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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA**
**In the Court of Appeals**

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APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely
Circuit Court Judge

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Appellate Case No.: 2022-001332

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Andrew Pampu, ……Appellant-Respondent,

v.

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

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# FINAL RESPONDENT'S BRIEF OF APPELLANT-RESPONDENT PAMPU IN RESPONSE TO RESPONDENT-APPELLANT GAHAGAN

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## STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court properly determine that collateral estoppel did not bar Andrew Pampu's defamation claim because Clemson's Office of Community and Ethical Standards ("OCES") was not a state agency under § 1-23-310 of the South Carolina Code, and the OCES process lacked the procedural safeguards required for a full and fair opportunity to litigate the issues?

II. Did the jury properly determine that Colin J. Gahagan was liable for defamation?

III. Did the Circuit Court properly uphold the jury's punitive damages award based on the factors listed in § 15-32-520(E) of the South Carolina Code?

## STATEMENT OF THE CASE

Pampu is a former student at Clemson University. R. p. 1428, lines 91:4-6, 13-17. Wingo and Gahagan are also former students at Clemson University. R. p. 1429, lines 92:14-16. Pampu asserts that Wingo and Gahagan defamed him by stating that Pampu had raped/sexually assaulted Wingo and that Wingo and Gahagan engaged in a civil conspiracy to have Pampu removed from Clemson. R. p. 1447, lines 18-25; p. 1453, line 20-p. 1455, line 15; p. 1458, line 25-p. 1459, line 13. At the trial in this matter, the Circuit Court denied Wingo and Gahagan's motions for a directed verdict with regard to, *inter alia*, Pampu's defamation claim. R. p. 2207, line 14-p. 2214, line 19. The jury returned verdicts of liability for defamation and civil conspiracy against Wingo and Gahagan.[1] R. p. 2314, lines 8-12, 16-22; p. 2314, line 25-p. 2315, line 2. The jury awarded Pampu $700,000 in actual damages and $220,000 in punitive damages as a result of Gahagan's defamatory conduct. R. p. 2314, lines 16-18. As a result of Gahagan's involvement in the civil conspiracy, the jury awarded Pampu $1,000,000 in actual damages. R. p. 2314, line25-p. 2315, line 2. Following post-trial motion practice, the Circuit Court incorrectly determined that Pampu failed to present sufficient evidence to prove his civil conspiracy claim and improperly overturned the

[1] The jury also returned a verdict of liability for defamation by David Wingo, Erin Wingo's father. R. p. 2314, lines 13-15. The jury awarded Pampu $230,000 in actual damages as a result of David Wingo's defamatory conduct. R. p. 2314, lines 13-15.

jury's verdicts. R. pp. 6-7. The Circuit Court did not disturb the jury's verdicts of liability for defamation against Wingo and Gahagan.[2] R. pp. 7-11.

## FACTUAL BACKGROUND

On September 10, 2015, the first day that Pampu and Wingo met, they engaged in an intimate physical encounter. R. p. 1430, lines 1-12; p. 1629, lines 5-7. At the time of this encounter, Pampu was friends with Gahagan, and Wingo was romantically entwined with Gahagan in a physically intimate relationship. R. p. 1430, lines 13-25; p. 1630, lines 15-17; p. 1755, lines 10-12, 19-21; p. 1836, line 18-p. 1837, line 5. Pampu and Gahagan were also pledge brothers rushing the Phi Delta Theta fraternity at that time. R. p. 1429, lines 2-6; p. 1430, lines 16-20. After the September 10, 2015 encounter, Wingo repeatedly initiated contact with Pampu during September and October of 2015 while also continuing to seek a relationship with Gahagan. R. pp. 3116-3116; pp.3125-3129. Wingo eventually told Gahagan about her September 10, 2015 tryst with Pampu. R. p. 1431, lines 19-22. Wingo told Pampu that she felt guilty about their September 10, 2015 encounter. R. p. 3116. After Wingo told Gahagan about her September 10, 2015 encounter with Pampu, she informed Pampu that Gahagan refused to let her sleep over at his dorm room, so she did not believe that he was "cool with" her rendezvous with Pampu. R. p. 3116. Wingo also told another friend that Gahagan was "furious with" Pampu because of the September 10, 2015 encounter. R. p. 3126. Wingo also told that same friend that Gahagan was not mad at her; rather, he was mad at Pampu. R. p. 3127.

On the evening of October 24, 2015, Pampu's fraternity hosted a party at its off-campus house, nicknamed the Compound, and Pampu, Gahagan, and Wingo were in attendance.

[2] The Circuit Court also declined to overturn the verdict of liability for defamation against David Wingo. R. pp. 9-11.

R. p. 1433, line 25-p. 1434, line 2; p. 1434, line 23-p. 1435, line 17. Upon her arrival at the party on October 24, 2015, Wingo went to find Gahagan. R. p. 2017, lines 16-24. Gahagan observed Wingo walking unassisted without stumbling, and the two had a conversation without Wingo slurring her words. R. p. 1761, line 18-p. 1762, line 14. After finding and speaking to Gahagan, Wingo became upset because Gahagan blew her off and told her to find somebody else, specifically Pampu. R. p. 1644, lines 19-23; p. 2017, line 25-p. 2018, line 15. Gahagan testified that he was not concerned about Wingo or her level of intoxication when he left her at the party. R. p. 1763, lines 17-19. Wingo then went to find Pampu. R. p. 1645, lines 5-9; p. 2072, line 21-p. 2073, line 3. After locating Pampu, Wingo went up to him and gave him a hug and a kiss on the lips in front of several people. R. p. 2073, lines 4-9. Wingo and Pampu eventually absconded to a more private location and engaged in a consensual sexual encounter. R. p. 1438 line 6-p. 1446, line 7. Shortly after this consensual sexual encounter had ended, Wingo began talking to Pampu about Gahagan, specifically asking why Gahagan did not love her and expressing disappointment with that fact. R. p. 1446, lines 15-21.

After her consensual sexual encounter with Pampu, Wingo sat on the front steps of the Compound and began crying and asking why Gahagan did not love her. R. p. 2021, line 2-p. 2022, line 25; p. 2073, line 10-17. Wingo was upset because she had "messed up the plan" to go home with Gahagan that evening. R. p. 1654, lines 1-15. She also stated that Gahagan was going to hate her. R. p. 2176, lines 16-19. Wingo did not mention Pampu while she was lamenting her unrequited love for Gahagan on the steps of the Compound immediately following the encounter, nor did she offer any indication that she had just been raped or sexually assaulted. R. p. 1655, lines 10-14; p. 2023, lines 3-5; p. 2076, lines 8-15. Wingo also texted Gahagan, who by that point had left the Compound. R. pp. 3118-3121.

During the car ride from the Compound back to her dorm, Wingo continued to cry about Gahagan, stating that he did not love her, but she never mentioned Pampu. R. p. 2073, lines 18-25; p. 2075, lines 1-13; p. 2199, lines 18-25. During the car ride, Wingo again stated that Gahagan was going to hate her. P. 2176, lines 20-23. When Wingo returned to her dorm following her consensual sexual encounter with Pampu, she told her friends that Gahagan was going to hate her, was not going to forgive her, and did not love her. R. p. 2176, line 24-p. 2177, line 8. She also told her RA that she was upset in part because she had been stood up at a party that she attended. R. p. 2085, lines 8-13. During her conversation with her RA, Wingo did not assert that she had been raped or sexually assaulted. R. p. 2085, line 24-p. 2085, line 5. Prior to going to sleep that evening, Wingo exchanged numerous hostile text messages with Gahagan. R. pp. 3118-3121.

After his sexual encounter with Wingo, Pampu sent a private text message to one of his pledge brothers, Jonathan Stoddart, informing Stoddart that he had sex with Wingo. R. p. 1530, lines 5-22; p. 1612, lines 18-21. Unbeknownst to Pampu, Stoddart took a screenshot of this private text message and sent it to a GroupMe chat that included the members of the fraternity pledge class, including Gahagan. R. p. 2195, lines 18-24. After receiving the GroupMe message from Stoddart, Gahagan deduced that Wingo had sex with Pampu on the evening of October 24, 2015. R. p. 1807, lines 8-25.

