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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

The Honorable 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.

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

Thomas J. Rode (SC Bar #77480)
Thurmond Kirchner & Timbes, P.A.
15 Middle Atlantic Wharf
Charleston, South Carolina 29401
(843) 937-8000
thomas@tktlawyers.com

-and-

Kimberly C. Lau (*Pro Hac Vice)*
James E. Figliozzi (*Pro Hac Vice)*
Warshaw Burstein, LLP
575 Lexington Avenue
New York, NY 10022
(212) 984-7700
klau@wbny.com
jfigliozzi@wbny.com

Attorneys for Appellant-Respondent Andrew Pampu

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INTRODUCTION

Erin and David Wingo's Initial Brief (the "Wingo Br.") offers multiple disingenuous arguments that have repeatedly failed before the Circuit Court. Andrew Pampu has consistently presented his position regarding his claims to the Wingos, the Circuit Court, and the jury. Pampu's stance is reiterated in great detail below for the benefit of this Court in order to definitively show that the Wingos' appeal should be denied. Indeed, the Wingos' decision to take this appeal is arguably frivolous. During oral argument before the Circuit Court regarding the deposit of funds to satisfy the defamation judgment at issue here, the Wingos' counsel admitted that had Pampu not taken an appeal regarding his civil conspiracy claim, then the Wingos would not have filed this appeal. Moreover, the Wingos have presented arguments for the first time on appeal that are not properly before this Court. Regardless, the Wingos have incorrectly interpreted the facts of this case and the law of South Carolina. As detailed below, there is simply no basis for disturbing the decisions of the Circuit Court or the damages awards reached by the jury.

ISSUES ON APPEAL

1. Did the Circuit Court correctly deny the Wingos' motion for directed verdict?

2. Did the Circuit Court correctly deny the Wingos' motion for judgment notwithstanding the verdict regarding their incorrect theory of collateral estoppel?

3. Did the Circuit Court correctly exclude evidence related to Clemson University's Title IX process and the Clemson Settlement Agreement?

4. Did the Circuit Court correctly admit a redacted version of David Wingo's defamatory letter to Phi Delta Theta that properly excluded irrelevant information?

5. Did the Circuit Court properly allow the admission of Erin Wingo's testimony regarding her decision to continue to get blackout drunk after having consensual sex with Pampu?

6. Did the Circuit Court correctly determine that David Wingo was not entitled to a qualified privilege and properly refuse to charge the jury regarding that defense?

7. Did the Circuit Court correctly determine that the jury's awards of actual and punitive damages were not excessive?

STATEMENT OF THE CASE

Pampu, Erin Wingo ("E. Wingo"), and Colin J. Gahagan are former Clemson University students. R. p. 1428, lines 4-6, 13-17; p. 1429, lines 14-16. David Wingo ("D. Wingo") is Wingo's father. R. p. 1850, lines 14-16. The Wingos and Gahagan defamed Pampu by stating that he raped/sexually assaulted E. Wingo. R. p. 1458, line 25-p. 1459, line 16. E. Wingo and Gahagan also engaged in a civil conspiracy to have him removed from Clemson. R. p. 1447, lines 18-25; p. 1453, lines 20-22; p. 1454, line 15-p. 1455, line 8, p. 1458, line 25-p. 1459, line 3. The jury found E. Wingo liable for defamation and awarded Pampu $700,000 in actual damages and $450,000 in punitive damages. R. p. 2314, lines 8-12. The jury also found D. Wingo liable for defamation and awarded Pampu $230,000 in actual damages. R. p. 2314, lines 13-15.[1] E. Wingo and Gahagan were also found liable for engaging in a civil conspiracy to have Pampu removed from Clemson. R. p. 2314, line 19-p. 2315, line 2. Post-trial, the Circuit Court incorrectly determined that Pampu failed to present sufficient evidence to prove his civil conspiracy claim and improperly overturned the jury's verdicts; Pampu is appealing this decision. R. pp. 6-7. The Circuit Court denied the Wingos' and Gahagan's post-trial motions regarding Pampu's defamation claim and D. Wingo's Motion to Reconsider. R. pp. 7-11; pp. 1-2.

FACTUAL BACKGROUND

On September 10, 2015, Pampu and E. Wingo had a consensual, 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 E. Wingo was romantically involved with Gahagan. R. p. 1430,

[1] The jury also 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.

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 pledge brothers rushing the Phi Delta Theta fraternity. R. p. 1429, lines 2-6; p. 1430, lines 16-20. After this encounter, E. Wingo repeatedly initiated contact with Pampu while also continuing to seek a relationship with Gahagan. R. pp. 3116-2117, pp. 3125-3129. Gahagan became upset with after learning about the September 10, 2015 encounter. R. p. 1431, lines 19-22; p. 3116; pp. 3126-3127.

On October 24, 2015, Pampu's fraternity hosted a party at its off-campus house, which Pampu, Gahagan, and E. Wingo attended. R. p. 1433, line 25-p. 1434, line 2; p. 1434, line 23-p. 1435, line 17. After finding and speaking to Gahagan upon her arrival, E. Wingo became upset because Gahagan blew her off and told her to find Pampu. R. p. 1644, lines 19-23; p. 2017, line 16-p. 2018, line 15. After locating Pampu, E. Wingo went up to him and gave him a hug and a kiss on the lips in front of several people. R. p. 1645, lines 5-9; p. 2072, line 21-p. 2073, line 9. Wingo and Pampu eventually engaged in a consensual sexual encounter. R. p. 1438, line 6-p. 1446, line 7. According to Gahagan, E. Wingo was not exhibiting any signs of incapacitation prior to her sexual encounter with Pampu. R. p. 1761, line 18-p. 1762, line 14. One of E. Wingo's friends confirmed that E. Wingo was not showing any signs of incapacitation prior to the encounter with Pampu. R. p. 2011, lines 9-19; p. 2016, lines 11-21; p. 2019, lines 3-12; p. 2020, lines 3-11. Pampu also did not observe any sign that E. Wingo had consumed an excessive amount of alcohol prior to having sex with her. R. p. 1488, line 12-p. 1490, line 6.

Shortly after the consensual sexual encounter ended, E. 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. For the remainder of the evening, E. Wingo told multiple witnesses that she was sad about her unrequited love for Gahagan and expressed fear that he would

be upset that she had "messed up the plan" by having sex with Pampu. R. p. 1654, lines 1-15; p. 2021, line 2-p. 2022, line 25; p. 2073, lines 10-25; p. 2075, lines 1-13; p. 2085, lines 8-13; p. 2085, line 24-p. 2086, line 5; p. 2176, line 16-p. 2177, line 8; p. 2199, lines 18-25. At no time that evening did E. Wingo assert that she had been raped or sexually assaulted. R. p. 1655, lines 10-14; p. 2023, lines 3-5; p. 2073, lines 18-25; p. 2075, lines 1-13; p. 2076, lines 8-15; p. 2085, lines 8-13; p. 2085, line 24-p. 2086, line 5; p. 2176, lines 20-23; p. 2199, lines 18-25; pp. 3118-3121. After the encounter, Pampu sent a private text message to Jonathan Stoddart stating he had sex; Stoddart circulated this message to a pledge class chat which included Gahagan. R. p. 1530, lines 5-22; p. 1612, lines 18-21; p. 2195, lines 18-24. Gahagan deduced that Wingo had sex with Pampu based on Stoddart's message. R. p. 1807, lines 8-25.

On October 25, 2015 between 8:18 a.m. and 9:28 a.m., Wingo sent text messages to Gahagan pleading for his love and attention. R. p. 1664, lines 2-12, 20-25; p. 1665, lines 1-7; pp. 3122-3123.[2] In these messages, E. Wingo never asserted that Pampu raped or sexually assaulted her 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, E. 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. 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., Jami Hafner arrived at E. Wingo's dorm room. R. p. 2050,

[2] 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. At the time the messages reflected in Plaintiff's Trial Exhibit 5 were sent, the east coast of the United States was observing EDT.

lines 9-16. At the time Hafner arrived, E. Wingo still had not spoken with Gahagan about the events of the prior evening. R. p. 2054, lines 12-25. According to Hafner, E. 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. E. 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 between 5:00 p.m. and 5:30 p.m., Gahagan arrived at E. Wingo's dorm room and showed her the Stoddart message to the fraternity pledge class. R. p. 1669, lines 2-10, 16-20; p. 1766, lines 10-22. In response, E. 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 said 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 the sexual encounter. R. p. 1674, lines 7-15. E. Wingo herself did not even start using the word "rape" 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, she sent Gahagan a text message lamenting the sexual encounter, not because she was raped or sexually assaulted, but because she "screwed up." R. p. 1792, lines 21-25; p. 3136.[3]

On October 27, 2015, Clemson received a report regarding Pampu's sexual encounter with E. Wingo, and she attended a meeting with Clemson to discuss the matter. R. p. 1572, lines 12-16; p. 1676, line 22-p. 1677, line 1; p. 1720, line 19-p. 1721, line 7. E. Wingo "cried throughout" this

[3] The text messages included in Plaintiff's Trial Exhibit 15 are timestamped using Universal Coordinated Time (UTC). At the time the messages reflected in Plaintiff's Trial Exhibit 15 were sent, the east coast of the United States was observing EDT.

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. On November 12, 2015, Gahagan told Pampu he knew that Pampu would never have raped E. Wingo. R. p. 3134; p. 1794, lines 11-18. Clemson's Office of Community and Ethical Standards ("OCES") instituted a disciplinary matter against Pampu, incorrectly found him responsible for, *inter alia*, "Sexual Misconduct," and suspended him from the university on February 29, 2016. R. pp. 345-347. E. Wingo and Gahagan provided false testimony at the disciplinary hearing upon which the OCES decision based. R. p. 1787, lines 2-4; p. 1787, line 22-p. 1789, line 2; p. 1798, lines:10-12, 16-19; p. 3135, pp. 3137-3139.[4] Pampu filed two internal appeals of the initial OCES decision, and his final appeal was denied on May 27, 2016. R. p. 360. In January 2017, Gahagan sent a series of text messages to Pampu in which he admitted that he and Wingo provided false information to Clemson in order to have Pampu removed from Clemson, acknowledged that he and E. Wingo knew the sexual encounter was consensual, and admitted that Pampu was innocent. R. p. 3135; p. 1787, lines 2-4; p. 1787 line 22-p. 1789, line 2.

Clemson's Anti-Harassment Policy lists "Sexual Misconduct," "Sexual Assault," and "Rape" as separate offenses. R. pp. 391-403. "Sexual Misconduct" explicitly does not include alleged instances of rape or sexual assault. *Id*. Even though Pampu was not found responsible for rape or sexual assault and she knew that the encounter was consensual, E. Wingo told sixteen people hundreds of times that Pampu raped her. R. p. 1676, line 19-p. 1679, line 25; p. 1682, line 18-p. 1688, line 3. On April 1, 2016, D. Wingo contacted the president of Pampu's fraternity and falsely stated that Pampu sexually assaulted E. Wingo. R. p. 1856, lines 1-7. In a letter to

[4] The text messages included in Plaintiff's Trial Exhibit 16 are timestamped using Universal Coordinated Time (UTC). At the time the messages reflected in Plaintiff's Trial Exhibit 16 were sent, the east coast of the United States was observing EST.

Pampu's fraternity dated April 4, 2016 (the "Phi Delta Theta Letter"), D. Wingo falsely stated that Pampu was a predator and who had raped and sexually assaulted E. Wingo. R. pp. 3142-3146.

