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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM PICKENS COUNTY

Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

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Appellate Case No.: 2022-001332

Common Pleas Case No.: 2017-CP-39-00709

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Andrew Pampu.....Appellant/Respondent,

v.

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

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REPLY BRIEF OF  
RESPONDENT/APPELLANT COLIN J. GAHAGAN TO  
APPELLANT/RESPONDENT'S BRIEF

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## I.

### THE LOWER COURT ERRED IN FAILING TO DISMISS ANDREW PAMPU'S ACTION FOR DAMAGES SINCE HE WAS COLLATERALLY ESTOPPED FROM PURSUING FURTHER LITIGATION ON THE ISSUE OF NON-CONSENSUAL SEX DETERMINED BY THE PRIOR ADMINISTRATIVE HEARING.

In his brief, Andrew Pampu acknowledges that under South Carolina law, where a civil action arises out of the same factual scenario as one which had been before a state agency with regard to an element that is critical to recovery in the civil action, the finding by the state agency is binding in the civil court. *Bennett v. South Carolina Dept. of Corrections*, 305 SC 310, 408 S.E.2d 230 (1991). This civil action arises out of the same factual scenario as was presented to the Clemson Office of Community and Ethical Standards, which found that Andrew Pampu had engaged in non-consensual sex with Erin Wingo. (*R. pp. 3255-57*). Andrew Pampu contends that collateral estoppel is inapplicable in this case since the Clemson Office of Community and Ethical Standards was not a state agency and, even if it were a state agency, the procedural safeguards which should be utilized in a contested case were ignored, thereby failing to give him the opportunity to properly defend himself. (*Pampu Brief in Response to Gahagan Brief at p. 15*). He is wrong on both counts.

Andrew Pampu initially argues that the Clemson Office of Community and Ethical Standards does not fall within any of the statutory definitions of "agency". (*Pampu Brief in Response to Gahagan Brief at pp. 15 - 18*) This

argument generally ignores the fact that the government operates through three branches of government: the executive, the judicial and the legislative branches. In order to carry out their functions, these branches of government may utilize agencies which are trusted with specific functions and goals. Often, the legislature will adopt an enabling act to set up the specific function to be carried out by an agency. No governmental entities independently exist which fall outside of these three branches as Andrew Pampu appears to argue.

In this instance, the legislature passed the *Sexual Assault Information Act* (§§ 59-105-10 to 60). Pursuant to *Section 59-105-20*, the legislature seeks

to encourage institutions of higher learning to develop, with input from students, faculty and staff, a comprehensive sexual assault policy to address prevention and awareness of sexual assaults and to establish procedures that address campus sexual assaults.

Under *Section 59-105-40 (A) (2)*, the comprehensive sexual assault policy was to establish and implement the procedures to be followed by the institution of higher learning once a sexual assault occurred and was reported. *Section 59-105-40 (B) (2)* further provided that the comprehensive sexual assault policy was to address the possible sanctions to be imposed following a final determination of an institutional disciplinary procedure regarding a sexual assault had been made.

Adhering to this legislative mandate, Clemson University (an institution of higher learning) created the Clemson Office of Community and

Ethical Standards, which was charged with undertaking the hearing on any reported sexual assault. Such a hearing would fall within the definition of a “contested case” as set forth in *Section 1-23-310 (2)*, which includes any proceeding 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. In this case, the Clemson Office of Community and Ethical Standards was obligated to provide a disciplinary action for Andrew Pampu, who stood accused of sexual assault, which could lead to his expulsion or suspension from school. *Section 1-23-310* also provides that “agency” is defined to include each state board, commission or department or officer, other than the legislative, courts or administrative law court, authorized by law to determine contested cases. As noted, all government functions are to be carried out by either the legislative, executive or judicial branch. The Clemson Office of Community and Ethical Standards is required by statute to undertake a hearing on contested cases involving campus sexual assaults and therefore is a state agency whose finding creates collateral estoppel.

