RECEIVED

Jun 16 2022

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Appellate Case No. 2020-000605
Published Opinion No. 5691 (S.C. Ct. App. Filed Nov. 6, 2019)

Amy Garrard and Lee Garrard, Guardians Ad Litem for R.C.G., A Minor; and 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; and 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 BRIEF OF PETITIONERS

John E. Parker
John E. Parker, Jr.
PARKER LAW GROUP, LLP
101 Mulberry Street East
Hampton, SC 29924
Phone: (803) 903-1781

-AND-

William F. Barnes III
BARNES LAW FIRM, LLC
13 Mulberry Street East
Hampton, SC 29924
Phone: (803) 943-4529
ATTORNEYS FOR PETITIONERS

INDEX

TABLE OF AUTHORITIES iii

ARGUMENT 2

I. All of the issues, arguments, and evidence referred to in Petitioners' Brief are preserved for review and documented in the Record on Appeal. 2

II. In defamation actions, the clear and convincing evidence standard only applies to actual malice on a motion for summary judgment. 6

III. The City Paper's accusations of racism contained facts that are provably false or implied the allegation of undisclosed defamatory facts, and are actionable regardless of their hyperbolic and insulting character. 7

IV. The City Paper misstates South Carolina law on general damages and misrepresents the record on damages. 10

V. There is clear and convincing evidence that when the City Paper published Chris Haire's "Mob Rules" article on October 30, 2014, it had obvious reasons to doubt the veracity of the allegations of racism. 12

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Abofreka v. Alston Tobacco Co.
288 S.C. 122, 126, 341 S.E.2d 622, 625 (1986) 10,11

Capps v. Watts,
271 S.C. 276, 282-83, 246 S.E.2d 606, 609-10 (1978 9

Erickson v. Jones St. Publishers, LLC,
368 S.C. 444, 466, 629 S.E.2d 653, 665 (2006) 6, 13, 14

Fawcett Publ'ns, Inc. v. Morris,
377 P.2d 42, 51-52 (Okla. 1962) 5

Garrard v. Charleston Cty. Sch. Dist.,
429 S.C. 170, 201 n.12, 838 S.E.2d 698, 714 n.12 (Ct. App. 2019)..... 8

George v. Fabri,
345 S.C. 440, 548 S.E.2d 868 (2001) 6, 10

Goodwin v. Kennedy,
347 S.C. 30, 40, 552 S.E.2d 319, 324-25 (Ct. App. 2001)..... 9,10

Johnson v. Trust Co. Bank
478 S.E.2d 629 (Ga. Ct. App. 1996) 14

Milkovich v. Lorain Journal Co.,
497 U.S. 1, 18, 110 S. Ct. 2695, 2705 (1990)..... 2

Smith v. Smith,
194 S.C. 247, 9 S.E.2d 584 (1940) 11

State v. Dunbar,
356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) 4

Stevens v. Tillman,
855 F.2d 394, 402 (7th Cir. 1988..... 8

Other Authorities

20 S.C. Jur. *Libel and Slander* § 92 7

Rules

Rule 210(h), SCACR. 4

Petitioners respectfully submit this Reply Brief to address certain inaccuracies and misrepresentations of the law raised in Respondent Jones Street Publishers, LLC's (City Paper) Brief. Before addressing these points, Petitioners would take the opportunity to draw the Court's attention to an illustration of why the Circuit Court and Respondent's position regarding the defamatory character of the subject statements, or their lack thereof, is fundamentally flawed. In its Brief, the City Paper quotes a segment of the hearing transcript on the City Paper's Motion for Summary Judgment in which the Circuit Court recites the City Paper's position that "any reasonable objective look at the caricature as drawn on that watermelon and circling around it and naming of that watermelon Bonds Wilson leads to the conclusion that that was an attempt to racially caricature." The City Paper has characterized this as a "very logical synopsis." (Br. of Resp't 12).

