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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Judicial Circuit

The Honorable Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2023-000952

Kelly Bingham and Kayla Bingham .... Appellants-Respondents,

v.

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

RESPONDENT-APPELLANT'S INITIAL REPLY BRIEF AS APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ARGUMENT 17

A. Plaintiffs Have Not Refuted MUSC's Arguments Regarding the Statements of Drs. Hazen-Martin and Kasman 1

1. Plaintiffs Have Not Refuted MUSC's Contention That These Statements Did Not Have a Defamatory Meaning. 1

2. Plaintiffs Have Not Presented Any Evidence that Drs. Hazen-Martin or Kasman Exceeded or Abused a Qualified Privilege 3

3. In the Alternative, Absolute Privilege Bars Plaintiffs' Claims Concerning the Statements of Drs. Hazen-Martin and Kasman 7

4. Plaintiffs' Claims Regarding the Written Correspondence of Drs. Hazen-Martin and Kasman Fail Under the Defense of Truth 9

B. Plaintiffs Have Not Refuted MUSC's Argument That the Trial Court Should Have Granted a Directed Verdict or MUSC's Post-Trial Motions as to the Alleged "Leak" of Confidential Information 11

1. Plaintiffs Have Not Refuted That Their Complaint Does Not Allege Defamatory "Leaks" 11

2. Plaintiffs Have Not Refuted MUSC's Argument That the Claimed "Leaks" Were Not Attributable to MUSC 12

a. MUSC Has Not Waived This Argument 13

b. Plaintiffs Presented No Evidence That Any MUSC Employee "Leaked" Anything About Them 15

3. The Court Must Reject Plaintiffs' Argument That Honor Council Members Would Be Acting in the Interests of MUSC in Leaking Information 17

4. Plaintiffs Response Does Not Refute MUSC's Fundamental Argument That—Even Assuming Plaintiffs' Theory About a "Leak" Is True—There Can Be No Liability Because Any Honor Council Member's Authority Had Ended 19

C. Plaintiffs Have Not Disputed MUSC's Contention That Their "Twinning" Theory Was Wholly Without Evidentiary Support................20

D. The Court Should Have Granted MUSC's Post-Trial Motions Because Plaintiffs Provided the Jury Patently Incorrect and Misleading Information 21

CONCLUSION...23

TABLE OF AUTHORITIES

CASES

Abofreka v. Alston Tobacco Co.,
288 S.C. 122, 341 S.E.2d 622 (1986) 5

Armstrong v. Food Lion, Inc.,
371 S.C. 271, 639 S.E.2d 50 (2006) 14

Cruce v. Berkeley Cty. Sch. Dist.,
896 S.E.2d 765 (2024) 2

Dial v. Niggel Assocs.,
333 S.C. 253, 509 S.E.2d 269 (1998) 21

Eubanks v. Smith,
292 S.C. 57, 354 S.E.2d 898 (1987) 8

Faile v. South Carolina Dep't of Juvenile Justice,
350 S.C. 315, 566 S.E.2d 536 (2002) 14

Fountain v. First Reliance Bank,
398 S.C. 434, 730 S.E.2d 305 (2012) 5

Hainer v. American Med. Int'l,
328 S.C. 128, 492 S.E.2d 103 (1997) 9

Herron v. Century BMW,
395 S.C. 461, 719 S.E.2d 640 (2011) 21

Kunst v. Loree,
424 S.C. 24, 817 S.E.2d 295 (Ct. App. 2018)....................5

Lane v. Modern Music, Inc.,
244 S.C. 299, 136 S.E.2d 713 (1964) 14

Moses v. State,
898 S.E.2d 174 (Ct. App. 2024)....................21

Murphy v. Jefferson Pilot Comm. Co.,
364 S.C. 453, 613 S.E.2d 808 (Ct. App. 2005).................... 17-18

State v. Morales,
439 S.C. 600, 889 S.E.2d 551 (2023) 21

Swinton Creek Nursery v. Edisto Farm Credit,
334 S.C. 469, 514 S.E.2d 126 (1999) 4-5

STATUTES/RULES/REGULATIONS

S.C. Code § 15-78-20 13

S.C. Code § 15-78-30 13

S.C. Code § 15-78-60 .... 13, 14, 15

S.C. Code § 15-78-70 .... 13, 14

S.C. Code Ann. § 40-33-936 9

ARGUMENTS

A. Plaintiffs Have Not Refuted MUSC's Arguments Regarding the Statements of Drs. Hazen-Martin and Kasman.

1. Plaintiffs Have Not Refuted MUSC's Contention That These Statements Did Not Have a Defamatory Meaning.

As MUSC has argued in this appeal, the trial court erred in denying its motions for directed verdict and judgment notwithstanding the verdict, because the correspondence sent by Drs. Hazen-Martin and Kasman were not susceptible of a defamatory meaning.

Dr. Hazen-Martin's email does not make any accusations of cheating or dishonesty. (*See* Def. Tr. Ex. 5). It merely communicates her observations that: (a) Plaintiffs were moving lockstep through the examination; and (b) they were giving similar incorrect answers. Plaintiffs infer from these statements that "it logically follows that the most rational explanation for such behavior that was being conveyed to the reader would be that the Binghams were collaborating on their examination." (*See* Pl.'s Resp. Br., at 18). However, nothing in her correspondence states that Plaintiffs cheated or engaged in any misconduct; in fact, it does not even name them. She simply recites her two observations. At no time does Dr. Hazen-Martin reach any conclusions or characterize Plaintiffs' actions as dishonest.

Plaintiffs argue that Dr. Kasman's correspondence with the president of the Honor Council (*see* Exs. 6-7) was defamatory because: (a) it includes the word "cheating" and (b) it says that Plaintiffs "were observed to be signaling each other and passing notes via scratch paper on the desk between them." (*See* Pl.'s Resp. Br., at 18-19). They conclude that this "suggest[s] that the Binghams were engaged in academic misconduct, which would impugn their fitness as medical students, and as such are defamatory." (*See id* at 19). Again, much of Dr. Kasman's correspondence was merely repeating facts that were observed by a proctor. Moreover, the word "cheating" could not reasonably have a defamatory meaning, as the correspondence was clear that Dr. Kasman was reporting a "***possible*** case of academic dishonesty" and stated that the

cheating that was "suspected." A reasonable person reading this correspondence would not, and could not, infer a defamatory meaning.

