STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS IN THE FIFTH JUDICIAL CIRCUIT CASE NO.: 2022-CP-40-01390
David Voros and Alexandra Stasko, Plaintiffs, v. Allison Dunavant; and Fitsnews, LLC, and Mandy Matney, Defendants.	)))))))))))	**MEDIA DEFENDANT MATNEY'S MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO SCRCP, RULE 12(c)**

This memorandum is submitted in support of Media Defendant Mandy Matney's Motion for Judgment on the Pleadings filed on October 26, 2022. For the reasons set forth below, the court should grant judgment/dismissal to Media Defendant Matney based on the Plaintiffs' Complaint, Defendant's Answer, the news reports alleged as basis of defamation claim and referenced in the Complaint and attached to the Motion, and the public filings available at the time of the publications at issue.

Plaintiffs filed this defamation suit regarding three (3) news reports written by Defendant Matney and published on the FITSNews website in December 2020 and March 2021. ("News Reports #1, #2, and #3). The articles reported on a lawsuit, filed by Defendant Dunavant, against the University of South Carolina ("USC") and one of its professors, Defendant Voros, alleging sexual misconduct ("Lawsuit"), and a pending lawsuit by USC instructor Misenheimer against Voros and USC, and resulting complaints and student protests about the manner in which USC handles student complaints/claims against its USC professors ("Grievance System"). In addition to the defamation claim, Plaintiffs' Complaint also alleges civil conspiracy which will be addressed at the conclusion of this memorandum.

I. THE GENERAL STANDARD FOR MOTION FOR JUDGMENT ON THE PLEADINGS IS SLIGHTLY DIFFERENT THAN THAT OF A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM BECAUSE, IN ADDITION TO THE COMPLAINT, THE COURT IS PERMITTED TO CONSIDER THE ANSWER, AND DOCUMENTS INCORPORATED BY REFERENCE INTO THE PLEADINGS, AND PUBLICLY AVAILABLE INFORMATION OR DOCUMENTS GERMANE TO THE ISSUES AT BAR

Rule 12(c) allows a party to move for judgment on the pleadings "[a]fter the pleadings are closed but within such time as not to delay the trial." S.C. R. CIV. P. 12(c). "The standard is almost identical to the standard employed in considering a Rule 12(b)(6) motion 'with the key difference being that on a 12(c) motion, the court is to consider the answer as well as the complaint.'" *Kissel v. Hess Corp.*, 2010 WL 2721964, at *1 (D.S.C. May 27, 2010). When considering a motion for judgment on the pleadings, the court may consider the pleadings, exhibits attached thereto, and any document incorporated therein by reference. See S.C. R. CIV. P. 10(c); *Carolina First Corp. v. Whittle*, 343 S.C. 176, 190 n.7, 539 S.E.2d 401, 410 n.7 (Ct. App. 2000). The court also may consider other materials that are public records or are otherwise appropriate for the taking of judicial notice. See S.C. R. EVID. 201(f); *Doe v. Bishop of Charleston*, 406 S.C. 128, 135 n.2, 754 S.E.2d 494, 498 n.2 (2014); *Sun v. Matyushevsky*, No. 2015-UP-146, 2015 WL 1249074, at *1 (S.C. Ct. App. Mar. 18, 2015).

II. FACTS ALLEGED AND PUBLIC INFORMATION AVAILABLE

1. News Report #1, published 12/09/2020, entitled: "Former Student who sued USC: System For Harassment Complaints Revictimizes the Victims" (see Exhibit A to Motion)

Media Defendant Matney authored and FITSNews published News Report #1 after Matney interviewed Defendant Dunavant [the former student] and reviewed public filings in the Lawsuit. The first clause in the first sentence of News Report #1 introduces the context that the report is about the Lawsuit and its aftermath:

> "A year after her harassment lawsuit against the USC settled, Allison Dunavant still carries the weight of an experience she hardly ever talks about – an experience that changed her adult life and warped the way she sees the world."

A few sentences prior to the specific section containing the allegedly defamatory statements in Plaintiffs' Complaint at para 8(b) – 8(e), News Report #1 introduces the lawsuit allegations as follows:

> Her [Dunavant's] lawsuit describes an unfathomable experience that began in May 2016, when she and two other students agreed to go to Italy with Voros three weeks before the USC study abroad program – ostensibly to help him set up the school before the students arrived.

