THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Appellate Case No.: 2023-000952

Kellie Bingham and Kayla Bingham ....Appellants-Respondents

v.

Medical University of South Carolina..................................Respondent-Appellant.

APPELLANTS-RESPONDENTS KELLIE BINGHAM AND KAYLA BINGHAM'S REPLY BRIEF AS APPELLANTS

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Throughout its Brief as Respondent, MUSC carefully tiptoes around a fundamental principle that is taught to all first-year law students: the language of a statute or rule of civil procedure matters. It cannot be ignored. When the plain and unambiguous language of a rule conveys a clear and definite requirement, courts have no right to abrogate that requirement through judicial decree. MUSC seeks to focus the Court's entire attention on the intentions of the Circuit Court and the fact that it gave a general charge to the jury, when the principles of statutory interpretation dictate that the Court should be focused exclusively on Rule 49's language. And make no mistake, the language of Rule 49, SCRCP is clear and unequivocal. To be considered a Rule 49(b) verdict, a verdict form *must* contain a *general verdict* accompanied by written questions of fact. The Rule says nothing of a trial judge's intentions, or that the use of jury charges nullifies the procedures of Rule 49(a). Here, the subject verdict form does not contain a general verdict under any definition or reasonable interpretation of that term, and therefore it must be a special verdict. For the following reasons, the Circuit Court's Order reducing the jury's verdict should be reversed.

ARGUMENT

To clarify for the Court, for the purposes of their Appeal the Binghams do not argue that in order for the jury's verdict to stand that this Court, or the Circuit Court on remand, must decide that at least three occurrences are supported by the evidence. The Binghams have instead argued that the Circuit Court's February 7, 2023 Order was an unappealed judgment in the amount of $750,000 per Plaintiff, and by

operation of Rule 49(a), SCRCP, the Circuit Court should be deemed to have made an unappealed finding on occurrences in accord with the jury's determination of damages and the entry of judgment.[1] However, even if the February 7 Order is not a judgment, the Circuit Court erroneously granted MUSC's motion to reduce the jury verdict because the verdict form was a special verdict under Rule 49(a), and as such as of today there would have been no prior determination of the number of occurrences. Regardless, the Binghams respectfully submit this Reply Brief to address certain issues raised by MUSC in its Brief as Respondent.

I. The Binghams' motion to determine the number of occurrences was an unnecessary precautionary measure, and even if it was required to activate Rule 49, SCRCP, it was timely and not limited by Rule 59, SCRCP.

MUSC argues in its Brief as Respondent that the Binghams were required to file a motion asking the Circuit Court to determine the number of occurrences within ten days of the jury's verdict in order to preserve their arguments for review. According to MUSC, after ten days the Circuit Court lost jurisdiction to determine the number of occurrences, so the Binghams' motion and arguments on appeal are of no significance. The jury was discharged on November 18, 2022, and the Binghams filed their motion on November 29, 2022, 11 days after the verdict. (Verdict Form; Pls.' Mot. to Determine the Number of Occurrences). MUSC had previously filed its

[1] The Binghams argued in their Brief that it was error for the Circuit Court to reduce the verdict after entering judgment on the unappealed February 7 Form 4 Order. (Appellants-Resp'ts' Br. as Appellants 41). A court's lack of subject matter jurisdiction to adjudicate a case may be raised at any time, even for the first time on appeal. *Carter v. State*, 329 S.C. 355, 495 S.E.2d 773 (1998).

own motion asking the Circuit Court to reduce the verdict to reflect one occurrence on November 28, 2022. (Def.'s Post-Trial Motions).

In making its argument MUSC ignores key aspects of Rules 49 and 59, SCRCP. First, the Binghams' motion was not a Rule 59 motion for a new trial or a motion to alter or amend a judgment. Under Rule 59, a party must file a motion for a new trial or a motion to alter a judgment within ten days of the jury being discharged or receipt of written notice of the entry of an order. The Binghams' motion was not a Rule 59 motion because it did not ask the Circuit Court to amend any judgment, the Circuit Court had not yet entered any orders regarding the jury's verdict when it was filed, and the motion had nothing to do with the Binghams' prior request for a new trial, which was filed on November 23, 2022. In the motion to determine the number of occurrences the Binghams did not ask for a retrial of any issues of fact.

