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.

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

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STATEMENT OF THE ISSUES ON APPEAL

I. Whether the Circuit Court erred in finding that the verdict form submitted to the jury was a general verdict form.

II. Whether the use of a special verdict form required the Circuit Court to make a factual finding on the number of occurrences prior to entry of judgment or in the absence of such a finding, the Circuit Court is deemed to have made a finding consistent with the jury's determination of the amount of damages.

INTRODUCTION

This Appeal presents a focused, novel issue that does not appear to have ever been addressed by South Carolina law. Namely, when a circuit court, in an action brought pursuant to the South Carolina Tort Claims Act, submits a special verdict form to the jury that omits the issue of occurrences, is the circuit court permitted to make its own factual finding on the number of occurrences? And if the circuit court fails to do so, is it deemed to have found a number of occurrences consistent with the jury's factual finding on the amount of damages? The South Carolina Rules of Civil Procedure and case law of federal and other state jurisdictions examining these questions support that the answer to both should be "Yes".

Under the plain language of Rule 49, SCRCP, when a trial court submits issues of fact to the jury for determination without asking the jury to return a general verdict in favor of any of the parties, and it omits *any* issue of fact raised by the pleadings and evidence, the trial court as a practical necessity is required to make its own findings of fact on those omitted issues, apply the law to the case, and enter a judgment. Or, it may decline to make such findings, in which case after entry of the judgment it is deemed to have made findings consistent with the remaining findings

of the jury in rendering its verdict. Otherwise, South Carolina trial courts would run the risk of fatally eradicating their ability to enter a final judgment anytime a plaintiff or defendant does not ensure that every factual issue implicated by a complaint, an answer, and the evidence admitted at trial is not included on the special verdict form.

Rule 49(a) specifically addresses this risk, and its plain language permits a trial court to cure the omission from the special verdict form of *any* issues of fact that were raised by the pleadings and evidence admitted at trial. Here, the special verdict form submitted to the jury did not include a general verdict asking the jury to make a general finding in favor of the plaintiffs or defendant. It did not include written questions on the issue of common law malice, the issue of occurrences, and Respondent-Appellant's affirmative defenses. Therefore, by entering judgment in favor of Appellants-Respondents in the amounts of $750,000 each, under Rule 49(a) the Circuit Court would be deemed to have made factual findings on these issues. It was error for the Circuit Court to reduce the verdict without making a factual finding on the issue of occurrences. The Circuit Court's Orders granting the motion to reduce the verdict should be reversed.

STATEMENT OF THE CASE

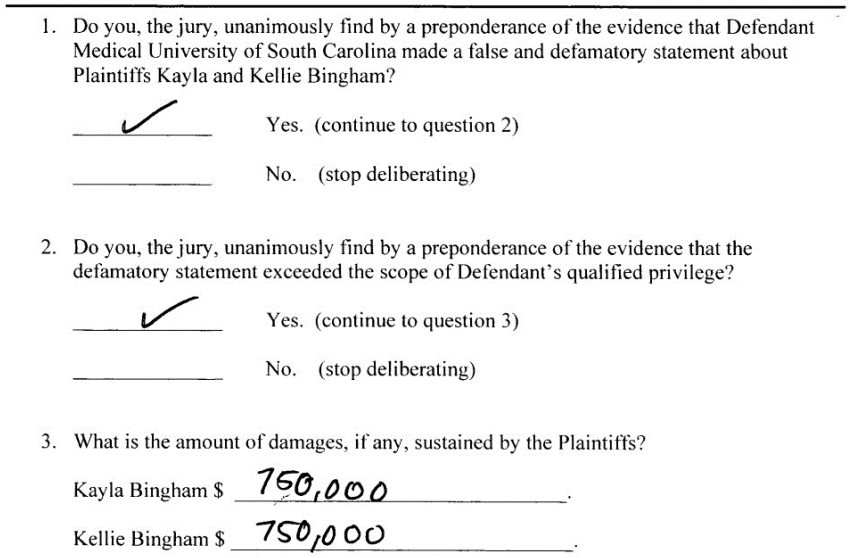
This Appeal arises from a defamation action brought pursuant to the South Carolina Tort Claims Act ("TCA") against Respondent-Appellant Medical University of South Carolina ("MUSC") by Appellants-Respondents Kellie Bingham and Kayla Bingham after false accusations that they cheated on a medical school examination

were published and leaked to the MUSC community and local media by MUSC employees and agents. The Binghams jointly filed this defamation action in the Charleston County Court of Common Pleas on November 2, 2017. (R. pp. 51-53). The Complaint alleges that MUSC is a governmental entity subject to suit pursuant to the TCA, and that MUSC employees and agents had published numerous defamatory statements concerning the Binghams which were eventually republished and reported by *The Post and Courier*. (R. pp. 51-52). The Binghams also alleged that the statements were libelous and slanderous *per se* in that they impugned the Binghams' reputation as medical students and charged the Binghams as unfit in their business and profession. (R. pp. 51-53).

In its Answer, MUSC denied that any of its employees or agents made any false statements concerning the Binghams that were republished and reported by *The Post and Courier*. (R. p. 56). MUSC also raised several affirmative defenses. These defenses included: (1) numerous exceptions to the TCA's waiver of immunity under S.C. Code Ann. § 15-78-60, (2) limitations on the Binghams' recovery under S.C. Code Ann. § 15-78-120, which would have capped their damages at $300,000 per individual, per occurrence, (3) lack of proximate cause, and (4) absolute or qualified privilege. (R. pp. 58-59).

The case was tried in Charleston County before a jury during the November 14-18, 2022 term of court. After closing arguments on November 18, 2022, the Circuit Court submitted a special verdict form to the jury on the issues of (1) whether a false and defamatory statement was made by MUSC, (2) whether any such statements

exceeded the scope of the qualified privilege, and (3) the amount of damages. (R. p. 4).



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

   ✓ Yes. (continue to question 2)

   _____ No. (stop deliberating)

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

   ✓ Yes. (continue to question 3)

   _____ No. (stop deliberating)

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

   Kayla Bingham $ 750,000.

   Kellie Bingham $ 750,000.

Fig. 1, Verdict Form.

Notably, the form did not include a general verdict finding in favor of any of the parties and it did not include written questions on the issue of common law malice or on any of MUSC's affirmative defenses. (*Id.*) The jury returned special verdicts for the Binghams on the first two issues and found that the amount of damages sustained by Kellie and Kayla was $750,000 each. (*Id.*).

On November 28, 2022, MUSC filed post-trial motions with exhibits, including a motion pursuant to S.C. Code Ann. § 15-78-120 to reduce the jury's finding on damages to $300,000 for each Plaintiff. (R. p. 70). In its motion, MUSC argued that in light of the Supreme Court of South Carolina's decision in *Chastain v. Anmed Health Foundation*, 388 S.C. 170, 694 S.E.2d 541 (2010), the Circuit Court was required to reduce the amount of damages because the jury was not instructed to determine the amount of occurrences and the verdict form did not specifically ask the

jury to determine the number of occurrences and the loss attributable to each occurrence. (R. pp. 70-73).

On November 29, 2022, prior to entry of judgment, the Binghams filed a motion to determine the number of occurrences.[1] (R. pp. 120-21). The motion asked the Circuit Court to determine the number of occurrences from the evidence admitted at trial and to deny MUSC's request for a reduction of the damages award. (R. p. 121). The motion also provided that the Circuit Court should deny MUSC's motion because to the best of the undersigned's recollection, the Circuit Court had proposed without objection to handle any determinations of occurrences and their applicability to the statutory damages cap post-trial. (R. pp. 120-21).

On December 1, 2022, MUSC filed a memorandum in opposition to the Binghams' motion to determine the number of occurrences, characterizing the verdict form as a general verdict and contending again that since the Binghams had not objected to the verdict form, and because it did not have a written question asking the jury to determine the number of occurrences, the Circuit Court was precluded from speculating as to the jury's verdict. (R. pp. 122-28). MUSC also argued that it was never suggested to the Circuit Court that there may have been multiple occurrences, that during discussions concerning the verdict form it was only agreed that the jury would not be informed of the statutory cap and that the Circuit Court would apply the cap before entering judgment, and that there was no discussion that the Circuit Court would determine the number of occurrences post-trial. (*Id.*).

