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 RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. **Did the trial court properly reduce the amount of the verdict to $300,000 per Plaintiff in accordance with the South Carolina Tort Claims Act, where the jury did not return a special verdict determining the number of occurrences?**

SUGGESTED ANSWER: *Yes.*

2. **Did the trial court properly reduce the amount of the verdict to $300,000 per Plaintiff in accordance with the South Carolina Tort Claims Act, where the evidence did not support the existence of more than one occurrences?**

SUGGESTED ANSWER: *Yes.*

3. **Did the trial judge properly conclude that the verdict form submitted to the jury was not a special verdict form?**

SUGGESTED ANSWER: *Yes.*

4. **Even if the jury rendered a special verdict, was it proper for the trial judge to reduce the verdict in accordance with the South Carolina Tort Claims Act?**

SUGGESTED ANSWER: *Yes.*

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 are identical twins who were second year medical students at MUSC. (*See* R. p. 51 ¶ 3). They allege that on May 5, 2016, they were taking an exam, which Debra Hazen-Martin, PhD ("Dr. Hazen-Martin") monitored remotely via computer. (*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 others repeated these statements and that they were 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 via email. (*See* R. p. 52 ¶ 10). They claim that they suffered reputational damage and emotional distress as a result. (*See* R. p. 53 ¶ 13).

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:

1. Do you, the jury, unanimously find by a preponderance of the evidence that Defendant Medical University of South Carolina made a false and defamatory statement about Plaintiffs Kayla and Kellie Bingham?

   ✓ Yes. (continue to question 2)

   _____ No. (stop deliberating)

2. Do you, the jury, unanimously find by a preponderance of the evidence that the defamatory statement exceeded the scope of Defendant's qualified privilege?

   ✓ Yes. (continue to question 3)

   _____ No. (stop deliberating)

3. What is the amount of damages, if any, sustained by the Plaintiffs?

   Kayla Bingham $ 750,000.

   Kellie Bingham $ 750,000.

(*See* R. pp. 1-4).

On November 28, 2022, MUSC filed its Post-Trial Motions. (*See generally* R. pp. 68-119). Among other things, MUSC's Post-Trial Motions asked the Court to reduce the verdicts from $750,000 to $300,000 for each Plaintiff to conform them to the statutory caps in the South Carolina Tort Claims Act. MUSC argued, in part:

> The jury here was not asked to make any specific determination as to the number of occurrences or the losses attributable to each such occurrence. It was [not] instructed about determining the number of occurrences. It was not asked to, and did not, find more than one occurrence. As a result, having failed to request a verdict form in compliance with *Chastain*, Plaintiffs cannot now ask the Court find multiple occurrences.

(*See* R. pp. 70-75 (*citing Chastain v. Anmed Health Found.*, 388 S.C. 170, 694 S.E.2d 541 (2010))). The following day (November 29, 2022), Plaintiffs filed a Motion to Determine the Number of Occurrences, stating in relevant part that:

> Plaintiffs' counsel understood from discussions of the verdict form and post-trial motions that the Court had proposed without objection from the parties to handle any determinations of occurrences and their applicability to the statutory damages cap post-trial, thus, Plaintiffs did not object to the Court's proposed verdict form, which did not include a special interrogatory as to occurrences. Defendant now asserts that the Court must have submitted to the jury a special verdict form or interrogatory asking the jury to determine the number of occurrences in order for Plaintiffs to prove multiple occurrences, to the contrary of the undersigned's best recollection of discussions that occurred on the record between the Court and Plaintiffs' counsel. Out of an abundance of caution, Plaintiffs request that the Court determine the number of occurrences from the factual evidence submitted in the record of this case and deny Defendant's request for remittitur, for the reasons set forth in any supporting memoranda which Plaintiffs may file.

(*See* R. pp. 120-21).

On February 1, 2023, the trial court conducted oral argument on the parties' post-trial motions. On February 7, 2023, before she decided the parties' post-trial motions, the trial judge entered a Form 4 Order stating:

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

The jury unanimously found in favor of Plaintiffs Kayla Bingham and Kellie Bingham for the defamation cause of action in the amount of $750,000 for Kayla Bingham and $750,000 for Kellie Bingham on November 18, 2022.

(*See* R. p. 1). This Form 4 Order did not express that the trial judge intended for it to be a judgment or that it disposed of the parties' post-trial motions — including motions concerning application of the statutory cap.

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." (*See* R. p. 8). Judge Curtis' May 5, 2023 Order further states:

> In this case, the court did not instruct the jury on the definition of "occurrences," and Plaintiff did not object to the sufficiency of the instructions. In addition, the verdict form did not require the jury to determine the number of occurrences, and again the Plaintiff did not object or request a different verdict form. In fact, both parties agreed to the verdict form that was used in this case. . . . Plaintiffs did not ask the jury to make specific determinations as to the number of occurrences or the losses attributable to each. The jury was not instructed about determining the number of occurrences. It was not asked to, and did not, find more than one occurrence. It did not specifically identify what conduct gave rise to its verdict. It did not determine the "loss" attributable to each alleged occurrence. . . .
>
> South Carolina law is clear that it is for the jury to determine whether there were multiple occurrences. It would be impossible for the court to determine the number of occurrences without knowing the basis for the jury's verdict. It would be inappropriate for this court to speculate as to the basis for the jury's verdict or to make post-trial findings of fact that come within the exclusive province of the jury.

(*See* R. p. 6-7). The trial judge ultimately denied Plaintiffs' Motion to Reconsider her May 5, 2023 Order.

On or about June 9, 2023, Plaintiffs filed a Notice of Appeal from Judge Curtis' order reducing the jury's verdict to conform with the South Carolina Tort Claims Act. (*See* R. pp. 210-19). For the reasons that follow, the Court should affirm Judge Curtis' May 5, 2023 order reducing the verdicts.

For the following reasons, the Court should affirm the trial court's conformance of the verdicts to the cap under the South Carolina Tort Claims Act.

ARGUMENTS

A. Standard of Review

"In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law." *Judy v. Judy*, 383 S.C. 1, 6, 677 S.E.2d 213, 216 (Ct. App. 2009) (*citing Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 464, 629 S.E.2d 653, 663-64 (2006)).

B. The Trial Court Properly Reduced the Amount of the Verdict to $300,000 for Each Plaintiff Under the South Carolina Tort Claims Act.

As a government entity, MUSC is "only liable for torts within the limitations of [the South Carolina Tort Claims Act ("Tort Claims Act")] and in accordance with the principles established [t]herein." *See* S.C. Code § 15-78-20(a). Under the Tort Claims Act, recovery is limited to certain amounts *per* claimant and *per* occurrence:

> (1) Except as provided in Section 15-78-120(a)(3), no person shall recover in any action or claim brought hereunder a sum exceeding three hundred thousand dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved.
>
> (2) Except as provided in Section 15-78-120(a)(4), the total sum recovered hereunder arising out of a single occurrence shall not exceed six hundred thousand dollars regardless of the number of agencies or political subdivisions or claims or actions involved.