MUSC cites *Ex parte Beard*, 359 S.C. 351, 358, 597 S.E.2d 835, 838 (Ct. App. 2004), for the proposition that a trial court loses jurisdiction over a case when the time to file post-trial motions has elapsed. In stating that a trial court loses jurisdiction within ten days if a post-trial motion is not filed, the Court in *Ex parte Beard* cited two other decisions, *Pitman v. Republic Leasing Co., Inc.*, 351 S.C. 429, 570 S.E.2d 187 (Ct. App. 2002), and *Ness v. Eckerd Corp.*, 350 S.C. 399, 566 S.E.2d 193 (Ct. App. 2002). *Ex parte Beard*, 359 S.C. at 358, 597 S.E.2d at 838. However, *Pitman* and *Ness* only state that a trial judge retains jurisdiction to alter a judgment for ten days *after a judgment has been entered*. *Pitman*, 351 S.C. at 432-33, 570 S.E.2d at 189-90; *Ness*, 350 S.C. at 402-03, 566 S.E.2d at 195.

The cited cases simply state that a trial judge loses jurisdiction to alter a final judgment or order within ten days of the judgment or order being filed if there are no Rule 59 motions, and that parties only have ten days after discharge of the jury to file a motion asking for a new trial. The "jurisdiction" referred to by the Court in *Ex parte Beard* was a trial judge's authority to retain jurisdiction over a case after entry of judgment by the clerk of court, and not the circuit court's subject matter jurisdiction over the case itself. *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 20 n.10, 633 S.E.2d 722, 730 n.10 (2006). At the time of the Binghams' motion, no judgment had been entered. Since the Binghams were not moving for a new trial and were not asking the Circuit Court to amend a judgment, their motion asking the Circuit Court to determine the number of occurrences was timely and was not subject to the restrictions of Rule 59.[2]

Rules 49 and Rule 58 specifically govern and in this instance provide that there is no set time limit for a circuit court to determine the number of occurrences prior to entering judgment, or for a party to file a motion asking a circuit court to do so. Rule 58(a), SCRCP does not set forth any hard deadline or time limit for a judgment on a special verdict or general verdict accompanied by answers to interrogatories to be reviewed by a court prior to approval and entry. Rule 49(a), SCRCP, does not set forth any deadline or time limit for a trial court to make a finding on a factual issue prior to entering a judgment on a special verdict. There is no rule or case law stating that the Binghams were required to ask the Circuit Court to exercise its authority under

[2] Further, since this issue was not raised by Respondent-Appellant MUSC prior to Appeal, and it does not concern subject matter jurisdiction, the issue is not preserved for review.

Rule 49(a) to determine factual issues within ten days of the jury's verdict or that the Circuit Court would lose its ability to do so. Additionally, even if the Binghams had not requested that the Circuit Court make such a determination, under Rule 49(a) it still had the discretion to do so, and in the event that it declined to make such a determination, Rule 49(a) provides that it would be deemed to have made such a determination by entering a judgment on the special verdict. The language of Rule 49(a) is clearly self-executing and requires certain findings of fact by a court upon entering a final judgment regardless of whether any party has moved the court to do so. MUSC's argument that the Binghams were required to file their motion within 10 days of the jury's verdict ignores this language and should therefore be disregarded by the Court.

II. The issue of whether the evidence supports multiple occurrences is not properly before the Court and even if it was, the evidence in the record supports at minimum three occurrences.

The Circuit Court never made a factual determination based on the evidence in the record prior to entering its February 7, 2022 Order or granting MUSC's motion to reduce the jury's verdict. Therefore, if the Circuit Court erred in granting MUSC's motion because the jury returned a special verdict, the Court should deem that the Circuit Court found three occurrences by virtue of entering its February 7 Form 4 Order, which has not been appealed. And if its February 7 Order was not a final judgment, then the Circuit Court never made a finding on the number of occurrences, and reversal of its Order denying the Binghams' motion does not require an analysis of how many occurrences are supported by the record. Regardless, the evidence in the

record undisputedly demonstrates that at minimum, MUSC is liable for more than one occurrence of defamation.

The South Carolina Tort Claims Act ("TCA") defines an occurrence as "an unfolding sequence of events which proximately flow from a single act of negligence." S.C. Code Ann. § 15-78-30(g). The Binghams' negligence claim was dismissed by the Circuit Court on MUSC's motion for directed verdict, so there was no negligence claim or acts of negligence suitable for jury determination. (Trial Tr. p. 916, line 12 – p. 917, line 1). The General Assembly has not defined what an occurrence is when tortious acts are defamatory and not negligent. Additionally, the Supreme Court of South Carolina has recognized that the interpretation and application of the term "occurrence" in tort and insurance law is complex and nuanced. *See Boiter v. S.C. Dep't of Transp.*, 393 S.C. 123, 133-34, 712 S.E.2d 401, 406 (2011); *Crossman Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 47, 717 S.E.2d 589, 592 (2011) ("This Court, among others, has struggled to discern the meaning of the expanded occurrence definition in the context of progressive damage cases."). Consequentially, the determination of what constitutes an occurrence under the TCA within the context of defamation of necessity requires an interpretation of law by a court, and not a jury, of what an occurrence is. Because the General Assembly failed to specifically define an occurrence within the context of defamation, and its intentions in doing so are impossible to derive from the statutory language, it would have been improper and confusing for the jury to ascertain what constitutes an occurrence under the statutory definition within the context of a defamation action.

