

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Appellate Case No. 2020-000605

Amy Garrard and Lee Garrard, Guardians Ad Litem for R.C.G., A Minor;
Dean Frailey and Kathryn Frailey, Guardians Ad Litem for C.F., A Minor;
Richard Nelson and Cheryl Nelson, Guardians Ad Litem for D.G.N., A Minor;
Adam Olsen Ackerman; and A.E.P., III, Plaintiffs,

v.

Charleston County School District; Kevin Clayton; Axxis Consulting Company;
and Jones Street Publishers, LLC, Defendants,

And

Eugene Walpole,Plaintiff,

v.

Charleston County School District; Kevin Clayton; Axxis Consulting Company;
and Jones Street Publishers, LLC, Defendants,

Of Whom Eugene Walpole; Amy Garrard and Lee Garrard, Guardians Ad
Litem for R.C.G., A Minor; Dean Frailey and Kathryn Frailey, Guardians Ad
Litem for C.F., A Minor; Richard Nelson and Cheryl Nelson, Guardians Ad
Litem for D.G.N., A Minor; Adam Olsen Ackerman; and
A.E.P., III, are the Petitioners,

And

Of Whom Jones Street Publishers, LLC is the Respondent.

PETITION FOR REHEARING

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ARGUMENT

Petitioners Eugene Walpole, Amy Garrard and Lee Garrard, guardians ad litem for R.C.G., a minor, Dean Frailey and Kathryn Frailey, guardians ad litem for C.F., a minor, Richard Nelson and Cheryl Nelson, guardians ad litem for D.G.N., a minor, Adam Olsen Ackerman, and A.E.P., III (“Petitioners”) respectfully petition the Court for rehearing of the Court’s May 31, 2023 Opinion finding that Petitioners, on a motion for summary judgment, did not provide at least a mere scintilla of non-speculative evidence of general damages. It appears that the Opinion (1) misapprehends the definition of general damages under South Carolina defamation law, which includes hurt feelings, mental suffering, or emotional distress, and not just injury to reputation, (2) imposes a burden on Petitioners to prove special damages or injury to reputation through the testimony of third-party witnesses as a prerequisite to demonstrating emotional harm as a form of general damages, and (3) overlooks evidence in the record that Respondent’s publications caused emotional harm to Petitioners. This Court’s precedents have never required plaintiffs to prove actual injury through direct evidence of injury to reputation or special damages as a prerequisite to proof of general damages encompassing emotional harm, even in constitutional defamation actions. To impose such a burden on Petitioners now would by *stare decisis* create a heightened burden for all future victims of defamation, without any reasoning or explanation from the Court for such a sea change in our defamation jurisprudence.

In its Opinion, the Court correctly observes that Petitioners are not entitled to the common law presumption of general damages, and that Petitioners were

therefore required to prove “actual injury.” See *Erickson v. Jones St. Publ’rs, LLC*, 368 S.C. 444, 466, 629 S.E.2d 653, 665 (2006). Petitioners were correctly required to show actual injury in the form of general *or* special damages. *Id.* The Court’s Opinion then erroneously concludes that Petitioners could only point to speculative evidence of actual injury. Dovetailing on the Court of Appeals’ Opinion, this required Petitioners to have produced evidence of the identity of readers of the *City Paper* articles whose opinion of Petitioners was affected (direct evidence of injury to reputation), evidence of lost friends or employment, and evidence of lost educational opportunities (evidence of special damages). This finding wholly ignores evidence in the record of Petitioners’ injuries in the form of hurt feelings, humiliation, mental suffering, and emotional distress (evidence of general damages) caused by the *City Paper*, which Petitioners were only required to prove through a mere scintilla of evidence under the summary judgment standard, with all inferences resolved in Petitioners’ favor. It also unnecessarily and without explanation muddies the waters of what constitutes general damages, and what a private-figure plaintiff is required to prove in his defamation claim against a media defendant.

