

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Jun 28 2023

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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.

REPLY IN FURTHER SUPPORT OF PETITION FOR REHEARING

John E. Parker
John E. Parker, Jr.
PARKER LAW GROUP, LLP
101 Mulberry Street East
Hampton, SC 29924
Phone: (803) 943-2111
ATTORNEYS FOR PETITIONERS

Other Counsel of Record:
Wallace K. Lightsey, Esquire
Meliah Bowers Jefferson, Esquire
Christopher B. Schoen, Esquire
WYCHE, P.A.
P.O. Box 728
Greenville, SC 29602
ATTORNEYS FOR RESPONDENT

William H. Davidson, II, Esquire
Davidson & Lindemann, PA
Post Office Box 8568
Columbia, SC 29202-8568
ATTORNEY FOR DEFENDANT,
CHARLESTON COUNTY SCHOOL DISTRICT

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”) submit this Reply in response to certain arguments made by Respondent Jones Street Publishers, LLC in opposition to Petitioners’ Petition for Rehearing. Respondent has effectively convinced the Court to bring about a change in South Carolina defamation law which would require proof of reputational harm as an essential element in First Amendment defamation claims, when this requirement has never before been one of the elements of the cause of action and has never before been stated or held by any court within this State.

Respondent argues that “our courts have consistently held and observed that a plaintiff alleging defamation against a media defendant must be able to show an actual injury **to reputation**” and that Petitioners have conflated the concepts of actionability and damages.¹ Respondent appears to have convinced the Court of these notions despite the fact that Respondent has never cited to a single South Carolina authority, outside of tangentially related dicta, that actually supports its arguments or imposes such a requirement. To the contrary, Respondent’s claims are not supported by the prior decisions of this Court and the elements of the defamation cause of action, and it is Respondent who has misunderstood the concept of actionability within the context of defamation. For better or worse, no South Carolina

¹ As will be explained below, actionability of a statement in First Amendment cases is directly dependent upon proof of damages, so the two concepts go hand-in-hand.

authority exists requiring that a plaintiff prove injury to reputation in a private figure defamation case involving a media defendant prior to the Court's Opinion, and the Supreme Court of the United States has explicitly stated that proof of injury to reputation is not a constitutional requirement under these circumstances.

The Supreme Court of the United States has never defined actual injury, although it has clarified that actual injury is not limited to out-of-pocket loss, and that the customary types of actual harm inflicted by defamatory statements includes personal humiliation and mental anguish and suffering, in addition to impairment of reputation.² *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S. Ct. 2997, 3012, 41 L.Ed.2d 789 (1974). Respondent has cited a footnote in *Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534, 17 L.Ed.2d 456 (1967), for the proposition that “in a defamation case ‘the primary harm being compensated is damage to reputation’ not ‘the mental distress from having been exposed to public view’”. Putting aside the fact that this is not what the footnote states, the Supreme Court later went on to hold that it was entirely permissible for a plaintiff to recover damages in a defamation case against a media defendant by proving emotional harm instead of injury to reputation.

Petitioner's theory seems to be that the only compensable injury in a defamation action is that which may be done to one's reputation, and that claims not predicated upon such injury are by definition not actions for defamation. But Florida has obviously decided to permit recovery for other injuries without regard to measuring the effect the falsehood may have had upon a plaintiff's reputation. This does not transform the action into something other than an action for defamation as that term is meant in *Gertz*. ***In that opinion we made it clear that States could base awards on elements other than injury to reputation, specifically listing “personal humiliation, and mental anguish and suffering” as***

² South Carolina has defined actual injury as including general damages or special damages. *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 466, 629 S.E.2d 653, 665 (2006)

examples of injuries which might be compensated consistently with the Constitution upon a showing of fault.

Time, Inc. v. Firestone, 424 U.S. 448, 460, 96 S. Ct. 958, 968, 47 L.Ed.2d 154 (1976).

