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 FINAL BRIEF AS APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES/RULES/REGULATIONS

OTHER MATERIALS

STATEMENT OF ISSUES ON APPEAL

SUGGESTED ANSWER TO ALL QUESTIONS: *Yes.*

1. **Did the trial court err in denying MUSC's directed verdict and post-trial motions where the evidence did not support a finding of defamatory statements by Drs. Hazen-Martin and Kasman?**

2. **Did the trial court err in denying MUSC's directed verdict and post-trial motions where the evidence did not support that Drs. Hazen-Martin and Kasman (or anyone else at MUSC) exceeded the scope of the qualified privilege that exists as a matter of law?**

3. **Did the trial court err in denying MUSC's directed verdict and post-trial motions by refusing to apply an absolute privilege to the statements of Drs. Hazen-Martin and Kasman?**

4. **Did the trial court err in denying MUSC's directed verdict and post-trial motions where the evidence showed that the statements of Drs. Hazen-Martin and Kasman were true?**

5. **Did the trial court err in denying MUSC's directed verdict and post-trial motions with regard to an alleged "leak" where Plaintiffs did not plead such a claim?**

6. **Did the trial court err in denying MUSC's directed verdict and post-trial motions with regard to an alleged "leak" where any such leak would have necessarily been outside of the official duties of any MUSC employee?**

7. **Did the trial court err in denying MUSC's directed verdict and post-trial motions with regard to an alleged "leak" where Plaintiffs did not present any evidence that an MUSC employee leaked any confidential information about them?**

8. **Did the trial court err in denying MUSC's directed verdict and post-trial motions where the evidence undermined Plaintiffs' central claim that twins answer questions the same on examinations?**

9. **Did the trial court err in denying MUSC's directed verdict and post-trial motions where Plaintiffs' counsel made demonstrably untrue statements of fact to the jury during closings?**

STATEMENT OF THE CASE

A. Factual Background

Appellants-Respondents Kellie and Kayla Bingham ("Plaintiffs") commenced this action on November 2, 2017 against Respondent-Appellant Medical University of South Carolina ("MUSC"). (*See generally* R. pp. 48-54). Plaintiffs allege they are identical twin girls who were second year medical students at MUSC. (*See* R. p. 51 ¶ 3). Plaintiffs allege that on May 5, 2016, they were taking an exam ("Exam" or "Block 12") monitored remotely via computer by Debra Hazen-Martin, PhD ("Dr. Hazen-Martin"). (*See id.*). They claim that Dr. Hazen-Martin falsely reported to Laura Kasman, M.D. ("Dr. Kasman") that they had cheated on the Exam and had been signaling each other and passing notes. (*See* R. p. 51 ¶ 4). Plaintiffs allege that on May 11, 2016, Dr. Kasman falsely wrote to Joseph Ivey that they were suspected of cheating and had been observed signaling each other and passing notes via scratch paper. (*See* R. pp. 51-52 ¶ 5). They claim that these statements were repeated by others and reported in the newspaper. (*See* R. p. 52 ¶ 6).

Plaintiffs alleged that MUSC based its accusations solely on the fact that they scored similarly, and MUSC was culpable because it was "well known in academia that it is common for identical twins to perform similarly on written examinations." (*See* R. p. 52 ¶ 7). Plaintiffs allege that MUSC wrongfully sent Exam data to a testing facility to determine the probability that two unrelated students would answer questions the same, but failed to inform the testing entity that they were identical twins who studied together. (*See* R. p. 52 ¶ 8). Plaintiffs assert that, because of MUSC's actions, defamatory statements about them were published in the Post and Courier with sufficient information to identify them. (*See* R. p. 52 ¶ 9). They further assert that MUSC students repeated defamatory statements verbally and by email. (*See* R. p. 52 ¶ 10). They claim that they suffered reputational damage and emotional distress as a result. (*See* R. p. 53 ¶ 13).

This is solely a defamation case. Plaintiffs do not challenge the propriety of MUSC's academic disciplinary policies or processes. They do not claim that MUSC publicly disclosed confidential information about them, thus invading their privacy. The case is not about whether Plaintiffs actually cheated on the Exam; MUSC was never required to prove this, though there are mountains of evidence supporting that conclusion. The only claims before the jury and this Court are for common law defamation. The verdict in favor of Plaintiffs must be reversed because Plaintiffs did not present evidence sufficient to create a jury issue as to whether MUSC defamed them. Even if they did, the trial court should have found as a matter of law that any allegedly defamatory statements were protected by qualified, if not absolute, privilege., As a result, this Court must reverse the trial court.

1. Block Exams and Medical School.

Each semester in medical school includes three "blocks" of instruction (each usually including a body system), with four defined theme areas within each block. (*See* R. p.446:7-447:3). Consequently, there are three "block exams" each semester, in which students must show competence in the four graded theme areas. (*See id.*). All students must achieve at least 70% for the semester in all four theme areas to advance to the next semester. (*See id.*). The Block 12 Exam was the final block exam of the second year. After the first two years, students advance to the clinical phase of medical school. (*See* R. p. 503:21-24). However, to do so they must pass the National Board of Medical Examiners Step 1 test. (*See* R. p. 503:25-504:5).

Plaintiffs signed a Statement of Acknowledgement agreeing that they had read and understood the Honor Code. (*See* R. pp. 1021-22). That Acknowledgment noted that the following acts violated the Honor Code:

2. Cheating: All tests, quizzes, written work, laboratory work, research, and examinations at the Medical University of South Carolina are conducted under the Honor Code. Cheating is defined as using or attempting to use unauthorized assistance, devices, material, or study aids in or prior to examinations or any other academic work; or cheating or attempting to prevent others from using authorized assistance, material or study aids.
   a. Plagiarism: using the ideas, information, work, or writings of another person and accepting credit for the work as one's own without proper acknowledgment on any paper, test, essay, lab work, research, or similar course activity.
   b. Altering records: misrepresenting or tampering with transcripts, academic records, research data, or computer programs; obtaining or using another's ID code, social security number, or electronic password.
   c. Knowingly using, buying, selling, transporting, or soliciting, any or all of or in part of the contents of an examination or other assignment not authorized for release, including the use of previously administered exams without the permission of the instructor.

(*See id.*). Additionally, the Honor Code forbade facilitating academic dishonesty and colluding with another person to violate the Code. (*See id.*). Plaintiffs do not dispute that working together on the Exam would violate the Honor Code they agreed to follow.

2. <u>Events Surrounding the Block 12 Exam.</u>

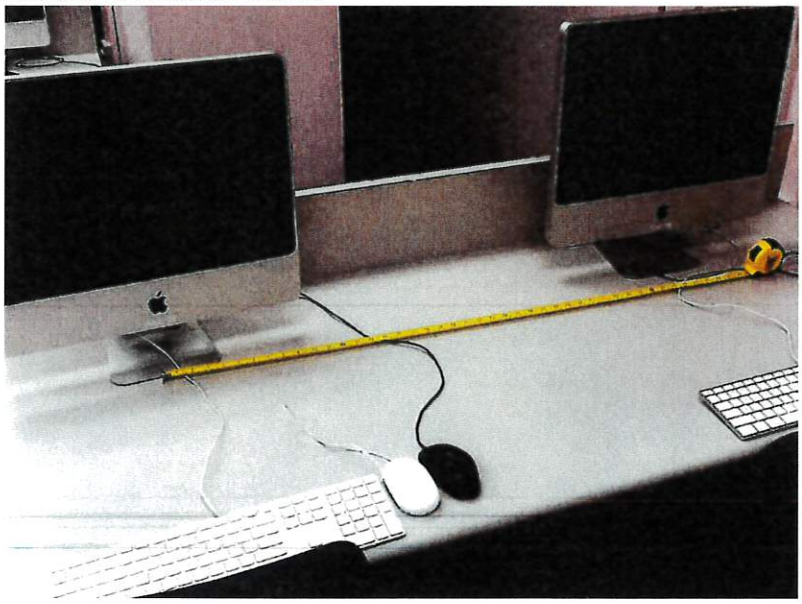
In May of 2016, Kayla Bingham was "in a precarious position heading into block 12." (*See* R. p. 447:6-11). Her average in the Altered Structure and Function theme area was in the failing range. (*See* R. p. 447:17-19). If she did not bring her semester average for that subject area up to 70%, she would be given an opportunity to retest; if she did not raise her grade to a 70% in that area she would be referred to the progress committee, which could require her to repeat her second year. (*See* R. p. 447:20-448:11). Dr. Hazen-Martin testified that Plaintiffs had told her prior to the Exam that they were "very worried about her standing." (*See* R. pp. 448:12-449:15). Kayla was worried about not moving forward from second year because of her grades, "and Kellie was worried for her." (*See* R. p. 449:16-20). Simply put, Kayla had a lot riding on the Exam, as did her sister who cared for her deeply. It was Kayla's last chance to avoid the possibility of repeating her second year.

On May 3, 2016, Kayla Bingham learned she was assigned to take the Exam in the Bioengineering Building (Seat C4), while Kellie was assigned to Library Room 436 (no assigned seat). (*See* R. pp. 851-53). Within minutes of receiving her seat assignment, Kayla asked "if there was ANY way" that she could take her exam in the Library.[1] (*See* R. p. 847). MUSC

[1] Dr. Hazen-Martin testified that there were assigned seats in Bioengineering because students used their own computers, which necessitated a record of where students sat; in the

granted her permission to do so. (*See* R. p. 846). Dr. Hazen-Martin testified that students were made aware that, if students changed locations for an exam, they would be assigned to Library Room 436 (where Kellie had been assigned). (*See* R. pp. 412:4-413:20). In Library exam rooms, there was no assigned seating. (*See* R. p. 414:6-9). Kayla Bingham testified that the proctor "asked us to please file into the room from back to front." (*See* R. p. 322:17-25). Because Plaintiffs entered the room together, they sat next to each other.[2] (*See* R. pp. 323:1-3, 331:14-18, 562:20-24). Plaintiffs were seated as far as possible from the proctor, with one of them next to the wall. (*See* R. p. 454:2-12, 525:4-15).

The computer screens for the Exam in Room 436 were "very large." (*See* R. p. 525:22). Plaintiffs' evidence shows that these large screens were only a foot or so apart and easily visible to the person seated next to an exam taker:



(*See* R. p. 843). There were no "blinders" on the sides of the computer screens, and Exam questions and possible answers were not "randomized," meaning that *everyone* had the exact

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library rooms, students used school computers, so they could sit where they wanted. (*See* R. pp. 450:21-451:19).

[2] Plaintiffs did so even though their own expert testified that she recommends to twins that they not sit next to each other to avoid the appearance of impropriety. (*See* R. p. 355:11-17).

same Exam (the questions and possible answers were all in the same order). (*See* R. pp. 454:13-455:2).

3. Dr. Hazen-Martin's Observations of the Exam.

Dr. Hazen-Martin was the Dean of curriculum for the first two years of medical school. (*See* R. p. 404:10-12). She was responsible for organizing and aggregating questions for the block exams and helping to administer those exams through the LXR computer system. (*See* R. p. 404:12-15). She was monitoring the Exam to "to ensure that the test ran smoothly." (*See* R. p. 404:16-22).

While monitoring the Exam, she observed that Plaintiffs were proceeding through the test "in lockstep": "Every time I check the spreadsheet related to LXR, they were on the same question. They had completed the same number of questions and they had almost always identical percent averages on those questions percent correct." (*See* R. pp. 406:23-407:28). Perhaps her most important observation was that Plaintiffs always seemed to have the same *wrong* answer:

> [A] lot of people have the same correct answer because our class average on exams as usual 85%, which means that a lot of people are going to have the same correct answers when you compare sheets. It's much less common to have the very same wrong answer on a multiple choice. Normally, most of our questions have five choices. A through E, others may have four A through D. And so normally when someone gets a question wrong, you see a scattering of choices. And that's one of the things we evaluate to look at the quality of the question.

(*See* R. p. 458:4-13). The Exam did not involve simple questions, but "second and third order" questions, involving multiple layers of analysis and decision-making. (*See* R. pp. 458:19-459:15). She testified that she checked on Plaintiffs on LXR at least every 20 minutes during the Exam. (*See* R. pp. 407:23-408:8). She testified that her suspicions were aroused because Plaintiffs were always on the same question with the same correct *and incorrect* answers. (*See* R. p. 409:5-12). Every time she clicked on them, Plaintiffs were on the same question. (*See* R. p. 457:9-17). She testified in her years of monitoring dozens of (at least 100) exams, this was the only time she had ever experienced this. (*See* R. pp. 452:12-453:10).

