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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015 CP-10-2389

A.E.P., et al.

PLAINTIFF(S)

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

DEFENDANT(S)

Submitted by: Jean H. Toal	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*) ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

FILED
2016 NOV 16 PM 2:23
CHARLIE CREEL
CLERK OF COURT
CHARLESTON COUNTY

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: Defendant Jones Street Publishers, LLC's Motion for Summary Judgment is GRANTED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk : See attached order

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

EXHIBIT
tabbies
A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

2758
Judge Code

11-15-16
Date

RECEIVED
DEC 19 2016
SC Court of Appeals

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

A.E.P., III, et al.,

Plaintiffs,

vs.

CHARLESTON COUNTY SCHOOL DISTRICT, KEVIN CLAYTON, AXXIS CONSULTING COMPANY, and JONES STREET PUBLISHERS, LLC,

Defendants.

C.A. No.: 2015-CP-10-2389
(Consolidated Case)

FILED
2016 NOV 18 PM 2:34
JULIE J. ARMSTRONG
CLERK OF COURT
BY

EUGENE H. WALPOLE,

Plaintiff,

vs.

CHARLESTON COUNTY SCHOOL DISTRICT, KEVIN CLAYTON, AXXIS CONSULTING COMPANY, AND JONES STREET PUBLISHERS, LLC,

Defendants.

C.A. No.: 2014-CP-10-7655

ORDER GRANTING DEFENDANT JONES STREET PUBLISHERS, LLC'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT CHARLESTON COUNTY SCHOOL DISTRICT'S MOTION FOR PROTECTIVE ORDER

#1

This matter comes before the Court on Defendant Jones Street Publishers, LLC's ("Jones Street") Motions for Summary Judgment on the claims made against it by each plaintiff in the complaints now consolidated in case number 2015-CP-10-2389 and the claims made against it by Eugene "Bud" Walpole in case number 2014-CP-10-7655. The Court has carefully reviewed the memoranda, exhibits, affidavits, and excerpts of deposition testimony submitted by the parties. The Court also conducted a hearing on October 11, 2016, and heard oral argument from

the parties on the motions. For the reasons stated below, the Court grants Jones Street's Motions for Summary Judgment.

The Court also heard Defendant Charleston County School District's motion for a protective order at the same hearing, and for the reasons noted below denies that motion.

Factual and Procedural Background

The plaintiffs in this matter are six members of the 2014-2015 football team and the head football coach at the Academic Magnet High School ("AMHS") located in Charleston, South Carolina. The plaintiffs brought this action against Jones Street, the Charleston County School District ("School District"), and two other defendants, alleging a single cause of action for defamation arising from statements made by defendants and two non-party School District officials concerning a post-game ritual performed by the team.

In the fall of 2014, the AMHS football team became the subject of national media attention for events occurring in the wake of the football team's post-game celebration ritual. The media coverage began on October 21, 2014, after the School District issued a press release stating that, after hearing of "inappropriate post game celebrations" by the AMHS football team, it had conducted an investigation and "as a result of the investigation, the head football coach will no longer be serving as a coach for Charleston County School District." The School District also announced that its Superintendent would be holding a press conference open to the public that day at the School District offices.

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During the press conference, the Superintendent described the post-game ritual that prompted the investigation. She stated that "Players would gather in a circle and smash the watermelon while others either were standing in a group or locking arms and making chanting sounds that were described as 'Ooo ooo ooo,' and several players demonstrated the motion."

The Superintendent described the chanting sounds as "monkey sounds" and stated that a School Board trustee had reported that the football team engaged in a "tribal-like chant that is animalistic or monkey-like." She also stated that the AHMS team named the watermelons "Bonds Wilson"[1] and drew a face on each watermelon "that could be considered a caricature." A copy of the caricature drawn by the same football player who drew it on the watermelons was shown to the persons attending the press conference.

Defendant Jones Street owns and publishes the *Charleston City Paper* weekly newspaper (the "*City Paper*"). *City Paper* reporter Paul Bowers attended the press conference and wrote an article about it based on what he heard and observed there. The article – "District: AMHS football team's watermelon ritual included 'monkey sounds,' 'caricature.' Coach removed after complaint of 'animalistic' sounds following defeat of majority-black team" – included a summary of the Superintendent's statements from the press conference. The article also included comments from parents of AMHS students made in support of Coach Walpole at or following the press conference.

