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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2022-001332

Andrew Pampu ..... Appellant-Respondent,

v.

Erin Wingo, David Wingo, and Colin J. Gahagan, ... Respondents-Appellants.

RESPONDENTS-APPELLANTS ERIN WINGO AND DAVID WINGO'S FINAL BRIEF

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2. Did the trial court err by excluding evidence and testimony related to Clemson University's Title IX process, thus requiring a new trial?

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6. Did the trial court err in denying the Wingo Defendant's motions for a new trial based on excessive actual and punitive damages awards?

STATEMENT OF THE CASE

Respondent/Plaintiff Andrew Pampu ("Plaintiff") initiated this action on June 15, 2017, against various Doe defendants. (R. 31). Those Doe defendants were later revealed to be Appellants/Defendants Erin Wingo ("Ms. Wingo") and David Wingo ("Mr. Wingo," and collectively with Ms. Wingo, the "Wingo Defendants"), and co-defendant/co-appellant Colin J. Gahagan ("Mr. Gahagan"). The claims and allegations arise from a sexual encounter between Plaintiff and Ms. Wingo during a party at the Phi Delta Theta Fraternity house at Clemson University in the late-night hours of Saturday, October 24, 2015. (R. 36-40). Following the sexual encounter, Ms. Wingo asserted that she did not recall the details of the encounter with Plaintiff due to being heavily intoxicated. (R. 44; R. 46). The Wingo Defendants and Mr. Gahagan, in varying capacities and at various times, subsequently made statements claiming that Plaintiff raped and/or sexually assaulted Ms. Wingo. (R. 42-59). Pampu brought the Complaint in this case and

asserted causes of action against the Wingo Defendants and Mr. Gahagan for abuse of process, intentional infliction of emotional distress, civil conspiracy, and defamation. (R. 59-69).

Prior to this action being filed, the incident was reported to Clemson University's Office of Community and Ethical Standards ("OCES"), which resulted in a formal Title IX complaint to Clemson by Ms. Wingo on November 11, 2015. (R. 48). Clemson University instituted an investigation of the sexual encounter, and as a result of the investigation, charged Plaintiff with violating various Clemson University General Student Regulations, including harm to person and sexual misconduct. (R. 52; R. 340-41). Following a hearing, on February 29, 2016, Clemson University found that Ms. Wingo was "incapacitated and unable to give consent which [Plaintiff] should have reasonably known." (R. 345). Plaintiff exhausted Clemson University's appeal process, and Clemson repeatedly upheld the findings. (R. 348-359).

The abuse of process and intentional infliction of emotional distress claims were dismissed prior to trial. (R. 28-29). The defamation and civil conspiracy claims proceeded to a jury trial on March 21, 2022. (R. 1338). The jury was ***not*** presented with evidence related to Clemson's Title IX process, what Clemson did in its investigation, what evidence or information Clemson considered, its findings, or conclusions. Instead, in granting a Motion in Limine filed by Plaintiff which was later reaffirmed at trial, the circuit court excluded all evidence related to Clemson's Title IX process. (R. 1293, line 4 - 1294, line 15; R. 1386, line 15 - 1387, line 23).

Before, during, and after the trial, Plaintiff and his counsel repeatedly stressed that the defamation cause of action was related to statements made *outside* of Clemson's Title IX process and the civil conspiracy claim was based on an alleged agreement by the Wingo Defendants and/or Mr. Gahagan to have Plaintiff removed from Clemson. (R. 1287, line 23 - 1288, line 10; R. 1292, lines 8-24; R. 1394, lines 12-17; R. 1416 lines 15-21; R. 2148, lines 1-7; R. 1115). Plaintiff was

permitted to offer testimony from a vocational expert, who claimed that Plaintiff's "suspension" from Clemson University caused him to not be accepted into dental school. (R. 1930-1959).

Ultimately, the jury rendered a verdict in favor of Plaintiff on his defamation claims against the Wingo Defendants and Mr. Gahagan, awarding both actual and punitive damages against Ms. Wingo and Mr. Gahagan. (R. 1084). The jury also rendered a verdict in favor of Plaintiff on his civil conspiracy claim against Ms. Wingo and Mr. Gahagan but found in favor of Mr. Wingo on that claim. (R. 1084). Following posttrial motions, the circuit court entered a judgement notwithstanding the verdicts on the civil conspiracy claims, finding that Plaintiff failed to establish numerous elements of the civil conspiracy cause of action. (R. 5-7). The circuit court denied the remaining arguments for judgment notwithstanding the verdict or, in the alternative, a new trial, concerning the verdict on the defamation cause of action. (R. 6-12).

STATEMENT OF THE FACTS

I. Background

a. The events and aftermath of October 24, 2015.

On the evening of October 24, 2015, Ms. Wingo and her college friends were planning to attend a party at Phi Delta Theta Fraternity house at Clemson University, often referred to as the "Compound." (R. 1435, lines 1-17; R. 1632, lines 13-23). At that time, Ms. Wingo had a relationship with Mr. Gahagan, who was a Phi Delta Theta pledge brother. (R. 1630, line 12 - 1632, line 9). Plaintiff was also a pledge brother of the Phi Delta Theta Fraternity in the fall of 2015. (R. 1430, lines 16-20).

Prior to attending the party at the Compound, Ms. Wingo went to a "pregame" at a friend's dorm room at around 9:30 or 9:45 PM. (R. 1637, lines 2-7). Over the course of the next hour or so, the 5'2", 114 to 118-pound, Ms. Wingo consumed roughly nine 1.5 ounce shots of alcohol. (R.

1637, line 2 - 1638, line 22). At around 10:30 PM, Ms. Wingo and her friends left the dorm room and made the short walk to the Compound for the party, arriving at approximately 10:45 PM. (R. 1638-41). In addition to the nine liquor shots that she consumed at the dorm pregame, Ms. Wingo brought a water bottle containing vodka with her to the party at the Compound. (R. 1641, line 23 - 1642, line 7). After arriving, Ms. Wingo first found Mr. Gahagan at the party, and while talking with him, Ms. Wingo took two "pulls" from her water bottle filled with vodka. (R. 1643, line 3 - 1644, line 15; R. 1706, lines 2-13). During her conversation with Mr. Gahagan, Ms. Wingo became upset over a comment she thought he said, and the two parted ways. (R. 1644, lines 19-23; R. 1706., lines 18-21; R. 1840, line 23 - 1841 line 12).

Ms. Wingo then asked another fraternity brother for help in finding the Plaintiff. (R. 1708, lines 14-19). Ms. Wingo testified that she was substantially feeling the effects of alcohol at this time. (R. 1708, lines 23-25). From this point, Ms. Wingo's memory is spotty with regards to the events that occurred. (R. 1647, lines 5-16; R. 1707, line 10 - 1710, line 2). According to Plaintiff in his testimony, after a short discussion, Ms. Wingo propositioned Plaintiff with oral sex and the two "decided to find somewhere more private than the party." (R. 1438, lines 10-18). The two first went to an area behind one of the buildings that comprises the Compound, referred to as the doll house, and then walked between a quarter and a half a mile down a path. (R. 1438, line 10 - 1442, line 6). The two ultimately arrived between a wooden fence and a shed. (R. 1503, line 18 - 1504, line 22). Either while on the walk or after arriving at the shed, both Plaintiff and Ms. Wingo took a sip from her water bottle of vodka. (R. 1442, line 22 - 1443, line 1; R. 1506, lines 7-10). While between the shed and the fence, Plaintiff and Ms. Wingo were involved in a sexual encounter, in which Plaintiff's penis penetrated Ms. Wingo's vagina. (R. 1443-46; R. 1508-14).

Despite generally claiming that the encounter was consensual and asserting that Ms. Wingo was the initiator, the Plaintiff previously admitted that Ms. Wingo was drunk when he first saw her at the party. (R. 1521, lines 1-3). The Plaintiff stated that Ms. Wingo was on the "bad end of drunk" and acknowledged that she had difficulty walking back to the Compound after the sexual encounter. (R. 1521, lines 4-11). Furthermore, Ms. Wingo testified at trial that she has an incomplete memory of these events and described the encounter as follows:

> A: …
>
> I remember grabbing onto his arm when I got over there. And I remember looking across from me and just seeing some fraternity guy with a coozie, a blue coozie. I was a freshman in college and I thought it was the coolest thing that somebody had brought a coozie to a party.
>
> The next thing I remember is being behind the doll house, and I remember being up against a fence. Drew was in front of me. And when I tell you I remember these things, I'm not telling you like I can walk through this and -- and play it like a movie. It's like a picture.
>
> Q. Like individual snapshots? Polaroids of the event?
>
> A. Yes, ma'am.
>
> Q. Okay.
>
> A. So I remember being up against that fence. I remember Drew being in front of me, and I remember looking off like to the left-hand side and there being another couple or a couple of people. And I remember thinking, why aren't you asking what's going on? Why aren't you saying anything?
>
> The next thing I remember is, again, another snapshot of just like a break in a fence, a chain-link fence.
>
> After that, I remember being hit, being slapped on my behind and it brought me back from wherever I was blacked out. I also remember me falling off the

> side of the shed and [Plaintiff] pulling me back up and saying, "I'm not done yet."
>
> After that, I remember sitting on the ground with my hands still around my ankles. And then the next thing I remember is walking down the sidewalk or whatever it was holding onto [Plaintiff's] arm crying.
>
> We got back to the Compound and I remember he sat me on the front steps, and he said, "Call me if you need anything," and left. . . .

(R. 1709, line 13 - 1710, line 24).

After leaving the party at the Compound, Ms. Wingo returned to her dorm room with her friends. (R. 1711, lines 1-21). Ms. Wingo vomited on multiple occasions both on the way back to her dorm room and after arriving at the dorm room. (R. 1711, lines 1-8; R. 2164, lines 2-12). Her friends and resident advisor had to help her get to the bathroom, had to open her dorm room for her because she lost her key, and had to assist her in getting her into her lofted bed. (R. 1656, line 20 - 1675, line 13; R. 2163, line 2 - 2165, line 1). Throughout this process, Ms. Wingo was upset, crying, and not very coherent. (R. 2163, line 2 - 2164, line 16).

Ms. Wingo testified at trial as follows regarding her feelings when waking up on the morning of Sunday, October 25, 2015:

> A. I woke up feeling like my world had changed. Like I said, you know when you just wake up and you have that pit in your stomach and you just want to throw up? I didn't even -- I couldn't tell you what it was. I could tell you that I had been so deeply violated and just whatever had happened that night before, awful, and I didn't remember most of it.