See S.C. Code § 15-78-120(a)(1) & (2). The term "occurrence" is defined as "an unfolding sequence of events which proximately flow from a single act of negligence." *See* S.C. Code § 15-78-30(g). For the reasons that follow, the trial court properly reduced each Plaintiff's verdict from $750,000 to $300,000 because the jury was not asked to (and did not) determine whether there were multiple "occurrences" or what those occurrences were and there was no way for the court to find multiple occurrences without knowing what unprivileged defamatory statement(s) the jury found.[1]

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[1] In its own appeal the Medical University contends that the trial court should have found as a matter of law that it made *no* unprivileged defamatory statements.

"[I]mbued with public policy considerations limiting and qualifying liability of governmental entities," the cap on damages under the Tort Claims Act "is self-executing and the court is required to apply the monetary statutory cap to any jury verdict exceeding $300,000." *See Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 285, 607 S.E.2d 711, 716 (Ct. App. 2005) (holding that government entity need not plead Tort Claims Act cap).[2] Moreover, the Tort Claims Act "must be liberally construed in favor of limiting the liability of the State." *See* S.C. Code § 15-78-20(f). The trial judge properly reduced the verdict to $300,000 per claimant under the Tort Claims Act.

1. Plaintiffs Did Not Timely Request a Determination of More Than One Occurrence.

Initially, the Court should reject Plaintiffs' current argument that they are entitled to a determination of multiple occurrences because they did not timely raise that issue to the trial judge. The jury returned its verdict on November 18, 2022. Defendant timely filed its Post-Trial Motions on November 28, 2022. Under South Carolina Rule of Civil Procedure 59(e), Plaintiffs were required to file their Motion to Determine Number of Occurrences by November 28, 2022. However, Plaintiffs did not do so until November 2***9***, 2022, one day after the time for filing such a motion expired. "The established case law is that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed." *Ex parte Beard,* 359 S.C. 351, 358, 597 S.E.2d 835, 838 (Ct. App. 2004). Because Plaintiffs filed their Motion to Determine Number of Occurrences more than 10 days after the verdict, the trial judge did not have jurisdiction to grant them the relief they requested. Therefore, the Court should reject Plaintiffs' arguments concerning multiple occurrences.

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[2] In *Campbell v. City of North Charleston*, 431 S.C. 454, 848 S.E.2d 788 (Ct. App. 2020), the Court of Appeals more recently reaffirmed that "the plain meaning of the statute indicates this cap must be executed" and that "under the plain meaning of section 15-78-120(a), courts *must* apply the statutory cap to actions brought pursuant to the Act." *See id.* at 793-94 (emphasis added). To reinforce its point, the Court of Appeals also reiterated that "the application of the cap is *mandatory* and self-executing." *See id.* at 793 (emphasis added).

2. Plaintiffs Did Not Submit a Proper Proposed Verdict Form Asking the Jury to Find More Than One "Occurrence" and, as a Result, the Jury Did Not Determine Whether There Was More Than One "Occurrence."

In order for claimant to recover damages for more than one occurrence, the jury must be instructed and asked to determine the facts that could support a determination of multiple occurrences. Plaintiff did not ask the trial court to do so. Therefore, the trial judge correctly reduced the jury's verdict to reflect the applicable Tort Claims Act cap for a single occurrence for each Plaintiff.

The Supreme Court has held that plaintiffs bear the burden of proving multiple "occurrences" under the Tort Claims Act[3]; additionally, they *must* request that the jury determine the facts that could support the court's determination of multiple occurrence if they seek to recover more than a single occurrence cap (*i.e.,* $300,000). *See Chastain v. AnMed Health Found.,* 388 S.C. 170, 174, 694 S.E.2d 541, 543-44 (2010). In *Chastain,* the appellant claimed she was injured while hospitalized at AnMed (a charitable entity) where six nurses cared for her. The jury returned a verdict of $2.2 million, which Anmed sought to reduce to $300,000, the single occurrence cap under the Solicitation of Charitable Funds Act. The Supreme Court affirmed the trial judge's limitation of recovery to a single occurrence because, from the jury charge and verdict form, it was impossible to determine the number of culpable acts the jury found:

> The trial judge reduced appellant's recovery to $300,000, finding there was only one "occurrence" and thus § 15-78-120(a)(1) operated to reduce the award pursuant to § 33-56-180(A) ("actual damages...in an amount not exceeding the limitations on liability imposed in [§ 15-78-120]"). . . . In her post-trial order, the judge gave as one reason for reducing appellant's award the impossibility of determining from the jury instruction and verdict forms whether the jury found one or more than one nurse had rendered negligent care to appellant. Thus, she held, it was impossible to conclude that the jury had found more than one occurrence. Appellant now contends that AnMed bore the burden of proving there was only one occurrence. We disagree.

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[3] *Chastain* involved the cap on liability under the South Carolina Solicitation of Charitable Funds Act, S.C. Code §§ 33-56-10 to -200. That statute caps recovery at "the limitations on liability imposed in the South Carolina Tort Claims Act in Chapter 78 of Title 15." *See* S.C. Code § 33-56-180(A).

> Just as in any tort action, a CFA plaintiff bears the burden of proof. If she alleges multiple occurrences, that is, that there was more than one single act of negligence from which proximately flowed an unfolding sequence of events, she bears the burden of proving each occurrence. Here, the jury was never instructed on the definition of occurrence nor was it asked to determine whether there was more than one occurrence, either in the instructions or in its verdict. The trial judge correctly reformed this verdict to reflect a single occurrence.

See Chastain, 388 S.C. at 174, 694 S.E.2d at 543-44; *accord Knox v. United States*, No. 0:17-cv-36-CMC, 2018 U.S. Dist. LEXIS 111445, at *15 (D.S.C. July 3, 2018) ("If Plaintiff presents evidence at trial to support more than one act of negligence, the jury will be instructed on the definition of occurrence and asked to determine whether Plaintiff has proven more than one occurrence.").

Applying *Chastain,* a recent Circuit Court decision properly concluded that, in the absence of a verdict form specifically asking the jury to determine the number of occurrences and the loss attributable to each occurrence, the plaintiff was limited to recovery for a single occurrence:

> In the case at bar, however, the Plaintiff has not satisfied his burden of proof in demonstrating that there were multiple occurrences or the amount of the "loss," if any, attributable to each occurrence. As was the case in *Chastain*, the jury was not asked for the type of information that this Court needs to apply the monetary caps for multiple occurrences. This does not make the verdict form inconsistent, as the Plaintiff contends in an attempt to argue that the discharge of the jury waived any inconsistencies with the verdict form. Instead, as in *Chastain*, the verdict form simply does not furnish the needed information. As the Supreme Court made clear in *Chastain*, it is the Plaintiff's responsibility to provide a verdict form bearing the information necessary to prove his case and support the judgment, if he seeks a judgment in excess of the $300,000 cap. The Defendant has no responsibility to make sure the verdict form proves the Plaintiff's case – that burden lies with the Plaintiff. Thus, the Court must reject the Plaintiff's attempts to shift the burden to the Defendant to make certain there is an adequate verdict form to prove entitlement to multiple occurrences and a judgment in excess of the $300,000 cap, just as a similar position taken by the plaintiff in Chastain to blame the defendant hospital for the inadequacy of the verdict form was rejected by the trial judge and the Supreme Court.
>
> Clearly, a trial judge may not speculate as to the jury's verdict, particularly on questions that jury was never asked to answer on the verdict form. *Chastain* makes that clear as well.