[1] Notably, this was not a motion for a new trial pursuant to Rule 59, SCRCP.

On December 16, 2022, the Binghams filed a memorandum in opposition to MUSC's motion to reduce the jury's special verdict on damages. (R. pp. 129-52). The memorandum sets forth that because a special verdict form was submitted to the jury on specific issues of fact without asking the jury to return a general verdict in favor of any of the parties, the parties had waived jury trial on any issues of fact raised by the evidence and the pleadings that were omitted from the verdict form, and that the Circuit Court therefore had two options under Rule 49(a), SCRCP. (R. pp. 136-40). First, it could make its own determination on any factual issue omitted from the verdict form that had been raised by the pleadings or the evidence, including the issue of occurrences. (*Id.*). Second, it could punt on the issue of occurrences, in which case it would be deemed that the Circuit Court had made a finding of at least three occurrences, consistent with the judgment on the special verdict which awarded the Binghams $750,000 each. (*Id.*).

MUSC filed a reply memorandum on January 30, 2023 in further support of its post-trial motions. (R. pp. 178-206). Relying on federal precedent, MUSC argued that the verdict form was a general verdict form with interrogatories as described by Rule 49(b), SCRCP, because the Circuit Court had provided instructions on the law to the jury. (R. pp. 179-82). MUSC also argued that it was impossible to determine from the verdict form which statements the jury had determined were defamatory. Thus, it would have been speculative for the Circuit Court to determine the number of occurrences. (R. p. 182). On February 1, 2023, the Circuit Court heard arguments on the post-trial motions filed by the parties. (R. pp. 227-93).

On May 5, 2023, the Circuit Court issued an Order denying the Binghams' motion to determine the number of occurrences and granting MUSC's motion to reduce the verdict. (R. pp. 5-9). The Order finds that the verdict form was a general verdict without explanation. (R. p. 5). Consequently, the Order concludes that since the jury was not instructed on the issue of occurrences, the verdict form did not require the jury to determine the number of occurrences, and the Binghams did not object to the verdict form, it would have been speculative for the Circuit Court to determine the number of occurrences. (R. pp. 6-8).

On May 10, 2023, the Binghams filed a motion for reconsideration. (R. pp. 207-209). The motion asked the Circuit Court to reconsider and provide further clarity to its ruling that the verdict form was a general verdict. (R. p. 208). On May 16, 2023, the Circuit Court denied the motion. (R. pp. 13-15). This Appeal of the Circuit Court's May 5 and May 16 Orders followed on June 9, 2023. (R. pp. 210-211).

STANDARD OF REVIEW

An issue regarding interpretation of the South Carolina Rules of Civil Procedure is a question of law. *See James v. S.C. Dep't of Transp.*, 393 S.C. 440, 444-45, 711 S.E.2d 919, 921-22 (Ct. App. 2011). "Questions of law may be decided with no particular deference to the trial court." *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008).

ARGUMENT

The issues on appeal strictly present a matter of statutory interpretation. The sole questions for the Court are whether the verdict form submitted to the jury was

a general verdict form or a special verdict form under Rule 49, SCRCP, and if so, whether the Circuit Court should be deemed to have made a finding on the number of occurrences in accord with the verdict and the Circuit Court's entry of judgment.

I. Statement of Facts.

This Appeal stems from defamatory statements made by agents of MUSC during Kellie and Kayla Bingham's Block 12 examination, which took place on May 5, 2016, while the Binghams were students at MUSC's College of Medicine.[2] (R. p. 51; R. p. 317, line 24 – p. 318, line 7; R. p. 343, line 20). Kellie and Kayla are monozygotic identical twins. (R. p. 835). During the examination, the Binghams were remotely monitored by a MUSC employee, Dr. Debra Hazen-Marten. (Supp. R. p. 1, lines 17 – 24; R. p. 344, lines 7 – 8; p. 404, lines 7 – 15; R. p. 798). While monitoring the exam, Dr. Hazen-Marten observed what she believed to be evidence the Bingham sisters were progressing throughout their examinations at a similar pace with a high number of identical correct and incorrect answers to the exam questions. (R. p. 798; R. p. 406, line 23 – p. 407, line 8). Dr. Hazen-Marten found this behavior to be "irregular" and supposedly instructed the afternoon proctor, Michele Friesinger, to note any "testing irregularities". (R. p. 411, line 16 – 21; R. p. 804).

While Dr. Hazen-Marten's sworn testimony was inconsistent between her deposition and trial as to whether she specifically pointed out the Binghams to Ms. Friesinger and identified them by name, Ms. Friesinger's testimony and notes clearly

[2] Block exams are periodic tests administered to medical students throughout their school career that assess the student's knowledge on a wide range of topics essential to the practice of medicine. (R. p. 314, line 20 – p. 315, line 9; R. pp. 932-91).

indicate that she was directed by Dr. Hazen-Marten to specifically watch the twins for the duration of the examination and that the Binghams, whom Dr. Hazen-Marten identified by name, had been engaged in "testing irregularities". (R. p. 427, lines 16 – 18; R. p. 507, lines 5 – 20). During the examination, Ms. Friesinger noted what she perceived as "irregularities" in their test taking behavior. (R. pp. 804-05). She noted that the Binghams were nodding their heads while taking the exam; that one of the twins asked for a pencil with a better eraser at the beginning of the exam; that one of them pushed herself back from her computer and glanced in her sister's direction at one point during the exam; and that one of them was writing notes on her scratch paper and her sister glanced briefly in the direction of the scratch paper.[3] (*Id.*). These observations were documented and given to Dr. Laura Kasman after the examination was complete. (R. pp. 799-800; R. p. 434, lines 15 – 17). Dr. Kasman also received the results from the examination. (R. p. 630, lines 20 – 24). Dr. Hazen-Martin has testified that she did not verbally inform Dr. Kasman that the Binghams were cheating, passing notes, or signaling one another during the examination. (R. p. 434, line 15 – p. 437, line 8).

Dr. Hazen-Martin did send an email to Dr. Kasman detailing that that she observed that the Binghams were "progressing lock-step" through the examination during the morning session and registering similar incorrect responses on identical test

[3] At trial, Ms. Friesinger testified that it was her opinion that the Binghams were collaborating on their examination, despite previously testifying before the Honor Council that she did not have an opinion as to their conduct that she was willing to share. (R. p. 530, line 16 – p. 531, line 5; R. p. 531, line 23 – p. 532, line 4; R. p. 533, lines 6 – 20; R. p. 542, line 11 – p. 543, line 7).

questions. (R. p. 798). However, Dr. Hazen-Martin testified at trial that she did not monitor the test software for up to twenty minutes at a time during the examination. (R. p. 407, line 23 – p. 408, line 13). Therefore, she could not have known if they were progressing "lock-step" throughout the entire examination. Dr. Hazen-Martin also testified in her deposition and at trial that she relied on printouts to ascertain whether they were answering the examinations similarly; however, it was demonstrated at trial that these printouts were not made until after the afternoon examination had already begun, and after Dr. Hazen-Martin had already directed Ms. Friesinger watch the Binghams for testing irregularities. (R. p. 410, line 24 – p. 411, line 21; R. p. 417, line 16 – p. 423, line 7).

Dr. Kasman subsequently 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.[4]

(R. p. 803) (emphasis added). Dr. Hazen-Marten has testified that the only behaviors she observed personally were that the Binghams scored similarly and were progressing through the exam at a similar pace whenever she would check the test software. (R. p. 409, lines 5 – 12). Ms. Friesinger could not definitively testify that she observed the

[4] This letter was also forwarded via email to Myra Haney Singleton. (R. pp. 801-802).

twins specifically signaling one another or passing notes. (R. p. 505, lines 1 – 9). Dr. Hazen-Marten also testified that she was not familiar with or cognizant of the fact that identical twins could perform similarly on tests. (R. p. 429, lines 3 – 6). Both Ms. Friesinger and Dr. Hazen-Marten testified that it would be inappropriate for faculty to conclusively determine that the Binghams were cheating or were engaged in behavior indicative of academic misconduct prior to an Honor Council proceeding. (R. p. 437, line 14 – p. 439, line 1).