The damages resulting from defamation, and from libel and slander per se in particular, are wholly distinct from those resulting from negligence and have historically been treated as such by the common law, necessitating a legal decision by a trial court, and not the jury, as to how many occurrences there are, as the General Assembly has not provided a definition of occurrences that encompasses the distinct harm caused by defamation. In other words, the lack of a statutory definition of occurrence within the context of defamation makes its application to the facts of this case strictly a matter of statutory interpretation for a court, and not a jury. Defamation involves elements of harm caused by each utterance of a defamatory statement, which the common law recognizes as separate and distinct actionable events giving rise to their own separate damages to a plaintiff's reputation.

It is a well-established principle of tort law that each publication of a libel constitutes a separate and independent tort. *Cianci v. New Times Publ'g Co.*, 639 F.2d 54, 60-61 (2d Cir. 1980); *Dixson v. Newsweek, Inc.*, 562 F.2d 626, 630-31 (10th Cir. 1977); *Seymour v. A.S. Abell Co.*, 557 F. Supp. 951, 953-54 (D. Md. 1983); 20 S.C. Jur. *Libel and Slander* § 49 (1993).

> Each time that libelous matter is communicated by a new person, a new publication has occurred, which is a **separate basis** of tort liability. Thus one who reprints and sells a libel already published by another becomes himself a publisher and is subject to liability to the same extent as if he had originally published it . . . . The republication of a libel, being a separate publication, may make the second publisher liable although the original publisher is protected by a privilege. On the other hand, the republication of a libel may be privileged although the original publication was not.

Restatement (Second) of Torts § 578 cmt. b (Am. L. Inst. 1965) (emphasis added).

South Carolina case law analyzing whether multiple acts of negligence constitute multiple occurrences under the TCA holds that in order for multiple acts to be considered a single occurrence, there must be an indication that the defendant's actions "combined to form a single act of negligence." *Boiter v. S.C. Dep't of Transp.*, 393 S.C. 123, 134-35, 712 S.E.2d 401, 406-07 (2011). In other words, in the context of defamation, the statements of separate individuals are separate occurrences if the verdict against one individual and his statement could stand even if the jury had not found the other individual's statements actionable. *See id.*

Here, there are reasonable inferences that can be drawn from the evidence that separate agents of MUSC made at least three separate and distinct defamatory publications concerning the Binghams at separate and distinct times, which did not unfold from each other so as to combine to form a single act of defamation.[3] First, Dr. Hazen-Martin insinuated that the Binghams were cheating by informing Dr. Kasman that the Binghams were progressing "lock-step" throughout the entire examination, despite the fact that she testified at trial that she could not have known whether they actually were on the same questions, item-to-item, throughout the entire duration of the examination. (Pls.' Trial Ex. 10; Trial Tr. p. 394, line 15 – p. 395, line 13, p. 405, lines 6-15). Dr. Hazen-Martin's statement was based on a conclusion she drew from her intermittent monitoring of the Binghams' examinations. (Trial Tr. p. 416, lines 6-10).

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[3] Plaintiffs contend that six separate publications are supported by the record. The defamatory letter from Dr. Kasman to Joseph Ivey was emailed as well to Myra Haney Singleton. This email was subsequently forwarded three times. (Pls.' Tr. Ex. 14). *See* Restatement (Second) of Torts § 577A cmt. a (general rule is that each communication of the same defamatory matter by the same defamer, whether to a new person or to the same person, is a separate and distinct publication for which a separate cause of action arises).

Second, five days later, Dr. Kasman characterized the Binghams' conduct as "the cheating" in a letter written to Joseph Ivey, President of the College of Medicine Honor Council, and specifically accused the Binghams of signaling one another and passing notes. (Pls.' Trial Ex. 14). Dr. Hazen-Martin testified that Dr. Kasman reached her own conclusions about the Binghams' test-taking conduct and that her conclusions were based on the test data and the proctor notes. (Trial Tr. p. 431, lines 1-8). Dr. Kasman admitted as much in her own testimony, and directly stated that her conclusions that the Binghams were signaling one another and passing notes were her own and came from her review of the proctor notes and the Binghams' scratch paper.[4] (*Id.* at p. 839, line 23 – p. 840, line 3, p. 857, lines 3-8). Thus, there is evidence in the record that Dr. Kasman's defamatory statements regarding signaling and passing notes did not unfold from Dr. Hazen-Martin's defamatory statement, but from Michele Friesinger's proctor notes, which themselves did not arise from Dr. Hazen-Martin's communications to Dr. Kasman.