Andrew Pampu nonetheless argues that collateral estoppel should not be utilized in this case since the procedures applicable to agency proceedings were not adhered to. He notes that *Section 8-17-340 (c)* (pertaining to the State Employee Grievance Committee) provides for certain procedures which provide for the opportunity to take depositions, the issuance of subpoenas upon request, the production of books and papers and records. (*Pampu Brief in*

*Response to Gahagan Brief at p. 19*). Under Section 1-23-320, S.C. Code (1976, as amended), each of these procedures required a request by Andrew Pampu of the hearing panel. Because the hearing testimony was not admitted, there is no evidence that such a request was made.

*Section 1-23-320 (E)* also provides that a party such as Andrew Pampu is to be afforded the opportunity to respond and present evidence and arguments. Again, there is no evidence concerning this. However, Andrew Pampu argues in his brief that he did have an attorney at the hearing, but that attorney was simply restrained to act through his client in making arguments or responding or presenting evidence. (*Pampu Brief in Response to Gahagan Brief at p. 22*).

More importantly, the argument of not having the opportunity to fully and fairly litigate the issues presented by the case are arguments which are directed against Clemson University since C.J. Gahagan, as a witness, had no control over the procedures or presentation. Andrew Pampu in fact had the means by which the trial presentation and procedure could have been contested. In fact, he appealed twice within the Clemson system. (*R. p. 3258*). He could have raised those issues during the course of those appeals but did not. Moreover, Andrew Pampu could have raised those issues by proceeding to judicial review pursuant to *Section 1-28-80 of the South Carolina Code*. He opted not to pursue this remedy and therefore waived the right to judicial review after exhausting administrative remedies.

He instead opted to take a second course by suing Clemson University in federal court. *Doe v. Clemson University, No. 18:16-CV-1957, 2019 WL 1383822 (D.S.C. March 17, 2019)*. Issues regarding assertions of due process violations could have been resolved through that litigation. Instead the matter was settled with no resolution regarding the alleged improper procedures and presentation being made. Based upon the settlement reached, the decision by the Clemson Office of Community and Ethical Standards was reinstated. (*R. p. 3260*).

Andrew Pampu, however, continues to press on. In his brief, he argues that no public college or university properly complies with applicable agency proceedings. Although these issues are not properly before the Court and are probably matters for the legislature, the argument clearly reveals that Andrew Pampu is seeking modification of the procedures actually utilized in the public colleges and universities in an action against private individuals, where the public colleges and universities are not represented. It should be recognized that Andrew Pampu has had several opportunities to have this issue addressed and has either lost that argument or waived making it. He can no longer argue that he has been unjustly denied the opportunity to protect his rights. The determination that he engaged in non-consensual sex with Erin Wingo should therefore stand and Andrew Pampu precluded from raising it again.

## II.

### ANDREW PAMPU'S ACTION FOR DAMAGES FOR DEFAMATION AGAINST C.J. GAHAGAN SHOULD HAVE BEEN DISMISSED DUE TO THE ABSENCE OF NEGLIGENT FAULT BY C.J. GAHAGAN

Recovery for defamation may be had only when there is proof of negligence by the declarant in making the defamatory statement. *Restatement, Torts (2d) §558*. The standard of conduct which must be adhered to by the declarant to avoid liability is that of the "reasonable man". (*Restatement (2d) Torts §580 B, comment g*).

Andrew Pampu contends that C.J. Gahagan should have known of Erin Wingo's condition when she first came to the fraternity party. (*Pampu Brief in Response to Gahagan Brief at p. 29*). However, this contention ignores the fact that when C.J. Gahagan first saw Erin Wingo, he noted that she might be drunk but not incapacitated. (*R. p. 1762, line 18 to p. 1763, line 4*). In fact, he suggested she go and have fun with her friends. However, it should be noted that Erin Wingo continued to drink before Andrew Pampu had sex with her. It is clear that once they had completed their sexual interaction, Erin Wingo was stumbling and crying as they returned to the fraternity compound. (*R. p. 1521, lines 1 – 20, R. p. 2021, line 2 to p. 2022, line 25*). As Andrew Pampu has stated, she was on the bad end of a drunk. (*R. p. 1521, lines 4 - 7*). When they returned to the compound, she continued crying and attempted to text C.J. Gahagan. (*R. pp. 3244 – 45; pp. 3, lines 5 - 16*). The texts demonstrate a lack of coordination on her part in attempting to spell. *Id.*