On October 25, 2015 at 8:18 a.m., Wingo sent a text message to Gahagan stating, in part, "But when I tell you I love you, I mean it," and "I want you to tell me to be yours and to care about what I do, I want that too. I want to be yours and only yours, and you won't ask me and I don't know why." R. p. 1664, lines 2-12; pp. 3122-3123.[3] At 9:24 a.m. on that same day, Wingo sent

[3] The text messages included in Plaintiff's Trial Exhibit 5 are timestamped using Universal Coordinated Time (UTC). UTC is four hours ahead of Eastern Daylight Time and five hours ahead of Eastern Standard Time. As an example, a message with a timestamp of 11:00 a.m. UTC would

another text message to Gahagan stating, in part, "All I want is you and that's all I ever wanted since being here." R. pp. 3122-3123; p. 1664, lines 20-25. She followed this up with another text message to Gahagan at 9:28 a.m. that stated, in part, "I cried over you all last night." R. pp. 3122-3123; p. 1665, lines 1-7. Gahagan did not respond to these messages from Wingo until 10:55 a.m., when he said, "Not the time to say I love you. I'm going to the Compound to clean now. We'll talk when I get back." R. pp 3122-3123; p. 1665, lines 18-23. During her text message exchange with Gahagan on the morning of October 25, 2015, Wingo never told Gahagan that she had been raped or sexually assaulted the previous evening. R. pp. 3122-3123; p. 1665, line 24-p. 1666, line 3; p. 1765, lines 19-24.

On October 25, 2015 at 10:04 a.m., before she had spoken with anyone about her sexual encounter with Pampu, Wingo sent a text message to Pampu, pleading, "do not tell [Gahagan] what happened," demonstrating a clear recollection of her sexual encounter with Pampu the previous evening. R. p. 3124; p. 1447, lines 14-17; p. 1667, lines 11-13. Significantly, her concerns focused solely on Gahagan finding out that she had engaged in sexual intercourse with Pampu; she did not express any concern that the encounter was not consensual. R. p. 3124; p. 1447, lines 14-17.

Later that morning at approximately 11:30 a.m., non-party witness Jami Hafner arrived at Wingo's dorm room. R. p. 2050, lines 9-16. At the time Hafner arrived at Wingo's dorm room, Wingo still had not spoken with Gahagan about the events of the prior evening. R. p. 2054, lines 12-25. According to Hafner, Wingo was upset because she had sex with Pampu instead of Gahagan the prior evening. R. p. 2050, lines 20-22; p. 2051, lines 12-24. During her conversation

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have been sent at 7:00 a.m. EDT or 6:00 a.m. EST. At the time the messages reflected in Plaintiff's Trial Exhibit 5 were sent, the east coast of the United States was observing EDT.

with Hafner on October 25, 2015, Wingo did not say that Pampu raped or sexually assaulted her. R. p. 1669, lines 11-15; p. 2052, lines 7-14.

Later that evening at some point between 5:00 p.m. and 5:30 p.m., Gahagan arrived at Wingo's dorm room. R. p. 1669, lines 16-20; p. 1766, lines 10-17. When Gahagan arrived, he showed Wingo the GroupMe message from Stoddart to the fraternity pledge class. R. p. 1670, lines 2-10; p. 1766, lines 18-22. After seeing the GroupMe message, Wingo did not assert that she had been raped or sexually assaulted. R. p. 1766, line 18-p. 1767, line 8. She did, however, for the first time and contrary to all of her previous representations, claim that she did not remember much from the previous night. R. p. 1669, lines 21-25; p. 1829, lines 9-14. In response, Gahagan told Wingo that if she did not remember what occurred with Pampu the previous evening, then it was rape. R. p. 1674, lines 1-4. Gahagan's use of the word "rape" was the first time that term was used to describe Wingo's sexual encounter with Pampu. R. p. 1674, lines 7-15. Wingo did not start using the word "rape" to describe her sexual encounter with Pampu until two days after her October 25, 2015 in-person conversation with Gahagan. R. p. 1748, lines 3-8. Indeed, later in the evening on October 25, 2015, Wingo sent Gahagan a text message lamenting her sexual encounter with Pampu, not because she was raped or sexually assaulted, but because she "screwed up" with Gahagan. R. p. 1791, lines 21-25; p. 3136.[4]

On October 25, 2015, Gahagan texted Pampu about Pampu and Wingo's consensual sexual encounter the previous night. R. pp. 3036-3037. During this text exchange, Pampu explained that he did not have time to fully explain himself because he had a "huge test" the next day that he

[4] The text messages included in Plaintiff's Trial Exhibit 15 are timestamped using Universal Coordinated Time (UTC). UTC is four hours ahead of Eastern Daylight Time and five hours ahead of Eastern Standard Time. As an example, a message with a timestamp of 11:00 a.m. UTC would have been sent at 7:00 a.m. EDT or 6:00 a.m. EST. At the time the messages reflected in Plaintiff's Trial Exhibit 15 were sent, the east coast of the United States was observing EDT.

needed to study for. R. pp. 3036-3037. However, Pampu made it clear that the sexual encounter with Wingo was consensual, that Wingo could speak coherently at the time, that Wingo was not stumbling leading up to the sexual encounter, and that he asked Wingo for her consent throughout their encounter. R. pp. 3036-3037. Rather than investigate the truth of the matter, on October 26, 2015, Gahagan told Brendan Swinehart, a fellow Clemson student and member of Phi Delta Theta's pledge class, that Pampu had raped Wingo. R. p. 1772, line 16-p. 1773, line 1. Despite testifying that he observed Wingo walking unassisted without stumbling, that he had a conversation with Wingo where she was not slurring her words, that Wingo did not vomit at the party, and that he was not concerned about Wingo or her level of intoxication when he left her at the party, Gahagan told Swinehart "I saw [Wingo] at the Compound. She was blackout drunk and couldn't handle herself and [Pampu] took advantage of it." R. p. 1761, line 8-p. 1763, line 22; pp. 3131-3132. Similarly, on October 26, 2015, Gahagan told Cameron Keramati, a fellow Clemson student who lived in Gahagan's dorm, that Pampu raped Wingo. R. p. 1776, lines 1-8; p. 1777, lines 10-15; p. 3133.

On October 27, 2015, after hearing Pampu's recounting of his sexual encounter with Wingo, Gahagan told Wingo that Pampu was "not a criminal, but he still did make an extreme unforgivable mistake." R. p. 1770, lines 8-21; p. 3130.[5] On that same day, an anonymous report was made to Clemson regarding Pampu's sexual encounter with Wingo. R. p. 1572, lines 12-16. Also on October 27, 2015, Wingo attended a meeting with Clemson to discuss her sexual encounter with Pampu. R. p. 1676, line 22-p. 1677, line 1; p. 1720, line 19-p. 1721, line 7. According to

[5] The text messages included in Plaintiff's Trial Exhibit 10 are timestamped using Universal Coordinated Time (UTC). UTC is four hours ahead of Eastern Daylight Time and five hours ahead of Eastern Standard Time. As an example, a message with a timestamp of 11:00 a.m. UTC would have been sent at 7:00 a.m. EDT or 6:00 a.m. EST. At the time the messages reflected in Plaintiff's Trial Exhibit 10 were sent, the east coast of the United States was observing EDT.

Wingo, she "cried throughout" this initial meeting, falsely indicating to Clemson that Pampu had sexually assaulted her even though she knew that the encounter was consensual. R. p. 1721, lines 10-11.