Chris Haire was the Editor of the *City Paper* and watched Superintendent McGinley's press conference by a live television broadcast from the School District's public hearing room. After viewing the press conference, he wrote two opinion editorials about the events described at the press conference: "Melongate," which was published in the *City Paper* on October 21, 2014, and "Mob Rules," which was published in the *City Paper* on November 5, 2014. Both editorials include information disclosed by the Superintendent during the press conference and contain biting commentary on the derogatory and negative racial offense of the post-game ritual.

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[1] Bonds Wilson is the name of a formerly segregated African-American school that was located at the campus where AMHS is now located and is named in honor of two prominent African-American educators from Charleston.

The story about the AMHS football team ritual and the firing of Coach Walpole was also reported on by numerous other news media, on the internet, in print, on the radio, and on television. In media outlets ranging from national publications to the local AMHS school newspaper, numerous commentators expressed the opinion that the behavior of the football players in the post-game ritual was racist or racially offensive, and that either the players or the coaches had to have known or should have known that the ritual would be perceived as racist. In short, the Superintendent's press conference and the factual allegations made therein were widely covered by national and local media outlets, and a diverse range of commentators expressed a diverse range of views on the story, including the opinion that the actions of the team were racist.

The plaintiffs' claims against Jones Street are based upon the two opinion editorials, or "op-eds," published in the *City Paper* about the controversy, and the headline of the news article reporting on the press conference where Coach Walpole's termination was announced. The plaintiffs contend that these publications are defamatory because they imply that the football team and the head coach are racist.

Discussion

A. Summary Judgment Is Appropriate as to All Plaintiffs' Claims.

1. The Statements of Fact Are Protected by the Fair Report Privilege.

The "fair report" privilege has long been recognized in South Carolina courts both under the common law and as a constitutional protection. *See Cobin v. Hearst-Argyle Television, Inc.*, 561 F. Supp. 2d 546, 550 (D.S.C. 2008) ("South Carolina recognizes the fair report privilege."); *see also George v. Kay*, 632 F. 2d 1103, 1105 (4th Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981); *Eubanks v. Smith*, 292 S.C. 57, 354 S.E. 2d 898 (1987); *Padgett v. Sun News*, 278 S. C.

26, 292 S. E. 2d 30 (1982); *McClain v. Arnold*, 275 S. C. 282, 270 S. E. 2d 124 (1980); *Jones v. Garner*, 250 S.C. 479, 158 S.E. 2d 909 (1968); *Lybrand v. State Co.*, 179 S.C. 208, 184 S.E. 580 (1936); *Oliveros v. Henderson*, 116 S.C. 77, 106 S. E. 855 (1921). While the early cases apply the privilege as a matter of common law, in *Padgett v. Sun News, supra*, the South Carolina Supreme Court recognized that there is a constitutional basis for the common law privilege, in that holding a publisher liable for an accurate report of a government official's statement or action would constitute liability without fault in violation of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

The privilege protects those who accurately report the substance of statements, actions, proceedings, reports, or records of public officials or agencies, even if what was stated by the government official turns out to be false and defamatory. As the Fourth Circuit has explained:

> [The] fair report privilege shields news organizations from defamation claims when publishing information originally based upon government reports or actions. ... The fair report privilege encourages the media to report regularly on government operations so that citizens can monitor them.

Reuber v. Food Chemical News, Inc., 925 F.2d 703, 712 (4th Cir. 1991). The privilege is not limited to official records or formal proceedings, but also applies to information provided by authorized public officials to the press, including the reporting of public statements made by public officials in news releases, press conferences, and interviews with the press. *See, e.g., Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1992) (public statement of congressman); *Kilgore v. Younger*, 640 P.2d 793 (Cal. 1982) (report of statement made by official at press conference); *ELM Medical Laboratory, Inc. v. RKO General, Inc.*, 532 N.E.2d 675, 678 (Mass. 1989) (privilege extends to statements of public officials in news releases and interviews); *Brandon v. Gazette Publishing Co.*, 234 Ark. 332, 352 S.W.2d 92, 93-94 (1961) (statement by governor at press conference).