(R. 1712, lines 7-13). Ms. Wingo continued to throw up for the remainder of the day on October 25th and began to piece together the night before. (R. 1712, line 5 - 1713, line 14). Early in the day, she told her friend that she thought she had sex with the Plaintiff. (R. 1713, lines 1-6). This suspicion was confirmed when she saw a text message sent by the Plaintiff proclaiming: "I fucked

a chick by a garbage thing behind Chipotle, so I think that definitely did it with they night alone – with that alone." (R. 1530, lines 16-22; R. 1713, lines 12-20; R. 1806, lines 14-24; R. 1828, lines 5-11). This text message was shared with Plaintiff's entire pledge class of Clemson students. (R. 1531, lines 9-11).

On both October 25 and 26, 2015, the two days that followed the incident between Ms. Wingo and the Plaintiff, Ms. Wingo confided to multiple people that she thought she had sex with Plaintiff but did not remember the details. (R. 1667-72; R. 1713-18). In these initial conversations, she did not use the terms "rape" or "sexual assault" but indicated that she lacked a memory of the events. (R. 1667-72; R. 1713-14). While discussing the night before with Mr. Gahagan on the evening of October 25th, Mr. Gahagan told Ms. Wingo something along the lines of: "If you don't remember, it is rape." (R. 1673, line 5 - 1674, line 6).

On October 27, 2015, an anonymous report was made to Clemson University asserting that Ms. Wingo had been raped. (R. 1572, lines 9-16; R. 1721, lines 3-5). Following the report, Ms. Wingo was called into a meeting with the University. (R. 1721, lines 6-7). The first time that Ms. Wingo ever used the term "rape" to describe her sexual encounter with Plaintiff was following this meeting when she was picked up by a friend. (R. 1721, lines 18-20). Ms. Wingo did tell various family and friends that she was raped by Plaintiff following the October 27, 2015, meeting with Clemson University. (R. 1676-88; R. 1722).

On November 11, 2015, a formal Title IX complaint was filed with Clemson University, and Clemson instituted an investigation of the October 24, 2015, incident. (R. 48; R. 340; R. 3067). As a result of the investigation, Clemson University charged Plaintiff with violating the following Clemson University General Student Regulations: Alcohol, Disorderly Conduct, Harm to Person, and Sexual Misconduct. (R. 342-43; R. 3075-76). The University referred the matter for a formal

administrative hearing. (R. 342-43). On February 29, 2016, after the hearing, Clemson University ultimately found that Defendant Erin Wingo was "incapacitated and unable to give consent which [Plaintiff] should have reasonably known, therefore [Plaintiff] were found in violation of all four charges . . . ," including sexual misconduct. (R. 345-47; R. 3077-79). Plaintiff exhausted Clemson's appeal process, and the University upheld the above finding and increased the Plaintiff's sanctions after the second appeal. (R. 348-359; R. 3080-83; R. 3092-95; R. 3115). Based on his actions on October 24, 2015, as determined by Clemson University in the Title IX process, Plaintiff was suspended from Clemson University for one year. (R. 359; R. 3115).

While the appeals at Clemson University were pending, Plaintiff applied to the College of Charleston. (R. 1572, lines 17-22). Although Clemson University never told him he could not return following his suspension, Plaintiff was ultimately accepted into and transferred to College of Charleston where he graduated with a degree in biochemistry. (R. 1461, line 12 - 1462, line 17; R. 1571, lines 9-17). Plaintiff testified that he applied to nine dental schools but was not accepted into any. (R. 1463, lines 16-20). As of the time of the trial, Plaintiff worked as a salesman for Siemens Health Care. (R. 1464, lines 11-17).

b. **Mr. Wingo informs Phi Delta Theta Fraternity of the events of October 24, 2015.**

Mr. Wingo is Ms. Wingo's father. (R. 1850, lines 12-16). Mr. Wingo became informed of the incident between Ms. Wingo and Plaintiff on October 27, 2015, via a phone conversation with his daughter and wife. (R. 1851, lines 17-23). On April 1, 2016, after the first two decision letters were issued by Clemson University in the Title IX process, Mr. Wingo contacted Shawn Wagoner, the president of Phi Delta Theta, to inform him of the incident that occurred involving Plaintiff and Ms. Wingo on October 24, 2015. (R. 1854, line 21 - 1856, line 7; R. 3140).

Then, on April 4, 2016, Mr. Wingo sent a demand letter to Mr. Wagoner further detailing the incident between Plaintiff and Ms. Wingo. (R. 1856-57; R. 789-95; R. 3142-46). The April 4, 2016 letter uses terms such as "rape" and "sexual assault" to describe the sexual encounter between Plaintiff and Ms. Wingo. (R. 789-95; R. 3142-46). It also details the findings of Clemson University's Title IX process and attaches the February 29, 2016 decision letter. (R. 789-95; R. 3142-46). Mr. Wingo's purpose in sending this letter was to provide a demand to the fraternity. (R. 1861, line 16 - 1862, line 15). As the letter expressly indicates, the Wingo Defendants wanted to "resolve the matter with Phi Delt without the necessity of litigation as outlined in this letter." (R. 789, 3142). Mr. Wingo testified he "was identify[ing] the liability. It's their choice on how they actually want to deal with that liability." (R. 1884, lines 14-23).

c. **Plaintiff sues Clemson University.**

On June 15, 2016, Plaintiff filed suit in the United States District Court for the District of South Carolina against Clemson University, Clemson's Board of Trustees, Clemson's President and Vice President for Student Affairs, Clemson's Title IX Coordinator Executive Director of Equity Compliance, Clemson's Director of Residential Learning, Clemson's Associate Director of Athletics, and Clemson's Executive Director of Campus Recreation alleging several causes of action related to the handling of the Title IX allegations that Plaintiff engaged in nonconsensual sexual activity with Ms. Wingo. *Doe v. Clemson Univ.*, No. 8:16-CV-1957, 2019 WL 1383822 (D.S.C. Mar. 27, 2019). (R. 18; R. 210; R. 2398). In his complaint against Clemson University, Plaintiff pled that **both he and Ms. Wingo were intoxicated** on October 24, 2015. (R. 265).

On March 21, 2018, the parties in *Doe v. Clemson* participated in mediation and reached a settlement agreement, which was reduced to writing (the "Clemson Settlement"). (R. 3190). Significantly, the Clemson Settlement reads in pertinent part: "Clemson University will reinstate

the hearing board's decision of February 29, 2016 as upheld by the University Vice President of Student Affairs." (R. 19; R. 3190).

Following the execution of the Settlement Agreement, a disagreement arose between the Plaintiff and Clemson regarding the following issues: "(1) how Clemson would treat [his] disciplinary records internally; (2) how Clemson would respond to third-party requests inquiring about [his] disciplinary records; or (3) whether Clemson would disclose any settlement agreement when confronted with a public records information request for same and, if so, whether [his] identity would be safeguarded." *Doe v. Clemson Univ.*, 2019 WL 1383822, at *2. Despite the existence of the Clemson Settlement, Plaintiff and Clemson could not agree on these issues. *Id.* Clemson then filed a motion to enforce the Clemson Settlement, and Plaintiff filed an opposition and cross-motion to void the settlement. *Id.* Ultimately, Judge Coggins concluded that the Clemson Settlement signed following mediation was enforceable. *Id.* at *3-4. Plaintiff did **not** appeal this determination.

II. Pretrial Issues

On March 14, 2018, Plaintiff filed a motion in limine to exclude the presentation of or reference to Clemson's Title IX decision and Plaintiff's subsequent settlement with Clemson pursuant to South Carolina Rules of Evidence 401, 402, and 403. (R. 1077). The motion in limine was largely based on a prior denial of a motion for summary judgment filed by the Defendants which argued that the Plaintiff's claims were collaterally estopped by Clemson University's Title IX findings. (R. 1077-81). Plaintiff claimed that because the collateral estoppel defense had been effectively rejected, evidence of the Title IX process was immaterial and irrelevant to the trial. (R. 1077-81). Under the same theory, the Plaintiff simultaneously filed a motion in limine to exclude the presentation of or reference to testimony of Alesia Smith, who was the Title IX coordinator at

Clemson University during the relevant time, pursuant to South Carolina Rules of Evidence 401, 402, and 403. (R. 865).

At the pretrial hearing on March 18, 2022, counsel for the Defendants argued that the Title IX process and Ms. Smith's testimony was relevant to various issues throughout the case, including the defense of collateral estoppel, whether the statements that Plaintiff raped Ms. Wingo were true, and whether defamation damages would be mitigated by the Title IX findings. (R. 1288-90). Counsel also argued that the testimony and information should be admissible under the doctrine of completeness. (R. 1290, lines 8-11). Notably, as counsel referenced during the pretrial hearing, the Complaint is replete with mentions of the Title IX process and mentions Title IX a total of sixteen times. (R. 31-71; R. 1290, lines 16-22). Lastly, counsel for the Defendants argued that the Title IX decision was relevant to the issue of damages because Plaintiff's anticipated calling an expert witness to testify that Plaintiff was unable to get into dental school because of the findings and conclusions from the Title IX process. (R. 1290, line 23 - 1291, line 10).

The trial judge excluded Ms. Smith's testimony and any other evidence related to the Title IX process. (R. 1293, lines 4-10). The trial court reasoned: "I think it just muddies up the water. I don't believe that's related to the issues here. I'm not going to let anything about that – their file come in, any of the Title IV [sic] information, any of that. I think that just muddies up the water and is beyond what this lawsuit is about." (R. 1293, lines 5-10).

The parties also presented arguments regarding the admissibility of the Clemson Settlement at the pretrial hearing, with the trial court likewise finding that the Clemson Settlement was inadmissible. (R. 1316-18).

At the pretrial hearing, the parties also discussed the letter authored by Mr. Wingo to Phi Delta Theta and whether Mr. Wingo was entitled to immunity based on the letter being a settlement

communication. (R. 1330-35). The court ultimately reserved ruling on this issue. (R. 1334, lines 2-5).

Again, during the pretrial hearing, counsel for Plaintiff stated on multiple occasions that Plaintiff's defamation claims and damages were not based on statements made inside the Title IX process, which process had resulted in the suspension from Clemson. (R. 1287-88; R. 1292; R. 1324).

