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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

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Appellate Case No.: 2023-000952

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

v.

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

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**APPELLANTS-RESPONDENTS KELLIE AND KAYLA BINGHAM'S FINAL  
BRIEF AS RESPONDENTS**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iv

COUNTERSTATEMENT OF ISSUES ON APPEAL ..... 1

INTRODUCTION ..... 2

STANDARD OF REVIEW ..... 3

ARGUMENT ..... 4

    I. Factual background. .... 4

    II. The statements of Dr. Hazen-Martin and those of Dr. Kasman, as well as those of any unknown Honor Council members, were susceptible to a reasonable inference that the Bingham's were cheating. .... 16

    III. The qualified privilege does not protect statements made in an improper manner or to improper persons. .... 20

    IV. The Circuit Court correctly found that an absolute privilege would not attach to the defamatory statements at issue in this Appeal..... 24

    V. There is evidence in the record supporting the jury's finding that the accusations of cheating were false. .... 29

    VI. There is circumstantial evidence in the record supporting a reasonable inference that a member of the Honor Council made defamatory statements concerning the Bingham's. .... 34

        A. The Complaint sufficiently alleged that MUSC was liable for the repetition of Dr. Hazen-Martin's and Dr. Kasman's accusations of cheating by other individuals..... 36

        B. There is circumstantial evidence in the record supporting an inference that an unknown member of the Honor Council leaked confidential information and the cheating accusations. .... 40

        C. Under the two-issue rule and law of the case doctrine, MUSC has failed to preserve an argument that it did not waive its affirmative defense under S.C. Code Ann. § 15-78-60(17)..... 43

VII.MUSC did not timely object to the Bingham's closing arguments and demonstrative exhibit..... 50

CONCLUSION ..... 52

## TABLE OF AUTHORITIES

### Cases

<i>Abofreka v. Alston Tobacco Co.</i> , 288 S.C. 122, 341 S.E.2d 622 (1986) .....	21
<i>Anderson v. S.C. Dep't of Highways &amp; Pub. Transp.</i> , 322 S.C. 417, 472 S.E.2d 253 (1996) .....	34
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662, 129 S. Ct. 1937 (2009) .....	38
<i>Austin v. Stokes-Craven Holding Corp.</i> , 387 S.C. 22, 691 S.E.2d 135 (2010) .....	4
<i>Bell v. Bank of Abbeville</i> , 208 S.C. 490, 38 S.E.2d 641 (1946) .....	21
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544, 127 S. Ct. 1955 (2007) .....	38
<i>Biales v. Young</i> , 315 S.C. 166, 432 S.E.2d 482 (1993) .....	44
<i>Bochette v. Bochette</i> , 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989) .....	45
<i>Bose v. Bea</i> , 947 F.3d 983, 994-996 (6th Cir. 2020) .....	25
<i>Buckner v. Preferred Mut. Ins. Co.</i> , 255 S.C. 159, 177 S.E.2d 544 (1970) .....	45
<i>Butz v. Economou</i> , 438 U.S. 478, 98 S. Ct. 2894 (1978) .....	24
<i>Carver v. Morrow</i> , 213 S.C. 199, 48 S.E.2d 814 (1948) .....	28
<i>Crowell v. Herring</i> , 301 S.C. 424, 392 S.E.2d 464 (Ct. App. 1990) .....	24,25,26

<i>Cruce v. Berkeley Cnty. Sch. Dist.</i> 442 S.C. 1, 896 S.E.2d 765 (2024) .....	17,18,19,37
<i>Dawkins v. Mozie</i> , 399 S.C. 290, 731 S.E.2d 342 (Ct. App. 2012) .....	44
<i>Doe v. Beaufort Jasper Acad. for Career Excellence</i> , No. 2021-UP-010 (S.C. Ct. App. filed Jan. 13, 2021).....	49
<i>Doe v. McGowan</i> , C/A 2:16-cv-00777, 2017 WL 573619 (D.S.C. Jan. 5, 2017) .....	38
<i>Erickson v. Jones St. Publishers, LLC</i> , 368 S.C. 444, 629 S.E.2d 653 (2006) .....	4
<i>Eubanks v. Smith</i> , 292 S.C. 57, 354 S.E.2d 898 (1987) .....	26
<i>Fleming v. Rose</i> , 350 S.C. 488, 567 S.E.2d 857 (2002) .....	16
<i>Fulton v. Atl. Coast Line R.R. Co.</i> , 220 S.C. 287, 67 S.E.2d 425 (1951) .....	20,24,28
<i>Garrard v. Charleston Cnty. Sch. Dist.</i> , 429 S.C. 170, 838 S.E.2d 698 (Ct. App. 2019).....	18
<i>General Assembly. Vulcan Materials Co. v. Greenville Cnty. Bd. of Zoning Appeals</i> , 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000) .....	29
<i>Hainer v. American Med. Int’l, Inc.</i> , 328 S.C. 128, 492 S.E.2d 103 (1997) .....	26,27
<i>Heike v. Guevara</i> , No. 09-10427-BC, 2009 WL 3757051 (E.D. Mich. Nov. 6, 2009) .....	25
<i>Holtzscheiter v. Thomson Newspapers, Inc.</i> , 332 S.C. 502, 506 S.E.2d 497 (1998) .....	16
<i>Jamison v. Howard</i> , 271 S.C. 385, 247 S.E.2d 450 (1978) .....	46
<i>Johnson v. Indep. Life &amp; Accident Ins. Co.</i> , 94 F. Supp. 959 (E.D.S.C. 1951).....	28

<i>Jones v. Elbert</i> , 211 S.C. 553, 34 S.E.2d 796 (1945) .....	46
<i>Kunst v. Loree</i> , 424 S.C. 24, 817 S.E.2d 295 (Ct. App. 2018) .....	4
<i>Ligon v. Norris</i> , 371 S.C. 625, 640 S.E.2d 467 (Ct. App. 2006) .....	51
<i>McCreight v. MacDougall</i> , 248 S.C. 222, 149 S.E.2d 621 (1966) .....	51
<i>McKay v. Med. Univ. of S.C.</i> , Civil Action No. 2:17-45, 2017 WL 3477799 (D.S.C. Aug. 14, 2017) .....	38
<i>Mentavlos v. Anderson</i> , 249 F.3d 301 (4th Cir. 2001) .....	48
<i>Murphy v. Jefferson Pilot Comm. Co.</i> , 364 S.C. 453, 613 S.E.2d 808 (Ct. App. 2005) .....	49
<i>Murray v. Holnam, Inc.</i> , 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001) .....	21
<i>Nash v. Sharper</i> , 229 S.C. 451, 93 S.E.2d 457.....	18
<i>Parrish v. Allison</i> , 376 S.C. 308, 656 S.E.2d 382 (Ct. App. 2007) .....	16,17,29
<i>Pond Place Partners, Inc. v. Poole</i> , 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002) .....	25
<i>Reid v. Delorme</i> , 2 Brev. 76 (1806) .....	28
<i>Richardson v. McGill</i> , 273 S.C. 142, 255 S.E.2d 341 (1979) .....	24
<i>Rodgers v. Wise</i> , 193 S.C. 5, 7 S.E.2d 517 (1940) .....	28

<i>S.C. Dep't of Transp. v. First Carolina Corp. of S.C.</i> , 372 S.C. 295, 641 S.E.2d 903.....	18
<i>Scoggins v. McClellion</i> , 321 S.C. 264, 468 S.E.2d 12 (Ct. App. 1996).....	52
<i>Smith v. Smith</i> , 194 S.C. 247, 9 S.E.2d 584 (1940) .....	17
<i>State v. Bailey</i> , 253 S.C. 304, 170 S.E.2d 376 (1969) .....	16
<i>State v. Drake</i> , 122 S.C. 350, 115 S.E. 297 (1922) .....	28
<i>Steinke v. S.C. Dep't of Labor, Licensing and Regulation</i> , 336 S.C. 373, 520 S.E.2d 142 (1999) .....	44,49
<i>Stokes-Craven Holding Corp. v. Robinson</i> , 416 S.C. 517, 787 S.E.2d 485 (2016) .....	4
<i>Tucker v. Pure Oil Co. of Carolinas</i> , 191 S.C. 60, 3 S.E.2d 547 (1939) .....	39
<i>Varnadore v. Nationwide Mut. Ins. Co.</i> , 289 S.C. 155, 345 S.E.2d 711 (1986) .....	51
<i>Vulcan Materials Co. v. Greenville Cnty. Bd. of Zoning Appeals</i> , 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000).....	29
<i>Wardlaw v. Peck</i> , 282 S.C. 199, 318 S.E.2d 270 (Ct. App. 1984) .....	17
<i>Wright v. Craft</i> , 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006) .....	3,4
<i>Young v. Warr</i> , 252 S.C. 179, 165 S.E.2d 797 (1969) .....	51
<b>Statutes</b>	
42 U.S.C. § 1983 .....	48
S.C. Code Ann. § 15-78-60 .....	43,44

**Rules**

Rule 8(a), SCRCP ..... 38

Rule 12(e), SCRCP ..... 39

Rule 268(d)(2), SCACR ..... 50

## COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. Whether the defamatory statements at issue in this case are susceptible of a defamatory meaning.
- II. Whether there is any evidence in the record supporting that the defamatory statements of Respondent-Appellant's agents exceeded the scope of the qualified privilege.
- III. Whether the absolute privilege protects statements made in connection with university disciplinary proceedings as a matter of law.
- IV. Whether there is any evidence in the record demonstrating that Appellants-Respondents did not cheat on their Block 12 examination.
- V. If the issue is preserved under the two-issue rule, whether the Appellants-Respondents adequately pled allegations of a leak to the public by an agent of Respondent-Appellant in their Complaint.
- VI. If the issue is preserved under the two-issue rule, whether Respondent-Appellant waived its Tort Claims Act scope of official duties defense and if it did not, whether any such leak would be outside the scope of its agents' official duties as a matter of law.
- VII. If the issue is preserved under the two-issue rule, whether there is any circumstantial evidence in the record that an agent of Respondent-Appellant leaked the accusations of cheating and details of Appellants-Respondents' Honor Council proceedings to the MUSC academic community and the public.
- VIII. Whether Respondent-Appellant preserved its argument that Appellants-Respondents' counsel made factually inaccurate statements to the jury during closing arguments and if it did, whether such statements were prejudicial to the extent that Respondent-Appellant was denied a fair trial.

## INTRODUCTION

Students should be afforded a modicum of support and respect by educational institutions when it comes to their academic careers. These considerations become paramount when a university's students have invested an enormous part of their lives, and devoted considerable financial resources, to pursuing a career that is as rigorous and scrutinized as that of a medical doctor. Appellants-Respondents Kellie Bingham and Kayla Bingham ("the Bingham") specifically chose to apply to and attend Respondent-Appellant Medical University of South Carolina's ("MUSC") College of Medicine because they believed MUSC would embrace those considerations while providing them with the knowledge and skills they would need to pursue successful careers as doctors. After completing its vetting process, MUSC accepted the Bingham as students because it believed that they had integrity and were fit to study and eventually practice medicine.