Third, months later, after Dean Raymond Dubois had overturned the Honor Council's conviction, a member of the Honor Council published at least one statement to someone outside the Honor Council, containing detailed information known only to the Honor Council, accusing the Binghams of cheating on their examination and using their family and political connections to have the conviction overturned. (Pls.' Trial Exs. 33, 35; Trial Tr. p. 440, lines 4-22, p. 555, line 20 – p. 556, line 3, p. 558, line 13 – p. 559,

[4] While Dr. Kasman did testify that she reviewed Dr. Hazen-Martin's letter, she also stated that she formed her "interpretations" based on the evidence that she personally had seen, as opposed to anything that Dr. Hazen-Martin had observed. (Trial Tr. p. 857, lines 7-21).

line 3). This information did not leak from the Honor Council after the conviction, but instead occurred weeks later after Dean Dubois' reversal of the Honor Council. (*Id.* at p. 369, lines 14-17, p. 765, line 14 – p. 766, line 15). This is sufficient evidence upon which the factfinder could determine that a third defamatory statement "unfolded" from Dean Dubois' decision, and not the defamatory statements of Dr. Hazen-Martin and Dr. Kasman.

The multiple publications made by MUSC's agents in this case led to separate events which separately and distinctly harmed the Binghams, without regard under the law as to whether a previous or subsequent publication was made. These three defamatory publications occurred at separate times and places, were undertaken by separate MUSC employees and/or agents and involved separate defamatory assertions concerning the Binghams. Each is a separate, actionable occurrence under South Carolina law causing divisible and separate reputational harm and each occurrence was alleged by the Binghams in their Complaint. There is sufficient evidence upon which a factfinder could determine that there were three separate occurrences capable of having caused sufficient damage to the Binghams' reputation to support the jury's verdict. Each above-described statement is a separate publication for which MUSC could be liable, even if it were not liable for the other two statements, and the three statements therefore do not combine to form a single act of defamation.

III. Rule 49(a) permits a trial judge to make findings of fact based on the evidence admitted at trial or to decline to make such findings, in which case such findings are deemed to have been made in accordance with the verdict.

MUSC argues that the Circuit Court had no way of making a finding on the number of occurrences or the damages per occurrence, and that there is no way for the Court to recognize an implicit ruling on occurrences and damages per occurrence in accordance with the verdict. To the contrary, there is a way for both scenarios to occur under Rule 49(a). Perhaps recognizing that Rule 49(a) provides the most logical way for the Circuit Court to enter or have entered judgment in favor of the Binghams, MUSC devotes a large part of its Brief as Respondent to arguing that the subject verdict form was not a special verdict.

First, MUSC argues that a true special verdict requires a jury to make findings on each issue of material fact, and that the verdict form in this case does not ask the jury to make any written findings of fact. According to MUSC, if a special verdict is submitted to the jury, it completely eliminates the need to speculate about what the jury intended. MUSC's first assertion is belied by the plain language of Rule 49(a) and the subject verdict form. The second assertion on the other hand is true, but not for the reasons given by MUSC. The special verdict eliminates the need to speculate about what the jury intended not because special verdicts as a matter of course must ask the jury to make a determination on every single issue of fact, but because it allows the trial court to step into the shoes of the jury on factual issues which are omitted from the special verdict, or it will be deemed to have done so by entering the jury's verdict as a judgment.

A. The subject verdict form is a Rule 49(a) special verdict.

1. Special verdicts do not have to address each issue of fact raised by the pleadings and evidence.

MUSC implies in its Brief that special verdicts must include written questions addressed to each issue of fact. Rule 49(a) specifically contemplates that a special verdict may not ask the jury to make a written finding on every factual issue raised by the pleadings and evidence: "The court shall give to the jury such explanation and instruction concerning the matter thus submitted . . . . **If in doing so the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue**." Rule 49(a), SCRCP (emphasis added); *see also Guidry v. Kem Mfg. Co.*, 598 F.2d 402, 406 (5th Cir. 1979) ("The rule itself provides insurance against one hazard: the necessity that the jury decide every element of recovery or defense lest the verdict remain incomplete and indecisive."). The subject verdict form clearly asks the jury to make two separate findings of fact on the first and second elements of the defamation claim as well as a finding of fact on damages, without ever asking the jury to declare in a single statement whether the Binghams or MUSC prevailed at trial.[5]