III. The Trial

The parties proceeded to trial on March 21, 2022. (R. 1338). At the beginning of the trial, the trial court placed on the record the various rulings on motions in limine. (R. 1385, line 24 - 1388, line 2). With respect to the testimony of Ms. Smith and the Title IX proceedings at Clemson University, the trial judge reaffirmed is prior ruling. (R. 1386, line 24 - 1387, line 15). Although the trial court acknowledged that the "result" of the Title IX process "is relevant," the trial court found that the process and findings could be confusing to the jury because the proceeding was held under different standards and rules. (R. 1386, line 24 - 1387, line 15). Based on this ruling, Plaintiff was allowed to introduce evidence that he was "suspended" from Clemson University, but the Wingo Defendants were *not allowed* to present evidence of the administrative process, investigation, findings, and conclusions that led to the suspension, nor were they allowed to put into evidence the Clemson settlement. (R. 1395, lines 6-9).

With respect to the letter authored by Mr. Wingo, the trial court determined that it was admissible, as "it goes well beyond the findings from Clemson University." (R. 1397, lines 3-12). However, the trial court indicated that the portions of the letter which related to the findings of Clemson University must be redacted in order to remain consistent with his prior ruling on excluding all testimony and information related to the Title IX process at Clemson (aside from the

ultimate result). (R. 1397-98). Defense counsel argued that the letter should be admitted in its entirety or not at all, but the trial judge was unpersuaded. (R. 1399, lines 9-22).

Towards the end of Plaintiff's opening statement, counsel for the Plaintiff discussed the issue of damages and linked the reputational damage based on defamation to Plaintiff's suspension from Clemson University. More specifically, Plaintiff's counsel argued:

> To be clear, the plaintiff's civil conspiracy claim is based on the defendants' common plan to get him removed from Clemson University and removed from the fraternity. Meanwhile, plaintiff's defamation claim is actually based on defendants' false statements to at least 20 other people calling him a rapist. Because of defendants' actions, Drew will be required to disclose and self-report his removal from Clemson for the rest of his life whenever he applies to another school or applies to certain jobs. His dreams of becoming an orthodontist will never happen because of defendants' irreversible actions. His reputation has been forever tarnished by the defendants, peers at Clemson University, and all the other individuals that have defamed him.

(R. 1416, line 16 - 1417, line 4).

During the trial, Plaintiff testified that he was suspended from Phi Delta Theta and his membership was removed because "David Wingo said I had raped his daughter and then contacted headquarters nationally." (R. 1583, lines 11-17). Defense counsel argued that this opened the door to the Title IX proceedings because the letter sent by Mr. Wingo was based, at least in part, on the Title IX process and findings (even attaching those findings). (1584-85). The trial court rejected this argument. (R. 1584, lines 2-6).

During the examination of Ms. Wingo, Plaintiff's counsel asked her if she "continued to get blackout drunk" after October 24, 2015. (R. 1693, line 25 - 1695, line 4). Defense counsel's relevance objection was overruled, and Plaintiff claimed that the testimony was relevant to show

motive." (R. 1694, lines 8-14). Ms. Wingo answered that she believes she got "blackout drunk" three times after October 24, 2015. (R. 1693, line 25 - 1695, line 4).

At the end of the presentation of his case, Plaintiff called vocational expert Steven Sheldin, who testified that "but for the suspension from Clemson, [Plaintiff] would have been able to get into dental school." (R. 1939-43; R. 1948-49). Mr. Sheldin further opined that Plaintiff also sustained a loss of earning capacity throughout his life because he was unable to get into dental school due to the suspension from Clemson. (R. 1939-43; R. 1948-49). The conclusion was based on the assumption that Plaintiff would have been able to become an orthodontist following completion of dental school. (R. 1947, line 16 - 1948, line 10).

At the beginning of the presentation of the defense, the Defendants proffered the testimony of Ms. Smith, who was the Deputy Title IX Coordinator for Clemson University and director of the Office of Community and Ethical Standards who the trial court previously ruled should be excluded from testifying. (R. 2095, line 19 - 2096, line 22). Ms. Smith testified in the proffer that when they received the formal complaint against Plaintiff in 2015, two investigators were assigned to the file. (R. 2103, lines 6-8). The investigators met with the complainant (Ms. Wingo) and respondent (Plaintiff) and also gathered information and evidence from numerous witnesses. (R. 2103, lines 6-23). In investigating the sexual assault allegations against Plaintiff, the investigators interviewed 12 individuals (in addition to Plaintiff and Ms. Wingo). (R. 2105, lines 8-15; R. 2407). After gathering all possible information and evidence, the investigators prepared a report and shared it with Plaintiff and Ms. Wingo, allowing them to comment on the report. (R. 2103-04, 2109). Following the review and comment period, the investigators issued a final report and made a recommendation that the claim should move forward with an administrative hearing. (R. 2105, line 22 - 2106, line 4).

The administrative hearing was held before five board members, and Ms. Wingo and Plaintiff were both represented by licensed attorneys (called advisors in the Title IX process). (R. 2107, line 3 - 2108, line 13). During the hearing, the University, Ms. Wingo, and the Plaintiff were permitted to call witnesses to testify. (R. 2109, lines 3-6). Following the hearing, Plaintiff was found to have engaged in sexual misconduct, and the decision refers to Clemson University's antiharassment policy. (R. 2113, lines 11-15; R. 345-47; R. 3077-79). In reaching this conclusion that hearing board found that, "[b]ased on the information presented, . . . the complainant was incapacitated and unable to give consent, which [Plaintiff] should have reasonable known." (R. 2114, lines 2-7; R. 344; R. 3077). The antiharassment policy defines "rape" to include instances where the victim is incapable of giving consent because of physical incapacitation. (R. 2114, lines 13-16; R. 392).

Based on Ms. Smith's proffered testimony, following the board's decision, the parties to the Title IX proceeding are permitted two appellate opportunities – the first appeal goes to the vice president of student affairs and the second goes to the president of the university or his/her designee. (R. 2114, line 17 – 2116, line 23). All the information relevant to the investigation and hearing are provided to the appellate decision makers. (R. 2120, lines 2-16). The Plaintiff exercised his appeal rights, and the decision was ultimately affirmed. (R. 2120, lines 2-16; R. 348-60; R. 3080-83; R. 3092-95; R. 3115). In fact, the recommended punishment for the Plaintiff was increased on appeal from a six-month suspension to a one-year suspension. (R. 360; R. 3115).

Following the presentation of evidence in this trial, Plaintiff's counsel gave a closing argument. During that argument, Plaintiff's counsel again discussed the issue of damages and linked the reputational damage directly to Plaintiff's suspension from Clemson University by arguing: "The reason [Plaintiff] cannot fulfill his intended career goal of being an orthodontist is

not because of Clemson, but for [Ms. Wingo and Mr. Gahagan's] statements, Clemson would not have kicked him out." (R. 2235, lines 3-6).

After the closing arguments and before the jury was charged, counsel for the Wingo Defendants argued for a jury charge related to the defense of qualified privilege or conditional privilege in relation to Mr. Wingo's statements made to the Phi Delta Theta Fraternity. (R. 2217-19). The trial court found that the defense and/or privilege did not apply as a matter of law. (R. 2217-19). As such, the jury was not provided with an instruction related to Mr. Wingo's asserted qualified privilege defense.

IV. The Verdict and Posttrial Issues

The jury returned a verdict in favor of the Plaintiff on his defamation claims against both Ms. Wingo and Mr. Wingo. (R. 1084-85). The jury also found in favor of Plaintiff on his civil conspiracy claims against Ms. Wingo but returned a verdict in favor of Mr. Wingo on the civil conspiracy claim asserted against him. (R. 1084-85). For the defamation claim against Ms. Wingo, the jury awarded $700,000 in actual damages and $450,000 in punitive damages. (R. 1084-85). For the defamation claim against Mr. Wingo, the jury awarded $230,000 in actual damages but no punitive damages. For the civil conspiracy claim against Ms. Wingo, the jury awarded Plaintiff $2,000,000 in actual damages. (R. 1084-85).

On April 4, 2022, Mr. and Ms. Wingo filed posttrial motions asserting various arguments for judgment notwithstanding the verdict as a matter of law, or, in the alternative, for a new trial absolute, or for remittitur of verdict. (R.1094). The Wingo Defendants first argued that the trial court committed reversible error by admitting evidence of damages resulting from the Title IX investigation but not evidence of the Title IX process itself. (1094-95). The Wingo Defendants similarly argued that this error was compounded by admitting the redacted version of Mr. Wingo's

April 4, 2016 letter to the Plaintiff's fraternity. (R. 1096 ("As a result of the redactions, the letter presented to the jury made it appear that David Wingo was making false allegations of his own creation against the Plaintiff. This is not true. The redacted portions of the letter clearly show David Wingo's reliance on the true finding of the Title IX investigation, as opposed to any defamatory statement."). In a related argument, the Wingo Defendants claimed that the claims are barred by the doctrine of collateral estoppel based on the Title IX proceedings. (R. 1096-97).

The Wingo Defendants also argued that their statements were privileged from defamation and that the Plaintiff's claim for civil conspiracy fails as a matter of law because he failed to prove the essential elements of the claim. (R. 1097-1100). Finally, the Wingo Defendants argued in their posttrial motions that the verdicts rendered for the defamation and civil conspiracy claim are inconsistent and/or constitutes duplicative recovery. (R. 1100-1103).

On July 11, 2022, the trial court entered its order on the posttrial motions. (R. 4). The trial court first granted the motion to set aside the civil conspiracy verdict, finding that the Plaintiff failed to introduce evidence to establish the elements of the claim. (R. 6). The trial court concluded that there was no evidence of an agreement or plan, that there was no evidence of the commission of any unlawful act, and that there was no evidence of monetary damages. (R. 6).

The trial court denied the posttrial motions in relation to all of the issues raised regarding the defamation claims against the Wingo Defendants. In this order, and for the first time, the trial court noted that the evidence of the Title IX process was excluded under Rule 403 "because it would have been more prejudice than probative." (R. 8-9). In the trial court's post trial order the court reasoned, "Any prejudice resulting from the presentation of a heavily redacted letter could have been cured by submitting only the admissible portions of the letter instead of the entire letter with redacted portions blacked out." (R. 9). On July 20, 2022, Mr. Wingo filed a motion to

reconsider certain findings by the trial court's posttrial order, arguing that Mr. Wingo's letter to Phi Delta Theta Fraternity should have been introduced in its entirety or not at all. (R. 1148). On August 22, 2022, this motion was denied. (R. 1).

ARGUMENT

I. The trial court erred by denying the Wingo Defendants motion for a directed verdict and judgment notwithstanding the verdict because the Plaintiff's defamation claim is barred by collateral estoppel.

