IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Appellate Case No.: 2016-002525
Consolidated Civil Action No.: 2015-CP-10-2389

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 ..... Appellants,

And

Of Whom Jones Street Publishers, LLC is the ..... Respondent.

APPELLANTS' FINAL BRIEF

John E. Parker
William F. Barnes, III
PETERS, MURDUAGH, PARKER,
ELTZROTH, & DETRICK, P.A.
101 Mulberry Street East
Post Office Box 457
Hampton, SC 29924
Phone: (803) 943-2111
ATTORNEYS FOR APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. DID THE LOWER COURT ERR IN HOLDING THAT THE STATEMENTS OF FACTS IN THE ARTICLES ARE PROTECTED BY THE FAIR REPORT PRIVILEGE?

II. DID THE LOWER COURT ERR IN HOLDING THAT THE OPINIONS EXPRESSED IN THE ARTICLES ARE NOT ACTIONABLE?

III. DID THE LOWER COURT ERR IN HOLDING THAT PLAINTIFFS HAVE NOT SHOWN PROOF OF INJURY TO REPUTATION?

IV. DID THE LOWER COURT ERR IN HOLDING THAT THE ALLEGED DEFAMATORY STATEMENTS WERE NOT 'OF AND CONCERNING' THE STUDENT PLAINTIFFS?

V. DID THE LOWER COURT ERR IN HOLDING THAT COACH WALPOLE HAS NOT SHOWN THAT JONES STREET ACTED WITH ACTUAL MALICE?

STATEMENT OF THE CASE

This appeal arises from the publication of false and defamatory statements by Jones Street Publishers, LLC ("City Paper")[1] about the members of the Academic Magnet High School ("AMHS") football team ("the Students") and Coach Eugene Walpole ("Walpole") (collectively "Appellants") that injured their reputations in violation of South Carolina's defamation principles. The Students filed a Complaint against the City Paper and other defendants on November 21, 2014, which was followed by Walpole's Complaint filed on December 16, 2014, both in the Charleston County Court of Common Pleas. (R. pp. 221-225; pp. 226-233).

On January 20, 2015, the City Paper moved to dismiss Appellants' Complaints pursuant to Rule 12(b)(6) on the grounds that the defamatory statements were not "of and concerning" the Students; the alleged defamation constitutes opinion, hyperbole, or epithet and therefore is not actionable; and the City Paper is protected by the fair report privilege for relying on fair and accurate report of statements from public officials. (R. pp. 27-31). The lower court heard the City Paper's Motion to Dismiss on May 8, 2015, and, in an order filed July 7, 2015, the lower court denied the City Paper's Motion to Dismiss. On April 29, 2016, the City Paper moved for summary judgment on the basis that there is no genuine issue of material fact on largely the same grounds as the motion to dismiss. (R. pp. 32-36). The lower court heard the City Paper's Motion for Summary Judgment on October 11, 2016. Appellants received written notice of entry of the Order granting the City Paper's Motion for Summary Judgment on November 21, 2016. (R. pp. 3-25). The Students and Walpole timely filed their Notices of Appeal on December 19, 2016. (R. pp. 906-908; pp. 909-910).

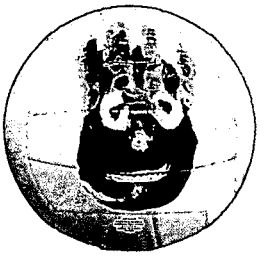
[1] Jones Street owns and operates the City Paper that is distributed around Charleston.

FACTS

Given that this appeal is before the Court on a motion for summary judgment, the facts below are to be viewed in a light most favorable to the Students and Walpole as the non-moving parties. Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994).

I. THE WATERMELON RITUAL

Following a win against Military Magnet in the second game of the 2014 season, the Academic Magnet football team began a celebration of smashing a watermelon after a winning game. (R. p. 333, lines 3-6; p. 366, line 20 0 p. 367, line 1; p. 389, lines 6-9). Before this particular game, a team member had purchased a watermelon on the way back to the school from getting dinner at Subway with his teammates. (R. p. 332, line 25 – p. 333, line 2; p. 403, lines 15-22; p. 422, lines 1-6). While the team was getting ready in the locker room, the player decided to draw a face on the watermelon, like in the movie *Castaway* starring Tom Hanks. (R. p. 334, lines 6-14). None of the coaches were in the locker room at this time. (R. p. 448, line 23 – p. 449, line 6). The player also named the watermelon Bonds-Wilson Junior, a reference to the volleyball in *Castaway*,[2] as well as to the name of the Academic Magnet High School campus. (R. p. 334, lines 15-18; p. 386, line 22 – p. 387, line 2; p. 445, lines 9-11). A picture of "Wilson" from *Castaway* is reproduced here:



[2] Tom Hanks's character in *Castaway* names the volleyball Wilson.

The player brought the watermelon on the bus with him and then placed it on his team's bench before the game. (R. p. 335, lines 14-18; p. 336, lines 2-16; p. 388, lines 22-23; p. 424, lines 11-20). At the end of the game, the players gathered around their coach, and he made a brief speech before dismissing the team. (R. p. 337, line 20 – p. 338, line 13; p. 425, line 18 – p. 426, line 1; p. 368, lines 13-16). Typically after his post-game speech, Coach Walpole would speak to the parents and other fans, while the assistant coaches ensured that the players collected the equipment and cleaned up the bench area. (R. p. 501, line 22 – p. 503, line 3). At this point, a player brought the watermelon over to the team and they began a football chant. One of the players smashed the watermelon on the ground and then they ate it. (R. p. 338, lines 3-8; p. 443, line 18 – p. 444, line 10). Following this celebration, the players threw away any watermelon pieces that were left and returned to the bus. (R. p. 340, lines 3-7; p. 368, line 25 – p. 369, line 3).