4. Michele Friesinger's Observations of the Exam.

After observing Plaintiffs proceed in "lockstep" during the morning session, Dr. Hazen-Martin spoke with the proctor for the afternoon session of the Exam for Plaintiffs' room, Michele Friesinger ("Ms. Friesinger"). (*See* R. pp. at 414:20-415:20). She told Ms. Friesinger, who is a National Board of Medical Examiners trained proctor, to observe Plaintiffs during the afternoon session because of a potential irregularity. (*See* R. pp. 426:13-22, 521:4-11). She further told Ms. Friesinger, who was "a very experienced proctor," to "proctor carefully and more importantly, not interrupt the examination process under any circumstance." (*See* R. p. 455:3-13; *accord* R. p. 456:7-10 ("She's very professional and quite competent.")). Ms. Friesinger testified that:

> She told me their names and told me that she had experienced some testing irregularities and to just follow the proctor guidelines so that I wouldn't stop the exam. Which a lot of times when you note something like that, it's kind of an urge to stop the exam, but she reminded me of the proctoring guidelines to continue to let them take the exam on.

(*See* R. p. 507:11-17). She confirmed that Dr. Hazen-Martin did not tell her what she should observe or note about Plaintiffs. (*See* R. pp. 527:22-528:4).

Ms. Friesinger testified that her NBME training taught her that testing irregularities "could mean again, if the room is cold or if the construction noise, it could be anything that could cause anything wrong with the exam." (*See* R. pp. 521:18-522:5). As an example, she recounted an exam where she noted an irregularity of a student flipping a coin to select between two answer choices. (*See* R. p. 522:11-19). She testified that her job as a proctor was to monitor the room and report anything abnormal (such as a student wearing a hat when the rules prohibit it). (*See* R. p. 523:13-20). However, reporting an irregularity does not equate to a conclusion that a student was engaging in academic dishonesty. (*See* R. p. 523:21-524:4).

Ms. Friesinger testified that when the room was full, she could not specifically focus on Plaintiffs, as she was monitoring the entire group; however, as students left the room after completing their tests, she observed numerous testing irregularities (*see* R. pp. 507:21-508:4):

- Before beginning, one of Plaintiffs asked for a pencil with a better eraser; another student switched pencils to accommodate her. (*See* R. pp. 858-59). Ms. Friesinger testified that she had "never had a student ask" for an eraser before. (*See* R. pp. 510:4-14; 526:10-12). She noted that this was odd, since students have unlimited scratch paper and most do not waste time erasing the scratch paper. (*See id.*). Scratch paper is not graded and does not impact the test score. (*See* R. p. 526:13-17).

- She noticed that one of Plaintiffs was pushed away from her desk (more than other students) and glancing toward the other Plaintiff. (*See* R. pp. 858-59).

- Plaintiffs were nodding their heads all through the Exam in a way she had never seen before. (*See* R. pp. 858-59). Ms. Friesinger testified that she believed that Plaintiffs were doing this in communication with each other. (*See* R. pp. 530:22-531:5 ("They were communicating, I believe.")). She further testified that she considered this to be Plaintiffs "signaling" each other. (*See* R. pp. 531:9-532:4).

- Near the end of the Exam, she saw one of the Plaintiffs write something on the corner of her scratch paper and push it over toward the other. (*See* R. pp. 858-59). The other Plaintiff would look at the paper and move through the questions on her computer. (*See id.*). The first Plaintiff would erase what she had written and flip her paper over. (*See id.*). She noticed this three times. (*See id.*). Ms. Friesinger testified that she believed that, in doing this (with one Plaintiff moving a note toward the other), Plaintiffs were "passing notes." (*See* R. p. 534:2-15). She detailed her observations as follows:

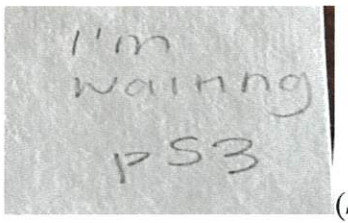
  > I noticed that they were writing on the paper and pushing it towards one another as one looked down and then pulled it back erased and then flipped over. That's actually what that (sic) caught my attention because that was pretty noisy and kind of like you could hear it. And so I noticed them doing that more than one time.

  (*See* R. p. 529:14-19).

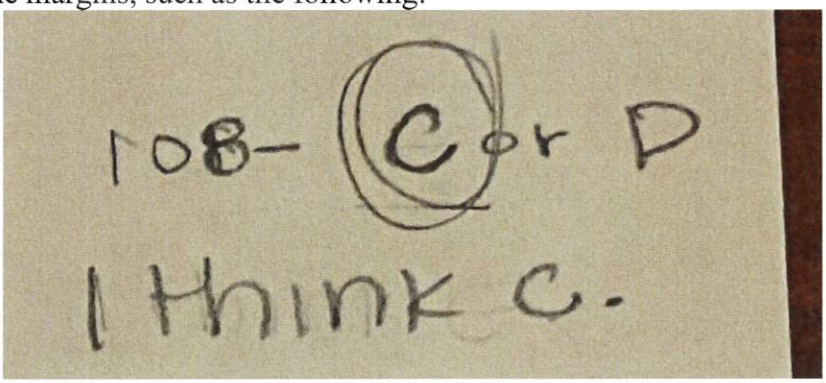
- Both students took the full amount of time and left together, turning in their scrap paper together. (*See* R. pp. 858-59). Though not in her proctor's notes, she testified that one of the Plaintiffs attempted to throw away her scratch paper rather than turn it in, which was unusual. (*See* R. pp. 535:16-536:3).

(*See* R. pp. 858-59). She recorded these irregularities in her proctors' notes, representing her own observations of Plaintiffs. (*See* R. p. 528:5-9).

As set forth above, Ms. Friesinger noted that Plaintiffs were communicating by scratch paper. In fact, Plaintiffs' scratch paper contains numerous statements that appear to be communicative with another person; for example, one page of scratch paper states (right along

the edge) "I'm waiting": 

(*See* R. p. 923). Plaintiffs presented no evidence to explain why one of them would have written "I'm waiting" as a note to themselves. Additionally, the scratch paper includes erasures and listings of question numbers and potential answers along the margins, such as the following:



(*See e.g.,* R. p. 924). Dr. Kasman — who initiated the Honor Counsel process — testified that this note and another "jumped out" to her. (*See* R. pp. 633:12-635:2).

After the Exam was completed, Ms. Friesinger handed the bag of materials from the Exam to Dr. Hazen-Martin. (*See* R. p. 536:4-14). She did not speak with Dr. Hazen-Martin or Kasman about her observations. (*See* R. pp. 536:15-537:1).

5. <u>Dr. Hazen-Martin's and Dr. Kasman's Communications About the Exam</u>

After making her own observations of the Exam, on May 6, 2016, Dr. Hazen-Martin emailed Dr. Kasman concerning possible irregularities in the Exam:

> I am sorry to notify you of a testing irregularity noted during the COM Year 2 Block Exam on Thursday, May 5th. During administration of the online exam, I routinely monitor LXR real-time to ensure that all students are logged in and that responses have been registered at the close of the session. I enter the exam several times during each testing period. During the AM testing period I noted that two students were progressing lock-step through the items, registering similar incorrect responses on identical items. The two students were located in the same testing module (LIB 436). I contacted the proctor in that module to closely monitor during the afternoon session. The same outcome was observed in the LXR testing data for the afternoon session. I am attaching the response sheets for

> the two students for both the AM and PM sessions for your review. The reports are time stamped at the bottom of the page. The response sheets show all responses and in the event the response is incorrect, the correct response is indicated in parenthesis. Scratch paper was collected from each student at the end of the testing period, per the required procedure. This material and proctor reports are secured by the testing site administrator, Inda Johnson, and are available for your review.

(*See* R. p. 861). She did not anticipate that this email would go beyond those with a legitimate reason to know in connection addressing possible academic dishonesty. (*See* R. p. 460:4-17). There is no evidence that the email was ever sent beyond those with a reason to know. Dr. Kasman, as the Director for Year 2, had the responsibility of "advising the Honor Council that there was a situation that required [its] investigation." (*See* R. pp. 460:25-461:6). Dr. Hazen-Martin testified that nothing in her email was untrue and that it did not identify Plaintiffs. (*See* R. p. 461:12-21).

Dr. Hazen-Martin's correspondence is one of the bases for Plaintiffs' defamation claim. However, she never accused Plaintiffs of cheating and testified that it was not her role to reach that conclusion, only to provide what she knew. (*See* R. p. 436:15-21). That is what she did, accurately writing that she observed Plaintiffs answering questions in lock step with almost identical responses. She included LXR printouts showing every answer to every question by Plaintiffs at three intervals: the end of the morning session, the middle of the afternoon, and the end of the afternoon. (*See* R. p. 461:7-11). Those printouts show that Plaintiffs remarkably gave the same answer (right or wrong) to 296 of 307 questions. (*See* R. pp. 892-915, 1019-20). Most tellingly, they gave the same *wrong* answer 54 times. (*See id.*). The day after the Exam, Dr. Kasman received Dr. Hazen-Martin's email. (*See* R. pp. 628:23-629:6; R. pp. 860-62). She reviewed the LXR printouts with all Plaintiffs' answers. (*See* R. pp. 630:20-631:10; R. pp. 892-915). Dr. Kasman was not present during the Exam and did not observe Plaintiffs. (*See* R. p. 628:13-22).

In response to Dr. Hazen-Martin's email, Dr. Kasman emailed MUSC Student Affairs to advise that she had "unfortunately been notified of a possible testing irregularity during the year

2 block 12 exam." (*See* R. pp. 631:11-632:6; R. pp. 860-62). She requested that she be given additional information about the Exam, including the proctor's notes. (*See* R. p. 632:6; R. pp. 860-62). Dr. Kasman went to Student Affairs and reviewed the proctor's notes, scratch paper, and LXR data. (*See* R. pp. 632:7-633:4). She testified that parts of the scratch paper (noted above) appeared to show "communication" and were "irregular." (*See* R. pp. 633:21-635:2). What she observed caused her to believe that these irregularities "should be further investigated." (*See* R. p. 636:14-17).

The proper procedure to start that process was to write a letter to the Honor Council president. (*See* R. p. 636:18-21). Dr. Kasman was the second year curriculum director and was the point person for disciplinary actions. (*See* R. p. 626:7-18). Consistent with her duties, Dr. Kasman wrote to Joseph Ivey, Honor Council President , to inform him of "a possible case of academic dishonesty," with the expectation that it would be used only for that process. (*See* R. pp. 863-65; R. pp. 637:21-638:8). Her correspondence accurately recounted the information she learned from Dr. Hazen-Martin, the proctor's notes, and scratch paper:

> It is my unfortunate responsibility to report a possible case of academic dishonesty by two second year medical students.
>
> The Incident occurred during the Block 12 exam on May 5, 2016. The cheating was first suspected during a routine audit of the LXR testing data, approximately two hours into the exam. The audit showed that two students had both completed exactly 107 out of 153 questions and had chosen nearly identical answers up to that point. Further investigation found that the students were seated next to each other, and were observed to be signaling each other and passing notes via scratch paper on the desk between them.
>
> LXR data for the entire class has been sent out for an objective external analysis which should provide an estimate of the probability of such similar responses occurring by chance. The original LXR data for the two students, their scratch paper, and the proctors report are waiting in a sealed envelope for you in the Dean's office at the front desk.

(*See id.*). She testified that this correspondence did not conclude that Plaintiffs had cheated. (*See* R. pp. 639:19-640:2). She based this correspondence on her review of material at Student

Affairs and Dr. Hazen-Martin's letter. (*See* R. p. 641:13-642:3). Plaintiffs claim that Dr. Kasman's correspondence to Mr. Ivey was also defamatory.

6. <u>The Caveon Report</u>

On May 13, 2016, at the request of MUSC, Caveon Test Security analyzed raw data for the Exam and prepared an Analysis and Interpretation of Similar Tests ("Caveon Report"). (*See* R. pp. 866-891). Caveon's mission "is to improve the security of exams, specifically to help the organizations to administer exams and develop exams to make sure that those processes are secure." (*See* R. p. 607:3-5). Dennis Maynes, Caveon's Chief Scientist who performed work underlying the Caveon Report, testified that he was involved in Caveon's subunit engaged in "statistical analysis of data to look for evidence of, let's say, whether or not . . . exams are secure." (*See* R. p. 607:7-8). He helped to develop the technology that Caveon uses in its forensic data review of exams. (*See* R. p. 608:20-24). While he did not invent the statistical analysis of exams, he developed existing technology into what he believes is the "best" system, which has been subjected to peer review. (*See* R. pp. 608:25-611:1). He testified that Caveon has analyzed more than 50,000,000 test records. (*See* R. pp. 611:17-612:10).

Mr. Maynes testified Caveon "was being asked to analyze test result data because [MUSC] had a concern." (*See* R. pp. 614:4-9). He further stated that before performing its analysis, Caveon was not told the nature of the suspected irregularity or even the identities of the students involved. (*See* R. pp. 614:4-9, 617:23-618:6). Caveon reviewed all answers to all questions for all students taking the Exam. Mr. Maynes testified:

> So we concluded that for the plaintiffs, their agreement with their answers was highly unusual. Actually, I would say anomalous, extreme. They had 242 correct answers that were the same. And they had 54 incorrect answers that were the same, which is 296 total correct -- total answers that were the same out of 307, which is why we get to 96 percent. And of those 242 the two plaintiffs had scores of 245 and 246. So since we already know that 242 was the same for both, one of the plaintiffs had a -- had three answers to the answer -- three questions answered correctly, that other missed, answered incorrectly. The other one had four questions they answered correctly the other one answered incorrectly. Which left 58 answer -- 58 questions that they both had incorrect. And of those 58 questions, they both had incorrect, they matched on 54 of that answers.