The report references that it was reporting on allegations Dunavant made in the lawsuit at least a dozen times, and quoted directly from the Amended Complaint several times. News Report #1 also reports the public fact that Dunavant, Voros, and USC settled the lawsuit in late 2019.

Plaintiffs' Complaint extracts the following seven (7) statements from News Report #1 and alleges those are actionable defamation:

a. "Voros allegedly engaged in sexual acts in front of Dunavant, sexually harassed her, then deprived her of food when she wouldn't comply." Para. 8 (a)

b. "One evening, as Dunavant entered Voros' home [in Italy] to get dinner, she said she walked in on Voros and the other female student having sex." Para. 8 (b)

c. "Then, he started to make sexual comments, according to her lawsuit. He'd say things like if she were 'more like' the other female student who was having sex with him, things would be much easier for her on the trip." Para. 8 (c)

d. Voros "ordered her to stay in her room – with bars on the windows- until she changed her attitude toward him" [The complete sentence concludes with . . . "according to the lawsuit."]. Para. 8 (d)

e. With respect to the allegation that Voros somehow withheld food from Ms. Dunavant, "'Thankfully, another student would sneak me food. It was the only way I could eat for a few days.'" Para. 8 (e)

f. A statement the "other female student" alleged in Para. 8 (b) and (c) to have been having sex with Voros on the trip was in fact Plaintiff Stasko, but that Stasko was in fact a "recent graduate," and not a student. Para.

13[1]

g. A statement that "at the very least, they [USC] could recognize these three lawsuits and realize that David Voros is harmful to students and teachers." Para. 15

Plaintiffs' Complaint does not allege that the statements it claims are defamatory are not in fact made by Dunavant in the underlying Lawsuit, but disputes the veracity of the underlying allegations themselves and alleges certain statements by Dunavant were "recanted" in the Lawsuit.

2. News Report #2 published on March 4, 2021, entitled: "You Must Listen to Survivors Of Abuse": USC Protesters Demand Professor Be Fired (see Exhibit A to Motion)

On March 4, 2021, Matney posted an online article reporting about two new lawsuits filed by USC instructors, Jaime Misenheimer and Pamela Bowers [Voros' ex-wife], references Dunavant's prior Lawsuit, and reports on new demands from USC students that the university terminate Voros and change the Grievance System that allegedly enabled the alleged behavior. The News Report cites to a local News 4 Twitter post showing students actively protesting on the USC campus demanding that Voros be fired and reports on a 2500 signature petition gathered since December 2021.

Plaintiffs' Complaint alleges the following statements in News Report #2 as the basis for their defamation claims:

a. Misenheimer said that Voros pressured her to give Dunavant a bad grade in her class in August 2016, Para. 14; and [NEWS REPORT #1]

b. Dunavant said Voros harassed, intimidated, and isolated her during a horrific 2016 study abroad trip to Italy when she was a graduate student." Para 17.

The statement in Paragraph 14 of the Complaint referencing Misenheimer and a bad grade does not appear anywhere within News Report #2. Instead, that statement appears in News Report

[1] Plaintiffs' Complaint does not allege that it was false that Voros and Stasko were having a sexual relationship, but that it was false that "the other student" (Stasko) was a current student, as opposed to recent graduate. Compl. 13.

#1. Only the statement repeating Dunavant's prior claim that Voros harassed, intimidated, and isolated her during the 2016 study abroad trip is actually located in News Report #2.

3. News Report #3 entitled "March 23, 2021, USC Student [Mary Elizabeth Johns] Accuses History Professor [Dr. David Snyder] of Sexual Harassment and Abuse in New Lawsuit" (see Exhibit A to Motion)

On March 23, 2021, Matney posted an online article report about new allegations against a different USC history professor, David Snyder. The article discusses The State Newspaper's article detailing ten (10) different womens' claims that USC mishandled their sexual misconduct claims, a resulting statement from USC that it was introducing a new "5-step plan for 'improving' the process of sexual misconduct reporting," and had placed Defendant Voros, the two other professors against whom claims were made on paid leave.

