that existence of duty is generally question of law reviewed de novo); *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 924 (Minn. 1986) (noting that "whether there exists a duty is a legal issue for court resolution"). "The existence of a legal duty depends on the factual circumstances of each case. It is not, however, the jury's function to determine whether the facts give rise to a duty." *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543 n.1 (Minn. 1989). "If no duty exists, it is error for the district court to submit [a] negligence claim to the jury." *Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 582 (Minn. 2012).[5]

Josh relies solely on section 323 of the Restatement (Second) of Torts to argue that respondents owed him a duty. Section 323 provides:

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

Restatement (Second) of Torts § 323.

The district court determined that no evidence supported Josh's claim that respondents voluntarily undertook "a general duty of protecting [his] health, safety and welfare" under section 323.

Josh cites three precedential Minnesota cases to support his negligence claim, but these do not support his argument because none create a section 323 duty; two rely on

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[5] The dissent quotes *Ironwood Springs Christian Ranch, Inc. v. Walk to Emmaus*, 801 N.W.2d 193, 200 (Minn. App. 2011), for the proposition that "[w]hether a duty has been *assumed* is a question of fact." (Emphasis added.) But in the standard of review for *Ironwood Springs*, this court stated that "[w]hether a person *has* a duty of care is an issue for the court to determine as a matter of law." 801 N.W.2d at 197 (emphasis added) (quoting *State v. Back*, 775 N.W.2d 866, 869 (Minn. 2009)). Notably, this court in *Ironwood Springs* first addressed the application of Restatement (Second) of Torts §§ 323, 324A (Am. L. Inst. 1965). *See Ironwood Springs*, 801 N.W.2d at 200. We concluded, as a matter of law, that section 323 did not apply and section 324A could have applied. *Id.* at 200. Here, we need not address section 324A because Josh does not present any argument about it for our review. We address only whether section 323 applies as a matter of law.

section 324A, a legal theory that Josh does not rely on; and none recognize a general duty to "protect" a party's "health and safety" in any context, let alone college athletics. *See Walsh v. Pagra Air Taxi, Inc.*, 282 N.W.2d 567, 568, 570 (Minn. 1979) (discussing section 324A duty to render fire-protection services); *Isler v. Burman*, 232 N.W.2d 818, 819, 821 (Minn. 1975) (discussing duty to inspect land under other Restatement sections); *Ironwood Springs*, 801 N.W.2d at 196, 200 (concluding that section 323 did not apply). Josh also cites out-of-state caselaw, which we conclude is not persuasive. We discuss each of these issues in turn.

A. Josh does not cite any binding Minnesota caselaw creating a section 323 duty and instead relies on two cases that focus on section 324A, a legal theory that he explicitly disclaims.

Josh does not cite any binding Minnesota caselaw in which a court created a section 323 duty. In *Isler*, a church voluntarily undertook the land-inspection duties of a possessor of land when it facilitated a snowmobile party on the land of another. *See* 232 N.W.2d at 820-21 (citing Restatement (Second) of Torts §§ 328E, 343, 383, 387 (Am. L. Inst. 1965)). After concluding that the district court did not err in its related jury instruction, the supreme court in *Isler* referenced caselaw, a legal encyclopedia, and section 323 for the proposition that, even if one acts voluntarily, they may be subject to a duty to exercise reasonable care. *See id.* at 822. The supreme court's conclusion rested on the land-inspection duties of a landowner. *See id.* at 820-22.

The holdings in *Ironwood Springs* and *Walsh* are similarly not grounded in section 323, with both resting instead on section 324A. *See Ironwood Springs*, 801 N.W.2d at 200 (concluding that case's question of assumption of duty "is governed by section 324A");

Walsh, 282 N.W.2d at 570 (concluding "that the applicable rule of law [in *Walsh*] is stated in [section] 324A").

Section 324A involves one party "who undertakes, gratuitously or for consideration, to render services to *another* which [they] should recognize as necessary for the protection of a *third person*." Restatement (Second) of Torts § 324A (emphasis added). In contrast, section 323 involves one party's rendering of services and liability to only one other party. *See* Restatement (Second) of Torts § 323.

In *Walsh*, a jury found that a plaintiff-pilot, a city, and an airport-support service were all negligent in an incident that led to the burning of the pilot Walsh's plane. 282 N.W.2d at 570. Walsh and the city settled, so only the airport-support service, Pagra, presented arguments on appeal. *Id.* The supreme court nonetheless noted in dicta that the city voluntarily undertook a duty "to render fire protection services" directly to airport users, including Walsh, under section 323. *Id.* The supreme court then held that "the applicable rule of law" for Pagra's duty is stated in section 324A. *Id.* at 570-71. The supreme court concluded that Pagra agreed, "[b]y the terms of its operating agreement with the city, . . . to undertake the [city's] fire-protection duty" to benefit third-party airport users like Walsh. *Id.* at 570.

In *Ironwood Springs*, an individual was injured in a slip-and-fall at a retreat facility owned by Ironwood Springs but rented by Emmaus. 801 N.W.2d at 195-96. After Ironwood Springs commenced a contribution action against Emmaus, Emmaus moved for summary judgment. *Id.* at 196. The district court granted the motion and concluded that Emmaus had not assumed a duty, without explicitly referencing any section of the

Restatement. *See id.* at 196, 199. This court rejected Emmaus's argument that section 323 applied, explaining that Ironwood Springs already "owed a duty of care to [the injured party]" and the only question remaining was "whether Emmaus, like Pagra, assumed [Ironwood Springs's] duty to [the injured party]." *Id.* at 200. We concluded as a matter of law that this question "is governed by section 324A." *Id.* And then, because there was a genuine dispute of material fact regarding that section 324A assumption of duty,[6] we concluded that summary judgment was not appropriate. *Id.*

Josh does not argue, on appeal or before the district court, that section 324A applies here. In fact, Josh asserts in his reply brief that cases related to section 324A are not relevant to his section 323 claim. We therefore decline to identify and then decide an issue about section 324A. *See, e.g.*, *Flooring Removal, Inc. v. Ryerson*, 447 N.W.2d 429, 430 (Minn. 1989) (holding that this court "erred in identifying and then deciding" issue that "was neither raised nor tried below and was not addressed by the parties on appeal"); *see also Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (declining to consider issues not presented to and considered by district court).

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[6] We noted in *Ironwood Springs* that "Minnesota courts use the terms undertake, undertaking, undertook, assume, and assumption interchangeably in this context." 801 N.W.2d at 199 n.2. While, in this opinion, we tend to use the word "undertake" for section 323 and "assume" for section 324A, we reference the relevant section in each instance for clarity.

B. Josh does not cite any binding Minnesota caselaw recognizing a general duty to "protect" a party's "health and safety."

None of the cases Josh cites rely upon section 323 to support a claim of a general duty to "protect . . . health and safety." Rather, they recognized specific duties to render certain services. In *Walsh*, for example, the city "voluntarily undertook to render fire protection services to airport users." 282 N.W.2d at 570. In *Isler*, the church voluntarily undertook the land-inspection duties of a possessor of land. *See* 232 N.W.2d at 820-21.

The general nature of Josh's argument is particularly striking because section 323 requires either (a) an undertaking party's "increase[of] the risk . . . of harm" or (b) a harmed party's "reliance upon the undertaking." Restatement (Second) of Torts § 323(a)-(b). Josh appears to argue both that respondents increased his risk of harm and that he reasonably relied on their undertaking, but he presents no relevant and binding caselaw to support either argument.[7] Because Josh fails to present legal arguments and binding authorities to support his assertions, we decline to consider them as inadequately briefed. *See Kropp*, 895 N.W.2d at 653.

The most similar, binding Minnesota case discussing section 323, cited only by the NCAA here, is *Funchess v. Cecil Newman Corporation*, 632 N.W.2d 666 (Minn. 2001). In *Funchess*, the supreme court addressed whether a landlord could be held liable for the death of a tenant who was murdered in their apartment by a third party. 632 N.W.2d at

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[7] Further, a person's "reasonable reliance must be based on specific actions or representations which cause the persons to forego other alternatives of protecting themselves." *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 807 (Minn. 1979). Josh makes no argument that he forewent alternatives of protecting himself by relying on any specific actions or representations by respondents.

