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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2022-001332

Andrew Pampu .... Appellant-Respondent,

v.

Erin Wingo, David Wingo, and Colin J. Gahagan, ... Respondents-Appellants.

RESPONDENTS-APPELLANTS ERIN WINGO AND DAVID WINGO'S INITIAL REPLY BRIEF

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INTRODUCTION

Pampu's arguments in his responsive brief take two fundamentally flawed positions. First, despite Pampu's insistence to the contrary, Clemson did reach the conclusion that Pampu engaged in nonconsensual sex with Ms. Wingo. Although he was not charged with "Sexual Assault" or "Rape," Clemson definitively concluded that Ms. Wingo did not consent to the sexual encounter on October 24, 2015. If she did not consent—and because everyone acknowledges that sexual intercourse occurred—it represents a finding of nonconsensual sex by Clemson. Second, it is undeniable that a confusing and conflated theory of damages was presented to the jury. Pampu mistakenly believes that he and his counsel clearly communicated to the jury the difference between the defamation and civil conspiracy damages. This is not the case. In fact, Pampu himself unequivocally told the jury that the defamation claim was based on false statements that led to his removal from Clemson. These two fundamental misstatements are discussed in detail in Sections I and III, *infra*.

Moreover, the Wingos' appeal – far from being "frivolous"[1] – should result in reversal in their favor. Clemson found that Pampu had nonconsensual sex with Ms. Wingo. Pampu failed to appeal this decision to the Circuit Court as permitted by the APA. Instead, Pampu sued Clemson in federal court. He ultimately settled with Clemson, for substantial consideration, and agreed that Clemson's administrative decision would be reinstated. Then, Pampu sued the Wingo Defendants, claiming that they defamatorily stated Pampu "raped" Ms. Wingo. The jury was tasked with deciding this defamation case without the benefit of evidence related to Clemson's Title IX process, which resulted in a miscarriage of justice. The Wingo Defendants acted, at least in part,

[1] Pampu insinuates there is weakness in the Wingos' arguments because they raised their arguments in the context of a cross appeal. Parties may decide not to file an appeal for any number of reasons that are unrelated to the merits, and the fact that the Wingo Defendants may have not filed this appeal but for Pampu's appeal is irrelevant.

in reliance on the Clemson process, witness interviews, and/or decision in making the statements about which they were sued. Additionally, there are numerous legal ramifications stemming from the Clemson findings. Most notably, whether those findings are entitled to preclusive effect thereby barring Pampu's defamation claim under the doctrine of collateral estoppel. At minimum, the jury should have been provided with the evidence related to the Title IX process in order to properly decide this matter. Instead, Pampu was allowed to argue he was "removed from Clemson" by the actions of the Defendants but the jury was not allowed to consider any evidence of what statements, testimony, and positions actually led to his suspension from Clemson by Clemson

ARGUMENT

I. Clemson did determine that Pampu had nonconsensual sex with Ms. Wingo.

A general theme throughout Pampu's response brief is that Clemson OCES did not charge Pampu with or find that he "raped" or committed "sexual assault" against Ms. Wingo. It is critical to understand the definitions of "Rape," "Sexual Assault, "Sexual Misconduct," and "consent" under the Clemson Anti-Harassment and Non-Discrimination Policy; to understand the admitted facts involving the incident between Pampu and Wingo; and their interplay with the Clemson findings against Pampu. These issues affect collateral estoppel, why the evidence related to the Title IX process is relevant, why Mr. Wingo should be entitled to JNOV, and why the damages award is excessive and unreasonable.

To start, Pampu not only admits to having sexual intercourse with Wingo in the incident, but actually texted about it shortly after the sexual encounter to third party, stating "I f*cked a chick by a garbage thing behind Chipotle," which was then forwarded along to a large number of third parties in Pampu's fraternity and was rather quickly deducted to be a reference by Pampu to having intercourse with Wingo. (Tr. at p. 193:16-194:16; R. __). So there has never been any

denial of sexual intercourse involving the incident occurring, and Pampu himself published that he had the sexual intercourse to a third party.

While it is true that Clemson OCES did not make a ***charge*** of "Sexual Assault and/or Battery," defined to include "[a]ny attempted or actual act of nonconsensual sexual intercourse" (Anti-Harassment Policy at p. 2; R. __), or "Rape," which is defined as the "carnal knowledge of a person without the consent of the victim including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical impairment," (Anti-Harassment Policy at p. 2; R. __), the denied portion of those actions as defined by Pampu was the "nonconsensual" portion of those definitions.

"Sexual Misconduct," which Clemson OCES ***did*** charge Pampu with, and ***did*** find Pampu had committed, is defined as "[a]ny other **<u>nonconsensual conduct</u>** of a sexual nature including but not limited to touching, fondling, kissing, groping, indecent exposure, sex-based cyber-harassment, peeping or other voyeurism, forcing others to view sexual activity, and/or the non-consensual photography, video or audio taping of sexual activity." (Anti-Harassment Policy at p. 3 (emphasis added); R. __). Lastly, the Anti-Harassment Policy indicates a person who is impaired "due to the influence of alcohol" is unable to give consent, but in order to find no consent under these circumstances, "there must be a finding that the complainant was unable to consent and a finding that the respondent knew or had reason to know the complainant was unable to consent." (Anti-Harassment Policy at pp. 4-5. 2; R. __).