However, instead of adopting what should have been a mutual level of trust, MUSC took the opposite approach. With only threadbare evidence, MUSC falsely and negligently accused the Bingham of cheating on a medical school examination and conveyed this accusation to MUSC faculty and the members of one of its honor councils. In doing so, it totally ignored a vital piece of evidence in its possession that even a child would have recognized as being significant: the Bingham are monozygotic twins with historically high levels of correlation in their test scores. Unfortunately, MUSC did not stop there. After its accusations caused a public controversy and found their way into print media, social media, and the academic

community, instead of making a reasonable effort to protect the Bingham, MUSC threw them to the wolves, forcing them to suffer unjustified ridicule from their peers in public view. Predictably, this led to the abandonment by the Bingham of their medical school careers and caused severe and lasting emotional and reputational harm.

In its Brief, MUSC wastes no time in asserting that this case “is not about whether Plaintiffs actually cheated on the Exam” and that MUSC was never required to prove that the Bingham had cheated. To the contrary, if you were to ask the Bingham, they would tell you that the accusations of cheating are the central issue of this case. There is ample evidence on multiple independent grounds supporting the jury’s finding that the accusations of cheating by MUSC’s agents were false, and that MUSC’s acts caused the publication of further defamatory statements by others, resulting in significant reputational harm to the Bingham. MUSC wishes to retry its case before this Court while giving zero weight to the evidence in the record that supports the jury’s findings. The Court should not allow it to do so. For these and the following reasons, the jury’s verdict and the Circuit Court’s Orders denying MUSC’s motions for a directed verdict, JNOV, and a new trial should be affirmed.

### **STANDARD OF REVIEW**

On appeal from an action at law tried by a jury, appellate courts correct errors of law and do not disturb the jury's factual findings unless the record reveals no evidence reasonably supporting those findings. *Wright v. Craft*, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006). When ruling on directed verdict, JNOV, or new trial

motions, “the [trial] court must view the evidence and all reasonable inferences drawn from the evidence in the light most favorable to the nonmoving party” and must deny the motions “[i]f the evidence at trial yields more than one reasonable inference or its inference is in doubt.” *Kunst v. Loree*, 424 S.C. 24, 37–38, 817 S.E.2d 295, 301–02 (Ct. App. 2018). The same standard is to be applied on appeal. *Wright*, 372 S.C. at 18, 640 S.E.2d at 495. Neither the trial court nor this Court have the authority to make credibility determinations or resolve conflicting evidence. *Kunst*, 424 S.C. at 38, 817 S.E.2d at 302. The trial court's ruling on a directed verdict, JNOV, or new trial motion will be reversed only if the ruling is governed by an error of law or *no evidence* supports the ruling. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 42, 691 S.E.2d 135, 145 (2010); *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016).

### ARGUMENT

In order to prove defamation, the plaintiff must show “(1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006). This Appeal concerns the first and second elements of the defamation claim, in addition to the affirmative defense of truth and the scope of official duties exception to the South Carolina Tort Claims Act.

#### **I. Factual background.**

This matter stems from supposed “irregularities” noted by agents of MUSC during the Bingham’s Block 12 examination, which took place on May 5, 2016, while they were second-year students at MUSC’s College of Medicine. (R. pp. 51-53). The Bingham’s are monozygotic twins. (R. p. 835; R. p. 308, lines 1-3; R. p. 592, line 23 – p. 593, line 4). Growing up, the Bingham’s did everything together. (R. p. 296, lines 17-20). Both twins qualified for the Olympic development program in soccer. (R. p. 297, lines 10-11, p. 310, line 8 – p. 311, line 25). They studied together, went to the same schools, including Furman University, played the same sports, participated in the same extracurricular activities, wore the same clothes, and had the same friends. (R. p. 294, line 16 – p. 296, line 16; R. p. 296, line 21 – p. 297, line 10; R. p. 299, line 22 – p. 300, line 20; R. p. 301, line 24 – p. 302, line 4; R. p. 304, line 20 – p. 305, line 15; R. p. 306, lines 6-8). Kellie was first in her high school class leading into their junior year, and Kayla was second. (R. p. 312, lines 12-13).

Starting their junior year, the Bingham’s attended the South Carolina Governor’s School for Science and Mathematics because in the first two years of high school they completed all the available coursework they could take to prepare for college. (R. pp. 303, line 22 – p. 304, line 9; R. p. 309, line 12 – p. 310, line 8). The Bingham’s were so similar in their combined approach to test preparation and test taking that they received identical scores on the SAT. (R. p. 836; R. pp. 313, lines 10-14; R. p. 376, line 13 – p. 377, line 4; R. p. 557, lines 11-12). Their high school GPAs had a 99.22% correlation rate, their college GPAs had a 98.09% similarity, and their MCAT scores were only one point apart. (R. p. 836; R. pp. 376, line 13 – p. 377, line 4; R. p. 557, lines

13-18). The Bingham's academic performance did not cause any of their teachers or their parents any concern, and it was expected that they would perform similarly at everything they did. (R. p. 298, line 5-p. 299, line 2; R. p. 300, lines 23-25; R. p. 301, lines 12-13; R. p. 304, lines 10-12; R. p. 313, lines 7-9; R. p. 569, lines 9-14). It came as no surprise to anyone that the Bingham's both chose to enroll in medical school at the Medical University of South Carolina.

In medical school, students take three examinations each semester, which are known as block examinations. (R. p. 314, line 20-p. 315, line 13; R. p. 446, line 7-p. 447, line 3). The block exams each contain different medical topics that students must adequately learn to advance to the next semester. (*Id.*) The Bingham's were at the end of the second semester of their second year and therefore had taken 11 block examinations. The results of their prior block examinations indicate that the Bingham's routinely had high correlations between their examination scores, regardless of where they sat during an examination.<sup>1</sup> (R. pp. 992-993).

Going into the Block 12 examination, Kayla had some concerns. First, she needed to pass the examination because the result of her Block 10 examination was unsatisfactory due to certain events beyond her control. (R. p. 315, lines 16-19, R. p. 567, lines 3-6). Kellie had been in Arizona, and they were not able to share notes, study together, and quiz one another on the exam material, which was their typical exam

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<sup>1</sup> The Bingham's have testified that they did not always sit next to one another when taking examinations in the library. (R. p. 584, line 18-p. 585, line 16). The results from the prior 11 examinations show that Bingham's historically demonstrated a high correlation in exam scores, with correlation rates of 83.48, 89.34, 93.55, 93.52, 92, 87, and 96 for examinations taken within the library. (R. pp. 992-993).

preparation routine. (R. p. 315, line 19-p. 316, line 9). Further, during the examination, Kayla was interrupted numerous times due to a technical issue with another student's computer, making it difficult for her to focus and complete the examination on time. (R. p. 316, lines 9-19; R. p. 567, lines 12-15). As a result, her performance suffered. While Kayla had some concerns about the Block 12 examination due to her performance on the Block 10 exam, she was not overly concerned because if her grade was not high enough she would have an opportunity to retake the examination before having to repeat the year. (R. p. 316, line 20-p. 317, line 16). MUSC's portrayal of the Bingham as being extremely worried about Kayla's academic standing because she was on the verge of jeopardizing her medical career or failing out is a mischaracterization of the facts.

After her Block 10 examination, Kayla met with Myra Haney Singleton, Associate Dean for Student Affairs, to discuss the distractions during her examination and her resulting performance. (R. p. 319, line 14-p. 320, line 8; R. p. 567, lines 6-10). Singleton suggested some additional study material and encouraged Kayla to take all of her future exams in the library, which was less likely to provide distractions. (R. p. 567, line 16-p. 568, line 2). Kayla had been assigned to the library for her Block 11 examination, but for her Block 12 examination she was assigned to the bioengineering building. (R. p. 320, lines 10-21). Before ascertaining where Kellie was taking the exam, Kayla immediately reached out to Singleton and asked to be scheduled to take the exam in the library per their prior discussion. (R. p. 320, lines 14-20; R. p. 321, line 24-p. 322,

line 5; R. p. 797). Kayla had no idea which room in the library she would be assigned.<sup>2</sup> (R. p. 321, lines 13-23; R. p. 390, lines 7-14).

Kayla was assigned to Room 436 in the library by Dr. Debra Hazen-Martin, the Associate Dean for Preclerkship Curriculum, which was the same room that Kellie was assigned. (R. p. 322, lines 6-19; R. p. 404, lines 10-12; R. p. 414, lines 2-5). Upon arriving at the library, the Bingham along with other students taking the Block 12 examination were given name cards and told to file into the room from back to front. (R. p. 322, line 19-p. 323, line 3). Kayla and Kellie did as instructed and sat in the seats made available to them by that process. (*Id.*). The Bingham were seated against the wall in front of the proctor's table and directly in her line of sight. (R. pp. 331, line 16-p. 332, line 19; R. p. 339, lines 16-24; R. p. 391, line 16-p. 392, line 7; R. p. 565, line 2-p. 566, line 2). The Bingham were given scratch paper and pencils prior to beginning their examination. (R. p. 323, lines 4-17). The morning proctor's notes do not indicate that there was anything irregular or remarkable about the Bingham's test taking behavior. (R. p. 837).

During the examination, the Bingham were being remotely monitored by Dr. Hazen-Martin. (R. p. 404, lines 7-22). Dr. Hazen-Martin has testified that during her monitoring of the morning examination, she believed that the Bingham, who were seated next to one another, were progressing through their examinations at a similar

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<sup>2</sup> Dr. Hazen-Martin testified that Room 436 in the library was an "overflow" room, and that all students knew it was the room they would be reassigned to if there was an issue with their seat assignments. (R. p. 412, line 6-p. 413, line 23). However, Dr. Hazen-Martin could point to no documents demonstrating that this specific information was communicated to students, and the email sent to Kayla informing her of the testing procedure makes no mention of Room 436 being an "overflow" room that all students would be reassigned to. (R. p. 797; R. pp. 855-57).

pace and had a high number of identical correct and incorrect answers to the exam questions. (R. p. 406, line 23-p. 407, line 8). Dr. Hazen-Martin had noted the similarity in the Bingham's examination performance before but had never found it to be unusual. (R. p. 406, lines 10-22). However, for whatever reason, on this day Dr. Hazen-Marten found this behavior to be "irregular" and told the afternoon proctor, Michele Friesinger, to note any "testing irregularities". (R. pp. 804-05; R. p. 414, line 20-p. 416, line 1).