See Larson v. South Carolina Dep't of Corrections, No. 2019-CP-20-0241 (S.C. Comm. Pl. Fairfield Feb. 10, 2022) (finding plaintiff did not properly raise "occurrence" issue where verdict asked jury to find number of occurrence but did not "jury did not tell this Court – because it was not asked to do so – what each occurrence was and, even more importantly, what was the 'loss,' if any, that arose from each occurrence found.").

This case presents the precise situation that the Supreme Court addressed in *Chastain*: the jury was not asked to determine the facts that support a finding of multiple occurrences. The jury was not even asked to determine the number of occurrences or the losses attributable to each such occurrence. It was not instructed about determining the number of occurrences. It was not asked to, and did not, find more than one occurrence or the facts that would allow for a determination of more than one occurrence. In fact, the jury gave no clue as to what unprivileged defamatory statement(s) it found that MUSC's agent(s) made (or who those agents were). Having failed to request a verdict form in conformity with the requirements of *Chastain,* Plaintiffs could not ask the trial court — or this Court — to find multiple occurrences. *See Holly Woods Ass'n of Residence Owners v. Hiller,* 392 S.C. 172, 191, 708 S.E.2d 787, 797 (Ct. App. 2011) ("We find that Appellants had an obligation to request a special interrogatory once the jury returned its verdict. Appellants waived appellate review of this issue because they failed to request a special interrogatory when the deciding jury was available and in place to review such a matter."). Any determination of a number of occurrences more than one would be sheer speculation about the jury's intention.

The absence of a finding of specific unprivileged defamatory statements on the verdict form is hardly a mere technical defect in the Plaintiffs' proof of multiple occurrences. The jury left the trial judge with no clue as to what defamatory statement(s) it based its verdict on. The trial judge could not have found multiple occurrences even if she had not found that the issue was waived.

For the foregoing reasons, the Court should affirm the trial judge's reduction of the verdict to $300,000 for each Plaintiff.

3. The Evidence Does Not Support Multiple "Occurrences".

Even if Plaintiffs were not required to have the jury decide the number of "occurrences," the evidence does not support more than one occurrence. To the contrary, all of Plaintiffs' claims arise from a single unfolding sequence of events.

If the same "unfolding sequence of events" proximately flows from multiple wrongful acts, there is still but a single occurrence. However, if those culpable acts each give rise to a new or different "sequence of events" so as not to be "unfolding" or "evolving" from past events, then there may be a new "occurrence." The number of wrongful acts is not dispositive of the number of "occurrences." The Supreme Court made that clear in *Boiter v. South Carolina Department of Transportation*, 393 S.C. 123, 712 S.E.2d 401, 406 (2011), where it explained: "we do not adopt a bright-line test based on the existence of multiple acts of negligence." Importantly, the Court also recognized that "[i]n many situations, negligent acts from more than one entity would still equal but one occurrence." 712 S.E.2d at 407. This would likewise be true where one entity commits multiple acts, particularly where those acts are similar and result in a continuous "unfolding sequence of events."

If those acts each give rise to a new "sequence of events" so as not to be "unfolding" or "evolving" from past events, only then is there a new and separate "occurrence." In other words, if the same "unfolding sequence of events" proximately flows from multiple acts, there is but a single occurrence, as *Boiter* explains. That is the scenario Plaintiffs have presented. Everything that occurred in this case was part of the same sequence of events concerning the observation of the Block 12 exam and the initiation of the Honor Council process. The evidence does not support a finding of new or different "unfolding sequences of events." *A fortiori,* it would be error to presume that the jury found more than one unfolding sequence of events. Therefore, the Court should conclude that Plaintiffs have only shown a single occurrence and, accordingly, the trial judge properly reduced the verdict as to each Plaintiff to the cap of $300,000 pursuant to S.C. Code § 15-78-120(a).

In *Boiter*, plaintiffs were injured in an automobile accident at an intersection controlled by a traffic light. The red light bulb burned out earlier on the day of the accident. The plaintiffs sued

the South Carolina Department of Transportation (DOT) and Department of Public Safety (DPS). Plaintiffs claimed that DOT was negligent in failing to ensure that bulbs were replaced *before* they burned out. As to DPS, plaintiffs alleged negligence in failing to respond to a citizen call an hour before the accident reporting the burned out bulb by sending an officer to direct traffic. After a jury verdict of $1.875 million, the trial court reduced the verdicts to $300,000.00 for each plaintiff, for a total of $600,000.00.

On appeal, the Supreme Court held that the trial court erred in reducing the verdicts under the Tort Claims Act because there were multiple "occurrences":

> We are persuaded that two independent and separate acts of negligence occurred here — one by SCDOT and one by SCDPS. There is no indication that the Respondents' actions combined to form a single act of negligence. Unlike the situation presented in Chastain, we have two separate and distinct acts of negligence involving two separate and distinct entities together with separate verdicts against each of them. As found by the jury, SCDOT was negligent in not having a re-lamping policy in place, and SCDPS was negligent in not following its own policy to notify a SCDOT technician when a light had burned out. Based on the facts presented here, we cannot see how SCDOT's negligent act "unfolded" into SCDPS' negligent act. SCDPS only became involved due to a citizen call regarding the burned-out light bulb; SCDOT never called SCDPS regarding the light, and SCDPS never informed SCDOT about the citizen call. We can find no causal connection between the actions of SCDOT and SCDPS; had the jury not found SCDOT negligent, the verdict against SCDPS could still stand, and the converse is also true. Therefore, we do not believe that these two separate and independent acts of negligence constituted an unfolding sequence of events which injured the Boiters.
>
> Respondents cite to language found in section 15-78-120(2), arguing that it demonstrates the General Assembly's recognition that the number of governmental entities involved in a particular occurrence does not increase the statutory limits on liability. While we do not disagree with Respondents' view, we do not believe this ends the inquiry. In many situations, negligent acts from more than one entity would still equal but one occurrence. However, under these facts, there were two separate entities which committed two separate and independent acts of negligence, and we do not believe the General Assembly's intent was to limit recovery in such situations based on there being only one occurrence. Accordingly, we hold each Respondent's act of negligence was a separate occurrence entitling the Boiters to a combined verdict of 1.2 million dollars, and we reverse the circuit court.

See id., 393 S.C. at 134-35, 712 S.E.2d at 406-07. The controlling fact was that there were two separate and independent culpable acts: (a) failing to ensure that lights were replaced before

burning out (SCDOT) and (b) failing to respond to reports of burned out light (SCDPS). SCDOT and SCDPS were negligent in two separate and different ways.

The Supreme Court addressed the same issue in the context of the meaning of "occurrence" under a liability insurance policy in *Owners Ins. Co. v. Salmonsen,* 366 S.C. 336, 622 S.E.2d 525 (2005). In that case, the insured was a distributor of allegedly defective synthetic stucco who had been sued in a class action products liability action. The question was how many "occurrences" were involved in multiple sales of the defective product. The Court concluded that because the insured had not committed independent acts giving rise to liability for each sale, "placing a defective product into the stream of commerce is one occurrence."