Wingo and Gahagan shared a desire to remove Pampu from Clemson, and they utilized the Clemson disciplinary process to achieve that goal. R. p. 1698, line 5-p. 1699, line 1. During a conversation that occurred on November 16, 2015, while the Clemson disciplinary process was ongoing, Gahagan told Wingo that they were "One step closer to him being gone," referring to having Pampu removed from Clemson. R. p. 1796, line 10-p. 1797, line 1; p. 3137. Gahagan also told Wingo, "Well you have four chances in the school to get what you want. Then you have criminal. Unless you decide criminal sooner is the best option." R. p. 3138. During their conversation, Wingo told Gahagan, "[H]alf of me wants to have him expelled and throw his ass in jail, and half of me wants to hide, right now the northern in me is coming out and I'm ready to hit him with a lawsuit." R. p. 3138. Gahagan later told Wingo, in reference to Pampu, "There's no way this kid can stay at this school. It's honestly impossible." R. p. 3138; p. 1798, lines 10-12. Gahagan further explained to Wingo, "He's gone Erin. It's not gonna be possible for him to stay," once again referring to Pampu. R. p. 3139; p. 1798, lines 16-19.

At the same time that Gahagan was scheming with Wingo to have Pampu removed from Clemson, Gahagan was pretending to be Pampu's friend. R. p. 1454, line 15-p. 1455, line 4. In fact, on November 12, 2015, Gahagan told Pampu, "I know the kind of kid you are. I know you would never do that." R. p. 3134. In using the term "that," Gahagan was referring to rape. R. p. 1794 11-18. In spite of this representation and with full knowledge that the sexual encounter giving rise to the Clemson disciplinary process was consensual, both Wingo and Gahagan provided

false testimony at the Clemson disciplinary hearing that resulted in Pampu's removal from the university. R. p. c; p. 3135.

It is clear that the false statements Wingo and Gahagan provided to Clemson during the disciplinary process initiated by the October 27, 2015 report led to Pampu's removal from Clemson. R. p. 1456, lines 2-3; p. 1461, lines 6-11; p. 1586, lines 7-14, 24-25. The text messages exchanged between Wingo and Pampu on November 16, 2015, acknowledge and relish the impact their false statements will have on Pampu's continued attendance at Clemson. R. p. 3137 (Gahagan telling Wingo, "One step closer to him being gone,"); p. 3138 (Wingo noting that she was hoping Pampu would be expelled); and p. 3139 (Gahagan stating in response to Wingo's desire to have Pampu expelled, "There's no way this kid can stay at this school. It's honestly impossible."). Moreover, in January 2017, Gahagan sent a series of text messages to Pampu in which he admitted that he and Wingo lied in order to have Pampu removed from Clemson, acknowledged that Pampu's sexual encounter with Wingo was consensual, and admitted that Pampu was innocent. R. p. 3135; p. 1787, lines 2-4; p. 1787, line 22-p. 1789, line 2. In this series of text messages, Gahagan explicitly stated that he lied during the hearing that led to Pampu's removal from Clemson and implied that Wingo lied during that same hearing by noting, "Erin wanted to have sex that night." R. p. 1788, lines 5-6; p. 3135.

## PROCEDURAL HISTORY AND TRIAL COURT RULINGS

Pampu commenced his Circuit Court action on January 15, 2017, in Pickens County alleging claims of (1) defamation, (2) intentional infliction of emotional distress, (3) civil conspiracy, and (4) abuse of process. R. pp. 31-71. At the time of trial, only Pampu's defamation and civil conspiracy claims remained. R. p. 1447, lines 18-25; p. 1453, line 20-p. 1455, line 15; p. 1458, line 25-p. 1459, line 13.

On September 22, 2021, Gahagan filed his Brief in Support of Motion for Summary Judgment arguing, *inter alia*, that Pampu's defamation claim was barred by the doctrine of collateral estoppel. R. pp. 404-415. On October 13, 2021, the Circuit Court denied Gahagan's motion for summary judgment, holding that OCES was not a state agency under § 1-25-310, and therefore, the OCES hearing decision was not entitled to preclusive effect. R. pp. 17-25.

This matter was tried before a jury in Pickens County between March 21, 2022, and March 25, 2022. R. p. 1338. At the close of Pampu's case-in-chief, Wingo and Gahagan moved for directed verdicts on Pampu's civil conspiracy and defamation claims, and the Circuit Court entertained extensive oral argument on these issues. R. p. 2127, line 23-p. 2153, line 7. At that time, the Circuit Court denied the motions for a directed verdict with regard to Pampu's defamation cause of action and took the motions for a directed verdict with regard to the civil conspiracy claim under advisement. R. p. 2153, lines 3-7.

In charging the jury, the Circuit Court correctly laid out the elements of defamation and instructed the jury that,

> Generally to recover defamation, the plaintiff needs to show that the actions of the defendant were negligent. The plaintiff need not show intent or actual malice. Negligence is the doing of what a reasonable and prudent person would do under the similar circumstance, or the failure to do what such a person would've done under the circumstances.

R. p. 2291, lines 6-13. The Circuit Court also properly instructed the jury that to recover punitive damages, a plaintiff "must show by clear and convincing evidence to entitle them to punitive damages." R. p. 2297, lines 18-19. The Circuit Court defined "clear and convincing evidence" as "a measure of proof [that] is intermediate, more than a mere preponderance, but less than required for beyond a reasonable doubt…. Something [that] firmly convinces you of the facts to be proven." R. p. 2299, lines 18-23. The Circuit Court further instructed the jury that "[t]he paramount purpose

for awarding punitive damages is not to compensate the plaintiff, but to punish and set an example for others," and "[b]efore you can award punitive damages, you must first find that the plaintiff is entitled to actual or nominal damages." R. p. 2298, lines 11-14; p. 2298, lines 15-17. The Circuit Court also instructed the jury that "actual [malice] must be shown to recover for punitive damages." R. p. 2297, lines 10-11. Finally, the Circuit Court instructed the jury to consider the factors set forth in S.C. Code Ann. § 15-32-520(E) regarding the award of punitive damages:

> [There are] certain factors which you may consider: You may consider the character of the defendants' acts; you may consider nature and extent of the harm to plaintiff which defendant caused; you can consider defendants' degree of culpability; punishment that should be imposed; the duration of the conduct; the defendants' awareness or concealment; existence of similar conduct in the past; the likelihood that such an award of punitive damages will deter defendants or others from like conduct; whether award -- you could consider whether the award is reasonably related to the harm and likely to result in such conduct; and, finally, you can consider the defendants' wealth or his or her ability to pay. Financial condition of the defendants is a factor for you to consider, but it's not the only factor. You must also consider the other factors which I have just listed.

R. p. 2298, line 21-p. 2299, line 13.

Following several hours of deliberations, the twelve-person jury returned verdicts finding Wingo and Gahagan liable for, *inter alia*, defamation. R. p. 2314, lines 8-10; p. 2314, lines 16-18. With regard to this finding of liability, the jury awarded Pampu $700,000 in actual damages, and $200,000 in punitive damages stemming from Gahagan's defamatory statements. R. p. 2314, lines 8-10; p. 2314, lines 16-18.

On March 30, 2022, Gahagan filed a post-trial motion seeking, *inter alia*, enforcement of the doctrine of equitable estoppel based on the erroneous theory that OCES is a state agency under the South Carolina Administrative Procedures Act (the "APA"), to overturn the jury's finding of liability for defamation based on the alleged absence of negligence by Gahagan when he published his defamatory statements, and to overturn the punitive damages award based on the factors listed in S.C. Code Ann. § 15-32-520(E). R. pp. 1086-1091. Pampu filed his response to Gahagan's

Post-Trial Motion on April 14, 2022. R. pp. 1130-1147. The Circuit Court filed its Order on Post-Trial Motions on July 11, 2022. R. pp. 4-13. In its Order on Post-Trial Motions, the Circuit Court properly concluded that Pampu's defamation claims were not barred by the doctrine of collateral estoppel because the OCES proceeding lacked the necessary procedural safeguards. R. pp. 7-8. The Circuit Court also properly concluded that there was evidence to support the jury's finding on the issue of whether Gahagan acted negligently in publishing the defamatory statements, and that the punitive damages award was appropriate. R. pp. 8, 11-12. Pampu filed his notice of appeal on September 21, 2022. R. pp. 1239-1240. Gahagan filed his notice of appeal on September 21, 2022. R. pp. 1249-1250. These appeals followed.