Friesinger's testimony and notes clearly indicate that she was directed by Dr. Hazen-Marten to specifically watch the Bingham's for the duration of the examination and that the Bingham's, whom Dr. Hazen-Martin identified by name, had been engaging in "testing irregularities" and had the same answers. (R. pp. 804-05; R. p. 506, line 25-p. 507, line 23). For the initial hours of the examination, Friesinger did not observe or note anything. (R. p. 507, line 23-p. 508, line 4). This is not surprising; the morning proctor, who was not directed to specifically watch the Bingham's and document their "testing irregularities", did not note anything unusual or suspicious about the Bingham's behavior. (R. p. 837). However, during the final hour of the afternoon session, Friesinger suddenly began noting what she perceived as "irregularities" in their test taking behavior. (R. pp. 804-05). She noted that the Bingham's were nodding their heads while taking the exam; that one of the Bingham's asked for a pencil with a better eraser at the beginning of the exam; that one of the Bingham's pushed herself back from her computer and glanced in her sister's direction at one point during the exam; and that one of the Bingham's was writing notes on her scratch paper and her sister glanced

briefly in the direction of the scratch paper.<sup>3</sup> (R. pp. 804-05; R. p. 508, line 11-p. 511, line 15). The Bingham, however, were not even actively answering the examination questions during the last hour and were instead double checking their answers. (R. p. 338, lines 14-17; R. p. 560, line 2-p. 561, line 24). Regardless, Friesinger's notes and the examination results were given to Dr. Laura Kasman, the year two curriculum director for the College of Medicine, after the examination was complete. (R. p. 434, lines 15-17; R. p. 437, lines 1-6; R. p. 439, line 24-p. 440, line 14).

The Bingham offered explanations for Friesinger's observations at trial. Kellie had tendinitis in her knee which required her to extend and stretch her leg during long periods of being seated. (R. p. 398, lines 22-24; R. p. 585, line 22-p. 586, line 3; R. p. 586, lines 6-8; R. p. 586, lines 21-24). The Bingham testified that the notes on their scratch paper were mnemonic devices or graphic representations of other test taking strategies used by the Bingham, that they did not attempt to throw their scratch paper away, that they would have used erasers during the examination to eliminate mistakes in their notes that could lead to later confusion, and that it would not have surprised them if they were nodding because they have animated personalities and both would often nod to themselves during an examination if they knew the correct answer. (R. p. 328, line 6-p. 329, line 5; R. p. 331, lines 8-13; R. p. 333, line 19-p. 334, line 9; R. p. 336, line

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<sup>3</sup> At trial, Friesinger testified that it was her opinion that Plaintiffs were collaborating on their examination, despite testifying before the Honor Council that she did not have an opinion as to their conduct that she was willing to share. (R. p. 542, line 11-p. 544, line 6). At trial, Friesinger could not convincingly account for why she chose not to state any opinion at the Honor Council proceeding yet chose to come forth with such an opinion at trial.

16-p. 337, line 24; R. p. 340, lines 2-20; R. p. 393, line 7-p. 396, line 3; R. p. 397, line 5-p. 398, line 1; R. p. 398, lines 2-11; R. p. 563, line 9-p. 565, line 1; R. p. 586, lines 4-8).

Dr. Hazen-Martin subsequently sent an email to Dr. Kasman detailing that she had observed the Bingham's "progressing lock-step" through the questions during the morning session and registering similar incorrect responses on identical test questions. (R. p. 344, lines 5-11; R. p. 406, line 23-p. 407, line 8; R. p. 798). However, Dr. Hazen-Martin did not continuously observe the Bingham's test taking behavior, and only intermittently looked at their test results every 20 minutes. (R. p. 407, line 15-p. 408, line 13; R. p. 417, lines 6-15). Therefore, she could not have known if the Bingham's were progressing "lock-step" from item to item throughout the entire examination. Dr. Hazen-Martin also testified in her deposition and at trial that she relied on printouts to ascertain whether the Bingham's were answering the examinations similarly and in "lock-step"; however, it was demonstrated at trial that these printouts were not made until after the morning session was over and the afternoon session had begun, and after Dr. Hazen-Martin had already instructed Friesinger to specifically monitor the Bingham's for cheating. (R. p. 409, line 13-p. 410, line 15; R. p. 417, line 22-p. 423, line 2).

Dr. Kasman, in turn, wrote a letter to Joseph Ivey, president of the MUSC College of Medicine Honor Council, which reads as follows:

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.<sup>4</sup>

(R. p. 803) (emphasis added). Dr. Hazen-Marten has testified that the only behaviors she observed personally were that the Bingham's scored similarly and were on the same question whenever she would check the test software. (R. pp. 409, lines 5-12; R. p. 436, lines 1-14; R. p. 516, lines 2-8). Her testimony is very clear that her job duties were not to monitor for and detect cheating, that she hasn't been trained to detect cheating, and that she would not specifically characterize any of the Bingham's test taking behaviors as documented by Friesinger as cheating. (R. p. 430, line 11-p. 433, line 17). Friesinger could not definitively testify that she observed the Bingham's specifically signaling one another or passing notes, but that it was her intuition that they were doing so. (R. p. 505, lines 4-9; R. p. 513, line 19-p. 514, line 5). Both Friesinger and Dr. Hazen-Marten testified that it would be inappropriate for faculty to conclusively determine that the Bingham's were cheating or were engaged in behavior indicative of academic misconduct prior to an Honor Council proceeding. (R. p. 438, lines 1-24; R. p. 514, line 6-p. 515, line 25).

The Bingham's examination results were sent to Caveon Test Security for a third-party statistical analysis of the Bingham's examinations. (R. p. 442, lines 1-4). However, MUSC failed to inform Caveon that the Bingham's were identical twins. (R. p. 442, lines 7-9). This is significant because peer-reviewed studies relied on and cited

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<sup>4</sup> This letter was also forwarded via email to Singleton. (R. pp. 801-802).

by the Bingham's twins expert, Dr. Nancy Segal, demonstrate that when an identical twin takes an examination, it's as if the other twin were taking the examination for her; in other words, on standardized exams, identical twins have a remarkably high correlation rate between their performance and examination scores. In fact, identical twins are eight to nine times more likely to have positive correlations between their exam performance than unrelated individuals. (R. p. 346, line 12-p. 351, line 5; R. p. 355, line 18-p. 356, line 4; R. p. 624, lines 15-18). This renders the results of any statistical analysis done on the outcome of an examination involving twins unreliable if the twin status of the test takers is not accounted for. (R. p. 352, line 6-p. 353, line 5; R. p. 357, lines 7-18). In his deposition, Dennis Maynes, Chief Scientist at Caveon, candidly admitted that he had no idea how the status of twins could affect the accuracy of his statistical analysis. (R. p. 623, lines 5-16). However, by the time of trial, he had conducted his own litigation-driven research and reversed course, stating that being a twin had no significant effect on his own testing, despite the fact that the study he relied on did not identify and isolate sets of identical twins for a statistical comparison. (R. p. 615, line 12-p. 616, line 25). Caveon determined that there was a high probability that the Bingham's had not been taking their examinations independently, and its report was submitted to the Honor Council prior to the hearing. (R. pp. 866-91).

The Honor Council hearing took place on May 26, 2016. (R. p. 345, lines 18-25). The Bingham's did not have the opportunity to confront their accuser, Dr. Kasman, they were not allowed to effectively question the accuracy of the Caveon report because a witness from Caveon was not called by the Honor Council, nor were they allowed to

introduce all the evidence that was in their favor. (R. p. 365, lines 14-18; R. p. 366, lines 1-19; R. p. 492, line 9-p. 493, line 11; R. p. 499, line 9-p. 502, line 12). During the Honor Council deliberations, investigators who served a prosecutorial function were allowed in the deliberation room, and boisterous laughter could be heard down the hallway. (R. p. 545, line 23-p. 546, line 7). The Honor Council concluded that Bingham were guilty of academic dishonesty. (R. p. 366, line 24-p. 367, line 3).

The Bingham appealed, and on June 14, 2016, Dr. Raymond Dubois, Dean of the MUSC College of Medicine, overturned the decision, finding that the evidence presented against the Bingham did not prove guilt by a preponderance of the evidence, and that they had provided plausible explanations for the circumstantial evidence that was presented against them. (R. pp. 806-07; R. p. 367, lines 20-22; R. p. 499, line 9-p. 502, line 12). The accusations of cheating and details of the Honor Council and appellate proceedings were eventually repeated to a reporter at *The Post and Courier*, Lauren Sausser, including detailed information such as a vote tally and recommended sanctions. (R. pp. 808-10). Dr. Nick Batalis, a faculty member of the Honor Council, wrote to Dean Dubois that “the reporter does seem to have been tipped off by someone with some knowledge of the case.” (*Id.*). Dean Dubois agreed that whoever leaked the information was “someone from MUSC with very detailed information about the case.” (*Id.*; R. p. 494, line 20-p. 495, line 3). The circumstantial evidence that will be more fully discussed below supports a reasonable inference that this individual was a member of the Honor Council.

Subsequently, the Bingham family were subjected to ill-treatment by many of their fellow students in person and via social media, leading to (1) a forum held with MUSC students and faculty, including Dr. Hazen-Martin, (2) a petition by the students to MUSC's administration expressing concern with how the incident was handled by MUSC and Dean Dubois, and (3) a letter from the President of MUSC to *The Post and Courier*. (R. pp. 816-18, 821-34; R. p. 368, line 15-p. 370, line 17; R. p. 371, lines 4-25; R. p. 475, line 6-p. 487, line 20; R. p. 580, line 1-p. 582, line 5). The popular belief amongst the students was that the Bingham family had in fact cheated on their examination and that the Dean's decision to overturn the Honor Council was solely due to the Bingham family and political connections, resulting in an overwhelming amount of animosity towards the twins.<sup>5</sup> (*Id.*). Instead of (1) admonishing the selfish and immature acts of bullying by the student community, (2) asserting the Bingham family's innocence, or (3) allowing the controversy to die off, MUSC repeatedly stirred the pot by engaging in dialogue with students and publishing statements about the controversy that did none of the above and only defended its own actions. (R. pp. 812-13).

The Bingham family on the advice of Dean Dubois left MUSC and eventually were forced to abandon all hopes of ever having a medical career as a result of the spread of false information within the medical academic community. (R. p. 372, line 12-p. 373, line 18; R. p. 374, lines 4-14; R. p. 388, line 23-p. 389, line 15). Both twins now suffer from post-traumatic stress disorder, severe anxiety, and insomnia, the effects of which

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<sup>5</sup> The Bingham family's grandfather is a member of MUSC's Board of Trustees. (R. p. 307, lines 11-21).

have invaded every aspect of their personal and professional lives. (R. p. 384, line 14-p. 387, line 25; R. p. 487, line 11-p. 489, line 4; R. p. 583, lines 13-23).

**II. The statements of Dr. Hazen-Martin and those of Dr. Kasman, as well as those of any unknown Honor Council members, were susceptible to a reasonable inference that the Binghamms were cheating.**

MUSC argues that the statements of Dr. Hazen-Martin and Dr. Kasman cannot be reasonably interpreted so as to possess a defamatory meaning.<sup>6</sup> “With the first element of defamation, the trial court must initially determine if the communication is reasonably capable of conveying a defamatory meaning.” *Parrish v. Allison*, 376 S.C. 308, 321, 656 S.E.2d 382, 389 (Ct. App. 2007) (citing *Holtzschetier v. Thomson Newspapers, Inc.*, 332 S.C. 502, 530, 506 S.E.2d 497, 513 (Toal, J., concurring)). “A statement is defamatory if it tends to harm one’s reputation so as to lower him in the esteem of his community or deter others from dealing or associating with him.” *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002).