The City Paper has offered this passage in support of its contention that the intent of the Petitioners has no bearing on whether or not editor Chris Haire's, and the City Paper's, assertions that the celebration ritual had racist overtones were defamatory, and this is true. What the City Paper fails to recognize is that the subject articles also accused the Petitioners of being racist, drawing racist caricatures, and participating in and condoning racist acts. As recognized by the Circuit Court in the above-quoted passage, the motive and intent behind Petitioners' celebration activities is verifiable, whether through the Petitioners' testimony and prior statements or character evidence. Thus, the City Paper's accusations of racist conduct can readily be scrutinized by the factfinder as to their truth or falsity, and by definition are not

pure opinion. This brings the subject statements within the *Charleston City Paper* articles squarely into the category of actionable opinion which implies an assertion of objective fact. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18, 110 S. Ct. 2695, 2705 (1990). For the following reasons, Petitioners respectfully request that the Court reverse the Court of Appeals' decision affirming the Circuit Court's dismissal of this action.

ARGUMENT

The City Paper makes numerous erroneous assertions in its Brief that require correction. First, the City Paper makes several factually flawed arguments as to why certain issues raised by Petitioners are not preserved for review. Second, the City Paper misconstrues the proper standard of review for the Court on all of the issues presented by this Appeal with the exception of actual malice. Third, the City Paper misconstrues the facts underlying the City Paper's accusations of racism and omits our State's law concerning whether hyperbole, epithets, and insults can be actionable defamation. Fourth, the City Paper misconstrues state law on the issue of general damages in a defamation case, and relies exclusively on the law of other jurisdictions to create the appearance that Petitioners have not produced a mere scintilla of evidence of general damages. Lastly, the City Paper fails to recognize all of the facts known to the City Paper prior to publication that would have called into question the veracity of its statements and put it on notice of the need to investigate its claims.

I. All of the issues, arguments, and evidence referred to in Petitioners' Brief are preserved for review and documented in the Record on Appeal.

In its Brief, the City Paper states that

> [f]or the first time in this case, Petitioners argue that labeling their acts as racist is a statement of fact and that 'the question for the Court is not whether calling Petitioners 'racist' is a protected opinion, but whether the City Paper accused Petitioners of specific conduct that is provably false.' This argument has never been made before and thus is not preserved for appeal.

(Br. of Resp't 24-25). This is simply not true. Petitioners argued to the Circuit Court in their Memorandum in Opposition to Summary Judgment, and the Court of Appeals in their Brief and Petition for Rehearing, that the City Paper's characterization of Petitioners' acts as racist was a provably false factual assertion and not pure opinion.

> In "Mob Rules. School district forces out superintendent who fired coach who condoned racist ritual," Mr. Haire states that the Academic Magnet's "largely white football team" drew a "racist caricature" on a watermelon and smashed it after defeating "predominately African-American competitors" . . . . As written, these statements are presented as factual assertions cloaked in the guise of opinion. Therefore, a reasonable jury could find that the printed statements are defamatory and not opinion . . . .

(App. p. 210). Similar arguments were made to the Court of Appeals in Appellants' Brief and Petition for Rehearing: "Whether or not an individual engages in racist ideologies or behavior is certainly provable by fact." (App. pp. 982-83, 1067). Both the Circuit Court and the Court of Appeals found the City Paper's accusations that Petitioners had engaged in racist behavior, had condoned or participated in a racist act, and had engaged in racist behavior did not assert any verifiable, objectively provable fact, despite the Circuit Court's previous recitation that one can objectively determine whether Petitioners' conduct was motivated by racial animus. (App. pp. 16-17, 1054-56). Thus, the argument is preserved for review, as it has been both raised to and ruled upon by the Circuit Court and the Court of Appeals.