In this case, a single government entity is alleged to have made false statements to commence an Honor Council proceeding. Even if the jury found more than one unprivileged defamatory statement, they were part of the single unfolding series of events connected to the reporting of suspected academic irregularities to the Honor Council for further handling. The fact that this process — because of the "chain of command" — required that Dr. Hazen-Martin first notify Dr. Kasman and that Dr. Kasman next contact Joseph Ivey could not make this a multiple occurrence case. Both communications were part of a single chain of events stemming from observed testing irregularities in a single examination. Therefore, the trial judge would have been required to reduce each Plaintiff's verdict to $300,000 even if the jury had expressly found more than one unprivileged defamatory statement.

C. Plaintiffs' Arguments for Reversal Are Without Merit.

Apparently recognizing that, under *Chastain,* their failure to request a specific jury finding concerning the identity and number of occurrences is fatal, Plaintiffs rely on South Carolina Rule of Civil Procedure 49 to assert that they were not required to request a jury determination of the number of occurrences, notwithstanding *Chastain.* Rule 49 provides in relevant part:

> (a) **Special Verdicts.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which

might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) **General Verdict Accompanied by Answer to Interrogatories.** The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

See S.C.R. Civ. P. 49(a) & (b).

The crux of Plaintiff's argument is that the jury's verdict was a "special verdict" under Rule 49(a). They contend that, under Rule 49(a), if a court omits an issue of fact from the jury form (and a party does not demand that it be submitted to the jury), that party waives its right to a jury trial on that issue. Plaintiffs next assert that, in that instance, the court may make a finding on the issue and, if it does not, it shall be deemed to have made a finding consistent with the special verdict. Plaintiffs claim that "by entering the judgment on February 7, 2023, the Circuit Court was deemed to have found three occurrences consistent with the jury's special verdict." (*See* Pls.' Br., at 41).

What follows is a technical response to Plaintiffs' technical procedural argument. None of this should obscure the plain fact that, even if the trial judge were permitted to make her own

findings as to the number of occurrences, she had no way of doing so. Moreover, there is no way for this Court to recognize an implicit ruling on that issue in accordance with the verdict. That MUSC made *any* unprivileged defamatory statements was—and is—highly contested, and the jury's verdict gave no clue as to what unprivileged defamatory statement(s) it found that MUSC made. The trial judge (and this Court) would have to fashion a verdict out of whole cloth in order to identify any, let alone multiple, occurrences that the jury found. For the following reasons, Plaintiffs' arguments do not support reversal of the trial judge's conformation of the verdict to the South Carolina Tort Claims Act.

1. The Jury Did Not Return a "Special Verdict."

At the onset, Plaintiffs' appellate arguments depend on the technical procedural question of whether the jury returned a "general verdict" or "special verdict." It is a *sine qua non* of Plaintiffs' argument that the jury's verdict be a "special verdict." If the jury returned a "special verdict," Plaintiffs will ask the Court to determine whether they are entitled to a reversal under Rule 49(a). On the other hand, if the jury returned a "general verdict," Plaintiffs concede that they must lose their appeal: "a general verdict would not permit a circuit court to make findings of fact on omitted issues prior to entry of judgment." (*See* Pls.' Appellant's Br., at 14). For the reasons follow, in addition to MUSC's other arguments, Plaintiffs' appeal fails because the jury returned a garden variety "general verdict."

The verdict form that the trial judge presented to the jury (and that the jury completed) contained the following questions:

1. Do you, the jury, unanimously find by a preponderance of the evidence that Defendant Medical University of South Carolina made a false and defamatory statement about Plaintiffs Kayla and Kellie Bingham?

✓ Yes. (continue to question 2)

_____ No. (stop deliberating)

2. Do you, the jury, unanimously find by a preponderance of the evidence that the defamatory statement exceeded the scope of Defendant's qualified privilege?

✓ Yes. (continue to question 3)

_____ No. (stop deliberating)

3. What is the amount of damages, if any, sustained by the Plaintiffs?

Kayla Bingham $ 750,000.

Kellie Bingham $ 750,000.

The judge instructed the jury in detail on the law governing Plaintiffs' defamation claim and various defenses to that claim that MUSC had raised. For the reasons that follow, this was not a special verdict, but was a general verdict (perhaps with special interrogatories). As a result, Rule 49(a) (upon which Plaintiffs' appellate arguments hinge) does not apply, and this Court must affirm the trial judge's reduction of the verdict to $300,000 for each Plaintiff in conformity with the South Carolina Tort Claims Act.

a. <u>The Difference Between a "Special Verdict" and a "General Verdict."</u>

"Under the special verdict system, the jury makes findings on *all issues of material fact and the court applies the law.*" *Maytag Corp. v. Clarkson*, 875 F. Supp. 324, 330 n.10 (D.S.C. 1995)[4] (emphasis added) (internal quotation marks and citation omitted); *accord United States v. Gonzales*, 841 F.3d 339, 346 (5th Cir. 2016) ("A true 'special verdict' asks the jury to make specific

[4] Prior to December 1, 2007, Federal Rule of Civil Procedure 49(a)-(b) was the same as the South Carolina version of the Rule. The amended Federal Rule 49(a)-(b) was similar in substance to its South Carolina counterpart.

factual findings in the absence of a general verdict, and leaves the judge to determine the defendant's guilt or innocence in light of those findings."); *Function Media, LLC v. Google Inc.*, 708 F.3d 1310, 1329 (Fed. Cir. 2013) ("Under the special verdict, the jury finds the facts while the court applies the law, and it is typically unnecessary to even instruct the jury on the law.").

The Eleventh Circuit has discussed in detail the role of the jury in a Rule 49(a) special verdict:

> Wright Medical contends that the jury delivered a special verdict, rather than a general verdict with written answers to special interrogatories. "Categorizing a verdict as a general verdict, or as a special verdict under Rule 49(a), or as a general verdict with special interrogatories under Rule 49(b) should be — but too often seems not — a simple matter." *Mason v. Ford Motor Co.*, 307 F.3d 1271, 1274-75 (11th Cir. 2002). "With a special verdict, the jury's sole function is to determine the facts; the jury needs no instruction on the law because the court applies the law to the facts as found by the jury." *Id.* at 1274. In contrast, here, the district court delivered "instructions to the jury on the law to be applied to the jury's factual findings as well as the requirement that the jury apply the law and render its verdict." *See id.* at 1275. Moreover, "[b]oth the court's instructions and the verdict form required the jury to perform the most essential function that marks a general verdict: to decide which party prevails." *See id.* The verdict sheet in this case contained a general verdict with written answers to special interrogatories.

See Christiansen v. Wright Med. Tech., Inc., 851 F.3d 1203, 1213 n.8 (11th Cir. 2017); *accord Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1521 (6th Cir. 1990) ("If the written questions submitted to the jury were truly special verdicts, no instruction on the law, and certainly not one as detailed would have been given to the jury. The record plainly shows that the jury was instructed on the law in order to reach a verdict. The record also shows that written questions were submitted only for the issue of negligent misrepresentation. Both of these actions contradict essential elements of special verdict procedure.").