Hence, Pampu was charged with "Sexual Misconduct," which is, by definition, ***nonconsensual*** conduct. (Tr. at p. 769:1–19; Def. Tr. Ex. 13; R. __). Again, there has never been a dispute that Pampu and Ms. Wingo engaged in sexual intercourse. The only dispute has been whether Ms. Wingo ***consented*** to the sexual act. Following the hearing, Clemson OCES sent

Pampu the initial decision letter memorializing the findings of the board that Pampu did commit "Sexual Misconduct," and the letter unequivocally states that, "[b]ased on the information presented, the hearing board found that [Ms. Wingo] was incapacitated and unable to give consent which you should have reasonably known." (Decision Letter at DOE-Clemson-OCES-000024; Tr. at pp. 776:25–777:7; R. __).

Clemson OCES clearly determined that Ms. Wingo did not consent to the admitted sexual acts. The fact that he was not charged with "Sexual Assault" is thus of no moment to this matter based on the necessary factual finding made by OCES in the initial decision letter and later affirmed by Clemson on appeal of lack of consent.

This is critical, as Pampu repeatedly asserts that he was not found by Clemson to have "raped" Ms. Wingo. While it is true that he was not ***charged*** with violating Clemson's policy on "Sexual Assault" and "Rape," all of the factual predicates for such a finding were present (*i.e.*, nonconsensual sexual intercourse). Substantial truth is the most obvious defense to defamation, and Pampu cannot escape the admitted truth that he had sexual intercourse with Wingo and in fact, he texted a third party about that act. The only contention Pampu ever made was his denial that any of the sexual activity was non-consensual. But Clemson found after a complete investigation and proceeding that it was.

Clemson OCES investigated, learned of the admitted sexual encounter, and then found that Wingo did not consent to the sexual encounter. For reasons not appearing in the record, Clemson did not charge Pampu with rape or sexual assault. But non-consensual sexual intercourse meets those definitions. Courts have addressed nomenclature in the defamation context and generally do not require that we all communicate technical legal principles with precision. *See Simonson v. United Press Int'l, Inc.*, 654 F.2d 478, 481–82 (7th Cir. 1981) (no defamation when word "rape"

used even though crime was second-degree sexual assault because "rape," as understood in common usage, truthfully described the conduct involved); *Nanji v. Nat'l Geographic Soc'y*, 403 F. Supp. 2d 425, 433–34 (D. Md. 2005) (finding that use of "rape" instead of "more technically precise term, such as 'sexual assault' or 'sexual abuse,'" did not render article inaccurate, and collecting cases for proposition that "technical errors in legal nomenclature in reports on matters involving violation of the law are of no legal consequence" in defamation actions) (internal quotations omitted); *see also Lambert v. Providence Journal Co.*, 508 F.2d 656, 658–59 (1st Cir.1975) (holding that the term "murder" was incapable of defamatory meaning, even if it implied that plaintiffs killing of local man was unlawful, because the articles stated that plaintiff denied the murder charge or made it clear that no determination of plaintiff's involvement had been made); *Orr v. Argus Press Co.*, 586 F.2d 1108, 1112 (6th Cir.1978) ("swindle" substituted for "defraud"); *Dostert v. Washington Post*, 531 F. Supp. 165 (N.D.W.Va.1982) ("guilty" substituted for "nolo contendere"); *Piracci v. Hearst Corp.*, 263 F. Supp. 511, 515 (D.Md.1966), *aff'd*, 371 F.2d 1016 (4th Cir.1967) ("possession of marijuana" substituted for "delinquency due to the act of possessing marijuana").

Pampu is claiming he was defamed because the Wingo Defendants said that he committed rape. Yet he admitted and indeed reported that the incident involved sexual intercourse. The jury was at minimum entitled to know that some of the alleged defamatory statements occurred after Clemson found that the incident was nonconsensual.

II. The trial court erred by denying the Wingo Defendants' motion for a directed verdict and judgment notwithstanding the verdict because the Plaintiff's defamation claim is barred by collateral estoppel.

Pampu conflates the issue of whether Clemson and OCES *complied with* the APA with the question really at issue here: whether Clemon's OCES *is subject to* the APA.[2] This effort at conflation should be rejected.

The first element of collateral estoppel is whether the issue was litigated in a prior action. *Beall v. Doe*, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189–90 n. 1 (Ct. App. 1984). Here, the finding by Clemson's OCES that Ms. Wingo was incapacitated and unable to give consent and that Plaintiff should have known this fact, which was later affirmed on appeal by Clemson's administration, should be given preclusive effect for two reasons: (1) it was concluded following a "contested case" decided by a "state agency," and/or (2) it was concluded following a quasi-judicial proceeding by a state agency.

While the APA does not include colleges and universities within the definition of "agency," contrary to Pampu's statutory interpretation argument, this omission is not dispositive. The terms of the APA neither include nor exclude schools expressly. However, the Wingo Defendants assert that for APA purposes Clemson OCES qualifies as a state "agency." The APA agency term includes "state boards" that are authorized to hear "contested cases." The term "contested case" is defined as a "proceeding **including, but not restricted to**, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party **are required by law** to be determined by an agency after an opportunity for hearing" S.C. Code Ann. § 1-23-310(3) (emphasis added).

Clemson's OCES is a board at Clemson University that is authorized and required by law to determine rights of parties under both federal and state law. Both the Department of Education and the Department of Justice have promulgated regulations under Title IX that require a school

[2] To the extent Pampu wants to argue that he was not afforded proper due process, that should have been raised on appeal to the Circuit Court under the APA.

to "adopt and publish grievance procedures that provide for the prompt and equitable resolution of student . . . complaints alleging any action that would be prohibited by" Title IX or regulations thereunder. 34 CFR § 106.8(b) (Dep't of Education); 28 CFR § 54.135(b) (Dep't of Justice). Such prohibited actions include all forms of sexual harassment, including sexual intercourse, sexual assault, and rape. Similarly, the South Carolina Campus Sexual Assault Information Act requires Clemson to establish procedures for institutional disciplinary actions in cases of alleged sexual assault. *See* S.C. Code Ann. § 59-105-40.