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"It is not necessary that [the report] be exact in every immaterial detail. ... It is enough that it conveys to the persons who read it a substantially correct account of the proceedings." RESTATEMENT (SECOND) OF TORTS § 611 comment f (1977); *accord Cobin v. Hearst-Argyle Television, Inc.*, 561 F. Supp. 2d 546 (D.S.C. 2008). Where the report is a fair and accurate summary of a statement made by a public official or agency, the person reporting it has no affirmative duty to investigate the underlying truth of the matter, nor may he be held liable for the negligence or bad faith of the government official or agency that was the source of the defamatory charge. *See Padgett,* 278 S.C. at 31, 292 S.E.2d at 34. Regardless of whether the statement made by the public official is true or not, if the press accurately reports the content of that statement, the press is immune from liability.

The plaintiffs' own Complaints establish that the allegedly defamatory factual statements in the *City Paper*'s article and op-eds at issue – as alleged by the very words used by the plaintiffs in their Complaints – fall within this privilege. The Complaints state that School District officials made the following statements to the public concerning the post-game ritual:

- "the football team made animal sounds and drew a monkey face on the watermelon during these celebrations," Complaint ¶ 7[2];
- "the team made monkey sounds and drew a monkey face on the watermelon," Complaint ¶ 7;
- "the plaintiff[s] [intended] to cast African American opponents in a derogatory light," Complaint ¶ 7;
- "[t]he defendants by their statements falsely accused the team and plaintiffs of being racially prejudiced," Complaint ¶ 7;
- "the members of the Academic Magnet High School football team 'had engaged in a game ritual after football games in which the football team would draw a monkey face on a watermelon and after a victory, would smash the fruit and make

[2] The ¶ numbers referenced herein relate to the Amended Complaint filed in the *A.E.P.* case. The complaints filed by the other student plaintiffs and Coach Walpole may reference different ¶ numbers, but are the same statements.

animal noises,'" Complaint ¶ 8;

- "players would gather in a circle and squash the watermelon while others were either standing in a group or locking arms and making sounds described as 'ooh,ooh,ooh,'" Complaint ¶ 9;
- "the sounds were 'monkey sounds,'" Complaint ¶ 9;
- "[plaintiffs' actions were] racially derogatory actions intended to equate black members of opposing football teams with monkeys," Complaint ¶ 10.

Paul Bowers and Chris Haire also submitted affidavits for the Court's review in which they note that all of the factual statements contained in the pieces that they wrote were in fact taken from the statements made by the Superintendent at the press conference. The plaintiffs conceded as much at the hearing on the motions. Plaintiffs also submitted, shortly after the hearing, a videotape of the press conference as well as a formal statement later made by the Superintendent, and these materials also confirm that all factual statements in the *City Paper* article and op-eds are accurate statements or summaries of statements made by the Superintendent at the press conference.

Therefore, this Court finds that all statements of a factual nature in the *City Paper* publications are accurate reproductions of comments made publicly by School District officials, and thus are protected by the fair report privilege. Because the *City Paper* presented a substantially accurate summary of the facts as represented by School District officials, Jones Street is immune from liability for those statements as a matter of law under the fair report privilege. This includes the entirety of the headline of the Paul Bowers' article that is the subject of plaintiffs' Complaints, and all of the factual statements about the ritual in Chris Haire's editorials.

2. The Opinions Expressed in the Articles Are Not Actionable.

When the factual statements listed above are removed from the *City Paper* editorials, the allegedly defamatory content of what remains are statements that are merely expressions of the writer's opinions and ideas on a matter of public concern. Under established First Amendment jurisprudence, Jones Street cannot be held liable for such statements.

The Court first notes that the subject of the Jones Street publications addressed a matter of public concern. "Whether ... speech addresses a matter of public concern must be determined by [the expression's] content, form, and context ... as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). The AMHS football team's ritual, the School District's investigation into the AMHS football team's ritual, and Coach Walpole's removal as head coach of the team were subjects of great interest to the Charleston community and garnered widespread coverage from media outlets both locally and throughout the United States. The controversy involved allegations of racial insensitivity in a city steeped with a historical legacy of racial tension. When viewing the record as a whole, there is little doubt that the speech at issue in this case was addressed to a matter of public concern.