In support of their argument that the emails of Drs. Hazen-Martin and Kasman were defamatory, Plaintiffs cite *Cruce v. Berkeley Cty. Sch. Dist.*, 896 S.E.2d 765 (2024). Plaintiffs' reliance on *Cruce* is misplaced. In that case, an athletic trainer sent an email to 45 people (including administrators, employees, and even volunteer coaches) stating that certain student athlete files "could" be missing, creating a potential "liability" for the school district. The Supreme Court held that, in light of the facts of that case, there was potential defamatory meaning of this email:

> We conclude a reasonable person who received Stevens' email could read it as suggesting Cruce's filing and management skills were incompetent. In the email, Stevens states that essential information from the student athlete files "could" be missing, posing a potential "liability" for the District. . . . A rational reader of Stevens' email could conclude that it was communicating information suggesting Cruce was incompetent and unfit to perform the administrative duties of his position. [Citation omitted.] The "liability" buzzword added a suggestion of not just incompetence but illegality.

See id., 896 S.E.2d at 772-73. In this case, however, Drs. Hazen-Martin and Kasman did not send their emails to 45 recipients (including *volunteer coaches*). These reports were non-conclusory communications made through the proper channels in connection with the Honor Council process. It is not reasonable to read a defamatory meaning into Dr. Hazen-Martin's and Dr. Kasman's statements under the circumstances.

For the foregoing reasons, there is no evidence that the correspondence from Dr. Hazen-Martin or Dr. Kasman were susceptible to a defamatory meaning.

2. **Plaintiffs Have Not Presented Any Evidence that Drs. Hazen-Martin or Kasman Exceeded or Abused a Qualified Privilege.**

Once a qualified privilege is shown to apply—the trial judge concluded that it did, as a matter of law, and Plaintiffs do not argue it does not apply—"the burden is on the plaintiff to show actual malice[[1]] or that the scope of the privilege has been exceeded." *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999). "The privilege is abused and lost, leaving the speaker unprotected, when either of following situations occur: '(1) a statement [is] made in good faith that goes beyond the scope of what is reasonable under the duties and interests involved or (2) a statement [is] made in reckless disregard of the victim's rights.'" *See Kunst v. Loree*, 424 S.C. 24, 43, 817 S.E.2d 295, 305 (Ct. App. 2018) (*quoting Fountain v. First Reliance Bank*, 398 S.C. 434, 444, 730 S.E.2d 305, 310 (2012)). Plaintiffs did not present any evidence to the jury showing that Dr. Hazen-Martin or Kasman exceeded their qualified privilege.

Plaintiffs argue that Dr. Hazen-Martin is not protected by the qualified privilege because her email was "without sufficient supporting evidence" and reached conclusions that "exceeded her stated job duties." (*See* Pls.' Resp. Br., at 21-22). As to Dr. Kasman, Plaintiffs primarily argue that she exceeded or abused the qualified privilege because she wrote that Plaintiffs engaged in "the cheating." In other words, Plaintiffs argue that Dr. Hazen-Martin and Dr. Kasman said *too much* in their emails, which were privileged as a matter of law. This argument is contrary to the evidence.

The face of the subject emails makes clear that they are limited to reporting information that was observed or reported from the examination. This is precisely the sort of information that one would expect to find in emails discussing potential academic dishonesty. The qualified privilege does not require that the reports of Drs. Hazen-Martin and Kasman be factually correct, only that they be made in good faith for a proper purpose. There is no evidence that either Dr. Hazen-Martin or Dr. Kasman included any irrelevant information about Plaintiffs or that they

[1] Plaintiffs do not argue that MUSC acted with actual malice, as this would preclude their claims under the Tort Claims Act. *See* S.C. Code § 15-78-60(17).

had some desire to harm Plaintiffs. Rather, they were making a report that Judge Curtis concluded was qualifiedly privileged because it was made to potentially initiate Honor Council proceedings. There is no evidence that Dr. Hazen-Martin or Dr. Kasman took any action to encourage or cause the Honor Council to take action against Plaintiffs.

Moreover, there is no evidence that Dr. Hazen-Martin, Dr. Kasman, or any MUSC agent ever sent these emails to anyone outside of MUSC or who did not have a valid reason to receive them in connection with Honor Council proceedings. There is no evidence that Dr. Hazen-Martin or Dr. Kasman sent copies of these emails to their friends or family. There is no evidence that Dr. Hazen-Martin or Dr. Kasman sent them to anyone who was not in some way involved in the Honor Council process.

Simply put, there is no evidence that Dr. Hazen-Martin or Dr. Kasman (or anyone else) did anything to exceed or abuse the qualified privilege. The South Carolina Supreme Court case of *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 514 S.E.2d 126 (1999), is instructive. In *Swinton Creek*, the plaintiff defaulted on a loan from defendant credit corporation to expand a business. Plaintiff learned that the defendant made comments in a letter to a potential buyer of the business regarding plaintiff's financial duress: "This is extremely important since the projected income for the nursery is not supported by a successful earnings trend. In fact, the operation you are purchasing has been under financial duress." The Supreme Court concluded that there was evidence that might support a jury finding that defendant exceeded the scope of its qualified privilege:

> It is questionable whether a specific comment about Swinton Creek's financial status was required to protect any interest or duty covered by the privilege. EFC contends it wrote the letter for the sole purpose of guiding Buyer into a successful loan application. Yet, Buyer was only seeking to buy some of Owner's assets, not the entire Swinton Creek operation. Moreover, if EFC wanted to convey to Buyer the difficulties of running a nursery in a small town, it could have simply made a general statement without specifically referring to Owner. Thus, even if EFC acted in good faith to assist Buyer, the jury might conclude that the "financial duress" comment was unnecessarily defamatory under these circumstances.