Ross v. Med. Univ. of S.C., 317 S.C. 377, 453 S.E.2d 880 (1994), offers strong support for the conclusion that the Clemson OCES hearing constitutes a "contested case" before a "state agency." There, a tenured professor at MUSC was terminated for alleged abuse of his position for personal financial gain. *Id.* at 378, 453 S.E.2d at 881. A Faculty Hearing Committee upheld the decision, and that committee's decision was reviewed by the Vice President for Academic Affairs and then by the MUSC Board of Trustees. *Id.* The professor then filed suit in the Circuit Court, seeking review of the decision under the APA. *Id.* This fact pattern is substantially similar to the one at issue in this case, with the Faculty Hearing Committee being akin to the OCES board and with a similar internal appellate process. Pampu attempts to distinguish this case by claiming that the issue of whether the APA was applicable was not raised in *Ross* and by claiming that MUSC and Clemson are different because Clemson is not "owned by the state." (Pampu Resp. Br. at p. 14, n. 7).

First, it is of no moment in *Ross* that the Supreme Court of South Carolina was not specifically presented with an argument regarding whether the APA applied. The state courts in *Ross* ***only had subject matter jurisdiction*** because the case was appealed under the APA. Other issues were originally brought in the lawsuit, but those issues were removed to federal court. Only

the review of the APA action was remanded to the Circuit Court. *Id.* A state appellate court "must, on its own motion, raise the issue of subject matter jurisdiction to ensure the 'orderly administration of justice.'" *Tatnall v. Gardner*, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002) (quoting *State v. Castleman*, 219 S.C. 136, 139, 64 S.E.2d 250, 252 (1951)). By deciding the issues in the case, the Supreme Court of South Carolina implicitly recognized that the APA applied. Otherwise, it would have lacked subject matter jurisdiction to decide the case.[3]

Second, as the District of South Carolina has previously determined in holding that Clemson is an arm of the state entitled to sovereign immunity under the Eleventh Amendment, "[m]ost state universities are not 'wholly owned and controlled by the State' but have features of independence." *Martin v. Clemson Univ.*, 654 F. Supp. 2d 410, 419 (D.S.C. 2009). Despite some features of independence, Clemson also has numerous features which show that it is under significant state control. For example, Clemson is required to remit to the State Treasurer for deposit in the State's General Fund all tuition payments that it receives; Clemson must prepare an annual budget for submission to the General Assembly through the South Carolina Commission on Higher Education; Clemson's financial records are subject to annual audit by the State Auditor's office; Clemson's Board of Trustees must report annually to the General Assembly on monies received and expended; and Clemson may issue institution bonds and auxiliary and athletic facilities revenue bonds only with the consent of the State Budget and Control Board and only to the extent permitted by the General Assembly. *See* S.C. Code Ann. §§ 11-7-20; 59-103-35; 59-107-30 through -50; 59-119-40; 59-119-740; 59-119-940; and 59-147-30. Therefore, for these

[3] Ordinarily, whether an argument was presented to a court is indeed a a proper inquiry when determining whether a case holding is fully precedential respecting an argument. (*See* Wingo Resp. Br. at p. 27). However, this is not the case when subject matter jurisdiction is involved, because the appellate court **must** consider the issue *sua sponte.*

purposes the Wingo Defendants assert that Clemson OCES is a state agency under the APA, and its decisions are entitled to preclusive effect.[4]

Additionally, the issue of consent was necessary to support the prior judgment. Here again, Pampu tries to claim that the defamation issues are distinct from those decided by Clemson because he was not found to have committed "Sexual Assault" or "Rape." Because the act of sexual intercourse was not in dispute, the only issue to be decided by Clemson and OCES was one of consent. On multiple occasions, Pampu claims the charge of "Sexual Misconduct" does not cover questions of capacity relative to consent. (*See* Pampu Resp. Br. at p. 20-21). This is wrong, as Pampu himself recognizes that "Sexual Misconduct" involves only "**nonconsensual conduct.**" (Pampu Resp. Br. at p. 20). If Clemson found that Ms. Wingo consented, Pampu could not have been found to have committed "Sexual Misconduct." To determine if Pampu committed "Sexual Misconduct," OCES had to determine whether the incident was consensual; it conclusively found that it was not. This should end the inquiry of whether the issue of consent was necessary to support the prior judgment. Further, as argued in the Wingo's Opening Brief, Pampu ultimately agreed to the reinstating of the Clemson OCES determinations in the settlement regarding his federal court lawsuit and is thus estopped in that unique manner as well from claiming otherwise.

[4] Even if the APA is found to not apply, for the reasons argued in the Wingo Defendants Opening Brief, the OCES findings are still entitled to preclusive effect because Pampu was afforded a quasi-judicial proceeding. (Wingo Op. Br. at p. 25). Pampu attempts to distinguish the cases relied on by the Wingo Defendants by arguing that, in those cases, the respondent was offered procedural protections that were required by law. Pampu claims that similar procedural protections were not available to him by law. (Pampu Resp. Br. at p. 15-16). However, this is not true. While Pampu's administrative hearing was conducted pursuant to Clemson's internal policies and procedures, those internal policies and procedures were required to comply with numerous federal regulations. *See* 34 CFR § 106.45.

Accordingly, for the reasons stated herein and in the Wingo Defendants' Opening Brief, the trial court committed reversible error in finding that Plaintiff was not estopped in pursuing his claims against the Wingo Defendants.