Furthermore, it is settled law that expressions of opinion on matters of public concern are immune from liability for defamation. The United States Supreme Court declared at the outset of its opinion in *Gertz v. Robert Welch, Inc.*:

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

418 U.S. 323, 339-40 (1974). The Supreme Court has also 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).[3] Additionally, statements are protected if they "cannot 'reasonably [be] interpreted as stating actual facts' about an individual." *Id.* at 20. This protection is important because it "provides assurance that public debate will not suffer for lack of 'imaginative expression' or 'rhetorical hyperbole' which has traditionally added much to the discourse of our nation." *Id.* In determining whether a statement can be "reasonably interpreted as an actual fact," the court considers the nature and purpose of the publication and whether the statement is "easily susceptible (if at all) to 'proof' one way or the other." *Faltas v. State Newspaper*, 928 F. Supp. 637, 649 (D.S.C. 1996). Whether the use of a term is a hyperbolic expression of ideas or whether it implies a fact also depends on the context in which the term is used. *Faltas,* 928 F. Supp. at 648. Statements of fact "are readily understood by the reader to have a precise, unambiguous and definite meaning and can be objectively characterized as true or false." *Chau v. Lewis*, 771 F.3d 118, 129 (2d Cir. 2014).

The crux of plaintiffs' Complaint against Jones Street involves the claim that the opinion editorials depict plaintiffs as racists. Removing the statements that merely repeated or summarized what School District officials stated publicly about the post-game ritual, the editorials contain the following statements concerning the AMHS football team and coach:

In "Melongate":

- "Today, Charleston was consumed by one story and one story only: the removal of Academic Magnet football coach Bud Walpole amid allegations that his players more or less behaved like racist douchebags. And if there's one lesson to be learned from all of this it's this: big toothy grins, watermelons, and monkey noises don't mix. Any sensible person can see that."

[3] Although the Supreme Court in *Milkovich* rejected the notion of a constitutional dichotomy of fact and opinion, courts applying *Milkovich* have continued to use the term "opinion" as a shorthand for the concept of statements that cannot be objectively provable as false or that cannot "reasonably be interpreted as stating actual facts about an individual," and this Court does so here.

- "Apparently not. And apparently not the coaching staff and the players on the Academic Magnet Raptors."

- "That the coaching staff of the Academic Magnet Raptors and none of its players, including at least one African American, didn't see the trouble with this toxic combination of monkey sounds, toothy grins, and watermelons is at best baffling and at worst indicative of the casual acceptance of racism in Charleston today, even among the best and brightest that the county has to offer."

- "Seriously, did everyone at AMHS forget the last 100 years of American history? Did they forget about blackface, Buckwheat, and *Birth of a Nation*? Did they forget about minstrel shows? Did they forget about Coons Chicken, lawn jockeys, golliwogs, and the like? Apparently so. I don't know about you, but I think it's time to reconsider Academic Magnet's rankings because clearly they are producing nothing more than grade-A dumbasses."

- "The point is that an entire team of players thought it was OK to draw a grinning face on a watermelon, smash it on the ground each time they beat a largely black team, and make monkey noises – and no one apparently told them to stop."

- "No one said, 'Hey guys, I know not a single one of you has a racist bone in your body, you know, because that's a bad thing, and well, you're an Academic Magnet kid, and you come from a good middle-class white family and you're going to college, and there's no way in hell you'd, you know, draw a racist caricature on a watermelon and make monkey noises and do it fully aware of, like, what all that stuff means, because if you did, knowing all that stuff, then, yikes, people might start thinking you're racists. Hell, I'd think you're a racist, and, well, I just don't know if I can deal with the fact that Charleston's best and brightest students are racist douchebags. I mean, it's just a joke right? Right?"

- "Actually, it's not. It's the sad truth about life here in Charleston, S.C. today."

In "Mob Rules":

- "School board forces out superintendent for firing coach who condoned racist ritual"

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- "[N]ow the Charleston County School District Board of Trustees has forced Superintendent Nancy McGinley out of her job because she dared to fire a football coach who condoned a racist act."

- "McGinley was in the right to give Walpole the boot – and the board should've backed her."

- "The Academic Magnet coach had to know that his players were engaging in a ritual that would be perceived as racist by any sensible outside observer."

- "Perhaps [McGinley] genuinely thought that the community would rise up with her and condemn this racist behavior. But it didn't."

- "Apparently, [for Walpole supporters] to admit that their coach, their children, might be just a smidgen racist was simply too much to bear."

- "Coach Walpole's firing should have been a teachable moment, the kind that instructs the largely white student body of Academic Magnet High School in the ways that white people, even good ones, can inadvertently engage in hurtful racially offensive behavior. Instead what the students got was a teachable lesson in mob rule and white privilege. Days after his removal, Walpole was reinstated."