Likewise, the City Paper claims that Petitioners in their Brief cite to "multiple excerpts of deposition testimony that were not included in any filing made in the Circuit Court and were never referenced in the lower court proceedings in any manner. Pet. Br. at 25-27, 31-32." (Br. of Resp't 38). However, out of the eight deposition excerpts referred to by the City Paper above, seven of them were cited by either Petitioners or the City Paper itself in briefing submitted to the Circuit Court on the City Paper's Motion for Summary Judgment. Further, all eight of the excerpts are part of the Record on Appeal and were cited by Petitioners and considered by the Court of Appeals in its review of this action, and can be considered by this Court without violating Rule 210(h), SCACR.

Lastly, the City Paper contends that Petitioners "attempt to advance new legal arguments urging this Court to adopt what Petitioners describe as 'the Restatement approach' or the 'intensity of suspicion approach.' However, Petitioners have never made these arguments to any court below and cannot interject them at this late stage of the litigation . . . ." (Br. of Resp't 44).[1] "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003).

Petitioners' arguments concerning the Restatement and intensity of suspicion tests were made pertaining to the issue of whether the City Paper's statements were "of and concerning" the individual student Petitioners. Additionally, the grounds and

[1] Petitioners have not in fact urged the Court to adopt either test. (Br. of Pet'rs 33).

underlying rationale for both tests rest on (1) the notion that a statement about a group may be interpreted as referring to the individual members where the statement refers to the group as a whole, and (2) the fact that the circumstances surrounding the group, including its size and the community's familiarity with the group, can affect whether the statement can be assigned to each member. *See Fawcett Publ'ns, Inc. v. Morris*, 377 P.2d 42, 51-52 (Okla. 1962).

Petitioners argued to the Circuit Court that their names and identities were readily available in connection with their team membership via online sources, that the statements referred to the entire team, and that the small number of players in conjunction with their visibility in the community gave a personal application to each individual Petitioner. (App. p. 207). The Circuit Court's Order found that defamatory statements about any group, no matter the size, are not defamatory unless they refer specifically to an individual member. (App. pp. 21-23). Petitioners made the same arguments to the Court of Appeals, where the Court of Appeals based its decision on group size and the fact that the City Paper did not publish Petitioners' names or pictures. (App. pp. 990, 1060-61). Therefore, while Petitioners did not specifically mention the names of either test in previous arguments or briefing, the grounds underlying the doctrines have been adequately presented to and considered by both the Circuit Court and the Court of Appeals, and the Court may consider and review both tests in determining whether the City Paper's articles were "of and concerning" the individual Petitioners, regardless of whether Petitioners previously invoked the name of either test.

II. In defamation actions, the clear and convincing evidence standard only applies to actual malice on a motion for summary judgment.

The City Paper has instructed the Court that "the 'scintilla of evidence' standard does not apply to the review of the Circuit Court's decision on Jones Street's motions for summary judgment because of the First Amendment principles governing this appeal." (Br. of Resp't 13). According to the City Paper, Petitioners were required to produce clear and convincing evidence supporting every element of their defamation claims in order to survive summary judgment. This is a complete misrepresentation of the law.

This Court has previously stated that

> [T]he United States Supreme Court addressed this precise issue under Rule 56(c) of the Federal Rules of Civil Procedure and held that the clear and convincing evidence standard must be considered by the trial court when ruling on a summary judgment motion **involving the issue of actual malice** . . .. Thus, we hold that the appropriate standard at the summary judgment phase **on the issue of constitutional actual malice** is the clear and convincing standard.