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. 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, the Wingos moved for directed verdicts on Pampu's defamation claims, which the and the Circuit Court denied. R. p. 2145, line 19-p. 2153, line 5. At the close of all evidence, the Wingos made perfunctory renewals of their pre-trial motion asserting that Pampu's defamation claim is barred by collateral estoppel and their previously denied motion for a directed verdict on the defamation issue, which the Circuit Court denied. R. p. 2215, lines 14-25; p. 2216, lines 9-16. Following several hours of deliberations, the twelve-person jury returned verdicts finding E. Wingo and D. Wingo liable for, *inter alia*, defamation. R. p. 2314, lines 8-15. On April 4, 2022, the Wingos filed their post-trial motion. R. pp. 1094-1109. Pampu filed his opposition to the Wingos' post-trial motion on April 14, 2022. R. pp. 1110-1129. The Circuit Court filed its Order on Post Trial Motions on July 11, 2022. R. pp. 4-13. D. Wingo filed a Motion to Reconsider on July 20, 2022. R. pp. 1148-1216. Pampu filed his opposition on August 12, 2022. R. pp. 1217-1238. The Circuit Court denied the Motion to Reconsider on August 22, 2022. R. pp. 1-3. The Wingos' appeal followed.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DENIED THE WINGOS' DIRECTED VERDICT MOTION REGARDING PAMPU'S DEFAMATION CLAIM

A. Standard of Review

As noted by the Supreme Court:

> When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this Court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party.

RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 331-332, 732 S.E.2d 166, 171 (2012). "The trial court must deny a motion for a directed verdict . . . if the evidence yields more than one reasonable inference or its inference is in doubt." *Id*. at 332, 732 S.E.2d at 171.

B. The Wingos Have Abandoned Any Argument Regarding The Circuit Court's Denial Of Their Motion For A Directed Verdict

The phrase "directed verdict" only appears five times in the Wingo Br. – once in the Table of Contents (Wingo Br. at i); once in the Statement of Issues on Appeal (*id*. at 1); once in an argument section hearing (*id*. at 19); once in an unlabeled standard of review recitation (*id*.); and once in a parenthetical to indicate an argument in the alternative related to an evidentiary issue (*id*. at 38). None of these references provides a citation to the trial transcript indicating exactly what directed verdict ruling the Wingos are appealing. The Wingos have also failed to present any argument explaining why the Circuit Court's ruling on the nondescript motion for a directed verdict was flawed. Predictably, the Wingos also fail to provide any caselaw support for their non-existent argument. Instead, they simply assert that the Circuit Court erred in denying their motion for a directed verdict three times without more. *Id*. at i, 1, 19. As noted by this Court, "an issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority." *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102,

106 n.3, 439 S.E.2d 283, 285 n.3 (Ct. App. 1993). It is clear that the Wingos have abandoned any argument regarding the Circuit Court's denial of their directed verdict motion, so it cannot be considered by this Court on appeal. *Id*.

C. The Trial Court Properly Denied The Wingos' Directed Verdict Motion

The Wingos' appeal on the directed verdict issue is limited to the Circuit Court's denial of their perfunctory renewal of their misguided pre-trial request for dismissal of Pampu's defamation claim on collateral estoppel grounds. Wingo Br. at 38. As detailed below, there is absolutely no basis for applying the doctrine of collateral estoppel to the instant matter. Section II., *infra*. Accordingly, it is clear that the Circuit Court correctly denied the Wingos' motion for a directed verdict on the collateral estoppel issue. [5]

II. THE CIRCUIT COURT PROPERLY DENIED THE WINGOS' MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT REGARDING THEIR FAULTY COLLATERAL ESTOPPEL DEFENSE

A. Standard Of Review

As stated by this Court:

> 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). "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

[5] Because the Wingos' appeal on the directed verdict issue is limited to the Circuit Court's repeated determinations that the doctrine of collateral estoppel does not apply to the OCES finding, no further argument regarding the directed verdict issue can be raised by the Wingos in reply. *See 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.").

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) (emphasis added). 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." *RFT Mgmt. Co.*, 399 S.C. at 332, 732 S.E.2d at 171.

B. OCES Is Not A State Agency And Its Decisions Cannot Form The Basis Of A Collateral Estoppel Defense

The Wingos incorrectly assert that OCES is a state agency that determines contested cases and its decisions are entitled to preclusive effect. Wingo Br. at 21-26. Yet they concede that none of the sections of the South Carolina Administrative Procedures Act (the "APA") that define the term "agency" include schools, colleges, or universities. Wingo Br. at 22. S.C. Code Ann. § 1-23-10 defines "agency" as "each state board, commission, department, executive department or officer, other than the legislature, the courts, the South Carolina Tobacco Community Development Board, or the Tobacco Settlement Revenue Management Authority, authorized by law to make regulations or to determine contested cases." S.C. Code Ann. § 1-23-10(1). Similarly, S.C. Code Ann. § 1-23-310 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 Wingos strangely assert that the absence of state schools, colleges, and universities from these definitions of "agency" means that state schools, colleges and universities are indeed agencies as defined by the APA. Wingo Br. at 22. This argument offends the cardinal rule of statutory interpretation: "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." *State v. Sweat*, 379 S.C. 367, 375, 665 S.E.2d 645, 650 (Ct. App. 2008), *aff'd as modified*, 386 S.C. 339, 688 S.E.2d 569 (2010) (emphasis

added). The plain language APA indicates that state schools, colleges, and universities are not state agencies.

The Wingos also offer passing citations to the South Carolina Tort Claims Act (the "TCA") to misleadingly assert that "the term 'agency' has been defined to include state schools, college, and universities." Wingo Br. at 22 n.1, 25. The TCA is inapplicable to this matter, as it merely describes the limited carve-out for bringing tort claims against certain state entities, such as a state university, that otherwise would enjoy sovereign immunity from civil liability. S.C. Code Ann. § 15-78-20. Moreover, under the TCA, the term agency only includes each "individual office, agency, authority, department, commission, board, division, instrumentality, or institution, including a state-supported governmental health care facility, school, college, university, or technical college **which employs the employee whose act or omission gives rise to a claim under [the TCA].**" S.C. Code Ann. § 15-78-30 (emphasis added). It is clear that this definition of "agency" is limited to the contours of the TCA and is of no import here. Even so, the TCA does not imbue the "agencies" described therein with the authority to decide contested cases.

A "contested case" means "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). OCES disciplinary proceedings are not "contested cases" within the meaning of S.C. Code Ann. § 1-23-310. The statute itself provides "ratemaking, price fixing, and licensing" as examples of "contested cases." S.C. Code Ann. § 1-23-310(3). Nowhere does the statute mention school disciplinary proceedings. While this is not an exhaustive list, the student disciplinary functions carried out by OCES are not analogous to the state and industry-wide regulatory functions set forth in the statute. S.C. Code Ann. § 1-23-310.

Additionally, parties to a contested case under the APA are entitled to conduct direct cross-examination. S.C. Code Ann. § 1-23-330(3). During the OCES hearing Pampu "was entitled to ask a few questions of the witnesses, but these questions were required to be submitted to the chairperson before being asked, making cross-examination limited." Summary Judgment Order at 6. Additionally, the APA states that "the rules of evidence as applied in civil cases in the court of common pleas **shall be followed**" in all contested cases except for proceedings before the Industrial Commission. S.C. Code Ann. § 1-23-330(1) (emphasis added). In this instant matter, OCES did not utilize the South Carolina Rules of Evidence as they are applied in civil matters. Summary Judgment Order at 6. Moreover, parties to a "contested case" under the APA have the right to depose witnesses, and agencies deciding "contested cases" have full subpoena power to obtain testimony and documents, including from witnesses identified by a party. S.C. Code Ann. § 1-23-320(C)-(D). Clemson's disciplinary process does not permit the parties to conduct depositions, and OCES does not have subpoena power. R. pp. 378-380, Clemson Code of Conduct at X. F. 3. Instead, only witnesses requested by Clemson are required to attend hearings; Clemson does not extend this power to compel to witnesses identified by accused students. *Id.* Based on the foregoing, it is abundantly clear that OCES is not an agency authorized by law to decide contested cases under the APA; thus, its decisions are not entitled to preclusive effect.

The Wingos offer the laughable assertion that OCES is a state "agency" as defined by the APA, relying on two statutes that are not the APA – Title IX and the South Carolina Campus Sexual Assault Information Act (the "SAIC") – that require Clemson to establish procedures for institutional disciplinary actions in cases of alleged assault. Wingo Br. at 23. This claim cannot stand even the slightest scrutiny. As an initial matter, Clemson, not OCES, is tasked with establishing and implementing the policies and procedures required by the SAIC and Title IX.

Moreover, as the Supreme Court has recognized, "the APA specifically requires an agency to: provide public notice of a drafting period where public comments can be accepted; conduct a public hearing on the proposed regulation; possibly prepare reports about the regulation's impact on the economy, environment, and public health; and submit the regulation to the Legislature for review, modification, and approval or rejection." *Joseph v. S.C. Dep't of Lab., Licensing & Regul.*, 417 S.C. 436, 454, 790 S.E.2d 763, 772 (2016) (citing S.C. Code Ann. §§ 1-23-110 to -160). The Wingos have not provided any evidence that Clemson's Anti-Harassment Policy was subjected to any of the requirements of notice and comment rule making. The reason for this lack of evidence is that none exists. Indeed, the SAIC does not require the robust notice and comment rulemaking mandated by the APA. Additionally, the Anti-Harassment Policy states that it is "meant to meet Clemson University's responsibilities" under the multitude of specific laws (or portions thereof), but makes absolutely no mention of the APA. R. p. 391.

Moreover, the Wingos inappropriately rely on a SAIC provision[6] that merely requires institutions of higher learning to "establish and implement a written campus sexual assault policy" and distribute that policy to students, faculty, and staff to incorrectly assert that the SAIC "make[s] the decisions by Clemson's OCES 'contested cases' under the APA." Wingo Br. at 23 (relying on S.C. Code Ann. § 59-105-40). The SAIC does not require that schools utilize the South Carolina Rules of Evidence as they are applied in civil matters, conduct hearings, allow students to have legal counsel present if there is a hearing, permit depositions, allow cross-examination, utilize subpoena power to the benefit of all parties, or offer any of the other procedural protections

[6] The Wingos also offer a non-specific cite to Title IX. Wingo Br. at 23. However, Title IX is inapplicable to the Court's analysis of the issue of collateral estoppel, as it does not confer preclusive effect on university decisions. It also does not require that colleges and universities provide the same procedural protections as the APA when determining sexual misconduct matters.

mandated by the APA when deciding disciplinary matters; indeed, the term "agency" does not even appear anywhere in the SAIC. S.C. Code Ann. § 59-105-10, *et. seq.* Based on the foregoing, the SAIC cannot support the Wingos' position that OCES is an agency as defined by the APA.

The Wingos' reliance on *Ross v. Med. Univ. of S.C.*, 317 S.C. 377, 453 S.E.2d 880 (1994), is misplaced. In *Ross*, a tenured professor challenged his termination from the Medical University of South Carolina ("MUSC") and availed himself of MUSC's appeal process until his matter reached the MUSC Board of Trustees, which reviewed his case and upheld the termination. *Ross*, 317 S.C. at 378, 453 S.E.2d at 881. The professor then filed a lawsuit seeking, *inter alia*, review under the APA. *Id.* at 378-79, 453 S.E2d at 881-82. The Supreme Court was only tasked with determining whether "the Circuit Court, sitting as a reviewing court under the APA, ha[d] jurisdiction to order discovery." *Id*. at 379, 453 S.E.2d at 882. There is no indication that MUSC ever asserted that the APA did not apply, and the Supreme Court did not issue any holding regarding application or irrelevance of the APA to state universities. *Id*. at 380-81, 453 S.E.2d at 882-83.[7] Thus, *Ross* has no bearing on the Court's analysis of the instant matter.[8]

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[7] MUSC is completely owned and controlled by the State of South Carolina. *See Smith v. Robertson*, 210 S.C. 99, 103, 41 S.E.2d 631, 632-33 (1947) (explaining that MUSC is a "corporate entity created by the General Assembly for the maintenance of a State owned Medical College"); S.C. Code Ann. § 59-123-40 (stating that the MUSC board of trustees shall be composed of "the Governor or his designee, ex officio, fourteen members to be elected by the General Assembly in joint assembly and one member to be appointed by the Governor."). Clemson "is not an institution or corporation wholly owned and controlled by the State," and the majority of Clemson's board of trustees are privately appointed. *Rice Hope Plantation v. S.C. Pub. Serv. Auth.*, 216 S.C. 500, 518, 59 S.E.2d 132, 139 (1950), *overruled on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) To the extent that MUSC considers its board of trustees a "state board," it gratuitously (yet erroneously) allowed itself to be subjected to the requirements of the APA.