III. The trial court committed reversable error by excluding evidence related to Clemson's Title IX process and the subsequent Clemson Settlement.

a. Pampu did conflate the various legal and damages theories before the jury.

The jury here was presented with confusing and conflated damages theories and arguments by Pampu. Pampu's own attempt to explain his theory in his response brief proves this point. More specifically, Pampu claims the following explanation from counsel's opening statement is "not confusing at all."

> To be clear, the plaintiff's civil conspiracy claim is based on the defendants' common plan to get him removed from Clemson University and removed from the fraternity. Meanwhile, plaintiff's defamation claim is actually based on defendants' false statements to at least 20 other people calling him a rapist. Because of defendants' actions, Drew will be required to disclose and self-report his removal from Clemson for the rest of his life whenever he applies to another school or applies to certain jobs. His dreams of becoming an orthodontist will never happen because of defendants irreversible actions. His reputation has been forever tarnished by the defendants[.]

(Pampu Resp. Br. at p. 27). According to Pampu, the jury clearly understood that the first sentence above (regarding the civil conspiracy claim) is related to the damages discussed in the third and fourth sentence, whereas the second sentence (regarding the defamation claim) is related to the damages discussed in the fifth sentence. But this has no clarity.

Pampu relies on the following statement from closing arguments as evidence that the jury was presented with a clear picture of his damage theories:

> Defendants perpetrated a fraud on Clemson. Erin and CJ worked together to get Drew kicked out of school when they made statements to Clemson that caused irreparable damages that Drew must forever self-report. The reason Drew cannot fulfill his intended career goal of being an orthodontist is not because of Clemson, but for Erin and CJ's statements, Clemson would not have kicked him out.

(Pampu Resp. Br. at p. 28). Rather than providing a "clear picture," this statement mixes the issues. It references Ms. Wingo's and Mr. Gahagan's "statements" and how those "statements" got him kicked out of Clemson. It is entirely unclear what "statements" are being referenced here, and any and all statements made *to Clemson*, which are the only statements that could have gotten Pampu suspend from Clemson, were wrongly *excluded* from the trial. The jury was not allowed to be made aware of what "statements" Ms. Wingo or Mr. Gahagan made *to Clemson*. The confusion relayed by this argument is reaffirmed by another point made in Pampu's closing argument just moments later:

> As Steve Shedlin testified, while Drew may be making $70,000 as a salesman now, Drew would have made significantly more as an orthodontist, especially over his lifetime. And if you believe Drew is less deserving of any damages for defendant's wrongful actions just because he has a job now, I want you to think about whether we want to live in a society that condones someone, or in this case three people, spreading harmful lies about someone else to deprive them of any opportunity?

(Tr. at p. 898:15-24; R. __). This argument to the jury asserts that the "spreading [of] harmful lies" led to Pampu's economic damages of not becoming an orthodontist. Yet, according to Pampu, these damages are only for the alleged civil conspiracy claim. If the economic damages are related to the civil conspiracy claim, then they are unrelated to the alleged act of "spreading harmful lies," which relates to defamation. Again, there was no evidence before the jury that any lies were told to Clemson, as evidence regarding what was said to Clemson was excluded.

Pampu also improperly asserts that the Wingo Defendants have relied on "provably false assertions." (Pampu Resp. Br. at pp. 28-29). Pampu relies heavily on the testimony found at pp. 123:7-124:23 of the trial transcript to establish that the jury received a clear view of his claims. In this portion of the trial, Pampu's attorney is questioning him about his two claims. Pampu argues that the phrase "the defendants' actions" refers to the conspiracy claim and not the defamation.

Somehow, according to Pampu, the jury understood that Pampu and his attorney seamlessly transitioned from discussing the defamation damages to discussing the civil conspiracy damages simply by using the phrase “the defendants’ actions.” This strains credulity, especially considering Pampu’s testimony just seconds before when the following exchange occurred:

> Q. What is the basis of your defamation claim against the defendants, Mr. Pampu?
> A. My claim for the defamation claim is that the false statements of the defendants contributed to my suspension from Clemson University and the removal of my fraternity.

(Tr. at p. 121:17-22; R. __). Here, Pampu directly testified that the basis of his defamation claim is that the false statements contributed to his suspension from Clemson. This, in a nutshell, shows the confusion presented to the jury, a confusion that was unnecessary had the Title IX process and evidence been admitted.

Pampu’s attempted explanations demonstrate why the trial court’s decision to exclude evidence related to Clemson’s Title IX process constitutes reversible error. The jury did not have the full picture of the facts surrounding the allegedly defamatory statements made by the Wingo Defendants and likely improperly based its defamation damages on Pampu’s alleged inability to get into dental school and become an orthodontist. Pampu’s arguments that everything was clearly and separately presented must be rejected.

b. Evidence related to Clemson’s Title IX process and subsequent Clemson Settlement is relevant.

Pampu asserts that the evidence related to the Title IX process is not admissible because it constituted an appeal to authority and was an improper attempt to make the jury believe Clemson had already decided the key questions at issue. (Pampu Resp. Br. at p. 33). This is inaccurate. For example, ***all*** of Mr. Wingo’s alleged defamatory statements took place **<u>after</u>** the initial decision letter was issued by OCES. Additionally, while it was not clear how many of Ms. Wingo’s alleged

defamatory statements took place after the initial decision letter, there is a reasonable inference that some were.[5] If any statements were made **after** the initial decision letter, the Clemson OCES finding is highly relevant to whether the Wingo Defendants acted negligently in making the allegedly defamatory comments. (*See* Section I, *supra*). As described in detail in the Wingo Defendants' opening brief, the evidence related to the Title IX process is also relevant for other reasons, e.g., respecting issues of truth and Mr. Wingo's qualified privilege defense. (Wingo Defs' Op. Br. at pp. 30-36).