2. The subject verdict form does not contain a general verdict.

[5] MUSC contends that the subject verdict form was not a special verdict because nowhere "in a trial transcript of 1,015 pages" is there a single usage of the phrase "special verdict". Likewise, nowhere within the trial transcript is there a single usage of the phrase "general verdict." The Binghams were not required by any rule or law to have specifically asked for the use of a special verdict form for Rule 49(a) to be applicable. The language of Rule 49(a) clearly provides that the mechanisms of the Rule are self-executing when a verdict form does not contain a general verdict and omits certain questions of fact. *See* Rule 49(a), SCRCP ("If in so doing the court omits any issue of fact . . . the court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.").

MUSC argues that the first question posed to the jury, "Do you, the jury, unanimously find by a preponderance of the evidence that Defendant Medical University of South Carolina made a false and defamatory statement about Plaintiffs Kayla and Kellie Bingham," is a general verdict. The question is clearly a direct recitation of the first element of the defamation claim, and not a general pronouncement of whether the jury found in favor of the Binghams on all the elements of the defamation claim. *Compare West v. Morehead*, 396 S.C. 1, 7, 720 S.E.2d 495, 498 (Ct. App. 2011) ("To establish a defamation claim, a plaintiff must prove: (1) a false and defamatory statement was made; (2) the unprivileged statement was published to a third party; (3) the publisher was at fault; and (4) either the statement was actionable regardless of harm or the publication of the statement caused special harm.") *with Walker v. N.M. & S. Pac. R.R.*, 165 U.S. 593, 596-97, 17 S. Ct. 421, 422 (1897) (describing a general verdict as "embodying in a single declaration the whole conclusion of the trial"). To the contrary of MUSC's argument, this first question, in an extremely specific manner, asks the jury to make a discrete finding on a single issue of fact and a single element of the defamation claim. *See Kelley v. Wren*, 415 S.C. 379, 386-87, 782 S.E.2d 406, 409-10 (Ct. App. 2016) (stating that the question of whether a defendant's statements could be reasonably construed as defamatory and false was a question of fact for the jury).[6]

The cases cited by MUSC in support of its argument that the subject verdict form was a general verdict with special interrogatories do little if anything to advance

[6] MUSC does not dispute that the second and third questions on the verdict form were issues of fact.

its cause. The first case, *Maytag Corp. v. Clarkson*, 875 F. Supp. 324 (D.S.C. 1995), involved a single, factual issue for the jury to resolve: whether the counterclaim plaintiff agreed to release the counterclaim defendant from his obligations under a personal guaranty. *Id.* at 326. The factual issue was submitted to the jury, and the court characterized the verdict form as a special verdict, as it was asking the jury to determine an issue of fact. *Id.* The arguments on the record clearly elucidate why such a verdict form was not a general verdict, even though it could be inferred from the verdict who the prevailing party was: because it did not ask the jury to simply rule for one party or the other. *Id.* In this case, the subject verdict form could only have been a special verdict under the plain language of Rule 49 in light of the absence of a general verdict.

The next case, *United States v. Gonzales*, 841 F.3d 339 (5th Cir. 2016), reemphasizes that under Rule 49(b), one of the hallmarks of a general verdict accompanied by special interrogatories is the general verdict itself. In *Gonzales*, the trial court submitted a verdict form to the jury asking the jury to return a general verdict of guilty or not guilty for each count, in addition to special interrogatories for two of the counts. *Id.* at 344. The court described the historic role of special interrogatories and special verdicts and stated that a special verdict asks the jury to make specific factual findings in the absence of a general verdict, which the court described as "an up/down verdict on guilt." *Id.* at 346. The court further stated that in a Rule 49(b) general verdict accompanied by special interrogatories that the written questions *supplement and accompany* a general verdict. *Id.*

MUSC primarily relies on *Ramos v. Davis & Geck, Inc.*, 224 F.3d 30, 32-33 (1st Cir. 2000), to support that in this case the first question posited to the jury, as to whether it found MUSC published false and defamatory statements concerning the Binghams, was in substance identical to asking he jury whether it found for the Binghams or MUSC. In *Ramos*, the plaintiff brought a Law 100 claim against the defendant.[7] The trial court submitted a verdict form to the jury asking, "Do you find that the Defendant constructively discharged the Plaintiff Rafael Ramos without just cause because of his age in violation of Law 100?" *Id.* at 31. The court found that this was a general verdict and not a special verdict, in part because it was "fully adequate to support the judgment entered for Ramos on the Law 100 claim, and not a special verdict which lacked a finding on an essential issue." *Id.* at 32. Taken out of context, *Ramos* may appear to stand for the idea that a single factual question may adequately support a judgment as a general verdict.