"When reviewing the trial court's ruling on a motion for directed verdict or a JNOV, this Court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331–32, 732 S.E.2d 166, 171 (2012); *Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001) (same). If the plaintiff fails to present such evidence, the trial court should direct a verdict for the defendant. *Wintersteen*, 344 S.C. at 35, 542 S.E.2d at 729. If the plaintiff's evidence is insufficient to support the jury's verdict, the trial court should grant JNOV for the defendant. *Richardson v. Piggly Wiggly Cent., Inc.*, 404 S.C. 231, 743 S.E.2d 858 (Ct. App. 2013). In either situation, a trial court's failure to direct a verdict or grant JNOV is reversible error. *Id.*; *Wintersteen*, 344 S.C. at 35, 542 S.E.2d at 729; *Young v. Meeting St. Piggly Wiggly*, 288 S.C. 508, 343 S.E.2d 636 (Ct. App. 1986).

The doctrine of collateral estoppel or issue preclusion provides that any issue litigated and decided that was necessary to the judgment in the first case, may not be relitigated in a second action involving a different claim. *See Catawba Indian Nation v. State*, 407 S.C. 526, 537, 756 S.E.2d 900, 906 (2014); *Lowe v. Clayton*, 264 S.C. 75, 212 S.E.2d 582 (1975). Collateral estoppel applies when an issue was "actually litigated and determined by a valid and final judgment" in a prior suit. *Zurcher v. Bilton*, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008). Collateral estoppel applies to specific

issues, regardless of whether the claims in the first and subsequent suits are the same, as long as "the precluded party has had a full and fair opportunity to litigate the issue in the first action." *Id.; see also Lowe*, 264 S.C. at 81, 212 S.E.2d at 585. The Court in *Lowe* explained:

> The rule granting conclusiveness to a judgment in regard to issues of fact which could properly have been determined in the action is limited to cases involving the same cause of action. Where a second action is upon a different claim, demand, or cause of action, the established rule is that the judgment in the first action operates as an estoppel only as to the (issues,) points or question actually litigated and determined, and not as to matters not litigated in the former action, even though such matters might properly have been determined therein.

Lowe, 264 S.C. at 81, 212 S.E.2d at 585 (quoting *Griggs v. Griggs*, 214 S.C. 177, 51 S.E.2d 622 (1949); 46 Am. Jur.2d, Judgments, Section 418).

As a threshold matter, collateral estoppel does not require mutuality of parties "where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues." *Carolina Renewal, Inc. v. South Carolina Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (citing *Snavely v. AMISUB of S.C., Inc.*, 379 S.C. 386, 398 (Ct. App. 2008)). The South Carolina Supreme Court has held that collateral estoppel barred a plaintiff from relitigating an issue even where the defendant was not a party, or in privity with a party, to the initial action. *Graham v. State Farm Fire & Cas. Ins. Co.*, 277 S.C. 389, 391, 287 S.E.2d 495, 495 (1982); *Irby v. Richardson*, 278 S.C. 484, 487, 298 S.E.2d 452, 454 (1982). The identity of the parties, and their relationships to one another, is simply not a concern when deciding whether collateral estoppel applies. *Carolina Renewal*, 385 S.C. at 554, 684 S.E.2d at 782.

Thus, although the Wingo Defendants were not "parties" to the Title IX proceedings at Clemson or Plaintiff's lawsuit against the Clemson, collateral estoppel nonetheless prevents Plaintiff from relitigating whether Ms. Wingo was incapacitated and unable to consent when he had sexual intercourse with her and whether he should have known Ms. Wingo was incapacitated.

Plaintiff had a full and fair opportunity to litigate that issue in the Title IX administrative hearing, subsequent appeals, and, separately, in federal court. Consequently, collateral estoppel should have prevented the Plaintiff from re-litigating that issue in this action. *See Wade v. Berkeley County*, 330 S.C. 311, 498 S.E. 2d 684 (Ct. App. 1998).

The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. *Beall v. Doe*, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189–90 n. 1 (Ct. App. 1984). A fact shown to have been a basis of the relief, or other ultimate right established by the judgment, is considered adjudicated. *Lowe*, 264 S.C. at 86, 212 S.E.2d at 587. The findings of Clemson's Title IX proceedings and subsequent federal court action satisfy each element of issue preclusion, and Plaintiff is estopped from relitigating whether Ms. Wingo was too intoxicated to give consent when he engaged in sexual intercourse with her.

a. **The issue was actually litigated and directly determined in a contested case.**

Plaintiff thoroughly litigated the issue of whether he sexually assaulted Ms. Wingo when she was incapacitated and incapable of consent. He disputed the issue through nearly every level of Clemson's Title IX process, including the available internal appeals. (R. 344-360; R. 3080-83; R. 3092-95; R. 3115). Dissatisfied with the outcome there, Plaintiff then pursued a federal suit against Clemson and many of its employees. (R. 210). That litigation ultimately concluded with the reinstatement of the hearing board's finding that Ms. Wingo was unable to consent in a settlement agreement, the validity of which was also litigated and resolved by the federal district court. *Doe*, 2019 WL 1383822.

"When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts

have not hesitated to apply res judicata to enforce repose." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107, 111 S. Ct. 2166, 2169, 115 L. Ed. 2d 96 (1991) (quoting *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642 (1966)). "Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise." *Id.*

Under South Carolina law, where a civil action arises out of the same factual scenario as one which has been before a state agency, a finding by that state agency with regard to an element that is critical to recovery in the civil action is binding upon the civil court. *Bennett v. South Carolina Dept. of Corr.*, 305 S.C. 310, 408 S.E.2d 230 (1991); *Perry v. South Carolina Law Enforcement Div.*, 310 S.C. 558, 426 S.E.2d 334 (1992). Here, the finding by Clemson's OCES that Ms. Wingo was incapacitated and unable to give consent, and that Plaintiff should have known this fact, should be given preclusive effect because it was concluded following a "contested case" decided by a "state agency" and/or because it was a conclusion reached following a quasi-judicial proceeding by a state agency.

First, the Title IX hearing decided by Clemson's OCES qualifies as a "contested case" decided by a "state agency" pursuant to the South Carolina Administrative Procedures Act, S.C. Code Ann. §§ 1-23-10, *et. seq.* Sections 1-23-10(1) and -310(1) of the APA define "agency" to include each state board, commission, department, or officer, other than the legislature or the courts, authorized by law to determine "contested cases."[1] This definition neither includes nor excludes schools, colleges or universities. In previous cases, decisions by University boards and/or

[1] Additionally, the term "agency" has been defined to include state schools, colleges, and universities. S.C. Code Ann. § 15-78-30(a).

committees have been found to be subject to the Administrative Procedures Act. *See Ross v. Med. Univ. of S.C.*, 317 S.C. 377, 379, 453 S.E.2d 880, 882 (1994) (tenured professor appeals a decision by a faculty committee, that was approved by the universities board of trustees, pursuant to the APA). Additionally, courts within this state have found that numerous other state boards fall within this broad definition of "agency." *See, e.g., Bursey v. S.C. Dep't of Health & Env't Control*, 360 S.C. 135, 143, 600 S.E.2d 80, 85 (Ct. App. 2004) (finding that the Mining Council is an agency under the APA), aff'd, 369 S.C. 176, 631 S.E.2d 899 (2006); *Ruocco v. S.C. State Bd. of Registration for Pro. Engineers & Land Surveyors*, 314 S.C. 111, 114, 441 S.E.2d 829, 831 (Ct. App. 1994) (finding that the South Carolina State Board of Registration for Professional Engineers and Land Surveyors is an agency under the APA); *Webber v. Michelin Tire Corp*., 285 S.C. 581, 583, 330 S.E.2d 547, 548 (Ct. App. 1985) ("The Industrial Commission is an agency for purposes of the Administrative Procedures Act."); *Gibson v. Florence Country Club*, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) ("Clearly, the Employment Security Commission is an agency within the meaning of S.C. Code Ann. § 1–23–310(1) of the APA as 'it has rule making authority, and hears and decides contested matters.'"); *Guerard v. Whitner*, 276 S.C. 521, 280 S.E.2d 539 (1981) (finding that the Coastal Council is an agency under the APA).

Just as these commissions and boards are "agencies" under the APA, so is Clemson's OCES, which is mandated by Title IX and the South Carolina Campus Sexual Assault Information Act to establish procedures for institutional disciplinary actions in cases of alleged sexual assault. S.C. Code Ann. § 59-105-40; *see also* 20 U.S.C. §§ 1681, *et seq*. These required procedures make the decisions by Clemson's OCES "contested cases" under the APA, as the term "contested case" is defined in § 1-23-310 as a "proceeding **including, but not restricted to**, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party **are required by law**

to be determined by an agency after an opportunity for hearing" S.C. Code Ann. § 1-23-310(3) (emphasis added).

Here, as authorized by statute, Clemson University's OCES provided Plaintiff not only the right to retain counsel, but also the right to be notified of the proceedings, the right to participate in the proceedings, the right to notice of the findings of the agency, and the right of appeal. (R. 375-77; R. 391-99). Plaintiff received notice of the hearing, retained counsel, participated in the proceedings with the assistance of counsel and was notified of the agency finding. (R. 342; R. 344; R. 2394, lines 2-18). Plaintiff also exercised his right to appeal the Hearing Board's decisions on two levels, to the Vice President of Student Affairs and then to the President of the University. (R. 2395, lines 2-4, 2396, line 24 - 2397, line 6; R. 348-360; R. 3080-83; R. 3092-95; R. 3115). Because OCES is a part of Clemson University, authorized to enforce institutional disciplinary actions for alleged sexual assaults through contested cases, it is a state agency authorized by law to determine contested cases and its findings are binding upon Plaintiff.

As a final matter with respect to the applicability and procedural protections afforded by the APA, to the extent Plaintiff believed certain protections of the APA were not provided, he could have appealed those issues to the state courts of South Carolina. *See* S.C. Code Ann. § 1-23-380. Plaintiff should not have been allowed to collaterally attack the findings of OCES via this defamation action after failing to seek judicial review of the OCES findings. *See Bennett*, 305 S.C. 310, 408 S.E.2d 230 (finding that a claimant's failure to seek judicial review of an agency's ruling barred his subsequent suit because by not seeking judicial review of the decision, he abandoned his only opportunity to gain a favorable ruling on the issues also raised in the subsequent suit); *McClellan v. Bd. of Regents of State Univ.*, 921 S.W.2d 684 (Tenn. 1996) (noting that allegedly

procedural issues in a hearing before the university's board should and could have been raised on appeal).