Moreover, the trial court did not exclude the evidence on relevance grounds. The only question is whether the trial court improperly excluded the evidence under Rule 403. The most obvious example of why the probative value of the evidence is not outweighed by the danger of unfair prejudice or confusion of issues for the jury is in relation to Mr. Wingo. Again, his only alleged defamatory statement was the letter sent to the fraternity **after** the initial decision rendered by OCES. In fact, he attaches this OCES decision to his allegedly defamatory statement (which the jury was prohibited from viewing). This means that, in assessing whether Mr. Wingo defamed Pampu, the jury was viewing an incomplete, redacted statement. While Pampu insists that the letter went beyond the scope of the decision by OCES, that should have been, at a minimum, a question of fact that the jury should have decided, as discussed in further detail below.

IV. The trial court committed reversable error by admitting a heavily redacted version of Mr. Wingo's letter to Phi Delta Theta Fraternity, and Mr. Wingo is entitled to JNOV because, had the unredacted letter been admitted, no reasonable juror could find that he acted negligently.

Pampu's arguments in response to Mr. Wingo's argument that the trial court committed reversable error by admitting a heavily reacted version of the letter and that he is entitled to JNOV

[5] Because the Title IX process was excluded at trial, this temporal distinction was not at issue during the trial.

are factual in nature. That is, Pampu asserts that Mr. Wingo's statements in the letter went beyond the scope of the Clemson OCES findings that he attached to the letter. (Pampu Resp. Br. at pp. 33-35). As discussed in Section I, *supra*, this argument is fatally flawed. While Pampu was not charged with "Sexual Assault" or "Rape" under the Clemson Anti-Harassment Policy, there was a clear factual finding, which was attached to Mr. Wingo's letter to the fraternity, that Ms. Wingo was incapacitated and unable to give consent to the sexual encounter. Pampu is attempting to assert the technical definition of the internal Clemson policy violation with which he was *charged*, rather than facing the reality that he was found to have sex with an incapacitated person that was unable to give consent.

Because no reasonable person, when viewing Mr. Wingo's letter in context with the Decision Letter that accompanied it, could find that Mr. Wingo acted negligently in sending the letter or making his claims in the letter, Mr. Wingo is entitled to JNOV on the defamation claim against him. Alternatively, should this Court find that JNOV is inappropriate, there is a clear factual question that the jury should have decided regarding whether Mr. Wingo exceeded the scope of the OCES findings in his letter. Unfortunately, the jury was not provided with all of the information it needed to determine whether Mr. Wingo went beyond the OCES findings in drafting the letter because the Decision Letter was redacted, and the Title IX process was excluded from evidence.[6]

V. The trial court committed reversable error by finding that Mr. Wingo's allegedly defamatory statements were not protected by a qualified privilege and by failing to charge the jury on the qualified privilege.

[6] Pampu argues that Rule 106, SCRE and the doctrine of completeness are inapposite because they are permissive rules of evidence rather than mandatory. (Wingo Resp. Br. at p. 36). The Wingo Defendants did not cite those authorities as binding precedent but as persuasive rationale for why the exclusion of the evidence was prejudicial and improper—that is, the rules of evidence specifically contemplate the fairness associated with admitted a complete document into evidence rather than a partial one.

Although Pampu asserts the Wingo Defendants' "argument completely ignores both the Circuit Court's correct determination that there was no privilege and the true holding of *Woodward*," (Pampu Resp. Br. at p. 45), the Wingo Defendants argue that the trial court erred by finding there was no qualified privilege and failing to charge the jury on qualified privilege. The letter Mr. Wingo wrote to the fraternity was a settlement negotiation written by a person with an interest in the outcome of the negotiation, and the question of the extent to which, if any, the contents of the letter exceeded the qualified privilege of the settlement negotiation was an issue of fact for the jury to decide.

First, "pre-trial settlement negotiations of legal claims give rise to occasions of qualified or conditional privilege when each side discloses its reasons for the relative positions taken." *Woodward v. S.C. Farm Bureau Ins. Co.*, 277 S.C. 29, 32, 282 S.E.2d 599, 601 (1981). Pampu argues that in order to constitute a settlement negotiation subject to privilege, the letter has to be made by a "side" in the settlement discussion for the limited purpose of protecting a legal interest. (Pampu Resp. Br. at p. 44 (citing *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469 at 486, 514 S.E.2d 126, 134–35 (1999))). At trial, counsel for Mr. Wingo put on the record that Mr. Wingo had power of attorney over Ms. Wingo. (Tr. at p. 882:17–19; R. __). Thus, Mr. Wingo did have an interest in the outcome of the negotiations and was in a position to initiate, settle, or accept a compromise with respect to a claim existing in favor of Ms. Wingo. *See* S.C. Code Ann. § 62-8-203(4).