Plaintiffs' Complaint alleges that in News Report #3 Matney:

a. repeated the same allegedly defamatory allegations [by Dunavant] that "Voros engaged in sexual acts in front of Dunavant, sexually harassed her, and then deprived her of food when she wouldn't comply," and claimed that it was well known in the USC community that these allegations that Voros engaged in sexual acts in front of Dunavant was directed as Professor Stasko. Par. 18-19; [NEWS REPORT # 1]

b. Plaintiffs cite to a statement reporting on Misenheimer's claim that: "Misenheimer believed Voros was making a sexual advance toward her" with regard to a story about a dark room encounter between Voros and Misenheimer. Para. 20 [HYPERLINKED News Report dated 12/01/2020.] See Exhibit 1.

Even though these statements do NOT appear in News Report #3, Plaintiffs allege that these statements in News Report #3 were substantively false, and repeated "stale unsworn allegations in civil cases where the actual party's testimony taken under oath and on the record" constitutes reckless and defamatory conduct, and evidence of actual malice in its reporting.

4. Hyperlink Article within News Report #2 and News Report #3, 12/01/2020 entitled "University of South Carolina Instructors Accuse Professor of Sexual Harassment in Lawsuit"

Construing Plaintiffs' Complaint in their favor, the statements attributed to News Report #3 appear to be part of a different News Report dated December 1, 2020, which was hyperlinked in the content of News Reports #2 and #3. That News Report focused on the lawsuits filed by the two USC instructors against Voros. See Exhibit 1. Both the statements in Complaint Paras. 14 and 20 reference allegations made by Misenheimer against Voros. Other than to deny the veracity of the underlying allegations by Misenheimer, the Plaintiffs' Complaint does not deny that the Misenheimer allegations (in her lawsuit) did not actually include the statements attributed to Matney's reports.

5. Public Information at the Time of Publication

At the time of News Reports, it was public record, and referenced in the Reports, that Defendant Allison Dunavant had sued Plaintiff Voros and USC in the Lawsuit. See Exhibits 2, 3, and 4 (Complaints). The Lawsuit was filed on May 15, 2018, removed to federal district court, settled some time prior to December 11, 2019, and was ultimately dismissed. Also, two (2) other USC-affiliated women mentioned in the News Reports, Misenheimer and Bowers, were currently suing Voros and USC for sexual misconduct and retaliation -related claims. See Exhibit 5 (Docket Reports at time of publications). The Misenheimer and Bowers cases remain pending.

Plaintiffs' Complaint alleges that Dunavant's deposition would have shown that the allegations in her Complaints were false. It contains references to this deposition like: "contrary to sworn testimony" and "actual testimony taken under oath and on the record," Para. 20, and alleges that Plaintiff Stasko emailed Matney and told her that Dunavant "told lies in the interview," and asked if Matney had "even read the depositions." Para. 16. Plaintiffs' Complaint does not allege that Plaintiffs or anyone actually provided the entire transcript of Dunavant's deposition, or any other "sworn statement" to Matney. The public docket report attached as Exhibit 6 reveals

that at no time during the Dunavant litigation did any party file the complete Dunavant deposition transcript. Instead, the Docket Report shows that, at the time of publication, the parties had filed seven (7) different motions for summary judgment of various scope, and had filed over 244 separately-linked exhibits to those motions, some of which contained deposition excerpts.

Lastly, certain of the allegedly defamatory statements were pulled directly from the Dunavant Lawsuit. The original Dunavant Complaint at paragraph 20 states that there were locked bars on the windows simulating a prison environment. Paragraph 30 alleged Dunavant walked in on Voros and another student engaging in sexual acts. Paragraph 33 referenced the allegation that Voros indicated if Dunavant had been "more like" the other student he was engaging with, she would not have to perform as much work at the ICA. Paragraphs 48, 50, and 52 alleged that Dunavant "could not come to dinner that evening or breakfast the next morning," "could not work until her attitude changed and if Plaintiff did not work, she would not be provided meals," and that Voros "denied her access to food and transportation."

The Dunavant Second Amended Complaint Paragraph 33 alleges the room she was provided had bars on the windows. Paragraph 37 alleged the statement about if Dunavant "acted more like" the other student, with whom Voros was engaging with sexually. Paragraph 35 alleges Dunavant walked in on Voros and another student "touching and being intimate with one another." And, Paragraphs 58-61, 63, and 145 make allegations regarding Voros withholding food.