If words are susceptible of two meanings, one imputing a crime, and the other innocence, the latter is not to be adopted, and the other rejected, as a matter of course. In such a case, it must be left to the jury to decide in what sense defendant used them. Their conclusion must be formed from the whole of the circumstances attending the publication, including the sense in which the witnesses understood the words.

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<sup>6</sup> Arguably, this argument is not preserved for review. MUSC does not appear to have raised it with sufficient specificity for the Circuit Court to understand that it was arguing that the defamatory statements were not capable of possessing a defamatory meaning in its motion for directed verdict or renewed motion for directed verdict. (R. p. 594, line 15-p. 606, line 13; R. p. 662, line 4-p. 682, line 13); see *State v. Bailey*, 253 S.C. 304, 310, 170 S.E.2d 376, 379 (1969) (stating that an issue must be raised with sufficient specificity so that the precise issue can be reasonably understood by the trial judge). MUSC argued that the statements were not defamatory because they were true, but never clearly argued that the statements were not capable of possessing a defamatory meaning.

*Parrish*, 376 S.C. at 323, 656 S.E.2d at 390 (quoting *Smith v. Smith*, 194 S.C. 247, 9 S.E.2d 584, 589 (1940)). How the words are to be understood in the circumstances in which they were uttered is a question for the jury, not the court, to decide. *Wardlaw v. Peck*, 282 S.C. 199, 203-04, 318 S.E.2d 270, 273-74 (Ct. App. 1984).

In *Cruce v. Berkeley County School District*, the head football coach and athletic director for Berkeley High School was relieved of his duties and reassigned to a position as a middle school guidance counselor after the 2015 season in which he adopted a “no punt” strategy, resulting in many lopsided defeats. *Cruce*, 442 S.C. 1, 7, 896 S.E.2d 765, 768 (2024). After he was reassigned, an athletic trainer sent an email to 45 people connected with athletic programs in the school district, including administrators, athletic department employees, and volunteer coaches, questioning the integrity and completeness of student athlete files the former coach had maintained and remarking that the filing issues were a potential “liability” to the school district. *Id.* at 7-8, 896 S.E.2d at 768.

Specifically, the former coach alleged that the athletic trainer’s email, which stated that essential information from the student athlete files “could” be missing, posing a “potential” liability for the school district, was defamatory in that it implied that he was not fit to perform the administrative duties of his position. *Id.* at 15, 896 S.E.2d at 772-73. The school district argued that because the athletic trainer hedged the statements in the email, and because he never directly stated that the former coach had done anything improper, the athletic trainer did not defame the former coach. The Supreme Court of South Carolina disagreed:

Our role, however, is to interpret the words fairly and in their natural sense. A rational reader of Stevens' email could conclude that it was communicating information suggesting Cruce was incompetent and unfit to perform the administrative duties of his position. The "liability" buzzword added a suggestion of not just incompetence but illegality. Because the email was susceptible of a defamatory meaning, the trial court did not err in submitting the issue to the jury and denying the District's JNOV motion.

*Id.* (internal citations omitted).

The email from Dr. Hazen-Martin to Dr. Kasman which initiated the Honor Council process details that "[d]uring the AM testing period I noted that two students were progressing lock-step through the items . . . ." <sup>7</sup> (R. p. 861). The assertion that the Binghamms were progressing "lock-step" gives rise to a reasonable inference that the twins were advancing item-to-item at the exact same time throughout the entirety of the examination. When taken in consideration with the remaining contents of the email, including Dr. Hazen-Martin's statement that the Binghamms were "registering similar incorrect responses on identical items", it logically follows

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<sup>7</sup> MUSC contends in its Brief that the email does not identify the Binghamms, presumably as an argument that the publication does not satisfy the defamation cause of action's "of and concerning" requirement. *See Garrard v. Charleston Cnty. Sch. Dist.*, 429 S.C. 170, 205, 838 S.E.2d 698, 716-17 (Ct. App. 2019) ("To prevail in a defamation action, the plaintiff must establish that the defendant's statement referred to some ascertainable person and that the plaintiff was the person to whom the statement referred."). While this issue appears to have been tangentially raised in MUSC's post-trial motions, it was never raised to or ruled upon by the Court in MUSC's directed verdict motion or renewed directed verdict motion and is therefore not preserved for review. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) ("It is well settled that an issue may not be raised for the first time in a post-trial motion."). And even if the issue was preserved, "[t]o support an action for libel, the plaintiff's name need not be mentioned in the writing; it is sufficient that there is a description of, or reference to, him, by which he may be known." *Nash v. Sharper*, 229 S.C. 451, 456, 93 S.E.2d 457, 459 (1956). It is undisputed that Dr. Kasman later disclosed that the Binghamms were the students identified in the email and letter, and that after the Honor Council proceedings and subsequent leak that the MUSC student body was aware that the controversy concerned the Binghamms. (R. pp. 643, line 15- p. 644, line 1).

that the most rational explanation for such behavior that was being conveyed to the reader would be that the Bingham were collaborating on their examination.

The subsequent letter from Dr. Kasman to Ivey contains two statements that impugned the Bingham's fitness as medical candidates. The first statement characterizes the Bingham's conduct as "the cheating": "**The cheating** was first suspected during a routine audit of the LXR testing data . . . ." (R. p. 803) (emphasis added). MUSC argues that this statement is not defamatory because it does not explicitly state that the Bingham were cheating, and because Dr. Kasman hedged the statement by stating that it was "a possible case of academic dishonesty." Like in *Cruce*, even if this statement does not directly state that the Bingham had cheated, when the words are interpreted "fairly and in their natural sense", they suggest that the Bingham were engaged in academic misconduct, which would impugn their fitness as medical students, and as such are defamatory and actionable if not protected by a privilege. (R. p. 343, line 15-p. 344, line 11).

When considered alongside the remaining parts of Dr. Kasman's email, there is sufficient evidence upon which the jury could have based its finding that MUSC published defamatory statements concerning the Bingham. The email later states that the Bingham "were observed to be signaling each other and passing notes via scratch paper on the desk between them." (R. p. 803). Stating that medical school students were signaling each other and passing notes within the context of a letter setting forth allegations of academic misconduct to an honor council president is

defamatory *per se* if untrue and is not reasonably susceptible to any meaning but that the Bingham were collaborating and cheating on their examination.

Lastly, the statements of the unknown Honor Council member(s) who leaked the accusations of cheating to the MUSC community and *The Post and Courier* are reasonably ascertainable from the evidence in the record and are capable of a defamatory meaning. The email from Sausser to Kendrick Kennedy, an Honor Council member, states that she received an “anonymous tip” that “the Bingham twins were sanctioned for cheating during exams by the MUSC Honor Council”, and that students were angry that the Bingham were able to “stay at school because of their political connections.” (R. p. 810). This, in conjunction with follow-up emails between faculty members, serves as circumstantial evidence that an Honor Council member published statements conveying that the Bingham were cheating on their examination and therefore not fit for the medical profession. Because the statements of Dr. Hazen-Martin and Dr. Kasman, in addition to the circumstantial evidence of the substance of an Honor Council leak, are susceptible of a defamatory meaning, the trial court did not err in denying MUSC’s motions and submitting the issue to the jury.

**III. The qualified privilege does not protect statements made in an improper manner or to improper persons.**

The Circuit Court correctly held that the written statements of Dr. Hazen-Martin and Dr. Kasman were protected by a qualified privilege. (R. p. 703, lines 2-5). However, that is not the end of the analysis. The protection of a qualified privilege may be lost by the manner of its exercise. *Fulton v. Atl. Coast Line R.R. Co.*, 220 S.C.

287, 296-97, 67 S.E.2d 425, 429 (1951). It does not protect any unnecessary defamation, and for a communication to be privileged, the person making it must not go further than his interests or his duties require. *Id.* When the communication goes beyond what the occasion demands should be published, it will not be protected, even if the statements is made in good faith. *Id.* A statement may exceed the qualified privilege when it is made in an improper manner or to improper persons. *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 125-26, 341 S.E.2d 622, 624-25 (1986). Whether a statement exceeds the scope of the qualified privilege, or is made to improper persons, is a question for the jury. *Murray v. Holnam, Inc.*, 344 S.C. 129, 140-41, 542 S.E.2d 743, 749 (Ct. App. 2001).

The Bingham's have not and do not seek to overcome the qualified privilege by showing actual malice, but instead have argued that the defamatory statements at issue in this case were made in an improper manner and/or to improper persons.<sup>8</sup> Dr. Hazen-Martin testified at trial that it was not one of her job duties to monitor for and detect cheating. (R. p. 404, lines 16-22; R. p. 407, lines 15-22). She stated that the purpose of her communications with Dr. Kasman were simply to indicate what was available for Dr. Kasman's review, and not to draw any conclusions about cheating or in any way influence what should have been an independent review by Dr. Kasman. (R. p. 436, lines 11-14). Dr. Hazen-Martin was clear that it was not her role

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<sup>8</sup> Consequently, these statements would be considered to be publications to third parties since they exceeded the scope of the qualified privilege. *See Bell v. Bank of Abbeville*, 208 S.C. 490, 496, 38 S.E.2d 641, 644 (1946) (finding that statements made to others with a common interest satisfy the publication element if the statements are outside the scope of the qualified privilege).

to make conclusions about academic misconduct, or to accuse students of cheating, that her only role was to provide information, and that it would be improper for her to report any conclusions she may have reached of testing impropriety. (R. p. 436, lines 15-21; R. p. 438, lines 17-24). Dr. Hazen-Martin, Dr. Kasman, and Friesinger were clear that faculty and staff were not to make conclusions as to whether academic dishonesty had occurred, and that it was exclusively within the province of the Honor Council to make conclusions as to whether a student's behavior constituted academic misconduct. (R. p. 437, lines 14-25; R. p. 513, lines 14-18; R. p. 514, line 6-p. 515, line 25; R. p. 637, lines 8-13; R. p. 639, line 24-p. 640, line 2). This is important because the MUSC Honor Code affords students a presumption of innocence. (R. p. 441, lines 3-5).

However, Dr. Hazen-Martin admitted in her testimony that she reached "conclusions" concerning whether the Bingham were engaging in testing "irregularities" prior to ever communicating with Friesinger. (R. p. 428, lines 6-10). Dr. Hazen-Martin stated in her email to Dr. Kasman that the Bingham were progressing "lock-step" through the morning and afternoon testing period without sufficient supporting evidence. (R. p. 798). Dr. Hazen-Martin communicated this conclusion despite the fact that she would only intermittently observe the Bingham during the examination. Dr. Hazen-Martin admitted at trial that up to 20 minutes at a time would pass between her observations, and that she couldn't state with any certainty whether the Bingham were actually progressing "lock-step" from question to question on the exam during the periods when she was not actually observing

them. (R. p. 407, line 23-p. 408, line 13). Her conclusion that the Bingham's must have been progressing "lock-step" from question to question, as stated in her email, clearly implies that the Bingham's were improperly collaborating on their examination. Dr. Hazen-Martin's own testimony supports that the formation of this conclusion exceeded her stated job duties. In conjunction with her other testimony, it serves as sufficient evidence upon which the jury could have based its finding that the defamatory statements in Dr. Hazen-Martin's email exceeded the scope of the qualified privilege.