668-69. The trustee for the tenant's heirs claimed that the landlord had failed to repair a security door, allowing the third party to enter the building. *Id.* at 671. The supreme court affirmed the district court's determination on summary judgment that the landlord owed no duty to protect the tenant from the third party. *See id.* at 671, 675. The supreme court also addressed whether, "by providing security measures, [the landlord undertook] a duty [under section 323] to maintain them that extend[ed] to protecting [the tenant] from harm inflicted by third-party criminals." *Id.* at 674. The supreme court concluded that the landlord did not undertake that duty. *Id.* at 675. *Funchess* rested in part on policy concerns: The supreme court explained that it was "not inclined to establish a rule that would discourage landlords from improving security." *Id.*

Josh's relationship with the University is similar to the landlord-tenant relationship in *Funchess*: They had some amount of interaction, and the University and landlord took some measures to protect the party who was ultimately injured. Josh's relationships with the NCAA and the Big Ten were even more attenuated, as the parties agree that he had no contact with them whatsoever. To the extent that any respondent took some measures to protect student-athletes, the existence of these measures does not necessarily create a duty under section 323. *See id.* at 674-75. Further, similar policy concerns as those expressed by the supreme court in *Funchess* apply here, weighing against the creation of a section 323 duty because it would discourage respondents from taking measures to protect student-athletes. *See id.* at 675.

C. No out-of-state caselaw merits reversal here.

Josh cites cases from the courts of other states, but these are not binding on us. *See Laliberte v. Dollar Tree, Inc.*, 987 N.W.2d 590, 595 (Minn. App. 2023) ("Although decisions from other states are not binding authority, they may be persuasive as they relate to the legal standard being evaluated."). Further, these cases are distinguishable, limiting their persuasive value, and they do not support Josh's argument.

In two of these out-of-state cases, the NCAA prevailed at the summary-judgment stage. *See Lanni v. Nat'l Collegiate Athletic Ass'n*, 42 N.E.3d 542, 553 (Ind. Ct. App. 2015) (affirming entry of summary judgment because "[t]he NCAA's conduct does not demonstrate that it undertook or assumed a duty to actually oversee or directly supervise the actions of the member institutions and the NCAA's student-athletes"); *Greiber v. Nat'l Collegiate Athletic Ass'n*, 244 A.D.3d 697, 699-700 (N.Y. App. Div. 2025) (reversing denial of NCAA's summary-judgment motion). And in one instance Josh cited an opinion by a lower court that had denied the NCAA's motion for summary judgment, but an appellate court subsequently reversed that decision. *See Greiber v. Nat'l Collegiate Athletic Ass'n*, 2021 WL 8442463, at *1-5 (N.Y. Sup. Ct. Nov. 29, 2021), *rev'd*, 244 A.D.3d 697 (N.Y. App. Div. 2025). The remaining out-of-state cases cited by Josh are not persuasive, so we decline to consider them.[8]

While we are sympathetic to the Campions' struggles following Josh's college football career, we are an error-correcting court and must decide cases consistent with

[8] For the same reason, we decline to address the out-of-state authorities cited by the parties in their citations of supplemental authority.

existing law. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). It is not our role to recognize new causes of action in the first instance. *See, e.g.*, *Stubbs v. N. Mem'l Med. Ctr.*, 448 N.W.2d 78, 80-81 (Minn. App. 1989) (acknowledging strong public-policy argument for recognition of "cause of action for invasion of privacy," but stating that court of appeals cannot "establish new causes of action"), *rev. denied* (Minn. Jan. 12, 1990); *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) (declining to extend implied warranty of fitness, provided by statute, to homes not included in statute because "the task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court"), *rev. denied* (Minn. Dec. 18, 1987).

Because no Minnesota caselaw recognizes a general duty to protect health and safety under section 323, we decline Josh's argument which, in effect, would require us to create a new duty. Following supreme court precedent, we conclude that respondents did not undertake a duty to "protect" Josh's "health and safety" under section 323. *See Funchess*, 632 N.W.2d at 674-75. As a result, we need not reach the question of primary assumption of the risk. *See Baber*, 531 N.W.2d at 495. We therefore affirm the district court's grant of summary judgment on Josh's negligence claim. *See Doe v. Archdiocese of St. Paul & Minneapolis*, 817 N.W.2d 150, 163 (Minn. 2012) (explaining that appellate courts "may affirm a grant of summary judgment if it can be sustained on any grounds").

III. The district court properly granted summary judgment for respondents on Ciera's loss-of-consortium claim because it is derivative of the other claims.

Ciera argues that the district court erred by dismissing her loss-of-consortium claim at the summary-judgment stage. We disagree.

Loss-of-consortium claims are derivative claims, meaning that a spouse's "right to recover from the defendant derives, by reason of [their] marriage to [an injured spouse], from [the injured spouse's] right to recover from the defendant." *Huffer v. Kozitza*, 375 N.W.2d 480, 482 (Minn. 1985). If the injured spouse's claim fails, then their spouse's loss-of-consortium claim also fails. *See, e.g.*, *Kohler v. Fletcher*, 442 N.W.2d 169, 173 (Minn. App. 1989), *rev. denied* (Minn. Aug. 25, 1989).

The district court dismissed Ciera's loss-of-consortium claim in part because it is derivative of the other claims, which it also dismissed. Ciera does not dispute this reasoning on appeal. Because we affirm the summary-judgment dismissal of the other claims, we conclude that the district court properly dismissed Ciera's derivative claim for loss of consortium.

IV. We need not address Josh's challenge to the exclusion of expert testimony.

Lastly, Josh argues that the district court abused its discretion by excluding expert testimony. We are not persuaded.

"An affidavit from an expert cannot create a duty where none exists. [When] a party has no duty, there can be no breach." *Safeco Ins. Co. of Am. v. Dain Bosworth Inc.*, 531 N.W.2d 867, 873 (Minn. App. 1995), *rev. denied* (Minn. July 20, 1995). Further, "[o]pinions regarding legal issues are ordinarily not admissible." *Id.*

Josh's experts offered opinions to support his claim that respondents breached their duties to him, causing permanent injuries. Because our legal conclusion that respondents did not owe a duty to Josh is dispositive, we need not address the exclusion of the expert testimony on the elements of breach or causation.

Affirmed.

BRATVOLD, Judge (concurring in part, dissenting in part)

I concur in part with the majority opinion that summary judgment is warranted as to all claims by appellants Josh and Ciera Campion against respondents National Collegiate Athletics Association (NCAA) and the Big Ten Conference Inc. and as to the breach-of-fiduciary-duty claim against respondent University of Minnesota.[1] But I write separately because I conclude that genuine issues of material fact preclude summary judgment on Josh's negligence claim and Ciera's loss-of-consortium claim against the University. Therefore, I concur in part and respectfully dissent in part.

My analysis begins with the record evidence. I first conclude that the district court abused its discretion by excluding the expert opinion testimony offered by the Campions. The relevant opinions relate to whether, by adopting the Concussion Management Plan (CMP), the University undertook to provide services necessary to Josh's protection and whether, during the Northwestern game, the CMP was triggered and the University violated its CMP. The expert's opinions are supported by the record evidence and, although the inferences drawn and opinions stated are disputed, the evidence is admissible and should be considered on summary judgment. If I view the expert's opinion and other record evidence in a light favorable to Josh, as I must on summary judgment, I conclude that genuine issues of material fact preclude summary judgment on the existence of a legal duty.

Primary express assumption of the risk also involves disputed fact issues. And while I conclude that primary implied assumption of the risk of harm from head injury applies to

[1] Because appellants share the same last name, this opinion, like the majority opinion, refers to them individually by their first names and collectively as the Campions.

Josh's negligence claim, I also conclude that genuine issues of material fact exist as to whether the University enlarged the risk of this type of harm to Josh when the University allegedly failed to follow the CMP during the Northwestern game. Thus, Josh should be entitled to a jury decision on his negligence claim against the University. Similarly, Ciera should be able to submit her loss-of-consortium claim to the jury.

I. Summary of the Factual Record in a Light Favorable to Josh

While the majority opinion accurately summarizes the parts of the record on which it relies, additional relevant facts affect my analysis. First, while the University's adoption of the CMP is important, its terms are equally important. The CMP states that a "student-athlete who shows *any signs*, symptoms, or behaviors *consistent with a concussion must be removed* from practice or competition *and evaluated by a medical staff member* (i.e. Certified Athletic Trainer, team physician or other medical physician . . . .)." (Emphasis added.) "If a concussion is confirmed, the student-athlete must be removed from practice or competition for the remainder of that calendar day."[2]

Second, the record includes important details about what happened in the locker room during halftime of the Northwestern game. As the University recognizes in its brief, "[t]oward the end of the first half, [Josh] took a hit to the head or neck area," then left the field and walked to the locker room. In his deposition, Josh, who was an offensive lineman during the game, testified that he "recall[s] very little." But Josh affirmed in his testimony

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[2] The Campions refer to both the 2014 and the 2015 CMP. I quote the 2015 CMP because it was in effect at the time of the October 2015 Northwestern game that is central to the Campions' claims.

what he had attested to in his affidavit—that as he walked to the locker room, he "reported to trainer Chris Ashton that [he] could not see properly."