(*See* R. p. 618:11-25). He noted that the Caveon methodology calculates the probability of all test takers working independently. (*See* R. pp. 619:17-23).

The Caveon Report concluded that "[t]he probability of the observed number of matching responses between Examinees 18013 [Kayla Bingham] and 18014 [Kellie Bingham], assuming they worked independently, was extremely small (less than 1 in 10^{38})."[3] (*See* R. pp. 866-91). Mr. Maynes testified that 10^{38} "is a number that's so big that I can't even imagine it, you know." (*See* R. pp. 619:17-23). He further testified that a *conservative* minimum threshold to raise a flag about whether Plaintiffs worked independently would be one in $10^{7.5}$; the statistical strength of Caveon's analysis was ***10^{31} greater*** than that threshold. (*See* R. pp. 620:8-19). To put it in layman's terms, the Caveon Report stated that the chances of such similarity between Plaintiffs' Exams occurring independently "is less than a person winning four consecutive Power Ball drawings." (*See* R. pp. 866-91).

Plaintiffs complain that Caveon should have considered that they are twins. However, Mr. Maynes testified that he knew of no "companies that do similar work to Caveon that somehow made adjustments for" test takers being twins. (*See* R. p. 616:6-9). Mr. Maynes conducted his own research into studies of twins and concluded that any impact on his analysis would be "modest." (*See* R. pp. 615:10-616:5).

7. The Honor Council Proceeding.

After a full hearing where Plaintiffs were allowed to offer evidence and examine witnesses, the Honor Council[4] concluded that Plaintiffs violated the Honor Code by collaborating on the Exam.[5] Plaintiffs appealed, and on June 14, 2016, Dr. Raymond N. DuBois, Dean of the College of Medicine, overturned the Honor Council ruling:

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3 This is 1 chance in 100,000,000,000,000,000,000,000,000,000,000,000,000,000.

4 The Honor Council is comprised of two student representative from each class, at least two faculty representatives (voting), and a faculty adviser. (*See* R. p. 999).

5 Significantly, the Honor Council did not call a witness from Caveon or otherwise address how, if at all, the Plaintiffs' status as twins might affect the validity of Caveon's analysis. Plaintiffs did submit expert testimony (the same expert they would call at the trial of this case) to the effect that identical twins perform similarly on tests.

> You acknowledged during the hearing that these circumstances created the appearance that you were improperly collaborating on the examination. The Honor Council was fully justified in reaching the conclusion that it did. I also find that you were accorded due process in all respects.
>
> Nevertheless, as the appellate authority, I am charged with the responsibility to weigh the evidence independently. In my opinion, the evidence presented against you does not rise to the level of proving guilt by the preponderance of evidence. I find that the evidence was circumstantial and that you provided plausible explanations for those circumstances. I hereby overturn the ruling of the Honor Council.

(*See* R. p. 809). Dean DuBois testified that he believed that there was evidence supporting the Honor Council's conclusions:

> Well, there was evidence for sure. I mean, there were testing irregularities that we've talked about earlier. There was the statistical analysis of the test. I think what really drove my decision on the appeal was that I thought that there were some unfair things that happened during the Honor Council hearing that led to over, you know, agreeing with the appeal.

(*See* R. p. 492:2-8).

Nevertheless, he ruled in Plaintiffs' favor because of three procedural concerns about the Honor Council proceeding:

- The "official accuser," Dr. Kasman, was not present at the hearing to answer questions. However, he later learned that Plaintiffs had approved her absence.
- There was no representative from Caveon present at the Honor Council hearing to answer questions about the statistical analysis. None of the other witnesses could answer those questions.
- The student investigators were present during the Honor Council's deliberations, where they communicated with members.

(*See* R. pp. 492:9-493:11). Dr. DuBois' decision notably does not exonerate Plaintiffs.

8. <u>Alleged Additional Disclosures.</u>

Plaintiffs admitted numerous Facebook postings — made well after Dr. DuBois vacated the Honor Council decision and ended that process — that were critical of MUSC and suggested (without naming them) that Plaintiffs received favorable treatment because of political connections. (*See generally* R. pp. 821-33). They also presented evidence that a newspaper

reporter contacted a member of the Honor Council to advise that she had "received an anonymous news tip" that Plaintiffs had been sanctioned for cheating but not expelled from school. (*See* R. p. 811). As discussed below, Plaintiffs presented *no* evidence of how information about them was leaked. They presented no evidence that any employee or agent of MUSC made defamatory statements to the media or to any students outside the Honor Council. To the contrary, the *only* evidence of an actual disclosure of information about the Honor Council was *Plaintiffs'* disclosure to their mother and cousin, as well as Kayla's boyfriend. (*See* R. pp. 400:20-401:20).

It is almost inconceivable that the jury could have found that Dr. Hazen-Martin's or Dr. Kasman's statements were defamatory or that those statements exceeded the bounds of qualified privilege. It is far more likely that the jury blamed MUSC for rumors about the Honor trial that were somehow leaked to the public in violation of MUSC's policy of strict confidentiality. Indeed, the focus of Plaintiffs' case was not on the Honor trial itself, but on the aftermath of the reversal of their convictions, wherein they felt ostracized because of the propagation of rumors that they escaped punishment because of their political connections. As will be shown below, there is no evidence that MUSC was responsible for any leak of information about the Honor proceedings.

B. Procedural History

Plaintiff commenced this action on November 2, 2017. (*See generally* R. pp. 48-54). The matter went to trial from November 14-18, 2022, resulting in a verdict in favor of Plaintiffs for $750,000 each. (*See* R. pp. 1-4). Defendant MUSC moved for a directed verdict at the appropriate times based, in part, on the absence of a properly-pled defamatory statement, absolute privilege, qualified privilege, and truth. (*See* R. pp. 594:9-606:13, 662:4-703:14). After the close of MUSC's case, the trial judge granted a directed verdict as to Plaintiffs' negligence claims, but denied the motion as to Plaintiffs' defamation claims. (*See* R. pp.702:14-703:1).

On November 28, 2022, Defendant MUSC filed its Post-Trial Motions, asking the trial court "for a judgment *non obstante veredicto* . . ., for a new trial, or for such other relief as the Court deems appropriate under the circumstances." (*See* R. p. 70). On December 16, 2022, Plaintiffs filed their Memorandum in Opposition to Defendant's Post-Trial Motions. On January 30, 2023, Defendant MUSC filed its Reply in Support of Post-Trial Motions. On May 15, 2023, the trial court entered a Form 4 Order denying MUSC's Post-Trial Motions and asked Plaintiffs' counsel to draft a formal order consistent. (*See* R. pp. 10-12). On September 19, 2023, Judge Curtis entered a detailed formal Order denying MUSC's Post-Trial Motions. (*See* R. pp. 16-47).

On or about June 9, 2023, Plaintiffs filed a Notice of Appeal from Judge Curtis' orders reducing the jury's verdict to conform with the South Carolina Tort Claims Act.[6] (*See* R. pp. 210-19). On June 12, 2023, MUSC filed a Notice of Cross-Appeal from:

> (a) the oral orders of Kristi F. Curtis, Circuit Court Judge, during the November 14-18, 2022 trial of this matter, including (but not limited to) the trial court's rulings denying MUSC's motions for directed verdict or judgment as a matter of law made at the close of Plaintiffs' and MUSC's cases at trial and any rulings on motions made by MUSC at the close of all evidence; (b) the jury verdict in the November 14-18, 2022 trial of this matter; and (c) the Form 4 order denying MUSC's Post-Trial Motions that the Honorable Kristi F. Curtis, Circuit Court Judge signed and filed on May 15, 2023 (attached hereto as Exhibit A).

(*See* R. pp. 220-24 Appeal). On October 16, 2023, MUSC filed its second Notice of Appeal from the trial court's September 19, 2023 formal Order, stating:

> The parties to this appeal are also parties to Appellate Case Number 2023-000952, in which MUSC filed a cross-appeal of a previous Form 4 Order denying its Post-Trial Motions. MUSC believes that this appeal should be consolidated with Appellate Case Number 2023-000952.

(*See* R. pp. 225-26).

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[6] On May 5, 2023, the trial judge entered an Order Granting Defendant's Motion to Reduce the Verdict Per the SCTCA and Denying Plaintiff's Motion to Determine Number of Occurrences. In that Order, the trial judge found "that the jury's verdict is limited to the statutory cap of $300,000 for Kellie Bingham and $300,000 for Kayla Bingham." MUSC has not appealed from that Order and, as a result, the issues surrounding the trial court's conforming of the verdict to the caps contained in the South Carolina Tort Claims Act will not be discussed in this Brief. Rather, MUSC will set forth why the trial judge properly reduced the verdict, in its response to Plaintiffs' anticipated Appellants' Brief raising this issue.

For the following reasons, the Court should reverse the trial court's denial of MUSC's motions for directed verdict and post-trial motions.

ARGUMENTS

A. Standard of Review

The standard of review governing motions for directed verdict or JNOV is well-settled in South Carolina:

> "In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions here either the evidence yields more than one inference or its inference is in doubt. The trial court can only be reversed by this [c]ourt when there is not evidence to support the ruling below."

See Solanki v. Wal-Mart Store #2806, 410 S.C. 229, 236, 763 S.E.2d 615, 618 (Ct. App. 2014) (citation omitted). Similarly, a trial court may grant a JNOV "if no reasonable jury could have reached the challenged verdict." *See Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). "If more than one inference can be drawn from the evidence, the grant of a JNOV is improper." *Burns v. Universal Health Servs.*, 361 S.C. 221, 232, 603 S.E.2d 605, 611 (Ct. App. 2004) (citation omitted).

"Under the 'thirteenth juror' doctrine, a trial judge may grant a new trial absolute when he finds the evidence does not justify the verdict." *Gastineau*, 323 S.C. at 181, 473 S.E.2d at 827. "[T]he trial judge is the thirteenth juror, possessing the veto power to the Nth degree, and, it must be presumed, recognizes and appreciates his responsibility, and exercises the discretion vested in him with fairness and impartiality." *Worrell v. South Carolina Power Co.*, 186 S.C. 306, 313-14, 195 S.E. 638, 641 (1938).

"The trial court's ruling on a directed verdict or JNOV motion will be reversed only if the ruling is governed by an error of law or no evidence supports the ruling." *See Dawkins v. Sell*, 434 S.C. 572, 580, 865 S.E.2d 1, 5 (Ct. App. 2021). "Upon review, a trial judge's order granting or denying a new trial [under the thirteenth juror doctrine] will be upheld unless the order is

wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law." *Lane v. Gilbert Constr. Co.*, 383 S.C. 590, 597, 681 S.E.2d 879, 883 (2009).

B. The Trial Court Should Have Granted a Directed Verdict or MUSC's Post-Trial Motions as to the Statements of Drs. Hazen-Martin and Kasman.

1. Plaintiffs Did Not Present Evidence of Defamatory Statements by MUSC.

Plaintiffs' Complaint is premised on written statements by Drs. Hazen-Martin and Kasman. (*See* R. pp. 860-65). However, those statements are clearly not defamatory. "Some statements are so clearly innocent . . . the court is justified in determining the question itself." *Parrish v. Allison*, 376 S.C. 308, 321, 656 S.E.2d 382, 389 (Ct. App. 2007). "'All of the parts of the publication must be considered in order to ascertain the true meaning, and words are not to be given a meaning other than that which the context would show them to have.'" *White v. Wilkerson,* 328 S.C. 179, 184, 493 S.E.2d 345, 347 (1997) (*quoting Jones v. Garner*, 250 S.C. 479, 485, 158 S.E.2d 909, 912 (1968)).

Dr. Hazen-Martin's email (*see* R. pp. 860-62) only states — *without even identifying Plaintiffs* — that two students were observed moving "in lockstep" on the Exam. Dr. Hazen-Martin does not allege any abnormalities other than her observations of Plaintiffs' progression. There is no accusation of cheating or dishonesty or other judgment about Plaintiffs' actions. Simply put, Dr. Hazen-Martin's email is not defamatory.

Similarly, Dr. Kasman's correspondence to Mr. Ivey (*see* R. pp. 863-65) is not susceptible of a defamatory meaning. That correspondence merely recites what Dr. Hazen-Martin's email had stated (regarding Plaintiffs moving in "lockstep"), what Ms. Friesinger wrote in her proctor's notes, and what she saw when she examined the scratch paper. Dr. Kasman did *not* state that Plaintiffs were, in fact, cheating. She only reported, truthfully, that she had been provided with information that might warrant a further look and that she had an obligation to report it to the Honor Council. She *does not identify Plaintiffs* (by name or description) and only states that there was a potential Honor Code violation.