Dr. Hazen-Martin also testified that Dr. Kasman reached her own conclusions that the Bingham's were cheating. (R. p. 437, lines 1-8). Dr. Kasman admitted as much in her own testimony. (R. p. 635, line 23-p. 636, line 3; R. p. 647, lines 3-21). Dr. Kasman based her conclusions on Friesinger's proctor notes. (R. p. 516, lines 2-8, R. p. 635, lines 3-22). However, Friesinger's proctor notes only state that the Bingham's were nodding their heads throughout the examination and pushing or flipping their scratch paper over. (R. p. 804-05). Friesinger explicitly stated at trial that she never documented in the notes that the Bingham's were cheating, signaling one another, or passing notes. (R. p. 513, line 14-p. 514, line 9). Despite this, Dr. Kasman's letter to Ivey characterizes the Bingham's conduct as "the cheating" and states that the Bingham's were signaling each other and passing notes to each other via scratch paper on the desk between them. (R. p. 803).

The testimony of Dr. Hazen-Martin, Dr. Kasman, and Friesinger contains sufficient evidence upon which the jury could have reasonably found that Dr. Hazen-

Martin and Dr. Kasman made the defamatory statements in an improper manner and outside the scope of the qualified privilege. Additionally, statements published by unknown members of the Honor Council detailing that the Bingham's were cheating would by the same token be made in an improper manner and to improper persons. The jury properly weighed this evidence and concluded that the defamatory statements exceeded the qualified privilege, and the Circuit Court's Orders and the jury verdict should be affirmed.

**IV. The Circuit Court correctly found that an absolute privilege would not attach to the defamatory statements at issue in this Appeal.**

The Circuit Court's finding that the absolute privilege would not attach to a public university honor council proceeding was not in error. The class of absolutely privileged communications is narrow in scope and practically limited to legislative and judicial proceedings. *Fulton*, 220 S.C. at 296, 67 S.E.2d at 429. However, the limits of the privilege are not rigid and should be prescribed by considerations of public policy. *Richardson v. McGill*, 273 S.C. 142, 146, 255 S.E.2d 341, 343 (1979). Our courts have extended the privilege to preliminary statements made in anticipation of a formal judicial proceeding, so long as the statements have a reasonable relation to it. *Crowell v. Herring*, 301 S.C. 424, 431, 392 S.E.2d 464, 467 (Ct. App. 1990). An academic honor council proceeding, however, is not a judicial or quasi-judicial proceeding.

The burden is on the party claiming absolute privilege to prove that public policy requires such a broad protection of the person's actions. *See Butz v. Economou*, 438 U.S. 478, 506, 98 S. Ct. 2894, 2911 (1978) (conducting the same analysis in the context of absolute immunity). The policy consideration underlying the absolute privilege of

statements made in judicial proceedings is due to the “overriding public interest that person should speak freely and fearlessly **in litigation** . . . .” *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 23, 567 S.E.2d 881, 892 (Ct. App. 2002) (emphasis added). This is because

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

*Id.* (emphasis added).

No such policy interests are at play in an Honor Council proceeding. Honor Council proceedings only involve an individual accused of academic wrongdoing and do not implicate the interests of the public at large. *See Heike v. Guevara*, No. 09-10427-BC, 2009 WL 3757051 at \*7-9 (E.D. Mich. Nov. 6, 2009) (finding that having a chilling effect on the academic reporting process does not in itself implicate a substantial public interest necessitating the protection of the absolute privilege); *see also Bose v. Bea*, 947 F.3d 983, 994-996 (6th Cir. 2020) (finding that private academic discipline does not involve a public benefit or interest). Because Honor Council proceedings are intrinsically focused on the character of an individual and his or her educational career, they do not as a matter of course implicate the public interest, and an absolute privilege permitting anyone involved in the proceedings to engage in unfettered speech is contrary to the highly sensitive and private nature of the proceedings.

Applicable South Carolina law has never extended an absolute privilege to statements made before or in connection to academic disciplinary proceedings that have not been authorized by the General Assembly. MUSC cites *Crowell* for the proposition

that South Carolina affords an absolute privilege to quasi-judicial proceedings. However, in *Crowell* the court was not presented with the issue of whether the absolute privilege extends to quasi-judicial or extrajudicial proceedings. In *Crowell*, the plaintiff sued multiple defendants for defamatory statements that were made during and preliminary to a Veteran of Foreign Wars court-martial. *Crowell*, 301 S.C. at 426-28, 392 S.E.2d at 464-66. The trial court held the VFW court-martial was a judicial proceeding, not a quasi-judicial proceeding, and the plaintiff did not appeal this finding. *Id.* at 430, 392 S.E.2d at 467. Therefore, the issues of whether a VFW court-martial could be considered a judicial proceeding or a quasi-judicial proceeding, and whether an absolute privilege should extend to quasi-judicial proceedings in addition to judicial proceedings, were not preserved for review.

MUSC extensively cites the law of other jurisdictions to support its position that statements made before and in connection to its Honor Council proceedings are absolutely privileged. This is not the law of South Carolina and binding precedent indicates that the Court should not extend an absolute privilege to the statements at issue in this case. *See Eubanks v. Smith*, 292 S.C. 57, 63, 354 S.E.2d 898, 902 (1987) (holding that absolute privilege does not apply to statements made during a criminal investigation that eventually culminated in a State Ethics Commission hearing). In *Hainer v. American Med. Int'l, Inc.*, 328 S.C. 128, 492 S.E.2d 103 (1997), the Supreme Court of South Carolina analyzed the privilege afforded to statements made before and connected to the State Nursing Board, which includes amongst its duties the discipline of nurses for misconduct. The court concluded that any statements made to the State

Nursing Board under a duty to report were only protected by a qualified privilege and not an absolute privilege. *Id.* at 135, 492 S.E.2d at 107. Although the court in *Hainer* was analyzing a statutorily granted privilege, and not a common law privilege, the same policy considerations are at work in the present circumstances. The Honor Council, like the State Nursing Board, is not a true judicial proceeding, and therefore should not be afforded the heightened protections enjoyed by courts of law or legislative bodies.

MUSC claims that an absolute privilege will enable academic institutions to protect academic integrity without fear of repercussion for simply being wrong. It is the Bingham's position that academic faculty and staff do not need the protection of an absolute privilege to safely identify, investigate, and describe incidents of potential dishonesty without fear of repercussion. So long as institutions and their agents confine their communications to the plain facts and refrain from embellishment and conclusory statements accusing students of academic dishonesty prior to an Honor Council hearing, as well as communications with disinterested sources concerning the details of proceedings, they can objectively investigate incidents and report their findings without the threat of reprisal. Here, MUSC and its agents failed to confine their communications to the facts as described by Friesinger's afternoon notes and made conclusory statements accusing the Bingham's of cheating prior to their Honor Council hearing, and to improper parties after the hearing. Dr. Hazen-Martin and Dr. Kasman could have simply conveyed the results of the Caveon analysis, the examination results, and the exact language of the proctor notes to the Honor Council without further

embellishment. An absolute privilege is not necessary to protect their defamatory statements under these circumstances.

Furthermore, a public university disciplinary proceeding is not even a quasi-judicial tribunal that would be eligible to receive the benefits of an absolute privilege under South Carolina law.<sup>9</sup> “[T]he class of absolutely privileged communications is narrow, and practically limited to legislative and judicial proceedings and acts of State.” *Fulton*, 220 S.C. at 296, 67 S.E.2d at 429. MUSC cannot seriously contend that its Honor Council proceedings are judicial or legislative proceedings, so it offers as an alternative argument that they are an administrative or quasi-judicial “act of State.”<sup>10</sup> To the extent that this argument is preserved, which it does not appear to be, to qualify as an “act of State” that could be afforded an absolute privilege, a tribunal or proceeding should be administrative in nature and at minimum authorized by statute.

While this proposition finds no support either way in South Carolina law within the context of the absolute privilege, administrative law provides that to be considered quasi-judicial a tribunal must have been granted its powers by the

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<sup>9</sup> The undersigned argued that the Honor Council proceeding was a quasi-judicial proceeding subject to the preclusive effect of *res judicata* previously in this litigation and was correctly ruled against by the Circuit Court.

<sup>10</sup> All except one of the South Carolina cases that MUSC cites as support for the idea that an absolute privilege should be extended outside the legislative or judicial context are cases in which the defamatory publications were made in connection to true legislative or judicial proceedings. See *Johnson v. Indep. Life & Accident Ins. Co.*, 94 F. Supp. 959 (E.D.S.C. 1951); *Carver v. Morrow*, 213 S.C. 199, 48 S.E.2d 814 (1948); *Rodgers v. Wise*, 193 S.C. 5, 7 S.E.2d 517 (1940); *Reid v. Delorme*, 2 Brev. 76 (1806). The lone exception does not even appear to be a case involving the absolute privilege, and it appears that the Court in that case applied a qualified privilege to its facts, which concerned Masonic Lodge proceedings. *State v. Drake*, 122 S.C. 350, 115 S.E. 297 (1922).

General Assembly. *Vulcan Materials Co. v. Greenville Cnty. Bd. of Zoning Appeals*, 342 S.C. 480, 492, 536 S.E.2d 892, 898 (Ct. App. 2000).<sup>11</sup> MUSC's Honor Council proceedings may have procedures in place that make them resemble a true judicial proceeding, but as of today MUSC has not been granted quasi-judicial authority by the Constitution, statute, or regulation. Since a university honor council proceeding is not an authorized quasi-judicial body, its actions should not be considered an "act of State", and the defamatory statements of Dr. Kasman, Dr. Hazen-Martin, and unknown members of the Honor Council are not subject to an absolute privilege.

**V. There is evidence in the record supporting the jury's finding that the accusations of cheating were false.**

The common law presumes a defamatory statement to be false. *Parrish v. Allison*, 376 S.C. 308, 327, 656 S.E.2d 382, 392 (Ct. App. 2007) ("A defamatory communication is presumed to be false under the common law. The plaintiff does not have the burden of proving falsity. However, truth can be asserted as an affirmative defense, the burden of which is on the defendant."). The jury was instructed that truth was a defense and not an element of the defamation claim. (R. p. 787, lines 11-12). Therefore, it was MUSC's burden to prove through a preponderance of the evidence that the Bingham's were progressing "lock-step" from question to question throughout the examination, that they were signaling one another, that they were passing notes, and that they were cheating.

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<sup>11</sup> While a bill proposing such legislation entitled the "Fundamental Fairness in College Discipline Act" appears to be pending in the General Assembly, it has not been enacted into law. [https://www.scstatehouse.gov/sess123\\_2019-2020/bills/3804.htm](https://www.scstatehouse.gov/sess123_2019-2020/bills/3804.htm).