On May 15, 2023, Gahagan filed a Motion for Leave to Deposit Judgment Amount, stating that Gahagan is "ready, willing, and able to deposit with the Court the entire combined judgment amount against them, plus accrued post-judgment interest as of the date an order is entered granting leave to make the deposit." R. pp. 1258-1261.

## STANDARD OF REVIEW

This Court has clearly established the following standard of review when facing appeals related to motions for JNOV:

> When ruling on a JNOV motion, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party. This court must follow the same standard. If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt, the case should be submitted to the jury

*Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325 734 S.E.2d 177, 180 (Ct. App. 2012) (internal quotations and citations omitted); *see also RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331-332, 732 S.E.2d 166, 171 (2012) (same); *Hunter v. Staples*, 335 S.C. 93, 105, 515

S.E.2d 261, 267 (Ct. App.1999) (same); *Watts v. Chastain*, No. 2019-001514, 2022 WL 17171097 at *2 (S.C. Ct. App. Nov. 23, 2022) (same).

This Court has further explained as follows:

> In ruling on a motion for judgment notwithstanding the verdict, the trial court must view the evidence and inferences therefrom in the light most favorable to the nonmoving party and must deny the motions if either the evidence yields more than one reasonable inference or its inferences are in doubt. **The verdict will be upheld if there is any evidence to sustain the factual findings implicit in the jury's verdict**.

*Shupe v. Settle*, 315 S.C. 510, 515, 445 S.E.2d 651, 654 (Ct. App. 1994) (emphasis added). As noted by this Court, "A motion for JNOV may be granted **only if no reasonable jury** could have reached the challenged verdict," and "The jury's verdict will not be overturned **if any evidence exists that sustains the factual findings** implicit in its decision." *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000) (citing *Smalls v. South Carolina Dep't of Educ.*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App.2000)) (emphasis added); *see also Hunter*, 335 S.C. at 105, 515 S.E.2d at 267-268 (same); *Watts*, 2022 WL 17171097 at *2 (same).

As the Supreme Court of South Carolina has explained, "A motion for a JNOV is merely a renewal of the directed verdict motion." *RFT Mgmt. Co.*, 399 S.C. at 331, 732 S.E.2d at 171. The Supreme Court has also noted that when deciding a JNOV motion, "neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." *Id*. at 332, 732 S.E.2d at 171.

## ARGUMENT

### I. The Circuit Court Correctly Held That Andrew Pampu's Defamation Claim Was Not Collaterally Estopped By The OCES Decision.

The doctrine of collateral estoppel provides that, "any issue litigated and decided that was necessary to the judgment in the first case, may not be relitigated in a second action involving a

different claim." *Catawba Indian Nation v. State*, 407 S.C. 526, 537, 756 S.E.2d 900, 906 (2014). Under South Carolina law, where a civil action arises out of the same factual scenario as one which has been before a state agency, a finding by that state agency with regard to an element that is critical to recovery in the civil action is binding upon the civil court. *Bennett v. South Carolina Dept. of Corr.*, 305 S.C. 310, 408 S.E.2d 230 (1991).

Gahagan's appeal rehashes his twice rejected argument that the OCES decision is entitled to preclusive effect even though OCES (a) does not fit the definition of an agency under the relevant statutes; and (b) does not follow the procedures applicable to agency proceedings. For the reasons set forth below, the Circuit Court's ruling on the issue of collateral estoppel should be affirmed.

A. OCES Is Not An Agency Under Article 3 Of The APA.

S.C. Code Ann. § 1-23-310(1) sets forth the only definition of "agency" that controls when interpreting §§ 1-23-310 et seq. ("Article 3"). A review of the statutes relied upon by Gahagan shows that he has set out to cobble together a definition of "state agency" that includes OCES to fit his narrative in this case. Gahagan's reliance on S.C. Code Ann. § 15-78-30(a) (the "Tort Claims Act" or "TCA") for the definition of the term "agency" is also misplaced because the definition of "agency" in the TCA is specifically limited to entities "which employ the employee whose act or omission gives rise to a claim under this chapter." S.C. Code. Ann. § 15-78-30(a). Because Pampu was a Clemson student, not an employee, the definition of "agency" in the TCA is inapplicable to the instant matter. Furthermore, S.C. Code Ann. § 1-23-310(2) is contained in Title 1, Chapter 23 of the South Carolina Code of Laws. S.C. Code Ann. § 1-23-310(2). This is both a different Title and Chapter than the TCA, so the TCA definition, which only applies to claims "under [Title 15,

Chapter 78]," cannot be used when interpreting the meaning of "agency" under Article 3 of the APA. S.C. Code. Ann. § 15-78-30(a); S.C. Code Ann. § 1-23-310.

Section 1-23-310(2) of the South Carolina Code defines "agency" as "each state board, commission, department, or officer, other than the legislature, the courts, or the Administrative Law Court, authorized by law to determine contested cases." S.C. Code Ann. § 1-23-310(2). The term "contested case" is defined by S.C. Code Ann. § 1-23-310 to be "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.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *White v. State*, 375 S.C. 1, 8, 649 S.E.2d 172, 176 (Ct. App. 2007). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction, and a court must apply the statute according to its literal meaning." *White*, 375 S.C. at 8, 649 S.E.2d at 176. While "ratemaking, price fixing, and licensing" do not represent an exhaustive list of what constitutes a "contested case," they are instructive when determining what constitutes a "contested case." Ratemaking, price fixing, and licensing deal with setting regulations across South Carolina or entire industries within the State. Moreover, the state agencies tasked with ratemaking, price fixing, and licensing go through a notice and comment process whenever they promulgate new rules that impact the rights of South Carolina's citizens. S.C. Code Ann. § 1-23-110-160. By contrast, Clemson has the Student Conduct Code Review Committee ("SCCRC") annually review the Student Code of Conduct and recommend changes to the vice president for Student Affairs. R. pp. 388-389, Section XII. The SCCRC is comprised of two faculty members, two staff members, and five students. *Id*.

Furthermore, parties to a "contested case" have the right to depose witnesses, the ability to subpoena witnesses for documents and testimony, the right to cross-examination, and the right to a hearing conducted in compliance with the South Carolina Rules of Evidence. S.C. Code Ann. § 1-23-320(C)-(D); § 1-23-330(3); § 1-23-330(1). None of these rights are available to students involved in the OCES process. *See* R. pp. 364-389; pp. 391-403.

Gahagan's argument that drafting a disciplinary policy pursuant to the South Carolina Campus Sexual Assault Information Act ("SCCSAIA") turns OCES into an agency under Article 3 also fails. Gahagan Brief ("Gahagan Br.") at 10; S.C. Code Ann. §§ 59-105-10 to 60. The SCCSAIA applies to "institutions of higher learning," which includes both public and private universities. S.C. Code Ann. § 59-105-20. Additionally, the SCCSAIA does not utilize the term "agency" at any point. S.C. Code Ann. §§ 59-105-10 to 60. Furthermore, the only rights the SCCSAIA provides to students involved in a disciplinary proceeding are the rights to be notified of the outcome and the availability of counseling resources. S.C. Code Ann. § 59-105-40. All other aspects of establishing a disciplinary process are left to the discretion of the institutions of higher learning. S.C. Code Ann. § 59-105-40.