Plaintiffs' only argument as to Dr. Kasman cherry-picks a few words out of context and ignores the meaning and impression of the letter. Plaintiffs argue that Dr. Kasman's correspondence was defamatory because they did not "signal[] each other" or "pass[] notes via scratch paper on the desk in front of them." Dr. Kasman's correspondence did not state the substance of signals or notes, and does not state or imply that they violated the Honor Code. She merely reported Ms. Friesinger's observations to the appropriate authority. While Plaintiffs disagree with Ms. Friesinger's observations, the testimony was clear that Ms. Friesinger and Dr. Kasman both believed that Plaintiffs signaled each other and passed notes. While Ms. Friesinger's notes do not use the words "signal" or "pass notes," the only reasonable interpretation is that they encompass those concepts.

Plaintiffs also refer to a sentence in isolation of Dr. Kasman's correspondence to argue that she concluded that Plaintiffs were cheating: "The cheating *was first suspected* during a routine audit of the LXR testing data, approximately two hours in the exam." (*See* R. p. 865 (emphasis added)). This sentence does not defame Plaintiffs by saying that they actually cheated. First, Dr. Kasman in the very same sentence states that the cheating was only "suspected," not a fact. (*See id.*). Moreover, the very first sentence says that Dr. Kasman was reporting "a *possible* case of academic dishonesty." (*See id.* (emphasis added)). Dr. Kasman's letter does not identify Plaintiffs, because federal law and "human decency" forbids it. (*See* R. p. 638:16-19). She did not disclose Plaintiffs' identities until the Honor Council looked at the information she had seen and determined to move forward with an investigation. (*See* R. pp. 643:15-644:5).

2. Defendant Cannot Be Liable for Dr. Hazen-Martin's or Dr. Kasman's Statements Because of Qualified Privilege.

Under the defense of qualified privilege, "one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused." *See Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999). The trial

judge held that Drs. Hazen-Martin's and Kasman's correspondence were qualifiedly privileged as a matter of law. (*See* R. p. 703:2-5). As a result, to return a verdict for Plaintiffs, the jury had to determine that MUSC abused or exceeded that privilege:

> The publisher must not wander beyond the scope of the occasion. [Citations omitted.] The privilege does not protect any unnecessary defamation. *Fulton, supra*. In order for a communication to be privileged, the person making it must be careful to go no further than his interests or his duties require. *Id.* Where the speaker exceeds his privilege and the communication complained of goes beyond what the occasion demands that he should publish, and is unnecessarily defamatory of the plaintiff, he will not be protected.

See Murray v. Holnam, Inc., 344 S.C. 129, 141, 542 S.E.2d 743, 749 (Ct. App. 2001). "Where the occasion gives rise to a qualified privilege, there is a *prima facie* presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice or that the scope of the privilege has been exceeded." *Harris v. Tietex Int'l, Ltd.*, 417 S.C. 533, 541, 790 S.E. 2d 411, 416 (Ct. App. 2016). Plaintiffs presented no evidence that MUSC exceeded or abused its qualified privilege.

First, there is no evidence that Dr. Hazen-Martin or Dr. Kasman published their correspondence beyond those who had a legitimate need to know in connection with the nascent Honor Council process or to anyone outside of MUSC. To the contrary, Drs. Hazen-Martin and Kasman testified without dispute that they did *not* disclose *anything about Plaintiffs* beyond the small circle of people with a legitimate need to know in connection with the Honor Council proceeding. (*See* R. pp. 460:4-17, 463:14-16, 472:11-6, 638:5-19, 645:9-646:4). These disclosures are plainly within the scope of the privilege, which related to the Honor Council process. There is no evidence whatsoever that Dr. Hazen-Martin or Dr. Kasman sent their correspondence to anyone outside of the circle of those with a need to know. There is simply no evidence that the scope of the privilege was exceeded.

A qualified "privilege also can be abused if the statement is made in reckless disregard of the victim's rights." *See Fountain v. First Reliance Bank*, 398 S.C. 434, 446, 730 S.E.2d 305, 311 (2012). Plaintiffs presented no evidence that Dr. Hazen-Martin or Dr. Kasman acted in

reckless disregard of their rights. To the contrary, the face of their communications shows that they made limited reports to the appropriate individuals to begin the *possible* process of an Honor Council proceeding. Dr. Hazen-Martin or Dr. Kasman limited their statements to communicating about their observations and the observations of others. They did not state that Plaintiffs had actually cheated (they didn't even name them) and did not advocate for any particular result. These statements did not attempt to poison the Honor Council process or even encourage that the Honor Council undertake a formal investigation in the first instance. Plaintiffs presented no evidence that Dr. Hazen-Martin or Dr. Kasman acted "recklessly" with regard to Plaintiffs' rights or did anything to unduly harm them. In fact, one can scarcely imagine more anodyne statements to begin the Honor Council process than the disclosures Drs. Hazen-Martin and Kasman made. (*See* R. pp. 860-65).

The public policy implications of the verdict and the denial of MUSC's motions are staggering. There could be no more compelling case for application of privilege than to statements made by an academic officer initiating an inquiry into a possible violation of an honor code. For obvious reasons, it is against the public's interest for academic officers of a medical university to be cowed into silence when they are confronted with evidence of academic dishonesty. The trial court should have found not only that qualified privilege applied to Drs. Hazen-Martin's and Kasman's measured statements, but that as a matter of law their statements did not exceed or abuse the privilege.

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

If the Court finds that Plaintiffs presented evidence that MUSC exceeded or abused the qualified privilege, it should nevertheless reverse the trial court's rulings because Dr. Hazen-Martin's and Kasman's communications are *absolutely* privileged. "'When a communication is absolutely privileged, no action lies for its publication, no matter what the circumstances under which it is published, *i.e.*, an action will not lie even if the report is made with malice.'" *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 22, 567 S.E.2d 881, 892 (Ct. App. 2002). While

"[h]istorically there has been a tendency to restrict the absolute privilege to judicial proceedings, legislative proceedings and acts of state," *Crowell v. Herring*, 301 S.C. 424, 430, 392 S.E.2d 464, 467 (Ct. App. 1990), but absolute privilege "does not depend on the rigid requirement of a strictly legislative or judicial proceeding; its limits are fixed rather by considerations of public policy." *See Richardson v. McGill*, 273 S.C. 142, 146, 255 S.E.2d 341, 343 (1979). Absolute privilege "'reflects the prevailing common law view that the public interest in freedom of expression by participants in judicial proceedings, uninhibited by any risk of resultant suits for defamation, outweighs the interest of the individual in the protection of his reputation from defamatory impairment in the judicial forum.'" *Corbin v. Wash. Fire & Marine Ins. Co.*, 278 F. Supp. 393, 398 (D.S.C. 1968) (citation omitted).

While absolute privilege is sometimes called "judicial," South Carolina law demonstrates that it is applied beyond literal court proceedings. In *Crowell,* 301 S.C. at 430-31, 392 S.E.2d at 466-67, the court extended absolute privilege to statements made to initiate a VFW court martial, which is certainly not a judicial proceeding.[7] The court cited the scholarly opinion of then-District Judge Russell in *Corbin,* which explained the rationale behind absolute privilege:

> Privilege in libel or slander is founded on sound considerations of public policy. It is horn-book law that such privilege falls into two categories, *i.e.*, absolute privilege and qualified privilege. While there has been some tendency in the decisions to narrow the absolute privilege, restricting it generally "to legislative and judicial proceedings and acts of state", the Courts of South Carolina have recognized "occasions other than those comprising strictly legislative or judicial proceedings", where, under considerations of public policy, absolute privilege has been upheld. After stating that, "South Carolina has applied the doctrine of absolute privilege to several occasions other than those comprising strictly legislative or judicial proceedings", Judge Wyche in *Johnson v. Independent Life & Accident Ins. Co.* (D.C.S.C.1951) 94 F. Supp. 959, 962 [applying absolute privilege to a letter written to the South Carolina Insurance Commissioner], reviews in detail the several cases, extending over a period of a century and a half, in which, absent a legislative or judicial occasion, an absolute privilege was extended to publications, *i.e., Carver v. Morrow* (1948) 213 S.C. 199, 48 S.E.2d 814 (suit against executor personally and as fiduciary for alleged defamation in will filed); *State v. Drake* (1922) 122 S.C. 350, 115 S.E. 297 (defamation in letter

[7] The VFW operates as an independent, nonprofit organization and is not a governmental agency. (*See* https://www.vfw.org/about-us/faq).

> answering charges made before a fraternal organization); *Rodgers v. Wise* (1940) 193 S.C. 5, 7 S.E.2d 517 (alleged defamation in letter between counsel in litigation); *Reid v. Delorme* (1806) 2 Brev. 76 (alleged defamation in petition submitted to the General Assembly.) After such review, Judge Wyche upheld a plea of absolute privilege for publications made to the insurance commission by the district manager of defendant-insurer with reference to the qualifications and conduct of plaintiff as an insurance agent.

See Corbin, 278 F. Supp. at 400 ("[T]he principle of absolute immunity is, in my opinion, essential to the maintenance of arbitration as an effective instrument for the settlement of controversies . . . ."). Absolute privilege has been applied to statements preliminary to a VFW court martial, an arbitration, a letter to the Insurance Commissioner, a will, a letter answering charges before a fraternal organization, a letter between lawyers concerning litigation, a petition submitted to the General Assembly, and a *lis pendens*.[8]

Absolute privilege has been applied in other states to honor council proceedings in institutions of higher learning:

> What is important is that [t]he underlying basis for the grant of the privilege is the public's interest in and need for a judicial process free from the fear of a suit for damages for defamation or invasion of privacy based on statements made in the course of a judicial or quasi-judicial proceeding. [Citation omitted.] The Tennessee Supreme Court has strongly endorsed a liberal application of the absolute privilege accorded to publication of defamatory matters in connection with judicial proceedings. [Citation omitted.] Extending this privilege to the Honor Council proceedings is consistent with the overall purpose of the privilege and Tennessee's liberal application.

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[8] Other jurisdictions have applied absolute immunity to "quasi-judicial" proceedings. *See Dahl v. Quinn*, 2020 Minn. App. Unpub. LEXIS 871, at *7 (Nov. 23, 2020) ("Absolute privilege applies to both judicial and quasi-judicial proceedings."); *Hartman v. Keri*, 858 N.E.2d 1017, 1031 (Ind. Ct. App. 2006) ("Keri identifies no other jurisdictions supporting his position that an action for defamation should trump the need for antiharassment complaints to be filed in quasi-judicial forums free from the fear of retaliatory litigation."); *Baldwin v. Adidas Am., Inc.*, 2002 U.S. Dist. LEXIS 19626, at *8 (S.D. Ohio July 29, 2002) ("The [Trademark Trial and Appeal] Board is a quasi-judicial tribunal. The statements contained in defendant's petition for cancellation are clothed with an absolute privilege."); *Newsom v. Moore (In re Moore)*, 186 B.R. 962, 976 (Bankr. N.D. Cal. 1995) ("[A] complaint to the State Bar, a quasi-judicial body, is absolutely privileged.") (emphasis added); *Allan & Allan Arts v. Rosenblum*, 201 A.D.2d 136, 139, 615 N.Y.S.2d 410, 412 (App. Div. 2nd Dept. 1994) (finding that absolute privilege applies "to proceedings before tribunals having attributes similar to those of courts."); *Hill Homeowners Asso. v. Zoning Bd. of Adjustment*, 129 N.J. Super. 170, 179, 322 A.2d 501, 506 (N.J. Super. Ct. 1974) ("A quasi-judicial procedure has such judicial attributes that an absolute privilege extends to communications made by an objector as it does when made before a court . . . .").

See Doe v. Rhodes Coll., 2016 U.S. Dist. LEXIS 201159, at *18-19 (W.D. Tenn. Oct. 26, 2016) (quotation marks omitted). As another court stated:

> Clement was required by the Honor System to communicate these allegations of student misconduct to the Honor Council due to his status as a faculty member and Honor System coordinator. He was also responsible for counseling both the faculty accuser and the accused. As a Professor in the plaintiff's department, Geary was similarly bound to report honor violations. Trani was instructed by Part V.H.8 of the VCU Rules and Procedures manual to review the Appeal Board recommendation and render a final decision. This result must be communicated to the accused and various faculty members. While the defendants were involved in the accusation and expulsion phases of the plaintiffs' Honor System case, none of these individuals took part in the determination of guilt or innocence. In sum, each of the allegedly defamatory communications was a direct outcrop of the quasi-judicial Honor Council proceedings and may not form the basis of a slander charge.

See Childress v. Clement, 44 Va. Cir. 169 (Cir. Ct. Va., City of Richmond 1997); *accord Le v. University of Med. & Dentistry,* No. CIV.A. 08-991SRC, 2009 WL 1209233, at *7 (D.N.J. May 4, 2009), *aff'd*, 379 F. App'x 171 (3d Cir. 2010) ("[A]bsolute immunity shields the statements made by the Student Defendants at the hearing from giving rise to an action against them for defamation or false light."); *See Pfeiffer-Fiala v. Kent State Univ.*, 2015-Ohio-5558, ¶ 33, 2015 Ohio Misc. LEXIS 10967 (Ohio Ct. Cl. Jan. 26, 2015) ("[T]he proceedings before the Academic Hearing Panel involved plaintiff receiving notice and a hearing, and, according to the complaint, she was able to present evidence at the hearing. Accordingly, it must be concluded that the proceedings were quasi-judicial in nature. Inasmuch as there has been no evidence presented of statements before the Academic Hearing Panel that were not reasonably related to the proceedings, the absolute privilege applies.").