C.M., Josh's teammate, testified that Josh was "moaning and groaning" as they walked into the locker room. In his affidavit, C.M. averred that Josh told him during the walk that he "had trouble seeing." C.M. testified that they sat down next to each other in the locker room and Josh told C.M. he thought he had a concussion. Josh was hunched over, "kind of blubbering, not crying loud, but like tears rolling down his face." Coach Matt Limegrover came over to them, and C.M. "mouth[ed] the words" that he thought Josh had a concussion. Trainer Ashton joined Limegrover and Josh. According to C.M.'s affidavit, both Limegrover and Ashton knelt by Josh and spoke "in low tones."

Limegrover told C.M. to pay attention to the team meeting; C.M. complied and did not hear the conversation between Limegrover, Ashton, and Josh. C.M.'s affidavit added that Ashton "did not test Josh at all," nor did Ashton take Josh "out of the locker room." And Ashton "did not ask for a physician to speak with" Josh. The only thing C.M. heard was Limegrover asking Josh, "Do you think you can go?" Josh responded, "I'm fine to go." C.M. testified that Josh "cried pretty much the rest of the game, even while he was playing."

Limegrover testified that he did not remember what happened in the locker room during the Northwestern game. Limegrover had read C.M.'s sworn statements and said he did not think C.M. was lying; "I don't think because I can't remember it, doesn't mean that it didn't happen." Ashton could not recall that Josh was in distress during halftime of the Northwestern game, nor could Ashton recall any of the events described by C.M. But

Ashton agreed that, based on C.M.'s testimony, the failure to test Josh during halftime violated the CMP.

Finally, one of the Campions' experts, Dr. Peter Seidenberg, who was the football team physician for Penn State University from 2013 to 2020, authored a report in which he summarized the grounds for his opinion that Ashton and Limegrover violated the CMP during the Northwestern game and "subjected" Josh to "the risk of second impact syndrome, death, and irreversible neurodegenerative disease, specifically the early onset neurocognitive disorder or dementia with which he has been diagnosed." Seidenberg also provided deposition testimony similar to his report. Based on C.M.'s sworn statements, Seidenberg concluded that Josh "was in significant and obvious distress, hunched over, groaning, and had tears flowing down his cheeks. The distress required intervention." Although Limegrover and Ashton saw Josh, "both have testified that they cannot recall anything from the half time locker room" during the Northwestern game.

Based on this and other record evidence, Seidenberg determined that Limegrover and Ashton did not interview C.M. or separate Josh from the team to have him evaluated and "determine whether his distress was concussion-related," which was "a failure and a violation" of the CMP.[3] Seidenberg also relied on the deposition testimony of team physician Suzanne Hecht. According to Seidenberg, while Hecht did not testify to what

[3] The University contends that C.M. lacked "factual and substantive foundation" for stating that Ashton "did not test Josh." I disagree because C.M.'s testimony is based on his observations of what happened in the locker room and his own experience of being evaluated for a concussion. More to the point, Seidenberg relies on C.M. for his firsthand observations and not for his conclusion that Ashton did not evaluate Josh during halftime.

happened in the locker room during the Northwestern game, she agreed that, "under [C.M.'s] version of events, the conduct of Mr. Limegrover is a violation of the Minnesota CMP." As for C.M.'s testimony that Limegrover asked Josh if he could go back in the game, Seidenberg's report stated that Limegrover and Ashton "relied on" Josh's "willingness to return to the game as the reason for putting him back in," and concluded that "this is a clear violation of the CMP."

The University's adoption of the CMP is Josh's primary evidence that the University undertook to provide services in the event of a player's concussion symptoms. Seidenberg's report, among other evidence, is relevant to whether the University undertook to provide services necessary to protect Josh from physical harm during the Northwestern game, whether the University's alleged failure to follow the CMP increased the risk of harm to Josh, or whether Josh suffered harm because he relied on the University to follow the CMP. *See* Restatement (Second) of Torts § 323 (Am. L. Inst. 1965). Seidenberg's expert opinion is also relevant to whether primary assumption of the risk precludes Josh's negligence claim.

Because Seidenberg's opinion testimony is relevant to analyzing whether the University owed a duty of care to Josh, my analysis of the district court's summary-judgment decision begins with the district court's decision to exclude Seidenberg's report and testimony.

II. The district court abused its discretion by excluding Seidenberg's expert opinion testimony.

Appellate courts review a district court's exclusion of expert testimony for abuse of discretion. *Marquardt v. Schaffhausen*, 941 N.W.2d 715, 719 (Minn. 2020). The district court's "ruling will not be reversed unless it is based on an erroneous view of the law or it constitutes an abuse of discretion." *Id.* (quotation omitted).

The district court excluded Seidenberg's report as to the University's alleged violation of the CMP during the Northwestern game after concluding that Seidenberg's opinion lacked foundation.[4] The Campions disagree. To be admissible, an expert report "must have foundational reliability." Minn. R. Evid. 702. "Foundational reliability is a concept that looks to the theories and methodologies used by an expert." *Kedrowski v. Lycoming Engines*, 933 N.W.2d 45, 56 (Minn. 2019).

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[4] The district court excluded two additional opinions by Seidenberg that (1) the University did not provide sufficient education for its players regarding the risk of concussion and (2) the University provided players with Toradol, a medication that "tends to mask injuries, including the most common symptoms of concussion, the headache." I conclude that the district court properly excluded both opinions. First, Seidenberg concedes that no evidence shows that Josh received Toradol; therefore, his Toradol opinion lacks relevance. Second, the University's discretionary acts are immune from liability under Minn. Stat. § 3.736, subd 3(b) (2024). *See Miller v. Chou*, 257 N.W.2d 277, 281 (Minn. 1977). Because the sufficiency of player education about concussions is a policymaking decision protected by statutory immunity, Seidenberg's opinion is not relevant to the University's liability to Josh. In contrast, the NCAA required the University to adopt the CMP and its procedures for how the University will respond to any signs, symptoms, or behaviors indicative of concussion. As a result, those procedures are not subject to immunity.

The district court also excluded the reports of Josh's two damage experts but only "to the extent they state that the University violated the CMP." Because I would reverse the exclusion of Seidenberg's opinion on the University's violation of the CMP, I would also reverse the district court's partial exclusion of the reports by Josh's two damage experts.

To determine whether expert testimony satisfies rule 702, district courts must consider "both the reliability of the underlying theory, as well as the reliability of the evidence in the particular case, with a view toward the purpose for which the expert testimony is being offered." *Id.* (quotations omitted). As to the reliability of the evidence, or factual foundation, the "opinion need only be based on enough facts to form a reasonable opinion that is not based on speculation or conjecture." *Mattick v. Hy-Vee Foods Stores*, 898 N.W.2d 616, 621 (Minn. 2017) (quotation omitted). And those facts must be "supported by the evidence." *Kedrowski*, 933 N.W.2d at 56.

When reviewing the admissibility of an expert's opinion, the district court must be careful not to act as a fact-finder by weighing the evidence or assessing witness credibility. *Pfeiffer v. Allina Health Sys.*, 851 N.W.2d 626, 638-39 (Minn. App. 2014), *rev. denied* (Minn. Oct. 14, 2014). "Alleged deficiencies in an expert's factual basis go more to the weight of the expert's opinion than to its admissibility." *Kedrowski*, 933 N.W.2d at 60 (quotation omitted). Thus, deficiencies in the factual basis for an expert opinion are subject to "detailed cross-examination and argument to the jury, rather than a foundational-reliability determination under Rule 702." *Id.*

In his report, Seidenberg identified the sworn statements, deposition testimony, and other evidence on which he relied. Seidenberg also summarized the facts on which he relied to determine that the University violated the CMP during the Northwestern game: (1) Josh told C.M. that he was concussed; (2) C.M. communicated to Limegrover that Josh had a concussion; (3) neither Limegrover nor Ashton interviewed C.M. about what Josh told him; (4) Josh spoke with Limegrover and Ashton, but Josh was not separated from the rest of the team during halftime or evaluated by the team physician; (5) Josh was hunched over, crying, groaning, and in "obvious distress"; (6) C.M. saw Josh's distress and said it was visible to Limegrover and Ashton; (7) Josh had suffered a concussion five weeks before the Northwestern game and two other concussions before that; (8) at the end of halftime, Josh was put back in the game when Limegrover asked him and Josh agreed that he could play; and (9) Limegrover and Ashton did not recall the encounter with Josh in the locker room and did not claim that C.M. was lying.