However, when one looks to the elements of the Law 100 claim, it becomes obvious that the question submitted to the jury was sufficient for the trial court to ascertain that the jury had returned a general verdict for the plaintiff. The elements of Law 100 require that (1) the plaintiff prove his employer lacked just cause to take adverse action with regard to the plaintiff, (2) that the plaintiff was directly or constructively discharged, and (3) that the discharge was motivated by discriminatory animus due to age. *Alvarez-Fonseca*, 152 F.3d at 28. The question submitted to the jury asked the jury to answer yes or no to each element of the Law

[7] Law 100 is Puerto Rico's Anti-Discrimination Act. *Alvarez-Fonseca v. Pepsi Cola of Puerto Rico Bottling Co.*, 152 F.3d 17, 21 (1st Cir. 1998).

100 claim in the conglomerate, and in substance could be construed as a general verdict. This is clearly distinguishable from the subject verdict form in this case, which omitted elements of the defamation claim and the issue of proximate cause from the subject verdict form altogether.[8]

The cases that do seem to offer support to MUSC's argument that the subject verdict form was a general verdict accompanied by special interrogatories are based on a flawed premise, that the act of charging the jury is the touchstone of whether a verdict form asking specific questions of fact falls under the rubric of Rule 49(a) or Rule 49(b). *See Function Media, L.L.C. v. Google, Inc.*, 708 F.3d 1310, 1329-30 (Fed. Cir. 2013) (holding that a verdict form was a general verdict because the questions submitted to the jury required instruction on the law); *Christiansen v. Wright Med. Tech., Inc.*, 851 F.3d 1203, 1213 n.8 (11th Cir. 2017) (same); *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1519-22 (6th Cir. 1990) (same).[9] This flies directly in the face of the language of Rule 49(a), which provides that the trial court is permitted to give a general charge the jury, and ignores Rule 49(b)'s plain language requiring the submission of a general verdict *in addition* to specific factual questions to the

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[8] In its September 19, 2023 Order denying MUSC's post-trial motions, the Circuit Court found that "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", although the jury never made a factual finding on this issue on the verdict form. (Order, Sep. 19, 2023 at 19).

[9] Unlike here, in *Christiansen* the verdict form included questions on every element of the plaintiff's claims, and the trial court was clearly able to discern how the jury explicitly found on each element. *Christiansen*, 851 F.3d at 1206 n.3. In *Portage II*, the trial court submitted to the jury a verdict form asking it to decide the plaintiff and defendant's comparative fault, which necessarily included a general determination by the jury that the defendant was negligent. *Portage II*, 899 F.2d at 1519.

jury. *See Downs v. Gulf & W. Mfg. Co.*, 677 F. Supp. 661, 668 (D. Mass. 1987) ("[T]hat the interrogatories submitted to the jury . . . followed a general charge to the jury on the relevant legal rules, does not take them out of the purview of Rule 49 or, more exactly, of Rule 49(a).").

Numerous jurisdictions have implicitly found that the act of charging the jury with the law is not indicative of whether a verdict form is a Rule 49(b) general verdict accompanied by special interrogatories or a Rule 49(a) special verdict. *Kavanaugh v. Greenlee Tool Co.*, 944 F.2d 7, 8-11 (1st Cir. 1991); *Malley-Duff Assocs., Inc. v. Crown Life Ins. Co.*, 734 F.2d 133, 144-45 (3rd Cir. 1984); *Ladnier v. Murray*, 769 F.2d 195, 197-99 (4th Cir. 1985); *Mercer v. Long Mfg. N.C., Inc.*, 665 F.2d 61, 64 (5th Cir. 1982); *Alverez v. J. Ray McDermott & Co., Inc.*, 674 F.2d 1037, 1039 (5th Cir. 1982); *Guidry*, 598 F.2d at 404-08; *Bates v. Jean*, 745 F.2d 1146, 1148-50 (7th Cir. 1984); *Pierce v. S. Pac. Transp. Co.*, 823 F.2d 1366, 1370-71 (9th Cir. 1987); *Johnson v. Able Trucking Co., Inc.*, 412 F.3d 1138, 1142-43 (10th Cir. 2005); *Stewart v. Stevenson Servs., Inc. v. Pickard*, 749 F.2d 635, 644-45 (11th Cir. 1984); *Whitlock v. Jackson*, 754 F. Supp. 1394, 1396-97, 1400 (S.D. Ind. 1991); *Team Contractors, L.L.C. v. Waypoint Nola, L.L.C.*, Civil Action No. 16-1131, 2018 WL 4252553, at *1 (E.D. La. Sep. 6, 2018); *Richard's Paint and Body Shop, LLC v. BASF Corp.*, No. A-11-CA-560 AWA, 2012 WL 5399059, at *5-8 (W.D. Tex. Nov. 5, 2012).