Second, even if the APA is found to be inapplicable to Title IX proceedings at Clemson University, that does not mean collateral estoppel does not apply to the findings. To the contrary, collateral estoppel applies if the three elements are met and is not entirely depended on whether the APA applies to a particular administrative proceeding. So long as Clemson's OCES is a state agency, in a general sense and not as defined under the APA, and the Plaintiff was afforded a quasi-judicial proceeding, the proceeding will have a preclusive effect. For example, in *King v. Charleston Cnty. Sch. Dist.*, the United States District Court for the District of South Carolina concluded that a "quasi-judicial hearing before the Charleston County School District Board of Trustees pursuant to the South Carolina Teacher Employment and Dismissal Act" was entitled to preclusive effect. 664 F. Supp. 2d 571, 580 (D.S.C. 2009); *see also Pettiford v. S.C. State Bd. of Ed.*, 218 S.C. 322, 344, 62 S.E.2d 780, 790 (1950) (finding that a school board disciplinary hearing resulting in the termination of a faculty member constituted a quasi-judicial proceeding). In *King*, the court noted that the plaintiff received substantial due process rights before the school board, including the first to produce witnesses, the right to cross-examine, the right to present defenses, and the right to counsel. *Id.*

Here, Clemson's OCES is clearly a "state agency." The term "agency" has been defined by the General Assembly to include state schools, colleges, and universities. S.C. Code Ann. § 15-78-30(a); *see also Martin v. Clemson Univ.*, 654 F. Supp. 2d 410, 419 (D.S.C. 2009) (finding that "South Carolina law regards Clemson as a state agency or instrumentality," which entitles Clemson to immunity under the Eleventh Amendment). Additionally, and as previously discussed, the

Plaintiff's hearing before OCES was quasi-judicial and entitled him to substantial due process protections.

Thus, Plaintiff has had a full and fair opportunity to litigate the issue of whether the sexual activity between himself and Ms. Wingo was consensual – first through the Title IX administrative investigation and hearing, then through the internal appeals of the decision at Clemson, and then through judicial review (which the Plaintiff did seek). As such, the finding that Ms. Wingo was incapacitated and unable to consent, which Plaintiff should have reasonably known, has been actually litigated and directly determined.

b. **Necessary to support the prior judgment.**

The finding that Ms. Wingo was incapacitated and unable to consent to the sexual encounter was also necessary to support the OCES finding. Plaintiff was found to have violated Title IX and Clemson policies by committing "Sexual Misconduct." "Sexual Misconduct" is defined by Clemson's Anti-Harassment and Non-Discrimination Policy as "any other nonconsensual conduct of a sexual nature." (R. 393).

During the Title IX process, OCES and the appellate decisionmakers were presented with two conflicting stories: (1) the story told by Ms. Wingo in which she was incapacitated and therefore could not consent to the sexual encounter; and (2) the story told by Plaintiff in which the encounter was consensual. The interaction was either consensual or it was not, and Sexual Misconduct is defined as "nonconsensual conduct." Therefore, a finding that Ms. Wingo was incapacitated and unable to give consent was therefore necessary to the judgment that Plaintiff committed Sexual Misconduct.

c. **Plaintiff is otherwise estopped by the Clemson Settlement.**

Plaintiff also attempted to have Clemson OCES's Tile IX findings and decision overruled in the federal courts. After exhausting his appeals within Clemson's system, Plaintiff sued Clemson and its employees in federal court and specifically sought a declaratory judgment that "the outcome and findings made by Clemson be reversed." (R. 291; R. 293). As discussed above, Plaintiff and Clemson thereafter reached a settlement agreement, which the federal district court ultimately enforced, reinstating the OCES findings and conclusions in direct contravention to the relief sought in the federal complaint.

The issue of consent was central and necessary to the outcome of both Clemson's Title IX process and Plaintiff's federal lawsuit against Clemson. OCES's plainly found Ms. Wingo was incapacitated and unable to consent, which Plaintiff should have reasonably known; and that Plaintiff's actions violated Clemson's policies prohibiting "sexual misconduct." The settlement agreement explicitly stated that the Title IX findings would be upheld and the initial sanctions be reinstated. The district court determined that the terms of that settlement were "clear and unambiguous" and signed by Plaintiff. *Doe*, 2019 WL 1383822, at *3; *see also* Restatement 2d of Judgments § 27 cmt. e (explaining that an issue is actually litigated where parties enter an agreement manifesting an intention for an issue to be conclusively decided).

Based on the series of events, Plaintiff was permitted to settle with Clemson for consideration and agree that the Title IX findings and decisions be reinstated, which reinstated Clemson's decision to suspend him, while also pursuing damages against the Wingo Defendants based on being suspended from Clemson. This is fundamentally inconsistent and unfair, as Plaintiff was simultaneously permitted to obtain a benefit from the reinstatement of the Title IX decision (in the form of the consideration offered in the Clemson Settlement), while also claiming

it harmed him (in the form of the instant suit). Thus, the trial court committed reversible error in finding that Plaintiff was not estopped by the Clemson Settlement in pursuing his claims against the Wingo Defendants, and in refusing to allow the Clemson Settlement into evidence.

II. The trial court committed reversable error by excluding evidence related to Clemson's Title IX process[2] and the subsequent Clemson Settlement.

Fundamentally and with due respect to the trial court, a new trial is required if JNOV is not ordered. Here, the court permitted the jury to base its verdict on a false reality – that Plaintiff's damages were the result of the suspension from Clemson, which suspension was the result of defamatory statements and a civil conspiracy. The problem is that the ***suspension and findings*** by Clemson were based – ***as a matter of fact and truth*** – on the evidence, interviews, and information and analysis by Clemson ***within*** its Title IX proceeding. In other words, the Title IX findings and suspension were not – in fact and in truth – based on any statements made *outside* the Title IX proceedings, nor were they based on any alleged civil conspiracy entered into *outside* the Title IX proceedings. Yet, the jury was presented with a portrayal of a reality where Plaintiff was suspended by Clemson (and thus he could not get a job as a dentist) based on a civil conspiracy outside the Title IX proceedings and based on statements made outside the Title IX proceedings. **The trial court ruled that no evidence of the Clemson Title IX proceedings or what they**

[2] The term "Clemson Title IX process" is intended to encompass the entirety of the Title IX proceedings and documents that were at issue in Plaintiff's motion in limine on the subject, including: the Clemson's Student Code of Conduct; Clemson's Anti-Harassment & Discrimination Policy; Clemson's November 11, 2015 Notice of Title IX Investigation to Plaintiff; Clemson's February 18, 2016 Administrative Hearing Letter; Clemson's February 29, 2016 Hearing Outcome Letter; Plaintiff's appeal letter dated March 4, 2016; Ms. Wingo's appeal letter; Clemson's Appeal Outcome Letter; Plaintiff's second appeal letter dated March 30, 2016; Ms. Wingo's second appeal letter dated March 31, 2016; Ms. Wingo's April 4, 2016 reply to Plaintiff's second appeal letter; Clemson's May 27, 2016 Final Appeal Decision; the federal court settlement agreement between Plaintiff and Clemson; Judge Donald C. Coggins' Order enforcing the settlement between Plaintiff and Clemson; and Plaintiff's application to the College of Charleston; and the proffered testimony of Ms. Smith. (R. 1077).

contained could come into evidence, yet allowed Plaintiff's damages case to be based on the suspension resulting solely from those very proceedings. This was fundamentally unfair and constitutes error. A further fundamental unfairness is that Plaintiff agreed in a settlement with Clemson that the Title IX findings would remain. Despite this agreement, the Plaintiff was then allowed to sue the Defendants and claim damages based on those findings and corresponding suspension. The true and accurate basis for the Plaintiff's suspension was not allowed to be told to the jury. The jury was instead led to believe that defamatory statements made outside the Title IX proceedings and the civil conspiracy caused the suspension. They simply did not do so.

a. **Standard of review**

While the admission of evidence is left to the sound discretion of the trial judge, his decision will be reversed where that discretion has been abused. *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 57–58 (2011) (quoting *State v. Williams*, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010)). "'An abuse of discretion occurs when the trial court's ruling is based on an error of law.'" *Id.* (quoting *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2001)). A finding of abuse of discretion does not end the analysis, however, "because to warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice." *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008). "Prejudice is a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." *Id.*

b. **Evidence related to Clemson's Title IX process and subsequent Clemson Settlement is relevant.**

"Evidence is relevant and admissible if it tends to establish or make more or less probable some matter in issue." *Johnson v. Horry Cnty. Solid Waste Auth.*, 389 S.C. 528, 534, 698 S.E.2d 835, 838 (Ct. App. 2010) (citing Rules 401 and 402, SCRE). Although Rules 401, 402, and 403

were argued by the Plaintiff in his motion in limine arguing for the excluding the Title IX process evidence, the trial court never referenced an evidentiary rule in excluding the evidence until after the trial. In ruling on the posttrial motions, the trial court noted that the evidence related to the Title IX process was excluded under Rule 403. Under Rule 403, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." *Johnson*, 389 S.C. at 534, 698 S.E.2d at 838 (internal quotation marks omitted).

By ruling that the evidence related to the Title IX process was excluded under Rule 403, the trial court implicitly acknowledged that the evidence is and was relevant. Indeed, and as discussed in detail below, the Title IX process is relevant to several issues in this matter, including the issues of negligence, defamation damages, the truth of the statements, and Mr. Wingo's qualified privilege defense.

i. *Relevant to the issue of negligence.*

The evidence related to the Title IX proceedings is relevant to the issue of whether the Wingo Defendants acted negligently in making the allegedly defamatory comments. In instructing the jury, the trial court correctly stated:

> Generally to recover defamation, the plaintiff needs to show that the actions of the defendant were negligent.… Negligence is the doing of what a reasonable and prudent person would do under the similar circumstances…Insofar as the truth or falsity of a defamatory statement is concerned. The question of negligence has sometimes been expressed in terms of the defendant's state of mind by asking whether he had reasonable grounds for believing that the communication is true.

(R. 2291, lines 6-21).