The Restatement directs that the determination of whether the declarant acted reasonably depends on what steps are taken in checking on the truth or falsity of the statement before publishing it. *Restatement (2d) Torts §580 B, comment (h)*. C.J. Gahagan would not have been present when the sexual interaction between Erin Wingo and Andrew Pampu occurred. Accordingly, the reasonableness of his subsequent statement would depend upon the information he was able to gather from indirect sources. For example, he knew Erin Wingo was having trouble with coordination through the tests she attempted to send on the evening of the event. He was also a recipient of the text sent by Andrew Pampu bragging about having sex with a girl behind a trash can. (*CR. P. 3248; R. p. 2195, lines 18 - 24*). He was able to logically establish who the girl was and confronted Erin Wingo about the text. Erin Wingo told him she had little to no knowledge of the event due to her state of intoxication. He also contacted several of Erin Wingo's friends who confirmed her high level of intoxication. (*R. p. 1602, lines 3 - 6*).

Andrew Pampu asserts that he told C.J. Gahagan that the sex was consensual. It should be noted, however, that Andrew Pampu also stated that he was unable to tell she blacked out until she told him the next day. (*R. p. 3249*). He then went on to state that he had blacked out too. (*R. p. 3250 (Id.)*) Further discussion of the matter only occurred after the two texts upon which the defamation claim is based were made. (*See R. p. 1772, lines 20 - 22; R. p.*

*1774, line 8 to p. 1775, line 9; R. p. 1776, line 6 – 8; R. p. 1776, lines 21 to p. 1777, line 15).*

Andrew Pampu also contends that C.J. Gahagan should have checked with others or simply waited. This begs the question of when any statement could ever be made without subjecting oneself to litigation and large damage verdicts. Under the circumstances, C.J. Gahagan made a considerable effort to determine what had happened with little to no cooperation from Andrew Pampu who initially bragged about his sexual conduct and then lied about the circumstances under which the sexual event occurred.

In light of the above, there is no evidence of negligence on the part of C.J. Gahagan or any true evidence of what further actions he should have taken to comply with the reasonable man standard. Without evidence of the breach of the applicable standard by C.J. Gahagan, the verdict finding liability on his part should be reversed.

### III.

#### **THE TRIAL COURT ERRED IN AFFIRMING THE AWARD OF PUNITIVE DAMAGES AGAINST C.J. GAHAGAN DUE TO THE ABSENCE OF CLEAR AND CONVINCING EVIDENCE OF THE STATUTORY FACTORS LISTED IN SECTION 15-32-520 (E) OF THE SOUTH CAROLINA CODE**

In order to justify the award of punitive damages, there must be clear and convincing evidence of an intentional or reckless act by the defendant. *Section 15-32-520 (D)*. Proof of both intentional and reckless acts requires proof that the defendant intended to undertake his act. An intentional act requires proof that the defendant also intended the harm. *See W. L. Prosser, Torts (4<sup>th</sup> Ed.) § 8*. A reckless act, on the other hand, only requires proof that the intended act was likely to cause the damage that occurred. *Berbericks v. Jade*, 392 S.C. 278, 709 S.E.2d 607 (2011). There is no proof that C.J. Gahagan acted in a reckless or intentional manner. Instead, the proof is just the opposite. Evidence demonstrates that C.J. Gahagan acted as a reasonable man and undertook to determine what might have occurred between Erin Wingo and Andrew Pampu. He was able to determine that the two had had sex based upon a text from Andrew Pampu in which he bragged about the event. (*R. p. 3248*). He was told by Erin Wingo that she was so intoxicated that she had no memory of the event. (*R. pp. 3033 - 34*). Andrew Pampu asserted the act was consensual but that he was also blackout drunk. (*R. pp. 3033 - 34*). Texts received from Erin Wingo indicated that she was very drunk, which was

confirmed by conversations had with Erin Wingo's girlfriends. (*R. pp. 3119 20; R. pp. 3115 - 18; R. p. 1602, lines 3 - 6*).