III. ARGUMENT

Generally stated, "[t]he tort of defamation allows a plaintiff to recover for injury to her reputation as the result of the defendant's communication to others of a false message about the plaintiff." *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 508, 506 S.E.2d 497, 501 (1998). "Slander is a spoken defamation while libel is a written defamation or one accomplished

by actions or conduct." *Id.* "To establish a defamation claim, a plaintiff must prove: (1) a false and defamatory statement was made; (2) the unprivileged statement was published to a third party; (3) the publisher was at fault; and (4) either the statement was actionable regardless of harm or the publication of the statement caused special harm." *West v. Morehead*, 396 S.C. 1, 7, 720 S.E.2d 495, 498 (Ct. App. 2011); *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006); *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). Certain communications give rise to qualified privileges. *West*, 396 S.C. at 7, 720 S.E.2d at 498. Under the defense of a qualified privilege, "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 [qualifiedly or] conditionally privileged, and (2) the privilege is not abused." *West*, 396 S.C. at 7, 720 S.E.2d at 499 (alteration in original) (quoting *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999)).

The standards governing defamation depend both on the status of the complaining party and the status of the defending party, and of the subject matter of the alleged defamatory statement. *See Garrard v. Charleston Cty. School Dist.*, 429 S.C. 170, 208, 838 S.E.2d 698, 718 (Ct. App. 2019) (*petition for cert. filed*) (discussing levels of protection for matters of public concern under the First Amendment).

> For purposes of a First Amendment analysis, our courts have held a variety of public school administrators and employees to be public officials. *See Sanders v. Prince*, 304 S.C. 236, 403 S.E.2d 640 (1991) (finding school board members to be public officials); *Scott v. McCain*, 272 S.C. 198, 250 S.E.2d 118 (1978) (finding school trustee to be a public official). Other jurisdictions have held that public school teachers and athletic coaches are public officials for purposes of applying the New York Times doctrine. See *Mahoney v. Adirondack Publ. Co.*, 517 N.E.2d 1365, 1368 (N.Y. 1987) (finding a public high school football coach to be a public figure); *Johnston v. Corinthian Television Corp.*, 583 P.2d 1101, 1102 (Okla. 1978) (finding person holding the dual positions of public school coach and physical education teacher to be a public official).

Garrard, 429 S.C. at 208, 838 S.E.2d at 718. It is for the court to determine whether is a public official or limited public figure. *Cruce v. Berkeley Cty. Sch. Dist*., 435 S.C. 7, 21, 865 S.E.2d 391, 398 (Ct. App. 2021). Here, Plaintiffs admit that they are both public university instructors. Compl. Paras. 5-6. Both Voros and Stasko are undeniably public officials in this context of this Complaint. Furthermore, the court should also determine that the subject matter of claims made against public university instructors while at school- affiliated events and that of the university's processes for addressing claims of misconduct against its personnel are undisputedly matters of public concern.

For several different reasons, Plaintiffs' allegations fail to state a claim for defamation against Media Defendant Matney because the New Reports (1) are not materially false, (2) represent a fair or summary report of the public allegations made against Voros and Stasko, (3) constitute protected statement of opinion, and (4) are not of or about Plaintiff Stasko. This analysis does not need to even reach whether there was actual malice in the publications by a media defendant about a public figure about a matter of public concern.

1. Plaintiffs Fail to Plead the Material Falsity of the Allegedly Defamatory Statements

To state a claim for defamation, a plaintiff must demonstrate that the challenged statements are reasonably construed as communicating a false and defamatory meaning about him. *Holtzscheiter*, 332 S.C. at 508-09, 506 S.E.2d at 501. This is a question of law for the court. *Boone v. Sunbelt Newspaper*, 347 S.C. 571, 582, 556 S.E.2d 732, 738 (2001). *See also Vice v. Kasprzak*, 318 S.W.3d 1, 20-21 (Tex. App. 2009) ("The [plaintiffs] own characterization of the allegedly defamatory statements cannot form the basis for a defamation suit"). Rather, if a "publication is incapable of any reasonable construction that will render the words defamatory" the claim should be dismissed. *Boone*, 347 S.C. at 582, 556 S.E.2d at 738.