After a hearing on May 26, 2016, the Honor Council concluded that the Binghams were guilty of academic dishonesty. (R. p. 366, line 24 – p. 367, line 3; R. p. 409, lines 13-17). The twins appealed, and on June 14, 2016, Dr. Raymond Dubois, Dean of the MUSC College of Medicine, overturned the Honor Council decision, finding that the evidence presented against the Binghams did not rise to the level of proving guilt by a preponderance of the evidence, and that the sisters had provided plausible explanations for the circumstantial evidence that was presented against them. (R. p. 807). The accusations of cheating and details of the Honor Council proceeding and appeal were eventually leaked and republished to a reporter at *The Post and Courier*, including detailed information such as a vote tally and recommended sanctions, to the extent that Dr. Nick Batalis, a faculty member of the Honor Council, wrote to Dr. Dubois that "the reporter does seem to have been tipped off by someone with some knowledge of the case." (R. pp. 808-813; R. p. 553, lines 10-22).

The accusations of cheating leading to the Honor Council proceeding and the details of the proceeding were protected by the Family Educational Rights and Privacy

Act ("FERPA"). (R. p. 495, line 7 – p. 496, line 11; R. pp. 814-815). Only a member of the Honor Council would have had access to this information, as the Dean of the College of Medicine did not even know what the vote was. (R. p. 497, line 7 – p. 498, line 2). A substantial amount of circumstantial evidence supports that an MUSC agent, likely an Honor Council member, leaked to the public the accusations of cheating. (Supp. R. p. 2, lines 2 – 10; R. p. 402, lines 7 – 13; R. p. 473, line 6 – p. 475, line 5; R. p. 496, lines 21 – 22; R. p. 497, lines 7 – 12; R. p. 546, line 24 – p. 547, line 6; R. p. 550, line 25 – p. 551, line 5; R. p. 556, lines 3 - 12; R. pp. 808-11; R. pp. 814-818). Subsequently, the Bingham sisters were subjected to ill-treatment by many of their fellow students in person and via social media, leading to a forum held with MUSC students and a petition by the students to MUSC's administration expressing concern with how the incident was handled by MUSC and Dr. Dubois. (R. pp. 821-34; R. p. 475, line 6 – p. 489, line 11; R. p. 551, line 18 – p. 555, line 4). Due to the false allegations that the Binghams had cheated and the subsequent false attacks on them within the MUSC community, the Binghams had no choice but to withdraw their enrollment at MUSC. (R. p. 372, line 16 – p. 373, line 18).

The Binghams subsequently brought the present action against MUSC for defamation on November 2, 2017, alleging that the statements made characterizing the sisters' conduct as cheating, passing notes, and signaling one another, in addition to other undocumented statements, were false and defamatory.[5] (R. pp. 51-53). Specifically, Plaintiffs made the following allegations as to MUSC and its agents:

[5] The Binghams filed a separate defamation action against *The Post and Courier* which is currently pending in the Charleston County Court of Common Pleas and is captioned

> 4. Debra Hazen-Martin, Ph.D., after the examination falsely reported to Laura Kasman, M.D. that the plaintiffs had cheated during the examination she was monitoring. She also falsely stated to Dr. Kasman that the plaintiffs had been observed signaling to each other and passing notes by scratch paper between them. These statements were false and defamatory.
>
> 5. On May 11, 2016, Dr. Kasman falsely wrote to Joseph Ivey that the plaintiffs were suspected of cheating on an examination and were seated next to each other and were observed signaling each other and passing notes via scratch paper on the desk between them. These statements were false and defamatory.
>
> 6. The false statements mentioned above were repeated by others and were eventually reported by the Post and Courier newspaper.

(R. pp. 51-52). In its Answer, MUSC raised as an affirmative defense S.C. Code Ann. § 15-78-120, asserting that the Binghams could not recover more than $300,000 each per occurrence under the TCA. (R. p. 58).

II. The verdict form submitted to the jury was a special verdict form and did not ask the jury to render a general verdict in favor of one party or the other.

In determining that it could not make a finding on the number of occurrences and in reducing the verdict, the Circuit Court found that the verdict form submitted to the jury was a general verdict. This finding was in error. The determination of whether a verdict form is a special verdict or general verdict with interrogatories is governed by the plain language of Rule 49, SCRCP. In this case, the subject verdict form was a special verdict, and not a general verdict pursuant to Rule 49. The classification of a verdict form is more than mere semantics and has significant consequences as to the

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Bingham v. The Post and Courier Inc. et al, Civil Action No. 2016-CP-10-05378. This action concerns subsequent emails sent by reporter Lauren Sausser to MUSC students which allegedly defamed the Binghams.

manner in which issues of fact implicated by the verdict are handled by a circuit court prior to entry of judgment.

While a general verdict would not permit a circuit court to make findings of fact on omitted issues prior to entry of judgment, a special verdict ensures a circuit court makes a finding on such issues, or the findings will be deemed by operation of law to have been made in accord with the remainder of the verdict upon entry of judgment. Rule 49(a), SCRCP. The practical effect of this rule on the matter before the Court is that if the subject verdict form was a general verdict, under *Chastain* the Circuit Court was correct in declining to make a determination on the number of occurrences and in subsequently reducing the verdict. However, if the verdict form was a special verdict, the Circuit Court was permitted to determine the number of occurrences, and in declining to do so and entering judgment in favor of the Binghams for $750,000 each, it was deemed to have made a factual finding of three occurrences to support the entry of judgment. Thus, its subsequent reduction of the verdict was in error and must be reversed.

A. The common law and Rules of Civil Procedure generally provide that there are three classifications of verdict forms.

The classification of a verdict form is a matter of statutory interpretation and is subject to *de novo* review by the Court. *State v. Taylor*, 436 S.C. 28, 34, 870 S.E.2d 168, 171 (2022). The terms of Rule 49 by their plain and ordinary meaning indicate that in order for the subject verdict form to be classified as a general verdict accompanied by interrogatories under Rule 49(b), SCRCP, as has been and most likely will be argued by MUSC, it must actually contain the form of a general verdict in addition to written

factual findings relevant to the verdict. Here, the verdict form does not under any construction of the term contain a general verdict and by default must be a special verdict under Rule 49(a), SCRCP, as it only asks the jury to make specific findings on certain issues of fact relevant to the Binghams' defamation claim without asking the jury to make an ultimate determination of liability. Any arguments by MUSC to the contrary ask the Court to forego its obligation to refrain from a forced construction of Rule 49's language. MUSC would ask the Court to apply an alternative meaning to the term "general verdict", with the ultimate goal of convincing the Court that the procedures of Rule 49(a), SCRCP are inapplicable, because such a finding would support the jury's verdict.

The common law, South Carolina, and Federal Rules of Civil Procedure implicitly recognize three forms of verdicts: the general verdict, the general verdict accompanied by interrogatories, and the special verdict.[6] Rules 49, 58, SCRCP; Fed. R. Civ. P. 49, 58. Rule 49 does not explicitly define what constitutes a general verdict so other authorities must be relied upon in ascertaining its parameters. A general verdict is a "verdict by which the jury finds in favor of one party or the other, as opposed to resolving specific fact questions." *General Verdict*, Black's Law Dictionary (7th ed. 1999). A general verdict pronounces generally in favor of the plaintiff or in favor of the defendant. *Mason v. Ford Motor Co., Inc.*, 307 F.3d 1271, 1274 (11th Cir. 2002). "[T]he hallmark of a general verdict is that it requires the jury to announce the 'ultimate legal result of each

[6] The language of Rule 49, SCRCP parallels and repeats most of the language of the federal rule, and the Court may look to federal decisions for guidance on interpreting it. *Maybank v. BB&T Corp.*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016).

claim.'" *Johnson v. Able Trucking Co., Inc.*, 412 F.3d 1138, 1142 (10th Cir. 2005) (quoting *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1031 (9th Cir. 2003)).