A special verdict provides the benefit of explaining *why* the jury reached its decision, which is particularly helpful in the consideration of appeals and post-trial motions:

> The special verdict was designed to identify the bases on which the jury rendered its verdict. This identification process avoids the need for additional proceedings and appellate uncertainty, and promotes judicial efficiency by reducing the likelihood of new trials. Special verdicts are especially helpful in complex cases involving multiple, alternative theories of recovery because they eliminate the

> uncertainty as to whether the verdict was based wholly on an improper theory requiring a retrial of the case. For example, trial courts have found that special verdicts are particularly suited to patent cases by reducing the number of retrials. Thus, the special verdict reveals all of the claims in the civil action that have issues, both fact and law, for the complete and final acceptance of the correct legal theory by the reviewing court. . . .
>
> When a verdict contains one or more errors or inconsistencies, the special verdict permits the trial judge to grant a retrial on a particular issue while the rest of the verdict may be saved. For example, in one case it was held that there was no need for a retrial because the district court's submission of a fraud claim to the jury was harmless error because the jury also specifically found by special verdict that negligence was a basis for liability.

See 3 Moore's Manual--Federal Practice and Procedure § 22.70[2][a].

"Most cases are submitted to the jury under instructions to return a general verdict in favor of the plaintiff or defendant without disclosing the particular findings of fact supporting the verdict." *See* Flanagan, *et al.,* South Carolina Civil Procedure § 49.A. A Rule 49(b) general verdict has been defined as "one that either finds in favor of the defendant or finds in favor of the plaintiff against the defendant and assesses damages in a stated sum." *See* 3 Moore's Manual--Federal Practice and Procedure § 22.70. "A general verdict has the advantages of certainty and simplicity but has the disadvantage of being either all wrong or all right, because it is an 'inseparable unit.'" *See id.* In addition, Rule 49(b) provides an option of a general verdict with interrogatories:

> The second alternative to a general verdict is provided by Rule 49(b), which allows the jury, after receiving its instructions, to return a general verdict together with answers to written questions. Rule 49(b) essentially combines the two other types of verdicts, the general verdict and the special verdict. If the answers to the written questions do not contradict the general verdict, the trial court enters judgment on the verdict.
>
> Special questions are directed to particular issues of fact and the answers should support, rather than take the place of, the general verdict. Thus, the Rule 49(b) verdict has been described as taking a middle course between the simple general verdict and the Rule 49(a) special verdict in that it focuses the jury's attention on the controlling points at issue, and the answers to the special questions provide a check on the propriety of the general verdict.

See 3 Moore's Manual--Federal Practice and Procedure § 22.70[1][b].

For the reasons that follow, the verdict was not a special verdict. As a result, Rule 49(a) does not apply, and Plaintiffs' appeal must fail.

b. <u>This Was Not a "Special Verdict."</u>

The verdict in this case was not a "special verdict" because it was not "verdict in the form of a special written finding upon each issue of fact." *See* S.C.R. Civ. P. 49(a). Rather, the verdict was a general verdict form (questions 1 and 3) with an interrogatory (question 2, related to whether MUSC exceeded the scope of its qualified privilege[5]). The jury determined the general questions of MUSC's liability and the amount of damages.

The face of the questions on the verdict form make clear that this was not a "special verdict." There is not a list of specific factual inquiries. The jury was not asked to make any written findings of fact (for example, what statements were defamatory). Instead, the jury was asked to return a general liability verdict, with a separate question on the issue of abuse of the qualified privilege. Most importantly, the verdict form did not include questions addressed to "each issue of fact." *See* S.C.R. Civ. P. 49(a). At most, it only asked the jury the specific factual question of whether MUSC exceeded the scope of its qualified privilege.

If this had been a "special verdict," the parties would not now be speculating about what the jury intended. That is the whole purpose of a special verdict: to obtain clarity on what the jury decided to avoid confusion or speculation in subsequent proceedings. Plaintiffs are asking this Court (and asked the trial judge) to speculate about what the jury found to be defamatory.

In a trial transcript of 1,015 pages, Plaintiffs cannot direct this Court to a single pre-verdict usage of the phrase "special verdict" or any statement on the record even suggesting that the parties contemplated a "special verdict." The trial judge never suggested that she was using a special

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[5] The trial judge determined, as a matter of law, that the alleged defamatory statements were subject to qualified privilege; the jury determined whether the MUSC exceeded the scope of that privilege. (*See* R. p. 790:21-24 ("While I have determined as a matter of law that the qualified privilege exists in this case, it's your duty to determine, as a matter of fact, whether the defendant abused the privilege.")).

verdict. Neither Plaintiffs nor MUSC asked the trial judge to present the jury with a special verdict form. Plaintiffs cannot cite a single reference of a "special verdict" in any pleading or trial filing. There is nothing to suggest that the trial judge or the parties ever contemplated that the verdict would be subject to Rule 49(a). To the contrary, the trial judge considered post-trial motions as if the jury had returned a general verdict.

In fact, Plaintiffs did even not raise the concept of "special verdict" until *after* MUSC filed its Post-Trial Motions (citing *Chastain, supra*): "Plaintiffs did not object to the Court's proposed verdict form, which did not include a special interrogatory as to occurrences. Defendant now asserts that the Court must have submitted to the jury a special verdict form or interrogatory asking the jury to determine the number of occurrences." (*See* R. p. 120). Thus, even Plaintiffs' first reference to that phrase did not assert that the jury had, in fact, returned a special verdict; rather, it suggested that MUSC's argument under *Chastain* was that the trial court should have submitted a special verdict form on the number and identity of occurrences. It was not until Plaintiffs filed their December 16, 2022 Memorandum in Opposition to Defendant's Post-Trial Motions that Plaintiffs asserted that the jury had returned a special verdict.[6] (*See generally* R. pp. 129-77). Plaintiffs did not even raise the possibility of the jury returning anything but a general verdict until they realized that the trial judge might reduce the verdict because they failed to comply with *Chastain*. Simply put, the parties (including Plaintiffs) never contemplated the submission of this case to the jury under the "special verdict" procedure.

To the contrary, all of the trial proceedings are consistent with the jury returning a general verdict (with a separate interrogatory on the scope of qualified privilege). For example, the jury instructions illuminate that the trial judge contemplated a general verdict on liability, not having the jury make factual determinations to which she would apply the law. The trial judge instructed the jury extensively on all of the elements of defamation, the defenses thereto, and other subjects

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[6] Notably, in their Opposition to MUSC's Post-Trial Motions, Plaintiffs stated that "[t]he jury returned *a verdict for Plaintiffs* in the amount of $750,000.00 each in compensatory damages." (*See* R. p. 134 (emphasis added)).

that would not have been relevant if the jury was — as Plaintiffs now contend — deciding only very limited factual issues as part of a special verdict. For example, the trial judge instructed the jury on:

- **The Elements of Defamation:** "In order to recover in this case, the plaintiffs must establish by a preponderance of the evidence that there was a false and defamatory statement by the defendant MUSC concerning the plaintiff's and unprivileged publication by the defendant to a third party, fault on the defendant's part in publishing the statement and that the publication of the statement cause special harm or damages to the plaintiff or the publication of a type of statement where the law presumes harm to the plaintiffs." (*See* R. p. 786:2-11).