By finding that Petitioners’ evidence was merely speculative of Petitioners’ injuries, the Opinion seems to confine proof of actual injury to evidence of injury to reputation or tangible losses or injuries to the Petitioners’ property, business, or occupation caused specifically by the *City Paper* publications. South Carolina law provides that Petitioners do not have to provide proof of such injuries on a motion for summary judgment, so long as they could provide a mere scintilla of evidence of hurt

feelings, humiliation, mental suffering, and emotional distress caused by the *City Paper*.

In a case involving an issue of public controversy and publications by a media defendant, the private-figure plaintiff must prove “actual injury” in the form of general *or* special damages. *Erickson*, 368 S.C. at 466, 629 S.E.2d at 655. General damages include hurt feelings, emotional distress, mental suffering, or personal humiliation, in addition to other intangible losses such as injury to reputation. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S. Ct. 2997, 3012 (1974); *Erickson*, 368 S.C. at 465 n.6, 629 S.E.2d at 654 n.6. Notably, nowhere has the Court ever explicitly required a plaintiff to prove all of these subcategories of injuries to prove general damages, or any one subcategory in particular; so long as Petitioners have produced some evidence of such general losses it should be sufficient proof of general damages for the purposes of summary judgment in a First Amendment defamation action.

This is in keeping with the United States Supreme Court’s decision in *Gertz*, where it left it to the states to define actual injury within the context of constitutional defamation, so long as common law presumptions of damages were no longer intact. In creating South Carolina’s definition of actual injury, this Court deliberately chose to include both general damages and special damages. This is a lenient standard as it does not require a heightened burden of proving tangible harm or specific injury to reputation, so long as some other category of general damage is proven. The Court in its prior precedents could have chosen to specifically require proof of injury to reputation or special damages for a plaintiff to prevail in a constitutional defamation

action, or made such proof a prerequisite to proof of the other delineated categories of emotional harm under general damages. Instead, our precedents only require Petitioners to provide some proof of general damage as defined by South Carolina law.

The evidence in this case, when viewed in the light most favorable to Petitioners, clearly does so. The Court has previously chosen to allow actual injury to be demonstrated by proof of emotional injury alone in the form of general damages, and it is entirely permissible under the Constitution for the Court to have done so. *Time, Inc. v. Firestone*, 424 U.S. 448, 460, 96 S. Ct. 958, 968 (1976); see *Holtzschetier v. Thomson Newspapers, Inc.*, 332 S.C. 502, 512 n.8, 506 S.E.2d 497, 503 n.8 (1998) (noting that the Constitution requires proof of actual injury which includes not only injury to reputation but also mental suffering and personal humiliation). The Court has never exclusively required proof of special damage or injury to reputation to support a libel claim, although these forms of damage are sufficient to support such a claim. See *Erickson*, 368 S.C. at 465, 629 S.E.2d at 664 (listing the elements of defamation, none of which require proof of injury to reputation or special damages in a libel case).

Therefore, if there is any evidence in the record supporting a reasonable inference that Respondent's publications were at least partially responsible for causing Petitioners personal humiliation, embarrassment, and hurt feelings, then Petitioners have satisfied their burden on summary judgment of pointing to a mere scintilla of evidence of general damages. So long as Petitioners can produce *some*

evidence of general damages caused by Respondent, Petitioners are not required to produce evidence that the publication changed anyone's opinion of Petitioners, nor are Petitioners required to produce evidence that Chris Haire's articles in the *City Paper* were solely responsible for the embarrassment, humiliation, and mental suffering experienced by Petitioners. By finding Petitioners' evidence of general damages to be merely speculative, the Court's Opinion errs in that it takes Petitioners' testimonial evidence that the *City Paper* articles were at least partially responsible for their hurt feelings, humiliation, and mental suffering and resolves all inferences that could be drawn from the evidence against Petitioners instead of in their favor.

Petitioners have drawn the Court's attention to at least a mere scintilla of evidence that the *City Paper* articles in particular caused Petitioners personal humiliation, hurt feelings, mental suffering, and emotional distress. The Court's Opinion is in error in two aspects in its view of the evidence in the record. First, it ignores evidence in the record that, when viewed in the light most favorable to Petitioners, demonstrates that the *City Paper* articles in particular harmed Petitioners.