Gahagan's argument that Clemson is a state agency under Article 3 of the APA because the Clemson University Board of Trustees (the "Board of Trustees") is authorized to make "all rules and regulations for the government of the university" is equally unavailing. Gahagan Br. at 10; S.C. Code Ann. § 59-119-50. As noted above, Clemson utilizes the SCCRC to amend its Code of Conduct; it does not comply with the APA's procedures for the promulgation of regulations. *Compare* S.C. Code Ann. § 1-23-110-160, *with* R. pp. 388-389, Section XII. Furthermore, a majority of members of the Board of Trustees are private individuals that were neither appointed nor elected by the General Assembly. S.C. Code Ann. § 59-119-40 ("The university shall be under

the management and control of a board of thirteen trustees, composed of the seven members nominated by the will and their successors and six members to be elected by the General Assembly in joint assembly"). It beggars belief to suggest that the General Assembly intended to confer the authority of a state agency as defined by the APA upon a board of trustees controlled by individuals who are not accountable to the people of South Carolina. Under the actual definition of "agency" in Article 3, OCES is not a state agency, and the OCES decision is not entitled to preclusive effect.

B. OCES Did Not Follow The Procedures Applicable To Article 3 Agency Proceedings, So Its Findings Are Not Entitled To Preclusive Effect.

Because OCES did not follow the procedures applicable to Article 3 agency proceedings, the OCES findings are not entitled to preclusive effect. Gahagan's appeal notes that in *Shelton*, "collateral estoppel did not apply with regard to a finding made by the Employment Security Commission since the finding by that commission is to determine whether a claimant is qualified to receive employment benefits in an expeditious manner so that employers are not compelled to intensely contest the hearing due to the stakes being low." Gahagan Br. at 8 (citing *Shelton v. Oscar Meyer Foods Corp.*, 325 S.C. 248, 481 S.E.2d 706 (1997)). In other words, a benefits hearing heard by the Employment Security Commission lacks the procedural safeguards that are the hallmark of a full and fair evidentiary hearing, making it inequitable to apply collateral estoppel.

Gahagan also relies on *Bennett*, a case in which the Supreme Court found that the employee's civil action was collaterally estopped by the State Employee Grievance Committee's (the "Grievance Committee") ruling because the hearing before the Grievance Committee was necessarily more in the nature of a full evidentiary hearing. Gahagan Br. at 9; *Bennett v. South Carolina Dept, of Corrections*, 305 S.C. 310, 408 S.E.2d 230 (1991). While the Court did not go into particulars about what made the Grievance Committee proceeding a "full and fair"

proceeding, S.C. Code § 8-17-340(C), which controls the Grievance Committee proceedings, states:

> The committee chairman or a designee is authorized to **administer oaths; to issue subpoenas for files, records, and papers; to call additional witnesses; and to subpoena witnesses**. The Department of Administration is **authorized to request assignment by the Attorney General of one or more of his staff attorneys admitted to practice law in South Carolina to serve in the capacity of committee attorne**y.

S.C. Code Ann. § 8-17-340(C) (emphasis added). None of the procedural safeguards or discovery tools that were available to the plaintiff in *Bennett* during the Grievance Committee proceedings were available to Pampu during the OCES process. *Compare Bennett*, 305 S.C. at 312; *and* S.C. Code § 8-17-340(C); *with* R. pp. 364-389. Lawyers were not allowed to actively participate in the hearing; testimony was not provided under oath; the presentation of evidence was heavily restricted; direct cross-examination was not permitted; witnesses could not be compelled to appear; parties and witnesses could not be compelled to produce documents or other evidence; there was no right to a jury trial; there is no public record; the rules of evidence did not apply; and the case was investigated, prosecuted, and decided by agents of the same party, namely Clemson University. R. pp. 375-383, Sections X.D-G.

Similarly, Gahagan's reliance on *Perry* is misplaced because *Perry* involved state employment decisions resolved by the State Employee Grievance Committee. *Perry v. State Law Enforcement Division DOJ*, 310 S.C. 558, 559, 426 S.E.2d 334, 335 (1992). As discussed above, the Grievance Committee derives its authority from the State Employee Grievance Procedure Act and applies to employees of state agencies, not Clemson University students. S.C. Code Ann. § 8-17-340. No similar statutory authority exists for the adjudication of student conduct violations by OCES. In short, because OCES is not a state agency tasked by state law with adjudicating student conduct violations, its decisions are not binding on subsequent civil actions.

C. Even If OCES Were An Article 3 Agency, It Is Inequitable To Apply The Doctrine Of Collateral Estoppel.

Even assuming *arguendo* that OCES is a state agency pursuant to Article 3, it would be inequitable to apply the doctrine of collateral estoppel to bar Pampu's defamation claim. "The doctrine of collateral estoppel is intended to reduce litigation and conserve the resources of the court and litigants and it is based upon the notion that it is unfair to permit a party to relitigate an issue that has already been decided." *State v. Bacote*, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998). "Since it is grounded upon concepts of fairness, it should not be rigidly or mechanically applied." *Id.*; *see also Carrigg v. Cannon,* 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct. App. 2001) ("The doctrine of collateral estoppel should not be rigidly or mechanically applied."); 50 C.J.S. *Judgments* § 779 (1997). "Thus, even if all the requirements of issue preclusion are met, when unfairness or injustice results or public policy requires it, the doctrine's application may be precluded." *Bacote*, 331 S.C. at 331, 503 S.E.2d at 163.

To determine whether the party adversely affected by collateral estoppel had a full and fair opportunity to litigate, courts look to the factors provided in Restatement (2d) Judgments. *Bacote*, 331 S.C. at 332, 503 S.E.2d at 163. According to the Restatement (2d) Judgments:

> relitigation of [an] issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or
>
> (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or
>
> **(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them;** or

(4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; **the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action**; or

(5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or **(c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.**

Restatement (2d) Judgments § 28 (emphasis added).

Similarly, Restatement (2d) Judgments § 29 notes that collateral estoppel does not apply when a party lacked a full and fair opportunity to litigate the issue in the first action, or if other circumstances justify affording him an opportunity to relitigate the issue. Restatement (2d) Judgments § 29. Restatement (2d) Judgments § 29 then sets forth the following factors for consideration:

(1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;

**(2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;**

(3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;

(4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;

(5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;

(6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;

> (7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;
>
> (8) Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.

Restatement (2d) Judgments § 29 (emphasis added).

Because Pampu has met the exception set forth in Restatement (2d) Judgments § 28(3), collateral estoppel should not be applied. Article 3 sets the minimum procedural standards that these agencies must follow when resolving "contested cases." S.C. Code Ann. § 1-23-320(C)-(D); § 1-23-330(3); § 1-23-330(1). This includes the right to depose witnesses, the ability to subpoena witnesses for documents and testimony, the right to cross-examination, and a hearing conducted in compliance with the South Carolina rules of evidence. S.C. Code Ann. § 1-23-320(C)-(D); § 1-23-330(3); § 1-23-330(1). During the OCES process, lawyers were not allowed to actively participate in the hearing; testimony was not provided under oath; the presentation of evidence was heavily restricted; direct cross-examination was not permitted; witnesses could not be compelled to appear; parties and witnesses could not be compelled to produce documents or other evidence; there was no right to a jury trial, there was no public record, the rules of evidence did not apply, and the case was investigated, prosecuted, and decided by agents of the same party, namely Clemson University. R. pp. 375-383, Sections X.D-G. The quality and extensiveness of the procedures applied in Pampu's civil litigation dwarf the procedures applied during the OCES process, making it inequitable to apply collateral estoppel in this matter.

Pampu also meets the exception set forth in Restatement (2d) Judgments § 28(4). During the OCES process, there was no presumption of innocence afforded by Clemson's policies. R. pp. 375-383, Sections X.D-G. Moreover, Gahagan's role was limited to that of a witness, meaning he had no burden of persuasion. R. p. 379, Section X.F.3.d-f. By contrast, in the civil litigation, the

statements made by Gahagan constituted defamation *per se*, and Gahagan had the burden of proving his affirmative defense of truth. *Kunst v. Loree*, 424 S.C. 24, 39, 817 S.E.2d 295, 302-303; R. p. 2292, lines 7-10.