Based on these facts, Seidenberg opined that the University violated the CMP because Limegrover and Ashton were alerted to a possible concussion; Josh's symptoms of a concussion were visible; and neither Limegrover nor Ashton evaluated Josh, called the team physician to evaluate Josh, or removed Josh from the game. In his deposition, Seidenberg testified that, based on his personal knowledge of the guest locker room at Northwestern, it was too small of a space to conduct a proper concussion evaluation. In his deposition, Seidenberg explained that his opinion about what is a proper concussion evaluation was "based upon the medical standard of care for both physicians and athletic trainers."

The district court determined that Seidenberg's opinion lacked factual foundation. The district court stated that Josh "acknowledges" that Ashton "examined him as required by the CMP during halftime of the Northwestern game." The district court then concluded that, "[s]ince neither Ashton nor [Josh] recalls that conversation and no one else heard it, any claim that Ashton violated the CMP by allowing [Josh] to return to play lacks foundation and is based on speculation."[5]

The Campions argue that the district court "usurped the jury function" by weighing the evidence underlying the expert's opinion and improperly found facts on summary judgment, such as its finding that Josh acknowledged that Ashton examined him. The University urges that the Campions "cannot show there was no evaluation" and that "all evidence suggests the conversation [between Josh and Ashton] focused on potential symptoms."

I conclude that the district court improperly weighed the evidence in deciding to exclude Seidenberg's expert testimony. The district court focused on the conversation between Josh, Limegrover, and Ashton and assumed it amounted to an "examination." But the district court did not acknowledge the other record facts that Seidenberg identified in his report—for example, that (1) Josh displayed symptoms, signs, and behavior indicative of a possible concussion, (2) the University violated the CMP by not separating Josh from the team and by not evaluating him, and (3) based on Seidenberg's personal experience as a university football team physician, that the Northwestern locker room was too small to

[5] The district court also noted that Seidenberg opined "that Ashton did not properly evaluate and diagnose [Josh] in determining whether he could return to play because Ashton ignored the applicable medical standard of care." The district court determined that "this is a malpractice standard" and that the Campions did not assert a medical-malpractice claim. I agree that the medical-malpractice standard of care does not apply but conclude that Seidenberg should be allowed testify to what is a *reasonable* standard of care for the evaluation of concussion symptoms.

perform a proper assessment. Because facts relevant to Seidenberg's opinions are supported by record evidence, the district court erred in excluding his expert evidence.

It is true that neither Josh, Limegrover, nor Ashton remembers what happened during their conversation at halftime. It is also true that a jury could reasonably determine that Josh *was* evaluated for a concussion during halftime at the Northwestern game and that this evaluation accorded with the CMP. But the opposite is also true: the jury would have evidence on which to find that Josh showed signs of concussion and the University did not evaluate him. Josh's burden of production at this stage is low. Because C.M. recalls material facts about what happened during halftime, the record establishes a genuine issue about the University's compliance with the CMP. *See*, *e.g.*, *Staub v. Myrtle Lake Resort, LLC*, 964 N.W.2d 613, 629-30 (Minn. 2021) (reversing the grant of summary judgment in a wrongful-death claim against a resort in which the decedent fell down a dilapidated staircase, no witness saw the decedent fall, and speculation was not required to determine the resort's negligence). Any deficiencies in the factual basis for Seidenberg's opinion should be addressed during cross-examination at trial or argument to the jury. *See Kedrowski*, 933 N.W.2d at 60.

In short, Seidenberg's opinion rested on record facts sufficient to form an opinion on whether the CMP was triggered by Josh's signs, symptoms, or behaviors and whether the University violated the CMP during the Northwestern game. Therefore, Seidenberg's opinions were "not based on speculation or conjecture." *Mattick*, 898 N.W.2d at 621. Thus, I conclude that the district court abused its discretion by excluding Seidenberg's expert opinions for lack of factual foundation.

III. Genuine issues of material fact preclude summary judgment on whether the University owed a duty of care to Josh.

The Campions argue that the University "committed voluntarily" to make Josh's "health and safety its *number one priority*" and that following the CMP was "[p]art of this voluntary commitment." Based on section 323 of the Restatement (Second) of Torts, Josh contends that the University's adoption of the CMP gave rise to a duty to exercise reasonable care in responding to Josh's alleged concussion symptoms during the Northwestern game.

"It is well established that one who voluntarily assumes a duty must exercise reasonable care or he will be responsible for damages resulting from his failure to do so." *Isler by Isler v. Burman*, 232 N.W.2d 818, 822 (Minn. 1975). The supreme court has applied section 323 of the Restatement (Second) of Torts to analyze whether a tortfeasor has assumed a duty that may give rise to liability. *See, e.g.*, *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 674-75 (Minn. 2001) (quoting section 323 and concluding that a landlord did not assume a "duty to maintain security measures" after it installed a security door).

Section 323 provides:

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

Restatement (Second) of Torts § 323. "Whether a duty has been assumed is a question of fact." *Ironwood Springs Christian Ranch, Inc. v. Walk to Emmaus*, 801 N.W.2d 193, 199 (Minn. App. 2011).[6]

Three cases illustrate facts in which Minnesota courts have considered whether a defendant undertook a duty under section 323. Some of these cases involve section 324A of the Restatement (Second) of Torts, which applies when one "undertakes . . . to render services to another" that the actor "should recognize as necessary for the protection of a *third person*." Restatement (Second) of Torts § 324A (Am. L. Inst. 1965) (emphasis added); *accord Ironwood*, 801 N.W.2d at 195 ("The liability of a person who undertakes another's duty owed to a third person is governed by Restatement (Second) of Torts § 324A."); *see*

[6] Minnesota courts have also applied section 314A of the Restatement (Second) of Torts and recognized a duty to protect another from harm when "an individual, whether voluntarily or as required by law, has custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection." *Bjerke v. Johnson*, 742 N.W.2d 660, 665 (Minn. 2007) (quotation omitted) (citing Restatement (Second) of Torts, § 314A (Am. L. Inst. 1965)).

In a nonprecedential opinion, this court looked to section 314A and considered whether the University owed a duty of care to an unsupervised cheerleading squad that was "a registered student organization." *Vistad v. Bd. of Regents*, No. A04-2161, 2005 WL 1514633, at *1-5 (Minn. App. June 28, 2005). This court stated that relevant factors in determining whether this duty existed "include whether the plaintiff was vulnerable or expected some form of protection, and whether the defendant receives pecuniary gain or has some control over the plaintiff's welfare." *Id.* at *3 (citing *Harper v. Herman*, 499 N.W.2d 472, 474-75 (Minn. 1993)). This court concluded that the University owed no duty to Vistad because the University "exerted minimal control over the cheerleaders," did not provide a coach or direct practices "or otherwise impose rules on the participants," and did not profit from cheerleading activities. *Id.* at *4.

Based on the record in the Campions' case, the University's relationship to its football team is distinguishable from that of the University to its cheerleading squad in *Vistad*. In any event, I do not analyze the University's duty to the football team under section 314A because, in their reply brief, the Campions explicitly argue that "the liability in this case is based on Restatement § 323."

Erickson v. Curtis Inv. Co., 447 N.W.2d 165, 170-71 (Minn. 1989) (citing section 324A and holding that a security company owed a duty of care to parking-ramp patron who was assaulted because it "undertook to perform" the ramp operator's duty to protect its customers). Sections 323 and 324A both require the same elements—an "undertaking to render services to another which [the defendant] should recognize as necessary for the protection" of another (in the case of section 323) and a third person (in the case of section 324A).[7] Therefore, caselaw analyzing section 324A duties instructs my analysis.

First, in *Walsh v. Pagra Air Taxi, Inc.*, the supreme court determined that Pagra, an aviation-services company, undertook a duty to fight airplane fires and breached that duty to Walsh, the owner of an airplane that "burst into flames" shortly after landing and "was reduced to salvage value" by the fire. 282 N.W.2d 567, 570-71 (Minn. 1979).[8] As the plane burned, Pagra's employees were unable to get the city firetruck out of its garage to suppress the fire because the garage door was broken. *Id.* at 570.

The supreme court determined that Pagra had agreed with the city that Pagra would fight airplane fires using the equipment provided by the city. *Id.* The supreme court also determined that, consistent with section 323, the city "undertook to render fire protection

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[7] Section 324A of the Restatement (Second) of Torts tracks the other elements of section 323 in all relevant respects, except that section 324A requires that the defendant has "undertaken to perform a duty owed by the other to a third person." *See Ironwood*, 801 N.W.2d at 199-200 (comparing sections 324A and 323 of the Restatement (Second) of Torts).