George v. Fabri, 345 S.C. 440, 453-54, 548 S.E.2d 868, 874-75 (2001) (emphasis added). First, while the student Petitioners are required to prove actual malice in order to be awarded punitive damages, Petitioners are private figures and do not have to prove fault by actual malice at either summary judgment or trial on the basic elements of their defamation claims, making constitutional actual malice and its clear and convincing evidence standard irrelevant to the merits. *See Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 466, 629 S.E.2d 653, 665 (2006). Second, while Petitioners maintain that Coach Walpole is not a public official as found by the Court of Appeals, even if he were, the clear and convincing evidence standard would

only apply to the issues of fault and actual malice, and would be inapplicable to the remaining elements of his defamation claim. *See* 20 S.C. Jur. *Libel and Slander* § 92 ("[T]he element of constitutional malice required under *New York Times Co. v. Sullivan* must be proved by clear and convincing evidence."). Therefore, the student Petitioners should have the record reviewed for a mere scintilla of evidence supporting the elements of their defamation claims, while Coach Walpole should be held to the same standard for all elements of his defamation claims with the exception of fault/actual malice, should the Court conclude that he is a public official.[2]

III. The City Paper's accusations of racism contained facts that are provably false or implied the allegation of undisclosed defamatory facts, and are actionable regardless of their hyperbolic and insulting character.

The City Paper characterizes the facts underlying its accusations of racism as simply recitations of statements made by Charleston County School District employees with the term "racism" added for a rhetorical flourish. In other words, the City Paper encourages the Court to excise the words "racism" and "racist" from its articles and to recognize that its factual reporting, once cleansed of the term "racist", is nearly identical to the statements made by the school district. Thus, the City Paper seeks to diagram its statements in such a way that any negative implications that could possibly be false are harmless opinion and rhetoric, and should be discarded by the Court, such that the remaining segments of the statements would be protected by the fair report privilege.

[2] Petitioners otherwise agree with the City Paper that the issues of actual malice and Walpole's status were threshold issues for the Circuit Court and are therefore subject to *de novo* review.

However, in order to ascertain whether the underlying facts alleged by the City Paper had a defamatory meaning, the sentences as a whole must be reviewed by the Court without selectively removing any words that would alter their original meaning. The City Paper did not report solely that the students drew a caricature on a watermelon, made "ooh ooh ooh ooh" sounds, and smashed it on the ground after a victory. The City Paper chose to publish statements alleging that the students engaged in racist behavior, that they drew a racist character on watermelon, and the Coach Walpole condoned racist acts. To the extent that these are underlying facts, they must be analyzed as a whole, and the Court must determine whether they are capable of a defamatory meaning or are "pure" opinion.

Further, Chris Haire's "Mob Rules" article, which was published on October 30, a week after the original City Paper pieces reporting on the event, contained no underlying facts and implied that there were undisclosed facts evincing racist behavior on the part of the students and Coach Walpole. (App. p. 612). The Court of Appeals observed that "calling someone a racist 'is not actionable unless it implies the existence of undisclosed [] defamatory facts.'" *Garrard v. Charleston Cty. Sch. Dist.*, 429 S.C. 170, 201 n.12, 838 S.E.2d 698, 714 n.12 (Ct. App. 2019) (quoting *Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988)). The article stated that "a racist caricature" had been drawn on a watermelon, and that Coach Walpole "condoned a racist act." However, the article did not give any specific factually objective descriptions of what the "racist caricature" and "racist act" were, other than vague allusions to "monkey sounds", watermelons, "black people", and "Sambo". Thus, the

entire "Mob Rules" article implies that there are undisclosed defamatory facts concerning the Petitioners, leaving it to the reader to surmise what exactly made the students' conduct "racist." This article constitutes an entirely separate publication from the City Paper's earlier reporting on the subject material, and as a separate occurrence is actionable on its own without reference to any previous reporting.

The City Paper also has gone to great lengths to characterize its statements as "hyperbole", "epithets", and "name calling." In doing so, it cites to the law of several other federal and state jurisdictions for the proposition that "the law affords no redress for insult alone." (Br. of Resp't 31-32). South Carolina's law is more nuanced than indicated by the City Paper's articulation of this general rule. This Court has previously noted that insults and epithets can be defamatory depending on the circumstances. In *Capps v. Watts*, the Court stated that while a defendant's characterization of the plaintiff as a "paranoid sonofabitch" constituted "words of abuse and scurrility" that would not as a general rule be considered defamatory, under the circumstances the words could be inferred to "impute personality traits and judgment deficiencies to the plaintiff" which were incompatible with the duties of his office. *Capps*, 271 S.C. 276, 282-83, 246 S.E.2d 606, 609-10 (1978).

