STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	CIVIL ACTION NO.: 2017-CP-10-5699
KELLIE BINGHAM AND KAYLA BINGHAM,)	
Plaintiffs,)	**ORDER**
v.)	
MEDICAL UNIVERSITY OF SOUTH CAROLINA,)	
Defendant.)	

This matter came before the Court on February 1, 2023, regarding Post-Trial Motions filed by Defendant Medical University of South Carolina ("Defendant") on November 28, 2022 for a JNOV or a new trial absolute on numerous grounds. Present at the video conference hearing was M. Dawes Cooke, Jr., attorney for Defendant, and John E. Parker and John E. Parker, Jr., attorneys for Plaintiffs Kellie and Kayla Bingham ("Plaintiffs"). After reviewing the record, the pleadings, submitted memoranda, and hearing the arguments of counsel, the Court denies Defendant's Post-Trial Motions for a JNOV or new trial absolute for the reasons set forth herein.

INTRODUCTION

This matter stems from claimed irregularities noted by agents of Defendant during Plaintiffs Kayla and Kellie Bingham's Block 12 examination, which took place on May 5, 2016 while Plaintiffs were students at MUSC's College of Medicine. Plaintiffs allege that agents of MUSC defamed them through accusations of academic dishonesty in connection with the Block 12 examination. Plaintiffs are identical twins. During the morning session of Plaintiffs' examination, a faculty member, Dr. Debra

Hazen-Martin, claimed that she noticed Plaintiffs were proceeding in "lock-step" throughout the examination and that they had a high number of identical correct and incorrect answers. She asked the afternoon proctor to monitor the Plaintiffs' test-taking behavior. After gathering the proctor's notes, Dr. Hazen-Martin reported her findings to Dr. Laura Kasman.

Plaintiffs were formally accused by Dr. Kasman of collaborating on the examination and were found guilty of academic misconduct by the College of Medicine Honor Council. Plaintiffs argued at the Honor Council hearing that their test results could be explained by their status as identical twins who prepared together for their examinations, and that historical test data supported that they had performed similarly, if not identically, on standardized test examinations for the majority of their educational careers. Plaintiffs also argued that the proctors' notes did not support they were communicating or collaborating on the examination. Plaintiffs appealed the Honor Council decision, which was eventually overturned by the Dean of the College of Medicine after he found that the accusations were not supported by a preponderance of the evidence. Subsequently, the details of the proceedings were leaked and found their way to the local press, and accusations of impropriety and favoritism followed in the school and local community. Plaintiffs eventually left MUSC due to the hostile environment, and their testimony at trial indicated that they have since abandoned their medical careers.

Plaintiffs maintained throughout trial that they had not cheated, that the evidence against them failed to consider their status as identical twins, that in

reckless disregard to their educational rights MUSC did not convey information within the Honor Council system in a proper manner, and that they suffered serious harm to their reputations as well as extreme emotional distress after the details of their Honor Council proceeding were leaked to the press. Defendant maintained that the evidence supported that Plaintiffs had in fact cheated, that their status as identical twins did not overcome statistical evidence supporting that their examinations were not taken independently of one another, that there was no evidence supporting that a member of the Honor Council had leaked any information to the press, and that Defendant's publications were either privileged or outside the scope of its agents' official duties.

This action was tried before a jury during the November 14-18, 2022 term of court, premised on the alleged statements of MUSC faculty members and unknown members of the Honor Council. The jury returned a verdict for Plaintiffs in the amount of $750,000.00 each in compensatory damages. Defendant has now moved the Court to grant a judgment notwithstanding the verdict or a new trial under the thirteenth juror doctrine.

DISCUSSION

Defendant's arguments can be summarized as follows: (1) there is not sufficient evidence in the record upon which the jury could have reasonably determined that Defendant made defamatory statements about Plaintiffs through its employees and agents acting within the scope of their official duties, (2) there is not sufficient evidence in the record upon which the jury could have reasonably determined that

members of the Honor Council were agents of Defendant, (3) there is not sufficient evidence in the record supporting that Defendant and its agents abused or exceeded the qualified privilege, (4) the absolute privilege would extend to MUSC's Honor Councils and grant Defendant absolute immunity, (5) there is not sufficient evidence in the record upon which the jury could have reasonably determined that any statements made by Dr. Debra Hazen-Martin, Dr. Laura Kasman, and members of the MUSC College of Medicine Honor Council were false and defamatory, independently of Plaintiffs' "twinning" theory, and (6) that closing arguments by counsel for Plaintiffs contained mathematical errors and relied on a demonstrative exhibit that unduly prejudiced Defendant.

I. Defamatory Meaning of Statements Concerning Plaintiffs

Defendant first argues that Plaintiffs have not produced sufficient evidence upon which the jury could have found that the statements concerning them were defamatory, or that as a matter of law the statements could not be defamatory or actionable. However, there was sufficient evidence produced at trial upon which the jury could have found that the statements concerning Plaintiffs were defamatory. Whether a publication has a defamatory meaning has been described as follows

> The defamatory meaning of a message or statement may be obvious on the face of the statement, in which case the statement is defamatory *per se*. An example of defamation *per se* is "A is a thief." If the defamatory meaning is not clear unless the hearer knows facts or circumstances not contained in the statement itself, then the statement is defamatory *per quod*. In cases involving defamation *per quod*, the plaintiff must introduce facts extrinsic to the statement itself in order to prove a defamatory meaning.

Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 508-09, 506 S.E.2d 497, 501 (1998).

Plaintiffs alleged that Dr. Hazen-Martin falsely reported to Dr. Kasman that the Plaintiffs had cheated during the Block 12 examination and that Plaintiffs were observed signaling each other and passing notes. In her email to Dr. Kasman, Dr. Hazen-Martin stated that "two students were progressing lock-step through the items . . . ." At the outset, the Court notes that any written and oral statements which either directly or through insinuation imply that Plaintiffs were unfit for medical school due to dishonesty, or that would impeach their reputations as medical students, are actionable per se, unless protected by some form of privilege. *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 510-11, 506 S.E.2d 497, 501-02 (1998). Therefore, common law malice and general damages are presumed, and the burden was on Defendant to demonstrate by a preponderance of evidence that its agents did not act with common law malice and that Plaintiffs did not suffer general damages. Additionally, since this is a common law defamation claim, a defamatory communication is presumed to be false, and truth can be raised as an affirmative defense. *Id.* at 519-20, 506 S.E.2d at 506-07. Thus, it was also Defendant's burden to demonstrate through a preponderance of the evidence that the statements concerning Plaintiffs were true.

"To render the defamatory statement actionable, it is not necessary that the false charge be made in a direct, open and positive manner. A mere insinuation is as actionable as a positive assertion if it is false and malicious and the meaning is plain."

Tyler v. Macks Stores of S.C., Inc., 275 S.C. 456, 458, 272 S.E.2d 633, 634 (1980). If a statement is capable of a reasonable construction which would render the words defamatory, then it is a jury issue as to whether the statement's meaning was in fact defamatory. *See Fountain v. First Reliance Bank*, 398 S.C. 434, 443, 730 S.E.2d 305, 310 (2012).

By stating that Plaintiffs were proceeding lockstep throughout the examination, the jury could have reasonably inferred from the witnesses' testimony that an insinuation was made that Plaintiffs were collaborating on each exam question and progressing to the next question together for the entirety of the examination. However, there was contradictory evidence produced at trial supporting that Dr. Hazen-Martin was not monitoring Plaintiffs for the entire duration of the examination and could not confirm that the observed behavior was continuous throughout the entirety of the examination. Since this is a private defamation case involving private figures, the burden was on Defendant, not Plaintiffs, to prove that Plaintiffs were progressing lockstep throughout the examination and cheating. *See Holtzscheiter*, 332 S.C. at 519, 506 S.E.2d at 506. The jury could have reasonably concluded that Dr. Hazen-Martin's statement was not true, and that it was defamatory *per quod* in that it insinuated that Plaintiffs were cheating on their examination, in light of additional evidence, including evidence of communications between Dr. Hazen-Martin and the test proctor, Michelle Friesinger. A determination of whether accusing Plaintiffs of proceeding lockstep throughout the examination is defamatory was entirely within the province of the jury.

Plaintiffs have also generally alleged that Dr. Hazen-Martin slandered them by falsely reporting information to Dr. Laura Kasman after the examination was complete. In her testimony, Dr. Hazen-Martin denied telling Dr. Kasman that Plaintiffs cheated, signaled one another, or passed notes during the exam. However, Dr. Hazen-Martin gave at times conflicting statements while under oath in the litigation of this action, and she could not account for inconsistencies in the time she created the exam printouts that she claims to have relied upon to confirm her suspicions of cheating. While discredited testimony is not typically a sufficient basis for drawing a contrary conclusion; i.e., that Dr. Hazen-Martin directly conveyed to Dr. Kasman outside their written communications that Plaintiffs were cheating, passing notes, and signaling one another, in some circumstances, such as when there is additional evidence, or where the jury believes the witness is lying outright, disbelief about the testimony may give rise to a positive inference of its converse. *See Bassil v. U.S.*, 147 A.3d 303, 308-09 (D.C. Ct. App. 2016); *U.S. v. Brown*, 53 F.3d 312, 314 (11 Cir. 1995).

Here, there is sufficient evidence such that the jury could have reasonably found Dr. Hazen-Martin's testimony unreliable. Additionally, Dr. Kasman's letter to the Honor Council characterized Plaintiffs' conduct as "the cheating" and stated that Plaintiffs were "signaling each other" and "passing notes via scratch paper on the desk between them." This could have reasonably been interpreted by the jury as accusing Plaintiffs of cheating, passing notes, and signaling. In conjunction with the unreliable aspects of Dr. Hazen-Martin's testimony, this could also give rise to a reasonable

inference by the jury that Dr. Hazen-Martin did in fact explicitly convey to Dr. Kasman that Plaintiffs were cheating on their examination. There is sufficient evidence in the record from which the jury could have reasonably concluded that Dr. Hazen-Martin and Dr. Kasman made at least two false statements concerning Plaintiffs that impugned their reputation as medical school students.

II. Pleading Requirements for Defamation Actions

Defendant next argues that Plaintiffs' Complaint only alleged defamatory statements by Dr. Hazen-Martin and Dr. Kasman, and not any unknown members of the College of Medicine Honor Council. However, paragraph six of the Complaint states that the defamatory statements of Dr. Hazen-Martin and Dr. Kasman were eventually repeated by others and reported to the *Post and Courier*. Defendant argues that this allegation is insufficient to support a third defamatory statement by an unknown member of the Honor Council. Defendant's argument is not in keeping with pleading standards under South Carolina law and misconstrues a South Carolina decision from 1939.