The Title IX process is direct evidence that neither Ms. Wingo nor Mr. Wingo acted negligently in communicating to others that Plaintiff raped and/or sexual assaulted Ms. Wingo. With respect to Ms. Wingo, the Title IX process occurred after she made some her allegedly defamatory statements. However, the confirmation and vindication by the Title IX process that Ms. Wingo was in fact incapacitated, and therefore unable to give consent, during the sexual encounter tends to support or prove that she was not negligent in telling others that Plaintiff raped and/or sexually assaulted her. She had reasonable grounds to believe that statement was true, as others, after looking at the totality of the evidence and circumstances, likewise agreed that she was unable to consent to the sexual encounter. In fact, the excluded Clemson Settlement shows that the Plaintiff himself also agreed to this as he acknowledged in the pleadings that Ms. Wingo was drunk when the sexual encounter occurred, and he agreed to have the Title IX findings and punishment reinstated in the settlement.

ii. *Relevant to the issue of defamation damages and/or mitigation of damages.*

The evidence related to Clemson's Title IX process is also relevant to the issue of Plaintiff's alleged reputational damage due to the claimed defamatory statements and/or the issue of mitigation of damages. There are two types of damages in defamation actions: general and special. *See Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 510, 506 S.E.2d 497, 501 (1998). General damages include injury to reputation, mental suffering, hurt feelings, and similar injuries incapable of definite money valuation. *Id.*; *see also Whitaker v. Sherbrook Distrib. Co.*, 189 S.C. 243, 246, 200 S.E. 848, 849 (1939). Special damages are a loss of money or some provable material injury to the "property, business, profession, or occupation" of the plaintiff and is capable of

monetary quantification. *Smith v. Phoenix Furniture Co.*, 339 F. Supp. 969, 971 (D.S.C. 1972). The trial court instructed the jury consistent with this law. (R. 2295-96).[3]

Before, during, and after the trial, Plaintiff and his counsel repeatedly stressed to the trial court that the defamation cause of action was related to statements made *outside* of Clemson's Title IX process. (R. 1287, line 23 - 1288, line 10; R. 1292, lines 8-24; R. 1394, lines 12-17; R. 1416 lines 15-21; R. 2148, lines 1-7; R. 1115). As expressly stated and emphasized in his memorandum in opposition to Defendants' posttrial motions, "Because Defendants seem unwilling or unable to understand the scope of Plaintiff's defamation claim against them, he will state it clearly once again – Plaintiff's defamation claim is based on statements made by Defendants **outside of the Clemson Title IX process**." (R. 1115).

Although there was scant direct evidence during the trial of any general damages related to Plaintiff's defamation claim, Plaintiff did summarily claim that his reputation suffered as a result of the allegedly defamatory statements and that it has been difficult from him to develop relationships. (R. 1460, lines 7-24 1606, lines 24 - 1607, line 1). Despite this very general statement and Plaintiff's insistence that his defamation claim was based on statements made outside of the Title IX process, the vast majority of Plaintiff's alleged damages were directly related to the Title IX process. For example, the Plaintiff himself testified that he was unable to graduate from Clemson and that he had to alter his career plans because he could not get into dental school due to his "removal" from Clemson. (R. 1461-64). Plaintiff had a vocational expert testify at trial that the Plaintiff would have gotten into dental school "but for" his removal from Clemson. (R. 1939-43; R. 1948-49). The expert did not place a specific monetary value to this alleged harm, as the

[3] The trial judge charged the jury on special damages despite stating during the charging conference that he has "removed any reference to special damages, monetary damages in the defamation claim." (R. 2221, lines 1-3).

trial court did not permit the testimony, and instead generally testified that Plaintiff suffered a reduced lifetime earning capacity based on the "removal" from Clemson. (R. 1939-43).

Despite the repeated suggestion to the trial court to the contrary, Plaintiff's counsel often conflated the issue of defamation reputational damages with the Clemson suspension while addressing the jury. For example, during the opening statement Plaintiff's counsel argued that "plaintiff's defamation claim is actually based on defendants' false statements to at least 20 other people calling him a rapist. Because of defendants' actions, [Plaintiff] will be required to disclose and self-report ***his removal from Clemson*** for the rest of his life whenever he applies to another school or applies to certain jobs. His dreams of becoming an orthodontist will never happen because of defendants' irreversible actions." (R. 1416, line 18 - 1417, line 2 (emphasis added)). In the same vein, during closing arguments Plaintiff's counsel claimed that, "[t]he reason [Plaintiff] cannot fulfill his intended career goal of being an orthodontist is not because of Clemson, but for [Ms. Wingo and Mr. Gahagan's] statements, ***Clemson would not have kicked him out."*** (R. 2235, lines 3-6 (emphasis added)).

Based on the testimony and arguments at trial, Plaintiff directly and repeatedly tied the allegedly defamatory statements to his removal from Clemson University. Not only is this contrary to Plaintiff's representations to the trial court pretrial as to what Plaintiff's defamation case would concern, but it was also highly prejudicial to the Wingo Defendants considering the exclusion of the Title IX process, proceedings, and findings evidence.

Statements made *within* the Title IX process, such as statements to investigators and/or testimony at the administrative hearing, are privileged and not subject to a defamation claim. *See Corbin v. Washington Fire & Marine Ins. Co.*, 278 F.Supp. 393 (D.S.C. 1968) (recognizing absolute immunity for arbitration) aff'd, 398 F.2d 543 (4th Cir. 1968)*; Hartman v. Keri*, 883

N.E.2d 774 (Ind. 2008) (extending absolute immunity to a public university's proceeding for investigating sexual harassment complaints). As such, these statements cannot form the factual predicate of the defamation claim. Instead, the defamation claim must be based on statements *outside* of the Title IX process, such as Ms. Wingo's comments to friends and family. The ultimate decision to suspend Plaintiff from Clemson was solely based on comments, statements, and evidence from *within* the Title IX process. There is no suggestion that Clemson University based its Title IX decision on anything other than the testimony and evidence presented during the Title IX hearing. Additionally, it was Clemson University's decision, and its decision alone, to suspend the Plaintiff. Simply put, none of the allegedly defamatory statements resulted in Plaintiff's removal from Clemson and subsequent failure to get into dental school. Those alleged damages were based solely on Clemson's decision to suspended Plaintiff from school based on its Title IX process and findings.[4] Despite this, the jury was presented with a distorted and confusing picture of Plaintiff's alleged reputational harm that blurred this critical legal and factual distinction.

The result of this testimony and Plaintiff's legal arguments is clear: the jury was led to believe, and even explicitly told, that the defamation led to Plaintiff's removal from Clemson. Any defamation damages awarded to Plaintiff based on his suspension from Clemson and subsequent failure to get into dental school are improper. The confusion about the source of the defamation damages would and should have been avoided through the admission into evidence of the Title IX process and findings. As it stands, the jury was left with confusing testimony about Plaintiff's "removal" from Clemson based on defamatory statements without any context as to what led to that removal, *i.e.* a full-blown Title IX administrative hearing complete with a thorough

[4] The damages were further perpetuated by the Plaintiff himself in agreeing to the Clemson Settlement. In the Clemson Settlement, the Plaintiff and Clemson agreed to reaffirm the findings of the Title IX process.

investigation, a hearing involving the presentation of evidence and witnesses, and numerous appeals. Accordingly, the Title IX process was highly relevant to the issue of defamation damages, and the exclusion of evidence of the Title IX process left the jury with an incomplete understanding of Plaintiff's removal from Clemson University, which prejudiced the Wingo Defendants.

Moreover, the Title IX process was relevant to the issue of mitigation. Under South Carolina law, "[m]atters may be considered in mitigation of damages which do not amount to justification." *Johnston v. Life & Cas. Ins. Co.*, 192 S.C. 518, 7 S.E.2d 463, 465 (1940). The jury may consider, as a mitigation of damages, evidence that the publication was based upon statements by another and that the defendant believed those statements to be true. *Gill v. Ruggles*, 95 S.C. 90, 99, 78 S.E. 536, 539 (1913). Here, the Title IX process and ultimate findings are clear evidence of mitigation for the Wingo Defendants. Clemson University's finding that Ms. Wingo was incapable of giving consent directly supports her statements that Plaintiff raped and/or sexually assaulted her. Similarly, Mr. Wingo's statements and letter to the fraternity occurred *after* the initial Tile IX decision, and those allegedly defamatory statements were based upon the initial findings of Clemson University.

iii. *Relevant to the issue of truth.*

Third, the Clemson IX process and findings are relevant because they support the Wingo Defendants' defense that the statements related to Plaintiff's rape of Ms. Wingo were true. In South Carolina, the first element a defamation plaintiff must prove is that "a false and defamatory statement was made." *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). Thus, an allegedly defamatory statement that is true is not actionable. *WeSave Fin. Corp. v. Luigfel*t, 316 S.C. 442, 450 S.E.2d 580 (1994); *Dauterman v. State-Record Co.*, 249 S.C. 512, 154 S.E.2d 919 (1967).

In this case, the allegedly defamatory statements made by the Wingo Defendants are that Plaintiff raped and/or sexually assaulted Ms. Wingo. The fact that the Title IX process at Clemson University, including the board and two individuals on appeal, supported the fact that Plaintiff did in fact commit sexual misconduct against Ms. Wingo is highly relevant to the factual question of whether the statements were true. Plaintiff attempted to use the fact that Ms. Wingo never filed a criminal complaint or civil case against Plaintiff to support the claim that the statements were false. (R. 1415, line 24 - 1416, line 3). Plaintiff's counsel directly asked the Plaintiff and the Wingo Defendants about whether Plaintiff was found convicted of rape by a criminal court or responsible for rape in any civil action. (R. 1459-60; R. 1676; R. 1869-70; R. 1882). At closing, Plaintiff's counsel declared that Mr. Wingo's letter was "based on conclusions that were never validated by any court of law." (R. 2232, lines 22-24). The fact that the Plaintiff was found to have violated Clemson University's antiharassment policy, and it was found that Ms. Wingo was incapacitated when the sexual encounter occurred with Mr. Pampu should have known, is relevant.

iv. *Relevant to Mr. Wingo's qualified privilege defense.*

Lastly, the Title IX process is relevant to Mr. Wingo's qualified privilege defense, which is discussed in more detail below. Mr. Wingo's statements to Phi Delta Theta are the only alleged defamatory statements asserted by the Plaintiff as to him, and these statements all occurred after and are based on the Title IX process, findings, and decision letter. The Title IX process puts Mr. Wingo's statements to the fraternity in context and is relevant to understanding the statements made by Mr. Wingo.

c. **The probative value of evidence related to Clemson's Title IX process is not substantially outweighed by the danger of unfair prejudice to Plaintiff.**

In addition to being relevant, the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice to the Plaintiff. Notably, the vast majority of

Plaintiff's claim that the evidence would be prejudicial is related to the defense of collateral estoppel asserted by all of the Defendants. (R. 1077). As argued by the Plaintiff, the evidence "would be unduly prejudicial, as [it] will impermissibly mislead the jury into adopting a belief that this Court has roundly rejected, named, that Clemson's Title IX disciplinary findings are entitled to deference." (R. 1079). However, the probative value of the evidence related to the Title IX extends far beyond the issue of collateral estoppel. As discussed in detail above, the evidence related to the Title IX process permeates numerous issues and defenses in this matter.