Q. How has the City Paper's – how has the City Paper's publications of the article "Mob Rules" harmed your reputation?

A. Well, it's like that was the – around the time, that was the article that everyone around had read just because it was so – it took – it kind of took things – it was on a different level than all the other articles it seemed because **everyone – everyone you talked to at the time was like, "Yeah, did you read this, did you read this, did you read this?"** It kind of spread through the news, it kind of spread through like a wildfire throughout our school community.

And then people I talked to, it's like they weren't asking me, "Did you read the Live 5 news article about this happening?" It's like, "Oh, did you read Chris Haire's article about how – about what your school – about what your school did and how" – it just seemed much more serious than . . .

Q. Can you name anyone who specifically asked you about the Chris Haire article?

A. Just classmates, no. I can't name exact names.

Q. Okay. And are you aware that other publications, both nationally and locally, also publicized or accused you – accused the football team's actions of being racist?

A. I did not know that they directly called us racists such as the City Paper has.

Q. Okay. And in your complaint, you are suing the Charleston City Paper for defamation because of an article they published entitled "Mob Rules." Could you tell me what about – could you tell me why you decided to sue the City Paper over that article?

A. Because I felt the article is misleading and it didn't take an objective form of – to portray and you pretty much just assumed that we were racists and didn't take the time to gather the facts and do honest reporting.

Q. Are you – why are you suing Jones Street Publishing?

A. Because they publish the City Paper.

Q. Okay. And why are you – why are you suing the City Paper?

A. Because like – defamation and slander is why.

Q. Okay. And how do you feel they defamed or slandered you?

A. They falsely accused us of being racists.

(App. p. 100, line 25 – p. 101, line 14; p. 101, lines 17-20; p. 188, lines 5-10; p. 362, lines 14-23; p. 399, line 20 – p. 400, line 4).

Second, the Court's Opinion does not view the following evidence of hurt feelings, humiliation, embarrassment, mental suffering, and emotional distress as evidence of general damages:

Q. Okay. And how has the Charleston City Paper's article, editorial harmed you?

A. They falsely accused me of being something I'm not, which makes you feel more self-conscious. It doesn't feel good to be called a racist when you're not.

Q. And how do you think that the City Paper's particular publication harmed your reputation?

A. I think that now – I know that I – I can't even wear an Academic Magnet shirt and walk around and not have people think about that now I should wear that shirt with pride, I shouldn't have to think, you know, who's – you know, oh, they see that shirt, they're thinking about a bunch of racist white people smashing watermelons.

(App. p. 188, lines 19-24; App. p. 416, lines 7-17). While counsel for Respondent couched her questions as inquiring into the harm that was caused by Respondent to Petitioners' reputation, the testimony clearly demonstrates that Respondent's publications caused non-speculative general damages in the form of embarrassment and hurt feelings suffered by Petitioners. The Court's Opinion does not sufficiently explain how this evidence is not adequate to survive summary judgment.

By taking the position that this evidence is “speculative”, the Court’s Opinion does two things: it assumes that Petitioners cannot personally testify as to the emotional harm they suffered without speculating, and/or it assumes that testimony from Petitioners that the *City Paper* articles in particular embarrassed and humiliated them, and were discussed in the school community, is false. In doing so, the Opinion fails to correctly apply the summary judgment standard of resolving inferences in favor of Petitioners and construing Petitioners’ testimony as credible and true. Without question a plaintiff may demonstrate through personal testimony alone evidence of damages in the form of hurt feelings and mental anguish.

To be clear, the evidence that the *City Paper* articles harmed Petitioners is not speculative. The testimonial evidence demonstrates that it was the *City Paper* articles that Petitioners’ peers were discussing at school and after class. It was the *City Paper* articles that overtly labeled Petitioners as racists, in contrast to other local, regional, and national publications. It was the *City Paper* articles that Petitioners identified as particularly causing them humiliation and embarrassment. The Petitioners’ testimony does not speculate as to these facts; it clearly sets forth that Petitioners’ primary source of embarrassment and emotional suffering was the articles written by Chris Haire in the *City Paper*. Petitioners’ actions are not trivial in nature and involve statements published in a regional paper that is widely read and distributed throughout Charleston, Berkeley, and Dorchester counties,

statements which accused Petitioners of being racist and creating a racist ceremony to denigrate the largely African-American teams on their football schedule.¹