*Section 15-32-520 (E)* was enacted by the legislature to have the trial court protect against punitive awards which were the result of passion or prejudice. Accordingly, Andrew Pampu's argument that these are issues to be solely left to the jury is incorrect.

The first factor listed under *Section 15-32-520 (E)* concerns the degree of culpability. This turns upon whether there is evidence of recklessness or intent. The trial court determined there was evidence of malice where defamation *per se* exists. However, this is incorrect since *Jones v. Garner*, 250 S.C. 479, 158 S.E.2d 909 (1968) directs that punitive damages can only be recovered only with proof of actual malice. Malice is the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances which imply are evil intent. (*Id.*) There is no evidence of malice on the part of C.J. Gahagan.

The trial court also erred with regard to the duration of the conduct. (*R. p. 11*). It focused on the acts of both defendants. However, the acts on which the action for defamation against C.J. Gahagan occurred only on one day. (*R. p. 1830, lines 10 - 24*). Andrew Pampu attempts to elongate this duration by focusing on D.J. Gahagan's alleged recantation. (*Pampu Brief in Response to Gahagan Brief, p. 33*). However, this is not the act being punished. Those acts occurred only the day after the sexual event.

With regard to other listed factors to be considered by the trial court under *Section 15-32-520 (E)*, the trial court acknowledged there was no evidence of prior similar conduct by C.J. Gahagan. Andrew Pampu has acknowledged that C.J. Gahagan did not profit from his statements. It was also noted there was no evidence regarding C.J. Gahagan's ability to pay. (Andrew Pampu argues in his brief that it is obvious there was an ability to pay, given the motion to deposit the judgement amount. (*Pampu Brief in Response to Gahagan Brief*, p. 35). Of course, this motion was made long after the trial court's order, which is what is under review. Moreover, the punishment is to be directed toward the individual defendant and not his insurer.) Of the remaining factors in *Section 15-32-520 (E)*, most are irrelevant to this particular matter. There are no other awards of punitive damages against C.J. Gahagan in other matters which would serve to avoid multiple awards of punitive damages. C.J. Gahagan was not the subject of any criminal action, thereby avoiding a double punishment. Also, there were no civil fines against him which would likewise avoid a double punishment. For the most part, Andrew Pampu's activities did not lead to an increase in the harm be sustained although his act of bragging of the sexual act and refusing to willingly discuss the matter with C.J. Gahagan certainly helped to initiate the acts of C.J. Gahagan. Finally, the punitive award is large and therefore likely to lead to deterrence, although this type of deterrence may be overkill. When

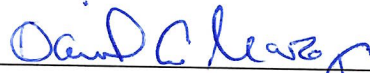
all of these factors are weighed together, it is clear that the punitive award was unjustified and should be reversed.

### CONCLUSION

Based on the above and arguments set forth in the Appellant's Brief of C.J. Gahagan, this case should have been dismissed under collateral estoppel since Andrew Pampu was found by a state agency to have engaged in non-consensual sex with Erin Wingo. The evidence of non-consensual sex would confirm the alleged rape. Moreover, C.J. Gahagan undertook a concerted effort to determine what had occurred and cannot be said to have been negligently at fault in this matter. Finally, even if these were fault on the part of C.J. Gahagan, it does not arise to the level of reckless or intentional acts necessary for the award of punitive damages, based upon the applicable statutory factors to be applied by the trial court.

Respectfully submitted,

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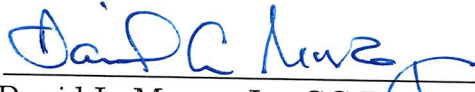
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Pursuant to Appellate Rule 210, the undersigned hereby certifies that the Brief of Colin J. Gahagan complies with Rule 210(b).

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I do hereby certify that I have served the Reply Brief of Respondent/Appellant Colin J. Gahagan's to Appellant/Respondent's Brief to all counsel of record on September 14, 2023, by *electronic mail only*, as follows:

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