Furthermore, it would be inequitable to apply collateral estoppel because Gahagan, acting in concert with Erin Wingo, deprived Pampu of an adequate opportunity to obtain a full and fair adjudication in the OCES process. Restatement (2d) Judgments § 28(5). As noted above, Pampu did not have the power to depose witnesses or subpoena testimony and documents from witnesses. R. pp. 375-383, Sections X.D-G. Additionally, witnesses that were interviewed by OCES or who participated in the hearing did not provide testimony under penalty of perjury. R. p. 379, Section X.F.3.e. Pampu also lacked the ability to conduct a direct cross-examination of the witnesses. R. p. 379, Section X.F.3.f. Gahagan and Wingo were able to exploit these procedural gaps to provide false testimony at the hearing, and because the OCES process did not provide Pampu with the necessary tools to prove the falsity of Gahagan and Wingo's statements, Pampu was found responsible and Gahagan and Wingo's lies went unpunished. R. pp. 3135; p. 1787, lines 2-4; p. 1787, line 22-p. 1789 line 2. Pampu was only able to obtain evidence of the fraud perpetrated by Gahagan and Wingo through Gahagan's admissions in January of 2017 that he "lied in that hearing" and that Wingo wanted to have sex with Pampu on the night in question and through discovery in the civil litigation process. R. pp. 3135; p. 1787, lines 2-4; p. 1787, line 22-p. 1789 line 2.

Finally, the civil litigation afforded Pampu procedural opportunities in the presentation and determination of the issues that were not available in the OCES process. These additional procedural opportunities allowed Pampu, for the first time, to fully and fairly argue his case. This allowed the jury to consider the full universe of relevant facts, and after a five-day trial, the jury

found in favor of Pampu. This shows that the additional procedural opportunities were significant enough to result in the issues being decided differently in the civil litigation than they were during the OCES proceedings. Accordingly, Restatement (2d) § 29(2) weighs against applying collateral estoppel.

Based on the foregoing, even if OCES were an agency under Article 3 (which it is not), collateral estoppel should not be applied because Pampu did not have a full and fair opportunity to litigate the issues that Gahagan contends were determined at the OCES hearing.

D. No Public College Or University In South Carolina Complies With The Procedures Applicable To Agency Proceedings.

If Gahagan's statutory version of Frankenstein's monster were to be given life by this Court, it would create a new administrative realm in South Carolina that is detached from public scrutiny and unbound by established procedural protections and legal precedent. There are 13 public colleges and universities in South Carolina. *Colleges and Universities List*, https://sc.gov/colleges-and-universities-list (last visited June 6, 2023). Under Gahagan's proposed interpretation of Article 3, all of these colleges and universities would be state agencies whose disciplinary decisions are entitled to preclusive effect in subsequent civil litigation. Gahagan Br. at 5-13. The disciplinary policies for all 13 South Carolina public colleges and universities are published on each school's website. Reviewing the equivalent Anti-Harassment and Non-Discrimination policies for these 13 public colleges and universities shows that if these institutions are state agencies under Article 3, then the State is either unaware of this fact, or it is willing to violate the rights of any of the over 100,000 students enrolled at these institutions who may be charged with a disciplinary violation. *See* pp. 25-28, *infra* (discussing policies of public colleges and universities in South Carolina). Either scenario is worrying because these proceedings happen behind closed doors, with no public record of disciplinary hearing decisions, and with no body of

precedent that will ensure similarly situated parties facing disciplinary charges are treated equitably.

As noted above, parties to a "contested case" have the right to depose witnesses, and agencies deciding contested cases are granted the authority to "issue subpoenas in the name of the agency for the attendance and testimony of witnesses and the production and examination of books, papers, and records on its own behalf or, upon request, on behalf of another party to the case." S.C. Code Ann. § 1-23-320(C)-(D). Certain procedural protections are also required in a contested case, such as the right to "conduct cross-examination." S.C. Code Ann. § 1-23-330(3). Moreover, S.C. Code Ann. § 1-23-330(1) requires the rules of evidence as applied in civil cases to be used in any "contested case" under Article 3. S.C. Code Ann. § 1-23-330(1).

According to The Citadel's Title IX Grievance Policy, "Parties to the Grievance Process do not have the right to depose parties or witnesses, nor to invoke a court system's subpoena powers to compel parties or witnesses to appear at hearings, or otherwise." The Citadel, *Title IX Grievance Policy* at 25, https://web.citadel.edu/root/images/policies/title-ix-grievance-policy.pdf (last visited June 6, 2023). This directly contravenes S.C. Code Ann. § 1-23-320(C). Additionally, The Citadel "does not have subpoena power, and it cannot compel attendance of third parties." The Citadel, *Title IX Grievance Policy* at 25. This directly contravenes S.C. Code Ann. § 1-23-320(D). Finally, The Citadel's Title IX hearing procedures also fail to comply with the rules of evidence as applied in civil cases in the court of common pleas in direct contravention of § 1-23-330(1). The Citadel, *Title IX Grievance Policy*.

Similarly, Coastal Carolina University's policy provides no subpoena power, does not compel witness attendance, and goes so far as to state that "a party or witness may choose not to answer a particular question" during the hearing. Coastal Carolina University, *Procedures and*

*Rules for Decorum for Adjudication of Alleged Violations of Title IX*, https://www.coastal.edu/titleix/hearing_procedures/ (last visited June 6, 2023). Indeed, an examination of the equivalent Anti-Harassment and Non-Discrimination policies at each public college and university in South Carolina shows that none of them comply with Article 3. *See e.g.* College of Charleston, *Student Sexual Misconduct Policy* at Section 12.7, https://eop.cofc.edu/policies-and-procedures/student-sexual-misconduct-policy-2021-2022.pdf (last visited June 6, 2023) ("The hearing will not follow a courtroom model and formal rules of evidence will not be observed"); Francis Marion University, *Student Handbook* at p. 60, 62, https://www.fmarion.edu/wp-content/uploads/2022/07/Student-Handbook-2022-2023-web.pdf (last visited June 6, 2023) (noting that "the level of due process in the [Francis Marion University] disciplinary system differs from that of the legal system" and that the "conduct hearing officer, board, or council *may request* the attendance of any person who can give pertinent information in a case to be present at the hearing") (emphasis added); Lander University, *Title IX Resolution Procedures* at Section 11.7.6, https://lander.edu/about/_files/documents/policies/Title-IX-Resolution-Procedures-b.pdf (last visited June 6, 2023) (allowing the Title IX decision-maker to consider statements from parties and witnesses who do not submit to cross-examination); Medical University of South Carolina, *Nondiscrimination, Anti-Harassment, and Equal Opportunity Policy and Complaint Procedures* at Section 7.F.1, https://web.musc.edu/-/sm/enterprise/about/leadership/institutional-offices/diversity/f/title-ix/nondiscrimination-anti-harassment-and-equal-opportunity-policy-and-procedures.ashx (last visited June 6, 2023) (affording students the opportunity to "suggest witnesses" to be interviewed, but providing no subpoena powers); South Carolina State University, *Sex Discrimination and Harassment Policy (Title IX Policy)* at Section 2C.06, https://scsu.edu/wp-

content/uploads/dlm_uploads/2022/08/SCSU-T9-Policy-10.6.21_signed-and-updated.pdf (last visited June 6, 2023) ("A Title IX hearing does not take place within a court of law and is not bound by formal rules of evidence"); University of South Carolina, *Discrimination, Harassment, Sexual Misconduct Resolution Procedures* at Section VIII.C, https://sc.edu/about/offices_and_divisions/civil_rights_title_ix/documents/ocrtix_resolution_procedures.pdf (last visited June 6, 2023) (USC systemwide policy providing no subpoena authority and noting that parties may "decline[] to voluntarily provide material information");[6] University of South Carolina Aiken, *Sexual Assault Policy* at Section VII, https://www.usca.edu/policies/student-affairs-policies/astaf-105 (last visited June 6, 2023) (describing administrative hearings and University Judicial Board hearings as "informal, non-adversarial hearings" with no right to "formal cross examination"); University of South Carolina Beaufort, *Student Code of Conduct* at 14-17, https://www.uscb.edu/human-resources/policies-and-procedures/pdfs/560-Student-Code-of-Conduct-Updates-22-23.pdf (last visited June 6, 2023) (providing no right to issue subpoenas for documents or testimony); Winthrop University, *Interim Title IX Sexual Harassment Policy* at Sections 13.5.3-13.5.4, https://apps.winthrop.edu/policyrepository/Policy/FullPolicy?PID=430 (last visited June 6, 2023) ("Parties to the grievance process under this policy do not have the right to depose parties or witnesses, nor to invoke a court system's subpoena powers to compel parties or witnesses to appear at hearings, or otherwise. Likewise, the University does not compel participation or have subpoena power under this grievance process.").