[8] Similarly, the cases the Wingos cite after asserting that boards of actual state agencies fall within the APA's definition of agency are wholly irrelevant to the Court's analysis, as it is obvious that they truly are agencies as defined by the APA, while OCES most-assuredly is not. Wingo Br. at 23; *see also Bursey v. S.C. Dep't of Health & Env't Control*, 360 S.C. 135,600 S.E.2d 80 (Ct. App. 2004) (involving **South Carolina** Mining Council); *Ruocco v. S.C. State Bd. of Registration for Pro. Engineers & Land Surveyors*, 314 S.C. 111, 441 S.E.2d 829 (Ct. App. 1994) (involving **South**

Similarly, *Martin v. Clemson Univ.*, 654 F. Supp. 2d 410 (D.S.C. 2009), does not help the Wingos' convoluted claim. In *Martin*, the District of South Carolina relied upon the definitions contained in the South Carolina Tort Claims Act to determine whether Clemson is entitled to Eleventh Amendment immunity in federal court. *Martin*, 654 F. Supp. 2d at 415, 418. As noted above, the South Carolina Tort Claims Act is inapplicable to the Court's analysis in the instant matter, as it is limited in scope offer an avenue for bringing tort claims against certain state entities that otherwise would enjoy sovereign immunity from civil liability. Moreover, *Martin* makes absolutely no reference to the APA. *See generally Martin*, 654 F. Supp. 2d 410 (failing to offer any discussion of the APA or its application to Clemson).

The Wingos present a completely unfounded argument that collateral estoppel applies even if OCES is not an agency as defined by the APA because Pampu was offered a quasi-judicial proceeding. Wingo Br. at 25. They also offer misleading citations to irrelevant cases to support this specious claim. In *King v. Charleston Cnty. Sch. Dist.*, 664 F. Supp. 2d 571 (D.S.C. 2009), the hearing was conducted "pursuant to the South Carolina Teacher Employment and Dismissal Act," which afforded the plaintiff "the right to produce witnesses and other documentary evidence, the right to require the Board of Trustees to order the appearance of any witness, the right to cross-examine the District's witnesses, and the right to present any and all defenses to the charges against him," as well as "the right to be represented by legal counsel." *King*, 664 F. Supp. 2d at 580. The OCES hearing, on the other hand, was conducted pursuant to Clemson's own policies and procedures which do not afford the same level of procedural rigor or protection as the South

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Carolina State Board of Registration for Professional Engineers and Land Surveyors); *Webber v. Michelin Tire Corp.*, 285 S.C. 581, 330 S.E.2d 547 (Ct. App. 1985) (involving decision by **South Carolina** Industrial Commission); *Gibson v. Florence Country Club*, 282 S.C. 384, 318 S.E.2d 365 (1984) (involving decision of **South Carolina** Employment Security Commission); *Guerard v. Whitner*, 276 S.C. 521, 280 S.E.2d 539 (1981) (involving **South Carolina** Coastal Council).

Carolina Teacher Employment and Dismissal Act or the APA. *Pettiford v. S.C. State Bd. of Ed.*, 218 S.C. 322, 62 S.E.2d 780 (1950), stemmed from alleged administrative violations by the South Carolina State Board of Education, a state agency (not a mere school board as falsely asserted by the Wingos) that was bound by specific procedural requirements noted in the South Carolina Code. *Pettiford*, 218 S.C. at 341, 62 S.E.2d at 788-89. Once again, OCES is not a state agency bound to meet any procedural requirements or provide specific procedural protections pursuant to the APA or any other South Carolina statute.

Based on the arguments presented above, it is clear that OCES is not a state agency authorized by law to decide contested cases pursuant to the APA.[9] Accordingly, the OCES findings have no preclusive effect in the instant matter.

C. Even If OCES Decisions Were Entitled To Preclusive Effect The Doctrine Of Collateral Estoppel Would Still Be Inapplicable In This Matter

Even if OCES were a state agency authorized by law to determine contested cases, which it is not, collateral estoppel would still not apply. Under South Carolina law, "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; **and** (3) necessary to support the prior judgment." *Kunst v. Loree*, 404 S.C. 649, 653, 746 S.E.2d 360, 362 (Ct. App. 2013) (internal quotations and citation omitted) (emphasis added) ("*Kunst I*"). The Wingos have failed to prove **any** (much less all three) of these elements, so collateral estoppel does not apply here.

[9] The Wingos also assert that Pampu has failed to exhaust his administrative remedies under the APA. Wingo Br. at 24. This argument fails because the APA is irrelevant to this instant matter. Additionally, the cases cited by the Wingos are distinguishable. *See Bennett v. S.C. Dep't of Corr.*, 305 S.C. 310, 408 S.E.2d 230 (1991) (involving decision by **State Employee Grievance Committee**, which is clearly an agency as contemplated by the APA); *McClellan v. Bd. of Regents of State Univ.*, 921 S.W.2d 684 (Tenn. 1996) (out-of-state case involving hearing that was explicitly conducted in compliance with the **Tennessee Uniform Administrative Procedures Act**, including all procedural protections and requirements).

The cases relied upon by the Wingos to assert that the "issue of whether [Pampu] sexually assaulted Ms. Wingo when she was incapacitated and incapable of consent" was actually litigated in and directly determined by Clemson are inapposite as they relate to state employee claims that are governed by statutory requirements. Wingo Br. at 21-22; *see Bennett*, 305 S.C. at 313, 408 S.E.2d at 232 (plaintiff required by statute to first seek relief from State Grievance Committee and exhaust administrative remedies before seeking judicial review); *Perry v. State L. Enf't Div*., 310 S.C. 558, 561, 426 S.E.2d 334, 336 (Ct. App. 1992) (same). The State Employee Grievance Committee derives its authority from the State Employee Grievance Procedure Act and applies to employees of state agencies, not students. S.C. Code Ann. § 8-17-310. No such statutory authority exists for the adjudication of student conduct violations by OCES, nor is there any administrative exhaustion requirement related to claims arising out of Clemson's disciplinary process, especially when those claims are not levied against Clemson. *See Stinney v. Sumter Sch. Dist.* 17, 391 S.C. 547, 550, 707 S.E.2d 397, 398 (2011) (erroneous to apply doctrine of exhaustion of administrative remedies to the students' tort claim as it was inapplicable where there was no statutory violation for which the legislature has provided an administrative remedy).

Clemson charged Pampu with four violations of the Anti-Harassment Policy – "Alcohol," "Disorderly Conduct," "Harm to Person," and "Sexual Misconduct." R. p. 345. Notably, Clemson did not charge Pampu with "Sexual Assault" or "Rape," even though both charges were available to Clemson under the Anti-Harassment Policy. Clemson's Anti-Harassment Policy provides the following definition for "Sexual Assault":

> Any attempted or actual act of nonconsensual sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any other object into the oral, genital or anal openings of another person's body. This includes forcible or non-forcible sex offenses under the uniform crime reporting system of the Federal Bureau of Investigation.

R. p. 392. "Rape," which is included as a sub-category of "Sexual Assault," is defined by Clemson as follows:

> 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 incapacitation.

Id.

Clemson's Anti-Harassment Policy provides the following definition for "Sexual Misconduct":

> **Any other** nonconsensual conduct 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.

R. p. 393 (emphasis added). Therefore, it is clear that Clemson's definition of "Sexual Misconduct," which appears later in the Anti-Harassment Policy than the definitions of "Sexual Assault" and "Rape," does not cover disciplinary matters involving sexual intercourse **at all**, let alone instances where incapacitation is an issue. There is also no reference to sexual intercourse in the Clemson decision letter. R. p. 345.

Still, the Wingos assert that the hearing board's statement that E. Wingo was incapacitated and unable to give consent was necessary to support the hearing board's finding of responsibility against Pampu. Wingo Br. at 26. This argument has no merit. The Initial Decision Letter states, "Based on the information presented the hearing board found that the complainant was incapacitated and unable to give consent which you should have reasonably known, therefore you were found in violation of **all four charges**." R. p. 345 (emphasis added). If the Initial Decision Letter's reasoning is taken at face value, it would mean that Clemson's findings of responsibility regarding the "Alcohol," "Disorderly Conduct," and "Harm to Person" charges levied against Pampu were based on E. Wingo's supposed incapacitation. This would be absurd, as the

definitions of these alleged violations do not reference sexual intercourse at all. R. p. 345. Moreover, as noted above, "Sexual Misconduct," as defined by Clemson, involves non-penetrative sexual contact and specifically excludes instances of sexual intercourse when an individual is incapacitated. Thus, incapacitation during sexual intercourse was irrelevant the findings of responsibility in the Initial Decision Letter. Accordingly, even if the Clemson decision were entitled to preclusive effect (which it is not), the reference to E. Wingo's alleged incapacitation and inability to give consent to sexual intercourse was a gratuitous finding that was unnecessary to the decision and which therefore cannot form the basis of an estoppel. *See Lowe v. Clayton*, 264 S.C. 75, 85, 212 S.E.2d 582, 587 (1975) (explaining that "a gratuitous finding . . . unnecessary to the decision . . . could not form the basis of an estoppel.").

In light of the foregoing analysis, the Wingos' use of *Lowe*, to support their misguided assertion that Pampu's defamation claim is barred by collateral estoppel is quite puzzling. *Lowe* involved two actions related to an adoption decree, the first action dealt with the visitation rights of the natural mother, while the second action asserted that the adoption decree was allegedly obtained by fraud. *Lowe*, 264 S.C. at 84-85, 212 S.E.2d at 586-87. The party seeking to employ collateral estoppel in that matter asserted that a statement in the decision resolving the original proceeding that the adoption decree was not "contingent upon any vested visitation rights" should "be construed to constitute a holding that the consent of appellant was not procured through fraud," thus deciding that issue and precluding the other party from pursuing a determination to the contrary in the subsequent proceeding. *Id*. at 85, 212 S.E.2d at 587. The Supreme Court rejected this interpretation and found that there was no basis for enacting collateral estoppel. *Id*. at 84-85, 212 S.E.2d at 586-87. Specifically, the Supreme Court noted that the original proceeding was disposed of solely based on an interpretation of the relevant South Carolina statute. *See Id*. at 85,

212 S.E.2d at 587 (explaining "The order denying visitation rights was, under the clear language of the court, based upon the conclusive effect of Section 10—2587.13."). The Supreme Court further explained that the *dicta* relied upon by the party seeking collateral estoppel "was a gratuitous finding by the court, unnecessary to the decision which had already been made and was not a basis for the judgment" and "therefore, could not form the basis of an estoppel." *Id*.

In the instant matter, the issue in the Clemson proceeding, based on the explicit terms of the Anti-Harassment Policy, was whether Pampu engaged in "Sexual Misconduct," which is clearly limited to "**any other** nonconsensual conduct" **that is not** "Rape" and "Sexual Assault" as defined by the Anti-Harassment Policy. "Rape" and "Sexual Assault" as defined by Clemson are defined as involving penetrative sex, while "Sexual Misconduct" is not. Moreover, only "Rape" includes a reference to incapacitation as a basis for a lack of consent. The Clemson hearing board was only tasked with determining whether Pampu engaged in "Sexual Misconduct," which by its very definition cannot involve allegations of non-consensual penetrative sex or sex with an incapacitated individual. Accordingly, the statement that E. Wingo "was incapacitated and unable to give consent which you should have reasonably known," was a gratuitous finding that cannot form the basis of an estoppel. *Lowe*, 264 S.C. at 85, 212 S.E.2d at 587.