- **The Defense of "Truth":** " If the statement is true, the plaintiffs cannot recover for defamation. The -- excuse me, the defamatory statement is presumed to be false. Defendant has the burden of proving that the statement was substantially true." (*See* R. p. 787:9-12).

- **The Requirements of Intent and Publication** (*See* R. p. 787:13-1001:11).

- **Requirement of Action Within Scope of Official Duties:** " Under the South Carolina Tort Claims Act[, y]ou may only return a verdict against MUSC if you find that plaintiffs have proven by a preponderance of the evidence that the conduct of MUSC's employees was within the scope of their official duties. An employee includes an agent and a person acting on behalf of or in service of a governmental entity in the scope of official duties." (*See* R. p. 791:15-21).

- **Exceptions to the Waiver of Immunity Under the Tort Claims Act:** " Under the South Carolina Tort Claims Act. MUSC may not be held liable for an injury that was caused by adoption, enforcement or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to any charter provision, ordinance, resolution, rule regulation or written policy. The statute also provides an MUSC or any other governmental entity may not be held liable for the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service, which is in the discretion or judgment of the governmental entity or employee. MUSC may not be held liable for employee conduct outside the scope of official duties. And finally, under the Court Claims Act, MUSC may not be held liable for an act or omission of a person other than an employee or agent MUSC, including but not limited to the criminal actions of third persons." (*See* R. p. 792:9-25).

If, as Plaintiffs now argue, the jury was only to return a special verdict on specific issues of fact, there would have been no reason for the trial judge to give such detailed instructions on the elements of the tort of defamation and defenses thereto.

Moreover, after the jury returned its verdict, Plaintiffs did not immediately ask the trial judge to apply the law to the specific findings of fact in the verdict. As set forth above, a special verdict would not have been a determination of liability but rather a factual finding on certain issues. If that had been the case, Plaintiffs would have promptly asked that the trial judge make a finding of liability in its favor. While the jury was provided with three questions to answer, it was not merely a "fact finder" for the judge. Rather, it was fully instructed on the law and made the final determination of liability. Therefore, "[t]he verdict form that was presented to the jury was a general verdict form with written questions pursuant to Rule 49(b) of the [] Rules of Civil Procedure, not a special verdict form pursuant to Rule 49(a) as argued by the [] Plaintiffs." *Firehouse Rest. Grp., Inc. v. Scurmont LLC,* No. 4:09-cv-00618-RBH, 2011 U.S. Dist. LEXIS 119610, at *32 (D.S.C. Oct. 17, 2011). As a result, Plaintiffs' reliance on Rule 49(a) is misplaced.

Plaintiffs' argument that the jury returned a special verdict is premised primarily upon the language used in question 1 on the verdict form: "Do you, the jury, unanimously find by a preponderance of the evidence that Defendant Medical University of South Carolina made a false and defamatory statement about Plaintiffs Kayla and Kellie Bingham?" (*See* R. p. 4). Specifically, they contend that "the verdict form never asked the jury to make an ultimate determination on liability and damages in a single, conclusive statement, and instead asks the jury specific fact questions relating to some, but not all, of the elements of the Binghams' defamation claim." (*See* Pls.' Appellants Br., at 21).[7] In Plaintiffs' view, a "general verdict" only exists whether the jury is

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[7] Plaintiffs state that question 1 could not have been a general verdict because its language did not encompass "fault on the part of the publisher":

> The questions on the verdict form are based on the first, second, and fourth elements of the defamation claim as defined under South Carolina law. The elements of defamation include: "(1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 506 S.E.2d 497 (1998) (Toal, J., concurring) (citing Restatement (Second) of Torts § 558 (Am. L. Inst. 1977)).

either asked: (a) whether it finds the defendant liable; or (b) whether it finds that a verbatim listing of all of the elements of each claim have been proven. They argue that because there were defamation questions beyond whether MUSC "made a false and defamatory statement about Plaintiffs," the jury's answer to the first question was not a general verdict of liability.

Plaintiffs' argument is a misreading of the verdict form and does not take into account the parties' and trial courts' intentions. As set forth above, the trial judge gave the jury a full instruction on all of the elements of (and defenses to) defamation. She also instructed the jury as to MUSC's defenses under the Tort Claims Act. By doing so, the trial court clearly expressed its intention to have the jury decide the general question of liability (which it did in question 1). Even if question could have been worded differently, the trial court clearly intended that the jury decide whether Plaintiffs had carried their burden of proving the elements of defamation:

> We conclude, however, that Rule 49(a) is inapplicable to this case. To begin with, the jury's verdict on Ramos's Law 100 claim was not a special verdict. On liability, the form asked the jury only one question--"Do you find that the Defendant constructively discharged the Plaintiff Rafael Ramos without just cause because of his age in violation of Law 100?"--rather than the "special written findings on each issue of fact" authorized by Rule 49(a). ***That one question, although phrased as a question of fact, was in substance identical to asking the jury, "On Plaintiff's Law 100 claim, do you find for Plaintiff or Defendant?"*** Then the jury was asked to find one amount for damages (and then double it pursuant to Law 100), without breaking it down into back pay and emotional distress. This was a general verdict . . . .

See Ramos v. Davis & Geck, Inc., 224 F.3d 30, 32-33 (1st Cir. 2000) (emphasis added). So here, question 1 was, in substance, asking the jury to find whether Plaintiffs proved all of the elements of negligence. Question 2 asked whether they had made a showing sufficient to defeat qualified

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(*See* Pls.' Appellants' Br., at 23).

The trial judge expressly instructed the jury on the third element of defamation: "The third element of defamation is fault on the part of the publisher. When a defamatory communication is written liable, the defendant is presumed to have acted with fault. When a defamatory statement is slanderous and charges the plaintiff with unfitness in one's business or profession, the defendant is presumed to have acted with fault." (*See* R. p. 788:6-11). There would have been no reason to so instruct the jury if it was not determining liability.

privilege. There is nothing to suggest that these were isolated findings of fact that the jury was asked to decide. They were being asked to decide whether MUSC was liable.

Therefore, because the verdict was a "general verdict," Rule 49(a) does not apply (and Plaintiffs' entire position on appeal must fail). Therefore, this Court should affirm the trial court's May 5, 2022 Order Granting Defendant's Motion to Reduce the Verdict Per the SCTCA and Denying Plaintiffs' Motion to Determine Number of Occurrences.

2. Even if This Was a "Special Verdict," the Trial Judge Did Not Err in Reducing the Verdict to Accurately Reflect the Effects of the South Carolina Tort Claims Act.

Plaintiffs' argument on appeal relies on Rule 49(a)'s language that in the context of a special verdict: "[a]s to an issue omitted without such demand the court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."[8] For the reasons that follow, this language does not support Plaintiffs' multiple occurrence argument.

a. The Face of the Verdict Is Inconsistent with Plaintiffs' Claim of Multiple Occurrences.