- "Many years from now, I know that many of these same AMHS students who defended Walpole and his players will see the error of their ways. I know that they will realize that it was wrong to turn a blind eye to how much pain the team's actions caused the African-American community, some of them their fellow students."

None of the above statements, to the extent they can be argued to have defamed the plaintiffs, asserts any verifiable, objectively provable fact. They are expressions of the editorial writer's ideas and opinions, using rhetorical hyperbole to emphasize his views. Whether the football players acted like "racist douchebags," whether the team's failure to perceive the negative racial connotations of their actions is "indicative of the casual acceptance of racism in Charleston today," whether the watermelon ritual was an act that "any sensible outside observer" would "perceive[] as racist," or an example of "inadvertently ... hurtful racially offensive behavior" – these are all statements on which different persons could have different views and sentiments. In fact, many people did express different views on the matter and it was a highly contested issue for the School District. None of the statements, as expressed in the Jones Street publications, are statements of fact that can be objectively proved or disproved in a court of law.

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Indeed, the record reflects that many of the plaintiffs agreed that the subject of Chris Haire's op-eds was a matter of opinion. In his deposition, plaintiff Ackerman agreed that "whether or not something is racist is a matter of opinion." Ackerman Dep. at 71, lines 16-18. Plaintiff Frailey agreed that the question of whether the watermelon ritual was racist "is a matter

of opinion." Frailey Dep. at 85, line 17. Plaintiff Moore agreed "[a]bsolutely" that "people can have different opinions as to what is racist." Moore Dep. at 115, lines 3-5. And plaintiff Coach Walpole agreed that whether or not something is racist is a matter of "individual interpretation." Walpole Dep. at 116 line 22 – p.117 line 1.

Furthermore, the context in which the op-eds were published was the "Views" section of the newspaper – a section devoted to opinion and commentary – and the football team's ritual was a matter of great public concern widely covered by local and national media. In the context of this public controversy, the op-eds published in the *City Paper* are a fundamental example of the type of public discourse protected by the First Amendment. *See Faltas*, 928 F. Supp. at 647 (publication of a letter to the editor calling the plaintiff a liar was "simply 'hyperbole' which a reasonable reader would not take as stating actual facts"). By invoking the term "racist" in opinion editorials about a sequence of events that involved facts disclosed by the School District officials related to a racially sensitive matter, the *City Paper* was simply publishing the editorial writer's views on a matter of public concern.

Courts around the country have held that the expression of one's opinion that another is racist cannot form the basis of an actionable defamation claim. *See Forte v. Jones*, 2013 WL 1164929, at *6 (E.D. Cal. 2013) ("where someone thinks another person is a racist and says so to a third person does not constitute publication of a defamatory statement because the statement is one of factual opinion that cannot be proven or disproven"); *see also Silverman v. Daily News, LP*, 2015 WL 201392, 43 Media L. Rptr. 2099 (N.Y. App. Div. June 24, 2015) (defendant's publication that plaintiff authored "racist writings" is a statement of opinion, not fact); *Covino v. Hagemann*, 627 N.Y.S.2d 894 (Sup. Ct. 1995) (allegation of racism is protected expression of opinion). Here, the writer used strong rhetoric to express his opinions, such as "more or less

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behaved like racist douchebags." However, such rhetoric is also protected by the First Amendment. *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 14 (1970); *see also Milkovich*, 497 U.S. at 16-17, 20. "To foreclose the use of hyperbole, under the threat of civil liability, 'would condemn [commentary] to an arid, desiccated recital of bare facts.' Such a result would ill-serve the interests of the First Amendment in 'assur[ing] [the] unfettered exchange of ideas' among the American people." *Fortson v. Colangelo*, 434 F. Supp. 2d 1369, 1385 (S.D. Fla. 2006) (quoting *Time, Inc. v. Johnston*, 448 F.2d 378, 384 (4th Cir. 1971); *Roth v. United States*, 354 U.S. 476, 484 (1957)).

Accordingly, the statements of fact in the *City Paper*'s op-eds are protected by the fair report privilege, and all other allegedly defamatory statements are protected expressions of ideas, opinions, and rhetorical commentary.