While the evidence related to the Title IX process would be prejudicial to the Plaintiff, this prejudice is not unfair and does not substantially outweigh the probative value of the evidence. By excluding the evidence, the trial court eviscerated or substantially weakened numerous defenses maintained by the Wingo Defendants. If nothing else, the probative value of various defenses and arguments raised by the Wingo Defendants is not *substantially* outweighed by the danger of unfair prejudicial to the Plaintiff. Plaintiff had the opportunity to defend himself during the Title IX process and was still found to be in violation of the Clemson antiharassment policy by having sexual relations with Ms. Wingo, who was physically incapacitated and unable to give consent. Additionally, it is difficult to understand how the probative value of the Title IX process can be outweighed by the unfair prejudice to the Plaintiff when the Plaintiff himself signed the Clemson Settlement, which expressly permits the University to reinstate the Title IX findings in perpetuity. Unfortunately, the jury was unaware of these facts, as the trial court improperly excluded evidence of the Title IX process *and* the Clemson Settlement. *See* Rule 408, SCRE (noting that settlement agreements are admissible "when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution").

d. **The probative value of evidence related to Clemson's Title IX process is not substantially outweighed by the danger of confusion of the issues for the jury.**

The probative value of the evidence related to the Title IX process is likewise not substantially outweighed by the danger of confusion of the issues for the jury. Although not argued in detail by the Plaintiff at any stage of the litigation, the Court stated that evidence related to the Title IX process could be "confusing to the jury because it's a totally different standard." (R. 1387, lines 8-9; R. 1398, lines 22-25). This ruling is in error and ignores that the standard and Title IX process can be easily communicated or explained to the jury (assuming *arguendo* directed verdict based on collateral estoppel was properly denied). Further, there would have been nothing stopping Plaintiff from cross-examining Ms. Smith or the other witnesses related to the Title IX process and what it means. The Wingo Defendant's statements and actions can simply not be fully understood unless the Title IX process is considered. As such, the probative value of that evidence is not substantially outweighed by the danger of confusion for the jury.[5]

In fact, the exclusion of evidence related to the Title IX process while *including* the ultimate results of that process was far more likely to confuse the jury and substantially prejudiced the Wingo Defendants. Instead of hearing about the lengthy procedural process the led to Plaintiff's removal or suspension for Clemson, the jury only heard that the Plaintiff was removed or suspended from Clemson based on the defamatory statements. The jury could have assumed that the Plaintiff was summarily and immediately suspended or removed from Clemson as a direct result of comments made by the Defendants made with no investigation or process.

[5] The fact that Plaintiff thought it was relevant and important to question various witnesses regarding the lack of a criminal or civil trial for rape further proves this point. The Plaintiff was permitted to use the absence of these other proceedings as evidence that the rape did not occur but also exclude the evidence that the Title IX process founds that Ms. Wingo was incapacitated and unable to provide consent.

The trial court essentially permitted the Plaintiff to have his cake and eat it too. By excluding evidence related to the Title IX process but permitting the jury to hear the result, the jury was not afforded a full and complete picture of the events leading to Plaintiff's removal from Clemson University. This confusion would have been avoided had the jury simply known the facts of what happened – the facts underlying the very damages Plaintiff was asserting.

Therefore, the trial court committed reversible error by excluding evidence of the Title IX process[6] while admitting evidence that the Plaintiff was suspended from Clemson, and the Wingo Defendants are entitled to a new trial, at minimum, on Plaintiff's claim for defamation.

e. **Mr. Wingo is entitled to JNOV because, had the unredacted attachment and letter been admitted, no reasonable juror could find that he acted negligently.**

With respect to Mr. Wingo, the Title IX process and the initial decision took place *before* he made his allegedly defamatory statements to the Phi Delta Theta fraternity. The statements and the April 4, 2016 letter to the fraternity were clearly made in heavy reliance on the Title IX process and findings, and the initial decision letter was even enclosed within the April 4, 2016 communication. The Title IX process and decision directly supports Mr. Wingo's claim that, as a matter of law, he acted as a reasonable person would under the circumstances in communicating to the fraternity that Plaintiff raped and/or sexually assaulted his daughter. Mr. Wingo is entitled to a judgment notwithstanding the verdict because no reasonable juror could find that he acted negligently when confronted with the Title IX process and findings that should not have been excluded. At a minimum, Mr. Wingo is entitled to a new trial with the admission of evidence related to the Title IX process so that a jury can fully and fairly determine whether he acted negligently in communicating with Phi Delta Theta.

[6] The trial court did permit impeachment using prior sworn statements from the investigation.

Again, as the trial court instructed, "[t]he question of negligence has sometimes been expressed in terms of the defendant's state of mind by asking whether he had reasonable grounds for believing that the communication is true." (R. 2291, lines 17-21). The Title IX process contained the finding that Ms. Wingo was "incapacitated and unable to give consent which [Plaintiff] should have reasonably known." (R. 345; R. 3077). Mr. Wingo's communications to the fraternity were in clear reliance of this finding, as the communications only occurred *after* the Title IX decision was renders and the April 4, 2016 letter both quoted and enclosed the Title IX findings. Mr. Wingo confirmed this obvious fact during his deposition. (R. 3030, lines 11-15; R. 3031, line 21 - 3032, line 1).

Accordingly, the evidence should have been admitted and Mr. Wingo should have been granted JNOV. Failing that, at minimum, a new trial is required based on the relevance of this excluded evidence.

III. The trial court committed reversable error by admitting a heavily redacted version of Mr. Wingo's letter to Phi Delta Theta Fraternity.

In closing, counsel for Plaintiff argued, "Mr. Wingo, he'll say he was merely a father supporting his daughter, but the evidence shows he went beyond that role and negligently contacted Phi Delta Theta to submit a claim with Erin's knowledge and consent about the nature of a sexual encounter he never witnesses based on conclusions that were never validated by any court of law." (R. 2232, lines 17-24). The argument to the jury was that because Mr. Wingo lacked personal knowledge of the events, he either pulled the statement out of thin air or merely relied upon supposed unvalidated claims that his daughter reported to him. In reality, Mr. Wingo based the statements in the letter, and believed they were validated as explained in the unredacted letter, on the Title IX investigation and findings. In other words, contrary to the picture presented to the

jury, "The whole basis of the letter was to let Phi Delta Theta know about the Clemson decision." (R. 2375, lines 6-8).

Due to the heavy redactions, the jury saw an incomplete letter that misled them to a skewed result. The concern for the prejudice that can result from incomplete writings is in fact reflected in the Rules of Evidence. *See e.g.*, SCRE 106 ("When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."); *United States v. Ellis*, 121 F.3d 908, 921 (4th Cir. 1997) ("The 'Doctrine of Completeness' operates to ensure that 'when one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completion is ipso facto relevant and therefore admissible....'" (citations omitted)). Recognizing this concern, counsel for Wingo argued that the letter be admitted in its entirety or not at all. (R. 1399, lines 9-22). Despite raising this concern, the redacted letter was admitted over defense counsel's objections. This redacted letter then misled the jury into finding Mr. Wingo defamed the Plaintiff, which was a reversible error necessitating a new trial.

IV. The trial court committed reversable error by finding that Mr. Wingo's allegedly defamatory statements were not protected by a qualified privilege and by failing to charge the jury on the qualified privilege.

The Wingo Defendants requested the jury be charged on privilege and qualified privilege, and the trial court made a reversible error in denying the request. When a trial court refuses to give a requested instruction and the refusal is both erroneous under the law and prejudicial to the requesting party, the refusal warrants a new trial. *Cohens v. Atkins*, 333 S.C. 345, 349–50, 509 S.E.2d 286, 289 (Ct. App. 1998) (finding the trial judge committed reversible error in refusing to

instruct jury with specific language from a relevant motor vehicle statute which was prejudicial error because the charge as given supported a finding of the requester's fault); *see also Carraway v. Pee Dee Block, Inc.*, 275 S.C. 511, 273 S.E.2d 340 (1980) (finding the trial judge committed reversible error in refusing to instruct jury on relevant motor vehicle statutes where the statutes were applicable to the facts and the appellant made a specific request for an instruction on the statutes, which prejudiced the requester). Here, the trial court refused to provide any instruction to the jury on the defense of qualified privilege after finding qualified privilege did not extend to Mr. Wingo's settlement negotiations with Phi Delta Theta. This refusal amounted to reversible error because the issue should have been submitted to the jury. *Murray v. Holnam, Inc.*, 344 S.C. 129, 141, 542 S.E.2d 743, 749 (Ct. App. 2001) (citing *Fulton v. Atl. Coast Line R. Co.*, 220 S.C. 287, 297, 67 S.E.2d 425, 429 (1951)).

Mr. Wingo stated in his letter, "We would like to resolve this matter with Phi Delt without the necessity of litigation." (R. 789, 3142). "In a defamation action, the defendant may assert the affirmative defense of conditional or qualified privilege. Under this defense, one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused." *Swinton Creek Nursery v. Edisto Farm Credit*, ACA, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999) (citing Restatement (Second) of Torts, § 593 (1977)). The South Carolina Supreme Court has held that "pre-trial settlement negotiations of legal claims give rise to occasions of qualified or conditional privilege when each side discloses its reasons for the relative position taken." *Woodward v. S.C. Farm Bureau Ins. Co.*, 277 S.C. 29, 32, 282 S.E.2d 599, 601 (1981). Where communications give rise to a qualified privilege, the burden shifts to the party alleging defamation to show that the scope of the privilege has been exceeded or actual malice. *Swinton Creek Nursery*

v. Edisto Farm Credit, ACA, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999) (citing *Fulton v. Atlantic Coast Line R. Co.*, 220 S.C. 287, 67 S.E.2d 425 (1951); 53 C.J.S. Libel and Slander § 79 (1987)).

"To prove actual malice, the plaintiff must show that the defendant was activated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff; or that the statements were published with such recklessness as to show a conscious disregard for [the] plaintiff[']s rights." *Id*. Moreover, while statements made in occasion of qualified privilege may go too far beyond what the occasion required and result in the loss of the qualified privilege, **the bounds of a qualified privilege and whether a communication lies within them is a question for the jury.** *Murray v. Holnam, Inc.*, 344 S.C. 129, 141, 542 S.E.2d 743, 749 (Ct. App. 2001) (citing *Fulton v. Atl. Coast Line R. Co.*, 220 S.C. 287, 297, 67 S.E.2d 425, 429 (1951)) (emphasis added). Abuse of the conditional privilege is only for the court to decide in the absence of controversy. *See Woodward v. S.C. Farm Bureau Ins. Co.*, 277 S.C. 29, 32, 282 S.E.2d 599, 601 (1981) (citing 53 C.J.S. Libel and Slander § 228, p. 347 (1948)).