A general verdict commonly appears as a single statement in a form similar to the following: "We, the jury in this action, find for plaintiff and against defendant in the sum of $*[dollar amount of verdict]*." 1B Fed. Proc. Forms § 1E:9 (2023). Of note is that a general verdict is a verdict in which the jury *only* makes a finding in favor of one party and may announce damages. *Zhang*, 339 F.3d at 1031; *Clinton Physical Therapy Services, P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 610 (Iowa 2006).

> The jury simply announces in whose favor it finds, and if for the plaintiff, in what amount. General verdicts provide little explanation for the decision, and thus, if a general verdict appears to be inconsistent, there is little basis to determine whether that verdict was the result of rational decision making, or if it was based on sympathy for one party, confusion, mistake, or nullification. It as been said of the general verdict that it "is as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi."

S. Mgmt. Corp. v. Taha, 378 Md. 461, 502, 836 A.2d 627, 651 (Md. 2003) (Raker, J., dissenting) (quoting *Skidmore v. Baltimore & Ohio R.R. Co.*, 167 F.2d 54, 60 (2d Cir. 1948)).

The general verdict accompanied by interrogatories is designed to pierce the mystery surrounding a general verdict. Rule 49(b) describes this second classification of verdicts as follows:

> The court may submit to the jury, *together with appropriate forms for a general verdict*, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict . . . . When the general verdict *and* the answers are harmonious, the appropriate judgment upon the verdict *and* answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in

> accordance with the answers, *notwithstanding the general verdict* . . . . When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers *and* verdict or shall order a new trial.

Rule 49(b), SCRCP (emphasis added). The Rule 49(b) general verdict with written interrogatories, much like the general verdict, "*is denoted by a jury finding upon the ultimate issue*, in contrast to a special verdict, but includes factual findings relevant to some aspect of the judgment." *State v. Payne*, 298 Or. App. 411, 426, 447 P.3d 515, 524 (Or. Ct. App. 2019) (emphasis added).

Importantly, the plain language of Rule 49(b) specifies that the general verdict must be separate and distinct from the written interrogatories and answers. *See Butler v. Gamma Nu Chapter of Sigma Chi*, 314 S.C. 477, 445 S.E.2d 468 (Ct. App. 1994) ("The same is true regarding the question of whether to submit to the jury written interrogatories *with* general verdict forms."); *Bree v. Jalbert*, 87 N.J. Super. 452, 464, 209 A.2d 836, 843 (N.J. Super. Ct. Law Div. 1965) ("From the custom of interrogating a jury on the return of a general verdict there was derived at common law in the United States the practice of submitting special interrogatories to the jury and requiring that their answers *accompany* the general verdict.").

This is because the entire purpose behind Rule 49(b) is to permit a trial court to inquire into the basis for the jury's return of a general verdict. The interrogatories serve to "test the correctness of the general verdict returned and enable the court to determine as a matter of law whether such verdict shall stand." *Freeman v. Norfolk & W. Ry. Co.*, 69 Ohio St. 3d 611, 613-14, 635 N.E.2d 310, 313 (Ohio 1994). By asking the jury to make

a special finding on issues of fact independently probative of the verdict, a trial court may ensure the validity of a general verdict. *Simmons v. Garces*, 198 Ill. 2d 541, 555, 763 N.E.2d 720, 730, 261 Ill. Dec. 471, 481 (Ill. 2002). The written interrogatory thus serves "as a guardian of the integrity of a general verdict in a civil jury trial." *Id.*

In short, under Rule 49(b) the written interrogatories do not serve the dual purpose of rendering a general verdict and eliciting determinations of material facts to test the general verdict; the written interrogatories *supplement* the general verdict. *See Dykema v. Carolina Emergency Physicians, P.C.*, 348 S.C. 549, 552, 560 S.E.2d 894, 895 (2002) ("[T]he jury returned a general verdict *accompanied* by special interrogatories . . . ."). This is clear from the plain language of Rule 49(b). *See Commonwealth v. Reeder*, No. 3192 EDA 2015, 2017 WL 3711019, at *2 n.3 (Pa. Super. Ct. Aug. 29, 2017) (citing Kate H. Nepveu, *Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Jury Trials*, 21 Yale L. & Pol'y Rev. 263, 264 (2003)) ("By contrast, special interrogatories ask the fact-finder to answer questions that merely supplement, without replacing, a general verdict . . . .").

> Rule 49(a) describes the third classification of verdict, the special verdict.
>
> > The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate.

Rule 49(a), SCRCP. It is readily apparent from the language of Rule 49(a) that a special verdict form does not ask the jury to render a general verdict. *See* Rule 49(a), SCRCP;

Richard's Paint and Body Shop, LLC v. BASF Corp., No. A-11-CA-560 AWA, 2012 WL 5399059, at *5 (W.D. Tex. Nov. 5, 2012) (stating that Rule 49(a) gives the trial court authority to dispense with the general verdict altogether); *Clinton Physical Therapy Servs.,* 714 N.W.2d at 610 (stating that on a special form "[n]o general verdict is entered by the jury . . . ."). Under Rule 49(a) the trial court gives a detailed charge of the law related to the case to the jury, "almost as he would for a general verdict", and the jury, applying the instructions, "records its conclusions with precision, *not in the conglomerate ambiguity of 'for the plaintiff,' 'for the defendant,' or the like.*" John R. Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338, 340 (1967) (emphasis added).

Rule 49(a) also states that if the court "omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury." Rule 49(a), SCRCP. Therefore, Rule 49(a) eliminates the doubt inherent in general verdicts, and the potential for inconsistency presented by the Rule 49(b) general verdict accompanied by written interrogatories, while avoiding the "hazard [of] . . . the verdict remain[ing] incomplete and indecisive" where the jury does not decide every element of recovery or defense or return a consistent verdict on the ultimate liability of one party or the other. *Kavanaugh v. Greenlee Tool Co.*, 944 F.2d 7, 11 (1st Cir. 1991). This feature of the Rule 49(a) verdict form is key to understanding the error of the Circuit Court's rationale in reducing the verdict. Under Rule 49(a), the issue of occurrences, if raised

by the pleadings and the evidence, would have been removed from the jury's consideration and reserved for the Circuit Court.

The distinction between general verdicts and special verdicts has been summed by the Supreme Court of the United States as follows:

> Now a general verdict embodies both the law and the facts. The jury, taking the law as given by the court, apply that law to the facts as they find them to be and express their conclusions in the verdict . . . . Beyond this, it was not infrequent to ask from the jury a special rather than a general verdict, that is, instead of a verdict for or against the plaintiff or defendant *embodying in a single declaration the whole conclusion of the trial*, one which found specially upon the various facts in issue, leaving to the court the subsequent duty of determining upon such facts the relief which the law awarded to the respective parties.

Walker v. N.M. & S. Pac. R.R., 165 U.S. 593, 596-97, 17 S. Ct. 421, 422, 41 L. Ed. 837 (1897) (emphasis added).

> If the jury announces only its ultimate conclusions, it returns an ordinary general verdict; if it makes factual findings *in addition to the ultimate legal conclusions*, it returns a general verdict with interrogatories. If it returns only factual findings, leaving the court to determine the ultimate legal result, it returns a special verdict.

Zhang, 339 F.3d at 1031 (emphasis added).

> Both special verdicts and special interrogatories submitted with a general verdict are findings by the jury that the court uses to enter judgment – like pieces of a puzzle. In the case of special verdicts, the jury merely gives the court the pieces, and the court assembles the puzzle and enters judgment. In the case of a general verdict with special interrogatories, the jury assembles the puzzle to complete the picture.

Clinton Physical Therapy Servs., 714 N.W.2d at 611. It is readily apparent from the language of Rule 49 as well as the case law of other jurisdictions that the distinguishing factor separating a general verdict or a Rule 49(b) verdict from a Rule 49(a) verdict is the utilization of general verdict form asking the jury, in a single declaration or in the

conglomerate of multiple questions, to explicitly render an ultimate decision either for or against the plaintiff or defendant.