First, Plaintiffs' Complaint cannot escape dismissal at this stage by omitting the fact of the Dunavant or Misenheimer lawsuits and allegations made therein. Plaintiffs' allegations illustrate that Media Defendant Matney was reporting on the lawsuit Dunavant had filed. Compl. para. 8. Plaintiffs' Complaint does not allege that the reports about the lawsuits' allegations are false. In other words, there is no allegation that statements made in the News Reports were not in fact made in the *Dunavant* or *Misenheimer* lawsuits. And, the public information regarding the filings illustrates that the reports were substantially accurate. Therefore, Plaintiffs cannot demonstrate that anything published in the News Reports was false, which is required as a matter of constitutional law. *See Milkovich v. Lorain Journal Co*., 497 U.S. 1, 19-20 (1990) ("a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least ... where a media defendant is involved."); *Parker v. Evening Post Pub. Co*., 317 S.C. 236, 243, 452 S.E.2d 640, 644 (Ct. App. 1994) ("in private figure cases involving matters of public concern, the common law presumption of falsity is invalid - the plaintiff must prove the statement was false.") (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768-69 (1986)). This burden cannot be satisfied if "the substance, the gist, the sting" of the statement is substantially true. *Masson v. New Yorker Magazine, Inc*., 501 U.S. 496, 517 (1991) (citation omitted). Put a different way, an alleged defamatory statement is "not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Id.* (citations omitted); *Cooper v. Lab Corp. Of Am. Holdings*, 150 F.3d 376, 381 (4th Cir. 1980) (publication was not defamatory where plaintiff admitted report was true, but challenged the accuracy of the report at issue) (applying South Carolina law).

Here, there can be no other conclusion that the News Reports were reporting the truth about claims made in the lawsuits. If Plaintiffs' allegations were found to have merit, the media could never report on pending lawsuits regarding a matter of public concern without facing liability.

2. The Fair or Summary Report Privilege Bars Plaintiffs' Defamation Claims

One of the qualified privileges recognized as a common law and constitutional by South Carolina courts is the "fair report" privilege. *See generally Padgett v. Sun News*, 278 S.C. 26, 38, 292 S.E.2d 30, 37 (1982) (Ness, J., dissenting) (recognizing a constitutional basis for the common law privilege of fair report). "Whether the occasion is one [that] gives rise to a qualified privilege is a question of law." *West*, 396 S.C. at 7, 720 S.E.2d at 499. The fair report privilege is "the privilege to publish fair and substantially accurate reports of judicial and other governmental proceedings without incurring liability." *West*, 396 S.C. at 7, 720 S.E.2d at 498; *Padgett*, 287 S.C. at 33, 292 S.E.2d at 34 (indicating that to hold a publisher liable for an accurate report of a public action or record would constitute liability without fault and would "make it impossible for a publisher to accurately report a public record without assuming liability for the truth of the allegations contained in such record").

Addressing a report on the content of an unfiled Summons prior to its filing with the clerk of court, the court in *Padgett v. Sun News* held that a pleading which is required by law to be filed with the clerk of court, when so filed, becomes public records in the course of a judicial proceeding. *Padget*, 278 S.C. at 31, 292 S.E.2d at 33 (citing *Lybrand v. The State Co.*, 179 S.C. 208, 184 S.E. 580 (1936). The complaints in the *Dunavant* and *Misenheimer* cases were all filed with the clerk of court, and therefore, are judicial proceedings within the protection of the privilege. Here, all but one of the alleged defamatory statements appear in the filed pleadings. The only one that does not substantively appear in the filed pleadings -- the statement in News Report #1 that "at the very

least, they [USC] could recognize these three lawsuits and realize that David Voros is harmful to students and teachers," Compl. para. 15 – is not actionable because it is a statement of opinion, *supra*. p. 14.

To qualify for the "fair report" privilege, "[i]t is not necessary that [the report] be exact in every immaterial detail or that it conform to that precision demanded in technical or scientific reporting. It is enough that it conveys to the persons who read it a *substantially* correct account of the proceedings." Restatement (Second) of Torts § 611 cmt. f (Am. Law. Inst. 1977). In order to be protected by the fair report privilege, the publisher is not required to investigate the truth of the underlying matter. *See Padgett*, 278 S.C. at 33, 292 S.E.2d at 34 ("[O]ur decision in *Lybrand v. The State Co.*[ ],completely refutes the contention that the publisher is required to go behind the allegations contained in the public record."); *Garrard*, 429 S.C. at 192, 838 S.E.2d at 709 (Ct. App. 2019). While a qualified privilege can be abused, South Carolina law does not require a media defendant give a "balanced" report of judicial proceedings.