[8] The city was also a defendant but reached a settlement with Walsh after Pagra appealed. *Id.* at 571-72. The supreme court analyzed and upheld the city's duty under section 323. *Id.* at 570. The supreme court also addressed whether Pagra had assumed a duty to the airplane owner under section 324A through its operating agreement with the city. *Id.*

services to airport users . . . evidenced by the city's supplying the airport with firefighting equipment and a firetruck, requiring the presence at the airport of personnel trained in firefighting, and providing equipment to contact the main fire station." *Id.* The supreme court concluded that the city "recognized that fire extinguishing equipment and personnel trained to use it are necessary parts of safe airport operation, and the record establishes that Walsh relied upon the airport fire protection service." *Id.* Thus, the supreme court affirmed the jury's verdict as to Pagra's duty under section 324A and its liability for damages caused by the fire. *Id.*

In *Isler*, the supreme court affirmed a judgment against a church that hosted a snowmobile party. 232 N.W.2d at 818-22. Isler sued the church for damages after the snowmobile she was riding crossed a ditch and she was "suddenly thrust forward and then thrown back into a bar on the rear portion of the snowmobile," leading to personal injuries. *Id.* at 819-20. The church argued that the district court "erred in imposing on it the duties of a possessor of land." *Id.* at 820. The supreme court determined that the church "had assumed the duty of inspecting the land to determine if it was free from hazards which would cause danger to those involved in the snowmobiling." *Id.* at 821. Relying in part on section 323, the supreme court rejected the church's argument that the church was "in effect, penalized . . . for undertaking an inspection which it had no duty to make in the first place." *Id.* at 821-22.

In *Laska v. Anoka County*, this court reversed the district court's summary-judgment order dismissing a wrongful-death negligence claim against a home daycare provider's adult daughter. 696 N.W.2d 133, 135-37 (Minn. App. 2005), *rev. denied* (Minn. Aug. 16, 2005). The district court determined that the daughter owed no duty to an infant who died of "possible sudden infant death syndrome" while napping "on her stomach on an adult bed on top of a foam-filled comforter" at the daycare. *Id.* The daughter had told her mother that she "would be 'around to help' with the day care" during a two-week period when the daycare had a variance to care for more toddlers than was typically allowed under its license. *Id.* at 136.

On the day of the infant's death, the daughter cared for children at the daycare. *Id.* at 136-37. On appeal, the daughter argued that she owed the infant no duty of care because she "never cared for, met, or saw [the infant] in life and was not present" when the infant was put down for the nap. *Id.* at 138. We rejected this argument, stating that the daughter "accepted the entrustment of every child in the day care and subsequently acted in a manner consistent with that acceptance." *Id.* at 138-39. We held, therefore, that "[p]ursuant to § 324A" the daughter "undertook a duty of care equal in scope to that owed by her mother" to every child at the daycare, including the infant. *Id.* at 139.

In sum, this court and the supreme court have determined that a tortfeasor may assume a duty to exercise reasonable care by undertaking to provide firefighting services at an airport, to inspect land for hazards before a snowmobile party, or to care for children in a daycare setting. I would apply this caselaw here. Each case applies section 323 or 324A to its facts without relying on prior caselaw involving equivalent factual circumstances. And as the majority notes, each case involves specific duties—as does the CMP. Indeed, the University's brief to this court describes the CMP as having "laid out the procedures to be followed if there were signs or symptoms of a concussion."[9]

In other words, the issue is not whether Minnesota courts have held that section 323 applies to a school or sports team that has adopted a concussion protocol but whether, by adopting the CMP, the University rendered a service that it should have recognized was "necessary for the protection" of Josh's "person" under the circumstances presented during the Northwestern game. I believe that the evidence establishes a genuine issue of material fact on this issue. *See Funchess*, 632 N.W.2d at 674 (applying section 323 and stating that "we ask whether the security measures in place at the apartment building constituted a 'service'" that the landlord "should have recognized was 'necessary for the protection'" of a tenant).

Persuasive caselaw from other jurisdictions supports the application of section 323 to a college's undertaking to provide services to protect and treat injured athletes. In *Feleccia v. Lackawanna College*, two football players in Pennsylvania were injured at a practice and sued the college for damages caused by its negligence. 215 A.3d 3, 8-9 (Pa. 2019). The players argued that the college had taken on "a duty to provide an athletic trainer, but then failed to provide an athletic trainer for its football team." *Id.* at 8. In

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[9] I agree with the University's observation that the CMP "does not define 'evaluation' or require any particular tests or components; this determination is left to the discretion of the medical professional." Still, under section 323, a tortfeasor who undertakes to provide services to another is liable for failing to do so with reasonable care if their failure "increases the risk of such harm" or the harm "is suffered because of the other's reliance" on the tortfeasor's undertaking. As discussed below, the summary-judgment record includes disputed facts and inferences about whether the University's alleged failure to follow the CMP increased the risk of harm to Josh.

Pennsylvania, an athletic trainer must pass a national certification exam and be licensed by the state. *Id.* at 6 n.1.

The college had "customarily employed two athletic trainers to support the football program," but during the relevant practice session, no licensed athletic trainers were present. *Id.* at 6. During a drill, one player "suffered a T-7 vertebral fracture," but after he was taken away in an ambulance, the team continued the same drill. *Id.* at 8. The second player suffered a "stinger" in his shoulder. *Id.* at 8-9. The college employee who was supervising practice "cleared [the second player] to continue practice if he was feeling better." *Id.* at 9 (quotation omitted). The second player returned to practice, and he "suffered a traumatic brachial plexus avulsion." *Id.*

The trial court dismissed the players' claims on summary judgment based on a waiver they had signed. *Id.* at 9-10. The intermediate appellate court reversed, in part because it determined that the college had a duty of care to "have qualified medical personnel available" at football practice and "to provide adequate treatment in the event that an intercollegiate student athlete suffered a medical emergency." *Id.* at 10. The Pennsylvania Supreme Court affirmed in part, holding that the college "had a duty to provide duly licensed athletic trainers for the purpose of rendering treatment to its student athletes participating in athletic events." *Id.* at 21.

The Pennsylvania Supreme Court first determined that the trial court erred by recognizing a new common-law duty without applying the factors required by Pennsylvania caselaw. *Id.* at 12-13. But the Pennsylvania Supreme Court nonetheless concluded that the college's duty arose under existing common-law principles and that it was unnecessary to recognize a new duty. *Id.* at 13-14. The Pennsylvania Supreme Court noted that section 323 was "an accurate statement of Pennsylvania law" and concluded that "the record supports a finding [that the college] undertook a duty to provide duly licensed athletic trainers for the purpose of rendering treatment to its student athletes participating in athletic events." *Id.* at 15.

This analysis is persuasive because, like the University, the college adopted a policy to mitigate the risk of injuries to its football players by employing two athletic trainers. The CMP provides: "A student-athlete who shows any signs, symptoms or behaviors consistent with a concussion must be removed from practice or competition and evaluated by a medical staff member (i.e. Certified Athletic Trainer, team physician or other medical physician . . . .)."

In other words, the jury could determine that—like the city that provided the airport with firefighting equipment and training of firefighting personnel, like the church that inspected land for hazards before hosting an event, and like the daycare owner's daughter who agreed to care for children—the University rendered a service to its players necessary for their safety when it adopted the CMP. I would hold that, under the existing common-law duty described in section 323, a genuine issue of material fact exists regarding whether the University undertook to provide services to Josh when it adopted the CMP. If so, the University had a duty to exercise reasonable care in following the CMP.

I do not share the majority's policy concern that holding the University to a standard of reasonable care in following the CMP would discourage the University from protecting student athletes. I would distinguish this case from *Funchess*, in which the supreme court held that a landlord's installation of an exterior security door did not give rise to a duty under section 323 to "maintain [the door] that extends to protecting [tenants] from harm inflicted by third-party criminals." 632 N.W.2d at 674. The supreme court stated that its decision was, in part, based on public policy because it was "not inclined to establish a rule that would discourage landlords from improving security." *Id.* at 675.