To be clear, there is no special heightened pleading standard unique to defamation cases under South Carolina law. The only heightened standard involving defamation claims is the clear and convincing standard used to prove actual malice in constitutional cases where a public official or figure is defamed over a public controversy. *George v. Fabri*, 345 S.C. 440, 451, 548 S.E.2d 868, 874 (2001). In a defamation case involving private individuals, there is no heightened standard of proof. To create the appearance that there is a heightened pleading standard imposed

on plaintiffs in defamation cases, Defendant cites to a number of federal cases from the United States District Court for the District of South Carolina for the proposition that in a defamation action a plaintiff must specify the speaker, time, and place of a defamatory statement, and its contents, within the allegations of his complaint.

However, the cases cited by Defendant were analyzed under the heightened pleading standard imposed on federal litigants by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), which are not applicable to state court actions. *See Doe v. McGowan*, 2017 WL 573619 (D.S.C. Jan. 5, 2017); *McKay v. Med. Univ. of S.C.*, 2017 WL 3477799 (D.S.C. Aug. 14, 2017). South Carolina has never imposed a heightened pleading standard on plaintiffs requiring the pleading of specific times, places, or exact contents of communications within complaints alleging defamation. Instead, South Carolina only requires "a short and plain statement of the facts showing that the pleader is entitled to relief." Rule 8(a), SCRCP. Defendant's assertion that Plaintiffs were required to plead their allegations with more specificity, and that as a result Plaintiffs could not prove to the jury that a defamatory statement was made by an unknown member of the Honor Council, is baseless and unsupported by South Carolina law.

Defendant does rely on one South Carolina authority, *Tucker v. Pure Oil Co. of Carolinas*, 191 S.C. 60, 3 S.E.2d 547 (1939), to claim that a plaintiff must allege "the name or names of the persons to whom the defamatory words concerning the plaintiff were spoken" in order to "limit the issues to the particular person or persons named in the complaint." *Id.*, 3 S.E.2d at 549. While the quoted language appears to support

Defendant's argument, once the entire decision itself is reviewed, it becomes clear that its logic is inapposite and unavailing to Defendant's argument. The quoted language is not the holding of *Tucker*, but dicta within the case discussing that ***when a motion to make more definite and certain*** has been brought by a defendant, the plaintiff should amend his complaint to include the specific names of parties who were witnesses to the defamation if their identity is known.

Nowhere within the decision does it state that as a matter of course, a plaintiff is required to plead the names, times, and contents of defamatory statements with specificity, or else lose their ability to prove the defamatory statements at trial. Defendant has never moved the Court for a more definite statement pursuant to Rule 12(e), SCRCP, and never took issue with this allegation of Plaintiffs' Complaint until pre-trial motions. The allegations of Plaintiffs' Complaint are sufficient to encompass any defamatory statements made by Honor Council members to the extent that there is sufficient evidence supporting a reasonable inference that such statements were made, as set forth in Plaintiffs' allegations.

III. Defamatory Statements Made by an Unknown Honor Council Member

Defendant contends that regardless of whether the Complaint sufficiently alleges statements made by Honor Council members, there is no evidence that any defamatory statements were made by members of the Honor Council to the student body, news media or other members of the public. In doing so, Defendant makes several assumptions. First, Defendant assumes that the only defamatory statements that could possibly be attributable to it and its agents were the statements made by

Dr. Hazen-Martin and Dr. Kasman. Second, Defendant assumes that the only way it could be liable for any defamatory statements made by an Honor Council member would be if an Honor Council member repeated verbatim the statements of Dr. Hazen-Martin and Dr. Kasman. In doing so, Defendant ignores that there is some circumstantial evidence that a member of the Honor Council made statements to either a member of the student body or a reporter for the *Post and Courier* accusing Plaintiffs of cheating on their examination and using political and family influence to reverse the Honor Council's decision.

In an August 11, 2016 email from Dr. Raymond Dubois, Dean of the College of Medicine, to Dr. Nicholas Batalis, a faculty member of the Honor Council, Dr. Dubois described that "[i]t is clear from our contact with this reporter that someone from MUSC with very detailed information about the case released the information to the press." Dr. Batalis had previously also confirmed that the reporter somehow knew who the individual members of the Honor Council were and knew details that suggested that the reporter must have been tipped off by someone with detailed knowledge of the Honor Council proceedings. The email also noted that there was angst amongst the student body concerning the proceedings, and that members of the Honor Council were very frustrated with the reversal of their decision. The confidentiality of the Honor Council proceedings, in conjunction with the disclosure of detailed knowledge that would have only been known to Honor Council members, further provide circumstantial evidence that the source of the rumors of cheating and gossip was a member of the Honor Council. Based on the available evidence, it would

have been entirely reasonable for the jury to conclude that a member of the Honor Council leaked defamatory information and made statements that the Plaintiffs had committed academic misconduct and escaped punishment.

Facebook messages amongst the members of the student body detail the information that, according to Plaintiffs, could only have been leaked from the Honor Council. The messages describe that Plaintiffs cheated and were cheaters and had their conviction overturned because of family and political influence and bribes. In other words, there is sufficient circumstantial evidence supporting that an Honor Council member, an agent of Defendant, made their own defamatory accusations concerning improper influence to a member of the student body or the *Post and Courier,* elaborating on the prior statements of both faculty members. Plaintiffs requested relief for these statements by alleging in paragraph six of their Complaint that false statements were repeated and made by others following Dr. Hazen-Martin and Dr. Kasman's statements, and the jury could have reasonably inferred from the circumstantial evidence in this case that more likely than not, the source of the leaks to the student body and press originated within the Honor Council.