In *Goodwin v. Kennedy*, the Court of Appeals determined that after the plaintiff was called a racially offensive slur, the defamatory meaning of the statement had to be assessed by a jury. The court rejected the exact same arguments being made today by the City Paper. First, the court found that all "opinions" are not exempted as non-defamatory, recognizing that "couching a statement with a defamatory

connotation in terms of an opinion does not grant an exemption for anything that might be said." *Goodwin*, 347 S.C. 30, 40, 552 S.E.2d 319, 324-25 (Ct. App. 2001). Second, the court found that charging a jury that insults and profanity cannot be defamatory would be an incorrect and broad statement of the law. *Id.* at 41-42, 552 S.E.2d at 325-26.

While the Court has not had the opportunity to speak to whether the type of statements and publications made in this action are capable of possessing a defamatory meaning, under the foregoing decisions it appears to be a certainty that at a minimum the statements present an issue suitable for jury determination as to their defamatory meaning. It should come as no surprise that in a previous case before this Court, it was a foregone conclusion, and not an issue before the Court, as to whether statements implying that a political candidate was racist and held supremacist views were defamatory if untrue. *See George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001). The Circuit Court should not have granted summary judgment, as it should have been left to the factfinder to determine whether the City Paper's publications were capable of possessing a defamatory meaning.

IV. The City Paper misstates South Carolina law on general damages and misrepresents the record on damages.

The City Paper states that "[i]njury to reputation is an essential element of a defamation claim", citing *Abofreka v. Alston Tobacco Co.* This is a misstatement of dicta from *Abofreka* and is not an accurate representation of the requisite elements of a defamation claim under South Carolina law. In *Abofreka*, the Court stated that

> Damages in a libel action include humiliation, wounded feelings and injury to reputation. *Smith v. Smith*, 194 S.C. 247, 9 S.E.2d 584 (1940). These elements of damage may extend into the future, and in a libel action it is not error to charge the jury on the mortality tables to assist them in determining these damages.

Abofreka, 288 S.C. 122, 126, 341 S.E.2d 622, 625 (1986). In referring to these types of general damages, the Court did not mean to imply that injury to reputation was an "essential element" of a defamation claim such that plaintiffs are required to bring witnesses before the jury willing to state that their opinions of the plaintiffs were lowered by the defamatory statements. Instead, the Court was merely repeating the definition of general damages, which includes embarrassment and wounded feelings. Either way, Petitioners were only required to submit a mere scintilla of evidence that they suffered some form of general damages, and there is sufficient evidence in the record to create a jury issue as to Petitioners' damages, including evidence of injury to reputation. It is difficult to imagine a scenario where articles published in a local community newspaper alleging that an individual participated in racist acts would not cause harm to the individual's reputation.

The City Paper further argues that "[o]nly two of the Petitioners (Walpole and Moore) made any reference at all to the *City Paper* coverage as harmful to their reputation, but neither one put forth any evidence to substantiate or support their bare assertions." (Br. of Resp't 39). This is not true. At least six Petitioners referenced the City Paper's coverage of the team, including Robert Garrard, Connor Frailey, Adam Ackerman, Reece Moore, Arthur Perry and Coach Walpole, as being particularly harmful. (App. p. 133, line 20 – p. 134, line 3; p. 172, line 1 – p. 173, line

8; p. 188, lines 5-24; p. 400, lines 19-24; p. 440, lines 1-25). Since Petitioners have pointed to at least a mere scintilla of evidence in the record that they suffered general damages that were directly caused by the City Paper's publications, the Circuit Court should not have granted summary judgment, and the decision of the Court of Appeals should be reversed.