The Wingos' reliance on *Catawba Indian Nation v. State*, 407 S.C. 526, 756 S.E.2d 900 (2014), is also curious. In *Catawba*, the Supreme Court determined that collateral estoppel did not apply because in the 2005 declaratory judgment action involving the same parties the plaintiff "sought a declaration that any changes in state law did not affect its vested right to offer video poker on its Reservation," while the 2012 declaratory judgment action sought "a declaratory judgment as to the interpretation and import specifically of the Gambling Cruise Act on [the plaintiff's] gaming rights." *Catawba*, 407 S.C. at 529, 532, 538-39, 756 S.E.2d at 902-4, 907.

Because the Gambling Cruise Act was not raised in the 2005 declaratory judgment action, was not necessary determining the 2005 declaratory judgment action, and was not actually litigated in the 2005 declaratory judgment action, the State failed to meet its burden of demonstrating that collateral estoppel should be applied. *Id*. at 538-39, 756 S.E.2d at 907.

As detailed above, Clemson's definition of "Sexual Misconduct" does not cover interactions involving penetrative sexual intercourse or questions of capacity relative to consent. Thus, in the instant matter, the issue of whether E. Wingo was incapacitated to the point where she could not consent to sexual intercourse was not necessary to determining whether Pampu engaged in "Sexual Misconduct" as defined by Clemson's Anti-Harassment Policy. While E. Wingo and Pampu may have offered arguments regarding consent and sexual intercourse during the Clemson process (Wingo Br. at 26), the clear and unambiguous language of the Clemson Anti-Harassment Policy proves that these arguments were unrelated to the issues being decided by OCES (R. pp. 392-393; p. 345) and were therefore unnecessary to any finding by Clemson. *Catawba*, 407 S.C. at 538-539, 756 S.E.2d at 907. Accordingly, that issue was not actually litigated by Clemson and cannot form the basis of a collateral estoppel argument. *Catawba*, 407 S.C. at 538-539, 756 S.E.2d at 907.[10]

Even if the Wingos were able to prove all of the required elements of collateral estoppel (which they cannot and have not), this appeal should still be denied. "The doctrine of collateral

[10] The other cases that the Wingos rely upon are similarly distinguishable. *See Zurcher v. Bilton*, 379 S.C. 132, 134-36, 666 S.E.2d 224, 225-26 (2008) (plaintiff collaterally estopped from litigating the issue of whether he committed assault and battery against defendant in the civil suit when it had already been fully and fairly litigated as a result of a guilty plea by plaintiff in criminal court); *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 553, 555, 557-58, 684 S.E.2d 779, 781-84 (Ct. App. 2009) (plaintiff admitted that issue of contract damages was actually litigated in prior action); *Beall v. Doe*, 281 S.C. 363, 365-66, 315 S.E.2d 186, 187-88 (Ct. App. 1984) (defendant collaterally estopped from denying he was driver who caused accident where jury determined issue at trial in prior action).

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.

Moreover, even where an issue is "actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

> . . .
>
> (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;
>
> . . .
>
> (5) There is a clear and convincing need for a new determination of the issue . . . 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 (Second) of Judgments § 28 (1982) (emphasis added); *see also Bacote*, 331 S.C. at 332, 503 S.E.2d at 163 (relying on Section 28 of the Restatement (Second) of Judgments to decline exercise of collateral estoppel). Where the first judgment stems from a proceeding that operates informally without pleadings, counsel, or rules of evidence, the first judgment should not preclude

arguments on the same issue in a subsequent action. Restatement (Second) of Judgments § 28, Illustration 7 (1982).

As detailed above, it is clear that the Clemon process was woefully deficient when compared to a real agency proceeding, let alone the civil trial held to determine liability with regard to Pampu's defamation claims. *See* Section II. B., *supra*. (detailing procedural deficiencies in Clemson OCES process). As the Circuit Court recognized, "It would be unfair to allow the OCES board's decisions to be entitled to preclusive effect while at the same time allowing it to operate outside of the rules that other state agencies follow." R. p. 22. Thus, there is no basis for applying the doctrine of collateral estoppel to the instant matter. Moreover, the testimony and documentary evidence in the record shows that this case is a prime example of when the behavior of an adversary bars the application of collateral estoppel (if it even applies to the instant matter, which Pampu strenuously asserts it does not). The evidence presented to the jury indicates that E. Wingo was not incapacitated when she had sex with Pampu. R. p. 1447, lines 14-17; p. 1667, lines 11-13; p. 1761, line 18-p. 1762, line 14; p. 2011, lines 9-19; p. 2016, lines 11-21; p. 2019, lines 3-12; p. 2020, lines 3-11; p. 2050, lines 20-22; p. 2051, lines 12-24; p. 3124. The evidence in the trial record further shows that E. Wingo and Gahagan both knew that the sexual encounter with Pampu was consensual and that they lied to Clemson about the nature of the encounter during the disciplinary process. R. p. 1798, lines 10-12, 16-19; p. 1787, lines 2-4; p. 1787, line 22-p. 1789, line 2; p. 3135; pp. 3137-3139. After receiving and analyzing this evidence, the jury returned verdicts in Pampu's favor on his civil conspiracy causes of action against E. Wingo and Gahagan. R. p. 2314, lines 19-22; p. 2314, line 25-p. 2315, line 2. In doing so, the jury correctly determined that Clemson's decision to suspend Pampu was based on false information and testimony provided by E. Wingo and Gahagan. Based on the foregoing, it would be fundamentally unfair, unjust, and

contrary to public policy to apply the doctrine of collateral estoppel based on the faulty findings of a university disciplinary proceeding that were reached based on E. Wingo and Gahagan's false claims and false statements.

D. The Clemson Settlement Agreement Cannot Form The Basis Of A Collateral Estoppel Defense

The Wingos dishonestly assert that the Clemson Settlement Agreement "explicitly stated that the Title IX findings would be upheld." Wingo Br. at 27. The Clemson Settlement Agreement clearly states that Clemson "will reinstate the hearing board's **decision** of February 29, 2016" and makes absolutely no reference to any factual findings. R. p. 3191, ¶ 2 (emphasis added). A plain reading of the Clemson Settlement Agreement clearly shows that it does not adopt the hearing board's factual findings, nor does it state that Pampu agrees with these factual findings or agrees to be bound by these factual findings. The Wingos also mendaciously claim "that Pampu "agree[d] that the Title IX findings . . . be reinstated" when he signed the Clemson Settlement Agreement. Wingo Br. at 27. In fact, the Clemson Settlement Agreement explicitly notes that Pampu "**denies** the allegations of [E. Wingo's] November 11, 2015 formal Title IX complaint to Clemson University, **the basis of which the hearing board's decision** . . . **was made**." R. p. 3190 (emphasis added). Review of the actual terms of the Clemson Settlement Agreement therefore shows that the Wingos' assertions that the Clemson Settlement Agreement "reinstat[ed] the OCES findings and conclusions," that Pampu agreed to this reinstatement, and that "[t]he issue of consent was central and necessary to . . . Plaintiff's federal lawsuit against Clemson" are **demonstrably false**. *Compare* Wingo Br. at 27 (asserting false claims regarding content of Clemson Settlement Agreement), Wingo Br. at 31 (same), *and* Wingo Br. at 34 n.4 (same) *with* R. p. 3190 (explicitly stating that Pampu "**denies** the allegations of [E. Wingo's] November 11, 2015 formal Title IX complaint to Clemson University, the basis of which the hearing board's decision . . . was made.")

(emphasis added) *and* R. p. 3191, ¶2 (stating that Clemson "will reinstate the hearing board's **decision** of February 29, 2016," and making no references to findings of fact reached by OCES) (emphasis added). Accordingly, Plaintiff's defamation claims against the Wingos are definitely **not** estopped by the Clemson Settlement Agreement.[11]

The Wingos' claim that it is "inconsistent and unfair" that Pampu "was permitted to settle with Clemson for consideration and agree that the Title IX findings be reinstated . . . while also pursuing damages against the Wingo Defendants based on being suspended from Clemson" shows a profound misunderstanding of the Clemson Settlement Agreement and Plaintiff's defamation cause of action. Wingo Br. at 27-28. As detailed above, the Clemson Settlement Agreement explicitly notes that Pampu "**denies** the allegations of [E. Wingo's] November 11, 2015 formal Title IX complaint to Clemson University, **the basis of which the hearing board's decision** . . . **was made**." R. p. 3190 (emphasis added). Pampu's defamation claim is based on false statements that the Wingos made **outside of the Clemson process and which tarnished his reputation**. R. p. 11676, line 19-p. 1679, line 25; p. 1682, line 18-p. 1688, line3; p. 1856, lines 1-7; pp. 3142-3146. In other words, Pampu's defamation cause of action **has absolutely nothing to do with Clemson's decision to suspend him**.[12] The Wingos' deliberate misunderstanding of Pampu's

[11] Any attempt by the Wingos to rely on the District of South Carolina's decision enforcing the Clemson Settlement Agreement is also misplaced, as it does not hold that Pampu agreed to the reinstatement of Clemson's factual findings or that he agreed to be bound by those findings, nor does it reference to E. Wingo's ability to consent to sexual intercourse. *Doe v. Clemson Univ.*, No. 8:16-CV-1957, 2019 WL 1383822 (D.S.C. Mar. 27, 2019). Thus, the District of South Carolina's decision cannot form the basis of any estoppel defense.

[12] The Wingos also wrongly claim that it was unfair for Pampu to obtain a "benefit from the reinstatement of the Title IX decision (in the form of the consideration offered in the Clemson Settlement), while also claiming it harmed him (in the form of the instant suit" thus leading to "reversable error by the Circuit Court "in finding that Plaintiff was not estopped by the Clemson Settlement in pursuing his claims against the Wingo Defendants." Wingo Br. at 27-28. Once again, the Wingos display an acute misapprehension of the issues at stake in the instant litigation. This is a tremendous feat, given that this matter has been going on for the better part of a decade.

claims in this matter has been an unfortunate running theme of this litigation that this Court must not entertain. Based on the forgoing, it is abundantly clear that the Clemson Settlement Agreement does not and cannot form the basis of any collateral estoppel defense by the Wingos.

III. THE CIRCUIT COURT PROPERLY EXCLUDED EVIDENCE RELATED TO CLEMSON'S TITLE IX PROCESS AND THE CLEMSON SETTLEMENT AGREEMENT

A. Standard Of Review

As this Court has explained:

> In general, rulings on the admissibility of evidence are within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion resulting in prejudice to the complaining party. [T]his Court is bound by the trial court's factual findings unless they are clearly erroneous. The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court.

State v. Green, 432 S.C. 572, 854 S.E.2d 626 (Ct. App. 2021), *reh'g denied* (Mar. 12, 2021), *cert. granted* (Mar. 15, 2022) (internal quotations and citations omitted) (bracketed text in original).[13]

B. Clemson's Title IX Process

The vast majority of the Wingos' unsupported arguments regarding the exclusion of evidence related to Clemson's Title IX process and the Clemson Settlement Agreement are based on a faulty understanding of Plaintiff's causes of action in this matter.[14] Wingo Br. at 28-39.

This obvious and willful misstatement of the facts has grown tiresome, but Pampu reiterates, once again, that his defamation cause of action and the related damages are wholly unrelated to the Clemson Title IX process and are instead based entirely on statements made by E. Wingo and D. Wingo **outside** of the Title IX process. The Court should completely disregard any arguments made by the Wingos that attempt to confuse these issues.

[13] This same standard of review also applies to Sections IV. and V., *infra*.

[14] The only potentially relevant case that the Wingos cite actually supports Pampu's position. *See Johnson v. Horry Cnty. Solid Waste Auth.*, 389 S.C. 528, 534-36, 698 S.E.2d 835, 838-39 (Ct. App. 2010) (deferring to trial court ruling that the danger of the prejudicial effect of evidence of a deceased motorist's blood alcohol content outweighed the probative value of that evidence because a trial judge's decision regarding the comparative probative and prejudicial effect of evidence is entitled to "great deference" and should only be reversed in exceptional circumstances).