3. Plaintiffs Have Not Shown Proof of Injury to Reputation.

Injury to reputation is an essential element of a defamation claim. *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 341 S.E.2d 622, 625 (1986). Unlike invasion of privacy, in which "the interest to be vindicated is the injury to the person's own feelings," *Zeran v. Diamond Broadcasting, Inc.*, 203 F.3d 714, 719 (10th Cir. 2000), in a defamation case "the primary harm being compensated is damage to reputation," not "the mental distress from having been exposed to public view," as in a privacy case. *Time, Inc. v. Hill*, 385 U.S. 374, 384 n.9 (1967); *see also Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971) ("[D]amage to reputation is, of course, the essence of libel."); *Capps v. Watts*, 271 S.C. 276, 283, 246 S.E.2d 606, 610 (1978) ("The essence of a defamation suit is recovery for injury to reputation.").

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Although the common law presumes damages in cases involving defamation *per se*, the South Carolina Supreme Court squarely held that damages may not be presumed in a case involving a media defendant and a matter of public concern:

> [I]n a case involving an issue of public controversy or concern where the libelous statement is published by a media defendant, the common law presumptions the defendant acted with common law malice and the plaintiff suffered general damages do not apply. Instead, the private-figure plaintiff must plead and prove common law malice and show "actual injury" in the form of general or special damages.

Erickson v. Jones Street Publishers, LLC, 368 S.C. 444, 466, 629 S.E.2d 653, 665 (2006). General damages "are imposed for the purpose of compensating the plaintiff for the harm that the publication has caused to his reputation." Restatement (Second) of Torts, sec. 621 comment a (1977). Special damages consist of some provable material loss to the plaintiff as a result of the injury to his reputation; hurt feelings do not suffice as proof of special damages. *Wardlaw v. Peck*, 282 S.C. 199, 318 S.E.2d 270 (Ct. App. 1984).

In response to Jones Street's motions, the plaintiffs have not produced any evidence of either special damages or general damages arising from injury to reputation as a result of the *City Paper* publications. In an interrogatory to plaintiffs, Jones Street specifically asked them to identify any person who read the *City Paper* publications and, as a result of those publications (and not the numerous other news stories and editorials about the team's ritual), thought less of any of the plaintiffs or their reputations. The plaintiffs admitted that they could not identify any such person.

Coach Walpole testified in his deposition that he was not even aware of the *City Paper* publications over which he has brought suit until his attorney showed them to him. Walpole Dep. at 118, lines 16-23. When questioned in their depositions about injury from the *City Paper*, none of the plaintiffs could identify any evidence that the article or editorials in the *City Paper* – as opposed to the other extensive media coverage of the controversy – were the proximate cause of any damage to their reputations. *See* Ackerman Dep. at 52, 69-70; Frailey Dep. at 59-60, 63-65, 76-78, 87; Moore Dep. at 83-84; Nelson Dep. at 85, 88-89, 92-95, Perry Dep. at 44-45, 61-

63, 65-66; R.C.G. Dep. at 32-33, 39-42; Walpole Dep. at 119-123.

In this regard, it is significant that the *City Paper* did not break the story about the team's ritual – it was already the subject of extensive publicity, both local and national, on the radio and television as well as in print and on the internet, including publicity of the alleged "monkey sounds" and caricature drawn on the watermelons. Thus, any inference of racism that might be drawn from the facts reported about the ritual had already been made in local and national media coverage of the story. The plaintiffs themselves assert this in their allegations against the School District. *See* Moore Complaint ¶ 13; Walpole Complaint ¶ 12.

Because the plaintiffs have not presented evidence of injury to reputation as a proximate result of the *City Paper* publications, their cases lack proof of an essential element of the cause of action of defamation, and summary judgment in favor of Jones Street is warranted as a matter of law.

B. Additionally, the Student Plaintiffs' Claims Are Subject to Summary Dismissal Because the Alleged Defamatory Statements Were not "of and concerning" These Plaintiffs.

Jones Street's motion is granted against the student plaintiffs for the additional reason that the alleged defamatory statements that form the basis of the plaintiffs' claims were not "of and concerning" the student plaintiffs, in that they refer to the entire football team and not to any of the plaintiffs individually. Consequently, the statements are not actionable under South Carolina defamation law.

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"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). Therefore, where defamatory language is applied broadly in discussing the members of a class or group, without any specific circumstances pointing to a particular member, no individual

member has a right to maintain an action for defamation. *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.") (citations and quotation marks omitted)).