At least two other states, Colorado and Nevada, have similarly lenient requirements for proof of actual injury in First Amendment defamation cases. Similar to South Carolina, in both states, proof of actual injury can consist of proof of general damages or proof of special damages. And both states' highest courts have held that in circumstances such as those found within this case, testimonial evidence of humiliation and hurt feelings is sufficient proof of actual injury to create a jury question on the issue of damages. *See Keohane v. Stewart*, 882 P.2d 1293 (Colo. 1994) (finding that first-hand testimonial evidence that a plaintiff was "devastated" by defamatory publications was sufficient to demonstrate that plaintiff was caused to "feel worse" by the publications, supporting an award of damages in a constitutional defamation action); *Nevada Independent Broadcasting Corp. v. Allen*, 99 Nev. 404, 664 P.2d 337 (Nev. 1983) (finding that testimonial evidence that plaintiff was humiliated and stunned by a defamatory publication was sufficient to support an award of damages in a First Amendment defamation action involving a public figure). Importantly, none of the above-cited cases relied on a common law presumption of general damages and required plaintiffs to prove actual injury in the form of general damages, which included damages for emotional harm under state law, just like in this State.

¹ The *City Paper's* weekly print readership is 87,500 and its online audience is over 700,000 readers monthly, with over 700 print distribution locations in Charleston, Berkeley and Dorchester counties. 2022 Rate Card Print & Digital, Charleston City Paper, https://charlestoncitypaper.com/wp-content/uploads/2022/01/2022_RateCard.pdf.

In sum, under South Carolina law Petitioners were not required to prove through direct evidence that the *City Paper* publications caused any of Petitioners' immediate peers to think differently of them, or that the *City Paper* articles were the sole proximate cause of any reputational damage suffered by Petitioners. Instead, to survive summary judgment Petitioners only needed to point to a mere scintilla of evidence that, when viewed in the light most favorable to Petitioners, demonstrated that the *City Paper's* publications caused general damages, including personal humiliation, mental suffering, and hurt feelings, to Petitioners. Petitioners' testimony undisputedly demonstrates that it was the *City Paper* articles in particular that embarrassed and wounded Petitioners.


It is difficult to understand how the Petitioners' testimony could be interpreted as being speculative. If the evidence is not sufficient to constitute a mere scintilla of proof of general damages caused by Respondent, or a reasonable inference of such damages, the Court should provide clarity as to what is now required for future defamation plaintiffs to prove actual injury in constitutional cases involving a media defendant. As written, the Court's Opinion appears to impose a heightened burden on private-figure plaintiffs to provide proof of injury to reputation or special damages, as opposed to the other subcategories of general damages, when there is not a common law presumption of general damages. This burden has never been imposed on plaintiffs within South Carolina or articulated in the decisions of this Court, and to do so now should require a more thorough explanation from the Court as to the burden of proof in private-figure constitutional defamation actions.

In other words, to the extent that the Court now imposes a heightened burden on plaintiffs and requires proof of injury to reputation or special damages as a prerequisite to proof of other forms of general damage in all constitutional defamation cases involving a media defendant, this requirement has never before been set forth as the law of this State, and therefore it should not be retroactively applied to Petitioners' defamation claims. South Carolina law since *Holtzscheiter* has only required plaintiffs under the instant circumstances to prove general damages or special damages; it has never required plaintiffs to prove injury to reputation **and** general or special damages, as now appears to be required by the Court of Appeals' and this Court's Opinions. For these reasons, Petitioners respectfully request that the Court rehear this matter and correct its Opinion to conform to its prior precedents regarding general damages and constitutional defamation claims.²

Respectfully submitted,

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² In the alternative, the Court should clarify its Opinion to avoid further confusion of this State's defamation doctrine, which has been previously noted to be "mind-numbingly incoherent." *Holtzscheiter*, 332 S.C. at 516, 506 S.E.2d at 505 (Toal, J., concurring). As written, the Opinion only obfuscates the requirements for future private-figure plaintiffs in cases against a media defendant.