For the reasons that follow, the Court should reject Plaintiff's arguments because — assuming it returned a special verdict — the jury expressly determined only that a single defamatory statement existed. As a result, even if she wanted to, the trial judge could not have expressly or implicitly found that there were multiple occurrences. Moreover, implying such a ruling would fly in the face of the jury's verdict.

In its verdict, the jury found "by a preponderance of the evidence that Defendant Medical University of South Carolina made ***a*** false and defamatory statement about Plaintiffs." (*See* R. p.

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[8] Plaintiffs do not seem to rely on the first part of this sentence from Rule 49(a). They do not argue that the trial judge erred by not making her own independent finding of a number of occurrences based on the evidence presented. To the contrary, Plaintiffs concede that, even in the context of a special verdict, the trial judge may "choose not to" make findings beyond those in the jury's verdict. (*See* Pls.' Appellants Br., at 33). Instead, their focus is on the second part of this sentence: *i.e.*, that the trial judge "shall be deemed to have made a finding in accord with the judgment on the special verdict." *See* S.C.R. Civ. P. 49(a).

4 (emphasis added)). Importantly, the verdict form only tasked the jury with deciding whether MUSC made one defamatory statement about Plaintiffs. That is precisely what the jury decided. It was not asked to determine whether MUSC made "at least one" statement. It was not asked how many defamatory statements were made or their substance. It was not asked to identify the defamatory statements. To the contrary, the plain face of the verdict form asked the jury whether MUSC had made one defamatory statement. That is precisely what the jury decided.

Plaintiffs contend that the jury did not make "an explicit finding of only one occurrence." (*See* Pls.' Appellants Br., at 41). In light of the wording of the verdict form, this is simply not accurate. It decided the only question before it: whether there was "a false and defamatory statement." Plaintiffs' request that this Court infer from this that the jury really found three statements is unavailing. Like MUSC, Plaintiffs did not object to the language of the verdict form. If they believed that the verdict form was a special verdict that would guide the trial court's decision on the number of occurrences, they should have objected to this language. Failing to do so, they may not now ask the Court to infer that their request to find multiple occurrences is, in any way consistent with or in accord with the verdict.

In the face of the verdict's unambiguous language (using the singular form of "a . . . statement"), Plaintiffs ask this Court—which was not present during the trial and did not observe the witnesses—to speculate about what the jury actually found to be defamatory. Plaintiffs have, at various times, argued that different statements by different people defamed them. However, the jury did not specifically communicate which statement (or statements) were, in fact defamatory. It could have found that Dr. Hazen-Martin defamed Plaintiffs while Dr. Kasman did not, or vice-versa. There is no way for this Court—and there was no way for the trial judge—to divine or conjure up the jury's intention. As a result, there is absolutely no way of knowing whether finding multiple defamatory statements would be in accord with the verdict, which was limited to finding a single statement.

This is the precise reason that *Chastain* requires the determination as to the factus supporting multiple occurrences to be made on the verdict form. *See Chastain v. Anmed Health*

Found'n, 388 S.C. 170, 174, 694 S.E.2d 541, 543-44 (2010) ("In her post-trial order, the judge gave as one reason for reducing appellant's award the impossibility of determining from the jury instruction and verdict forms whether the jury found one or more than one nurse had rendered negligent care to appellant. Thus, she held, it was impossible to conclude that the jury had found more than one occurrence. Appellant now contends that AnMed bore the burden of proving there was only one occurrence. We disagree."). Plaintiffs seek to impute a decision on the jury based on sheer conjecture, that is not even consistent with the face of the verdict form.

For the foregoing reasons, because the jury concluded only that there was "a . . . statement," neither the trial judge nor this Court can reconcile the express language of the verdict with a finding of multiple occurrences.

b. <u>The Trial Court's February 7, 2023 Order Cannot Be Deemed a Finding That There Were Multiple Occurrences.</u>

Plaintiffs contend that "by entering the judgment on February 7, 2023, the Circuit Court was deemed to have found three occurrences consistent with the jury's special verdict." (*See* Pls.' Appellants Br., at 41). Plaintiffs' logic is that the trial court's Form 4 order—entered before she ruled on the parties' post-trial motions—implicitly determined that there were three occurrences. Specifically, they conclude that three occurrences would have been necessary for Plaintiffs to recover the $750,000 each referenced in the Form 4 Order. However, for the reasons that follow, Plaintiffs' argument is misplaced. As a result, the Court should affirm the trial court's reduction of the jury's verdict to reflect the caps under the South Carolina Tort Claims Act.

i. Relevant Procedural History Concerning the Verdict.

As noted above, the jury returned its verdict on November 18, 2022. Defendant MUSC filed its timely Post-Trial Motions on November 28, 2022, MUSC filed its Post-Trial Motions.[9] *(See generally* R. pp. 68-119.). Among other things, MUSC's Post-Trial Motions asked the trial court to reduce the verdicts from $750,000 to the $300,000 statutory cap for each Plaintiff, in part because Plaintiffs failed to submit a proper verdict form asking the jury to decide the occurrence issue, as the Supreme Court required in *Chastain*. On November 29, 2022 (the very next day), Plaintiffs filed their Motion to Determine the Number of Occurrences asking that the trial judge find that the verdict encompassed multiple occurrences and, as a result, the verdict would not need to be reduced. The parties submitted further memoranda on the parties' post-trial motions, and the trial judge held oral argument on February 1, 2023 via Webex.

Several days after this hearing, on February 7, 2023, the trial judge entered a Form 4 Order stating:

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

The jury unanimously found in favor of Plaintiffs Kayla Bingham and Kellie Bingham for the defamation cause of action in the amount of $750,000 for Kayla Bingham and $750,000 for Kellie Bingham on November 18, 2022.

(*See* R. p. 1). On its face, the Form 4 Order does not state an intention to enter a final judgment against MUSC; rather, it only placed the jury's verdict on the docket and recited the accurate factual statement that the jury had returned such a verdict on November 18, 2022. It attached the completed verdict form as an exhibit. Additionally, the Form 4 Order did not decide, or even mention, the parties' respective post-trial motions.

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[9] On or about November 23, 2022, Plaintiffs filed their Motion for New Trial, challenging the trial judge's grant of a partial directed verdict to MUSC on Plaintiffs' negligence claims. Plaintiffs apparently do not seek appellate review of the denial of their Motion for New Trial.

On May 5, 2023, the trial judge entered her Order Granting Defendant's Motion to Reduce the Verdict Per the SCTCA and Denying Plaintiff's Motion to Determine Number of Occurrences, which is the subject of Plaintiffs' appeal.[10] On May 10, 2023, Plaintiffs filed a Motion for Reconsideration of that Order. (*See generally* R. pp. 207-09). On May 16, 2023, the trial court entered a Form 4 Order denying Plaintiffs' Motion for Reconsideration. (*See* R. pp. 13-15).

ii. The Trial Court's February 7, 2023 Form 4 Order Was Not the "Judgment on the Special Verdict."