B. Regardless of the Circuit Court's intentions, under the plain language of Rule 49, SCRCP, the subject verdict form is clearly a Rule 49(a) special verdict.

In its May 5, 2023 Order the Circuit Court found that the subject verdict form was a general verdict, and that it was therefore precluded by *Chastain* from leaving the jury's award of damages intact under the TCA. This finding is unquestionably in error because the verdict form never asked the jury to make an ultimate determination on liability and damages in a single, conclusive statement, and instead asks the jury specific fact questions relating to some, but not all, of the elements of the Binghams' defamation claim. As an alternative argument, in its reply memorandum in support of its post-trial motions, MUSC proposed that the verdict form was a Rule 49(b) general verdict accompanied by written interrogatories. This argument is also flawed, not only because the subject verdict form is devoid of anything resembling a general verdict, but because the written questions submitted to the jury by the Circuit Court did not encompass the elements of the defamation claim in their entirety, which would have required the Circuit Court to have made an assumption as to the jury's general verdict and entered judgment on a prohibited, incomplete verdict form, as Rule 49(b) does not authorize a trial court to make determinations on factual issues.

The special verdict form submitted to the jury by the Circuit Court asked the jury three questions:

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

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

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

(R. p. 4). Notably, the verdict does not contain a single statement to the effect of "We, the jury in this action, find for plaintiffs and against defendant in the sum of $750,000 each", yet it undisputedly contains three written questions on specific issues of fact; therefore, the verdict form is not a general verdict under its common meaning, and the Circuit Court's May 5, 2023 Order is in error.

The questions on the verdict form are based on the first, second, and fourth elements of the defamation claim as defined under South Carolina law. The elements of defamation include: "(1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 506 S.E.2d 497 (1998) (Toal, J., concurring) (citing Restatement (Second) of Torts § 558 (Am. L. Inst. 1977)). In addition to omitting a general verdict, the special verdict form does not ask the jury to make a factual finding on the issue of common law malice, which was the standard of fault implicated under the facts and circumstances of this case. *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 475-76, 629 S.E.2d 653, 670 (2006).

In its reply memorandum in support of its post-trial motions, MUSC cited a number of federal cases for the proposition that the subject verdict form was a Rule 49(b) general verdict accompanied by written interrogatories. A review of the federal case law demonstrates that occasionally federal courts have found that verdict forms similar to the subject verdict form in this case were either general verdicts or verdicts submitted to the jury under Rule 49(b). However, the first theory, that the subject verdict form is a general verdict, is inapplicable because here the subject verdict form did not ask the jury to make a factual finding on the issue of common law malice, making it impossible for the Circuit Court or this Court to determine how the jury would have found on this elemental issue, and thus, whether the jury made a general legal conclusion as to liability. As to the second theory, that the subject verdict form is a general verdict with written interrogatories, the reasoning underlying the theory is flawed because it ignores the plain language of Rule 49 and asks the Court to delve into the intentions of the Circuit Court without regard to Rule 49(b)'s specific requirements. Such an exercise directly controverts the rules of statutory interpretation and cannot serve as a reasonable framework for the courts of this State to reliably characterize verdict forms in the future.

1 <u>The verdict form cannot be construed as asking the jury to return a general verdict because it does not ask the jury to make a single, ultimate decision on liability or to answer a sufficient number of factual questions from which the Circuit Court could have assumed the jury made an ultimate determination of liability.</u>

As noted above, the subject verdict form omits any questions as to common law malice, which is the standard of fault in private figure defamation cases involving a

private matter, as presented by the facts of this case. *Erickson*, 368 S.C. at 475-76, 629 S.E.2d at 670 ("[T]he plurality of the Court in *Holtzscheiter II* chose to retain common law malice and accompanying presumptions in private-figure actions."). While it is true that in this case there would have been a presumption that MUSC acted with common law malice, to reach an ultimate decision as to liability the jury was required to make a factual determination as to whether MUSC acted with common law malice or whether it did not, regardless of whether the evidentiary burden on this element of the defamation claim belonged to the Binghams or MUSC. *See S.C. State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 376, 346 S.E.2d 324, 325 (1986) (stating that the absence of an element renders a cause of action insufficient). And even if the Binghams were not generally required to plead and prove common law malice due to their status as private figures, in this case the presumption would have been ignored as the Circuit Court determined that the statements were protected by a qualified privilege.

Even if the defamation is actionable *per se*, if the communication is privileged, the plaintiff must prove common law malice to overcome the privilege.[7] *Bell v. Bank of Abbeville*, 208 S.C. 490, 494, 38 S.E.2d 641, 643 (1946) (stating that a privileged communication is an exception to the rule that malice will be presumed where the statement is actionable per se); *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334

[7] A defamatory statement is classified as actionable *per se* when it is libel or when it is slander charging the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession. *Parrish v. Allison*, 376 S.C. 308, 322, 656 S.E.2d 382, 389 (Ct. App. 2007). A plaintiff is not required to plead and prove common law malice and special damages when the statement is actionable *per se*. *Id.*

S.C. 469, 484, 514 S.E.2d 126, 134 (1999) ("Where the occasion gives rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice . . . ."); *Castine v. Castine*, 403 S.C. 259, 269, 743 S.E.2d 93, 98 (Ct. App. 2013) (stating that to the extent the issue of common law malice becomes an issue, "its existence is a question of fact that must be proven at trial."). Here, the Circuit Court found that a qualified privilege applied to the statements made in this case. (R. p. 790, lines 21 – 24). Therefore, the presumption of common law malice was no longer applicable, and the Binghams were required to prove common law malice.[8] However, the subject verdict form entirely omits the issue of common law malice. On its face, the verdict form does not present an ultimate determination of liability in favor of one party or the other, it does not permit an inference of liability by virtue of its factual questions, and by definition is therefore not a general verdict.

Other jurisdictions analyzing verdict forms similar to the subject verdict form in this case almost unanimously find that such verdict forms are general verdicts only where the jury has been asked to make specific factual findings on each element of

[8] At trial, the undersigned argued that in this case there is a presumption of common law malice because it involves a matter of private concern and private-figure plaintiffs. To the extent that MUSC would argue that the Binghams should be judicially estopped from arguing on appeal that there is an exception to the presumption of common law malice for privileged statements, MUSC must prove that the Binghams' argument at trial was intentionally made to mislead the Circuit Court. *See Cothran v. Brown*, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004). There is no such proof in the record that the undersigned sought to intentionally mislead the Circuit Court, as the proposition that there is a presumption of common law malice under the circumstances of this case is supported by South Carolina precedents. Further, the Circuit Court instructed the jury that the Binghams were required to establish by a preponderance of the evidence fault on MUSC's part, that there was a qualified privilege, and that the Binghams could overcome the privilege by proving that MUSC did not act in good faith or acted with reckless disregard of the truth. (R. p. 786, lines 2 – 8, p. 790, line 12 – p. 791, line 9).

liability, thus leaving no factual determinations to the trial court and eliminating the need to make any assumptions upon entering judgment, or where the jury has been asked to generally find the defendant liable on each of several different theories. *See Jarvis v. Ford Motor Co.*, 283 F.3d 33, 55-56, 71-72 (2d Cir. 2002); *Miller v. Premier Corp.*, 608 F.2d 973, 982-83 (4th Cir. 1979); *Turyna v. Martam Const. Co., Inc.*, 83 F.3d 178, 181-83 (7th Cir. 1996); *Christiansen v. Wright Med. Tech., Inc.*, 851 F.3d 1203, 1205 n.3, 1213 n.8 (11th Cir. 2017); *Mason v. Ford Motor Co., Inc.*, 307 F.3d 1271, 1273-75 (11th Cir. 2002); *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1053 n.10, 1055 (11th Cir. 1994); *Giddy Up, LLC v. Prism Graphics, Inc.*, Civil Action No. 3:06-CV-0948-B, 2008 WL 656504, at *3 (N.D. Tex. March 12, 2008). None of these cases find that a verdict form omitting a single, ultimate question on liability and specific written questions sufficient to satisfy every element of each claim can be a general verdict. That is because characterizing such a verdict form as a general verdict would impermissibly require the trial court to assume certain unanswered factual questions in order to enter judgment.