See id., 334 S.C. at 486, 514 S.E.2d at 135. On the other hand, in this case any information in the emails from Dr. Hazen-Martin and Dr. Kasman related directly to the issue at hand: whether there were testing irregularities that might require scrutiny. There is no statement about the general character of Plaintiffs (they were not named) and no suggestion that they actually had violated the Honor Code.

Subsequent to *Swinton Creek*, the South Carolina Supreme Court again considered the question of abuse of the qualified privilege, stating:

> Thus, our concern in *Swinton Creek* was that evidence existed tending to show that the scope of Huggins' statement went beyond the circumstances surrounding Collins' involvement in Swinton Creek Nursery. The same is not true in this case. The store's management was an essential part of the analysis for the loan request, and Fountain's role as manager therefore was a valid consideration for First Reliance. [T]here is nothing here indicating that Ewart informing Pennell of his concern about Fountain being involved in the business went beyond the scope of the privilege. ***In fact, this statement went straight to the heart of the loan request***. While abuse of the privilege ordinarily is a question of fact for the jury, it is for the court to determine in the first instance whether there are facts demonstrating abuse. Here, the circuit court properly found there is no evidence the privilege was abused by going beyond its scope.

See Fountain v. First Reliance Bank, 398 S.C. 434, 446, 730 S.E.2d 305, 311 (2012) (emphasis added); *Kunst v. Loree*, 424 S.C. 24, 44, 817 S.E.2d 295, 305 (Ct. App. 2018) ("[E]vidence demonstrates Loree's statements to subcontractors—that Kunst took money from other clients—went beyond the scope of the subcontractors' involvement in the Gaby project.").

As in *Fountain,* in this case, the emails of Drs. Hazen-Martin and Kasman only included information that "went straight to the heart" of the matter: *i.e.,* whether there existed circumstances that might require the Honor Council's consideration. They did not say anything completely extraneous or irrelevant to MUSC's clear interest in ensuring academic integrity. *See Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 126, 341 S.E.2d 622, 625 (1986) ("Appellants stated the memorandum was prompted by concerns that Abrofreka altered claims to bring them within the policy coverage. Yet the memorandum asserted he overtreated his patients and

charged unreasonably high fees. The defamatory statement clearly exceeded the purpose for which it was written.").

In light of the foregoing, Plaintiffs presented no evidence that Drs. Hazen-Martin and Kasman did anything to abuse or exceed the scope of the qualified privilege. Plaintiffs present no evidence that either Dr. Hazen-Martin or Dr. Kasman disclosed their correspondence to anyone outside of those at MUSC who had a need to know in connection with the Honor Council process or included any gratuitous information.

Plaintiffs' argument that MUSC abused or exceeded its qualified immunity threatens to prevent any college faculty member from ever reporting a potential academic issue. The reports at issue were not gratuitous. They were not written in an emotionally charged manner. They are reports of observations and concerns. They do not suggest that Plaintiffs should be found guilty of cheating. Even if they were incorrect, the reports of Drs. Hazen-Martin and Kasman were proper, professional reports of observations that could constitute academic dishonesty. One can scarcely imagine a more anodyne way in which Drs. Hazen-Martin and Kasman could have reported these issues to the Honor Council. Any report to the Honor Council carries with it an implication that there was possibly academic dishonesty; the qualified privilege allows MUSC to make these reports without fear of liability, so long as it does not do anything extreme that would take it outside of the privilege. Under Plaintiffs' view of the qualified privilege, any faculty member reporting a potential issue of academic dishonesty would have to traverse a minefield of possible defamation liability to compose the perfect report. That is not consistent with the concepts underlying the qualified privilege.

Plaintiffs also argue that Dr. Hazen-Martin exceeded the qualified privilege because her "stated job duties" observing the examination on that day were not specifically to monitor for cheating. Irrespective of the precise scope of Dr. Hazen-Martin's job responsibilities on the date of the exam, all MUSC faculty are required to report any suspected violation of the Honor Code. Specifically, the MUSC Honor Code mandates that "faculty who believe that a breach of the Honor Code has occurred *are obligated to report the suspected breach.*" (*See* Def. Ex. 15, at 3

(emphasis added)). As a result, even if Dr. Hazen-Martin's primary purpose for monitoring the exam was to detect any technological issues, she was required to report any suspected academic issues. As a result, she was acting within the scope of the qualified privileged when she reported the potential Honor Code violation.

For the foregoing reasons, the Court should reverse the trial court's denial of MUSC's motions for directed verdict and to alter or amend because there is no evidence that the jury could rely upon to find that MUSC exceeded its qualified privilege.

3. In the Alternative, Absolute Privilege Bars Plaintiffs' Claims Concerning the Statements of Drs. Hazen-Martin and Kasman.

As MUSC has argued throughout this case, the emails from Dr. Hazen-Martin and Dr. Kasman should be protected by an absolute privilege. As a public government medical school, there is a strong public interest in ensuring that MUSC faculty has the freedom to report possible academic dishonesty. Plaintiffs' parsing of the emails—which were not written with the expectation that they would be placed under a microscope— in their Brief of Respondents argument on qualified privilege emphasizes why an absolute privilege is necessary. The trial court found, as a matter of law, that a qualified privilege applies to communications by medical school faculty regarding possible Honor Code violations. This is so because there is a strong interest in allowing open communication about those topics. However, in an effort to show that the qualified privilege has been exceeded or abused, Plaintiffs scrutinize every jot and tittle of these emails searching for words and phrases that they can use to argue for an inference of an abuse of the privilege. Plaintiffs' hyper-analysis of the emails from Drs. Hazen-Martin and Kasman would chill any faculty member from reporting possible academic dishonesty in the future, for fear that the use of the wrong words might subject her to liability for defamation.