Here, the News Report and alleged defamatory statements of fact come directly from the Dunavant or Misenheimer lawsuit, and are directly traceable to the pleadings. The Plaintiffs' Complaint plainly is objecting to the merits of the underlying allegations by Dunavant and Misenheimer. The references to sworn statements and Dunavant's deposition seek to hold a media defendant responsible for undertaking a separate investigation into the credibility of the judicial proceedings on which it is reporting. For a nonlawyer, the Dunavant and Misenheimer docket report is a complicated docket. The Plaintiffs' allegations regarding "sworn statements," "interviews," and "depositions" suggest that a member of the media is required to research and review all kinds of information on file in a lawsuit prior to reporting on it. That is simply not the law. A "report need not track or duplicate official statements to qualify for the [fair report]

privilege; rather, it need give only a 'rough-and-ready' summary that is substantially correct." *Kapinski v. Union Leader Corp*., 2019 U.S. Dist. LEXIS 117858 (citing *Thomas v. Tel. Publ'g Co.*, 155 N.H. 314, 327, 929 A.2d 991 (2007).) In a case somewhat similar to the case at bar, the Supreme Court of Illinois described the analysis required to determine if a report of a judicial proceeding – here the Dunavant and Misenheimer complaints- is fair and substantially accurate:

> . . . the court must determine if the sting of the defamatory statement in the proceeding is the same as the sting of the defamatory statement in the report . . . If so, the privilege defeats the defamation claim because the accuracy of the summary is the "benchmark of the privilege"; the report is the public's window to the proceeding.

Solaia Tech., LLC v. Specialty Publ. Co., 852 N.E.2d 825, 845 (Ill. 2006).

Based on the foregoing, despite the Plaintiff's argument (or opinion) that underlying merits of Dunavant's Complaint were later "recanted," there is no dispute that the News Reports at issue accurately depicted the allegations in the lawsuits. Thus, Plaintiffs' defamation claims arising from the News Reports are barred by the fair report privilege, and should be dismissed.

3. Constitutional Actual Malice

Plaintiffs' Complaint appears to allege that Media Defendant was alerted to the existence of depositions and other "sworn" statements made in relation to the Dunavant lawsuit, and that any failure to review those materials usurps the fair report privilege. According to Judge Jean Toal in the recently decided case of *Garrard v. Charleston Cty. Sch. Dist*.:

> Once it is determined that the plaintiff is a public official, pursuant to *New York Times Co. v. Sullivan*, the plaintiff must show proof that the publication was made with "actual malice" or else the publication is constitutionally privileged. *See McClain*, 275 S.C. at 283, 270 S.E.2d at 124. Actual malice must be proven by clear and convincing evidence. *Elder v. Gaffney Ledger*, 341 S.C. 108, 114, 533 S.E.2d 899, 902 (2000). "Actual malice in this context has been defined as the publication of an article 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *McClain*, 275 S.C. at 283, 270 S.E.2d at 124 (quoting *New York Times*, 376 U.S. at 280). "Whether the evidence is

> sufficient to support a finding of actual malice is a question of law." *Elder*, 341 S.C. at 113, 533 S.E.2d at 901–02. . . . "[A] 'reckless disregard' for the truth 'requires more than a departure from reasonably prudent conduct.'" *Id*. at 114, 533 S.E.2d at 902. "There must be sufficient evidence to permit the conclusion that the defendant *in fact entertained serious doubts as to the truth* of his publication." *Id*. (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). "Failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." *Id*.

429 S.C. at 191, 838 S.E.2d at 709. Ill will, hatred, spite, or desire to injure are not elments of the New York Times standard. *Sanders v. Prince*, 304 S.C. 236, 239, 403 S.E.2d 640, 643 (1991).

Plaintiffs' Complaint alleges only that Stasko emailed Matney on December 17, 2020 (after News Report #1 and after the 12/01/2020 hyperlinked news report) and informed her that Dunavant had told lies in her interview and asked if Matney had even read the depositions. Compl. Para. 16. However, the public docket report does not show that Dunavant's deposition transcript had been made available, nor does Stasko allege she provided a complete copy of the deposition to Matney. Furthermore, the only statement made by Matney after the alleged email from Stasko allegedly alerting Matney to Stasko's opinion that Dunavant's deposition showed that Dunavant had previously lied is that "Dunavant said Voros harassed, intimidated, and isolated her during a horrific 2016 study abroad trip to Italy when she was a graduate student." Compl. Para 17. All other statements made regarding the details of Dunavant's allegations were made prior to the alleged December 17, 2020 email from Stasko to Matney.