B. The subject verdict form did not ask the jury to determine the number of occurrences, and the jury did not determine that there was only one occurrence.

MUSC alternatively argues that if the verdict form was a special verdict, the jury returned a finding of a single occurrence. MUSC bases this argument on the first question on the special verdict form, which asked whether the jury found that MUSC had made "*a* false and defamatory statement" concerning the Binghams. According to MUSC, this "tasked" the jury with deciding whether MUSC made one defamatory statement about the Binghams. Taking the question out of context and without knowing the elements of the defamation cause of action, it would be fair to assume that may have been the purpose of the question. However, the purpose of the question was not to ascertain how many occurrences of defamation were borne out by the evidence, but to determine if the first element of the defamation claim had been satisfied.

"To establish a defamation claim, a plaintiff must prove: (1) *a* false and defamatory statement was made . . . ." *West*, 396 S.C. at 7, 720 S.E.2d at 498 (emphasis added). This is exactly what the first question on the subject verdict form seeks to address. It does not ask the jury how many defamatory statements were made. It does not specifically ask if only a single defamatory statement was made. And it does not preclude a factual finding that more than one occurrence of defamation was supported by the record. On its face it only means that the jury found there was sufficient evidence supporting that at least one defamatory statement had been made by MUSC sufficient to satisfy the first element of the defamation claim.

Further, even if there was only one defamatory statement (for example, "the Binghams cheated on their Block 12 examination"), the verdict form does not

eliminate the possibility that a reasonable juror could find that multiple actionable occurrences of that statement were supported by the record. MUSC's argument conflates the concept of "a defamatory statement", which is cabined to and concerned with the language of the defamatory statement, with the concept of "occurrences", which instead involves the number of times a defamatory statement was republished. Case law is clear that a defendant may be independently liable for multiple republications of the same defamatory statement. 20 S.C. Jur. *Libel and Slander* § 49 ("As a general rule, each communication of **a defamatory statement** to a third person constitutes a new publication, separate and apart from the original publication, and potentially gives rise to a new cause of action.").

MUSC asserts the Binghams are asking the Court to speculate about what the jury actually found to be defamatory. The Court does not need to speculate at all for several reasons. The jury was never asked to determine how many occurrences of defamatory statements were presented by the evidence, nor was it asked to determine what all of those defamatory statements would be. It was only asked to determine if there was at least one defamatory statement supported by the evidence. Since special findings on the factual issues of occurrences, which specific statements were defamatory, and the amount of damages per defamation were omitted from the special verdict form, the jury never made such findings, and Rule 49(a) permitted the Circuit Court to make them instead in accord with the remainder of the verdict. And in the event that the Circuit Court declines to make such a determination, as has occurred in this instance, by entering judgment it is deemed by operation of law to

have made findings in accord with the remainder of the verdict. Therefore, it is for the Circuit Court, and not this Court or the jury, to determine the number of occurrences of defamatory statements, leaving nothing to this Court's speculation.

IV. **The Circuit Court's February 7, 2023 Form 4 Order was a final judgment in favor of the Binghams because its language explicitly and unambiguously indicated that it ended the case.**

By entering its February 7, 2023 Form 4 Order, under Rule 49(a) the Circuit Court is considered to have made an implicit finding that there were at least three occurrences sufficient to support the jury's determination of damages. MUSC states that the Form 4 Order was not a final judgment and that it does not contain any of the indicia of a judgment entered on a jury verdict. To the contrary, the Order states that it is a "**JUDGMENT IN A CIVIL CASE**", that the verdict was in favor of the Binghams for $750,000 each, and most importantly, that the Form 4 Order ended the case:

ORDER INFORMATION

This order ☑ ends ☐ does not end the case. ☐ See Page 2 for additional information.

(Order, Feb. 7, 2023). The Court entered this Order after MUSC's post-trial motions, the Binghams' motion to determine the number of occurrences, and all supporting memoranda had been filed, and after the motions were heard by the Circuit Court on February 1, 2023. Because the box indicating that the Order ended the case has been checked, and the order indicates that it is a separate, standalone "Statement of Judgment", the Order clearly meets the requirements of a final judgment under the plain language of the Rules of Civil Procedure.