IV. Agency of University Honor Council Members

Defendant contends that even if an Honor Council member did make defamatory statements to the press or student body, Defendant cannot be liable for such publications because a member of a university honor council cannot be an agent of the university as a matter of law. However, there is evidence upon which the jury could have reasonably determined that an MUSC Honor Council member individual is

an agent of MUSC, and South Carolina agency principles have no blanket exception for state universities and their students.

In South Carolina,

> If the servant is doing some act in furtherance of the master's business, he will be regarded as acting within the scope of his employment, although he may exceed his authority. If there is doubt as to whether or not the servant, in injuring a third person, was acting at the time within the scope of his authority, the doubt will be resolved against the master, at least to the extent of requiring the question to be submitted to the jury for determination.

Jones v. Elbert, 211 S.C. 553, 558, 34 S.E.2d 796, 798-99 (1945).

The case of *Jamison v. Howard*, 271 S.C. 385, 247 S.E.2d 450 (1978), is illustrative of the outer limits of when an agent's tortious conduct can still be considered as within the scope of his agency. In *Jamison*, a liquor store owner was sued after his manager directed another individual to shoot the plaintiff for a debt that was owed to the store. The owner denied the authority of the manager to undertake such actions, testifying that the manager did not have authority to sell goods on credit, and therefore that the manager would certainly not have authority to collect any debt through the use of force. The Supreme Court found that despite this testimony, there was a reasonable inference that the manager could have been acting for the owner and in the owner's interest by attempting to collect a debt that was owed to the store. An analogous scenario is presented by the present facts.

The MUSC Honor Code introduced at trial sets forth that its purpose is to establish high ethical standards within the MUSC academic community and to ensure that students meet these standards, especially with regard to honesty, trust, and

integrity. The Honor Code sets forth that it was created to provide a framework for this purpose. The Honor Code creates Honor Councils, composed of students and faculty, and charges the Honor Councils with the responsibility of ensuring that those within the community do not lie, cheat, steal or tolerate those who do. The Honor Code specifically creates a responsibility for the Honor Councils to protect the integrity of MUSC. This responsibility entails duties not only to investigate reported infractions and participate in hearings, but also to educate the MUSC community through outreach on the value and importance of the Honor Code. The thrust of the Honor Code's purpose is to protect the integrity of MUSC, whether that be from academic misconduct by students, or misconduct by faculty that directly bears upon students and their relationship with the university.

The evidence presented to the jury is susceptible to a reasonable inference that whoever leaked the accusations that Plaintiffs cheated and benefited from political connections from the Honor Council was acting within the interests of MUSC and within the scope of his agency, even if he exceeded his authority. The emails between Dr. Batalis and Dr. Dubois indicate that the Honor Council members were frustrated that their decision had been overturned by Dr. Dubois, and that the leak likely originated from the Honor Council. The content of the rumors that subsequently arose within the MUSC community indicated that the students and Honor Council likely believed that Dr. Dubois's decision to reverse the Honor Council was unethical and harmful to the integrity of the university and the entire student body. Thus, a reasonable inference from the evidence would be that while the member of the Honor

Council may have exceeded his authority in leaking defamatory statements to the student body and/or press, he was still acting within the interest of MUSC and within the scope of his agency as an Honor Council member charged with protecting the academic integrity of MUSC and educating the community on the value of the Honor Code.

Defendant has argued that "the law is clear" that students and Honor Council members cannot be agents for whose conduct it can be liable, citing to dicta from a Fourth Circuit decision stating that a student is not transformed into a state actor just because some authority has been delegated to that student. The Court believes that Defendant's reliance on this decision is misplaced because the decision discusses whether a student is a "state actor" under 42 U.S.C. § 1983, which requires the private individual to have exercised powers that are "traditionally the exclusive prerogative of the State", or for the state to have "exercised coercive power" or "provided such significant encouragement, either overt or covert, that the choice must in law deemed to be that of the State." *Mentavlos v. Anderson*, 249 F.3d 301, 311 (4th Cir. 2001). South Carolina agency rules do not have such exacting standards for an agent to be considered as acting on behalf of his principal. Further, other jurisdictions have seemingly recognized without reservation that a university may be liable for the actions of honor council members. *See, e.g., Atria v. Vanderbilt Univ.*, 142 F. App'x 246 (6th Cir. 2005); *Valente v. Univ. of Dayton*, 689 F. Supp. 2d 910 (S.D. Ohio 2010). Contrary to Defendant's arguments, Honor Council members can be considered agents whose conduct is imputed to MUSC, depending upon the facts, and there is sufficient

evidence to support a finding by the jury that an unknown Honor Council member was acting as an agent of Defendant in seeking to correct perceived misconduct.

V. Affirmative Defenses Under the South Carolina Tort Claims Act/Official Duties Exception

Defendant's assertion that any publication by an Honor Council member would be outside the scope of his official duties cannot be considered by the Court because Defendant has waived the argument. The TCA provides an exception to its waiver of sovereign immunity for "employee conduct outside the scope of his official duties . . . ." S.C. Code Ann. § 15-78-60(17). Exceptions to the TCA are affirmative defenses that must be pled or they are considered waived. *See Steinke v. S.C. Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 393, 520 S.E.2d 142, 152 (1999) (stating that the exceptions to the TCA are affirmative defenses that must be proven by the defendant); *Dawkins v. Mozie*, 399 S.C. 290, 294, 731 S.E.2d 342, 345 (Ct. App. 2012) (stating that an affirmative defense is waived if not pled).