While Pampu misconstrues Mr. Wingo's testimony to suggest that Mr. Wingo was not an interested participant in settlement negotiations with the fraternity but was simply acting as a "Good Samaritan," (Pampu Resp. Br. at p. 44 (citing Tr. at 547:7–13, 20–22. (R. __))), the plain language of the letter provides the purpose is to "resolve this matter with Phi Delta without the

necessity of litigation as outlined in this letter." (Plf.'s Opp. to Def's Mot. For Summ. J. at Ex. O; R. __). At trial, Mr. Wingo stated, "I was identifying the liability. It's [the fraternity's] choice on how they actually wanted to deal with that liability." (Tr. at 547: 20–22. (R. __)). Viewing the unredacted letter, the liability to which Mr. Wingo refers includes the liability of "numerous parties under the Phi Delta Theta umbrella" for "the sexual assault and continued harassment of Erin." (Plf.'s Opp. to Def's Mot. For Summ. J. at Ex. O; R. __). The letter goes on to provide, "To settle all claims, I demand payments to Erin for her physical and mental pain, anguish, and suffering in the amount of $100,000.00. This very reasonable sum is intended to circumvent lengthy settlement negotiations." (*Id.*). Therefore, Mr. Wingo was representing his daughter's settlement interests when he wrote the letter to the fraternity, and the trial court erred in finding the letter did not give rise to qualified privilege.

Moreover, the unredacted version of Mr. Wingo's letter—along with its attachments and references thereto—create a genuine controversy that should have been submitted to the jury as to whether the letter exceeded the bounds of the qualified privilege conferred to settlement negotiations. In *Woodward*, the South Carolina Supreme Court provided, "abuse of the conditional privilege is ordinarily an issue reserved for the jury, in the absence of a controversy as to the facts . . . it is for the court to say in a given instance whether or not the privilege has been abused or exceeded." *Woodward v. S.C. Farm Bureau Ins. Co.,* 277 S.C. 29, 32, 282 S.E.2d 599, 601 (1981) (citing 53 C.J.S. Libel and Slander § 228, p. 347 (1948)). Pampu alleges the Wingo Defendants "offer a misleading summary that fundamentally alters an important holding from *Woodward*." (Pampu Resp. Br. at p. 44). In contrast to being "made up" or "misleading," the statement that abuse of the conditional privilege is only for the court to decide in the absence of controversy accurately reflects that in the ***presence*** of a controversy as to the facts, it is for a ***jury*** to decide

whether the conditional privilege has been abused or exceeded. *See Woodward,* 277 S.C. at 32-33, 282 S.E.2d at 601.

Applying the standard and considering the unredacted contents of the letter, a controversy exists, which should have been submitted to the jury, as to whether the letter exceeded the bounds of the qualified privilege conferred to settlement negotiations. *See also Murray v. Holnam, Inc.,* 344 S.C. 129, 141, 542 S.E.2d 743, 749 (Ct. App. 2001) ("Whether the publication went too far beyond what the occasion required, resulting in the loss of the qualified privilege, is a question for the jury."). The issue at hand in Mr. Wingo's letter was the liability of the fraternity for damages to Ms. Wingo as a result of actions by its members and what Mr. Wingo, negotiating while having Ms. Wingo's power of attorney, would settle for in exchange for not taking legal action against Phi Delta. (*See* Wingo Def.'s Memo. In Supp. of Mot. for Summ. J. at Exs. O and T; R. __).

Pampu fails to explain how, in reading the contents of the unredacted letter and its attachments, the letter is not reasonably related to the issue of the settlement of Ms. Wingo's potential claims against the fraternity or how "it is clear [Mr. Wingo] abused any privilege that may have existed." (Pampu Resp. Br. at p. 45). Pampu is correct that the statements Mr. Wingo made in the letter were "not idle comments," and "they were carefully chosen and placed." (*Id.*). The statements were settlement negotiations, and "they were carefully chosen and placed" in order to detail the suffering that Ms. Wingo experienced as a result of numerous parties under the fraternity's umbrella and the liability of the fraternity for the actions of those parties. Thus, the question of whether the statements made by Mr. Wingo while negotiating as the power of attorney for his daughter crossed the line from privileged to defamatory was a question for the jury, not the trial court or Pampu to decide.

VI. The trial court committed reversable error by admitting other evidence of Ms. Wingo's intoxication.

Pampu first asserts that this issue was not properly preserved for appeal. Upon the question of Ms. Wingo regarding her drinking habits, counsel objected for "relevance." (Tr. at p. 356:25-357:5; R. __). Notably, counsel for Pampu argued that the evidence was relevant to show "motive." (Tr. at p. 357:6-12; R. __). On appeal, Ms. Wingo argues that "evidence related to Ms. Wingo getting 'blackout drunk' on other occasions is not relevant to the facts in dispute" and is improper character evidence. (Wingo Op. Br. a pp. 45-47).

The objection to relevance at trial can easily be seen as a general relevance objection and as an objection to improper character evidence. While "a party is not required to use the exact name of a legal doctrine in order to preserve the issue," *Herron v. Century BMW,* 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011), the party nonetheless must be sufficiently clear in framing his objection so as to draw the court's attention to the precise nature of the alleged error, *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Additionally, when the evidence is inherently prejudicial, the grounds for the objection are patent, and the issue will be found preserved. *Dunn v. Charleston Coca–Cola Bottling Co.*, 311 S.C. 43, 43–47, 426 S.E.2d 756, 757–58 (1993). Here, both rules are satisfied. Counsel for Pampu seemed to understand that the objection was related to the attempt to introduce improper and irrelevant character evidence in that she argued it was admissible to show "motive." *See* SCRE 404(b) (providing that evidence of other acts may be admissible to show *motive*). Regardless, this issue has been properly preserved because, as discussed previously and below, this questioning and evidence is inherently prejudicial and the grounds for the objection are patent.

Pampu argues that the evidence of Ms. Wingo's decision to get blackout drunk was relevant and admissible to "establish her character for truthfulness" because "no reasonable person would repeatedly engage in behavior that supposedly led to their sexual violation." (Wingo Resp. Br. at

p. 39). Pampu also argues that the evidence is indicative of her motive to lie. (Wingo Resp. Br. at pp. 39, 41). These arguments are absurd, callous, and offensive.