There is an overwhelming amount of evidence in the record the jury could have relied on to find that Dr. Hazen-Martin's email, Dr. Kasman's letter, and the Honor Council "leak" contained false statements about the Bingham's conduct during the Block 12 examination. The Bingham's testified that they did not collaborate on the examination and provided reasonable explanations for their test results, scratch paper notes, and Dr. Hazen-Martin's and Friesinger's observations. (R. p. 324, line 10-p. 327, line 18; R. p. 328, line 3-p. 331, line 13; R. p. 333, line 1-p. 338, line 8; R. p. 339, line 3-p. 340, line 20; R. p. 345, lines 1-14; R. p. 367, lines 4-9; R. p. 393, line 19-p. 399, line 10; R. p. 557, lines 9-18; R. p. 558, line 20-p. 561, line 13; R. p. 562, line 20-p. 565, line 1; R. p. 569, line 24-p. 570, line 4; R. p. 572, line 9-p. 576, line 15; R. p. 577, line 7-p. 579, line 11; R. p. 585, line 22-p. 587, line 13; R. pp. 819-20). Historical test data demonstrated that the Bingham's have performed similarly on examinations their entire lives. (R. p. 836; R. p. 312, lines 8-14; R. p. 388, lines 12-17; R. p. 569, lines 9-14). The Bingham's twins expert, Dr. Segal, testified that it would be entirely expected for identical twins to perform as the Bingham's had done on their examinations. (R. pp. 838-41; R. p. 348, line 11-p. 351, line 5; R. p. 354, lines 10-13; R. p. 355, line 22-p. 356, line 6; R. p. 357, line 22-p. 358, line 9). Testimony from witnesses demonstrated that the Bingham's were exceptional students and had never been accused of dishonesty or misconduct over the entirety of their academic careers. (R. p. 298, line 5-p. 299, line 2; R. p. 301, lines 12-13; R. p. 444, lines 1-3; R. p. 548, line 9-p. 549, line 22; R. p. 571, lines 21-25).

The jury could have also discredited the testimony of Friesinger and Dr. Hazen-Martin, both of whom could not account for numerous discrepancies and inconsistencies in their testimony.<sup>12</sup> (R. p. 409, line 13-p. 410, line 18; R. p. 417, line 16-p. 427, line 18; R. p. 428, lines 11-19; R. p. 507, lines 9-11; R. p. 507, line 23-p. 508, line 16; R. p. 512, lines 2-10; R. p. 516, lines 10-24; R. p. 517, lines 21-p. 520, line 9; R. p. 538, line 20-p. 541, line 7; R. p. 542, line 11-p. 543, line 7; R. p. 572, lines 9-23). Dr. Dubois testified that he overturned the Bingham's conviction because he thought that they were not afforded a fair Honor Council hearing and that a preponderance of evidence did not support that they were cheating. (R. p. 807; R. p. 491, lines 14-24; R. p. 555, lines 18-23). Friesinger's afternoon notes did not contain any statements documenting that the Bingham's actually signaled one another or passed notes during the examination, and the morning proctor's notes did not document any irregularities with the Bingham's test-taking conduct at all. (R. pp. 804-05, 837).

MUSC's burden is particularly important when analyzing whether there is evidence in the record supporting that the email of Dr. Hazen-Martin was false. Because of the presumption of falsity, to prevail on its affirmative defense of truth MUSC had to come forward with a preponderance of evidence demonstrating that the

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<sup>12</sup> To summarize, these inconsistencies include Dr. Hazen-Martin's and Friesinger's inability to adequately explain prior inconsistent statements that were made under oath, Dr. Hazen-Martin's inability to explain how she relied on printouts to conclude that the Bingham's were collaborating on their examination when they were not created until after she had instructed Friesinger to monitor the Bingham's, Friesinger's inability to sufficiently explain why her proctor's notes and testimony provided to the Honor Council did not contain observations that she shared with the jury at trial, and Friesinger's inability to explain why she did not record any testing irregularities until the final hour of the examination, after the Bingham's had completed the examination and were double-checking their answers.

Binghams were progressing lock-step from question to question. Ultimately, Dr. Hazen-Martin could not verify that the Binghams were actually performing in such a manner on the examinations and could only verify that she intermittently ascertained which questions each twin had progressed to on the examination at 20 minute intervals. (R. p. 407, line 15-p. 408, line 13). The Binghams testified that during the last hour of the examination they both were working on previous questions that they had left unanswered or were uncertain about the answer, so it would have been impossible for them to have been advancing in “lock-step” for the entire last hour of the examination. (R. p. 338, line 14-p. 339, line 2; R. p. 560, line 2-p. 561, line 24). And to the contrary of MUSC’s arguments in its Brief, the testing data itself does not indicate when the Binghams answered their questions and does not confirm Dr. Hazen-Martin’s assumption that the Binghams were progressing lock-step through each and every item. (R. pp. 892-915). There simply is no evidence that the Binghams were progressing “lock-step” from item to item throughout the entire examination. (R. p. 588, line 25-p. 589, line 7). MUSC’s argument and its evidence are insufficient to overcome the presumption of falsity, and Dr. Hazen-Martin’s inability to verify that the Binghams were in fact progressing through the questions identically, item-to-item, throughout the examination was sufficient evidence upon which the jury could have found that her statements were false.

MUSC disagrees with the Binghams’ theory that the Caveon report was flawed and that their examination results were independently achieved because they are genetically identical twins. MUSC discounts the opinions of Dr. Segal, and her

reliance on twin research, and in doing so hopes to convince the Court that this is a valid basis for reversing the Circuit Court's Orders. The entirety of section D. of MUSC's Brief ignores all of the evidence in the Bingham's favor and seeks to rehash factual arguments that were extensively addressed by the parties' experts, peer-reviewed studies, and cross-examination of the witnesses, in an effort to convince the Court to reverse the Circuit Court and the jury's verdict. MUSC wholly ignores that this is not the appropriate standard when MUSC is appealing from a jury verdict and a denial of its directed verdict and post-trial motions. The standard of review only requires that the Bingham's point to some evidence in the record supporting the jury's finding that the Bingham's did not cheat, pass notes, or signal one another during their examination. An appeal is not an opportunity for the losing party to relitigate their case and have this Court weigh the facts.

The jury was entitled to hear the testimony and evidence of both experts and give weight to one, the other, or neither. The jury was entitled to find that the Bingham's were not cheating based on the credibility of the twins' testimony alone. Or the jury could have considered supporting additional witness testimony and exhibits demonstrating that the Bingham's were not cheating and were treated unfairly. Or the jury could have considered that the Bingham's had a spotless academic record which reflected a historical correlation between their examination scores and grades. The Bingham's "twinning theory", as described by MUSC, was not essential to prove the Bingham's case, so even if MUSC's assertion that the theory is not supported by evidence was true, it would not mandate reversal of the Circuit Court's Orders and the

jury verdict. This is particularly true in this instance because it was MUSC's burden to demonstrate truth as an affirmative defense. The jury reasonably could have determined from multiple other sources of evidence, unrelated to the Bingham's status as identical twins, that they were not cheating on their examination. The Court should affirm the Circuit Court's Orders and the jury verdict.

**VI. There is circumstantial evidence in the record supporting a reasonable inference that a member of the Honor Council made defamatory statements concerning the Bingham's.**

MUSC argues that there is no evidence that an unknown Honor Council member made any defamatory statements concerning the Bingham's, and even if there were such evidence, it cannot be liable for any such statements. Under the two-issue rule, the Court need not reach this argument.

It should be noted that although cases generally have discussed the "two issue" rule in the context of the appellate treatment of general jury verdicts, the rule is applicable under other circumstances on appeal, including affirmance of orders of trial courts. For example, if a court directs a verdict for a defendant on the basis of the defenses of statute of limitations and contributory negligence, the order would be affirmed under the "two issue" rule if the plaintiff failed to appeal both grounds or if one of the grounds required affirmance.

*Anderson v. S.C. Dep't of Highways & Pub. Transp.*, 322 S.C. 417, 420 n.1, 472 S.E.2d 253, 255 n.1 (1996). Although this trial did not involve a general verdict form, the special verdict form submitted to the jury only asked whether it found that MUSC had made false and defamatory statements. (R. p. 4). Thus, the jury's decision could have been based on a finding that only the statements of Dr. Hazen-Martin, Dr. Kasman, or an unknown member of the Honor Council, or some combination thereof, were false and defamatory. Since the Circuit Court's Orders and the jury verdict

require affirmance on the grounds that the statements of Dr. Hazen-Martin and Dr. Kasman were defamatory and not protected by a privilege, the jury's verdict and thus, the Circuit Court's Orders, may be affirmed without reaching the issues of whether any statements made by an Honor Council member were within the scope of their official duties and whether there is evidence in the record supporting an Honor Council leak. The jury awarded damages without apportioning them between any specific defamatory statements, and MUSC has not argued that the statements of Dr. Hazen-Martin and Dr. Kasman were insufficient to support the damages award.<sup>13</sup> However, even if the Court were to address this issue, MUSC's arguments are incorrect or unpreserved.

MUSC argues that there is no evidence that a member of the Honor Council published defamatory statements about the Bingham's within the scope of their official duties, and that even if there were such evidence, it would not be within the pleadings because the Complaint does not raise the issue sufficiently for trial. MUSC ignores that the Complaint contains sufficient allegations to put MUSC on notice that the repetition of the accusations of cheating against the Bingham's by Honor Council

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<sup>13</sup> MUSC has not raised any arguments concerning proximate cause in its Brief. MUSC's only arguments as to proximate cause at trial concerned the Bingham's negligence claim and involved a different set of facts than those presented by its scope of official duty/defamation argument. (R. p. 683, line 20-p. 686, line 10). Since MUSC has abandoned any argument that Dr. Hazen-Martin's and Dr. Kasman's statements did not proximately cause all the events at issue in this Appeal, a finding by the Court that their statements were defamatory and unprivileged is sufficient to support the jury's entire damages award. The Circuit Court found that the statements of Dr. Hazen-Martin and Dr. Kasman proximately caused the social media and *The Post and Courier* controversies in its Order denying MUSC's post-trial motions. (R. p. 34).

members was a basis for their defamation claims. MUSC also would have the Court ignore the standard of review and evidence, when the testimony, exhibits, and reasonable inferences are drawn in the Bingham's favor, supporting the theory that an Honor Council member published defamatory statements. Lastly, MUSC's argument that any statements would have been outside an MUSC agent's scope of official duties is not preserved for review under the two-issue rule and law of the case doctrine.

A. **The Complaint sufficiently alleged that MUSC was liable for the repetition of Dr. Hazen-Martin's and Dr. Kasman's accusations of cheating by other individuals.**

MUSC argues that the Complaint only alleges that it is liable for the statements of Dr. Hazen-Martin and Dr. Kasman. This is not true. The following allegations plainly state that MUSC was liable for the publication of accusations of cheating by individuals (including its agents) other than Dr. Hazen-Martin and Dr. 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 . . . .
5. On May 11, 2016, Dr. Kasman falsely wrote to Joseph Ivey that the plaintiffs were suspected of cheating . . . .
6. The false statements mentioned above were repeated by others and were eventually reported by the Post and Courier newspaper.
7. The defendant **and its agents** and employees were negligent and grossly negligent in falsely accusing the plaintiffs of cheating on the

examination because it was well known in academia that it is common for identical twins to perform similarly on written examinations.<sup>14</sup>

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.