While the issue was allowed to go to the jury, Defendant's Answer failed to raise section 15-78-60(17) as an affirmative defense, so the Court now declines to consider whether any defamatory publication by an Honor Council member was outside the scope of his official duties. It was not Plaintiffs' responsibility to prove that the acts of any MUSC agents were within the scope of official duties as part of their defamation claim; as an affirmative defense, it was Defendant's burden to raise the defense prior to trial, and it failed to do so. Defendant did not move the Court to amend its Answer to add section 15-78-60(17) as an affirmative defense.

Regardless, even if the exception had been raised as an affirmative defense, the evidence supports a reasonable inference that the unknown Honor Council member was acting within the scope of his official duties. While it is correct that "scope of official duties" is narrower than conventional scope of agency under South Carolina law, in this case, Defendant's Honor Code specifically tasks the Honor Council members with protecting the integrity of the MUSC academic community and provides that the members are to communicate with the MUSC community to promote and preserve the value of the MUSC Honor Code. This evidence was presented to the jury, and the jury could reasonably have inferred that an Honor Council member leaked information in a misguided, defamatory attempt to do exactly what he was required to do by the Honor Code; that is, preserve the academic integrity of the university by outreach and education as to what he perceived as corruption, nepotism, academic malfeasance and preferential treatment. A reasonable interpretation of the Honor Code is that it requires its members to undertake such efforts.

Defendant lists numerous sections of the Honor Code and the Family Educational Rights and Privacy Act that require confidentiality in honor council proceedings. However, this evidence does not demonstrate that the Honor Council member acted outside the scope of his official duties, it only demonstrates that he may have exceeded his authority. And the case law is clear that a principal will still be liable for the acts of an agent that exceed his authority so long as he is acting in furtherance of the principal's interests. *Murphy v. Jefferson Pilot Comm. Co.*, 364 S.C.

453, 462, 613 S.E.2d 808, 812 (Ct. App. 2005). Since the alleged acts of the Honor Council member are not wholly disconnected from the furtherance of the Honor Code's purpose, there was sufficient evidence upon which the jury could have determined that any defamatory publications were within the scope of the Honor Council member's official duties.

Defendant cites to the unpublished decision *Doe v. Beaufort Jasper Acad. for Career Excellence*, No. 2021-UP-010, 2021 WL 118300 (Ct. App. Jan. 13, 2021), to support that any publications by Honor Council members were outside the scope of their official duties. The facts in *Doe* are wholly distinguishable from the circumstances presented in this case. *Doe* involved salacious letters that were written to a school employee's family members, ostensibly by a fellow school employee, accusing the employee of engaging in inappropriate conduct. The letters were of such an offensive, aggressive, and personal nature that the Court of Appeals concluded they only could have been published out of personal animus, and not in the promotion of any interests of the school or in an official capacity.

As described above, in this case, a leak of information characterizing Plaintiffs as cheaters who unfairly benefited from political connections reasonably could have been motivated by a desire to preserve the academic integrity of MUSC, and not out of any personal animus towards Plaintiffs. Defendant has produced no evidence indicating the leak was motivated by personal animus towards Plaintiffs. Plaintiffs have characterized the publications throughout this entire litigation not as malicious, but as being made in reckless disregard of their rights. As the evidence in the light

most favorable to Plaintiffs is susceptible to a reasonable inference that the Honor Council member could have been acting within the scope of his official duties, the Defendant's motion for JNOV or a new trial is denied on this point.

VI. Third-Party Publications as Evidence of Plaintiffs' Damages

Defendant maintains that Plaintiffs' evidence of social media publications and newsprint publications discussing the controversy was not relevant or admissible on the issue of Plaintiffs' damages, and that South Carolina has never recognized potential liability for third-party publications. Defendant argues that it could not have reasonably expected that any defamatory statements by its agents would be repeated by its students, because it could not reasonably expect that the information would be leaked to the MUSC academic community. While it may be true that Dr. Hazen-Martin or Dr. Kasman could not have reasonably anticipated that their statements would be leaked to the student body and press, and that therefore the statements would be republished outside the Honor Council proceedings, it would have been reasonable for the Honor Council source to know that any leaks would unquestionably be repeated and discussed by students and other members of the MUSC community.

The acts of the agent are imputed to the principal. Thus, under the Restatement (Second) of Torts § 576, Defendant and its agents' publications are a legal cause of all harm caused to Plaintiffs by the social media and print discussions of Plaintiffs' examination and Honor Council hearing.[1] The testimony presented to the

[1] Plaintiffs do not argue that Defendant is liable for the individual acts and conduct of each MUSC student who republished statements concerning Plaintiffs. Thus, the evidence was

jury clearly supported that the social media and news media discussions following Defendant's Honor Council proceeding caused considerable emotional distress and anguish to Plaintiffs. It was not improper for the jury to consider these publications as evidence of Plaintiffs' damages. These publications are direct evidence of Plaintiffs' loss of reputation in the community, regardless of whether Defendant or its agents could have reasonably foreseen that any defamatory statements would grow into a considerable controversy. There is not a foreseeability requirement for a defamation claim under current South Carolina law. The evidence is relevant not because it creates any liability of Defendant for statements made by third-parties; instead, the evidence is relevant of Plaintiffs' loss of reputation in the community, and Defendant conflates the two concepts.