Plaintiffs argue that an absolute privilege does not apply because "[n]o . . . policy interests are at play in an Honor Council proceeding." (*See* Pls.' Resp. Br., at 24). Respectfully, Plaintiffs' argument is inaccurate. In fact, one could scarcely imagine more consequential public policy interests than those at issue here. MUSC is entrusted with training the next generation of

medical professionals in South Carolina. As Dr. Hazen-Martin testified, it was important that MUSC's curriculum be challenging because its students "will soon be solely responsible for patient treatment. The MD is the leader of the team in medicine." (*See* Tr. Transc., at 448:23-25). Even Plaintiff Kayla Bingham testified at trial about the need to "ensure that whenever you graduate from medical school, you're prepared to take care of people. You literally have people's lives in your hands." (*See* Tr. Transc., at 314:15-17). If the public has an interest in open communication in the litigation of private disputes in courts, it certainly has an equally strong interest in ensuring that graduates of a state government medical school are properly trained and will be competent doctors. Physicians, of course, tend to see people when they are at their most vulnerable and cannot care for themselves; the public is best served by not placing a muzzle on medical school faculty who suspect possible academic dishonesty.

To support their argument that "binding precedent indicates that the Court should not extend an absolute privilege to the statements at issue in this case," Plaintiffs cite *Eubanks v. Smith*, 292 S.C. 57, 354 S.E.2d 898 (1987). (*See* Pls.' Resp. Br., at 25). Contrary to Plaintiffs' representation to the Court, *Eubanks* does not hold that "absolute privilege does not apply to statements made during a criminal investigation that eventually culminated in a State Ethics Commission hearing." (*See id.*). Rather, in *Eubanks,* the plaintiffs did not assert defamation claims based on statements given within the context of an investigation (such as a complaint or an interview). Rather, the libel in *Eubanks* was contained in "several ***press releases*** during the course of the investigations of the Building Department." *See Eubanks*, 292 S.C. at 63, 354 S.E.2d at 901 (emphasis added). The defamatory statements were not found in complaints or statements given directly in connection with the investigation, but in a broad publication to the media (completely outside of that process). There is not a shred of evidence that Drs. Hazen-Martin or Kasman *ever* released their emails to the media or made a press release—or sent them to anyone who did not have a legitimate reason to have them. *Eubanks* does not support Plaintiffs' argument that absolute privilege does not apply.

Plaintiffs also rely on *Hainer v. American Med. Int'l*, 328 S.C. 128, 492 S.E.2d 103 (1997), to support their conclusion that absolute privilege does not apply outside of literal judicial proceedings. However, *Hainer* is inapposite because it involved a specific statutory privilege that explicitly qualified and limited the privilege. *See id.*, 328 S.C. at 133, 492 S.E.2d at 105 ("In addressing the abuse of process claim, the Court of Appeals focused on the statutory privilege contained in S.C. Code Ann. § 40-33-936 (1986), which provides that a communication to the Nursing Board is privileged 'except upon proof that such communication was made with malice.'"). The statute in *Hainer* created a privilege—applicable to very specific circumstances—that was *expressly qualified*, rather than absolute. The statute was the product of the General Assembly's consideration and weighing of competing policy concerns in the context of the Nursing Board. The legislature has not engaged in such weighing of the competing interests in connection with MUSC (or any other academic) Honor Council proceedings. The statute at issue in *Hainer* was limited to the Nursing Board; Plaintiffs cannot extrapolate the statute's limited creation of a *qualified* privilege under such circumstances as limiting all quasi-judicial proceedings to qualified privilege. To the contrary, the fact that the General Assembly chose to limit the privilege in connection with Nursing Board proceedings to a *qualified* privilege suggests that it did *not* intend to do so in other situations.

In light of the foregoing, it is apparent that the Court should find that an absolute privilege applies to the communications of Dr. Hazen-Martin and Dr. Kasman at issue in this case.

4. Plaintiffs' Claims Regarding the Written Correspondence of Drs. Hazen-Martin and Kasman Fail Under the Defense of Truth.

MUSC's Brief of Appellant explained in detail why the evidence shows only that the emails from Dr. Hazen-Martin and Dr. Kasman were true on their face.

Plaintiffs have still not cited any evidence to dispute that Dr. Hazen-Martin observed them moving in "lockstep." Dr. Hazen Martin testified that she saw Plaintiffs "always in adjacent rows and they had most often the same number of questions completed and the same

percentage. And when I moved the cursor to their names, it indicated that they were on the same number, the same question number, and they proceeded from one." (*See* Tr. Transc., at 462:12-23). They present no evidence to dispute her observation that they were giving the same wrong answers. In fact, the undisputed evidence shows that Plaintiffs remarkably gave the same answer (right or wrong) to 296 of 307 questions on the subject exam. (*See* Def.'s Tr. Exs. 7-10 & 21). More amazingly, they gave the same *wrong* answer 54 times. (*See id.*). Plaintiffs cannot direct the Court to any evidence disputing that they were giving many of the same wrong answers.

With regard to Dr. Kasman's email, Plaintiffs focus on the specific words "signaling," "passing notes," and "cheating." However, there is no evidence disputing what she said. Plaintiffs have not presented evidence to refute Michele Friesinger's testimony that she observed them nodding at each other or writing notes. (*See* Tr. Transc., at 615:19-618:15). While the proctor's notes may not state verbatim that they were "signaling" each other or "passing notes," it plainly describes appearance of that conduct. Moreover, any reference to cheating in Dr. Kasman's email is not a statement of fact; the only statement of fact is that, to Dr. Kasman, there was behavior that appeared to be consistent with possible violation of the Honor Code. The record is clear that what Dr. Kasman wrote was true.

Plaintiffs argue that the record contains an "overwhelming amount of evidence" supporting a finding that the correspondence of Drs. Hazen-Martin and Kasman were untrue (*see* Pls.' Resp. Br., at 28-33:

- Plaintiffs' testimony that they did not cheat and "reasonable explanations for their test results, scratch paper notes, and Dr. Hazen-Martin's and Friesinger's observations."
- Historical test data demonstrating that Plaintiffs "performed similarly on examinations their entire lives."
- The testimony of Plaintiffs' expert that it "would be entirely expected for identical twins to perform as the Binghams had done on their examinations."
- Plaintiffs were exceptional students and had never been accused of dishonesty or misconduct over the entirety of their academic careers.