Therefore, the *Firestone* rule permits a defamation plaintiff to recover compensatory damages against a media defendant where a defamatory statement is made to a third person, fault is demonstrated, and harm by way of emotional distress is shown, even without proof of harm to reputation. A showing of actual injury does not require proof of injury to reputation unless South Carolina has previously chosen to specifically define actual injury in such a manner. It never has, and Respondent has not cited any decisions during the entirety of this entire litigation containing such a holding. Contrary to Respondent's contentions, "concrete proof of injury to reputation" has never been required by this Court or the Supreme Court of the United States as a matter of law.

The logic of the Supreme Court's holding in *Gertz* is that it should not be necessary to prove injury to reputation in order to prevail on a libel claim, presumably because injury to reputation is inherently difficult and sometimes close to impossible to prove. This rationale has been explained as follows:

We are directed by Hearst to the recent decision of the Supreme Court of Kansas in *Gobin v. Globe Publishing Co.*, 232 Kan. 1, 649 P.2d 1239, 1243 (1982), where that court adopted the rule that "[u]nless injury to reputation is shown, [a] plaintiff has not established a valid claim for defamation" This approach, in our view, fails to respect the centuries of human experience which led to a presumption of harm flowing from words actionable per se. One reason for that common law position was the difficulty a defamation plaintiff has in proving harm to reputation. Eaton, *supra*, at 1357 describes the problems:

The conclusive presumption of injury for certain kinds of defamation derives from the recognition that injury to reputation is extremely difficult to demonstrate, even when it is obvious that serious harm has resulted. Identifying and locating those persons in the community who may think less highly of the plaintiff because of the publication is difficult, especially when the defamatory statement has been indiscriminately circulated. And once located, it is the rare witness who will admit to the plaintiff or testify in court that his attitudes toward the plaintiff have changed as a result of the publication, when by doing so he admits that he changed his opinion without determining the truth or falsity of the statement.

Ordinarily, the plaintiff will be able to present the witnesses who will testify only that the plaintiff's reputation had been good, that their own opinion of the plaintiff has not changed, but that the plaintiff's general reputation in the community has suffered as a result of the publication. This kind of testimony often lacks credibility because it is bottomed on hearsay and imputes to others a change in attitude which the witnesses themselves thought unnecessary. And this kind of evidence is usually insufficient to establish the necessary causal connection between the defamatory publication and the alleged decline in community standing. In short, a requirement of actual proof of injury to reputation **has always** been thought to reduce considerably any chance for adequate compensation.

Hearst Corp. v. Hughes, 297 Md. 112, 129-30, 466 A.2d 486, 495 (Md. 1983) (emphasis added). In abolishing the common law presumption of general damages, *Gertz* and *Holtzscheiter*, neither case ever imposed a new requirement on plaintiffs to prove actual reputational harm, it only required plaintiffs in the future to prove some type of general or special damage.

Again, there are no historical decisions of this Court, prior to the Court's Opinion in this case, holding that a plaintiff must prove injury to reputation in order to show actual injury. Respondent has essentially played a shell game with the Court, relying on dicta from a number of its prior decisions which state in different forms that the focus of defamation is on the harm to one's reputation, to create the

appearance that there has historically been a requirement in this State for defamation plaintiffs to prove reputational harm. Petitioners would ask the Court to follow the ball, and not the shells, to discern what this Court's prior precedents actually require Petitioners to prove in order to survive a motion for summary judgment.

A plaintiff need only prove the elements of his cause of action by a preponderance of the evidence, and on a motion for summary judgment, by pointing to a mere scintilla of evidence. *See Nelson v. Piggly Wiggly Central, Inc.*, 390 S.C. 382, 389, 701 S.E.2d 776, 779 (Ct. App. 2010); *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). There are only four elements of the defamation cause of action: “(1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 519, 506 S.E.2d 497, 506 (1998) (Toal, J., concurring). Notably, none of these elements requires or informs the plaintiff that he must prove injury to reputation through concrete, testimonial evidence from witnesses.