VII. Qualified Privilege

"The qualified privilege exists only when the publication has occurred in a proper manner and to proper parties only." *Abrofreka v. Alston Tobacco Co.*, 288 S.C. 122, 125-26, 341 S.E.2d 624, 624-25 (1986). A statement must be limited in scope to preserve the qualified privilege. *Manley v. Manley*, 291 S.C. 325, 331, 353 S.E.2d 312, 315 (Ct. App. 1987). The evidence reasonably supports that the publications made by Defendant's agents inferring or explicitly stating that Plaintiffs cheated, signaled one

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not introduced for the purpose of demonstrating actionable republications. Defendant's argument does not recognize that the news articles and social media posts are evidence of Plaintiffs' damages, i.e, the harm that was caused to their reputation by Defendant's own acts. The news articles and social media posts are direct evidence of the wide reach of the defamatory publications.

another, and passed notes were either (1) made in an improper manner with reckless disregard to Plaintiffs' rights under the Honor Code, or (2) made to improper persons.

The testimony of Ms. Friesinger, the afternoon proctor, and Dr. Hazen-Martin indicated that it was improper for any faculty or staff member to make conclusions of cheating prior to an Honor Council determination. Ms. Friesinger's testimony indicated that she apparently refrained from making any conclusory statements in her proctor's notes in keeping with this principle. Their testimony also supported that it would be in disregard of Plaintiffs' right to a presumption of innocence to make such conclusions. Since the evidence could lead to a reasonable inference that Dr. Hazen-Martin and Dr. Kasman accused Plaintiffs of cheating and misconduct, either outright or through innuendo, prior to a formal Honor Council proceeding, a jury could find this was done in disregard of Plaintiffs' rights and in an improper manner under the Honor Code's protocols. Additionally, any publication by the Honor Council to an outside party would constitute a publication to an improper party, as the Honor Council proceedings were required to be confidential. The jury was entitled to weigh this evidence, and it concluded that the defamatory statements exceeded the qualified privilege.

VIII. Absolute Privilege

Defendant for the fourth time in this litigation reasserts that the defamatory statements at issue in this case are absolutely privileged. The class of absolutely privileged communications is narrow in scope and practically limited to legislative and judicial proceedings. *Fulton v. Atlantic Coast Line R.R. Co.*, 220 S.C. 287, 296, 67

S.E.2d 425, 429 (1951). However, the limits of the privilege are not rigid and should be prescribed by considerations of public policy. *Richardson v. McGill*, 273 S.C. 142, 146, 255 S.E.2d 341, 343 (1979). For example, the absolute privilege has been extended to statements made between county legislative delegation members and county agencies when those bodies have "an official interest in the proper operation of the county government and its agencies." *Id.* Thus, statements may be absolutely privileged even if they are not made during legislative proceedings if they have some relation to or are part of one's duties as a member of a legislative body. *Id.*

Likewise, our courts have extended the privilege to preliminary statements made in anticipation of a formal judicial proceeding, so long as the statements have a reasonable relation to it. *Crowell v. Herring*, 301 S.C. 424, 431, 392 S.E.2d 464, 467 (Ct. App. 1990). In sum, under South Carolina law the absolute privilege generally applies to statements made during legislative or judicial proceedings, as well as statements made extrinsic to such proceedings, so long as they have a reasonable relationship to the proceedings and any connected governmental duties or interests.[2] An academic honor council proceeding is not a judicial proceeding, and the Court has previously determined in this case that an academic honor council is not even a quasi-judicial administrative tribunal.

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[2] Plaintiffs maintain that the absolute privilege should not extend to preliminary statements made in anticipation of the quasi-judicial proceeding or statements made extraneous to the proceedings, arguing that the same policy considerations for protecting statements made in a true judicial proceeding are not at play in the context of an academic proceeding and necessitate a narrow application of the privilege, if it is applied at all. The Court does not reach Plaintiffs' argument as it has determined that there is no applicable absolute privilege with regards to university honor council proceedings.

The burden is on the party claiming absolute immunity to prove that public policy requires such a broad protection of the person's actions. *Butz v. Economou*, 438 U.S. 478, 506, 98 S. Ct. 2894, 2911 (1978). The policy consideration underlying the absolute privilege of statements made in judicial proceedings is due to the "overriding public interest that person should speak freely and fearlessly ***in litigation*** . . . ." *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 23, 567 S.E.2d 881, 892 (Ct. App. 2002) (emphasis added). This is because

> The interest of society requires that whenever men seek the aid of courts of justice, either to assert or to defend rights, of person, property or liberty, speech and writing therein must be untrammeled and free. ***The good of all*** must prevail over the incidental harm to the individual.

Id. (emphasis added).

Several courts have held that Honor Council proceedings only involve the private interests of an individual accused of academic wrongdoing and do not implicate the interests of the public at large. *See Heike v. Guevara*, No. 09-10427-BC, 2009 WL 3757051 at *7-9 (E.D. Mich. Nov. 6, 2009) (finding that having a chilling effect on the academic reporting process does not in itself implicate a substantial public interest necessitating the protection of the absolute privilege); *see also Bose v. Bea*, 947 F.3d 983, 994-996 (6th Cir. 2020) (finding that private academic discipline does not involve a public benefit or interest). Because Honor Council proceedings are intrinsically focused on the character of an individual and do not implicate the public interest, an absolute privilege permitting anyone involved in the proceedings to engage in unfettered speech is contrary to the highly sensitive and private nature of the proceedings. This reasoning is affirmed by our constitutional defamation doctrine,

which affords the highest burden of proof to defamation actions involving the public interest, while relaxing the standard for private matters involving private individuals.