Here, in order for the Circuit Court to characterize the subject verdict form as a general verdict, it would have had to assume that the jury had made a finding in the Binghams' favor as to the issue of common law malice. This is because the absence of any one of the elements of a tort renders the cause of action insufficient. *S.C. State Ports Auth.*, 289 S.C. at 376, 346 S.E.2d at 325. Under South Carolina law, a circuit court cannot construe the verdict of the jury, and it cannot enter judgment on an incomplete general verdict form. *Stevens v. Allen*, 336 S.C. 439, 451, 520 S.E.2d 625, 631 (Ct. App.

1999). Therefore, the subject verdict form could not have been a general verdict, either logically or under the plain language of Rule 49. Since the subject verdict form left an essential factual determination to the Circuit Court on the issue of common law malice, on its face it does not resolve the case against MUSC, it simply makes findings of fact, and by entering judgment in the Bingham's favor, by operation of law Rule 49(a) preserves the verdict and deems any unresolved findings of fact in favor of the Binghams.

2. <u>The Circuit Court's jury charges and intentions are not dispositive of whether the subject verdict form is a Rule 49(b) general verdict accompanied by interrogatories, as such a determination must be governed by the plain language of Rule 49(b), SCRCP.</u>

MUSC is likely to argue that despite the specific written factual questions posed by the subject verdict form, it is best characterized as a Rule 49(b) verdict because the Circuit Court's jury charges and entry of judgment indicate that the Circuit Court intended for the jury to make an ultimate determination of liability. This argument is flawed because it ignores Rule 49(b)'s stated requirements and would require the Circuit Court to have made an assumption as to the jury's determination of a required element of the defamation claim.

Several federal jurisdictions have stated that when determining whether a verdict form is a Rule 49(a) special verdict or a Rule 49(b) general verdict accompanied by interrogatories, the primary question is whether the trial court was seeking a general verdict accompanied by answers to interrogatories and intending to use the procedures outlined by Rule 49(b), regardless of the language on the verdict form. *E.g., Putnam*

Resources v. Pateman, 958 F.2d 448, 455 (1st Cir. 1992); *Lavoie v. Pac. Press & Shear Co., a Div. of Canron Corp.*, 975 F.2d 48, 53 (2d Cir. 1992); *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1521 (6th Cir. 1990); *Mason*, 307 F.3d at 1275. In order to make this determination, these courts have usually looked to whether the trial court charged the jury with the law prior to deliberations. *Id.* The logic of these decisions is that if the trial court had intended for the jury to only make findings of fact under Rule 49(a), then instructions on the law would not be needed. However, these decisions are in error primarily because they ignore the requirements of Rule 49(b) and the language of Rule 49(a). Additionally, their logic is inapplicable here because construing the subject verdict form as a Rule 49(b) verdict would again have required the Circuit Court to make assumptions on certain factual findings by the jury, leading to an impermissible entry of judgment on an incomplete verdict form.

Courts will apply the same rules of construction used to interpret statutes in discerning the meaning of the South Carolina Rules of Civil Procedure. *Garrison v. Target Corp.*, 435 S.C. 566, 576, 869 S.E.2d 797, 803 (2022). "Where the statute's language is plain and unambiguous, and coveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The best evidence of intent is in the statute itself: "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.* (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 (5th ed. 1992)). When the terms of a

statute are clear, the court must apply those terms according to their literal meaning. *Cooper v. Moore*, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002). The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. *Durham v. United Cos. Fin. Corp.*, 331 S.C. 600, 604, 503 S.E.2d 465, 468 (1998).

Rule 49(b) specifically states that under its procedures written interrogatories must be accompanied by a general verdict. Written interrogatories must be submitted "with appropriate forms for a general verdict", and "the general verdict *and* the answers" must be consistent. Rule 49(b), SCRCP (emphasis added). Rule 49(b) contains no language discussing the classification of a verdict form based on the intentions of the trial court. The plain language of Rule 49(b) thus requires that a verdict form submitted pursuant to its authority must contain both a general verdict and written interrogatories. Furthermore, the entirety of Rule 49 contains no language differentiating between Rule 49(a) and Rule 49(b) verdict forms based on the provision of legal instructions to the jury prior to deliberations.

Here, the subject verdict form only contains written questions on three issues of fact that do not reflect all of the elements of the Binghams' defamation claim. The first question, which asks if MUSC published a false and defamatory statement, goes to the first element of the defamation claim and is clearly a question of fact. *See Kelley v. Wren*, 415 S.C. 379, 387, 782 S.E.2d 406, 410 (Ct. App. 2016) ("[T]he issue of whether Wren accused Kelley of committing a crime by delivering contributions was a question of fact for the jury . . . ."). The second question, whether the jury found that the scope of the

qualified privilege was exceeded, reflects the second element of the defamation claim and is also a pure question of fact. *See Fountain v. First Reliance Bank*, 398 S.C. 434, 446, 730 S.E.2d 305, 311 (2012) ("[A]buse of the privilege ordinarily is a question of fact for the jury . . . ."). The third question on the amount of damages is a quintessential question of fact. *Wilder v. Blue Ribbon Taxicab Corp.*, 396 S.C. 139, 148, 719 S.E.2d 703, 708 (Ct. App. 2011) ("The amount of damages suffered in a personal injury action is a question for the fact-finder."). None of these questions required the jury to apply the law to the facts or make an ultimate determination on liability, either standing alone or in the conglomerate.

The questions and answers are not in such comprehensive and conclusory terms as to constitute a general verdict. Therefore, the verdict form is missing a key requirement under Rule 49(b): *a general verdict. See Merchant v. Ruhle*, 740 F.2d 86, (1st Cir. 1984) ("We would be reluctant to interpret Rule 49(b) as applicable. First, there is no 'general verdict' even if the jury's responses qualify as answers to 'interrogatories upon one or more issues of fact.'"); *Simien v. S. S. Kresge Co.*, 566 F.2d 551, (5th Cir. 1978) ("Nowhere was there given to the jury 'appropriate forms for a general verdict.' Thus the submission must be judged under the standard of Rule 49(a)."); *e.g. Sakamoto v. N.A.B. Trucking Co., Inc.*, 717 F.2d 1000, 1003 n.3, 1006 (6th Cir. 1983) (describing a general verdict with written interrogatories, including an appendix with sample verdict form); *Givens v. City of Chicago*, ---N.E.3d---, 2023 IL 127837, 2023 WL 6886085, at *6, 15 (Ill. 2023); *Ligon v. Norris*, 371 S.C. 625, 633, 640 S.E.2d 467, 471 (Ct. App. 2006) (describing a general verdict with special interrogatories). The Circuit Court's

instructions to the jury do not cure the subject verdict form of its omission of a general verdict under Rule 49(b)'s requirements.

The federal jurisdictions that have looked to the use of jury instructions as a differentiating factor between a general verdict accompanied by interrogatories and a special verdict are flawed for an additional reason: Rule 49(a) explicitly provides that a trial court must provide instructions to the jury when submitting a special verdict form. "The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue." Rule 49(a), SCRCP. "[T]hat the interrogatories submitted to the jury . . . followed a general charge to the jury on the relevant legal rules, does not take them out of the purview of Rule 49 or, more exactly, of Rule 49(a)." *Downs v. Gulf & Western Mfg. Co., Inc.*, 677 F. Supp. 661, 669 (D. Mass. 1987). "The use of a special verdict under Rule 49 frequently calls for explanatory instructions." *Clegg v. Hardware Mut. Cas. Co.*, 264 F.2d 152, 156-57 (5th Cir. 1959). Simply put, the fact that the Circuit Court provided the jury with instructions, in light of the plain language of Rule 49, has little to no bearing on whether the subject verdict is properly classified as a Rule 49(a) or Rule 49(b) verdict form.