Contrary to the Wingos' mendacious claims, the Circuit Court **did not** permit the jury to base its defamation verdict on Pampu's suspension from Clemson, the jury was **never** presented with a portrayal that Pampu was suspended from Clemson "based on statements made outside of the Title IX proceedings," and the jury was **never** "led to believe that defamatory statements made outside the Title IX proceedings and the civil conspiracy caused the suspension." Wingo Br. at 28-29; *see also* Wingo Br. at 31-35 (exhibiting the same confounding misunderstanding of Pampu's claims and damages). As Pampu has repeatedly stated to the Wingos, the Circuit Court, the jury, and this Court, his civil conspiracy cause of action was based on false statements that were made to Clemson **during the disciplinary process that resulted in his suspension and subsequent economic damages**, while his defamation cause of action is based on defamatory statements made **outside of the Clemson process that led to reputational damages**.[15]

The Wingos have offered disingenuous truncated versions of statements made by Pampu's counsel during opening and closing arguments in an effort to mislead this Court. Wingo Br. at 33. In reality, Pampu's counsel stated the following during opening arguments:

> 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[.]

R. p. 1416, line 15-p. 1417, line 4. This is not confusing at all – the first sentence states the basis of the civil conspiracy claim, while the third and fourth sentences note the associated damages; the

[15] While not conceding the issue, there is no need to address the privilege arguments raised by the Wingos regarding statements made by E. Wingo during the Title IX process because those statements do not form the basis of Pampu's defamation claim. *See* Wingo Br. at 33 (asserting that statements made withing Title IX process are privileged/not subject to a defamation claim).

second sentence states the basis of the defamation claim, while the fifth sentence notes the associated damages. During closing arguments, Pampu's attorney explained that the defamation cause of action was based on "defendants' statements made to nearly 20 separate individuals on and off Clemson University campus that Drew was a rapist." R. p. 2234, lines 11-13. Pampu's counsel summed up the civil conspiracy cause of action as follows:

> 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.

R. p. 2234, line 24-p. 2235, line 6. Thus, contrary to the Wingos' false claim, Pampu **never** "conflated the issue of defamation reputational damages with the Clemson suspension while addressing the jury." Wingo Br. at 33. Regardless, the Wingos never objected to the manner in which Pampu's counsel presented his causes of action to the jury at trial, so the issue is not before this Court. *See State v. Johnson*, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) ("If a party fails to properly object [at trial], the party is procedurally barred from raising the issue on appeal.").

The Wingos rely on other provably false assertions to further their faulty argument that the Circuit Court's proper exclusion of evidence related to the Title IX process was somehow prejudicial. *See, e.g.*, Wingo Br. at 33 (falsely asserting that Pampu "directly and repeatedly tied the alleged defamatory statements to his removal from Clemson"); Wingo Br. at 34 (falsely claiming that "the jury was led to believe, and even explicitly told, that the defamation led to Plaintiff's removal from Clemson"). However, Pampu directly testified that his reputation suffered as a result of the Wingos' defamatory statements because he is now falsely known as a rapist. R. p. 1460, lines 7-13. He further explained that he suffered from relationship difficulties, trust issues, and socialization problems due to the Wingos' defamatory statements. R. p. 1460, lines 14-23. When asked how he was impacted by E. Wingo and Gahagan's "actions" – in other

words the conspiracy – Pampu explained the educational difficulties he faced, including his removal from Clemson and his inability to get into dental school. R. p. 1461, lines 6-23; p. 1462, line 18-p. 1463, line 2. Pampu's vocational expert, Steven Shedlin, provided testimony about the economic damages that flowed from Pampu's removal from Clemson, namely Pampu's inability to attend dental school. R. p. 1938, line 25-p. 1943, line 6; p. 1959, lines 3-7. Under cross-examination from Gahagan's attorney, Pampu confirmed that defamatory statements made by Gahagan (and by extension the Wingos) **were not** the basis for his removal from Clemson. R. p. 1607, line 24-p. 1608, line 2. Thus, the actual evidence shows (1) that the jury was presented with a clear picture of Pampu's causes of action and their related damages and (2) that the Clemson Title IX process had absolutely nothing to do with Pampu's defamation damages.[16] This Court should not be persuaded by the Wingos' transparent attempt to confuse the issues in this case.

The Wingos also put forth a bizarre and incoherent argument regarding mitigation of damages asserting that they were simply publicizing defamatory statements made by Clemson. Wingo Br. at 35. Even if the Court were to consider this strange and counterfactual claim, it must fail. As detailed painstakingly above, Clemson did not find Pampu responsible for "Rape" or Sexual Assault." Section II. C., *supra*. Additionally, E. Wingo uttered some of her defamatory statements before the issuance of the Initial Decision Letter, and D. Wingo sent his defamatory letter before the Clemson process was final based largely, if not entirely, on what his daughter had told him without engaging in any due diligence. The Wingos' mitigation argument is clearly baseless. Similarly, D. Wingo's argument that the Clemson Title IX documents are relevant to his

[16] It is unclear what point the Wingos attempt to make by providing a description of the different types of defamation damages, especially when they admit that the Circuit Court charged the jury "consistent with this law." Wingo Br. at 31. Regardless, as the record shows, Pampu was not seeking special damages related to his defamation claim. Rather, the only economic damages sought stemmed from his civil conspiracy cause of action.

qualified privilege defense is meritless, lacking in factual basis or caselaw support, and argued in conclusory fashion, indicating that it has been abandoned. Wingo Br. at 36; *Fields*, 312 S.C. at 106 n.3, 439 S.E.2d at 285 n.3. Regardless, the Phi Delta Theta Letter contains statements that are not rooted in any aspect of the Clemson Title IX documents. *See* Section IV., *infra* (detailing differences between Phi Delta Theta Letter and Initial Decision Letter).

Moreover, because (1) the OCES decision (and by association the entire Clemson Title IX process) is not entitled to preclusive effect and (2) Pampu was not found responsible for (or even charged with) "Rape" or "Sexual Assault" as defined by Clemson, the documents, information, and findings related to the Title IX proceeding cannot possibly assist in determining whether the Wingos were negligent in making their defamatory statements or whether they were telling the truth, which means the evidence irrelevant. Section II., *supra*.; Rule 401, SCRE; Rule 402, SCRE. Regardless, the trial record undeniably shows that any attempt by E. Wingo to rely on the Clemson Title IX evidence to assert she was not negligent (Wingo Br. at 30-31) or was telling the truth (Wingo Br. at 35-36) is absurd and patently unreasonable.[17]

E. Wingo was present during the sexual encounter, her own sworn testimony was the best evidence that the jury could possibly receive and evaluate to assist in determining whether she was telling the truth or behaving negligently. Other evidence submitted to the jury contained the following facts: the sexual encounter at issue was consensual; E. Wingo was not showing any signs of incapacitation prior to the encounter; E. Wingo did not claim she was raped or sexually assaulted in the immediate aftermath of the encounter despite being in the presence of multiple potential outcry witnesses; E. Wingo knew the encounter was consensual; and E. Wingo and

[17] Because the Wingos provide no caselaw citations to support these arguments and instead rely merely on conclusory rhetoric, this Court could well determine that the arguments have been abandoned. *Fields*, 312 S.C. at 106 n.3, 439 S.E.2d at 285 n.3

Gahagan provided false statements to Clemson during the Title IX process to secure Pampu's removal from Clemson. R. p. 1447, lines 14-17; p. 1654, lines 1-15; p. 1655, lines 10-14; p. 1667, lines 11-13; p. 1761, line 18-p. 1762, line 14; p. 1787, lines 2-4; p. 1787, line 22-p. 1789, line 2; p. 1798, lines 10-12, 16-19; p. 2011, lines 9-19; p. 2016, lines 11-21; p. 2019, lines 3-12; p. 2020, lines 3-11; p. 2021, line 2-p. 2022, line 25; p. 2023, lines 3-5; p. 2073, lines 10-25; p. 2075, lines 1-13; p. 2076, lines 8-15; p. 2085, lines 8-13; p. 2085, line 24-p. 2086, line 5; p. 2176, line 16-p. 2177, line 8; p. 2199, lines 18-25; pp. 3118-3121; p. 3124; p. 3135, pp. 3137-3139. Similarly, there is also no basis for asserting that the Title IX evidence is relevant to D. Wingo's truth defense.[18] Once again, Clemson did not investigate or find Pampu responsible for "Rape" or "Sexual Assault," so the statements by D. Wingo that Pampu engaged in such acts of moral turpitude go well beyond anything contained in the Title IX evidence. Section II. C., *supra*. Moreover, D. Wingo's letter contains multiple claims that are divorced from reality and appear nowhere in the Clemson documents. *See* Section IV., *infra* (detailing divergences between Clemson Title IX documents and Phi Delta Theta Letter).

Further, even if it were relevant, introducing evidence related to a Clemson process marred by fraud (committed in part by E. Wingo) that did not find Pampu responsible for rape or sexual assault would clearly have an undue tendency to suggest a decision on an improper basis regarding the defamation claim, so the Circuit Court was right to exclude it as unfairly prejudicial. Rule 403, SCRE; *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991); *see also* Section II. C., *supra*. (explaining the charges available to Clemson in the Title IX process and the decision to

[18] Regarding D. Wingo and the issue of negligence, the Wingos simply assert that the Title IX process is direct evidence that D. Wingo did not act negligently when he defamed Pampu. Wingo Br. at 30. This "short, conclusory statement without supporting authority" indicates that the Wingos have abandoned this issue. *Fields*, 312 S.C. at 106 n.3, 439 S.E.2d at 285 n.3.

charge Pampu with "Sexual Misconduct," which explicitly excludes "Rape" and "Sexual Assault); Trial Tr. at 461:10-12, 16-19; 450:2-4; 450:22-452:2; Plaintiff's Trial Exhibit 14; Plaintiff's Trial Exhibit 16. The facile arguments presented by the Wingos regarding the supposed probative value the Title IX documents are pure rhetoric lacking any citations to caselaw. Wingo Br. at 36-39. Regardless, they fail to meet the exacting standard required to overturn the Circuit Court's decision to exclude the Clemson Title IX evidence. *See Johnson*, 389 S.C. at 534-36, 698 S.E.2d at 838-39 (trial judge's decision regarding comparative probative value and prejudicial effect of evidence entitled to "great deference" and should only be reversed **in exceptional circumstances**). Indeed, the Wingos' arguments could fairly be characterized as ridiculous. According to the Wingos, the Circuit Court's well-reasoned exclusion of the Clemson evidence "eviscerated or substantially weakened numerous defenses" they planned on asserting. Wingo Br. at 37. They further maintain that "the probative value **of various defenses and arguments** raised by the [Wingos] is not *substantially* outweighed by the danger of unfair prejudicial [*sic*] to [Pampu]." Wingo Br. at 37 (emphasis added) (italics in original). This is simply not the standard for determining if the prejudicial effect of **evidence** outweighs its probative value. The fact that the Wingos decided to base their defense on inadmissible evidence does not support reversal of the Circuit Court's ruling.

Similarly, the Wingos offer no support for their baseless claim that the supposed probative value of the Clemson Title IX process evidence is not substantially outweighed by the danger of confusion of issues for the jury. Wingo Br. at 38-39. There is absolutely no evidence in the record that the jury was confused by the absence of the Clemson Title IX documents. Instead, the Wingos rely on the false assertion that "the jury only heard that [Pampu] was removed or suspended from Clemson based on defamatory statements." Wingo Br. at 38. As detailed extensively above, this blatant lie is a perversion of Pampu's causes of action. Moreover, the record at trial clearly shows

that the jury was aware that a disciplinary process took place. R. p. 1788, lines 5-6. Thus, there is no merit to the Wingos' contention that the "jury could have assumed that [Pampu] was summarily and immediately removed from Clemson as a direct result of comments made by the Defendants made with no investigation or process." Wingo Br. at 38. Indeed, the jury heard more testimony and received more evidence regarding the sexual encounter than Clemson did, and the Wingos are simply unhappy that their story fell apart when exposed to the light, which does not support overturning the Circuit Court's decision. *Johnson*, 389 S.C. at 534-36, 698 S.E.2d at 838-39. Regardless, as the Circuit Court properly noted, there are different rules applied during the Clemson process when compared to a court of law, including substantially dissimilar evidence rules. R. p. 1387, lines 10-11. Thus, the Wingos' goal in seeking admission of the Clemson Title IX documents was to lead the jury to a logical fallacy, namely, an appeal to authority. Improperly leading the jury to believe that the issue central to Pampu's defamation claim had already been decided by Clemson would obviously have an undue tendency to suggest a decision on an improper basis. Rule 403, SCRE. The Circuit Court properly excluded this evidence as unfairly prejudicial. *Alexander*, 303 S.C. at 382, 401 S.E.2d at 149.