Applicable South Carolina law has never extended an absolute privilege to statements made before or in connection to academic proceedings. Defendant cites *Crowell* for the proposition that South Carolina affords an absolute privilege to quasi-judicial proceedings. However, in *Crowell* the court was not presented with the issue of whether the absolute privilege extends to quasi-judicial or extrajudicial proceedings. In *Crowell*, the plaintiff sued multiple defendants for defamatory statements that were made during and preliminary to a Veteran of Foreign Wars court-martial. *Crowell*, 301 S.C. at 426-28, 392 S.E.2d at 464-66. The trial court held the VFW court-martial was a judicial proceeding, not a quasi-judicial proceeding, and the plaintiff did not appeal this finding. *Id.* at 430, 392 S.E.2d at 467. Therefore, the issues of whether a VFW court-martial could be considered a judicial proceeding or a quasi-judicial proceeding, and whether an absolute privilege should extend to quasi-judicial proceedings in addition to judicial proceedings, were not preserved for review.

Defendant extensively cites to the law of other jurisdiction to support its position that statements made before and in connection to its Honor Council proceedings are absolutely privileged. This is not the law of South Carolina and binding precedent indicates that the Court should not extend an absolute privilege to the statements at issue in this case. *See Eubanks v. Smith*, 292 S.C. 57, 354 S.E.2d 898 (1987) (holding that absolute privilege does not apply to statements made during a criminal investigation that eventually culminated in a State Ethics Commission

hearing). In *Hainer v. American Med. Int'l, Inc.*, 328 S.C. 128, 492 S.E.2d 103 (1997), the Supreme Court of South Carolina analyzed the privilege afforded to statements made before and connected to the State Nursing Board, which includes amongst its duties the discipline of nurses for misconduct. The court concluded that any statements made to the State Nursing Board under a duty to report were only protected by a qualified privilege and not an absolute privilege. *Id.* at 135, 492 S.E.2d at 107. Although the court in *Hainer* was analyzing a statutorily granted privilege, and not a common law privilege, the same policy considerations are at work in the present circumstances. The Honor Council, like the State Nursing Board, is not a true judicial proceeding, and therefore should not be afforded the heightened protections enjoyed by courts of law or legislative bodies.

Defendant claims that an absolute privilege will enable academic institutions to protect academic integrity without fear of repercussion for simply being wrong. It is the Plaintiffs' position that academic faculty and staff do not need the protection of an absolute privilege to safely identify, investigate, and describe incidents of potential dishonesty without fear of repercussion. The Court agrees with Plaintiffs. So long as institutions and their agents confine their communications to the plain facts and refrain from making conclusory statements accusing students of academic dishonesty prior to an Honor Council hearing, and refrain from communicating with disinterested sources concerning the details of proceedings, faculty, staff, and Honor Council members can objectively investigate incidents and report their findings without the

threat of reprisal. An absolute privilege does not protect the defamatory statements under these circumstances.

IX. Truth as a Defense

For Defendant's next argument, it claims that there is not sufficient evidence upon which a jury could have reasonably concluded that the statements at issue were not true. As has been previously discussed, the evidence demonstrates that Dr. Kasman and an unknown member of the Honor Council could have published defamatory statements concerning Plaintiffs accusing them of cheating, signaling each other, and passing notes during their Block 12 examination. The evidence also supports a reasonable inference that Dr. Hazen-Martin conveyed to Dr. Kasman that Plaintiffs were cheating, and that her testimony that she did not make such assertions was not credible. These statements would all be actionable *per se* so long as they are not true. The burden was on Defendant, not Plaintiff, to produce sufficient evidence at trial to overcome the presumption that any defamatory statements made by Defendant were false. *Holtzscheiter*, 332 S.C. at 519, 506 S.E.2d at 506 (Toal, J. concurring).

Plaintiffs produced substantial evidence at trial from which the jury could have reasonably concluded, in conjunction with the presumption of falsity, that Plaintiffs were not cheating. Plaintiffs testified that they did not collaborate on the examination and provided reasonable explanations for Defendant's theories. Historical test data introduced at trial demonstrated that Plaintiffs have performed similarly on examinations their entire lives. Plaintiffs' expert testified that it would be entirely

expected for identical twins to perform as Plaintiffs have done on their examinations. Testimony from witnesses demonstrated that Plaintiffs have never been accused of dishonesty or academic misconduct over the entirety of their academic careers. Ms. Friesinger and Dr. Hazen-Martin, the two primary accusers of misconduct at trial, could not account for numerous discrepancies and inconsistencies in their own testimony.

Dr. Dubois, Dean of the College of Medicine when Plaintiffs were medical students, testified that he overturned Plaintiffs' conviction because he thought Plaintiffs were not afforded a fair Honor Council hearing, and evidence of his appeal decision demonstrates that he did not believe a preponderance of the evidence supported cheating or misconduct. There is ample evidence upon which the jury could have reasonably concluded that more likely than not, the defamatory statements at issue in this case were not true, and that Plaintiffs were not cheating, progressing lock-step throughout their examination, passing notes, or signaling one another. The afternoon proctor's contemporaneous notes arguably do not document any of the alleged behavior of Plaintiffs. It was entirely reasonable for the jury to conclude that any statements of Defendant's agents concerning cheating and misconduct were false and defamatory.