Therefore, the primary question for this Court in answering whether the verdict form in this case was a special verdict or general verdict accompanied by interrogatories is simple: Did the verdict contain a general verdict in any form? Not only does the subject verdict form not contain a question asking the jury to make an explicit, ultimate finding as to liability, it does not contain sufficient questions which would have

permitted the Circuit Court to infer that the jury had made an ultimate decision as to liability. Therefore, in order for the Circuit Court to have entered judgment on the verdict, it was required to avail itself of Rule 49(a), which creates a procedure for the legally correct entry of judgment under such circumstances. By necessity, the Circuit Court had to state the ultimate legal result of the trial in entering judgment, and such an exercise would be entirely permissible only under Rule 49(a).

3. The characterization of the subject verdict form as a special verdict is consistent with South Carolina and federal precedents and is the only mechanism by which the Circuit Court could have properly entered judgment on the verdict rendered by the jury.

The application of Rule 49(a) solves all of the aforementioned problems with construing the subject verdict form as a general verdict or a general verdict accompanied by interrogatories. Rule 49(a) does not require the submission of a question on each issue of fact. Rule 49(a), SCRCP; *Reorganized Church of Jesus Christ of Latter Day Saints v. U.S. Gypsum Co.*, 882 F.2d 335, 338 (8th Cir. 1989). In fact, Rule 49(a) by its language contemplates that a special verdict will only consist of special written findings on issues of fact without submitting to the jury a general verdict: "The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact." Rule 49(a), SCRCP.

In the event that factual issues raised by the pleadings and the evidence are omitted from the verdict form, Rule 49(a) has created a saving mechanism by which the trial court may make factual findings upon such issues, or choose not to, in which case it is deemed to have made such findings in accord with the judgment. *Kavanaugh*, 944

F.2d at 11 (1st Cir. 1991) (stating that the purpose of Rule 49(a) is to sidestep the hazard of the verdict remaining incomplete and indecisive where the jury did not decide every element of recovery or defense). Thus, Rule 49(a) permitted the Circuit Court to enter judgment on the jury's verdict, even in the absence of a finding on the issue of common law malice, while avoiding the general prohibition against entering judgment on an incomplete verdict. By operation of this self-executing saving mechanism, the parties waived the right to a jury trial on the issue of occurrences, and the Circuit Court was consequently permitted to make a finding on this issue. Since it declined to do so, Rule 49(a) provides that an implicit finding on the issue was made consistent with the judgment, which was $1,500,000 for both Kellie and Kayla Bingham. It was error for the Circuit Court to reduce the verdict nearly three months after it was deemed to have made a factual determination of at least three occurrences in accord with the verdict.

A vast majority of federal jurisdictions find that when a verdict form does not contain (1) a comprehensive set of questions from which the jury's finding on liability may be determined with certainty, or (2) a general verdict in the form of a single, ultimate question on liability, the verdict form is a special verdict under Rule 49(a).[9] *Kavanaugh*, 944 F.2d at 8, 12; *Bradway v. Gonzales*, 26 F.3d 313, 316-17 (2d Cir. 1994); *Malley-Duff Assocs., Inc. v. Crown Life Ins. Co.*, 734 F.2d 133, 144-45 n.3 (3rd Cir. 1984); *Ladnier v. Murray*, 769 F.2d 195, 197 (4th Cir. 1985); *Reo Indus., Inc. v. Pangaea Resource Corp.*, 800 F.2d 498, 500 n.3, 501 (5th Cir. 1986); *Mercer v. Long Mfg. N.C.,*

[9] Many of these cases conclude that a verdict form is a special verdict even if it contains a sufficient series of questions upon which a trial court could have inferred the jury's ultimate determination of liability.

Inc., 665 F.2d 61, 64 n.8 (5th Cir. 1982); *Alverez v. J. Ray McDermott & Co., Inc.*, 674 F.2d 1037, 1039 n.1 (5th Cir. 1982); *Guidry v. Kem Mfg. Co.*, 598 F.2d 402, 404-06 (5th Cir. 1979); *Bates v. Jean*, 745 F.2d 1146, 1149-50 (7th Cir. 1984); *Skyway Aviation Corp. v. Minneapolis, N. & S. Ry. Co.*, 326 F.2d 701, 703 (8th Cir. 1964); *Pierce v. S. Pac. Transp. Co.*, 823 F.2d 1366, 1368 n.1, 1370 (9th Cir. 1987); *Johnson v. Able Trucking Co., Inc.*, 412 F.3d 1138, 1142-43 (10th Cir. 2005); *Bonin v. Tour West, Inc.*, 896 F.2d 1260, 1262-63 (10th Cir. 1990); *Stewart & Stevenson Servs., Inc. v. Pickard*, 749 F.2d 635, 639 n.2, 644-45 (11th Cir. 1984); *Whitlock v. Jackson*, 754 F. Supp. 1394, 1396-97 (S.D. Ind. 1991); *Team Contractors, L.L.C. v. Waypoint Nola, L.L.C.*, Civil Action No. 16-1131, 2018 WL 4252553, at *1, 3 (E.D. La. Sep. 6, 2018); *Downs*, 677 F. Supp. at 668, 673; *Richard's Paint and Body Shop, LLC v. BASF Corp.*, No. A-11-CA-560 AWA, 2012 WL 5399059, at *1, 7-8 (W.D. Tex. Nov. 5, 2012). South Carolina courts have historically described verdict forms similar to the one at issue in this case as special verdicts. *See Scruggs v. Quality Elec. Servs.*, 282 S.C. 542, 543-44, 320 S.E.2d 49, 50 (Ct. App. 1984); *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 298-99, 641 S.E.2d 903, 905 (2007); *Erickson*, 368 S.C. at 460-61, 629 S.E.2d at 662.

The verdict form in this case did not contain a comprehensive set of questions on the requisite elements of the Binghams' defamation claim from which liability could be clearly determined, nor did it contain any form of question asking the jury to make an ultimate determination of liability. This removes the verdict form from the realm of Rule 49(b) and general verdicts, and places it squarely within the category of special verdicts described in Rule 49(a). The plain language of Rule 49 makes no mention of a

trial court's intentions or the use of jury instructions as factors that are dispositive in the classification of a verdict form. However, the language of Rule 49 does make clear that in order to fall under Rule 49(b), a verdict form *must* contain a general verdict. Since the subject verdict form did not contain a general verdict, it was error for the Circuit Court to find it was general verdict, necessitating a reversal of the Circuit Court's Orders.

III. Under Rule 49(a), SCRCP, either the Circuit Court could make its own finding on the issue of occurrences, or it would be deemed to have made such a finding in accord with its entry of judgment if it declined to do.

It is undisputed that the verdict form does not include questions asking the jury to return a special written finding on the issue of occurrences. However, the verdict form's failure to include a question on this issue, or on the issue of which statements the jury found to be defamatory, did not preclude the Circuit Court from making such findings, either itself or by operation of law.

> If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or if it fails to do, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

Rule 49(a), SCRCP. Relying on *Chastain*, the Circuit Court determined that since it submitted a general verdict to the jury, it was precluded from making a determination on the number of occurrences. In *Chastain*, the Supreme Court held that when a general verdict form is submitted to the jury without including a written question asking the jury to return a finding on the issues of occurrences, then it is appropriate to reform the

verdict to reflect a single occurrence, since it is the plaintiff's burden to prove each occurrence. *Id.* at 174, 694 S.E.2d at 543-44. This holding is clearly inapplicable when a special verdict is submitted to the jury pursuant to Rule 49(a).