Instead, the fourth element only requires the plaintiff to prove actionability of the statement irrespective of special harm or the existence of special harm. Respondent contends, without citing to any authority, that “the requirements of actionable defamation” under South Carolina require plaintiffs to show “actual injury to their reputations”. To the contrary, this Court has previously defined actionability

in the following terms: “To be actionable, the libel, as a result of its tendency to impeach or injure the plaintiff’s reputation, must thereby injure him. The injury, if any, which results from the libel is in the form of ‘general damages’ or ‘special damages’.” *Capps v. Watts*, 271 S.C. 276, 281, 246 S.E.2d 606, 609 (1978). There is no mention of proof of reputational harm. Thus, under South Carolina law actionability does not specifically require actual injury to reputation, but instead requires proof of general damages or special damages.

The Court has repeatedly found that in defamation cases such as this, a plaintiff may show “actual injury’ in the form of general damages **or** special damages.” *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 466, 629 S.E.2d 653, 665 (2006) (emphasis added). It has never stated that a plaintiff alleging defamation against a media defendant must be able to prove actual injury to reputation, which explains Respondent’s lack of citations to South Carolina authority directly supporting this proposition. By permitting a plaintiff to recover against a media defendant by proving general damages, the Court has determined that in cases such as this, the defamatory statements made by *The City Paper* are actionable irrespective of special harm, as stated by the elements of the defamation cause of action, so long as there is some proof of general damages.

The Court has repeatedly stated in its prior decisions that evidence of general damages is not limited to injury to reputation. The Court has always defined general damages as “injury to feelings, mental suffering, injury to character and reputation” and other similar injuries. *Whitaker v. Sherbrook Distributing Co.*, 189 S.C. 243, 200

S.E. 848, 849 (1939). While in cases not involving a media defendant there is a presumption of general damages, in this case Petitioners were entitled to show actual injury by proving general damages, or by proving special damages. Petitioners have pointed to at least a scintilla of evidence demonstrating that they suffered hurt feelings and emotional distress as a result of *The City Paper's* publications. The definition of general damages as stated in *Whitaker, Holtzscheiter*, and numerous other cases contains no language indicating that a plaintiff must prove injury to reputation to the exclusion of proof of injury to feelings or emotional distress, and the decisions contain no language curtailing the proof of general damages in such a manner. *Erickson* never holds that a plaintiff must prove actual injury by demonstrating injury to reputation. The cases state a plaintiff must prove actual injury by demonstrating general damages. Respondent has convinced the Court to formulate a new rule out of whole cloth.

This Court has never stated that a plaintiff must prove actionability by pointing to evidence of injury to reputation prior to being permitted to demonstrate evidence of other forms of general damages. To put it simply, the question of whether South Carolina requires proof of a specific type of actual injury – injury to reputation – to the exclusion of other forms of general damages in order to establish a right to recover has never been raised to, considered, or determined by this Court. The Court's Opinion in effect now establishes a requirement of such proof without explanation and retroactively imposes this requirement on Petitioners. In doing so, the Court appears to abrogate an entire line of doctrinal decisions only requiring that a private

plaintiff prove general damages to show actual injury, which are defined as including hurt feelings and emotional distress, without stating that it is doing so or providing any clarification or explanation for why this is now the rule in South Carolina. For these reasons, the Petitioner for Rehearing should be granted and the Court should reverse its decision affirming the Court of Appeals on the issue of actual injury.

Respectfully submitted,

PARKER LAW GROUP, LLP

By: _____



June 28, 2023
Hampton, South Carolina

John E. Parker
John E. Parker, Jr.
101 Mulberry Street East
P.O. Box 457
Hampton, SC 29924
(803) 943-2111
jparker@parkerlawgroupsc.com
jayparker@parkerlawgroupsc.com
ATTORNEYS FOR PETITIONERS