X. Evidentiary Support for Plaintiffs' "Twinning" Theory

Defendant raises issues with Plaintiffs' assertions that a statistical report on Plaintiffs' examination results was flawed, and that their examination results were independently achieved despite great similarity, all because they are identical twins.

These arguments present evidentiary issues that were properly resolved by the factfinder. The jury was entitled to hear the testimony and evidence of both Plaintiffs' and Defendant's experts and give weight to one, the other, or neither. The jury was entitled to find that Plaintiffs were not cheating based on the credibility of Plaintiffs' testimony alone. Or the jury could have considered supporting testimony from other witnesses who believed that Plaintiffs were not cheating and were treated unfairly. Or the jury could have considered that Plaintiffs had an apparently spotless academic record which reflected a historical correlation between Plaintiffs' examination scores and grades, or that the testimony of Defendants' expert concerning the report results was not compelling. There is no rule that a jury must give more evidentiary weight to a statistical report than it does to the testimony of witnesses.

Plaintiffs' "twinning theory", as described by Defendant, was not essential to prove Plaintiffs' case, so even if Defendant's assertions that it is misplaced were correct, it would not necessitate JNOV or a new trial. This is particularly true in this instance because it was Defendant's burden to demonstrate truth as an affirmative defense. The jury reasonably could have determined from multiple other sources of evidence, unrelated to Plaintiffs' status as identical twins, that Plaintiffs were not cheating on their examination.

XI. Plaintiffs' Closing Arguments

Defendant lastly argues that it should be granted JNOV or a new trial because Plaintiffs' closing arguments and a demonstrative exhibit used in closing by Plaintiffs contained mathematical errors. Regardless of the correctness of Defendant's

argument, it does not support the grant of JNOV or a new trial because Defendant failed to timely object to the arguments and the demonstrative exhibit.

> We have held that the proper course to be pursued when counsel makes an improper argument is for opposing counsel to *immediately* object and to have a record made of the statements or language complained of and to ask the court for a distinct ruling thereon.

Varnadore v. Nationwide Mut. Ins. Co., 289 S.C. 155, 159, 345 S.E.2d 711, 714 (1986) (quoting *Young v. Warr*, 252 S.C. 179, 165 S.E.2d 797 (1969)). When a party fails to make a timely objection to an improper closing argument, the issue is not preserved for review. *Ligon v. Norris*, 371 S.C. 625, 633 n.1, 640 S.E.2d 467, 471 n.1 (Ct. App. 2006). The failure to timely object to evidence or exhibits introduced at trial serves as a waiver of any objection. *McCreight v. MacDougall*, 248 S.C. 222, 226, 149 S.E.2d 621, 622 (1966). Further, in this case, even if Plaintiffs moved in limine to preclude the introduction of evidence or exhibits without first offering them to opposing counsel, the rule is that Plaintiffs' motion in limine would not excuse Defendant from the necessity of objecting contemporaneously with the introduction of Plaintiffs' demonstrative exhibit, as the Court did not rule on Plaintiffs' motion immediately prior to the introduction of the demonstrative exhibit. *See State v. Kromah*, 401 S.C. 340, 353, 737 S.E.2d 490, 496-97 (2013).

Defendant did not make a contemporaneous or timely objection to Plaintiffs' closing arguments or the demonstrative exhibit used by Plaintiffs. Defendant did not specify at trial the objectionable language used in closing arguments, did not ask the Court at the time to make a ruling, and did not ensure that any objections and arguments were made part of the record. Defendant was required to timely object at

trial to Plaintiffs' closing arguments and the demonstrative exhibit, and not for the first time in post-trial motions. This is true even if the Court had made a ruling on Plaintiffs' motion in limine concerning the introduction of evidence.

And even if Defendant had timely objected to the arguments and exhibit, and Defendant was correct that Plaintiffs' closing arguments were mathematically incorrect or flawed, Defendant still has not met its burden on a motion for JNOV or a new trial of demonstrating that the other evidence in this case was not legally sufficient to sustain the verdict. For the reasons previously discussed, the jury could have considered and weighed Plaintiffs' testimony, the witnesses' testimony as to Plaintiffs' academic history and record, Plaintiffs' expert's testimony, and exhibits demonstrating the Plaintiff's test-taking and academic record, and reasonably concluded that Defendant had not carried its burden of overcoming the presumption that Plaintiffs did not cheat on their examination. Defendant has not demonstrated that Plaintiffs' closing arguments were so unfairly prejudicial that they would have had an impact on the outcome of the trial, or that the Caveon report was an essential piece of evidence that was considered by the jury. Regardless, since Defendant has failed to make a timely objection, it has waived any objection to Plaintiffs' closing arguments and demonstrative exhibit, and for this reason Defendant's motion for JNOV or a new trial must be denied.

Therefore, the Court DENIES Defendant's Post-Trial Motions.

IT IS SO ORDERED.

Dated: September ___, 2023
Sumter, South Carolina

Honorable Kristi F. Curtis
Third Judicial Circuit

Charleston Common Pleas

Case Caption: Kellie Bingham VS Medical University of South Carolina

Case Number: 2017CP1005699

Type: Order/Other

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762