Here, no such policy choice is involved because the NCAA requires the University to have a CMP in place. Holding the University liable for any negligence in failing to follow the mandatory provisions of the CMP would improve player safety. And the legal duty to exercise due care in following the CMP would not affect the scope of the University's liability for other health and safety policies.[10]

I also reject the district court's reasons for determining that the University did not owe Josh a duty under section 323. The district court concluded that the University owed Josh no duty under section 323 because it "did not commit" to "specific duties or services to protect [Josh] from concussions." The district court reasoned that "the general statements upon which [the Campions] rely are aspirational and are not nearly specific enough to constitute a 'voluntary assumption' of such a duty" to protect "[Josh]'s health, safety and welfare from the adverse effects of head impacts." The district court appears to refer to the

[10] I would also distinguish *Funchess* on its facts. First, in *Funchess*, the security door was redundant because the landlord also provided a security guard and a lock on the door of the injured tenant's unit. *Id.* The CMP is the University's mandatory procedure for mitigating harm to football players from concussions. Second, unlike here, *Funchess* involved harm caused by the criminal act of a third party. *Id.* at 668.

preamble to the CMP, which states that the "health and safety of our student-athletes is the first priority of the University."

I agree that a promise by the University to make Josh's and other University athletes' "health and safety its *number one priority*" is not, as the Campions argue in their brief, by itself an undertaking that would give rise to a duty under section 323. But I disagree with the district court's conclusion that the University "did not commit to any . . . specific duties or services to protect Josh from concussions." The CMP is an express commitment to follow a specific protocol involving services—to provide qualified medical personnel who will diagnose and treat any sign, symptom, or behavior indicative of a concussion during player participation in football practices and games.

The district court also determined that the University was entitled to summary judgment on Josh's negligence claim because he "has not provided any evidence that the University failed to follow the CMP." Relying on Josh's 2018 email to Ciera, the district court stated that Josh "acknowledged" he was "examined" by a "certified athletic trainer" "as required by the CMP during halftime of the Northwestern game." I disagree with the district court's reading of Josh's email as stating that he was "examined" by Ashton—the email states that Josh spoke with Ashton during halftime. More importantly, the district court disregarded C.M.'s testimony that Josh exhibited signs and behavior indicative of a concussion and was not tested by Ashton or separated from the team.

As already discussed, I would also conclude that the district court erroneously excluded Seidenberg's expert opinion testimony, which provides additional evidence that the University violated the CMP during the Northwestern game.[11] Seidenberg's testimony is relevant to whether Josh exhibited signs, symptoms, and behavior indicative of a concussion at halftime, triggering the CMP and thereby impacting the existence of a duty under section 323.

Stated somewhat differently, the record raises disputed issues on foreseeability of injury. Our caselaw has recognized that "the duty to exercise reasonable care arises from the probability or foreseeability of injury to the plaintiff." *Domagala v. Rolland*, 805 N.W. 2d 14, 26 (Minn. 2011). The foreseeability of injury provides "insight into whether the connection between the danger and the alleged negligent act is too remote to impose liability as a matter of public policy, in which case there is no duty." *Glay v. R.C. of St. Cloud, Inc.*, 30 N.W.3d 639, 653 n.15 (Minn. 2026) (quotations omitted). Our caselaw also instructs that, "[i]n close cases, the issue of foreseeability should be submitted to the jury." *Domagala*, 805 N.W.2d at 27. I would conclude that evidence of Josh's symptoms during halftime of the Northwestern game created a fact issue as to whether his injuries were

[11] The University asserts that "the only evidence" of Josh's conversation with Ashton is Josh's 2018 email to Ciera, in which he wrote that, at halftime, he "told a trainer that [he] took a big hit and that [he] was a little shaken up, nothing came of it. [He] knew that it was severe[.]" Josh added that he "thought that if [he] were to report head pain, visual disturbance, and mental fog that coaches thought [he] would be 'faking it' or being 'soft.'" From this, the University argues that Josh concealed from Ashton any symptoms of concussion.

I am not persuaded. While the University highlights one inference that the jury might draw from the email, a jury may also infer that the physical symptoms displayed by Josh and corroborated by C.M. amounted to "any signs, symptoms, or behaviors consistent with a concussion" and therefore required an evaluation as provided in the CMP. The University's argument also overlooks other evidence, including Josh's averment that he reported vision problems to Ashton and C.M.'s deposition testimony that he told Limegrover that Josh was concussed.

foreseeable, precluding summary judgment on the issue of whether the University owed a duty of care.

On summary judgment, appellate courts must "view the evidence presented in the light most favorable to the nonmoving party and must resolve all doubts and factual inferences against the moving parties." *Under the Rainbow Early Educ. Ctr. v. County of Goodhue*, 978 N.W.2d 893, 902 (Minn. 2022) (quotations omitted). Under this standard, there are genuine issues of material fact whether the University undertook to provide services to Josh when it adopted the CMP and therefore owed Josh a duty to exercise due care. Disputed facts also relate to whether, during the Northwestern game, the CMP was triggered and the University failed to follow the CMP. Thus, I would reverse the district court's summary-judgment decision on Josh's negligence claim based on the duty of care.

IV. Genuine issues of material fact preclude summary judgment on primary assumption of the risk.

Because I conclude that there is a genuine issue of material fact as to whether the University undertook a duty to provide services to Josh for his protection as stated in the CMP, I also consider whether Josh's negligence claim is nonetheless barred by primary assumption of the risk. "Primary assumption of the risk arises when parties have voluntarily entered a relationship in which plaintiff assumes well-known, incidental risks." *Grady v. Green Acres, Inc.*, 826 N.W.2d 547, 550 (Minn. App. 2013) (quotation omitted). Primary assumption of the risk "completely bars a plaintiff's claim because it negates the defendant's duty of care to the plaintiff." *Soderberg v. Anderson*, 922 N.W.2d 200, 203 (Minn. 2019) (quotation omitted). In other words, primary assumption of the risk "precludes liability for negligence." *Id.* But this doctrine "may not apply if the defendant enlarged the risk to the plaintiff." *Schneider by Schneider v. Erickson*, 654 N.W.2d 144, 152 (Minn. App. 2002).

I first address whether Josh assumed the risks of injury inherent to football, then consider whether Josh presented evidence that the University enlarged these risks by not following the CMP during the Northwestern game.

A. Whether Josh Assumed the Risks Inherent to Football

Primary assumption of the risk may be express or implied. *Armstrong v. Mailand*, 284 N.W.2d 343, 351 (Minn. 1979) (stating that this principle "is dependent upon the plaintiff's manifestation of consent, express or implied, to relieve the defendant of a duty"). In its order, the district court determined that Josh expressly and impliedly assumed the risk of concussion injury "as an inherent part of playing football." Although the district court and the parties appear to conflate express and implied primary assumption of the risk at times, I consider these two doctrines separately.[12]

1. Express Primary Assumption of the Risk

Express primary assumption of the risk may arise when a plaintiff explicitly agrees to hold the defendant harmless for certain risks—for example, by signing a contract with

[12] In its brief, the University argues that the Campions contest the application of primary assumption of the risk "[f]or the first time on appeal" and therefore the issue is forfeited. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts generally address only those questions presented to and considered by the district court). But the record shows that the Campions challenged primary assumption of the risk when they opposed the University's motion for summary judgment. Because the Campions made this argument in district court, I conclude that it is not forfeited on appeal.

an exculpatory clause. *See*, *e.g.*, *Bunia v. Knight Ridder*, 544 N.W.2d 60, 62-63 (Minn. App. 1996), *rev. denied* (Minn. May 9, 1996). Minnesota courts generally disfavor exculpatory agreements and "are reluctant to let parties contractually invade tort law to undermine its deterrent and compensatory objectives." *Id.* at 64 (concluding that an exculpatory clause in a contract was "void as against public policy"). Thus, courts strictly construe these agreements "against the benefited party." *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 789 (Minn. 2005) (quotation omitted).

The district court determined that there was "no doubt" that Josh "voluntarily and expressly assumed" the risks associated with playing football because he "signed documents reaffirming the risk." The Campions urge that these signed form documents are "irrelevant" to our analysis. The University counters that these documents show that Josh expressly assumed the risk "of catastrophic injury, brain damage, and even death" associated with playing football. In its legal argument in support of affirming summary judgment on assumption of the risk, the University refers to Josh's express assumption of the risk but does not analyze the doctrine or urge affirmance solely on that basis.

Genuine issues of material fact make summary judgment in favor of the University inappropriate on this issue. The record shows that Josh signed the University's required "Medical Management Agreement and Assumption of Risk" form before each football season. The form includes a section labeled "Assumption of Risk," which states:

> 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 participation include but are not*

> *limited to* death, serious neck and spinal injuries that may result in complete or partial paralysis or *brain damage*, serious injury to virtually all bones, joints, ligament, muscles, tendons, and other aspects of the muscular-skeletal system, *and serious injury or impairment to other aspects of my body, general health and well-being*. Because of this risk of dangers, I recognize the importance of following all instructions of the coaching staff, strength and conditioning staff, and/or Athletic Medicine staff. Furthermore, I understand that the possibility of injury, including catastrophic injury, does exist even though proper rules and techniques are followed to the fullest. . . . In consideration of the University of Minnesota permitting me to participate in intercollegiate athletics and to engage in all activities and travel related to my sport, *I hereby voluntarily assume all risks allocated with participation and agree to hold harmless, indemnify, and irrevocably and unconditionally release the [University]* from any and all liability . . . and any 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*.