However, none of this evidence disproves the limited statements in the emails sent by Dr. Hazen-Martin and Dr. Kasman. While they may deny cheating and have reasonable explanations for Ms. Friesinger's observations, this does not dispute any of the observations made about them. Plaintiffs have not presented evidence contrary to Dr. Hazen-Martin's statement that they were moving through questions at the same pace and getting the same wrong answers. They have not proffered any evidence that they were not observed nodding or writing notes and moving their papers, as referenced in Dr. Kasman's email.

For the foregoing reasons, the trial judge erred in denying MUSC's motions for directed verdict and post-trial motions because the alleged defamatory statements of Drs. Hazen-Martin and Kasman were indisputably true.

B. Plaintiffs Have Not Refuted MUSC's Argument That the Trial Court Should Have Granted a Directed Verdict or MUSC's Post-Trial Motions as to the Alleged "Leak" of Confidential Information.[2]

1. Plaintiffs Have Not Refuted That Their Complaint Does Not Allege Defamatory "Leaks."

As MUSC has argued since before trial, Plaintiffs' Complaint limits its allegations of defamatory statements to the emails of Drs. Hazen-Martin and Kasman. They did not plead any other defamatory statements. Plaintiffs argue that their Complaint plainly alleges that "that MUSC was liable for the publication of accusations of cheating by individuals (including its agents) *other than* Dr. Hazen-Martin and Dr. Kasman." (*See* Pls.' Resp. Br., at 35). However, as MUSC has previously asserted, the *only* defamatory statements referenced in Plaintiffs' threadbare 13-paragraph Complaint are those by Drs. Hazen-Martin and Kasman in their emails.

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[2] Plaintiffs argue that "the jury's decision could have been based on a finding that only the statements of Dr. Hazen-Martin, Dr. Kasman, or an unknown member of the Honor Council, or some combination thereof, were false and defamatory." (*See* Pls.' Resp. Br., at 33). MUSC does not disagree with this statement. In fact, this is the very reason Plaintiffs' own appeal is without merit. Because we have no way of knowing what the jury decided, it is completely improper for Plaintiffs to argue that the trial court should have interpreted the verdict to be based on multiple occurrences under the Tort Claims Act.

The Complaint alleges that ***<u>those particular statements</u>*** were repeated in the newspaper and by students, but does not allege that any agent of MUSC impermissibly "leaked" that information. (*See* Pl.'s Compl. ¶¶ 9-13). The Complaint does not allege that MUSC impermissibly disclosed any other information. Plaintiffs do not allege they were defamed concerning their use of political influence to evade their conviction. The Complaint does *not* allege that members of the Honor Council themselves made defamatory statements. The Complaint does not reference any *defamatory* leak by an MUSC employee acting within the scope of official duties.

MUSC litigated this case and conducted discovery based on the allegations of the Complaint, which only referenced the statements of Drs. Hazen-Martin and Kasman. Obviously, had MUSC known that Plaintiffs intended to argue at trial that they were defamed by members of the Honor Council, MUSC would have taken a significantly different tact in discovery and other aspects of the litigation.

For the foregoing reasons, the trial court erred in not directing a verdict in favor of MUSC with regard to claims of defamatory leaks.

2. <u>Plaintiffs Have Not Refuted MUSC's Argument That the Claimed "Leaks" Were Not Attributable to MUSC.</u>

With regard to their claims that some agent of MUSC defamed them by disclosing information regarding their Honor Council proceeding, Plaintiffs claims fail because—assuming that such a leak occurred—such a "leak" could not result in the imposition of liability on MUSC. If someone affiliated with the Honor Council—whether a member of the Council or a member of the faculty—disclosed *anything* about Plaintiffs to the media, other students, or anyone else, they were acting, by definition, outside of the scope of their authority. The act of disclosing such information could not have been within the scope of such unidentified person's official duties for MUSC.

a. **MUSC Has Not Waived This Argument.**

Plaintiffs argue that MUSC did not properly preserve this argument because "MUSC has not argued in its Brief that the Circuit Court erred in finding that MUSC's scope of official duties exception defense[[3]] had been waived." (*See* Pls.' Init. Resp. Br., at 43). This argument is misplaced, as the requirement of proof of conduct sufficient to support *respondeat superior*—whether under the Tort Claims Act or the common law—is not merely an affirmative defense, but is an element of Plaintiffs' case-in-chief. Irrespective of the allegations of MUSC's Answer, Plaintiff is obligated under the common law and the Tort Claims Act to prove that the law supports the imputation of conduct to MUSC.

The South Carolina Tort Claims Act "is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents" and "constitutes the exclusive remedy for any tort committed by an employee of a governmental entity." *See* S.C. Code §§ 15-78-20(b) & 15-78-70(a). Under the Act, an employee is an "officer, employee, agent, or court appointed representative of the State or its political subdivisions, including elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of a governmental entity *in the scope of official duty* including, but not limited to, technical experts whether with or without compensation." *See* S.C. Code § 15-78-30(c) (emphasis added). For a government employee to be acting within the scope of his official duty or employment, the employee must be (1) "acting in and about the official business of the government entity," and (2) "performing official duties." *See* S.C. Code § 15-78-30(i). This is not an affirmative defense. It is a mandatory element of Plaintiffs' claim that their claims are within the waiver of sovereign immunity.

[3] Plaintiffs reference S.C. Code § 15-78-60(17), which states that a governmental entity is not liable for "employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." However, as discussed herein, the requirement of conduct within the scope of official duties is not merely an affirmative defense. It is an element of Plaintiffs' claims that they must prove.