13. As a result of the false and defamatory statements made by the defendant's employees, the plaintiffs have suffered damage to their reputations and have suffered severe mental anguish because of these false statements.

(R. pp. 51-53) (emphasis added).

To the contrary of MUSC's arguments, the Complaint does not have to specifically allege that specific Honor Council members repeated the accusations of cheating, amongst other accusations, to a member of the student body or *The Post and Courier*. The above allegations clearly placed MUSC on notice that the publications of its agents and employees, including Honor Council members, proximately caused reputational harm to the Bingham, which would clearly encompass any statements by Honor Council members as well as the subsequent fallout within the MUSC community caused by those statements. MUSC erroneously believes that because the above allegations "make no specific allegations concerning the substance of any 'leaks' and do not allege a *defamatory* leak" that the Circuit

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<sup>14</sup> Under South Carolina law, on a defamation claim brought by a private figure against a non-media defendant related to a private concern, the plaintiff has the burden of proving fault by at least a negligence standard. See *Cruce*, 442 S.C. at 15, 896 S.E.2d at 772.

Court should not have permitted the Bingham's to pursue their defamation claim based on the leak theory or admitted evidence of the leak and its subsequent fallout. This proposition is not in keeping with pleading standards under South Carolina law and ignores that the substance of any leaks is the same as the substance of every other defamatory statement at issue in this case: that the Bingham's cheated on their Block 12 examination.

To be clear, there is no special heightened pleading standard for defamation cases under South Carolina law. To create the appearance that there is a heightened pleading standard imposed on plaintiffs in defamation cases, MUSC cites a number of federal cases from the United States District Court for the District of South Carolina for the proposition that in a defamation action a plaintiff must specify the speaker, time, and place of a defamatory statement, and its contents, within the allegations of his complaint.

However, these cases were analyzed under the heightened pleading standard imposed on federal courts by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009), which is not applicable to state court actions. See *Doe v. McGowan*, C/A 2:16-cv-00777, 2017 WL 573619 (D.S.C. Jan. 5, 2017); *McKay v. Med. Univ. of S.C.*, Civil Action No. 2:17-45, 2017 WL 3477799 (D.S.C. Aug. 14, 2017). South Carolina has never imposed a heightened pleading standard requiring allegations of specific times, places, or exact contents of communications. Instead, South Carolina only requires "a short and plain statement of the facts showing that the pleader is entitled to relief." Rule 8(a),

SCRCP. MUSC's assertion that the Bingham's were required to plead their allegations with more specificity, and that as a result the Bingham's could not prove to the jury that a defamatory statement was made by an unknown member of the Honor Council, is baseless and unsupported by South Carolina law.

MUSC does rely on one South Carolina authority, *Tucker v. Pure Oil Co. of Carolinas*, 191 S.C. 60, 3 S.E.2d 547 (1939), to claim that a plaintiff must allege "the name or names of the persons to whom the defamatory words concerning the plaintiff were spoken" in order to "limit the issues to the particular person or persons named in the complaint." *Id.*, 3 S.E.2d at 549. While the quoted language appears to support MUSC's argument, once the entire decision itself is reviewed, it becomes clear that its logic is inapposite and unavailing. The quoted language is not the holding of *Tucker*, but dicta buried within the case discussing that when a *motion to make more definite and certain* has been brought by a defendant, the plaintiff should amend his complaint to include the specific names of parties who were witnesses to the defamation if their identity is known.

Nowhere within the decision does it state that as a matter of course, a plaintiff is required to plead the names, times, and contents of defamatory statements with specificity, or else lose their ability to prove the defamatory statements at trial. Moreover, MUSC never moved the Court for a more definite statement pursuant to Rule 12(e), SCRCP, and never took issue with the allegations of the Complaint until pre-trial motions. MUSC's argument as to pleading and the Complaint is a red herring and should be totally disregarded by the Court as such.

**B. There is circumstantial evidence in the record supporting an inference that an unknown member of the Honor Council leaked confidential information and the cheating accusations.**

MUSC claims that there is not a shred of evidence indicating that an Honor Council member or agent of MUSC leaked the details of the Honor Council proceedings, and the accusations of cheating against the Bingham, to the public.<sup>15</sup> MUSC contends that the only evidence in the record of the leak is speculative and insufficient to permit an inference that MUSC leaked the defamatory information. To the contrary, the totality of the circumstantial evidence in the record creates a reasonable inference that the only way the defamatory publications were leaked from the Honor Council proceedings was through an Honor Council member.<sup>16</sup>

*The Post and Courier* sent messages to multiple individuals involved in the Honor Council proceeding, including investigator Deep Sangani, Dr. Hazen-Martin, and Kendrick Kennedy, indicating that she had received an “anonymous news tip” that the Bingham were sanctioned for cheating, that they were allowed to remain at

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<sup>15</sup> In doing so, MUSC makes several faulty assumptions. First, it assumes that the only defamatory statements that could possibly be attributed to it and its agents were the statements made by Dr. Hazen-Martin and Dr. Kasman, when the Bingham clearly argued to the Circuit Court that the remaining evidence of defamatory statements made by an unknown Honor Council member and members of the MUSC academic community were relevant and admissible on the issue of damages. (R. p. 648, line 5-p. 650, line 2). Second, MUSC assumes that the only way it could be liable for any defamatory statements made by an Honor Council member would be if they repeated verbatim the statements of Dr. Hazen-Martin and Dr. Kasman. MUSC has not argued in its Brief that the statements of Dr. Hazen-Martin and Dr. Kasman did not proximately cause the Honor Council leak and subsequent controversy in the MUSC community, which is a separate and standalone issue supporting MUSC’s liability. The Circuit Court found that MUSC and “its agents’ publications are a legal cause of all harm caused to Plaintiffs by the social media and print discussions of Plaintiffs’ examination and Honor Council hearing” and MUSC has not appealed this issue in its Brief. (R. p. 34).

<sup>16</sup> To be clear, the verdict form does not indicate what statements the jury found to be defamatory, who made the statements, and the damages for each statements. (R. p. 4).

school because of political connections, that the Honor Council had voted 8-2 to dismiss the Bingham, and that Dean Dubois had overturned the decision. (R. pp. 808-811; R. p. 443, lines 4-22). Kendrick Kennedy immediately informed Dr. Batalis of the message. (R. pp. 808-11).

Dr. Batalis forwarded the message to Dean Dubois, noting that Kennedy “had no previous relationship with the reporter”, that he was not sure how she obtained his information or knew he was on the Honor Council, and that the reporter was tipped off by someone with inside knowledge of the case. (*Id.*). Dean Dubois responded to Dr. Batalis by acknowledging that “someone from MUSC with very detailed information about the case released the information to the press” and that “the reporter does know the person at MUSC who provided her with this information.” (*Id.*). The emails also document that the members of the Honor Council were very frustrated with the reversal of their decision. Only members of the Honor Council and convicted students are informed of the results of an appellate decision. (R. p. 1005). This evidence reasonably supports inferences that: (1) whoever informed Sausser (or informed the person who informed Sausser) had detailed information that was not publicly available on the identity of Honor Council members and a witness to the Honor Council proceedings, (2) whoever leaked the information knew details of the accusations instigating the Honor Council proceedings, which was confidential information, (3) whoever leaked the information purported to know the vote tally, total number of votes, and voting procedure of the Honor Council, and (4) the leaker was aware of Dean Dubois’ decision to overturn the Honor Council decision.

The jury would not have had to solely rely on this evidence to reach a conclusion that the information was leaked by an Honor Council member. Dean Dubois testified that *he* didn't even know what the vote tally was, indicating that whoever purported to know the final vote must have been on the Honor Council themselves. (R. p. 497, line 13-p. 498, line 3). Dr. Hazen-Martin testified that the university's website would not have specifically indicated that she was in any way involved in the Honor Council process. (R. p. 443, lines 4-22). Therefore, only someone with inside information could have been the source. The individual responsible for originally leaking the information that reached Sausser had specific knowledge, knowledge that was not publicly available, that could only be known to someone directly involved in the Honor Council proceedings and deliberations.

Additionally, the evidence in the record demonstrates that the Bingham family only discussed the accusations of cheating and the Honor Council proceedings with the following individuals: their grandparents, their parents, their cousin, Dr. William Bingham, and Kayla's boyfriend at the time, Dr. Miltiadis Kerdemelidis. (R. p. 341, lines 8-12; R. p. 400, line 20-p. 401, line 15; R. p. 490, lines 6-11). Dr. Bingham testified that he never shared this information with anyone and that to his knowledge neither had Dr. Kerdemelidis, and that the Bingham family had asked them to keep the information private. (R. p. 473, line 6-p. 474, line 19). There is no evidence that any of the Bingham family members and friends had any detailed knowledge of the Honor Council proceedings such as the vote tally, much less that they shared such information with anyone outside of the proceedings prior to the Honor Council leak.

A reasonable inference from this evidence is that only an Honor Council member could have leaked the information, including the defamatory accusations that the Bingham had gotten away with cheating on their examination.

Facebook messages amongst the members of the student body detail the information that was leaked from the Honor Council. The messages describe that the Bingham cheated and were cheaters and had their conviction overturned because of political influence and bribes. (R. pp. 821-834). MUSC is not only liable because a member of the Honor Council leaked the statements of Dr. Hazen-Martin and Dr. Kasman; MUSC is liable because there is sufficient circumstantial evidence supporting that an Honor Council member, an agent of MUSC, made their own defamatory statements to a member of the student body or *The Post and Courier*.<sup>17</sup> The Bingham clearly requested relief for these statements by alleging in their Complaint that false statements were repeated and made by other MUSC agents following the statements of Dr. Hazen-Martin and Dr. Kasman. The Circuit Court did not err in admitting this evidence and allowing the issue to go to the jury, and there is sufficient evidence in the record upon which the jury could have found that a member of the Honor Council leaked the defamatory information.

C. **Under the two-issue rule and law of the case doctrine, MUSC has failed to preserve an argument that it did not waive its affirmative defense under S.C. Code Ann. § 15-78-60(17).**

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<sup>17</sup> As an additional sustaining ground for the jury's verdict and Circuit Court's Orders, MUSC is liable because the ensuing controversy and leak were proximately caused by MUSC's publications. Again, MUSC has not argued in its Brief that the statements of its employees did not proximately cause the public controversy with regards to the defamation claim.

The Circuit Court's Order denying MUSC's post-trial motions states that MUSC's argument that a defamatory publication by an Honor Council member would be outside the scope of their official duties had been waived by MUSC:

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

(R. p. 31). S.C. Code Ann. § 15-78-60(17) provides that "employee conduct outside the scope of his official duties" is an exception to the South Carolina Tort Claims Act's waiver of immunity. Exceptions to the Tort Claims Act are affirmative defenses that must be pled or they are considered waived. *See Steinke v. S.C. Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 393, 520 S.E.2d 142, 152 (1999) (stating that the exceptions to the Tort Claims Act are affirmative defenses that must be proven by the defendant); *Dawkins v. Mozie*, 399 S.C. 290, 294, 731 S.E.2d 342, 345 (Ct. App. 2012) (stating that an affirmative defense is waived if not pled).