[6] The University of South Carolina Columbia and the University of South Carolina Upstate direct students to the same policy: https://sc.edu/about/offices_and_divisions/civil_rights_title_ix/documents/ocrtix_resolution_procedures.pdf

## II. Ample Evidence Was Presented At Trial From Which A Reasonable Juror Could Find C.J. Gahagan At Fault For Publishing Defamatory Statements About Andrew Pampu.

"Whether [Gahagan] acted negligently in this matter was clearly a question for the jury and there was evidence to support the jury's finding in this regard." R. p. 8. To hold a party liable for defamation, there must be (1) a false and defamatory statement by the defendant concerning the plaintiff; (2) an unprivileged publication by the defendant to a third party; (3) fault on the defendant's part in publishing the statement; and (4) either actionability of the statement irrespective of special harm or the existence of special harm to the plaintiff caused by the publication. *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002). By only raising the issue of fault in his appeal, Gahagan concedes that he made a false statement about Pampu, which was unprivileged and published to a third party, and that the statement constitutes defamation *per se.* Gahagan Br. at 13-14; s*ee also McClurg v. Deaton*, 395 S.C. 85, 87 n.2, 716 S.E.2d 887, 888 n.2 (2011) ("It is axiomatic that an issue cannot be raised for the first time in a reply brief."). Gahagan only challenges the third prong — whether he was at fault for making the statements — arguing that Gahagan's fault in publishing the false and defamatory statements did not even rise to the level of negligence, as required to be liable for civil damages. Gahagan Br. at 13-14.

As Gahagan states, he was not present when the sexual acts occurred and, therefore, Gahagan did not have firsthand knowledge of what occurred between Wingo and Pampu. Gahagan Br. at 14. While Gahagan argues that he learned from other individuals that Wingo was extremely drunk at the party, Gahagan's own observations of Wingo at the party showed that she was not incapacitated at the time. Gahagan Br. at 14-15; R. p. 1761, line 8-p. 1763, line 22. Gahagan also claims, without citation, that he was aware of the definition of "rape" in Clemson's Anti-Harassment and Non-Discrimination Policy when he made the defamatory statements, and relied on this definition in concluding that Pampu had raped Wingo. Gahagan Br. at 14-15. Additionally,

Gahagan claims his defamatory statements were made without fault because Pampu refused to provide his side of the story on October 25, 2015. Gahagan Br. at 15. However, Pampu's position on the matter — that the sexual encounter was consensual — was clearly conveyed to Gahagan in texts sent on October 25, 2015. *See* R. pp. 3036-3037 (texts explaining that the sexual encounter with Wingo was consensual, that Wingo could speak coherently at the time, that Wingo was not stumbling leading up to the sexual encounter, and that Pampu asked Wingo for her consent on everything). Despite this, Gahagan rushed to tell multiple people that Plaintiff had "raped" Wingo. R. p. 1761, line 8-p. 1763, line 22; pp. 3131-3132; p. 1776, lines 1-8; p. 1777, lines 10-15; p. 3133. When Pampu and Gahagan did speak on October 27, 2015, Gahagan concluded that "[h]earing [Pampu's] side of the story definitely made [Gahagan] feel like [Pampu is] not a criminal." R. p. 3130.[7]

Having been told over text that the sexual encounter was consensual and the rationale supporting that conclusion, if Gahagan still had doubts about whether the sexual encounter was consensual, he should have waited for Pampu to be available to share more information about his side of the story. Similarly, Gahagan failed to speak to several of Wingo's friends who observed her at the party to get their take on the matter. For example, Rachel Corbin testified that she observed Wingo and Pampu walking around the backyard of the Compound, and that Wingo was able to walk, was not stumbling, was not unsteady on her feet, and was not vomiting. R. p. 2019, line 23-p. 2020, line 11. If Gahagan had spoken to other people from the party, such as Corbin, or waited to speak with Pampu, he would have learned the information necessary to conclude that Pampu did not rape Wingo. Instead, on October 26, 2015, Gahagan rushed to judgment based on

[7] Gahagan texted Wingo at 12:06 AM (UTC) on October 28, 2015. This would have been 8:06 PM (EDT) on October 27, 2015.

incomplete information and sent defamatory texts to Brendan Swinehart and Cameron Keramati. R. p. 1761, line 8-p. 1763, line 22; pp. 3131-3132; p. 1776, lines 1-8; p. 1777, lines 10-15; p. 3133. Moreover, despite testifying that on the night in question he observed Wingo walking unassisted without stumbling, he had a conversation with Wingo where she was not slurring her words, Wingo did not vomit at the party, and he was not concerned about Wingo or her level of intoxication when he left her at the party, Gahagan told Swinehart "[he] saw [Wingo] at the Compound. She was blackout drunk and couldn't handle herself and [Pampu] took advantage of it." R. p. 1761, line 8-p. 1763, line 22; pp. 3131-3132. He also told Keramati that Pampu raped Wingo. R. p. 1776, lines 1-8; p. 1777, lines 10-15; p. 3133. The story that Gahagan had made up and shared with Swinehart and Keramati is directly contradicted by Gahagan's own observations on the night of the party indicated in his sworn testimony at trial.

It was not until January 15, 2017, that Gahagan finally admitted that Pampu was "innocent," and that Wingo wanted to have sex with Pampu on the night in question. R. p. 3135. This admission shows that Gahagan never had any basis for asserting that Pampu was a rapist. Thus, there was sufficient evidence introduced at trial for the jury to conclude that Gahagan was at least negligent in publishing the defamatory statements. Accordingly, the Circuit Court's decision to uphold the jury's finding of liability for Pampu's defamation claim should be affirmed.

## III. There Was Clear And Convincing Evidence To Support The Jury's Award Of Punitive Damages Against C.J. Gahagan.

"If punitive damages are awarded, the trial court shall review the jury's decision, considering all relevant evidence, including the factors identified in subsection (E), to ensure that the award is not excessive or the result of passion or prejudice." S.C. Code Ann. § 15-32-520(F).

S.C. Code Ann. § 15-32-520(E) allows the jury to consider "all relevant evidence, including, but not limited to" the eleven factors outlined in the statute.[8] These factors favor Pampu.

A. The Defendant's Degree Of Culpability.

The Supreme Court has held that it is a question for the jury to determine whether there is evidence reasonably sustaining an inference that the defendant made the defamatory publication due to ill will toward the plaintiff, or if the defendant acted so recklessly as to indicate a conscious indifference to the plaintiff's rights. *Jones v. Garner*, 250 S.C. 479, 488-489, 158 S.E.2d 909 (1963) ("[w]hile there are strong circumstances negativing the existence of actual malice, the reasonable inferences to be drawn from the evidence were correctly left by the trial judge to the jury to resolve."). Moreover, "[a]ctual malice may be present where one fails to investigate and there are obvious reasons to doubt the veracity of the information." *Garrard v. Charleston Cnty. Sch. Dist.*, 429 S.C. 170, 209, 838 S.E.2d 698, 719 (Ct. App. 2019).