S.C. Code Ann. § 15-78-70(c) specifically provides that "a person, when bringing an action against a governmental entity under the provisions of this chapter shall name as a party defendant only the agency or political subdivision *for which the employee was acting*." S.C. Code § 15-78-70(c) (emphasis added). In *Faile v. South Carolina Department of Juvenile Justice*, 350 S.C. 315, 566 S.E.2d 536, 543 (2002), the Supreme Court explained that "only the entity employing the employee whose act gives rise to the claim may be sued."

In addition to the requirements of the Tort Claims Act, Plaintiffs also carry the burden under the common law of proving that MUSC should be held liable for the actions of its agents under a *respondeat superior* theory. *See Armstrong v. Food Lion, Inc.*, 371 S.C. 271, 277 n.2, 639 S.E.2d 50, 53 (2006) ("[T]his argument ignores the fact that *petitioners have the burden of proving* the employees were about Food Lion's business and acting within the scope of their employment at the time of the attack.") (emphasis added); *Lane v. Modern Music, Inc.*, 244 S.C. 299, 304-05, 136 S.E.2d 713, 716 (1964) ("A plaintiff seeking recovery from the master for injuries must establish that the relationship existed at the time of the injuries, and also that the servant was then about his master's business and acting within the scope of his employment.").

Contrary, to Plaintiffs' arguments, the requirement that they prove agency—under both the common law and the Tort Claims Act—is not an affirmative defense that the Defendant must plead and prove to preserve. Rather, it is an element of Plaintiffs' cause of action.

The trial judge's Order[4] denying MUSC's Post-Trial Motions confirms the difference between agency as an element of Plaintiffs' claims and as an affirmative defense. In that Order—in a section preceding its discussion of the *affirmative defense* under S.C. Code § 15-78-60(17), which Plaintiffs cite in their Respondent's Brief—engages in a lengthy analysis of the "[a]gency of University Honor Council [m]embers" and addresses the substance of MUSC's argument that any Honor Council leak was outside of the scope of official duties. (*See* Sept. 19,

[4] Plaintiffs' counsel drafted the Order.

2023 Order, at 12-16). In other words, even the trial court correctly considered the question of agency as an element of Plaintiffs' *prima facie* case.

Even if Plaintiffs are correct that MUSC only raised this issue in the trial court as an affirmative defense, the language of MUSC's answer is sufficiently broad to encompass and preserve it as a defense. Specifically, MUSC alleged as an affirmative defense that "Plaintiffs' claims are barred by the provisions of the South Carolina Tort Claims Act, including ***but not limited to*** S.C. Code Ann. §§ 15-78-60(1), (2), (4), (5), (20), (23), and (25)." (*See* MUSC's Ans. ¶ 17 (emphasis added)). While MUSC may not have explicitly named subsection (17), it made clear that it was asserting its right to raise any of Section 15-78-60's applicable exceptions to the waiver of immunity.

If anything, Plaintiffs' argument illustrates the fundamental flaw in Plaintiffs' claim that their threadbare Complaint encompassed claims about leaks. MUSC did not mention subsection (17) by name because the face of the Complaint does not allege that MUSC should be liable for a member of the Honor Council leaking information about Plaintiffs. Based on what is actually in the Complaint—that MUSC should be liable for defamatory statements of Dr. Hazen-Martin or Dr. Kasman—MUSC was never placed on notice that subsection (17) was implicated. Plaintiffs cannot have it both ways: they cannot refuse to specifically plead their claims and also hold MUSC to such a high standard of anticipating what defenses *might* be relevant to defend against unpled claims.

For the foregoing reasons, the Court should reject Plaintiffs' argument that MUSC waived its argument any alleged leaks were not made in the course and scope of employment or official duties.

b. Plaintiffs Presented No Evidence That Any MUSC Employee "Leaked" Anything About Them.

As MUSC argued throughout trial (and in its appellate briefing), there is no record evidence supporting Plaintiffs' claim that a leak about their Honor Council actually came from someone on the Honor Council. Rather than direct the Court to evidence supporting their

argument, Plaintiffs speculate that the information could only have come from someone on the Honor Council or who MUSC employed. Again, there is no evidence of who leaked the information, what was disclosed, to whom it was disclosed, or the relevant dates. To the extent they base their defamation claims on a purported leak, Plaintiffs engage in rank speculation without evidence. Plaintiffs seek to impose defamation liability where no court has done so before. They seek to prove defamation without being able to tell the jury what was actually said.

More fundamentally, it is not correct that someone acting as an agent for MUSC is the only person who could have leaked the information. To the contrary, other individuals had knowledge of the accusations and could just as easily have revealed information. As MUSC noted in its Brief of Appellant, there is evidence that Plaintiffs themselves disclosed information about their Honor Council proceeding to others. They did not present any evidence proving that none of those individuals—including an ex-boyfriend—leaked any information about them. The jury could only conjecture that an MUSC agent or employee leaked the information.

Plaintiffs base their claim that the source of the leak had to be someone within intimate knowledge of the Honor Council proceeding, including details such as the vote. The evidence undercuts such an inference. Ms. Sausser's email contains incorrect statements that go to the heart of what happened: (a) that the vote was 8-2; and (b) that the Honor Council recommended that Plaintiffs be "expelled" or "dismiss[ed]." (See Pls.' Tr. Ex. 33). Neither of these facts is true. In other words, if someone leaked information to Ms. Sausser about Plaintiffs, that information was inaccurate. This is wholly inconsistent with the information coming from an MUSC employee or Honor Council member with intimate knowledge of the situation. Had someone with such intimate knowledge divulged the information, it would not have been so wrong. The fact that the Post & Courier had incorrect information suggests that the "leaker" was someone with only partial knowledge of what happened, not an MUSC "insider."

For the foregoing reasons, contrary to Plaintiffs' Brief of Respondent, there is no evidence that the alleged leak of information came from someone acting as an agent of MUSC.