First, the suggestion that no reasonable person would continue to engage in behavior that supposedly led to their sexual violation is a classic example of victim blaming. Ms. Wingo's drunken state is not to "blame" for a sexual encounter without her consent. In fact, the incapacity caused by heavy drinking prevents another from engaging in sexual acts with them because they cannot consent to such. Ms. Wingo's acts of drinking after the incident are irrelevant. Drinking has nothing to do with motivation to lie. Instead, the questions were a clear attempt to slander her character in front of the jury.

Lastly, contrary to Pampu's assertion, the introduction of this evidence does not qualify as harmless error. (Pampu Resp. Br. at p. 40). Pampu claims that the evidence is harmless because it is merely cumulative of other evidence related to Ms. Wingo's motive to lie. Evidence that Ms. Wingo got "blackout drunk" on other occasions has nothing to do with whether she had a motive to lie. Instead, the questioning and testimony tends to unnecessarily smear Ms. Wingo's character. *See Shawhan v. Polk Cnty.*, 420 N.W.2d 808, 810 (Iowa 1988) (finding that the trial court abused its discretion in admitting evidence of prior drug use because there was as serious danger that a jury would conclude that the litigant was a "bad person").

VII. The trial court erred in failing to award a new trial based on the excessive actual and punitive damages awards.

a. The actual damages are excessive considering the evidence elicited at trial

Likely knowing that he received an unreasonably high actual damages award based on his defamation claim, Pampu once again accuses the Wingo Defendants of not understanding the defamation claims. While Pampu may have *thought* or *intended* to claim defamation damages based on statements made outside of the Title IX process at Clemson, as argued herein at Section

III, *supra*, and in the Wingo Defendants' opening brief, the jury was presented with an confusing and conflated blurring of the claims and damages theories. There was scant mention of general defamation damages, *i.e.*, reputational harm. Plaintiff only summarily claims that his reputation suffered as a result of the allegedly defamatory statements and that it has been difficult from him to develop relationships. (Tr. at p. 123, 269–70; R. __). That is all. There was no other testimony related to how Pampu's reputation was harmed. However, there was expert testimony presented related to Pampu's lost income due to his alleged inability to get into dental school and become an orthodontist. Although Pampu claims in his brief this was related only to the civil conspiracy claim, Pampu's testimony was otherwise.

The only reasonable conclusion is that the jury, at least in part, improperly based their actual defamation damages on Pampu's suspension from Clemson and the testimony from the expert witness regarding lost earning capacity. This expert witness testimony, as well as that of Pampu himself, is speculation, not evidence. Damages cannot be based on speculation. Neither the existence, amount, nor cause of damages can be left to speculation or conjecture. *Gray v. Southern Facilities, Inc.,* 256 S.C. 558, 183 S.E.2d 438 (1971). Accordingly, because the jury was misled and there was insufficient evidence to support the actual defamation damages award, the award was grossly excessive, speculative, and improper.[7] The award should be reversed, or at minimum, a new trial ordered.

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[7] Pampu unreasonably faults the Wingo Defendants in failing to cite the appropriate standard for determining whether the actual damages are excessive. However, there is "no definite standard for determining whether actual damages awarded are grossly excessive." *Freeman v. A. & M. Mobile Home Sales, Inc.*, 293 S.C. 255, 259–60, 359 S.E.2d 532, 535 (Ct. App. 1987) (citing *Beasley v. Ford Motor Company*, 237 S.C. 506, 117 S.E.2d 863 (1961)). "The courts must be governed by the circumstances of the particular case presented for consideration." *Id.* (citing *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 136 S.E.2d 286 (1964).

b. The Wingo Defendants have not waived their arguments regarding punitive damages.

Pampu claims that the Wingo Defendants have waived their argument that the trial court failed to conduct the proper due process review of the punitive damages award under the *Mitchell/Gore* guideposts by failing to object to the jury instructions and by failing to raise the issue in posttrial briefing. This argument is without merit.

First, in their posttrial motion, the Wingo Defendants did argue that the punitive damages award should be set aside. (Wingo Posttrial Mot. at pp. 13-15; R. __). While *Mitchell* was not specifically cited, the law in this State is clear that the trial court's due process review of a punitive damages award is **mandatory**. *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 587, 686 S.E.2d 176, 185 (2009) ("We have said in the past that trial courts **must** consider both the *Gamble* and the *Gore* factors." (emphasis added)); *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 195–96, 638 S.E.2d 667, 671 (2006) (nothing that a "trial court **shall review** the constitutionality of a punitive damages award by determining whether the award was reasonable under the" proper guideposts (emphasis added)). Further, Pampu's wavier argument regarding the jury charge is misplaced, as the *Mitchell/Gore* guideposts are intended for *post-judgment* review of a jury's award of punitive damages.

Accordingly, the Wingo Defendants have not waived their arguments regarding the constitutionality of the punitive damages award, and this Court should analyze the merits of the Wingo Defendants' arguments.

c. The trial court erred by failing to subject the punitive damages award to the required post-judgment constitutional review, and Ms. Wingo's culpability does not support an award of punitive damages.

Pampu does not argue that the trial court applied the proper legal standard in conducting the post-judgment constitutional review of the punitive damages award. Instead, Pampu seems to claim that by considering the *Gamble* factors, the trial court adequately conducted the review. This is not the law. If it were, it would render the *Mitchell/Gore* guideposts meaningless.[8] As previously noted, the precedent in this state is clear that the trial court's due process review of a punitive damages award is **mandatory**. The failure to conduct it constitutes reversible error.

d. The punitive damages award does not withstand constitutional scrutiny under the *Mitchell* guideposts.