Applying absolute privilege to Honor Council proceedings would be consistent with the reluctance of courts to interfere with academic operations. *See e.g., Board of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978) ("We decline to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship."); *Tigrett v. Rector & Visitors of the Univ. Of Va..*, 290 F.3d 620, 629-30 (4th Cir. 2002) ("In the absence of a constitutional or statutory deprivation, the federal

courts should be loathe (sic) to interfere with the organization and operation of an institution of higher learning."); *Powell v. National Bd. of Medical Examiners*, 364 F.3d 79, 88 (2nd Cir. 2004) ("When reviewing the substance of a genuinely academic decision, courts should accord the faculty's professional judgment great deference."); *Henson v. Honor Committee of U. Va.*, 719 F.2d 69 (4th Cir. 1983) ("[J]udicial intrusion into academic decision-making should be avoided."); *Gati v. University of Pittsburgh of Commw. Sys. of Higher Educ.*, 91 A.3d 723, 731 (Pa. Super. Ct. 2014) ("Schools have broad discretion to implement and enforce academic and disciplinary rules and regulations."); *Waliga v. Board of Trustees of Kent State Univ.*, 22 Ohio St. 3d 55, 58, 488 N.E.2d 850, 852–53 (1986) ("Modern courts have also traditionally refused to interfere with fundamental university functions . . . ."); *Maas v. Corp. of Gonzaga Univ.*, 27 Wash. App. 397, 402-03, 618 P.2d 106, 109 (Wash. Ct. App. 1980) ("Professors in the position of making academic decisions will not be second-guessed by the courts."). "'[T]he rule of judicial nonintervention in academic affairs is particularly appropriate in the health care field ... because a medical school must be the judge of the qualifications of its students to be granted a degree; courts are not supposed to be learned in medicine and are not qualified to pass opinion as to the attainments of a student in medicine.'" *Gurbani v. Johns Hopkins Health Sys. Corp.*, 237 Md. App. 261, 293-94, 185 A.3d 760, 779 (Md. Ct. App. 2018) (citation omitted).

This Court should conclude that absolute privilege applies to MUSC's Honor Council proceeding, as a quasi-judicial process. The Honor Code sets forth a detailed process for handling potential violations. A formal charge is made to the Council President, as it was here. (*See* R. p. 1000). The Honor Code then sets forth extensive provisions providing due process and protecting the accused's rights, including: notification, excuse from exams during pendency, right to be accompanied by an advisor, time for preparation of a defense, right to expedient resolution, right to confront accusers, the right to examine all evidence, and the right to remain silent.[9] (*See* R. pp. 1001-02). After the formal charge, a notification conference is held (like a

[9] This lawsuit does not involve a challenge to the sufficiency of MUSC's procedures or whether MUSC complied with them.

grand jury) to decide whether to pursue a formal hearing. (*See* R. pp. 1002-03). The Honor Council contains detailed requirements for the formal hearing, including the introduction of evidence and closing statements. (*See* R. pp. 1003-04). While it may not have all of the procedural requirements of a circuit court lawsuit, the Honor Council process certainly is, at the very least, quasi-judicial.

As MUSC faculty members, Drs. Hazen Martin and Kasman made the allegedly defamatory statements to begin that Honor Council process, akin to the filing of a civil complaint. Even if the observations of Drs. Hazen-Martin or Kasman turned out to be mistaken, an absolute privilege should attach to their correspondence, which were clearly intended to begin the quasi-judicial process. Absolute immunity will prevent chilling medical school faculty from reporting possible academic dishonesty without fear of repercussion. The trial court's rulings threaten faculty efforts to ensure academic integrity and may prevent reports of suspicious activity because of fear of being sued. The trial court's rulings insulate twin students from receiving proper academic scrutiny and will deter faculty from reporting concerns about twins.

The allegedly defamatory communications were made entirely within the context of the Honor Council procedure and in accordance with Drs. Hazen-Martin's and Kasman's professional and academic responsibilities. They were made to those with a legitimate need to know and in MUSC's legitimate interest in ensuring academic integrity.[10] Applying the Court's holding in *Richardson v. McGill*, *supra*, that application of absolute privilege "does not depend on the rigid requirement of a strictly legislative or judicial proceeding; its limits are fixed rather by considerations of public policy", there can be no justification not to apply absolute privilege to statements made in furtherance of an Honor proceeding at a state medical university. If a VFW court martial, a letter to the insurance commissioner, and a private arbitration are worthy

[10] Moreover, Drs. Hazen-Martin and Kasman acted in furtherance of the public interest in ensuring the competency of the medical profession. Public policy demands that educators be permitted to report potential academic misconduct without fear of reprisal. This is particularly true in the case of medical school students, who will be entrusted with the care of South Carolinians at their most vulnerable. Public policy is best served by encouraging professional schools to ensure the competency of graduates.

of protection by absolute privilege, so too is MUSC's Honor procedure. The vital nature of the integrity of MUSC's academic curriculum requires that its faculty freely communicate their concerns without fear of reprisal.

In the alternative, because MUSC is a state entity, its Honor Court proceedings would be subject to absolute privilege even under the historical "tendency to restrict the absolute privilege to judicial proceedings, legislative proceedings and *acts of state.*" *Crowell,* 301 S.C. at 430, 392 S.E.2d at 467 (emphasis added). Irrespective of whether the Honor Council is quasi-judicial, the Court should apply absolute privilege because Drs. Hazen Martin and Kasman engaged in an "act of state" as faculty of MUSC, a legislatively created state entity. Consequently, their statements were absolutely privileged under the "acts of state" prong.

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

The trial judge also erred in denying MUSC's directed verdict and Post-Trial Motions because the undisputed evidence shows that the alleged defamatory statements were true. "'The truth of the matter is a complete defense to an action based on defamation.'" *Kunst v. Loree*, 424 S.C. 24, 40, 817 S.E.2d 295, 303 (Ct. App. 2018) (*quoting WeSav Fin. Corp. v. Lingefelt*, 316 S.C. 442, 445, 450 S.E.2d 580, 582 (1994)). For the truth defense to apply, "the truth must be as broad as the defamatory imputation or 'sting' of the statement." *Richardson v. State-Record Co.,* 330 S.C. 562, 566, 499 S.E.2d 822, 824 (Ct. App. 1998) (citation omitted). "[A] sufficient defense is made out where the evidence establishes that the statement was substantially true." *Ross v. Columbia Newspapers, Inc.*, 266 S.C. 75, 80, 221 S.E.2d 770, 772 (1976).

The evidence demonstrates beyond any doubt that the statements of Drs. Hazen-Martin and Kasman were substantially true. Dr. Hazen-Martin merely recounted her observations of Plaintiffs' performance on the LXR system during the test — that they were moving in "lockstep" and giving the same answers. The LXR data introduced into evidence confirms that her testimony and email were accurate. (*See* R. pp. 892-915). Plaintiffs present no evidence disputing that what Dr. Hazen-Martin said was true.

Similarly, as discussed above, Dr. Kasman's letter to Mr. Ivey is substantially true. The most Plaintiffs can do is quibble over wording. They believe that the letter — which was already abundantly clear — should have even more clearly stated that the cheating was only suspected. Plaintiffs also quibble over the use of words like "signaling" and "passing notes." The evidence is clear that Ms. Friesinger saw Plaintiffs nodding to each other and pushing paper toward each other. While Plaintiffs may disagree about whether Dr. Kasman should have chosen other words, the overall impression of Dr. Kasman's letter is entirely consistent with Ms. Friesinger's observations.

Because the evidence is indisputable that the statements of Drs. Hazen-Martin and Kasman were substantially true, the Court should have granted MUSC's motion for directed verdict or Post-Trial Motions.

C. The Trial Court Should Have Granted a Directed Verdict or MUSC's Post-Trial Motions as to the Alleged "Leak" of Confidential Information.

At trial, Plaintiffs sought to expand their defamation claims beyond the two written correspondence of Drs. Hazen-Martin and Kasman, claiming that they were defamed in alleged "leaks" outside of the Honor Council to other students or to the media. For the reasons that follow, the trial judge should have entered a directed verdict or granted MUSC's Post-Trial Motions with regard to any claims of defamatory "leaks."

1. Plaintiffs' Complaint Does Not Allege Defamatory "Leaks," But Is Limited to the Statements of Drs. Hazen-Martin and Kasman.

The trial judge should have entered judgment against Plaintiffs to the extent they base their defamation claims on alleged "leaks," because those claims exceeded the allegations of their Complaint, which only identify defamatory statements by Drs. Hazen-Martin and Kasman:

> 4. Debra Hazen-Martin, Ph.D., after the examination falsely reported to Laura Kasman, M.D., that the plaintiffs had cheated during the examination she was monitoring She also falsely stated to Dr. Kasman that the plaintiffs had been observed signaling to each other and passing notes by scratch paper between them. These statements were false and defamatory.

> 5. On May 11, 2016, Dr. Kasman falsely wrote to Joseph Ivey that the plaintiffs were suspected of cheating on an examination and were seated next to each other and were observed signaling each other and passing notes via scratch paper on the desk between them. These statements were false and defamatory.

(*See* R. pp. 51-52 ¶¶ 4-5). These are the *only* defamatory statements in the brief 13-paragraph Complaint. In the five-plus years between the filing of the Complaint and trial, Plaintiffs never sought leave to amend to add any further defamatory statements.

The Complaint does *not* allege that members of the Honor Council "made their own defamatory statements to a member of the student body or the Post and Courier," as Plaintiffs argued during post-trial motions. (*See* R. p. 159). At most, the Complaint obliquely references rumors and information eventually published in the newspaper:

> 6. *The false statements mentioned above* [*i.e.*, the statements of Drs. Hazen-Martin and Kasman] were repeated by others and were eventually reported by the Post and Courier newspaper. . . .
>
> 9. Because of the actions of the defendant's employees, *the false and defamatory statements made about the plaintiffs* were published in the Post and Courier newspaper and the information published contained sufficient information to identify the plaintiffs.
>
> 10. As a result of the false and defamatory statements of the defendant's employees, *the false and defamatory statements were repeated numerous times* by the students at MUSC both verbally and by email.

(*See* R. p. 52 ¶¶ 6, 9-10). Plaintiffs make no specific allegations concerning the substance of any "leaks" and do not allege a *defamatory* leak by an MUSC employee acting within the scope of official duties. The Complaint did not place MUSC on notice of any claims of defamation beyond Drs. Hazen-Martin and Kasman in Paragraphs 4-5. Consequently, the Court should not have allowed Plaintiffs to pursue defamation claims based on alleged leaks.

Plaintiffs were obligated to specifically plead the defamatory statements underlying their claim to apprise MUSC of their claim. "A defendant 'cannot be expected to defend against an allegation that [the defendant] defamed Plaintiff by making a statement heard by unknown persons at an unknown place at an unknown time.'" *See Doe v. McGowan*, 2017 WL 573619, at *3 (D.S.C. Jan. 5, 2017), *report and recommendation adopted*, 2017 WL 571487 (D.S.C. Feb.

13, 2017) ("The Complaint does not allege with specificity the time, place, medium, or listener of any of the alleged defamatory statements."); *accord McKay v. Medical Univ. of S.C.*, 2017 WL 3477799, at *4 (D.S.C. Aug. 14, 2017) ("[Plaintiff], however, does not allege the actual contents of the defamatory statements or the identity of the persons to whom they were made. Without that factual detail, Plaintiff's defamation claim is merely the conclusory statement that [d]efendants defamed her to other [defendant] employees and others."). Requiring Plaintiffs to allege "the name or names of the persons to whom the defamatory words concerning the plaintiff were spoken is [intended] to limit the issues to the particular person or persons named in the complaint." *Tucker v. Pure Oil Co. of Carolinas*, 191 S.C. 60, 3 S.E.2d 547, 549 (1939) (emphasis added). Plaintiffs did not plead the identity of the alleged "leaker," the hearer of the statement, or its substance.

At trial, Plaintiffs sought (over Defendant's objections) to expand their defamation claims to encompass unknown disclosures by unknown people of unknown information to unknown students or the media that were never pled. Because Plaintiffs did not allege those statements in their Complaint, MUSC was denied the opportunity to engage in detailed discovery directed to them. The trial court should not have permitted Plaintiffs to present evidence or argue that unpled "leaks" could be a potential basis for liability. To the contrary, Plaintiff's defamation claims should have been limited to the specific statements pleaded in the Complaint.