3. **The Court Must Reject Plaintiffs' Argument That Honor Council Members Would Be Acting in the Interests of MUSC in Leaking Information.**

Plaintiffs contend that "whoever leaked the accusations that the Binghams cheated and benefited from political connections was intending to act within the interests of MUSC and within the scope of their agency and official duties as a member of an MUSC honor council." (*See* Pls.' Resp. Br., at 46). Specifically, they argue that whoever leaked the information did so "in a misguided attempt to . . . preserve the academic integrity of the university by outreach and education as to what they mistakenly perceived as corruption, nepotism, academic malfeasance and preferential treatment." (*See id.*). While this argument is creative, the evidence does not support it; it is the product of pure speculation.

First, as MUSC has repeatedly argued, both federal law and MUSC policy strictly forbid the disclosure of confidential student information—especially information about Honor Council proceedings. Everyone involved in the Honor Council process—including Plaintiffs—was required to swear to maintain confidentiality and privacy. Any leaks would have directly violated MUSC policy. Plaintiffs presented no evidence that MUSC ever took any action to limit its privacy requirement or that it allowed disclosure of information for a good reason. The only evidence is that MUSC expressly and adamantly prohibited the disclosure of private student information. Any disclosure of private student information would, without doubt, violate MUSC policy and could not be consistent with actions in the furtherance of MUSC's official business.

Nevertheless, Plaintiffs argue that "a principal will still be liable for the acts of an agent, even if they exceed his authority, so long as he is acting in furtherance of the principal's interests." (*See* Pls.' Resp. Br., at 47 (*citing Murphy v. Jefferson Pilot Comm. Co.*, 364 S.C. 453, 613 S.E.2d 808 (Ct. App. 2005)). The *Murphy* case that Plaintiffs cite illustrates the flaw in Plaintiffs' argument. In *Murphy*—in which Plaintiffs' counsel represented the plaintiffs—there was specific evidence showing that the defaming actor appeared to have authority to act on behalf of his principal:

> As to Feldman's authority and scope of employment, O'Neill and Waring testified that Feldman told them Wing, the station manager at that time, gave Feldman the

> authority to write the Letter. Feldman also told O'Neill that Dan McAlister, counsel for Jefferson Pilot, likely previewed the Letter. The Letter was written on WCSC stationery and in it, Feldman purported to be motivated by a desire to protect Senn, the station, and Jefferson Pilot.
>
> There was evidence in the record that Feldman had broad authority to speak on behalf of WCSC, enter contracts on behalf of WCSC, respond to viewer complaints, and defend the station in letters to newspaper editors or reporters. . . . Both Senn and DuTremble testified they believed Feldman had authority to act on WCSC's behalf. Senn believed Feldman's story regarding the incident on the plane and believed Feldman had the authority to write the Letter.

See id., 364 S.C. at 463-63, 613 S.E.2d at 813. The *Murphy* trial judge referred to that case's facts as "bizarre" and "unique" and "in the written history of the law there has never been another case like it."

Unlike *Murphy*, there is no evidence here to support actual or apparent authority. Plaintiffs do not know who actually leaked information, but merely assume the identity and motivation of such a hypothetical actor. This is not evidence. It is rank conjecture. Because Plaintiffs presented no evidence of who leaked information and why, their speculation about his or her motivations is just that, speculation. The only evidence is that the leak occurred after the completion of the Honor Council proceeding and appeal. It was indirect violation of MUSC policy and federal law. It did not benefit MUSC in any way—in fact, the leak served only to sow unrest among students. There is no evidence whatsoever supporting that the leaking of confidential student information in direct violation of MUSC policy and federal law could possibly be imputed to MUSC.

For the foregoing reasons, the Court should reverse the trial court's denial of a directed verdict, as there is no evidence whatsoever supporting that whoever leaked information did so as an agent of MUSC.

4. Plaintiffs Response Does Not Refute MUSC's Fundamental Argument That—Even Assuming Plaintiffs' Theory About a "Leak" Is True—There Can Be No Liability Because Any Honor Council Member's Authority Had Ended.

As MUSC has argued throughout trial and its Brief of Appellant, any alleged leak from the Honor Council would have *after* the Honor Council proceedings were completed with Plaintiffs' successful appeal. Plaintiffs claim that someone from MUSC leaked information about Dean DuBois' reversal of the decision of the Honor Council. The only evidence of a "leak" comes from Facebook postings and a newspaper reporter's inquiry, both of which occurred *weeks after* the Honor Council completed its work. (*See* Tr. Transc., at 369:14-17 (noting that "rumors and things" began in August, 2016, "after they overturned our appeal.")). This is consistent with the rumors' suggestion that Plaintiffs used political influence to reverse the Honor Council decision. Dr. DuBois' email, upon which Plaintiffs rely for "proof" of the leak, is an internal MUSC correspondence concerning an inquiry from a reporter about the disposition of Plaintiffs' appeal. (*See* Pls.' Tr. Ex. 33).

In other words, any claimed "leak" would have occurred after the speaker—who, under Plaintiffs' theory, would have been an Honor Council member—fully completed their service on the Honor Council. At the time of the claimed leaks, the Honor Council members were no longer acting in their capacity as Honor Council members. Their work was over. Any statements made could not have been in the scope of official duties.

Plaintiffs respond that MUSC's "argument ignores that under the Honor Code, individual members of the Honor Council serve for the entirety of their careers at MUSC if they are students, and faculty members may serve multiple year terms." (*See* Pls.' Resp. Br., at 48). This argument is unavailing. The Court should not accept this argument. First, irrespective of the length of terms on the Honor Council, it is clear that the Honor Council proceedings ended upon the disposition of Plaintiffs' appeal. At that time, the Honor Council had no further responsibilities or authority to act in connection with the Plaintiffs' matter. If a member of the Honor Council leaked any information at that time, he or she could not have been acting as an

MUSC agent. Any action at that time could only be viewed as outside of the scope of any agency or authority to act on behalf of MUSC.

Moreover, as noted throughout, there is no evidence of *who* made a leak and, as a result, no evidence of whether such person was still affiliated with the Honor Council at the time of the disclosure. As agency is a part of Plaintiffs' case-in-chief, *they* carried the burden of proving that whoever leaked information did so as an agent of MUSC. Again, the jury was left to speculate about the question of agency, as there was not a scintilla of evidence regarding the question of who was the source of the alleged leak or whether the alleged leaker's conduct could be imputed to MUSC.