V. There is clear and convincing evidence that when the City Paper published Chris Haire's "Mob Rules" article on October 30, 2014, it had obvious reasons to doubt the veracity of the allegations of racism.

As described above, only Coach Walpole may have a burden of demonstrating through clear and convincing evidence that the City Paper acted with actual malice, and he only has this burden if the Circuit Court and Court of Appeals did not err in finding that he was a public official.[3] The record demonstrates that Superintendent Nancy McGinley concluded by October 20, 2014 that no evidence supported that the acts of the football players were racially motivated. (App. p. 615). Despite this, the City Paper chose to publish on October 30, 2014 that Coach Walpole had condoned a racist act, and that Petitioners had drawn a racist caricature on a watermelon.[4]

On October 21, 2014, in her press conference, which was viewed by editor Chris Haire, Superintendent McGinley stated that after investigation, the principal of AMHS determined that the coaches had not directly observed any behavior that could be considered culturally insensitive, and that "again, this was an innocent ritual, and the coaches had no concerns about the potentially racially insensitive overtones or

[3] Petitioners acknowledge that all must prove actual malice to recover punitive damages.
[4] The record also indicates that the "Mob Rules" article was published on November 5, 2014. (App. p. 621).

perception . . . ." (App. p. 620). Ultimately, McGinley stated that they concluded that the accountability "lies with the adults". In other words, McGinley informed the public, including Haire, that while the student Petitioners had not engaged in purposefully racist behavior, in her opinion the coaches should have stopped the celebration ritual. Despite this, the City Paper chose to publish Haire's "Melongate" article later that same day.

In a "Statement of Record", McGinley documents that prior to the press conference, on October 20, 2014, she concluded that "there was no evidence to suggest that the football players understood the negative cultural implications of their ritual . . . ." (App. p. 615). Following the October 21, 2014 press conference, Coach Walpole was reinstated on October 22 and McGinley subsequently resigned. On October 30, 2014, the City Paper published Haire's "Mob Rules" article, which stated that Coach Walpole condoned a racist ritual, and that the students drew a racist caricature on a watermelon. (App. p. 629). This also occurred after the City Paper, and Haire, received numerous letters from members of the Academic Magnet community informing them that Petitioners were not in fact racist. (App. pp. 797-803). The City Paper has not pointed to any evidence in the record documenting that Haire ever investigated his claims of racism and racist conduct beyond watching the McGinley press conference.

In *Erickson v. Jones St. Publishers, LLC*, the Court affirmed a jury's finding that the City Paper acted with actual malice in publishing an article in which it accused a guardian ad litem of having a sexual relationship with the father of a child

she represented and of manipulating a family court judge. *Erickson*, 368 S.C. 444, 456-57, 629 S.E.2d 653, 660 (2006). In doing so, the Court noted that the article had been based on one conversation with a source, and that the City Paper had failed to conduct an investigation. *Id.* at 478, 629 S.E.2d at 671. Likewise, the City Paper had reason in this case to doubt its accusations of racism, as McGinley had initially reported that the investigation had uncovered no racial animus underlying the celebration, Coach Walpole had been reinstated, and McGinely had been forced to resign, all prior to the publication of Haire's "Mob Rules" article. It was error for the Circuit Court to determine that the circumstances of this case did not create a factual issue on actual malice suitable for jury determination.

CONCLUSION

For the foregoing reasons, all reasons put forth to the Court of Appeals and Circuit Court, and those incorporated in Petitioners' Brief, Petitioners respectfully request that the Court reverse the Court of Appeals' decision and reverse the Circuit Court's granting of summary judgment.

[Signature Page to Follow]

Respectfully submitted,

PARKER LAW GROUP, LLP

By: 

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

-AND-

William F. Barnes III
BARNES LAW FIRM, LLC
13 Mulberry Street East
Hampton, SC 29924
Phone: (803) 943-4529

ATTORNEYS FOR PETITIONERS

June 16, 2022
Hampton, South Carolina