The Wingos incorrectly assert that evidence related to the Clemson Title IX process was necessary in order for the jury to properly understand the defamatory letter he wrote to Phi Delta Theta. Wingo Br. at 39-40. As described below, the defamatory statements in the letter go far beyond any plausible interpretation of Clemson's findings or anything else found in the Title IX documents. Section IV., *infra*. As the Circuit Court explained to the jury with regard to negligence and its impact on defamation, "Putting the question in terms of conduct is to ask whether the defendant acted reasonably in checking on the truth or falsity or defamatory character of the communication before publishing it." R. p. 2291, lines 21-25. By this standard, D. Wingo's

decision to make statements regarding Pampu that far exceeded the Clemson findings was clearly negligent, and the introduction of the Clemson Title IX documents into evidence would have only improperly confused the jury into reaching a decision on an improper basis.

C. The Clemson Settlement Agreement

Other than patently false descriptions of its contents (Wingo Br. at 29, 31, 37), the Wingos offer little, if any, explicit argument regarding the Circuit Court's proper exclusion of the Clemson Settlement Agreement, indicating that they have abandoned any such arguments. *Fields*, 312 S.C. at 106 n.3, 439 S.E.2d at 285 n.3. Either way, the Wingos have failed to identify any exceptional circumstances that warrant disturbing the Circuit Court's decision that the prejudicial effect of the Clemson Settlement Agreement outweighs any supposed probative value. *Johnson*, 389 S.C. at 534-36, 698 S.E.2d at 838-39. Additionally, none of the exceptions of South Carolina Rule of Evidence 408 apply, so it is unclear why the Wingos attempt to rely on that provision. Wingo Br. at 37; Rule 408, SCRE. Moreover, as noted above, in the Clemson Settlement Agreement, Pampu explicitly denied the allegations that formed the basis of the Title IX process and findings. R. p. 3190; Section II. D., *supra*. Because use of the Clemson Settlement Agreement for the Wingos' intended purpose of asserting that Pampu raped or sexually assaulted E. Wingo would be incredibly misleading and have an undue tendency to suggest a decision on an improper basis, the Circuit Court rightfully excluded it as unfairly prejudicial. Rule 403, SCRE; *Alexander*, 303 S.C. at 382, 401 S.E.2d at 149 (1991).

IV. THE CIRCUIT COURT PROPERLY ADMITTED A REDACTED VERSION OF DAVID WINGO'S LETTER TO PHI DELTA THETA

As noted above, the Circuit Court correctly determined that the doctrine of collateral estoppel does not apply to the instant matter. Section II., *supra*. As a result, D. Wingo's attempt to rely on the Clemson Title IX findings as a defense to defamation must fail. Additionally, due

to their unfairly prejudicial nature, the Clemson Title IX documents and any references thereto were properly excluded by the Circuit Court, including the redacted portions of D. Wingo's letter to Phi Delta Theta. Section III., *supra*. There is simply no basis for reversing the Circuit Court's decision regarding the comparative probative value and prejudicial effect of the content of the letter to Phi Delta Theta. *Johnson*, 389 S.C. at 534-36, 698 S.E.2d at 838-39.

Contrary to the Wingos' false claims, the defamatory statements contained in D. Wingo's letter to Phi Delta Theta were not based on the Title IX investigation and findings. Wingo Br. at 40. As detailed extensively above, Clemson could have charged Pampu with "Rape" and/or "Sexual Assault" as defined by its Anti-Harassment Policy but instead chose to charge him with the lesser offense of "Sexual Misconduct" which explicitly does not cover penetrative sexual acts, sexual acts where an individual is alleged to be incapacitated, rape, or sexual assault. Section 2.C., *supra*. Yet, as the Circuit Court aptly noted, "a lot" of D. Wingo's letter to Phi Delta Theta "goes well beyond" the Clemson findings. R. p. 1397, lines 5-8. Indeed, despite the fact that Pampu was never found responsible for rape or sexual assault, D. Wingo repeatedly asserted that Pampu raped and sexually assaulted E. Wingo while describing the consensual sexual encounter as "the rape," "the assault," and "the sexual assault." R. pp. 3142-3146. Further, he falsely claimed that Pampu "preyed on" E. Wingo and described Pampu's conduct as "predatory." R. pp. 3142, 3145. The Circuit Court took particular notice of this deviation. R. p. 1397, lines 9-12 (finding "at some point [D. Wingo] goes into [Pampu] being a predator and so forth, and I didn't see . . . any findings like that from Clemson University."). D. Wingo also made the following claims that appear nowhere in the Initial Decision Letter:

- Pampu "brought her to an isolated but public location to sexually assault her."
- Pampu would become a "serial perpetrator" who would sexually assault up to five other women.

- Pampu would "target . . . another female student, guest or visitor of Phi Delt. Or he could next harm [Gahagan], a pledge, or a teacher."

R. p. 3145. D. Wingo also falsely asserted that Pampu "was bragging to his pledge class about assaulting Erin" even though he knew that Pampu did not send a fraternity-wide message about the consensual encounter. R. p. 3144; p. 1884, line 25-p. 1886, line 9. If D. Wingo truly only wanted to inform Phi Delta Theta about Clemson's findings (Wingo Br. at 41), he could have just enclosed the Clemson decision letter.

Additionally, the Wingos' claim that the jury was misled into reaching in improper result due to the redactions in the letter is completely speculative, as they have not pointed to any evidence of jury confusion and instead rely on cursory citations to South Carolina Rule of Evidence 106 and a Fourth Circuit case, neither of which helps their baseless argument. Wingo Br. at 41. Notably, South Carolina Rule of Evidence is permissive, not mandatory. Rule 106, SCRE ("When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party **may** require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.") (emphasis added). Moreover, in *United States v. Ellis*, 121 F.3d 908 (4th Cir. 1997), the Fourth Circuit stated that its analysis of Federal Rule of Evidence 106 "**does not require** the introduction of the document into evidence." *Ellis*, 121 F.3d at 921 n.19 (emphasis added); *see also State v. Cheeseboro*, 346 S.C. 526, 551, 552 S.E.2d 300, 313 (2001) ("Evidence that is otherwise inadmissible is not admissible under [South Carolina] Rule 106."). The Circuit Court properly determined that evidence related to the Clemson Title IX process was inadmissible, so the Wingos' Rule 106 argument must fail.

V. THE CIRCUIT COURT PROPERLY ADMITTED TESTIMONY REGARDING ERIN WINGO'S DRINKING

The Wingos incorrectly assert that the Circuit Court erred in admitting evidence that E. Wingo continued to get blackout drunk after her sexual encounter with Pampu. Wingo Br. at 45-

46. Specifically, in the instant appeal, the Wingos – for the first time – assert that the Circuit Court's admission of this evidence violated South Carolina Rule of Evidence 404 because it constitutes improper character evidence that does not fall under any relevant exception. Wingo Br. at 45-46. However, this Court need not even consider the merits of the Wingos' contention, as review of relevant South Carolina caselaw and the trial transcript shows that the Wingos failed to preserve this argument for appeal.[19]

The Supreme Court has clearly stated the standard for preserving issues for appeal:

> To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court. The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error. If a party fails to properly object, the party is procedurally barred from raising the issue on appeal.

Johnson, 363 S.C. at 58-59, 609 S.E.2d at 523 (internal citations omitted). In *Johnson*, the petitioner argued on appeal that the trial judge improperly applied the outdated "moral turpitude standard" regarding the admissibility of prior remote convictions even though the common law rule had been replaced by South Carolina Rule of Evidence 609. *Id*. However, at trial, the petitioner's attorney failed to specifically object to the application of the moral turpitude standard. *Id*. at 59, 609 S.E.2d at 523. Instead, the attorney simply objected to the admissibility of prior convictions on the basis that they were too remote. *Id*. Although the Supreme Court determined that the trial judge did indeed err in applying the moral turpitude standard, it ultimately held that "[b]ecause the objection was clearly based on remoteness and not the use of the moral turpitude standard . . . the issue regarding the use of the moral turpitude standard is not preserved for appellate review." *Id*. at 58-59, 609 S.E.2d at 523.

[19] The Wingos also did not raise this argument in their post-trial motion. Even if the Wingos had presented this issue to the Circuit Court in their post-trial motion, it still would not have been preserved for appeal. *See Bank of New York v. Sumter Cty.*, 387 S.C. 147, 159, 691 S.E.2d 473, 479 (2010) ("It is axiomatic that an issue cannot be raised for the first time in a post-trial motion.").

In the instant matter, counsel for the Wingos merely uttered, "Objection, Your Honor. Relevance," when Pampu's attorney asked E. Wingo, "After October 24th, you continued to get blackout drunk, right?" R. p. 1694, lines 1-5. The Circuit Court's understanding that the objection was solely limited to relevance was unequivocal. *Id*. line 7 ("All right. Objection's for relevance."). In response, counsel for Pampu explained that the testimony on this topic was relevant because it would tend to prove motive. *Id*. lines 8-12. The Circuit Court determined that the testimony was relevant and overruled the Wingos' objection. *Id*. lines 13-14. Accordingly, the Wingos' arguments regarding Rule 404 are barred on appeal. *Johnson,* 363 S.C. at 58-59, 609 S.E.2d at 523.

Even if this Court were to entertain the Wingos' late and improper objection, there would still be no basis for upsetting the Circuit Court proceedings. South Carolina Rule of Evidence 404 permits the introduction of character evidence or evidence of other acts done by that individual if such evidence is being introduced to "prov[e] action in conformity therewith on a particular occasion" or to "show action in conformity therewith" and a relevant exception applies. Rule 404, SCRE. Character evidence being used to "prov[e] action in conformity therewith on a particular occasion" will be admitted if it is being used to, *inter alia*, attack the credibility of the witness through impeachment, to probe the witnesses' character for truthfulness or untruthfulness while attacking that witness' credibility regarding specific instances of conduct, or to show "[b]ias, prejudice, or **any motive to misrepresent**." Rule 404(a), SCRE; Rule 607, SCRE; Rule 608, SCRE (emphasis added).[20] Evidence of other acts introduced to "show action in conformity

[20] While South Carolina Rule of Evidence 608(b) applies to evidence obtained on cross-examination, E. Wingo was examined by Pampu's counsel pursuant to South Carolina Rule of Evidence 611(c), which permits the use of leading questions typically reserved for cross-examination. Rule 611(c), SCRE; Rule 608, SCRE; R. p. 1629, lines 10-11. Thus, the exception of Rule of Evidence 608 would still apply because E. Wingo was being questioned as if she were under cross-examination when the testimony at issue was elicited.

therewith" is admissible if it is being used "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE.