A. The issue of occurrences was raised by the pleadings and by the evidence introduced at trial.

Rule 49(a) explicitly states that the trial court may make a finding not only on issues that are essential to the plaintiff's claim, but on *any* issue raised by the pleadings or by the evidence. The issue of occurrences was raised by the Binghams in their Complaint, by MUSC in its Answer, and by the evidence introduced at trial. Even though the statutory cap under S.C. Code Ann. § 15-78-120 is not an affirmative defense, MUSC raised it as a defense in its answer, stating that "Plaintiffs' recovery, if any, is limited by the provisions of the South Carolina Tort Claims Act, including but not limited to S.C. Code Ann. § 15-78-120." (R. p. 58); *see Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 282-84, 607 S.E.2d 711, 714-15 (Ct. App. 2005). Section 15-78-120 generally sets forth that the total recovery in any claim brought under the TCA cannot exceed $600,000 per occurrence. The Complaint filed in this action alleges that defamatory statements were made on separate occasions by Dr. Hazen-Martin, Dr. Kasman, and subsequent individuals. (R. pp. 51-52). Therefore, the pleadings at a minimum raise the issue of whether separate, remote publications were made for which MUSC could be liable under a theory of multiple occurrences.

Additionally, the evidence introduced in this case raises the issue of whether there are multiple occurrences for which MUSC could be liable. The evidence indicates that separate agents of MUSC made at least three separate and distinct defamatory

publications concerning the Binghams at separate and distinct times.[10] First, Dr. Hazen-Martin insinuated that the Binghams were cheating by informing Dr. Kasman that they were progressing "lock-step" throughout the entire examination, despite the fact that she testified at trial that she could not have known whether they actually were on the same questions throughout the entire duration of the examination. (R. p. 798; R. p. 407, line 23 – p. 408, line 13). Second, five days later, Dr. Kasman characterized the Binghams' conduct as "the cheating" in a letter written to Joseph Ivey, and specifically accused the Binghams of signaling one another and passing notes. (R. p. 803).

Third, over a month later, after Dr. Dubois had overturned the Honor Council's conviction, a member of the Honor Council, in violation of FERPA, published at least one statement to someone outside the Honor Council, containing detailed information, accusing the Binghams of cheating on their examination and using their family and political connections to have the conviction overturned. (Supp. R. p. 2, lines 2 – 10; R. p. 402, lines 7 – 13; R. p. 473, line 6 – p. 475, line 5; R. p. 496, lines 21 – 22; R. p. 497, lines 7 – 12; R. p. 546, line 24 – p. 547, line 6; R. p. 550, line 25 – p. 551, line 5; R. p. 556, lines 3 - 12; R. pp. 808-11; R. pp. 814-818). These three publications occurred at separate times and places, were undertaken by separate MUSC employees and/or agents and involved separate defamatory assertions concerning the Binghams. Each is a separate, actionable occurrence that was alleged by the Binghams in their Complaint.

[10] The Binghams contend that six separate publications are supported by the record. The defamatory letter from Dr. Kasman to Mr. Ivey was emailed as well to Myra Haney Singleton. This email was subsequently forwarded three times. (R. pp. 801-802). *See* Restatement (Second) of Torts § 577A cmt. a (general rule is that each communication of the same defamatory matter by the same defamer, whether to a new person or to the same person, is a separate and distinct publication for which a separate cause of action arises).

Additionally, MUSC's Answer asserts that the Binghams' recovery was limited by the number of occurrences. The issue of occurrences was explicitly raised by the parties in the pleadings and is encompassed by numerous facts in the record.

B. Rule 49(a)'s self-executing saving mechanism precluded the Circuit Court from reducing the verdict unless it made its own factual finding on the number of occurrences.

The Circuit Court was entitled and authorized by Rule 49(a) to make its own finding on the number of occurrences since the issue was raised by the pleadings and the evidence. The trial transcript demonstrates that at the conclusion of trial, the undersigned (and arguably the Circuit Court) believed the Circuit Court would make such a finding on occurrences post-trial:

> MR. COOKE: We would ask for 10 days to do post-trial motions.
>
> THE COURT: Sure.
>
> MR. COOKE: And also I don't – I think we can include this post-trial motion, but obviously to reduce the verdicts to the statutory cap.
>
> THE COURT: Anything that you all want to put on the record before we adjourn?
>
> MR. PARKER: No, Your Honor, I have – Mr. Cook [says the] verdict needs to be reduced, but we'll say that [depends] as to the number of occurrence[s].
>
> [THE COURT]: What I would say is if you will include that in your post-trial motions as to, you know, your request to amend the verdict to reflect the caps, and then you all can do a written response to that as well. And then we'll determine at that point if we need to have like a WebEx hearing on post-trial motions or something to that effect.

(R. p. 795, line 18 – p. 796, line 9). This belief was in keeping with the Circuit Court's submission of a special verdict form to the jury and the notice provided by Rule 49(a) that a trial court may make factual findings on issues omitted from a special verdict form.

On the basis of this belief, the Binghams moved the Circuit Court to make a determination of the number of occurrences on November 29, 2022, and in their December 16, 2022 memorandum in opposition to MUSC's post-trial motions, they offered further arguments that Rule 49(a) empowered the Circuit Court to determine the number of occurrences. (R. pp. 120-21; R. pp. 135-52.). On February 1, 2023, the Circuit Court conducted a hearing on the post-trial motions. (R. pp. 227-93). Months later, the Circuit Court filed an Order reducing the verdict pursuant to *Chastain* and the TCA on May 5, 2023. (R. pp. 5-9).

The subject verdict form did not include a written question on the issue of occurrences, and the parties did not object to its omission. (R. p. 726, line 19 – p. 728, line 2). Therefore, the parties waived the right to a trial by jury on the issue. Rule 49(a), SCRCP ("[E]ach party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury."). Although the Circuit Court had the opportunity to make a finding on the number of occurrences in response to the Binghams' motion to determine the number of occurrences, it declined to do so. The decision not to make a finding on the number of occurrences was not in error and was clearly permitted by Rule 49(a).

However, under Rule 49(a), if a trial court does not make a finding on an issue not submitted to the jury, "it will be presumed on appeal that the lower court made whatever finding was necessary in order to support the judgment that was entered." 9A Wright & Miller, *Federal Practice and Procedure* § 2507 (1995).

> The present record leaves little doubt that the reason the court made no findings on the omitted issues was that plaintiffs waited until after jury was discharged before bringing the omissions to the attention of the court. Consequently, plaintiffs are deemed to have waived their right to jury trial on those issues; hence, we deem the omitted findings of fact relating to Greenlee's misuse defense to have been made in conformity with the judgment entered on the special verdicts, as provided by rule 49(a) . . . .

Kavanaugh, 944 F.2d at 11-12.

Rule 49(a) is clear that if a trial court fails for any reason to make a finding on an issue of fact omitted from a special verdict form, it is deemed on appeal to have made a finding consistent with the remainder of the jury's verdict. Therefore, while it was not error for the Circuit Court to fail to make a finding on the number of occurrences, it was error for the Circuit Court to reduce the verdict, in contravention of Rule 49(a)'s self-executing saving mechanism, without first having made an explicit finding of only one occurrence. The Circuit Court's Order reducing the verdict should be reversed.

CONCLUSION

The law is clear that if a general verdict form had been submitted to the jury, it would have been the Bingham's burden, either under *Chastain* or Rule 49(b), to have ensured that the issue of occurrences was included for the jury's consideration. However, because a special verdict form was submitted to the jury, it was instead MUSC's burden to demand the issue's inclusion on the verdict form if it did not wish for

the issue to be left to the Circuit Court. Since MUSC did not object to the omission of the issue, and the Circuit Court did not make a finding on it, by operation of law the jury (or Circuit Court) are deemed to have made a finding on the issue of occurrences consistent with the jury's damages award.

A finding by this Court that the subject verdict form was a special verdict will not invalidate the verdict form itself. Neither party asks this Court to salvage the verdict form or to correct any perceived errors it may contain. Rather, the question for this Court is whether it was error for the Circuit Court to subsequently reduce the verdict based on the mistaken belief that it could not make a finding on the issue. For the foregoing reasons, the Circuit Court's Order denying the Binghams' motion to determine the number of occurrences and reducing the verdict should be reversed.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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August 1, 2025
Hampton, South Carolina

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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.: 2023-000952

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

-v-

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

CERTIFICATE OF COUNSEL

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

[SIGNATURE PAGE FOLLOWS]

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