Nothing in the *City Paper* publications makes specific reference to any individual team member or any characteristic of a team member that would make him identifiable as the subject of the article or editorials. Courts examining analogous circumstances have found that the individual member of a group could not maintain an action for defamation. For example, in *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012), members of a college lacrosse team brought a section 1983 action against a police spokesperson and others, seeking to assert, *inter alia*, a "due process stigma-plus" claim based on several allegedly defamatory statements made concerning a rape investigation. The Court of Appeals reversed the trial court's denial of the defendant's motion to dismiss and the concurring opinion noted that the plaintiffs could not even meet the requirements of traditional defamation law because they were attempting to hold a spokesperson liable for statements about the team when no individual had been referenced. *Id.* at 660; *see also Algarin v. Town of Wallkill,* 421 F.3d 137 (2d. Cir. 2005) (affirming the dismissal of 23 individuals' stigma-plus claims because the alleged defamatory statements did not sufficiently identify any specific officers).

Similarly, the Fourth Circuit Court of Appeals affirmed a decision of the South Carolina District Court holding that a defamatory statement about a company's "management" was not "of and concerning" one of 17 individual members of the company management team. *Outlaw*

v. Standard Products Co., 122 F.3d 1062 (4th Cir. 1997). The Fourth Circuit reasoned:

> [R]eference to a group does not implicate the individual members of the group. As the district court noted, in this case none of the articles mentions Outlaw [the plaintiff] or any other employee by name or title. The reference to "management" refers to a group, and therefore does not implicate Outlaw.

Id.

The *City Paper's* publications made only general statements about the conduct of the AMHS football team as a whole. The *City Paper* did not publish any facts or commentary specific to any particular member of the AMHS football team, and there is no statement in the *City Paper* that refers to any of them individually. For this reason, in addition to the others discussed above, the student plaintiffs may not maintain their action for defamation against Jones Street.

C. Coach Walpole's Claims against Jones Street Also Fail as a Matter of Law Because He Is a Public Official, and He Has Not Shown that Jones Street Acted with Actual Malice.

The Court further finds that summary judgment is appropriately granted to Jones Street on Coach Walpole's complaint because he is a public official and has failed to adduce any evidence of actual malice. When a public official seeks to recover damages for an alleged defamatory falsehood, he must allege and prove by clear and convincing evidence that the defendant acted with actual malice in publishing the statement. *See New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964); *accord Time, Inc. v. Firestone*, 424 U.S. 448, 453-55 (1976); *Fleming v. Rose*, 350 S.C. 488, 494-95, 567 S.E.2d 857, 860-61 (2002); *George v. Fabri*, 345 S.C. 440, 451, 548 S.E.2d 868, 874 (2001); *Elder v. Gaffney Ledger*, 341 S.C. 108, 533 S.E.2d 899 (2000).

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"[T]he 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility

for or control over the conduct of government affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). The public official category is not limited to elected officials or the upper echelons of government. "The status of a public official may be deemed sufficient to warrant application of the *New York Times* privilege, not because of the government employee's place on the totem pole, but because of the public interest in a government employee's activity in a particular context." *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 520 n.4, 506 S.E.2d 497, 507 n. 4 (1998) (*Holtzscheiter II*) (Toal, J., concurring) (quoting *McClain v. Arnold*, 275 S.C. 282, 284, 270 S.E.2d 124, 125 (1980)).

For purposes of First Amendment analysis, courts have held a wide variety of public school administrators and employees to be public officials. *See Keller-Moser Consulting, LLC v. Daniels*, 2012 WL 554643 (D.S.C. 2012) (discussing the status of superintendents as public officials); *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 trustees to be public officials). In particular, public school teachers and athletic coaches have been held to be public officials for purposes of applying the *New York Times* doctrine. *See, e.g., Johnson v. Southwestern Newspapers Corp.*, 855 S.W.2d 182 (Tex. App. 1993); *Mahoney v. Adirondack Publishing Co.*, 71 N.Y.2d 31 (1987); *Johnston v. Corinthian Television Corp.*, 583 P.2d 1101 (Okla. 1978); *Basarich v. Rodeghero*, 321 N.E.2d 739 (Ill. 1974).

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Coach Walpole is the head football coach at AMHS, the head women's basketball coach at AMHS, and a teacher in the School District. As the head coach of two teams at AMHS, Coach Walpole was not a stranger to media coverage. Indeed, the public had a continuing interest in his leadership of the AMHS teams throughout the many years of his tenure as coach. In the particular context of the coverage of the AMHS football team's post-game ritual, the

public interest in his responsibility for oversight of the team's activities was overwhelming as demonstrated by the breadth of coverage of the matter. Accordingly, as a matter of law, Coach Walpole is a public official under the *New York Times* doctrine.