For the foregoing reasons, the Court should reverse the trial court's denial of a directed verdict as to alleged defamatory leaks.

C. Plaintiffs Have Not Disputed MUSC's Contention That Their "Twinning" Theory Was Wholly Without Evidentiary Support.

In an effort to explain to the Court the fundamental flaw in Plaintiffs' case, MUSC's Brief as Appellant gives a detailed and well-supported refutation of their theory that they performed the same on the Block 12 exam because they are twins. The evidence does not support that theory. At most, accepting as true all of their evidence, the best Plaintiffs can do is present evidence to support the uncontroversial idea that identical twins often have similar aptitudes.

That was never the issue in this case. MUSC does not doubt that Plaintiffs are likely similar in their intellect or skills. The question has always been whether the evidence supports that twins not only get similar grades, but also answer the same questions the same way. Dr. Hazen-Martin and Dr. Kasman did not write their emails because Plaintiffs got the same score. They acted because they observed, *inter alia,* that Plaintiffs were proceeding in lock step on the exam, question by question, getting the same answers, including the same incorrect answers.

As MUSC argues in its Brief of Appellant, the undisputed evidence completely undermines the idea that Plaintiffs not only got the same grades, but also answered questions in

the same way. The reality is that Plaintiffs had very different academic strengths and weaknesses and quite often did not give many identical answers. In fact, while at MUSC, it appears that Plaintiffs only gave highly correlated answers when sitting near each other. Moreover, the evidence admitted at trial definitively showed that Plaintiffs had different strengths and weaknesses in various subject areas. (*See* Def. Tr. Exs. 13, 16-17).

Plaintiffs have never presented any evidence to support the primary logical underpinning of their theory of the case: that identical twins answer the same questions in the same way.

D. The Court Should Have Granted MUSC's Post-Trial Motions Because Plaintiffs Provided the Jury Patently Incorrect and Misleading Information.

In its Brief of Appellant, MUSC pointed out that Plaintiffs, in their closing, provided very misleading mathematical evidence to the jury in an effort to undermine the work of Caveon, MUSC's expert. Plaintiffs respond by arguing that MUSC has not preserved this issue. While MUSC is cognizant that South Carolina has not adopted the "plain error" rule:

> [A]ppellate courts are to be "'mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner'" and thus should not apply preservation rules in a manner that "elevat[es] form over substance to trap trial lawyers so as to prevent the appeal of a legitimate issue." *State v. Morales*, 439 S.C. 600, 609, 889 S.E.2d 551, 556 (2023) (*quoting Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011).

See Moses v. State, 898 S.E.2d 174, 177 (Ct. App. 2024). However, MUSC could raise an issue regarding an "inflammatory argument" by post-trial motion rather than immediate objection. *See Dial v. Niggel Assocs*., 333 S.C. 253, 257, 509 S.E.2d 269, 271 (1998).

While MUSC does not suggest that Plaintiffs' counsel made any vicious or personal attacks on MUSC or its attorneys, the error presented to the jury was of such great magnitude that it can only be characterized as "inflammatory." Plaintiffs' closing did not merely mention this false data; it emphasized it to suggest that the Caveon analysis was "bogus":

> And so a report came back to the Honor Council that said that there was one and 10 to the 38th hours (sic) [odds] that they were coordinating. . . . And if you say that it is twice as likely, which is erroneously used this day about the performance of identical twins, and he said it would be the opposite of this, but what it would do, of course and half it would be 10 to the 19th power.

> Well, and going down, you say, well, it's three times 8 more likely, and it's one times 10 to the 12.7 and four times. And you go right on down the document and the testimony from Dr. Segal is that twins are eight to nine times as likely to score same on these tests. And if you take that evidence, then you're down to one. If you say nine, one in 16,595.
>
> And if you recall Mr. Mayne's testimony, he said if it got down to where the statistics showed that it was one in a million, it would prove they did not collaborate. And if he had appropriately done this, and if they had given the correct information to him, he would've found that they did what could not achieve (sic) [have cheated] because the likelihood would've been one in 16,000. . . . So by giving him the wrong information and him not considering the twins, he came out with a ***<u>total bogus statistic</u>***. . . . The guy's saying, he looked at the statistics and the statistic proved them cheating? And that is absolutely false. And to say that's absolutely false.

(*See* Tr. Trans., at 945:5-7, 946:3-947:8 (emphasis added)).

Plaintiffs do not dispute that they gave false information to the jury in their closing. Again, this was not a minor error. This was a mathematical error of astronomical proportions. While they now suggest that the Caveon report may not have been "an essential piece of evidence" (Pls.' Resp. Br., at 50), they certainly deemed it important enough to use a (previously undisclosed) demonstrative exhibit in their closing to emphasize their (blatantly wrong) view of the data. Obviously, the Caveon report—which concluded that the likelihood of Plaintiffs working independently was one in 100,000,000,000,000,000,000,000,000,000,000,000,000—was a crucial piece of evidence. It was the focal point of much of the trial.

Plaintiff did not disclose the demonstrative exhibit until the time of the closing. MUSC's attorneys—like Plaintiffs and their attorneys—are not mathematicians. If MUSC's counsel had received advance notice that Plaintiffs would use this demonstrative exhibit in their closing and sufficient time to verify its accuracy, they would have been able to object before Plaintiffs' closing. In light of the magnitude of the error, the emphasis and attention Plaintiffs gave to this mistaken data in their closing, and the late disclosure of the exhibit, MUSC respectfully posits that this issue warrants appellate review even in the absence of a contemporaneous objection.

CONCLUSION

For all of the foregoing reasons, the Court should reverse the trial judge's denial of its motions for directed verdict and Post-Trial Motions. The Court should enter judgment in favor of MUSC. If this Court does not enter judgment in favor of MUSC, it should order a new trial.

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