Several of these exceptions apply in this instant matter. E. Wingo's decision to repeatedly get blackout drunk after she had sex with Pampu tends to prove that she was lying when she claimed that Pampu raped and/or sexually assaulted her, as no reasonable person would repeatedly engage in the behavior that supposedly led to their sexual violation. Thus, it is admissible because it is relevant to establishing her character for truthfulness or untruthfulness while attacking her credibility regarding the incident in question. Rule 404(a), SCRE, Rule 607, SCRE. The testimony is also indicative of her motive to lie about the true nature of her sexual encounter with Pampu, especially in light of the other evidence admitted at trial indicating her desire to maintain a relationship with Gahagan. Rule 404(a), SCRE; Rule 404(b), SCRE; Rule 608, SCRE; R. p. 1429, lines 2-6; p. 1430, lines 1-25; p. 1431, lines 19-22; p. 1447, lines 14-17; p. 1629, lines 5-7; p. 1630, lines 15-17; p. 1654, lines 1-15; p. 1655, lines 10-14; p. 1664, lines 2-12, 20-25; p. 1665, lines 1-7; p. 1665, line 18-p. 1666, line 3; p. 1667, lines 11-13; p. 1669, lines 11-25; p. 1670, lines 2-10; p. 1674, lines 1-4, 7-15; p. 1748, lines 3-8; p. 1755, lines 10-12, 19-21; p. 1765, lines 19-24; p. 1766, line 10-p. 1767, line 8; p. 1791, lines 21-25; p. 1829, lines 9-14; p. 1836, line 18-p. 1837, line 5; p. 2021, line 2-p. 2022, line 25; p. 2023, lines 3-5; p. 2050, lines 9-16, 20-22; p. 2051, lines 12-24; p. 2054, lines 12-25; p. 2052, lines 7-14; p. 2073, lines 10-25; p. 2075, lines 1-13; p. 2076, lines 8-15; p. 2085, lines 8-13; p. 2085, line 24-p. 2086, line 5; p. 2176, line 16-p. 2177, line 8; p. 2199, lines 18-25; pp. 3116-3117; pp. 3118-3121; pp. 3122-3123; p. 3124; pp. 3125-3129; p. 3136. The Circuit Court correctly recognized that the testimony at issue was admissible because it was relevant to E. Wingo's motive. R. p. 1694, lines 1-14.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Gaster*, 349 S.C. 545, 557 564 S.E.2d 87, 93 (2002). Given the multiple exceptions to South Carolina Rule 404 that apply to E. Wingo's testimony regarding her decision to get blackout drunk after she had sex with Pampu, there is absolutely no basis for asserting that the Circuit Court's decision to admit this testimony constituted an abuse of discretion. Moreover, as explained by this Court, even if certain evidence is improperly admitted at trial, such an admission is harmless error if the evidence at issue is merely cumulative of other evidence in the record. *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 299, 519 S.E.2d 583, 600 (Ct. App. 1999). As detailed in the preceding paragraph, there was a significant amount of evidence in the record indicating that E. Wingo had a motive to lie about – and indeed was lying about – the true nature of her sexual encounter with Pampu. Thus, even if the testimony at issue were improperly admitted (which it was not), it would constitute harmless error. *Id.*

Further, the Wingos' assertion that the probative value of the properly admitted testimony is "substantially outweighed by the danger of unfair prejudice" is speculative, conclusory, and unsupported by any citations and, therefore, cannot be considered by this Court. Wingo Br. at 46; *see Fields*, 312 S.C. at 106 n.3, 439 S.E.2d at 285 n.3 (explaining that "an issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority."). Moreover, because this objection was not raised at trial, it has not been properly preserved for appeal. *See* R. 1694, lines 1-5 (counsel for Wingos merely objecting to introduction of testimony on relevance grounds); *Johnson*, 363 S.C. at 58-59, 609 S.E.2d at 523; *State v. Young*, 432 S.C. 535, 541-42, 854 S.E.2d 615, 618 (Ct. App. 2021). Regardless, the Wingos have utterly failed to present any argument that would support their contention that the admission of E. Wingo's testimony resulted in unfair prejudice. Rather, they

are simply upset that the evidence properly admitted by the Circuit Court hurt their case because it assisted Pampu in showing that E. Wingo's defamatory statements were false, damaged her credibility, and helped establish her motive for lying. *See State v. Dennis*, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013) ("Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.") (internal quotations and citation omitted).

The cases cited by the Wingos are either distinguishable or helpful to Pampu's position. In *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 609 S.E.2d 286 (2005), the trial court improperly allowed the plaintiff to introduce evidence of heat-related complaints and injuries brought by other workers and the union even though the plaintiff "did not establish that the reported complaints and injuries stemmed from the same or similar circumstances as his injuries." *Whaley*, 362 S.C. at 483-84, 609 S.E.2d at 300. Here, the testimony at issue involves substantially similar circumstances as the behavior that E. Wingo herself alleges she engaged in prior to the sexual encounter with Pampu. This evidence is also relevant to Pampu's defamation claim, as it assists in establishing E. Wingo's character for truthfulness or untruthfulness while attacking her credibility. Rule 404(a), SCRE, Rule 607, SCRE. It also showed that she had motive to lie about or otherwise misrepresent the true nature of her sexual encounter with Pampu, thus tending to prove the falsity of her defamatory statements. Rule 401, SCRE; Rule 404(a), SCRE; Rule 404(b), SCRE; Rule 608, SCRE. Accordingly, *Whaley* is inapposite to the instant matter.

It is unclear why the Wingos cited the other cases they rely upon, as they can only be interpreted to favor Pampu's position. *See Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 361, 725 S.E.2d 112, 119 (Ct. App. 2012) (evidence regarding similar construction defects across multiple property sites developed by defendant admissible

because they were "substantially similar to those experienced by" plaintiff); *State v. Clasby*, 385 S.C. 148, 156, 682 S.E.2d 892, 896 (2009) (evidence of four incidents of uncharged sexual misconduct that defendant had previously committed on a minor properly admitted because the evidence revealed "a close degree of similarity to the facts of the indicted charges"); *State v. Gaines*, 380 S.C. 23, 28-30, 667 S.E.2d 728, 731-32 (2008) (illicit chats between defendant and minor that were not the subject of the proceeding properly admitted and probative value of the chats outweighed any prejudicial effect because there was a "close degree of similarity between the crime charged and the prior bad act"). As noted above, the testimony at issue involves behavior with a close degree of similarity to the conduct E. Wingo herself asserts she engaged in on October 24, 2015. Accordingly, *Magnolia*, *Clasby*, and *Gaines* support the denial of the appeal.

VI. THE CIRCUIT COURT CORRECTLY DETERMINED THAT DAVID WINGO'S DEFAMATORY STATEMENTS LACKED QUALIFIED PRIVILEGE AND CORRECTLY CHARGED THE JURY

A. Standard of Review

"Generally, whether an occasion gives rise to a qualified privilege is a question of law for the court." *Kunst v. Loree*, 424 S.C. 24, 43, 817 S.E.2d 295, 304 (Ct. App. 2018) ("*Kunst II*"). Additionally, "to establish that the judge's refusal to give the requested charge deprived one of a fair trial, the refusal must have been both erroneous and prejudicial." *Miller v. City of W. Columbia*, 322 S.C. 224, 230, 471 S.E.2d 683, 686 (1996). "The failure to give requested jury instructions is not prejudicial error when the given instructions set forth the proper test for determining the issues before the jury." *Id*.

B. The Circuit Court Correctly Found That There Was No Qualified Privilege

The Circuit Court properly determined that D. Wingo's defamatory statements to Phi Delta Theta were not entitled to a qualified privilege. As this Court has explained, "It is the duty of the trial judge to determine if the statement is privileged." *Murray v. Holnam, Inc.*, 344 S.C. 129, 141,

542 S.E.2d 743, 749 (Ct. App. 2001). Of great importance to the instant matter, this Court further explained, "A communication **made in good faith** on any subject matter **in which the person communicating has an interest or duty** is qualifiedly privileged if made to a person **with a corresponding interest or duty** even though it contains matter which, without this privilege, would be actionable." *Id*. At 140-41, 542 S.E.2d at 749 (emphasis added). D. Wingo's own testimony shows that he is not entitled to a qualified privilege. At trial, he clearly explained the purpose of his letter to Phi Delta Theta:

> [The intent of the letter] was to raise the issue of the risk of rape and for [Phi Delta Theta] to understand that there was potential liability and for them to make an appropriate decision on how they wanted to deal with that risk as I do in my job.

R. p. 1884, lines 7-13. D. Wingo further explained, "I was identifying the liability. It's [Phi Delta Theta's] choice on how they actually wanted to deal with that liability." R. p. 1884, lines 20-22. D. Wingo's own testimony establishes that he was acting as a good Samaritan and had no legal interest related to the information he was communicating in his letter, so there was no interest or duty that he had in common with Phi Delta Theta. Moreover, D. Wingo had no interest or duty when he communicated his defamatory statements to Phi Delta Theta because E. Wingo was a legal adult at that time and could have pursued a settlement with Phi Delta Theta on her own. The Circuit Court recognized this fact and determined, as a matter of law, that no qualified privilege existed for D. Wingo's defamatory statements. R. p. 2219, lines 10-23. While the Wingos maintain that E. Wingo signed a power of attorney that enabled her father to act on her behalf, they made no effort to introduce the document when arguing the qualified privilege issue at trial. R. p. 2159, lines 17-19. Further, the Wingos' counsel told the Circuit Court, in no uncertain terms, "[D. Wingo] alone authored the letter. **Erin was not involved in the letter**." R. p. 2130, lines 5-7 (emphasis added). Thus, it is clear that D. Wingo was not representing his daughter's settlement interests when he conveyed his defamatory statements, so there can be no qualified privilege. Even

if D. Wingo and Phi Delta Theta's interests were aligned, it is obvious that the communication was made in bad faith, as the letter contains a large amount of defamatory material that is unrelated to the information contained in the Initial Decision Letter. Section IV, *infra*.

The cases relied upon by the Wingos to support their position are either distinguishable from the instant matter or require denial of the appeal. In *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 514 S.E.2d 126 (1999), an employee of the defendant bank asserted that the plaintiff business was in "financial distress" in a communication to a potential buyer which led to a lower purchase price for the seller of the business. *Swinton*, 334 S.C. at 474-75, 514 S.E.2d at 128-29. A conditional privilege existed because there was no evidence that the letter was written in bad faith; the author of the letter (*i.e.*, the bank) was trying to protect its own interest as a lender; the letter was written for the limited purpose of assisting the buyer in obtaining a loan; and the comments at issue were made on the proper occasion in the proper manner. *Id*. At 486, 514 S.E.2d at 134-35. Here, there is evidence that D. Wingo wrote the letter to Phi Delta Theta in bad faith. Section IV, *infra*. As evidenced by his own testimony, he was not trying to protect any of his own interests by writing the letter. R. p. 1884, lines 7-13, 20-22. If he was only trying to identify risk for Phi Delta Theta, the letter should have been limited to a statement of what OCES determined; there was no need to include pages of gratuitous and defamatory information. Thus, the letter was not written for a limited purpose, and the defamatory comments were not made on the proper occasion in the proper manner. Thus, *Swinton* is inapplicable to the instant matter.

In *Woodward v. S.C. Farm Bureau Ins. Co.*, 277 S.C. 29, 282 S.E.2d 599 (1981), the Supreme Court stated that "pre-trial settlement negotiations of legal claims give rise to occasions of qualified privilege when each side discloses its reasons for the relative position taken." *Woodward*, 277 S.C. at 32, 282 S.E.2d at 601. D. Wingo's own testimony establish that he was

not involved in settlement negotiations with Phi Delta Theta. R. p. 1884, lines 7-13, 20-22. To the extent that the letter was a part of a settlement negotiation, D. Wingo was not a "side" in that discussion and had no interest in the outcome. R. p. 2219, lines 10-23. *Woodward*, therefore, does not support the Wingos position in this matter. Moreover, the Wingos offer a misleading summary that fundamentally alters an important holding from *Woodward*, asserting that "Abuse of the conditional privilege is only for the court to decide in the absence of controversy." Wingo Br. at 43. The complete holding of the Supreme Court in *Woodward* is, "While abuse of the conditional privilege is ordinarily an issue reserved for the jury, in the absence of a controversy **as to the facts**, as here, **it is for the court to say in a given instance whether or not the privilege has been abused or exceeded**." *Woodward*, 277 S.C. at 32-33, 282 S.E.2d at 601. The Wingos incorrectly assert that, based on their made-up standard, there is a controversy as to whether the defamatory content of the letter exceeded the bounds of settlement negotiation, which creates a jury issue. Wingo Br. at 43-45. This argument completely ignores both the Circuit Court's correct determination that there was no privilege and the true holding of *Woodward*. The parties here do not dispute that D. Wingo authored the letter to Phi Delta Theta, nor is there any disagreement regarding the accuracy or authenticity of the document that was admitted into evidence at trial. D. Wingo's defamatory statements were not idle comments; they were carefully chosen and placed in a letter. Accordingly, even if D. Wingo did have a qualified privilege, the appeal should still be denied, as it is clear he abused any privilege that may have existed.