Here, whether Mr. Wingo's letter and statements to Phi Delta Theta exceeded the bounds of a settlement communication's qualified privilege was a question for the jury. In the letter, Mr. Wingo, acting as power of attorney for Ms. Wingo, establishes the purpose of the communication is to "resolve this matter with Phi Delt without the necessity of litigation as outlined in this letter." (R. 789, 3142; R. 2219, lines 14-19). The letter goes on to allege actions of Plaintiff that resulted in damages to Ms. Wingo and make demands to remedy Ms. Wingo's damages and prevent other women from experiencing similar damages in the future.

Reviewing Mr. Wingo's letter and the attached Title IX findings, unredacted, presents a genuine controversy of whether the letter went beyond the bounds of a settlement negotiation. Mr.

Wingo makes statements such as "[Plaintiff] preyed on my daughter['s] . . . intoxicated state . . . and sexually assaulted her" ; "[Plaintiff] sexually assaulted her"; and "[Plaintiff] raped [Ms. Wingo]." (R. 789-95, 3142-46). However, Mr. Wingo also attached the findings from the Title IX hearing which provide that, "the hearing board found that [Ms. Wingo] was incapacitated and unable to give consent." Plaintiff does not contest having sexual intercourse with Ms. Wingo on the night in question. (R. 1444, lines 15-16). The Title IX findings also refer to the Anti-Harassment and Non-Discrimination Policy which, using the uniform crime report system of the Federal Bureau of Investigation, defines sexual assault to include "[r]ape: The carnal knowledge of a person without the consent of the victim including instances of giving consent because of his/her . . . mental or physical incapacitation." (R. 2114, lines 8-16; R. 392). The Title IX findings and its references, when read together, lead a reasonable person to rely on those materials in good faith to assert Plaintiff sexually assaulted and/or raped Ms. Wingo. Thus, the unredacted version of Mr. Wingo's letter along with its attachments and references thereto creates a genuine controversy, that should have been submitted to the jury, as to whether the letter exceeded the bounds of the qualified privilege conferred to settlement negotiations.

Based on the redacted letter, which excluded most of the details underlying the demands, including some of the demands themselves, the jury was presented with the question of whether Mr. Wingo's (incomplete) letter (without attachments which lent context) was defamatory in the absence of the context of the Title IX proceedings and without the jury instruction understanding that settlement negotiations are subject to a qualified privilege. The refusal of the trial court to charge the jury on qualified privilege and to allow them the opportunity to determine whether the letter (or at least parts thereof) should have led to immunity via the privilege, was highly prejudicial

to Mr. Wingo. Therefore, the trial court's refusal to charge the jury on qualified privilege was reversible error, and a new trial is warranted.

V. The trial court committed reversable error by admitting other evidence of Ms. Wingo's intoxication.

The trial court also committed reversable error by allowing Plaintiff's counsel to examine Ms. Wingo about getting "blackout drunk" on other occasions following the sexual encounter on October 24, 2015. The primary issue at trial was whether the Defendants negligently stated the Plaintiff raped and/or sexual assaulted Ms. Wingo on the night of October 24, 2015. Whether Ms. Wingo got intoxicated on occasions after October 24, 2015, was irrelevant to the issues of trial and represented an improper attack on Ms. Wingo character.

Pursuant to Rule 404(a), SCRE, "evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion" unless an exception applies. Additionally, under Rule 404(b), SCRE ,"[e]vidence of other . . . acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."

The admission or exclusion of evidence is within the circuit court's discretion, and its decision will not disrupted or reversed absent an abuse of discretion. *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005). Our supreme court has "recognized that similar acts are admissible if they tend to prove or disprove some fact in dispute." *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Cmtys., Inc.*, 397 S.C. 348, 360, 725 S.E.2d 112, 119 (Ct. App. 2012). However, "[e]vidence of similar acts has the potential to be exceedingly prejudicial." *Id.* Even if evidence is relevant and falls within an exception allowing for its admission, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,

confusion of the issues, or misleading the jury." Rule 403, SCRE; *see also State v. Clasby*, 385 S.C. 148, 155–56, 682 S.E.2d 892, 896 (2009) ("Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." (quoting *State v. Gaines*, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008))).

Here, evidence related to Ms. Wingo getting "blackout drunk" on other occasions is not relevant to the facts in dispute. Plaintiff argued at trial that the evidence and testimony was relevant to show "motive." (R. 1694, lines 8-14). Specifically, Plaintiff's counsel argued: "She's claiming that she got blackout drunk on the occasion at issue. I'm trying to establish whether there were any other times, how many times." (R. 1694, lines 17-20). This rationale makes little sense. Whether Ms. Wingo got intoxicated on other occasions has no bearing on whether she was intoxicated and able to provide consent to the sexual encounter on October 24, 2015. Instead, the questioning and testimony tends to smear Ms. Wingo's character.

None of the exceptions permitting the admissibility of this character evidence apply. It was not relevant to prove or disprove the falsity of the defamatory statements, it was not relevant to the damages, it was not necessary to impeach Ms. Wingo, it was not relevant to her credibility or biases, and despite Plaintiff counsel's claim, it was not relevant to her motive. Even if somehow marginally relevant, the probative value of the testimony was substantially outweighed by the danger of unfair prejudice. There is substantial danger of unfair prejudice based on this testimony. The jury may have discounted Ms. Wingo's claim of rape by unfairly viewing her as a someone who repeatedly made herself vulnerable. Of course, an incapacitated person should never be subjected to sexual misconduct regardless of circumstances. Accordingly, the trial court abused its discretion in admitting the evidence, which necessitates that a new trial be granted.

VI. The trial court erred in failing to award a new trial based on the excessive actual and punitive damages awards.

Lastly, the Wingo Defendants' motion for a new trial should have been granted because the actual and punitive damages were excessive and not compliant with due process.

a. The actual damages are excessive in light of the evidence elicited at trial.

As previously discussed, there was scant evidence presented to the jury with respect to general defamation damages, *i.e.*, reputational harm. Instead, the vast majority of the damages related evidence presented to the jury was the testimony that Plaintiff could not get into dental school and attain his dream of becoming an orthodontist because of his removal or suspension from Clemson. As set forth, however, Plaintiff's removal from Clemson was based on Clemson's investigation and findings, not on any alleged defamatory comments made outside the Title IX process. The Wingo Defendants statements did not prevent the Plaintiff from being admitted to dental school. Instead, the finding of Clemson's OCES after its thorough Title IX investigation and process, and the subsequent Clemson Settlement, did. There was little other evidence of any reputational damage, and certainly not such that could justify the large jury verdict. Hence, the actual damages award for defamation is arbitrary and excessive.

b. The lower court erred by failing to subject the punitive damages award to the required post-judgment constitutional review, and Ms. Wingo's culpability does not support an award of punitive damages.

In *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 588, 686 S.E.2d 176, 186 (2009), the Supreme Court set forth the applicable requirements for ***mandatory*** constitutional due process review of all punitive damage awards under South Carolina law. The *Mitchell* court explained that the court must conduct a ***post-judgment*** review of punitive damages in accordance with *BMW of North America v. Gore*, 517 U.S. 559 (1996) by assessing: (1) the degree of reprehensibility of the defendant's conduct, (2) the disparity between the actual or potential harm suffered by the plaintiff

and the amount of the punitive damages award, and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. *Id.* The *Mitchell* court noted that the eight *Gamble* factors[7] remain "relevant to the post-judgment due process analysis, but only insofar as it adds substance to the *Gore* guideposts." *Id.* at 587, 686 S.E.2d at 185; *see also Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 396, 714 S.E.2d 904, 911 (Ct. App. 2011) (assessing the constitutionality of a punitive damages award "requires us to determine whether the award was reasonable in light of the . . . [*Gore*] guideposts"). Following *Mitchell*, the Legislature made this post-judgment review an essential part of any punitive damages award. S.C. Code Ann. § 15-32-520(F).

Here, the lower court did not apply the *Mitchell* guideposts and instead only considered the *Gamble* factors in its posttrial order. (R. 5-7). By failing to subject the punitive damages award to the required due process review under the *Mitchell/Gore* guideposts, the court committed reversible error as a matter of law.

c. **The punitive damages award does not withstand constitutional scrutiny under the *Mitchell* guideposts.**

Turning first to reprehensibility, a court must consider whether (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the

[7] These are: (1) the defendant's degree of culpability; (2) the duration of the conduct; (3) the defendant's awareness or concealment; (4) the existence of similar past conduct; (5) the likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) the defendant's ability to pay; and (8) any other factors deemed appropriate. *Gamble v. Stevenson*, 305 S.C. 104, 110-11, 406 S.E.2d 350, 354 (1991). *See also*, the similar required statutory factors for mandatory review by the trial court, at S.C. Code Ann. 15-32-520(E).

result of intentional malice, trickery, or deceit, rather than mere accident. *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185. Here, there is little to no evidence to support any of the reprehensibility factors, as the harm was not physical, there was no reckless disregard for the health and safety of others, the Plaintiff was not financially vulnerable, and the allegedly defamatory statements were limited to family, friends, and advisors.

In evaluating the disparity prong, a court is charged with considering the "likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay." *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185. Here, even assuming Plaintiff was entitled to the full amount of actual damages awarded by the lower court (he was not), the court's imposition of a punitive damages award is grossly disproportionate to the minimal reputational damage presented at trial and requires reversal on due process grounds. In fact, there is a harmful implication of the punitive damages award, as it may discourage victims of sexual assault from speaking out. *See Sagaille v. Carrega*, 194 A.D.3d 92, 143 N.Y.S.3d 36, leave to appeal denied, 37 N.Y.3d 909, 174 N.E.3d 710 (2021) ("[S]exual assaults remain vastly under reported, primarily due to victims' fear of retaliation. It does not escape [the Court] that defamation suits like the instant one may constitute a form of retaliation against those with the courage to speak out.").

Lastly, the Order on Posttrial Motions does not make any attempt to compare other awards in similar cases or available civil penalties as required by *Mitchell*. Again, the lower court committed error as a matter of law by failing to subject the judgment to this scrutiny.

For all these reasons, the awards of actual and punitive damages are unsupported by the evidence and by the law and should be set aside.

CONCLUSION

For the reasons stated herein, the judgment should be reversed and judgment should be entered in favor of the Respondents-Appellants. Failing that, a new trial should be ordered as to the defamation claim. The judgment notwithstanding the verdict ordered by the trial court as to civil conspiracy should be affirmed.

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