As a public official, Coach Walpole must come forth with evidence of actual malice to establish his defamation claim against Jones Street. He has not done so. Actual malice exists when a statement is made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 279-80. As a public official, plaintiff Walpole must present clear and convincing proof "that the defendant realized that [the allegedly defamatory statement about the plaintiff] was false or that [the defendant] subjectively entertained serious doubt as to the truth of [the statement]." *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511 n.30 (1984) (citations omitted).

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant v. Thompson, 390 U.S. 727, 731 (1968). These rigorous standards were recently reaffirmed by the South Carolina Supreme Court:

> Actual malice is a subjective standard testing the publisher's good faith belief in the truth of his or her statements. The constitutional actual malice standard requires a public official [or public figure] to prove by clear and convincing evidence that the defamatory falsehood was made with the knowledge of its falsity or with reckless disregard for its truth. A "reckless disregard" for the truth, however, requires more than a departure from reasonably prudent conduct. "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." There must be evidence the defendant had a "high degree of awareness of ... probable falsity."

Elder, 341 S.C. at 114, 533 S.E.2d at 902 (emphasis in original) (quoting *St. Amant, supra; Garrison*, 379 U.S. at 74).

The Jones Street publications were merely paraphrased summaries of public statements made by School District officials concerning the post-game ritual. Further, as acknowledged in Coach Walpole's Complaint, those statements were reported widely in both local and national news media. *See* Complaint ¶ 12. Each of the writers of the Jones Street publications submitted affidavits to this Court stating that they had no reason to doubt that the reported information was anything other than completely true and accurate. Coach Walpole presented no evidence to the contrary. Although he has argued that the various depositions taken in this case and the publications themselves were evidence of actual malice, he could not direct the Court to a single line of testimony in the depositions or any passage of the publications that constitutes evidence that anyone at Jones Street knew of any false statement in the editorials or articles or in fact entertained serious doubts as to the truthfulness of them. Therefore, summary judgment is warranted.

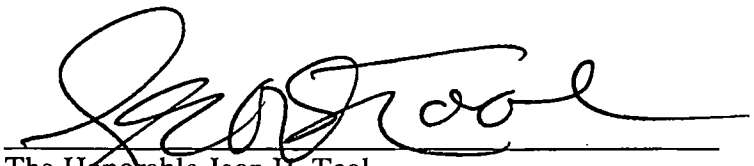
D. The School District's motion for a protective order is denied.

Also pending before the Court is a motion by the School District for a protective order. Specifically, in the depositions of two former District officers, counsel for the District objected to questions about statements made while the School Board was in executive session, and instructed the witnesses not to answer. The sole basis of counsel's objection was the provision of the South Carolina Freedom of Information Act ("FOIA") which authorizes public bodies to go into executive session to discuss certain matters. The Court finds that this provision applies as an exception to disclosure under the FOIA but does not apply to discovery in a lawsuit brought by a person who was the subject in part of the executive session discussion. Accordingly, the District's motion is denied.

Conclusion

For the reasons stated herein, the Court grants defendant Jones Street's Motions for Summary Judgment and dismisses all of the plaintiffs' claims against Jones Street as a matter of law.[4]

IT IS SO ORDERED.



The Honorable Jean H. Toal
Chief Justice (Retired), South Carolina Supreme Court
Acting Judge, South Carolina Circuit Court

Nov. 15, 2016

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[4] At first blush, it would appear that this Court's conclusions on Jones Street's motions would extend to the disposition of plaintiffs' claims, in whole or in part, as they relate to the other defendants in this case. The Court particularly notes that any claims against the remaining defendants by the student plaintiffs would be subject to dismissal if none of those defendants' statements mentioned any student plaintiff by name or otherwise identified an individual plaintiff such that the statements could be "of and concerning" the student plaintiff. At the motion hearing, counsel for the School District indicated that he intended to move for summary judgment after the Jones Street motion had been addressed. Because the School District's motion is not presently before the Court, the current record does not succinctly demonstrate the manner in which the grounds for summary judgment discussed herein would apply to defendants other than Jones Street. If and when the remaining defendants file their own motions, the plaintiffs may then respond with such evidence as they deem pertinent, and the record will be ripe for a complete analysis of the defamation claims against those defendants.