Regarding the reprehensibility guidepost, Pampu asserts that the trial court "analyzed E. Wingo's degree of culpability, the duration of her conduct, her awareness or concealment, and the existence of similar past conduct." (Pampu Resp. Br. at p. 49). The trial court on this point stated:

> If you consider the time which elapsed from the initial report until the completion of the hearing by the OCES and subsequent communications with the National Fraternity, the duration of the conduct was for more than 4 months. Even though there was no evidence of prior similar conduct, the evidence showed that all of the Defendants were fully aware of their actions at the time.

(Posttrial Order at p. 8; R. __). There are numerous issues with this reasoning and Pampu's description of it. First, there is no discussion on the degree of culpability and awareness. Second, in analyzing the duration of Ms. Wingo's conduct, the trial court refers to the communications with the fraternity. This communication ***was not made by Ms. Wingo*** and refers to a communication that was made by her father, a defendant who was not assessed punitive damages. A punitive damages award cannot be based, even in part, on a separate defendant's conduct. Similarly, the duration analysis ignores that in the OCES hearing referenced by the trial court, **it**

[8] The *Mitchell* Court stated that the *Gamble* factors remained relevant, but only insofar as they add substance to the *Mitchell* guideposts. The *Gamble* factors are not a substitute for the *Mitchell* guideposts.

was determined that Ms. Wingo did not consent to the sexual encounter.[9] It defies logic that the duration of conduct can weigh in favor of assessing punitive damages when during the period being referenced, Ms. Wingo was being vindicated by Clemson's Title IX administrative process. Finally, this passage acknowledges that there is no evidence of prior similar conduct. Missing is an assessment on this guidepost mandated by *Mitchell.*, *i.e.*, whether harm was physical or economic (not physical), whether there was a reckless disregard for health and safety of others (not applicable), did the target of the conduct have financial vulnerability (no), was the conduct isolated (yes, in that it involved a single encounter) and did it involve intentional malice or trickery or deceit (Clemson certainly found this not to be so).

Regarding the second prong of the *Mitchell* guideposts, a court is charged with considering the "likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay." *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185. Pampu claims that this prong was satisfied in that the ratio was only 0.64, and he also notes that the trial court found that it is likely to deter similar acts in the future. (Pampu Resp. Br. at p. 50). However, Pampu presented almost zero evidence related to his reputational harm. He only conclusively stated that his reputation was damaged and that he has trouble building relationships. (Tr. at p. 123, 269–70; R. __). Thus, the actual damage award was based on speculation, and any award given should have been, at most, nominal. When viewing the actual damages suffered in the proper light (meaning, considering the

[9] It is also unclear why the trial court used the hearing by OCES in considering the duration of conduct when those facts were not presented to the jury and the jury was unaware that the hearing occurred. While Ms. Wingo testified regarding how many times she claimed Pampu raped her, the "duration" of her conduct was not clear from the testimony. (Tr. at pp. 345:18-352:2; R. __).

dearth of information on reputational damage), the punitive damages are far greater than the numerical ratio of 0.64. As a result, they should not stand.

Finally, Pampu does not even attempt to argue that the trial court properly analyzes the third *Mitchell* prong related to comparing other awards in similar cases or available civil penalties, and he simply claims it was harmless error. It is certainly not harmless to completely ignore a legal factor in analyzing whether someone's constitutional due process rights were violated. The Wingo Defendants posit that there are no civil penalties for comparison and the defamation, as argued herein, is grounded in nomenclature and also untrue on the issue of consent, as found by the Clemson OCES. Thus, there are no justifying comparable similar punitive damages awards. The failure to afford constitutional protections in conducting the mandatory due process review is inherently flawed and more akin to a structural defect rather than a trial error. *Arizona v. Fulminante*, 499 U.S. 279, 307-09, 111 S. Ct. 1246, 1263–64, 113 L.Ed.2d 302, 329–31 (1991) (dividing constitutional errors into "trial errors" and "structural defects," with the latter defying analysis by harmless error standards because they affect the framework within which a trial proceeds, rather than simply an error in the trial process itself); *State v. Byrd*, 318 S.C. 247, 456 S.E.2d 922 (Ct. App. 1995) (same).

In accordance with the above, this Court should apply the proper and mandatory *Mitchell* analysis on a *de novo* basis and reverse the punitive damages award. Failing that, a new trial absolute should be ordered.

CONCLUSION

For the reasons stated herein and in the Wingo Defendants' opening brief, the judgment should be reversed and judgment should be entered in favor of the Respondents-Appellants. Failing that, a new trial

should be ordered as to the defamation claim. The judgment notwithstanding the verdict ordered by the trial court as to civil conspiracy should be affirmed.

(Signature Page Follows)

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2022-001332

Andrew Pampu, ...	Appellant-Respondent,
v.	
Erin Wingo, David Wingo, and Colin J. Gahagan...	Respondents-Appellants.

PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Erin Wingo and David Wingo, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified, pursuant to the Supreme Court Order 2022-05-06-04, and a copy of that electronic mail is attached to this certificate.

Pleading(s): Respondents-Appellants Erin Wingo and David Wingo's Initial Reply Brief

Served: **Via E-Mail**

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Subject:	Andrew Pampu v. Erin Wingo - Case No. 2022-001332
Attachments:	Wingo Initial Reply Brief.pdf; Wingos - Proof of Service.pdf

Good afternoon,

Attached for service upon you in the above matter are the Respondents-Appellants Erin Wingo and David Wingo's Initial Reply Brief and Proof of Service.

Thank you,

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