(Emphasis added.)

None of the form documents that Josh signed refer to football or the specific risks inherent to football, such as head injury or concussion. Instead, they state that an athlete's "involvement *in any sport* can be a dangerous activity" and list many potential injuries, including "brain damage." (Emphasis added.) The law requires courts to strictly construe this language against the University as the "benefited party" to the contract. *Id.*

Even more to the point, the supreme court has held that, where an exculpatory clause does not refer to a benefited party's own conduct or express that the benefited party is being released from liability for its own conduct, the clause does not release the benefited party from liability for its own negligence. *See Justice v. Marvel, LLC*, 979 N.W.2d 894, 898-902 (Minn. 2022). The exculpatory clause in the form documents signed by Josh, while broad and expressly including a release for "any and all liability," does not refer to the University's own negligent conduct or its liability for its own conduct. Therefore, summary judgment in favor of the University on this issue was inappropriate.

2. Implied Primary Assumption of the Risk

Implied primary assumption of the risk is noncontractual and may arise "by implication." *Soderberg*, 922 N.W.2d at 203. The Minnesota Supreme Court has applied the doctrine of implied primary assumption of the risk to certain identified "inherently dangerous sporting events in which participants assume the risks inherent in the sport." *Id.* at 203-04 (quotation omitted) (summarizing caselaw applying this doctrine to damages claims involving flying baseballs, flying hockey pucks, on-ice collisions in recreational figure skating, and spectator injuries from flying golf balls). The supreme court, however, stated that it is "loathe to extend the doctrine of implied primary assumption" of the risk to other activities. *Id.* at 205; *see also Daly v. McFarland*, 812 N.W.2d 113, 120-122 (Minn. 2012) (declining to extend the doctrine to recreational snowmobiling).

Appellate courts review de novo a district court's application and extension of this doctrine. *Soderberg*, 922 N.W.2d at 202-203. Generally, "one who participates in a sport assumes the risks which are inherent in it, and it is ordinarily for the jury to determine what those risks are." *Moe v. Steenberg*, 147 N.W.2d 587, 589 (Minn. 1966). But the "applicability of primary assumption of the risk may be decided by the court as a matter of law when reasonable people can draw only one conclusion from undisputed facts." *Grady*, 826 N.W.2d at 549-50 (quotation omitted).

Minnesota courts have not explicitly addressed whether implied primary assumption of the risk extends to football or which risks of harm are inherent to football. The district court applied implied primary assumption of the risk to football and determined that "serious injuries"—including "head trauma," "concussions," and "permanent injury"—are "inherent risks of participating in football." On review, the Campions concede that "there is an inherent risk of head injury in football." The Campions maintain, however, that Josh did not know "the risk of long-term brain damage" or that "he could sustain an incurable brain disease caused by recurrent concussions."

In *Soderberg*, the supreme court considered whether implied assumption of the risk extends to recreational downhill skiing and snowboarding. 922 N.W.2d at 205-06. The supreme court declined to extend the doctrine, in part because the record did "not substantiate that injurious collisions between skiers are so frequent and damaging that they must be considered inherent in the sport." *Id.* The supreme court also stated: "If skiers act in accordance with the rules and general practices of the sport, at reasonable speeds, and with a proper lookout for others on the slopes, the vast majority of contact between participants will be eliminated. *The same may not be said of soccer, football, basketball and hockey*." *Id.* at 205 (emphasis added) (quoting *Jagger v. Mohawk Mountain Ski Area, Inc.*, 849 A.2d 813, 832 (Conn. 2004)). Thus, the supreme court indirectly recognized that implied assumption of the risk extends to football.

The supreme court's decision in *Soderberg*, the record, and persuasive authority from other jurisdictions convince me that injurious head collisions between football players lead to concussions and are "so frequent and damaging" that they should be considered inherent to the sport. *See id.* For example, Josh's expert attested that football is "the collision sport in which players most commonly sustain concussive injury, including repeat concussions," and that "[m]edical science has known of these risks for generations." C.M. averred that trainers "communicated to the football team that concussions were a risk" and that he believed he "sustained grade one concussions in every practice and game." This aligns with the majority view that football is an inherently dangerous sport with a "high probability of impact to the head" and an increased risk of concussions from tackling and other physical contact. Theresa S. Kim, *Tackling Head Injuries in Youth and Interscholastic Football with NFL Contract Reform*, 24 Sports Law J. 71, 73 (2017) (quotation omitted); *see, e.g.*, *Benitez v. N.Y. City Bd. of Educ.*, 541 N.E.2d 29, 34 (N.Y. 1989) (stating that "[f]atigue and, unfortunately, injury are inherent in team competitive sports, especially football," and concluding that a player assumed the risk of a broken neck); *Wicina by Wicina v. Strecker*, 747 P.2d 167, 169, 173-74 (Kan. 1987) (considering claims by a football player who "received severe injuries rendering him permanently quadriplegic" but concluding that "there are dangers and risks inherent in the game of football and those who play the game encounter these risks voluntarily").

Because the undisputed facts point to one conclusion, I conclude that implied primary assumption of the risk applies to football players, including Josh. And I agree with the Ohio Supreme Court that "head injuries, including concussions, are an inherent part of football." *Schmitz v. Nat'l Collegiate Athletic Ass'n*, 122 N.E.3d 80, 88 (Ohio 2018). Put another way, football players assume the inherent risk of head injuries based on physical contact associated with practice and playing the game. Thus, I conclude that Josh assumed the risk of head injury when he played football.

B. Whether the University Enlarged the Risks Inherent to Football

As discussed above, primary assumption of the risk does not bar a tort claim "if the defendant enlarged the risk to the plaintiff." *Schneider*, 654 N.W.2d at 152. A tortfeasor enlarges an assumed risk if evidence establishes that there is (1) "a new risk" and (2) "only a limited time to react." *Grady*, 826 N.W.2d at 552 (quotations omitted). Generally, a tortfeasor's enlargement of the risk must involve "positive acts" instead of omissions. *Id.*; *see also Jussila v. U.S. Snowmobile Ass'n*, 556 N.W.2d 234, 237 (Minn. App. 1996) (declining to apply the exception where "none of the claimed omissions" presented the appellant "with a new risk to which he had only limited time to react"), *rev. denied* (Minn. Jan. 29, 1997).

The district court determined that there was "no evidence that the University enlarged the risk that [Josh] would suffer a concussion." The Campions argue that the University "enlarged the risk of brain damage" to Josh by not following its CMP during the Northwestern game. The University counters that the enlargement exception to primary assumption of the risk is "inapplicable" because the Campions "do not identify any act that enlarged risks, nor do they argue there was a limited time to react."[13]

[13] In its brief, the University implies that the enlargement exception to primary assumption of the risk does not "exist" because it has not been expressly adopted by the Minnesota Supreme Court. But this court has analyzed facts under the enlargement exception in several precedential opinions, which are binding on this court. *See Grady*, 826 N.W.2d at 552; *Jussila*, 556 N.W.2d at 237; *Rusciano v. State Farm Mut. Auto. Ins. Co.*, 445 N.W.2d 271, 273-74 (Minn. App. 1989); *see also State v. Chauvin*, 955 N.W.2d 684, 695 (Minn.

In *Rusciano*, Rusciano sued a driver for negligence after Rusciano was struck "in an alley where a group of teenagers was gathered." 445 N.W.2d at 272. Before the accident, Rusciano "voluntarily stood in front of the oncoming car to see whether the car would stop before [he] jumped out of the way." *Id.* The driver "did not swerve because he might have hit other persons in the alley, nor did he hit the brakes because he 'never thought [Rusciano] was going to jump on the car.'" *Id.* Three witnesses testified that the driver accelerated before striking Rusciano. *Id.* at 272-73.

This court affirmed the judgment in favor of Rusciano and rejected the appellant's argument that the district court erred when it refused to instruct the jury on primary assumption of the risk. *Id.* at 274. We reasoned that Rusciano "assumed an inherent risk by walking into the path of an oncoming vehicle." *Id.* at 273. But we also determined that, as a matter of law, the driver enlarged that risk because he knew Rusciano's position but failed to brake and, instead, accelerated. *Id.* at 273-74. Thus, we held that primary assumption of the risk did not bar Rusciano's negligence claim. *Id.* at 274.