Moreover, to the extent the trial judge allowed any claims relating to "leaks," it should have restricted Plaintiffs to the allegations of Paragraphs 6, and 9-10 of the Complaint, which asserted that the defamatory statements of Drs. Hazen-Martin and Kasman were "repeated by others" and published in the Post & Courier. The statements of Drs. Hazen-Martin and Kasman are limited and circumspect, focused on bringing a potential issue to the Honor Council. Those statements are limited to: (a) Dr. Hazen-Martin's recitation of her observations of LXR data; and (b) Dr. Kasman's report to Joseph Ivey of potential academic dishonesty and "suspected" cheating, repeating Michele Friesinger's observations of non-verbal signaling and passing of notes on the desktop. Plaintiffs presented no evidence whatsoever that these statements were

ever repeated in public. To the contrary, the rumors that Plaintiffs complained of were that they were caught cheating, but escaped punishment because of their political connections. Dr. Hazen-Martin and Dr. Kasman's communications contained none of that information, nor could they have since they preceded the Honor trial and the reversal of Plaintiffs' Honor convictions..

Plaintiffs' reliance on "leaks" is disconnected from their pleaded defamation claims. As set forth above, the Complaint is based on defamation and does not assert claims for the disclosure of Plaintiffs' private information. They do not allege a claim for violations of their rights to privacy under any federal or state laws or an invasion of privacy cause of action. They do not make a due process challenge to the Honor Council procedure (which ultimately resolved in their favor). As a result, Plaintiffs' claims could only rely upon "leaks" if they presented evidence of the substance of the actual leak so that the jury could determine whether the specific allegedly defamatory statements were defamatory. Plaintiffs have not done so. Therefore, the claimed "leaks" cannot be actionably tied to the alleged defamatory statements giving rise to these claims in the first instance.

For the foregoing reasons, the trial court erred in permitting Plaintiffs to base their claims upon alleged leaks of information to the media or to their fellow students.

2. The Claimed "Leaks" Were Not Attributable to MUSC, Were Outside of the Official Duties of Honor Council Members, and Were Contrary to MUSC's Policies.

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). The Act further

provides that MUSC 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." *See* S.C. Code § 15-78-60(17).

The "scope of official duties" under the Tort Claims Act is narrower than the common law "course and scope of employment" for imposing vicarious liability. *South Carolina State Budget & Control Bd. v. Prince*, 304 S.C. 241, 403 S.E.2d 643 (1991) (holding that "course of employment" in insurance policy is broader that the Act's "scope of official duties"). Because of this, "it follows that acts not within the [common law] 'scope of employment' are not within the [Tort Claims Act] 'scope of official duties.'" *See Frazier v. Badger*, 361 S.C. 94, 102, 603 S.E.2d 587, 591 (2004) (sexual harassment not within "scope of official duties").

Under common law vicarious liability, to hold an entity liable for its agent's defamation the plaintiff must show "that the latter was at the time acting within the scope of his employment and in the actual performance of the duties of the corporation touching the matter in question." *See Johnson v. Life Ins. Co. of Ga.*, 227 S.C. 351, 357, 88 S.E.2d 260, 263 (1955); *accord Murray v. Holnam, Inc.*, 344 S.C. 129, 139, 542 S.E.2d 743, 748 (Ct. App. 2001) ("[A] principal may be held liable for defamatory statements made by an agent acting within the scope of his employment or within the scope of his apparent authority"). "If the servant is doing some act in furtherance of the master's business, he will be regarded as acting within the scope of his employment, although he may exceed his authority." *Murphy v. Jefferson Pilot Communic. Co.*, 364 S.C. 453, 462, 613 S.E.2d 808, 812 (Ct. App. 2005) (citation omitted). "An act falls within the scope of the [employee]'s employment if it was reasonably necessary to accomplish the purpose of the [employee]'s employment[] and it was done in furtherance of the [employer]'s business." *Wade v. Berkeley Cty.*, 330 S.C. 311, 319, 498 S.E.2d 684, 688 (Ct. App. 1998) (emphasis added). Conversely, "if the [employee] acts for some independent purpose of his own, wholly disconnected with the furtherance of his [employer]'s business, his conduct falls outside the scope of his employment." *Pridgen v. Ward*, 391 S.C. 238, 244, 705 S.E.2d 58, 62 (Ct. App. 2010) (citation omitted).

An unauthorized leak by a disgruntled MUSC employee (or student or Honor Council member) would be, as a matter of law, "outside the scope of [their] official duties" under the Tort Claims Act and outside of the course and scope of employment under the common law. It would not and could not further any purpose or business of MUSC. To the contrary, such actions would be highly detrimental to MUSC and contrary to its policies.

MUSC's Honor Code is clear that Honor Council investigations and proceedings are highly confidential and are not to be disclosed to anyone:

- "Information pertaining to honor council hearings or any matters under investigation are confidential. Only those persons involved in a particular case or with a legitimate need to know will be informed." (*See* R. p. 997).

- "The dean assists the honor council in maintaining a secure, permanent location for all confidential records." (*See* R. p. 1000).

- "The formal written charge is confidential . . . ." (*See id.*).

- "Confidentiality is important during this process, and representatives will remind each witness that discussions are confidential." (*See* R. p. 1001).

- "The Notification Conference will be taped and transcribed (excluding the deliberations) in a non-identifying manner (*i.e.*, deleting all direct name references) by the dean's office of that college for confidentiality and safekeeping." (*See* R. p. 1002).

- "Upon completion of any hearing, all recorded or transcribed records are delivered to the dean's office of that college for confidentiality and safekeeping." (*See* R. p. 1003).

- "The Honor Council President convenes the hearing, instructs all participants in their respective roles, and charges all participants with strict confidentiality. The president administers the following pledge to all persons presenting testimony during the Formal Hearing:

  > "I, _____, will tell the truth in relation to the inquiry about which I am to give testimony. I further affirm that all matters relative to this hearing shall be held in strictest confidence."

  (*See id.*).

- "The president will notify the accuser in confidence of the verdict and sanctions following the formal hearing." (*See* R. p. 1004).

As a matter of law, any conduct violating those policies could not be within the scope of the official duties of an MUSC "employee" (or Honor Council member) under the Act. Any disclosure of confidential Honor Council information in direct violation of MUSC's policies would be well outside the course and scope of employment or any official duties.

Moreover, such conduct would violate Family Educational Rights and Privacy Act (FERPA) regulations, which state that a "student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records." *See* 34 C.F.R. § 99.30(a). An "education record" under FERPA is broadly defined as any records that are "(1) Directly related to a student; and (2) Maintained by an educational agency or institution or by a party acting for the agency or institution." *See* 34 C.F.R. § 99.3. Thus, any agent or employee of MUSC who leaks information about a disciplinary proceeding could violate FERPA. If MUSC violates FERPA, the federal government may, among other things, terminate its eligibility to receive funding under any program. *See* 34 C.F.R. § 99.67(a)(1)-(3). It would defy logic to suggest that potential violations of FERPA could be within the scope of an employee's official duties in furtherance of MUSC's business. There is no evidence whatsoever that any "leak" of information served MUSC's business in any way.

Finally, any leak from the Honor Council could not have been in the scope of official duties because it would have occurred *after* the Honor Council proceedings were completed with Plaintiffs' successful appeal. The only evidence of a "leak" comes from Facebook postings and an inquiry by a newspaper reporter. These all occurred *weeks after* the Honor Council had completed its work. (*See* R. p. 403:14-17 (noting that "rumors and things" began in August, 2016, "after they overturned our appeal.")). This is consistent with the tenor of the rumors, suggesting that Plaintiffs had used political influence to obtain a reversal. Dr. DuBois' email, upon which Plaintiffs rely for "proof" of the leak, is in response to an inquiry from a newspaper reporter about student discontent about Plaintiffs' success in their appeal; in other words, this claimed leak would have occurred after the Honor Council had completed its work. (*See* R. pp.

808-10). Therefore, at the time of the claimed leaks, the Honor Council members were no longer acting as such with regard to this issue. Their work had ended. Consequently, any statements made could not have been in the scope of official duties.

As a matter of law, MUSC cannot be liable for any leak because such actions are indisputably outside of the scope of the official duties of any MUSC employee or agent. A South Carolina Court of Appeals' unpublished decision — in which Plaintiffs' counsel represented the plaintiff — is illustrative. *See Doe v. Beaufort Jasper Acad. for Career Excellence*, No. 2021-UP-010, 2021 S.C. App. Unpub. LEXIS 10 (Ct. App. Jan. 13, 2021). In *Doe*, the plaintiff sued the Academy under the Tort Claims Act, alleging that he was the victim of an anonymous defamatory letter accusing him of having an affair with a coworker. Although he could not identify the author, he testified that the circumstantial evidence showed that it was the Academy because the information had come from someone with access to his personnel file (*i.e.,* someone from the Academy). The Court of Appeals affirmed the grant of summary judgment to the Academy, concluding as a matter of law that the alleged defamation was outside of the course and scope of employment (and outside the scope of official duties):

> [T]here is little doubt that the publication of the defamatory letters was personally, not professionally, motivated and wholly disconnected from the Academy's business. [Citation omitted.] We are not persuaded by Appellant's argument that because the accusations of infidelity against him included another member of the Academy's staff, a jury could reasonably determine the publication of the defamatory letters was within the scope of employment or in furtherance of the Academy's business. [Citations omitted.] The contents of the letters make clear that the author was operating with personal animus against Appellant and Jane Doe. To say nothing of the personal attacks conveyed in the letters, the fact that letters were mailed to Appellant's wife shows the author's purpose was principally to disrupt Appellant's personal, not professional, life. . . . Even granting Appellant the benefit of every reasonable favorable inference—the assertions in the letters are untrue, the letters came from an employee who had access to the Academy's personnel files and used them to gather information to create and publish the letters, etc.—publishing the letters would still not fall within the scope of the employee's official duties.

See id., 2021 S.C. App. Unpub. LEXIS 10, at *9 & *14-15. Similarly, there is absolutely no set of facts under which the disclosure of private Honor Council information — in violation of the

MUSC Honor Code and FERPA, and after the Honor Council completed its work — furthered MUSC's business. To the contrary, any leaks were detrimental to MUSC's educational goals and its obligations to maintain confidentiality. Moreover, as the Facebook postings indicate, any leak created a rift among MUSC students and interfered with the educational process.

The *only* evidence shows that — if any "leak" from MUSC occurred — it was for purely personal reasons. All of the identified communications — including Facebook postings Plaintiffs entered into evidence — demonstrate that any leak was motivated by personal anger from the perception that Plaintiffs received favorable treatment because of their indisputable political connections. The substance of the Facebook posts upon which Plaintiffs so heavily relied (most of which did not even name them) confirm the personal motivation for any leaks or rumors about Plaintiffs. (*See* R. pp. 821-34). It is indisputable that no leaks could have been made to further MUSC's business, which expressly prohibited such disclosures of confidential Honor Council information. Instead, any leaks that occurred could only have been motivated by personal frustration with Plaintiffs' perceived benefit from political influence.

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

The jury could not have concluded that MUSC should be held liable for any "leaks" of information, because Plaintiffs did not present a scintilla of evidence of a particular leak by any MUSC employee. Unlike nearly every other defamation claim in the history of South Carolina jurisprudence, Plaintiffs cannot identify a specific, actual publication with regard to the claimed leaks. Years after filing suit and after a week-long trial, Plaintiffs still cannot present admissible evidence of who made a defamatory leak, the substance of the leak, the recipient of the leak, or its circumstances. Instead, at trial, Plaintiffs relied on what they called "circumstantial evidence," which was in fact sheer speculation. In essence, Plaintiffs asked the jury to speculate that any leak (the substance of which was unknown) *must have* come from an MUSC employee or member of Honor Council, without evidence of who said what, when, and to whom. Such sheer speculation could not support the verdict.

The only "circumstantial evidence" of a leak was an August 12, 2016 email from Dean Dr. Raymond DuBois to Drs. Nicholas Batalis and Donna Kern. (*See* R. p. 808). That email was part of a chain that began with an email from Lauren Sausser, a Post & Courier reporter, to Honor Council member Ken Kennedy:

> I received an anonymous news tip today that the Bingham twins were sanctioned for cheating during exams by the MUSC Honor Council, but were not expelled from the school, despite the recommendation of the council.
>
> I need a student rep from the council to confirm off-the-record that these proceedings took place. Apparently people are very angry that the twins will be able to stay at the school because of their political connections.
>
> I understand that the council voted 8-2 to dismiss them, but Dean Dubois decided to let them stay. Can you confirm these details and give me an idea when this took place?

(*See* R. p. 810). Mr. Kennedy then forwarded this email to Dr. Nicholas Batalis, the Honor Council faculty advisor, stating that he had not responded to inquiry and "wanted to get some direction on how I should proceed with this issue." (*See* R. p. 809). Dr. Batalis then forwarded the chain to Dean DuBois and Donna Kern, stating that Mr. Kennedy had no idea how the reporter obtained his information or knew he was on Honor Council. (*See id.*).