C. The Circuit Court Correctly Charged The Jury

The Circuit Court correctly refused to charge the jury on the issue of qualified privilege. As detailed above, D. Wingo's claim of qualified privilege regarding the defamatory letter sent to Phi Delta Theta lacks a cognizable legal basis. As a result, the Circuit Court properly determined

that he lacked qualified privilege when he falsely asserted that Pampu was, *inter alia*, a predator and a rapist. As the only proper issue before the jury was whether D. Wingo defamed Pampu, the Circuit Court's instructions regarding defamation were sufficient, and the failure to instruct the jury on qualified privilege was neither erroneous nor prejudicial. *See Miller v. City of W. Columbia*, 322 S.C. 224, 226-30, 471 S.E.2d 683, 684-87 (1996) (refusal to issue requested jury charge not erroneous or prejudicial where "trial judge appropriately charged the law of defamation" which "set forth the appropriate test for determining" whether defamation occurred).

The Circuit Court correctly and methodically explained all of the elements of defamation to the jury as well as the bases for awarding damages. R. p. 2288, line 18-p. 2291, line 25; p. 2294, line 20-p. 2299, line 23. The Circuit Court also provided the jury with an accurate primer on the Wingos' affirmative defenses of truth and self-publication. R. p. 2292, line 7-p. 2294, line 19. Because the Circuit Court appropriately determined that no qualified privilege existed, the defamation charge "set forth the appropriate test for determining the issue" in this case, and the Circuit Court's refusal to charge the jury with the defense of qualified privilege was neither erroneous nor prejudicial. *Miller*, at 322 S.C. at 230, 471 S.E.2d at 686-87. In the cases relied upon by the Wingos to assert that the Circuit Court erred in refusing to charge the jury on the defense of qualified privilege, the trial court failed to provide an accurate statement of the law. *See Cohens v. Atkins*, 333 S.C. 345, 349-50, 509 S.E.2d 286, 289 (Ct. App. 1998) (trial court offered incomplete statement of relevant jury charge that failed to state relevant South Carolina law and tended to "support the common belief that in a rear-end collision the second vehicle is usually, if not always, at fault."); *Carraway v. Pee Dee Block, Inc.*, 275 S.C. 511, 513-14, 273 S.E.2d 340, 342 (1980) (trial court gave general statement regarding duty instead of reading the

specific jury charges). Here, the Circuit Court provided the jury with an accurate statement of the law, so this appeal should be denied.

VII. THE DAMAGES AWARDED BY THE JURY ARE APPROPRIATE

A. Standard Of Review

"The denial of a motion for a new trial *nisi* will not be reversed on appeal unless there was an abuse of discretion. An appellate court is obligated to review the record and determine whether an abuse of discretion amounting to an error of law exists." *Kunst II*, 424 S.C. at 47, 817 S.E.2d at 307 (internal citations omitted). Additionally, "a party [seeking a new trial] must provide compelling reasons to justify invading the province of the jury." *Id*.

B. The Wingos Have Abandoned Any Arguments Regarding Actual Damages

In asserting that the actual damage awards by the jury are excessive, the Wingos offer a single paragraph with no case or record citations (or reference to the appropriate standard of review) to support what amounts to mere rhetoric based on a complete misunderstanding of Pampu's claims for defamation and civil conspiracy. Wingo Br. at 47. As repeatedly stated in this brief and before the Circuit Court, Pampu's defamation damages are based on statements outside of and totally unrelated to the Clemson disciplinary process that adversely impacted his reputation. The damages associated with Pampu's removal from Clemson and subsequent inability to attend dental school are solely related to his civil conspiracy claim. The Wingos' argument is a mere tautology: the verdict is excessive because it is large. They have abandoned any arguments regarding the actual damages award. *Fields*, 312 S.C. at 106 n.3, 439 S.E.2d at 285 n.3.

C. The Actual Damages Awarded By The Jury Are Not Excessive

"[A] jury's determination of damages is given substantial deference." *Kunst II*, 424 S.C. at 46, 817 S.E.2d at 306. A jury's award cannot be disturbed unless it is "so grossly excessive and the amount awarded is so shockingly disproportionate to the injuries to indicate that it was the

result of caprice, passion, prejudice, or other considerations not found on the evidence." *Miller*, 322 S.C. at 231, 471 S.E.2d at 687. Because the Wingos accused Pampu of a crime of moral turpitude (rape and/or sexual assault), their statements were actionable *per se*, and the law presumes that they acted with common law malice and that Pampu suffered general damages. *Kunst II*, 424 S.C. at 39, 817 S.E.2d at 302-303. The Wingos have failed to point to any evidence that the "jury's verdict resulted from prejudice, passion, partiality, bias, or caprice," which supports the denial of this appeal. *Miller*, 322 S.C. at 231, 471 S.E.2d at 687. The jury's verdict was based on Pampu's testimony that he suffered reputational damage, as well as problems forming relationships, trusting others, and socializing – all as a result of the Wingos' defamatory statements. R. p. 1460, lines 7-23. Any argument asserting jury confusion on the breakdown of the damages associated with Pampu's causes of action has no merit. *See* Section III. B., *infra* (explaining the different facts and damages associated with Pampu's defamation and civil conspiracy causes of action). "[A] person's reputation is invaluable." *Kunst II*, 424 S.C. at 50, 817 S.E.2d at 308. Thus, the actual damages awarded by the jury are reasonable considering that Pampu will have to deal with the false smear of being a rapist for 50-plus years. Because the Wingos have failed to offer any reason for invading the province of the jury, there is no basis for disturbing the jury's verdict or the decision of the Circuit Court. *Id*. at 47, 817 S.E.2d at 307.

D. The Wingos Have Failed To Preserve Their Arguments Regarding Punitive Damages For Appellate Review

The Wingos assert that the Circuit Court committed reversible error as a matter of law by "only consider[ing] the *Gamble* factors in its posttrial order" and "failing to subject the punitive damages award to the required due process review under the *Mitchell*/*Gore* guideposts." Wingo Br. at 48. However, in their Post-Trial Motion, the Wingos failed to assert this argument and instead accepted that the *Gamble* factors were appropriate for conducting a review of the jury's

award of punitive damages against E. Wingo. R. pp. 1122-1124. Moreover, the Wingos participated in the preparation of the jury charge regarding an award of punitive damages and did not object at trial when the Circuit Court relayed the *Gamble* factors to the jury when explaining the issues the jury may take into consideration when determining the amount of punitive damages. R. p. 2298, line 20-p. 2299, line 13. Because the Wingos have failed to preserve their argument that the Circuit Court improperly utilized the *Gamble* factors, this Court cannot consider this belated assertion. *See Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993) (holding "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.").

E. There Is No Basis For Disturbing The Jury's Award Of Punitive Damages

Even if the Wingos had not waived their arguments on punitive damages, there would still be no basis for altering the jury's award. In *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009), the Supreme Court noted that the reprehensibility prong "adequately encompasses . . . the first four factors of the *Gamble* review." *Mitchell*, 385 S.C. at 587 n.7, 686 S.E.2d at 185 n.7.[21] The Circuit Court clearly analyzed E. Wingo's degree of culpability, the duration of her conduct, her awareness or concealment, and the existence of similar past conduct in reviewing the award of punitive damages and determined that there was sufficient evidence in the record to support the jury's award of punitive damages. R. p. 11.[22]

The Circuit Court engaged in an adequate analysis of the second *Mitchell* prong:

[21] The Wingos assert that punitive damages are not warranted because the defamatory statements were "limited to family, friends, and advisors." Wingo Br. at 49. This is not a *Mitchell* factor.

[22] The Circuit Court noted E. Wingo's months' long defamation campaign while she was "fully aware" of her actions, thus satisfying the fourth and fifth *Mitchell* reprehensibility factors. Order on Post Trial Motions at 8. The evidence in the record clearly supports this finding. R. p 3124; p. 1457, lines 14-17; p. 1667, lines 11-13; p. 1676, line 19-p. 1679, line 25; p. 1682, line 18-p. 1688, line 3.

> The verdict and award of punitive damages will likely deter others from bringing such claims which the jury found to be false and the award was reasonably related to the harm. Additionally, the punitive award was much less than the actual damages. The Court would note that there was no evidence as to the Defendants' ability to pay, but our appellate courts have found that this is not to be a deciding factor.

R. pp. 11-12; *Mitchell*, 385 S.C. at 587-88, 686 S.E.2d at 185. In *Mitchell*, the Supreme Court explained, "South Carolina courts have most often upheld [punitive damages] verdicts on the low end of the single-digit spectrum." *Mitchell*, 385 S.C. at 593, 686 S.E.2d at 188. Here, the ratio of punitive damages ($450,000) to actual damages ($700,000) in the verdict against E. Wingo is not **less than 1**, specifically 0.64. Thus, it is clear that the punitive damages award against E. Wingo satisfies the *Mitchell* ratio prong. *See id.* (collecting cases of single-digit ratio punitive damages awards upheld by South Carolina Courts). Given the miniscule ratio and the history of South Carolina courts upholding much larger single-digit ratios, the failure by the Circuit Court to compare punitive damages awards in other cases constitutes harmless error. The Wingos cannot reasonably argue that a ratio of 0.64 is "so grossly excessive" that it warrants invading the province of the jury. *Miller*, 322 S.C. at 231, 471 S.E.2d at 687; *Kunst II*, 424 S.C. at 46, 817 S.E.2d at 306. Indeed, they offer no cases arguing this issue in their appeal.[23] It is clear that there is no basis of disturbing the jury's award of punitive damages.

CONCLUSION

For the reasons stated above, this Court should deny the Wingos' Appeal.

[23] The Wingos' argument that the award of punitive damages will dissuade victims of sexual assault from speaking out is a reprehensible attempt by E. Wingo to hide behind actual sexual assault victims and is barely worth mentioning. Wingo Br. at 49. Regardless, this Court should take no notice of this obvious emotional play that depends on an out-of-state motion to dismiss case that does not even reference punitive damages. *Id.*; *Sagaille v. Carrega*, 194 A.D.3d 92, 143 N.Y.S.3d 36 (1st Dept 2021).

WARSHAW BURSTEIN, LLP

s/James E. Figliozzi
Kimberly C. Lau, *pro hac vice*
James E. Figliozzi, *pro hac vice*
575 Lexington Avenue
New York, NY 10022
(212) 984-7700
klau@wbny.com
jfigliozzi@wbny.com

-and-

Thomas J. Rode (SC Bar #77480)
THURMOND KIRCHNER & TIMBES, P.A.
15 Middle Atlantic Wharf
Charleston, SC 29401
(843) 937-8000
thomas@tktlawyers.com
Attorneys for Appellant-Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable 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.

CERTIFICATE OF COUNSEL

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

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.

s/Thomas J. Rode
Thomas J. Rode (SC Bar #77480)
15 Middle Atlantic Wharf
Charleston, SC 29401
(843) 937-8000
thomas@tktlawyers.com

-and-

Kimberly C. Lau, *pro hac vice*
James E. Figliozzi, *pro hac vice*
WARSHAW BURSTEIN, LLP
575 Lexington Avenue
New York, NY 10022
(212) 984-7700
klau@wbny.com
jfigliozzi@wbny.com
Attorneys for Appellant-Respondent