"'Final judgment' is a term of art referring to the disposition of all the issues in the case." *Doe v. Howe*, 362 S.C. 212, 216, 607 S.E.2d 354, 356 (Ct. App. 2004). A judgment is "any decree or order **which dismisses the action as to any party** . . . ." Rule 54(a), SCRCP (emphasis added). "A judgment is the final determination of an action **and thus has the effect of terminating the litigation**." 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2651 (3d ed. 1998) (emphasis added). Courts should not look beyond the filed document to determine the trial court's intentions and whether a final judgment exists. *Id.* § 2652. All that is required of judgment under Rule 54(a) is that the language of the order sets out the amount of the judgment, and that it be clear that the judgment ends the case. *Id.*

A final judgment is any order that signifies the end of litigation, and its meaning depends entirely on what the order says, so the judgment must be construed as it was written. *Dinunzio v. Apfel*, 101 F. Supp. 2d 1028, 1030-31 (N.D. Ill. June 16, 2000). When interpreting a text's meaning, the initial analysis is confined to the four corners of the document. *See Van Dyke v. Navigator Grp.*, 668 S.W.3d 353, 361 (Tex. 2023).

> Our principal difficulty with the district court's approach is that it goes behind the language of the judgment. Like any proper judgment, the decree entered in this case omits reasons and legal conclusions. It says who is liable for how much, then stops. The meaning of the judgment depends on what it says rather than on what is in the complaint or what the parties (or judge) intended.

Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co., 68 F.3d 1016, 1021 (7th Cir. 1995).

By stating that the Form 4 Order ends the case, the Order clearly and unequivocally does just that: it disposes of all pending motions and any other matters related to the verdict by ending the case as to all of the parties. The language in the Order is unambiguous. The Order states that a verdict in favor of the Binghams was reached, and it provides an exact damages award for each Plaintiff. There was no further amount of relief to be determined. The Order does not set forth that any further action was necessary to settle and determine the entire controversy, and it does not indicate that a formal order would be forthcoming. The Order therefore contains all the indicia of a final judgment. *See* Rule 54(a), SCRCP (stating that a judgment dismisses the action as to any party and that it does not have to contain a recital of the pleadings or the record of prior proceedings); *Hope v. U.S.*, 43 F.3d 1140, 1142 (7th Cir. 1994) (stating that a filed order is a final judgment where it is self-contained and complete, sets forth the relief to which the prevailing party is entitled, does not incorporate another document or other legal reasoning, and otherwise unambiguously communicates the district court's final disposition of the proceedings). The judgment is set forth on its own, separate document (the Form 4 Order itself) and was filed and docketed by the Court. *See* Rule 58(a), SCRCP (stating that a final judgment is effective when set forth on a separate document and entered in the record); *Cardinal Health 110, Inc. v. Cyrus Pharm., LLC*, 560 F.3d 894, 902 (8th Cir. 2009) (stating that entry of judgment occurs on the date on which the judgment is set out in a separate document rather than the date on which the docket entry is made).

The implications of the Order clearly affect the Court's subject matter jurisdiction over the parties' appeals. Rule 58(a), SCRCP, states that upon a special verdict, the circuit court is to promptly prepare the form of the judgment, and have it entered, upon which the judgment is effective. None of the parties ever filed a Rule 59 motion concerning the Form 4 Order, nor was it appealed within 30 days.[10] Therefore, when the Order was filed, since the Circuit Court had declined to make a finding on the number of occurrences, such a finding was made under operation of Rule 49(a). Since the Order has not been appealed, and no Rule 59 motion was filed, such a finding is not reviewable, could not have been reconsidered by the Circuit Court, and cannot be reversed by this Court.[11]

CONCLUSION

For the foregoing reasons and those set forth in Appellants-Respondents' Brief as Appellants, the Court should reverse or vacate the Circuit Court's May 5 and May 16 Orders reducing the jury's verdict.

[SIGNATURE PAGE TO FOLLOW]

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[10] If the February 7, 2023 Order was a Rule 54(a) final entry of judgment, it by necessity resolved the parties' motions in favor of the Binghams and against MUSC, and the Circuit Court's subsequent Orders would have been moot. Therefore, the Court would not be able to take jurisdiction over the Appeal and Cross-appeal. *See Curtis v. State*, 345 S.C. 557, 567-68, 549 S.E.2d 591, 596 (2001) (stating that an appellate court can only take jurisdiction over moot issues under three general exceptions).

[11] Consequently, the Circuit Court's May 5, 2023 Order denying Plaintiffs' Motion to Determine the Number of Occurrences and reducing the jury verdict had no effect, as the Circuit Court lost jurisdiction to *sua sponte* alter its February 7, 2023 Form 4 Order within 10 days. *See* Rule 59, SCRCP.

Respectfully submitted,

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