*Jones* dealt with an allegedly defamatory article published in a newspaper accusing the plaintiff of criminal tax evasion. *Jones*, 250 S.C. at 483, 158 S.E.2d at 911. The Court held that because no criminal charge was ever made by the IRS, reported by the IRS to the defendants, or contained in the public records inspected by the defendants, there was sufficient evidence from which the jury could infer actual malice in the publication of defamatory statements by the Defendants. *Jones*, 250 S.C. at 489, 158 S.E.2d at 914. Here, the jury was instructed that "actual [malice] must be shown to recover for punitive damages." R. p. 2297, lines 10-11. At trial, the evidence showed that Gahagan had a jealous history surrounding his relationship with Wingo.

[8] When utilizing the *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991), factors, the trial court is not required to make specific findings of fact for each factor. *Miller v. City of West Columbia*, 322 S.C. 224, 232 (1996). Factors 9 through 11 are inapplicable to this appeal. Accordingly, those factors have been omitted from this analysis.

Gahagan reacted angrily when he learned that Plaintiff and Wingo kissed in September 2015. R. p. 3116; p. 3126; p. 3127. Additionally, there was overwhelming evidence that in the immediate aftermath of the sexual encounter, Wingo was only concerned with how Gahagan would react and whether it meant the end of any remaining hope for a committed relationship between them. R. p. 1447, lines 14-17; p. 2021, line 2-p. 2022, line 25; p. 2073, lines 10-17; p. 3124; p. 1667, lines 11-13.

Angry and embarrassed by the fact that "[his] girl" hooked up with another pledge brother again, Gahagan had no desire to investigate the facts or uncover the truth. R. p. 3039. Instead, Gahagan ignored his own observations from the party and refused to wait even a single day to speak with Pampu about what happened before he published the defamatory allegation that Pampu was a rapist. R. p. 1761, line 8-p. 1763, line 22. In Gahagan's own words, Pampu is not someone who would have sex with someone who was incapacitated. R. p. 3134. At trial, Gahagan testified that prior to the sexual encounter between Pampu and Wingo he did not see Wingo stumble, need assistance walking, slur her words, or vomit; he also confirmed that he was not concerned about Wingo or her level of intoxication when he left her at the party to be with Pampu. R. p. 1761, line 8-p. 1763, line 22. After investigating the matter by speaking with Pampu, Gahagan concluded that Pampu was not, in fact, a rapist. R. p. 3130. Despite knowing the truth, Gahagan made no effort to correct the record until he finally admitted over a year later that he knew that Wingo wanted to have sex with Pampu on the night in question; in other words, Gahagan never had any basis for calling Pampu a rapist. R. p. 3135. Based on these facts, it is clear Gahagan was acting with ill will towards Pampu or was consciously indifferent to Pampu's rights when he rushed to label Pampu as a rapist without investigating the matter first.

B. The Severity Of The Harm Caused By The Defendant.

Gahagan's appeal does not challenge the severity of the harm caused by Gahagan's actions. Gahagan Br. at 15-19. However, as noted by the Circuit Court, "the nature of the defamatory statements was severe." R. p. 11. Gahagan falsely accused Pampu of a crime of moral turpitude. In this day and age, falsely accusing a young man of rape is incredibly damaging. Gahagan's false statements have forever branded Pampu as a rapist. Pampu will be forced to deal with this false accusation for the rest of his life. Accordingly, it is abundantly clear that the Circuit Court's characterization of the nature of the defamatory statements was correct.

C. The Extent To Which The Plaintiff's Own Conduct Contributed To The Harm.

Gahagan does not argue that Pampu's own conduct contributed to the harm. Gahagan Br. at 15-19. The facts detailed above show that Gahagan's behavior alone contributed to the harm.

D. The Duration Of The Conduct, The Defendant's Awareness, And Any Concealment By The Defendant.

Gahagan's conduct lasted beyond just one day. It was not until January 2017, more than a year later, that Gahagan admitted that he defamed Pampu. R. p. 3135. During that time, Pampu was unjustly smeared as a rapist as a result of Gahagan's willful concealment of the truth, and Gahagan made no effort to correct the vile lies that he spewed about Pampu.

E. The Existence Of Similar Past Conduct.

While Gahagan had a history of jealousy, there were no prior instances of similar defamatory statements made by Gahagan. However, as noted above, Gahagan ignored his own observations from the party and refused to wait even a single day to speak with Pampu about what happened before he published the defamatory allegation that Pampu was a rapist. R. p. 1761, line 8-p. 1763, line 22; *see also* pp. 3036-3037. To claim that Pampu "refused to discuss the matter to reveal his position" is disingenuous. Gahagan Br. at 18. Pampu did not "refuse" to meet with

Gahagan, and he made his position abundantly clear — the sexual encounter was consensual. R. pp. 3036-3037. When Gahagan reached out to Pampu on October 25, 2015, Pampu was temporarily unavailable because he had a test the next day that he needed to study for. R. pp. 3036-3037. However, Pampu made it clear that the sexual encounter with Wingo was consensual, that Wingo could speak coherently at the time, that Wingo was not stumbling leading up to the sexual encounter, and that he asked for and received consent from Wingo. R. pp. 3036-3037. While Wingo was seen crying after the sexual encounter with Pampu, the trial record shows that she was only concerned with how Gahagan would react and whether it meant the end of any remaining hope for a committed relationship between them. R. p. 2021, line 2-p. 2022, line 25; p. 2073, lines 10-17. Thus, it is clear that at the very least Gahagan had a history of being angry with Pampu after Pampu engaged in consensual physical intimacy with Wingo which contributed to his defamatory statements.

F. The Profitability Of The Conduct To The Defendant.

While Gahagan did not profit financially, he was successful in the reputational harm to Pampu that he set out to inflict.

G. The Defendant's Ability To Pay.

As noted by the Circuit Court, "evidence of ability to pay is not a *sine qua non* of a punitive damage award." R. p. 12 (quoting *Charles v. Texas Co.,* 199 S.C. 156, 18 S.E.2d 719 (1942)). Additionally, "there is no requirement that the defendant be a man of means before the jury is justified in awarding punitive damages." R. p. 12 (quoting *Norton v. Ewaskio,* 241 S.C. 557, 565, 129 S.E.2d 517, 521 (1963)). Furthermore, the award was reasonably related to the reputational harm Pampu suffered, and the punitive award was much less than the actual damages. R. pp. 11-12.

Finally, on May 15, 2023, Gahagan filed a Motion for Leave to Deposit Judgment Amount, stating that he is "ready, willing, and able to deposit with the Court the entire combined judgment amount against them, plus accrued post-judgment interest as of the date an order is entered granting leave to make the deposit." R. pp. 1260. Given Gahagan's assurances to the Court that he is "ready, willing, and able" to pay the actual and punitive damages awarded on the defamation claim, he cannot now claim in this appeal that he is unable to pay the punitive damages award.

H. The Likelihood The Award Will Deter The Defendant Or Others From Like Conduct.

As the Circuit Court found, the punitive damages award would likely deter Gahagan and others from like conduct. R. pp. 11-12. In addition to the factors set forth in S.C. Code Ann. § 15-32-520(E), Gahagan argues that the Circuit Court failed to consider the fact that Gahagan was a college freshman when he defamed Pampu. Gahagan Br. at 19. However, a review of Gahagan's post-trial motions shows that Gahagan did not raise this issue before the Circuit Court. *See* R. pp. 1089-1091. The Supreme Court has clearly stated, "where an issue has not been ruled upon by the trial judge nor raised in a post-trial motion, such issue may not be considered on appeal." *Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993); *see also Sims v. Hall*, 357 S.C. 288, 299, 592 S.E.2d 315, 321 (Ct. App. 2003) (holding that failure to raise issue in post-trial motion bars appellate consideration of that issue). Regardless, a lesson learned early in life will undoubtedly have a very strong deterrent effect on future behavior.

## CONCLUSION

Based on the foregoing, Gahagan's appeal should be denied.

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**THE STATE OF SOUTH CAROLINA**
**In the Court of Appeals**

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APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely
Circuit Court Judge

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Appellate Case No.: 2022-001332

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Andrew Pampu, ……Appellant-Respondent,

v.

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

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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that the enclosed complies with Rule 211(b), SCACR.

Respectfully submitted,

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