Plaintiffs arguments on appeal are premised, in part, on their contention that the trial court "entered judgment on behalf of the Binghams in the amount of $750,000 each on February 7, 2023." (*See* Pls.' Appellants Br., at 40; *accord id.* at 7 ("On February 7, 2023, the Circuit Court entered a judgment by way of a Form 4 Order in favor of the Binghams for their defamation cause of action in the amount of $750,000 each.")). They further note that "[m]onths later, the Circuit Court filed an Order reducing the verdict . . . on May 5, 2023." (*See id.* at 40). Plaintiffs assert that "[i]t was error for the Circuit Court to reduce the verdict nearly three months after it was deemed to have made a factual determination of at least three occurrences in accord with the verdict." (*See id.* at 33). They contend that, because the Form 4 Order referenced verdicts of $750,000 it implicitly determined that there were at least 3 occurrences.

However, the trial court's February 7, 2023 Form 4 Order was ***not a judgment, and certainly not a "judgment on the special verdict,"*** as referenced in Rule 49(a). As a result, irrespective of the amount of the verdict referenced in the February 7, 2023 Form 4 Order, the trial judgment should not "be deemed to have made a finding in accord with the judgment on the special verdict" that there were multiple occurrences. *See* S.C.R. Civ. P. 49(a). The Form 4 Order could

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[10] On May 15, 2023, the trial court entered a Form 4 Order denying MUSC's Post-Trial Motions (except as to the reduction of the verdict) and requesting that Plaintiffs submit a proposed formal order. (*See* R. pp. 10-12). On September 19, 2023, the trial judge entered a formal order denying MUSC's Post-Trial Motions. (*See* R. pp. 16-47).

not implicate what Plaintiffs call the "self-executing saving mechanism" of Rule 49(a). (*See* Pls.' Appellants Br., at 41).

"A verdict is not a final judgment. From it no appeal can be taken. It is merely a basis upon which a judgment may be entered." *Sparks v. Atlantic Coast Line R.R. Co.*, 109 S.C. 145, 149, 95 S.E. 344, 346 (1918). The Rules of Civil Procedure define a "judgment" as including: "any decree or order which dismisses the action as to any party or finally determines the rights of any party. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings." *See* S.C.R. Civ. P. 54(a). Rule 58 governs the entry of judgments following jury verdicts:

> (a) **Entry Upon Verdict or Decision.** Subject to the provisions of Rule 54(b):
>
> (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court;
>
> (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly prepare the form of the judgment, or direct counsel to promptly prepare the form of judgment, to which may be attached the decision, order or opinion of the court, and after review and approval by the court, the clerk shall promptly enter it.
>
> Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and entered in the record. Entry of the judgment should not be delayed for the taxing of costs.

See S.C.R. Civ. P. 58(a).

The Form 4 Order entered on February 7, 2023 was, on its face, ***not*** a judgment.[11] It was merely an order reciting the verdict and placing it on the public docket. It stated only that "[t]he

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[11] The Form 4 Order does have the box labeled "Statement of Judgment" checked off. However, this does not mean that this was a judgment upon the verdict. In fact, the "Statement of Judgment" box is checked off on interlocutory orders entered in this case via Form 4 before the verdict:

- June 24, 2020 Form 4 Order denying Plaintiffs' Motion to Quash Subpoenas

jury unanimously found in favor of Plaintiffs Kayla Bingham and Kellie Bingham for the defamation cause of action in the amount of $750,000 for Kayla Bingham and $750,000 for Kellie Bingham on November 18, 2022." (*See* R. p. 1). It does not state that Plaintiffs are actually entitled to recover any amount. It does not include any language ordering that MUSC pay Plaintiffs any amount. It could not be used as the basis for the commencement of proceeding in execution. It merely recites the undisputed fact that the jury returned a verdict in Plaintiffs' favor.

Further, the February 7, 2023 Form 4 Order does not contain the indicia of a judgment entered on a jury verdict. It does not include any information for enrolling the judgment[12] in the judgment index, as provided in the Court's official form for Form 4 orders:

INFORMATION FOR THE JUDGMENT INDEX **Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.**		
Judgment in Favor of (List name(s) below)	**Judgment Against (List name(s) below)**	**Judgment Amount To be Enrolled (List amount(s) below)**
		$
		$
		$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

- October 5, 2022 Form 4 Order denying Plaintiffs' Motion for Partial Summary Judgment and MUSC's Motion for Summary Judgment

12 Such enrollment permits plaintiffs to execute upon judgments against real or personal property. *See* S.C. Code § 15-35-810 ("Final judgments and decrees entered in any court of record in this State . . . shall be declared to create a lien, shall constitute a lien upon the real estate of the judgment debtor situate in any county in this State in which the judgment or transcript thereof is entered upon the book of abstracts of judgments and duly indexed . . .").

(*See* SCRCP Form 4C (02/2017)). South Carolina law requires that all judgments be entered in the "abstract of judgments" (including the details of the judgment). *See* S.C. Code § 15-35-520 ("In this book [abstract of judgments] shall be entered each case wherein judgment may be signed . . . ."). The Form 4 contains none of the typical hallmarks of a money judgment following a jury trial.

Most importantly, the February 7, 2023 Form 4 Order did not resolve any of the parties' post-trial motions and does not express an intention to finally dispose of the case. The parties had argued their post-trial motions only days before entry of the February 7, 2023 Form 4 Order. At the close of the February 1, 2023 oral argument on the parties' post-trial motions (including Plaintiff's Motion to Determine Number of Occurrences), the trial judge stated:

> I'm going to look carefully at the material that you've given me before I make any determination. You know, I do think there were a lot of issues in the case and, you know, I mean I certainly have granted (indiscernible) before but I don't do it lightly. So I'm going to look at it carefully. I know everybody involved is heavily invested in this so ***y'all be a little patient*** with me while I look back on it, but ***I will email you with my ruling***.

(*See* R. p. 291 (emphasis added)). Consistent with the trial judge's statement on the record, she took her time to carefully review the filings and ruled on the parties post-trial motions several months later. Nothing in Judge Curtis' conduct or statements at the hearing on post-trial motions suggested that the Form 4 Order was intended to be a judgment upon the verdict. Certainly, nothing in that Form 4 Order suggests that the trial court had ruled on MUSC's Post-Trial Motion seeking a reduction in the amount of the verdict.

Respectfully, the February 7, 2023 Form 4 Order is not a judgment, in that it does not finally determine the parties' rights. To the contrary, it did not address the parties' numerous post-trial motions, which had been extensively briefed and argued. It was not a judgment that would implicate Rule 49(a). In fact, to this date, no judgment has been entered in Plaintiffs' favor on the jury's verdict (for any amount).

For the foregoing reasons, because the February 7, 2023 Form 4 Order did not enter a judgment upon the verdict, Plaintiffs' reliance on it to trigger an implied finding Rule 49(a) concerning the number of occurrences is misplaced.

CONCLUSION

For all of the foregoing reasons, the Court should affirm the trial judge's order conforming the jury's verdict to reflect the caps on liability under the South Carolina Tort Claims Act.

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July 11, 2024

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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 Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the **RESPONDENT-APPELLANT'S FINAL BRIEF AS RESPONDENT** 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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