"While abuse of [the conditional] privilege is ordinarily an issue [reserved] for the jury, . . in the absence of a controversy as to the facts, . . . it is for the court to say in a given instance whether or not the privilege has been abused or exceeded." *Woodward v. S.C. Farm Bureau Ins. Co*., 277 S.C. 29, 32-33, 282 S.E.2d 599, 601 (1981); *see also Padgett*, 278 S.C. at 33, 292 S.E.2d at 34 (reversing the denial of a directed verdict motion based on fair report privilege where the

"record conclusively show[ed] that the articles . . . were accurate reports of the documents as they were filed in the litigation"). Here, there can be no question that the above-referenced statement substantially and accurately summarizes the allegations by Dunavant against Voros. Even had Matney logged onto PACER, downloaded hundreds of motion for summary judgment exhibits, reviewed selected deposition excerpts, that would not change the absence of controversy that Dunavant, in fact, alleged that Voros harassed, intimidated, and isolated her during their study abroad trip.

4. Certain Allegations are not capable of defamatory meaning because they are opinion

In the leading decision applying the First Amendment protection for expression of opinion, the Supreme Court held that "a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least ... where a media defendant is involved." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990) (emphasis added). The Supreme Court explained that a fact, in contrast to an opinion, must assert something objectively verifiable. A fact is "a thing done or existing" or "[a]n actual happening." An opinion is "a belief[,] a view," or a "sentiment which the mind forms of persons or things." *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 183 (2015) (citing Webster's New International Dictionary 782 (1927) and 7 Oxford English Dictionary 151 (1933)).

In the case at bar, the only statement contained in the Plaintiffs' Complaint which could be construed to be "opinion" is the allegation that News Article #1 states that "at the very least, they could recognize these three lawsuits and realize that David Voros is harmful to students and teachers." Para. 15. The statement that someone is "harmful" to students and teachers based on recounting of several lawsuits related to sexual misconduct is pure opinion. Media Defendant is

protected from claims for defamation based on the First Amendment. The court should dismiss that claim based solely on the pleadings.

5. The Allegedly Defamatory Statements related to Plaintiff Stasko fail to sufficiently identify her, and calling Stasko a student instead of former student carries no defamatory meaning

"To prevail in a defamation action, the plaintiff must establish that the defendant's statement referred to *some ascertainable person and that the plaintiff was the person* to whom the statement referred." *Burns v. Gardner,* 493 S.E.2d 356, 359, 328 S.C. 608, 615 (Ct. App. 1997) (emphasis added). *See AIDS Counseling and Testing Centers v. Group W Television, Inc.,* 903 F.2d 1000, 1005 (4th Cir. 1990) ("In order to actionably defame an individual, a publication must contain some special application of the defamatory matter to the individual. The circumstances of the publication [must] reasonably give rise to the conclusion that there is *a particular reference to the individual*.") (emphasis added; citations and quotation marks omitted)).

Plaintiff Stasko's claims, presumably with regard to the 2-3 references to this other student Voros was allegedly engaging with sexually, fail to reach the level "of and concerning" her. Her name is not mentioned. She does not allege that the allegations with regard to the sexual relationship are false, but instead alleges she was not a "student," as reported, but a former student. Referring to someone as a student as opposed to former student does not carry defamatory meaning.

6. Media Defendant Matney is entitled to dismissal of civil conspiracy claim

To maintain a civil conspiracy claim, a plaintiff "must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff." *Paradis v. Charleston Cty. Sch. Dist.,* 433 S.C. 562, 574, 861 S.E.2d 774, 780 (2021). Plaintiffs' Complaint does not plead any "unlawful act,"

"lawful act by unlawful means," or "the commission of any overt act" in furtherance of the alleged agreement to damage Plaintiffs' professional reputation. Compl. Paras. 34-37.

IV. CONCLUSION

For the reasons stated above, Media Defendant Matney respectfully requests the Court grant the Motion for Judgment on the Pleadings.

s/Christy Ford Allen
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