MUSC has not argued in its Brief that the Circuit Court erred in finding that MUSC's scope of official duties exception defense had been waived. Under both the law of the case doctrine and the two-issue rule, an appellate court will affirm a ruling by a lower court if the offended party does not challenge all independent bases for that ruling. *Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993). Failure to challenge the ruling "is an abandonment of the issue and precludes consideration on

appeal.” *Id.* The unchallenged ruling, “right or wrong, is the law of the case and requires affirmance.” *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970). An appellant may not use a reply brief as a vehicle to argue issues not argued in the appellant’s brief. *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989).

Since MUSC has not challenged the Circuit Court’s final finding that its Tort Claims Act exception defense was waived, the issue has been abandoned on appeal, and the Court need not determine whether statements made by an unknown Honor Council member accusing the Bingham of cheating on their examination, directly or by implication, were within the scope of that member’s official duties. Regardless, even if the issue was preserved, the evidence supports a reasonable inference that the unknown Honor Council member was acting within the scope of their official duties. While it is correct that “scope of official duties” is narrower than “scope of employment” under South Carolina law, in this case, MUSC’s Honor Code specifically tasks the Honor Council members with protecting the integrity of the MUSC academic community and provides that the members are to communicate with the MUSC community to promote and preserve the value of the MUSC Honor Code.

In South Carolina,

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

*Jones v. Elbert*, 211 S.C. 553, 558, 34 S.E.2d 796, 798-99 (1945). The case of *Jamison v. Howard*, 271 S.C. 385, 247 S.E.2d 450 (1978), is illustrative of when an agent's tortious conduct can still be considered as within the scope of his agency. In *Jamison*, a liquor store owner was sued after his manager directed another individual to shoot the plaintiff for a debt that was owed to the store. The owner denied the authority of the manager to undertake such actions, testifying that the manager did not have authority to sell goods on credit, and therefore that the manager would certainly not have authority to collect any debt through the use of force. The Supreme Court found that despite this testimony, there was a reasonable inference that the manager could have been acting for the owner and in the owner's interest, however misguided his intentions were, by attempting to collect a debt that was owed to the store. An analogous scenario is presented by the present facts.

The Honor Code sets forth that its purpose is to establish high ethical standards within the MUSC academic community and to ensure that students meet these standards, especially with regard to honesty, trust, and integrity. (R. pp. 996-98). The Honor Code was created to provide a framework for this purpose. (*Id.*). The Honor Code creates Honor Councils, composed of students and faculty, and charges the Honor Councils with the responsibility of ensuring that those within the community do not lie, cheat, steal or tolerate those who do. (*Id.*) ("Faculty and students are in the process of education and share a common objective. All have fundamental investment in the enterprise of academic work and all must share the responsibility for ensuring its integrity."). The Honor Code specifically creates a responsibility for the Honor Councils

to protect the integrity of MUSC. (*Id.*) (“Acceptance of the Honor Code bestows upon students the responsibility to respect and protect the integrity of MUSC.”)

This responsibility entails duties not only to investigate reported infractions and participate in hearings, but also to educate the MUSC community through outreach on the value and importance of the Honor Code. (*Id.*) (“These honor councils are responsible for **educating everyone in their respective colleges** on the meaning and importance of the Honor Code, investigating reported infractions within the college and participating in hearings in an unbiased manner.”). The entire thrust of the Honor Code’s purpose is to protect the integrity of MUSC, whether that be from academic misconduct by students, or misconduct by faculty that directly bears upon students and their relationship with the university.

The evidence presented to the jury was susceptible of a reasonable inference that whoever leaked the accusations that the Binghamms cheated and benefited from political connections was intending to act within the interests of MUSC and within the scope of their agency and official duties as a member of an MUSC honor council. The emails between Dr. Batalis and Dean Dubois indicate that the Honor Council members were frustrated that their decision had been overturned by Dr. Dubois. (R. pp. 808-10). The content of the rumors that subsequently arose within the MUSC community indicated that the students and Honor Council believed that Dean Dubois’s decision to reverse the Honor Council was unethical and harmful to the integrity of the university and the entire student body. (R. pp. 821-34). The jury could have reasonably inferred that the Honor Council member leaked information in a misguided attempt to do exactly what

they were required to do by the Honor Code; that is, preserve the academic integrity of the university by outreach and education as to what they mistakenly perceived as corruption, nepotism, academic malfeasance and preferential treatment.

MUSC claims that Honor Council members cannot be agents for whose conduct it can be held liable, citing to dicta from a Fourth Circuit decision stating that a student is not transformed into a state actor just because some authority has been delegated to that student. MUSC's reliance on this decision is misplaced because it is discussing whether a student is a "state actor" under 42 U.S.C. § 1983, which requires the private individual to have exercised powers that are "traditionally the exclusive prerogative of the State", or for the state to have "exercised coercive power" or "provided such significant encouragement, either overt or covert, that the choice must in law deemed to be that of the State." *Mentavlos v. Anderson*, 249 F.3d 301, 311 (4th Cir. 2001). South Carolina agency rules do not have such exacting standards for an agent to be considered as acting on behalf of his principal. Contrary to MUSC's arguments, Honor Council members can be considered agents whose conduct, when within the scope of their official duties, is imputed to MUSC, and this was a factual issue that was correctly determined by the jury.

MUSC lists numerous sections of the Honor Code and the Family Educational Rights and Privacy Act that require confidentiality in honor council proceedings. However, this evidence does not demonstrate that as a matter of law the Honor Council member acted outside the scope of his official duties. And the case law is clear that a principal will still be liable for the acts of an agent, even if they exceed his authority, so

long as he is acting in furtherance of the principal's interests. *Murphy v. Jefferson Pilot Comm. Co.*, 364 S.C. 453, 462, 613 S.E.2d 808, 812 (Ct. App. 2005). This conflicting evidence was correctly left to the jury for determination. *See Steinke*, 336 S.C. at 393-98, 520 S.E.2d at 152-55 (finding that exceptions were properly charged to the jury). Since the acts of the Honor Council member are not wholly disconnected from the furtherance of the Honor Code's purpose, it was for the jury to determine whether any publication was within the scope of his official duties, and the evidence supports a reasonable inference that it was.

MUSC also argues that any leak was outside the scope of an MUSC agent's official duties because it would have occurred after the completion of the Honor Council hearing and decision. This argument ignores that under the Honor Code, individual members of the Honor Council serve for the entirety of their careers at MUSC if they are students, and faculty members may serve multiple year terms. (R. p. 999). MUSC's unsupported argument that the Honor Council members' obligations and duties ended with the termination of the Bingham's hearing is controverted by its own Honor Code, and there is no evidence that any member of the Honor Council graduated and/or left their position in the intervening time between the Bingham's hearing and the time of the leaks, which occurred in the weeks following Dean Dubois' decision. (R. p. 403, lines 14-17; R. p. 590, line 14-p. 591, line 15).

MUSC cites *Doe v. Beaufort Jasper Acad. for Career Excellence*, No. 2021-UP-010 (S.C. Ct. App. filed Jan. 13, 2021), to support that any publications by the Honor Council

were outside the scope of their official duties.<sup>18</sup> As noted by MUSC, the undersigned became counsel of record in the *Doe* case after it had been appealed. The facts in *Doe* are wholly distinguishable from the circumstances presented in this case. *Doe* involved extremely salacious and offensive letters that were written to a school employee's family members, ostensibly by a fellow school employee, accusing the employee of engaging in inappropriate conduct, and the Court of Appeals concluded they only could have been published out of personal animus, and not in the interests of the school.

As described above, in this case, it is not unreasonable to infer that the leak of information characterizing the Bingham as cheaters who unfairly benefited from political connections could have been motivated by a desire to preserve the academic integrity of MUSC, and not out of any personal animus towards the Bingham. MUSC has produced no evidence indicating the leak was motivated by personal animus towards the Bingham. The Bingham have characterized the publications throughout this entire litigation not as malicious, but as being made in an improper manner and negligently in disregard of their rights as students. As the evidence in the light most favorable to the Bingham is susceptible to a reasonable inference that the Honor Council member was acting within the scope of his official duties as described by the Honor Code, the Circuit Court's Orders and the jury verdict should be affirmed.

**VII. MUSC did not timely object to the Bingham's closing arguments and demonstrative exhibit.**

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<sup>18</sup> Rule 268(d)(2), SCACR, provides that MUSC should not have cited this unpublished opinion in its Brief.

MUSC lastly argues that it should have been granted JNOV or a new trial because the Bingham's arguments and a demonstrative exhibit used in closing contained mathematical errors. Regardless of the correctness of MUSC's argument, it does not support the grant of JNOV or a new trial because MUSC failed to timely object to the arguments and the demonstrative exhibit. When improper arguments are made in closing, it is a requirement that opposing counsel must immediately object, have a record made of its argument, and ask the court to make a ruling on the objection. *Varnadore v. Nationwide Mut. Ins. Co.*, 289 S.C. 155, 159, 345 S.E.2d 711, 714 (1986) (quoting *Young v. Warr*, 252 S.C. 179, 165 S.E.2d 797 (1969)). When a party fails to make a timely objection to an improper closing argument, the issue is not preserved for review. *Ligon v. Norris*, 371 S.C. 625, 633 n.1, 640 S.E.2d 467, 471 n.1 (Ct. App. 2006). The failure to timely object to evidence or exhibits introduced at trial serves as a waiver of any objection. *McCreight v. MacDougall*, 248 S.C. 222, 226, 149 S.E.2d 621, 622 (1966).

MUSC did not object or specify at trial the objectionable language used in the undersigned's closing arguments, did not ask the Circuit Court at the time to make a ruling, and did not ensure that any objections and arguments were made part of the record. And even if MUSC had timely objected to the arguments and exhibit, and MUSC was correct that the Bingham's closing arguments were mathematically incorrect or flawed, MUSC still has not met its burden of demonstrating that the Bingham's closing arguments were so unfairly prejudicial that they had an impact on the outcome of the trial, or that the Caveon report was an essential piece of evidence

given any weight by the jury at all. MUSC has not argued once that it was denied the opportunity for a fair trial.<sup>19</sup> Regardless, since MUSC failed to make a timely objection, its argument has been waived.

### **CONCLUSION**

For the foregoing reasons, the Circuit Court's Orders and the jury verdict should be affirmed.

Respectfully submitted,

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<sup>19</sup> “The test for granting a new trial on the basis of improper closing argument by opposing counsel is whether the complaining party was prejudiced to the extent that he or she was denied a fair trial.” *Scoggins v. McClellion*, 321 S.C. 264, 269, 468 S.E.2d 12, 15 (Ct. App. 1996).

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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Appellate Case No.: 2023-000952

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

v.

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

**CERTIFICATE OF COUNSEL**

The undersigned certifies that Final Brief as Respondent complies with Rule 211(b), SCACR.

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**Proof of Service**

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The undersigned certifies that a copy of the Respondents-Appellants' Final Brief as Respondents has been served upon the following counsel of record by emailing a copy of the same this 17 day of July 2024.

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