Plaintiffs rely on Dr. Dubois' response to Dr. Batalis, which states, in relevant part:

> Needless to say, this case is complicated. However, the information regarding the case and the action taken by MUSC is confidential and protected by the Family Educational Rights and Privacy Act. This is a Federal regulation that was enacted some time ago to protect information about students, including any disciplinary action or Information related to accusations about cheating or other performance issues. *It is clear from our contact with this reporter that someone from MUSC with very detailed information about the case released the information to the press*. If the information is ultimately published, there will likely be a Federal investigation into the matter resulting in fines and/or other penalties. Apparently, the reporter does know the person at MUSC who provided her with. this information. She has not revealed her source to us at this point.
>
> We probably need to let everyone know the implications of releasing this type of information to the public. *I really do hope that someone from the Honor Council is not responsible for this breach of confidentiality* as this will result in very serious consequences.

(*See* R. p. 808 (emphasis added)). Plaintiffs have relied upon the italicized language as "evidence" that the leak of information giving rise to the Post & Courier's outreach to Mr. Kennedy came from an MUSC employee or a member of the Honor Council.

However, Dean DuBois' email does not support that an MUSC employee acting within the scope of official duties leaked defamatory statements about Plaintiffs' Honor Council proceedings. To the contrary, Dr. DuBois stated only that someone "from MUSC" with knowledge — which could have included Plaintiffs or anyone they told about the Honor Council proceeding in violation of the Honor Code (*see* R. pp. 994-1006) — released information to Ms. Sausser. As Dr. DuBois testified, "from MUSC" encompassed "students, it can be, you know, the janitor, it can be faculty, it can be anybody from the MUSC community." (*See* R. pp. at 495:25-496:6). Dr. DuBois expressly stated in the email that he did *not* know who disclosed the information and certainly did not know that the "leak" came from an employee or anyone on Honor Council. (*See* R. p. 808). He reiterated in his testimony that he did not know who leaked information. (*See* R. p. 494:17-16).

There is no evidence — particularly at the time of Plaintiffs' Exhibit 33 — that Dr. DuBois had any knowledge of the source of the disclosure of information to Ms. Sausser, aside from speculation and surmise. In fact, he expressed hope in his email that "someone from the Honor Council *is not responsible* for this breach of confidentiality." (*See* R. p. 808 (emphasis added)). Dr. DuBois' email cannot reasonably support an inference that an agent of MUSC or member of the Honor Council disclosed anything about Plaintiffs in the scope of their official duties.

Importantly, the email at the genesis of this chain came from Ms. Sausser to an Honor Council member[11] stating that she "received an anonymous news tip" and "need[ed] a student rep from the council to confirm off-the-record that these proceedings took place." (*See* R. p. 810).

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[11] Rather than make information about Ms. Sausser's inquiry public, Mr. Kennedy immediately reported the contact to the Honor Council faculty advisor, who immediately notified Dean DuBois. All took the proper steps to protect the confidentiality of Honor Council information.

In other words, from the start, Ms. Sausser admitted that her nameless source was *not* on the Honor Council. As a result, Plaintiffs' Trial Exhibit 33 does not support, in any way, that an MUSC employee or Honor Council member made a defamatory leak about Plaintiffs.[12] Far from asking the jury to draw a reasonable inference from reliable circumstantial evidence, Plaintiffs piled speculation upon speculation and invited the jury to do the same.

However, there was evidence of someone leaking information about the Honor Council proceeding. The *only* evidence of an actual disclosure of information about the Honor Council was that *Plaintiffs* disclosed information to their mother and cousin, as well as Kayla's boyfriend. (*See* R. pp. 400:20-401:20). None of those persons were on the Honor Council or served any formal role in the Honor Council process. They are all possible sources of the alleged "leaks" of information to the media and other students. In any event, Plaintiffs are the only persons who have been shown to have violated the confidentiality of the Honor Council.

Moreover, even if Plaintiff *could* produce evidence that a member of the Honor Council leaked information in the scope of their official duties, students and Honor Council members cannot be employees for whose conduct MUSC may be held liable. The Fourth Circuit has determined that a member of an honor council in a state educational institution is *not* a state actor under the much broader "color of state law" Section 1983 standard. *See Mentavlos v. Anderson*, 249 F.3d 301, 322 (4th Cir. 2001). Since this is true under that broad standard, then *a fortiori,* honor council members cannot be employees under the strict definition of the Tort Claims Act (or under common law). *See, e.g., Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1245 (10th Cir. 1999) ("[A] school district is not liable for the conduct of a harassing student because the student is not an agent of the school."); *Hanson v. Kynast*, 24 Ohio St. 3d 171, 174, 494 N.E.2d 1091, 1094 (1986) ("This relationship does not constitute a principal-agent

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12 Further undercutting any inference that MUSC leaked information, Ms. Sausser's email contains factually untrue statements: (a) that the vote was 8-2; and (b) that the Honor Council recommended that Plaintiffs be "expelled" or "dismiss[ed]." (*See* R. p. 810). This is inconsistent with the information coming from an MUSC employee or Honor Council member. Had the information been divulged by someone with such intimate knowledge, it would not have been so inaccurate.

relationship. The student is a buyer of education rather than an agent."). As a legal matter, MUSC students (including Honor Council members) are not agents or employees whose conduct can be imputed to MUSC.

In light of the foregoing, to the extent Plaintiffs were permitted to assert that MUSC engaged in defamation in connection with the leak of information, there was no evidence whatsoever to support the jury's speculation about that leak.

D. Plaintiffs' Theory Was Without Evidentiary Support.

The entire focus of Plaintiffs' case is that MUSC incorrectly perceived they were collaborating on the Exam because they are identical twins who perform identically on tests. They contend that MUSC should have realized that this was the reason for their identical performance on the Exam and not reported them to Honor Council. However, while Plaintiffs' theory may have some facial appeal, it is without *any* evidentiary support. Even if Plaintiffs had similar capabilities and comparable historical test scores and grades, the undisputed evidence shows that they had very different academic strengths and weaknesses, and did not have a consistent history of giving the same answers in block exams.

Plaintiffs' expert, Dr. Nancy Segal, conceded that twins are capable of cheating and have a higher affinity toward each other than random people. (*See* R. pp. 362:17-364:5). However, she further opined that identical twins taking exams are essentially the same person:

> They said that when identical twin takes a test or two identical twins take a test, it's like one twin take the test for the other. That's how similar the twins would be, like the same person taking the test twice. That's the easiest way of putting it.

(*See* R. p. 349:13-17). In her work on the case, she considered Plaintiffs' answers to the Block 12 Exam and said that she expected such results from identical twins. (*See* R. pp. 350:13-351:5). She went to far as to testify that "I would be surprised to find vast discrepancies between their responses." (*See id.*). However, she did not do any testing of her own to determine whether Plaintiffs had cheated or question them to determine whether their knowledge of the subjects on the Exam was identical. (*See* R. pp. 360:23-361:5). Moreover, she did not compare their past

medical school results ***and answers*** to determine whether they had, in fact, consistently performed identically. If she would have done so, she might have been "surprised" at what she found. Instead of doing this, Dr. Segal simply accepted as true Plaintiffs' claims that they had not cheated (as she did with other sets of twins involved in alleged academic dishonesty for whom she worked). (*See* R. pp. 359:17-360:6).

MUSC does not dispute that identical twins in general (and Plaintiffs in particular) often achieve similar test scores. Plaintiffs often obtained similar grades and scores, including identical SAT scores and similar grade point averages. (*See* R. p. 836). However, Plaintiffs and Dr. Segal conflate similar results with giving identical answers. Plaintiffs' Trial Exhibit 56 merely lists results; it does not address the relevant question — whether Plaintiffs actually answered questions the same or merely obtained similar final scores. The alleged defamatory statements had nothing to do with Plaintiffs getting similar grades; rather, the Honor Council process was commenced because there were numerous irregularities in the Exam, including Plaintiffs' giving *practically identical answers (including wrong answers).* If, as Plaintiffs claim, they are carbon copies and essentially the same people, the evidence must show that they not only got similar grades, but also answered questions the same way. The evidence not only does not support this; it shows (beyond any doubt) that Plaintiffs did *not* answer questions in the same.

As an initial matter, it should be noted that Plaintiffs' performances on the 307-question Exam were not merely similar; they were practically identical. Out of 307 questions, Plaintiffs gave the same answer an astonishing 296 times; more amazingly, they shared the same *wrong* answer 54 times. (*See* R. pp. 1019-20). This is not a case of two students having similar scores; it is essentially two students turning in essentially identical products. Plaintiffs explain this amazing coincidence by arguing that it resulted from them being genetically identical. If this is true, one would expect that most of their other exams were similarly identical; however, he undisputed evidence refutes that.

First, undisputed testimony established that, in the spring of their second year, Plaintiffs were diverging in their academic performance. Plaintiff Kayla Bingham was having academic struggles that her sister did not experience. Kayla was contacted by MUSC's office of Student Affairs to provide information that might help her improve her grades; it did not contact Kellie.

More importantly, an examination of the answers given to Plaintiffs on all of their exams shows that they did not always "think the same"; rather, the correlation between their work was erratic and showed no signs of them sharing the same brain. Defendant's Trial Exhibit 14 tracked Plaintiffs' exams throughout medical school, including not only final scores but also their answer correlation (*i.e.*, how many answers, right or wrong, they had in common).[13] Defendants' Exhibit 14 — the accuracy of which is not disputed — shows, contrary to Plaintiffs' (and their expert's) theories, that their answer correlation fluctuated dramatically throughout medical school. (*See* R. pp. 992-93). Plaintiffs had high answer correlations; just as frequently, however, they did not:

EXAM	**ROOM(S)/SEAT(S)**	**CORRELATION (% SAME ANSWERS)**
1	**DDB 110 C-2** **DDB 110 C-22 (seats far away)**[14]	**76.3**
2	LIB 437	83.48
3	**DDB 110 A-30** **DDB 110 A-5 (seats far away)**[15]	**69.79**
4	LIB 440	89.34
5	DDB 110 C-18 DDB 110 C-14 (seats very close)[16]	96.20
6	LIB 436	93.55
Year One Synthesis	LIB 440	93.52
7	LIB 440	92
8	LIB 439	87
9	**LIB 438** **DDB 110 B-6**	**63**

[13] For example, a "correlation" rate of 99% on a 100-question test would mean that Plaintiffs gave the same answer (correct or incorrect) on 99 questions. A correlation rate of 50% on a 100 question test would mean that they gave the same answer half the time (irrespective of their final scores).

[14] While in the same row, Plaintiffs were separated by 9 seats. (*See* R. p. 1023).

[15] Although in the same row, Plaintiffs were practically at opposite ends, with an aisle between them. (*See* R. p. 1023).

[16] Plaintiffs were seated in the same row with only one seat between them. (*See* R. p. 1023).

EXAM	ROOM(S)/SEAT(S)	CORRELATION (% SAME ANSWERS)
10	DDB 110 E-5 BE F1	61
11	LIB 436 BE B6	76
12	LIB 436	96

In fact, in the three tests prior to the Exam, Plaintiffs gave significantly different answers, with only 61% similar answers on Block 10. Between Block 11 (76%) and Block 12 (96.42%), Plaintiffs' common answers skyrocketed (increasing by almost 35 percent from Block 10 to Block 12). In other words, the indisputable objective evidence shows that Plaintiffs did not answer test questions nearly identically on any reliable basis. While they may have achieved similar grades, there is no evidence that they answered questions in a nearly identical fashion because they are twins.

Perhaps the most telling aspect of Plaintiffs' historical testing data relates to *when* their correlations were highest. Defendant's Trial Exhibit 14 shows that Plaintiffs had the highest correlation percentages (at least 83.48%) when they were in the same library room (without assigned seats) or were seated very close to each other. On the other hand, when they were in different rooms or on opposite sides of a room, their correlations (*i.e.,* the percentage of identical answers) were *always below 80%.* (*See* R. pp. 992-93). In other words, Plaintiffs' performance only seemed to correlate when — like the Exam at issue — they were taking exams where they could sit next to each other.

In addition to the stark statistical evidence, the only evidence presented at trial showed that Plaintiffs exhibited very different academic abilities. In fact, Plaintiffs' medical school Individual Mastery Reports[17] demonstrate that, far from being identical, Plaintiffs had *vastly*

[17] These reports (admitted as Defendants' Trial Exhibit 13 (R. pp. 932-91)) show — for each exam taken by Plaintiffs in medical school — Plaintiffs' individual grades for four "themes" for each semester that they had to pass and provides detail about their performance in various subject areas covered in each Block exam. As Dr. Hazen-Martin testified, these documents show how each student is performing in the various themes and substantive areas covered during the semester. (*See* R. pp. 465:25-466:2 ("As I indicated the mastery sheet is made for the purpose of the student. It allows the student to look at how they did in the different areas.")).

different strengths and weaknesses. (*See* R. p. 865). Dr. Hazen-Martin testified that these reports showed that, even if Plaintiffs achieved similar grades, they performed differently in different subject areas:

> Q. And in your review of those sheets, did you made (sic) any observations about the comparison between their performance?
>
> A. It was variable. It was not identical until block 12.
>
> Q. Okay. And specifically how identical?
>
> A. The points that they acquired were different among the themes. So even if they had a near identical overall total, you would see that the -- if you compare those upper bars between the two for a given block exam, you would see that their scores were -- would chart to different areas of that continuum. They were -- if they were identical, they would be aligned. Right.
>
> Q. So in other words, in different subject matter areas, different strength and different weaknesses?
>
> A. Yes, but it wasn't predictable. That was the odd thing. It would be one thing to say that Kayla was always better enemy (sic) or always the stronger of the two and a particular theme, but there was a great deal of variability and it made it hard to generalize. The only thing that I can say is that Kayla was in trouble for ASF and that was much -- it was somewhat lower. Kellie's score at the end of the second block was more like 72 overall.