Like Rusciano, Josh assumed the inherent risk of head injury by playing football. But for the reasons already stated, whether the University enlarged that risk during the Northwestern game by not following the CMP is a genuine issue of material fact. The evidence could support a jury finding that Josh displayed signs, symptoms, and behaviors indicative of a concussion and that the University violated its CMP by allowing Josh to

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App. 2021) (stating that precedential opinions from the court of appeals are binding on this court and the district courts), *rev. denied* (Minn. Mar. 10, 2021). And we discern no reason to believe that the supreme court would reject this exception.

play the second half without evaluating him for concussion. Josh has offered expert testimony that he was concussed during the first half of the Northwestern game. Continuing to play with a concussion presented a new risk to Josh and was contrary to the team's established protocol for a "confirmed concussion" as stated in the CMP.

The circumstances gave Josh little time to react. Indeed, it should be for a jury to decide whether the record supports Josh's inference that the University deferred to Josh on whether he could return to play. Seidenberg's expert report opines that a concussed player is "de facto cognitively disabled" and therefore "not capable of deciding whether he can reenter a game." As a result, I would conclude that genuine issues of material fact preclude summary judgment as to whether the University enlarged the risk to Josh.

In sum, I conclude that genuine issues of material fact exist as to whether Josh expressly assumed the risks inherent to football; I also conclude that Josh impliedly assumed those risks as a matter of law. And I conclude that fact issues remain as to whether the University enlarged the risk to Josh by failing to follow its CMP during the Northwestern game. For these reasons, I would reverse the district court's decision to dismiss Josh's negligence claim on summary judgment.

V. Genuine issues of material fact preclude summary judgment on the loss-of-consortium claim.

"Consortium" describes the shared, intangible benefits of a marital relationship, including "comfort, companionship, and commitment to the needs of each other." *Thill v. Mod. Erecting Co.*, 170 N.W.2d 865, 867-68 (Minn. 1969). A married person may recover for harms caused to their spouse through a loss-of-consortium claim. *Lefto v. Hoggsbreath*

Enters., Inc., 567 N.W.2d 746, 750 (Minn. App. 1997), *aff'd*, 581 N.W.2d 855 (Minn. 1998). A loss-of-consortium claim is a derivative claim, meaning that the claimant's right to recover arises from their injured spouse's right to recover from a tortfeasor. *Huffer v. Kozitza*, 375 N.W.2d 480, 482 (Minn. 1985) (explaining that both claims "use the same liability but they are separate claims with separate injuries"). In other words, the dismissal of the injured spouse's claim would preclude the noninjured spouse's loss-of-consortium claim. *See*, *e.g.*, *Kohler v. Fletcher*, 442 N.W.2d 169, 173 (Minn. App. 1989), *rev. denied* (Minn. Aug. 25, 1989).

The district court dismissed Ciera's loss-of-consortium claim, in part because it was derivative of Josh's dismissed claims against the respondents. Because I concur with the majority that the district court properly dismissed Josh's claims against the NCAA and the Big Ten, I also concur that the district court properly dismissed Ciera's loss-of-consortium claims against the NCAA and the Big Ten. But because I conclude that Josh's negligence claim against the University survives summary judgment, I also conclude that Ciera's loss-of-consortium claim against the University should not be dismissed as a derivative claim. Therefore, I turn to the district court's other reason for dismissing Ciera's claim.

The district court stated, as a matter of law, that loss-of-consortium claims "are precluded when the injury to a spouse occurs prior to the marriage." The district court determined that Ciera did not "state a valid loss-of-consortium claim" because "she knew about [Josh's] injuries, and the symptoms he was suffering, when she married him."

In reaching its decision, the district court relied on *Wagner v. International Harvester Co.*, which concluded that Minnesota courts would follow Pennsylvania and rule that a "subsequent [spouse] should not acquire any right to sue for loss of consortium" and "should not be entitled to marry a cause of action." 455 F.Supp. 168, 169 (D. Minn. 1978) (quotation omitted) (dismissing a plaintiff's loss-of-consortium claim in a diversity action because she met and married her spouse after his alleged injury). *Wagner* is a nonbinding federal district court opinion from almost 50 years ago. *Id.* at 168; *see TCI Bus. Cap., Inc. v. Five Star Am. Die Casting, LLC*, 890 N.W.2d 423, 431 (Minn. App. 2017) ("A federal court's interpretation of Minnesota law is not binding on this court, though it may have persuasive value.").

Very little caselaw guides us on loss-of-consortium claims. In fact, Minnesota courts have not considered whether an individual who knew of their spouse's injury before marriage may assert loss of consortium. The majority rule denies loss-of-consortium claims to a spouse who was not married to the plaintiff at the time of the alleged injury. *See*, *e.g.*, *Sawyer v. Bailey*, 413 A.2d 165, 166 (Me. 1980); *Sostock v. Reiss*, 415 N.E.2d 1094, 1099 (Ill. App. Ct. 1980). The policies behind this rule include that (1) a person should not be allowed "to marry a cause of action"; (2) a spouse assumes the risk of premarital injury; and (3) tort liability should be limited. *Stager v. Schneider*, 494 A.2d 1307, 1315-16 (D.C. 1985).

Some states, however, have adopted an exception when a spouse is injured before the marriage but the injury is discovered during the marriage and neither spouse knew nor should have known about the injury before the marriage. *See*, *e.g.*, *Green v. Am. Pharm. Co.*, 960 P.2d 912, 919 (Wash. 1998); *Vazquez v. Friedberg*, 637 A.2d 300, 302 (Pa. Super.

Ct. 1994). Thus, a latent injury involves special circumstances in which the underlying rationales for denying loss-of-consortium claims are not present.

For example, the plaintiff in *Green* sued a pharmaceutical company for negligence and failure to warn Green's mother about the dangers of taking diethylstilbestrol (DES) during pregnancy, which caused the abnormal development of Green's uterus. 960 P.2d at 914. Before her marriage, Green knew that she was exposed to DES but did not know its impact on her reproductive health. *Id.* Three-and-a-half years into her marriage, Green learned about the damage to her uterus, which caused complications during her own pregnancy. *Id.* Along with Green's suit for personal injuries, Green's spouse sued for loss of consortium. *Id.*

The district court dismissed the spouse's loss-of-consortium claim, and the Washington Supreme Court reversed and remanded. *Id.* at 915. The Washington Supreme Court reasoned that, while a person cannot "marry a cause of action," the loss-of-consortium claim may survive summary judgment if "the injury to the affected spouse is latent and unknown" and that the "class of potential plaintiffs" in the loss-of-consortium context is "quite limited, confined to those who might some day be in consortium with an injured party." *Id.* at 918-19.

The Campions argue that there are genuine issues of material fact as to whether Ciera knew or should have known about the extent of Josh's injuries before their marriage. The University argues that the undisputed evidence shows that Ciera knew about Josh's concussions before their marriage and that her lack of knowledge of "the extent of damage" does not defeat the general rule that she cannot recover for an injury that predated the marriage.

The Minnesota Supreme Court has not limited loss-of-consortium claims to postmarriage torts, nor has it rejected the latent-injury exception to the majority rule. Viewing the evidence in the light most favorable to Ciera, I conclude that genuine issues of material fact preclude the dismissal of her loss-of-consortium claim. The record shows that Ciera married Josh about eight months after the Northwestern game. Ciera learned about Josh's concussion diagnosis shortly after the game and observed symptoms of that concussion. But medical evidence also shows that, after they married, Josh met "the criteria for early onset dementia due to a neurodegenerative disorder" that "will progress." The record also shows that Josh's symptoms have worsened over time.

Like the plaintiff in *Green* who knew she was exposed to DES before her marriage, the Campions knew that Josh suffered concussions before their marriage. But this record presents a question of fact as to whether Ciera knew or should have known about Josh's neurodegenerative brain injury before their marriage. Therefore, I would reverse the district court's dismissal of Ciera's loss-of-consortium claim against the University and remand to the district court, where Ciera would have the burden of proving what she knew about Josh's injuries, when she first experienced a loss of consortium, and what damages she suffered.

For the reasons stated, I would reverse the district court's decision to exclude Seidenberg's expert opinion testimony, reverse summary judgment as to Josh's negligence claim against the University, and reverse summary judgment as to Ciera's loss-of-consortium claim against the University. I would remand this matter for a jury to determine whether the University undertook to provide services to Josh when it adopted the CMP, whether the University violated the CMP during the Northwestern game, whether the University enlarged the risk of injury to Josh during the Northwestern game, and whether Ciera knew or should have known about Josh's brain injury and dementia before they married. In all other respects, I would affirm the district court's summary-judgment decision.