(*See* R. pp. 467:7-468:4). The exception to this, of course, was the Exam where Plaintiffs' performance in all themes was basically identical:

Category 1 (Theme)	Score	%	0	100
ASF	95.00 of 111.00	85.59		
FPC	40.00 of 50.00	80.00		
PHD	68.00 of 92.00	73.91		
PTN	44.00 of 54.00	81.48		

Category 1 (Theme)	Score	%	0	100
ASF	95.00 of 111.00	85.59		
FPC	40.00 of 50.00	80.00		
PHD	70.00 of 92.00	76.09		
PTN	44.00 of 54.00	81.48		

(*See* R. pp. 932-91). The Individual Mastery Reports demonstrate that Plaintiffs are not carbon copies of each other; rather, they each have unique areas of strength and weakness.

In addition, National Board of Medical Examiners standardized testing administered to Plaintiffs further confirms that they are not identical. For example, testing in the spring of 2015 showed that — while they scored similarly (72 for Kellie and 68 for Kayla) — their subject-area performance differed dramatically. (*See* R. pp. 1007-10). For example, Kayla was at the very bottom of the performance scale for Central Nervous System, Endocrine, and Renal, while Kellie performed much better. (*See id.*). On the other hand, unlike Kayla, Kellie was in the bottom ranges for Fundamentals of Patient Care, Interview and Patient Education, and Nervous System. (*See id.*).

Plaintiffs took another NBME exam on May 9, 2016 (before they learned of any issues with the Exam), which was a predictor for performance on the Step One test, which they needed to pass to advance to the clinical portion of medical school. (*See* R. pp. 1011-14).[18] Again, the charts analyzing performance by discipline and system confirmed that, despite their similar final scores, Plaintiffs performed differently in various areas. For example, Kayla was on the bottom end of Behavioral Sciences and Behavioral Health and Nervous System/Special Senses, while her sister performed well. (*See id.*). On the other hand, Kayla fared better in areas such as cardiovascular and gastrointestinal systems. (*See id.*).

In other words, despite their and their expert's claims that twins often achieve similar results — which MUSC never disputed — the evidence is indisputable that *these* twins do not *perform* so similarly that they could be wrongfully accused of working together. To the contrary, despite their similarities, Plaintiffs frequently answered questions quite differently and performed very differently in various subject areas. There was nothing about Plaintiffs that required that MUSC treat them any differently from any other two students who: (a) handed in practically identical tests; (b) progressed at a practically identical pace; and (c) were observed in

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[18] Kayla scored a 49 on this test, and Kellie scored a 53. (*See* R. pp. 1011-14). Dr. Hazen-Martin testified that those low scores were predictors that Plaintiffs would have difficulty passing their Step One examinations. (*See* R. pp. 469:12-471:16). Consistent with their performance on this predictor — and despite MUSC providing substantial assistance and support — Plaintiffs failed the Step One examination *four* times, precluding them from advancing in medical school. (*See* R. pp. 1015-18).

a number of irregularities during the Exam. Plaintiffs' past performance at MUSC simply does not support that they are essentially the same person. MUSC did not overreact to their uncannily similar answers on this Exam or to the mountain of circumstantial evidence supporting that they were collaborating.[19] To the contrary, MUSC handled this situation as it should have, by following its chain of command and Honor Council process. That process was carried out to its conclusion, with an appeal resolving in Plaintiffs' favor on technical grounds. The evidence does not support that MUSC (particularly Drs. Hazen-Martin and Kasman) did anything wrong by not assuming that Plaintiffs' suspicious performance on the Exam was a product of them being twins. Rather, MUSC would have done a disservice to its academic integrity if Drs. Hazen-Martin and Kasman would not have reported these testing irregularities merely because Plaintiffs are twins.

As a result of the foregoing, the trial judge erred in denying MUSC's motions for directed verdict and Post-Trial Motions.

E. <u>The Court Should Have Granted MUSC's Post-Trial Motions Because Plaintiffs Provided the Jury Patently Incorrect and Misleading Information.</u>

As noted above, using a sophisticated analysis it has used on at least 50 million test records, Caveon concluded that the likelihood that Plaintiffs completed the Exam independently was an amazing 1 in 10^{38}. (*See* R. pp. 866-91). This is as close to an absolute certainty as one could imagine. Plaintiffs and their expert argued that Caveon mistakenly failed to consider that Plaintiffs are identical twins. Dennis Maynes, MUSC's expert, testified that there was a study that could be read to support that "twins are maybe twice as likely as other people in the population to answer questions the same," theoretically doubling the chance of Plaintiffs having

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[19] Again, this includes undisputed testimony that Ms. Friesinger saw Plaintiffs engage in irregular acts such as asking for a better eraser (when none was needed), signaling with their heads, moving notes toward each other (and then erasing and flipping the paper over), leaning further back than other students, looking toward each other's screens, leaving at the same time and questioning the need to hand in scrap paper. It also includes Dr. Hazen-Martin's observation of Plaintiffs moving in "lock step" giving nearly identical answers. It would also include the scratch paper with plainly communicative language ("I'm waiting"). Finally, it includes evidence of motive, in light of the fact that Kayla Bingham needed to perform well on the Exam to avoid academic repercussions (including possibly repeating a year).

worked independently: *i.e.*, from 1 in 10^{38} to 2 in 10^{38}.[20] (*See* R. pp. 620:20-622:12). Again, this is about as close to an absolute certainty as one could imagine.

On the other hand, Plaintiffs were never able to concretely explain *how* Caveon should have adjusted for them being twins. Plaintiffs' expert testified about a study concluding that identical twins have "eight or nine times that the probability that they would score the same as to unrelated people."[21] (*See* R. p. 624:15-8). This is the closest that Plaintiffs came to quantifying the impact of "twinness" on exam performance. This would have, at most, increased the chances of Plaintiffs working independently to 9 in 10^{38}. In other words, it would be the chances of winning *four consecutive* Powerball drawing having purchased 9 tickets each time. Once again, this is still essentially an absolute certainty.

Plaintiffs were aware that the statistical evidence was absolutely damning. In an effort to minimize the impact of the undisputed statistical evidence, Plaintiffs' counsel critiqued Mr. Maynes' analysis, implying that he had made a shocking mathematical error. To begin, he said that, if Mr. Maynes assumed that Plaintiffs were twice as likely to answer similarly, the likelihood of independent work would reduce to 1 in 10^{19} (not 2 in 10^{38} as Mr. Maynes had testified).[22] (*See* R. p. 733:2-6). Then, despite Plaintiffs' own motion in limine,[23] their attorney published a chart to the jury that was not admitted into evidence or disclosed to MUSC:

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[20] This is the equivalent of winning four consecutive Powerball drawings buying two tickets instead of one. (*See* R. pp. 620:20-622:12).

[21] By Dr. Segal's own admission, the main study she relied upon "did not take into account *answers* that were the same. It took into account *scores, but not answers*." (*See* R. p. 625:3-8 (emphasis added)).

[22] 10^{19} is the *square root* of 10^{38} (*i.e.*, 10^{19}x10^{19}=10^{38}).

[23] Plaintiffs' filed a motion *in limine* requesting that "[p]rior to any publication or reference of a document, such documents must be offered to opposing counsel for review and admitted into evidence." (*See* R. p. 62). MUSC consented to that request and did not show *any* documents to the jury (including demonstratives) that had not been admitted into evidence first. However, despite their own motion *in limine*, Plaintiffs did not do the same.

MORE ACCURATE PROBABILITY ANALYSIS FOR IDENTICAL TWINS		
CAVEON STATEMENT ON LIKELYHOOD OF TEST TAKEN INDEPENDENTLY	IDENTICAL TWINS MATCH RATE COMPARED TO GENERAL POPULATION	LIKELYHOOD OF TEST TAKEN INDEPENDENTLY BASED ON IDENTICAL TWINS
1 IN 1 X 10^38	2 TIMES MORE LIKELY	1 IN 1 X 10^19
1 IN 1 X 10^38	3 TIMES MORE LIKELY	1 IN 1 X 10^12.7
1 IN 1 X 10^38	4 TIMES MORE LIKELY	1 IN 1 X 10^9.5
1 IN 1 X 10^38	5 TIMES MORE LIKELY	1 IN 39,810,717
1 IN 1 X 10^38	6 TIMES MORE LIKELY	1 IN 2,137,962
1 IN 1 X 10^38	7 TIMES MORE LIKELY	1 IN 251,188
1 IN 1 X 10^38	8 TIMES MORE LIKELY	1 IN 56,234
1 IN 1 X 10^38	9 TIMES MORE LIKELY	1 IN 16,595
1 IN 1 X 10^38	10 TIMES MORE LIKELY	1 IN 6,309

(*See* R. p. 119). Plaintiffs' counsel further told the jury about this chart:

> 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 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.

(*See* R. p. 733:2-14). In other words, Plaintiffs told the jury that, under their expert's best estimate, the odds of them working independently were only 1 on 16,995 (still a very unlikely result).

However, through an apparent error, Plaintiffs' closing misstated indisputable mathematical facts and misled the jury with demonstrably false information. These are not matters of difference of interpretation, but blatantly incorrect calculations. It appears that Plaintiffs prepared the chart by dividing 10^{38} by 2 through 10; however, in doing so, they *divided* the *exponent* by 2 through 10.[24] For example, Plaintiffs asserted that doubling the likelihood of independent work would result in odds of one in 10^{19}, not 2 in 10^{38} as Mr. Maynes testified. Similarly, To divide 10^{38} by 5, Plaintiffs divided *the exponent by five:*

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[24] When an exponential number is divided in half, the exponent itself is not halved. In other words, half of 10^{10} is not 10^5, it is 5 x 10^9. Likewise, 10^{10} divided by 5 is not 10^2, it is 2 x 10^9.

$10^{38\div5} \rightarrow 10^{7.6} \rightarrow 39{,}810{,}717$. In reality, if the odds increased by 5 from Caveon's conclusions, they would have been 5 in 10^{37}. Compounding this error, Plaintiffs misinformed the jury that increasing the likelihood of independent work by a factor of 10 would increase the odds of independent work from one in 10^{38} to one in 6,309.[25] **This calculation is astronomically incorrect, since dividing 10^{38} by ten yields 10^{37}, *not 6,309.*[26]** Even accepting if they are *ten* times more likely to perform similarly, the odds of Plaintiffs working independently would *only* increase to one in 10^{37} (*or* 10 in 10^{38}). This likelihood is still off the charts in Caveon's experience of analyzing more than 50 million test results. Far from debunking Caveon's work, the correct math confirms that it is nearly certain that Plaintiffs worked together on the Exam.[27]

MUSC does not intend to impugn Plaintiffs' counsel in any way. MUSC does not believe that they acted intentionally or with malice. To the contrary, the attorneys enjoyed a very collegial relationship throughout the trial (and after). MUSC respects zealous advocacy. However, Plaintiffs conveyed egregiously false information to the jury (including on a demonstrative that had not been shown to MUSC's attorneys or admitted into evidence). At the very least, the trial court should have granted MUSC's post-trial motion for a new trial.

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25 Plaintiffs reach this conclusion by taking 10^{38} and *dividing* the *exponent* (38) *by ten* to arrive at $10^{3.8}$, which equals approximately 6,309. This is astoundingly inaccurate.

26 Even accepting Plaintiffs' erroneous math, it is still far more likely than not that Plaintiffs' worked together. Plaintiffs' false math shows that the likelihood of them working independently was still only 1 in 6,309. Such a likelihood would certainly have supported MUSC's efforts to investigate and uncover the truth about Plaintiffs' Block 12 Exams.

27 Making the radical assumption (which the evidence at trial does not even suggest) that identical twins are 100,000,000 (one hundred million) times more likely than non-twins to perform similarly, Caveon's degree of certainly would only be reduced to one in 10^{30}. Simply put, none of Plaintiffs' glaring mathematical errors even begin to undermine Caveon's report.

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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July ___, 2024

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.

RULE 211 CERTIFICATION

The undersigned certifies that this Respondent-Appellant's Final Brief as Appellant complies with Rule 211(b), SCACR.

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHARLESTON COUNTY
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PROOF OF SERVICE

I certify that I have served the **RESPONDENT-APPELLANT'S FINAL BRIEF AS APPELLANT** on counsel for the above-referenced Appellants-Respondents by email in accordance with the South Carolina Supreme Court's Order re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022) on July 11, 2024, addressed to their attorneys of record:

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