Subsequent to the victory over Military Magnet, the AMHS football team repeated this celebration after each game that they won. (R. p. 446, line 18 – p. 447, line 3; p. 370, lines 3-10; p. 371, line 23 – p. 372, line 4; p. 372, line 22 – p. 373, line 12). The players credited the ritual as leading to their success. (R. p. 342, lines 2-8; p. 428, lines 2-12; p. 441, lines 8-19). The same player bought the watermelon for all but possibly one game. (R. p. 341, lines 5-8; p. 427, line 24 – p. 428, line 1). The characteristics of the face on the watermelon varied each week as it was drawn by several different players over the course of the season. (R. p. 404, line 10 – p. 405, line 5; p. 423, lines 5-11; p. 342, line 20 – p. 343, line 4; p. 344, lines 8-25; p. 388, lines 3-8). The players chanted or cheered each time before the watermelon was smashed. (R. p. 345, lines 3-10; p. 346, lines 1-10; p. 450, line 23 – p. 451, line 3). Players described the chanting as like the chants heard in the movie *Remember the Titans*, a college football pre-game chant, and football

grunts. (R. p. 339, lines 7-10; p. 406, lines 2-8; p. 442, lines 17-18). Coach Walpole was aware that the team was celebrating their wins by cheering and smashing a watermelon, but he did not know that the watermelons had a face or a name. (R. p. 503, lines 7-25; p. 506, lines 11-23; p. 511, lines 3-6).

The watermelon was accidentally left on the bus during the game against Garrett. (R. p. 407, lines 6-9; p. 429, line 24 – p. 430, line 11; p. 374, line 15 – p. 375, line 6). The players were unable to return to the bus to get it, so the team waited until they had returned to their school to perform their celebration. (R. p. 430, line 22 – p. 431, line 8; p. 347, line 23 – p. 348, line 8). Once back at AMHS, the team gathered in the courtyard to smash the watermelon. (R. p. 408, lines 19-23; p. 452, lines 1-8). The freshmen lock-in was taking place at that same time, so various other students and AMHS teachers were also in the courtyard during the celebration. (R. p. 452, lines 1-17; p. 453, lines 20-25; p. 432, lines 2-11; p. 433, lines 16-21; p. 376, lines 4-17). The players were subsequently reprimanded for disturbing the freshmen lock-in. (R. p. 349, lines 16-20).

II. THE INVESTIGATION

On Monday, October 13, 2014, Charleston County School Board member Michael Miller emailed Charleston County School District (CCSD) Superintendent Nancy McGinley, alleging that the students would destroy a watermelon while making monkey noises after victories, and asking for an inquiry into the matter. Superintendent McGinley requested that AMHS principal Judith Peterson perform an investigation. Principal Peterson spoke with the head coach, an assistant coach, the athletic director, and the team captain. Although Principal Peterson's report concluded that there were no racial overtones to the celebration, Superintendent McGinley requested further investigation.

On October 16, the football team was called to the auditorium for interviews regarding the watermelon celebration. The members of the football team were asked to report to the auditorium at the start of the day and were told to sit apart from one another and not talk. (R. p. 454, line 21 – p. 455, line 16; p. 377, line 8 – p. 378, line 19; p. 434, line 8 – p. 435, line 13; p. 390, line 16 – p. 391, line 4). Players were called individually to be questioned by Associate Superintendent Lou Martin and Kevin Clayton, the CCSD Diversity Committee Advisor, in a classroom next to the auditorium. (R. p. 351, lines 5-11; p. 436, line 16 – p. 437, line 18). Some players waited over four hours to be interviewed. (R. p. 458, lines 6-13; p. 350, line 12 – p. 351, line 4). Players were asked what they knew about the watermelon ritual and specifically about the face drawn on the watermelon and the sounds made during the celebration. (R. p. 456, line 17 – p. 457, line 3; p. 392, lines 1-23; p. 352, line 21 – p. 354, line 15). The players were also asked whether they knew about the negative connotations or racial overtones surrounding watermelons, and if the students replied in the negative, they were told to look it up. (R. p. 390, lines 1-7; p. 409, line 12 – p. 410, line 7; p. 459, lines 10-18). At the end of each interview, the player was sent back to class after being told not to tell anyone what was discussed. (R. p. 411, lines 11-15; p. 355, lines 12-25).

Following the player interviews, Coach Walpole was also interviewed by Mr. Martin and Mr. Clayton, with Principal Peterson present. (R. p. 528, lines 14-23). During the interview, Mr. Martin informed Coach Walpole that the watermelons had a drawing on them and the players made monkey sounds during the celebration. (R. p. 523, line 24 – p. 524, line 9). Coach Walpole was also told that having a watermelon on the bench was like running up and down the sideline with a Confederate flag. (R. p. 522, lines 3-7). On October 20, 2014, the Charleston County School District relieved Coach Walpole of his coaching duties. (R. p. 614).

III. THE PRESS CONFERENCE

On October 21, 2014, the CCSD held a press conference at which Superintendent McGinley described the investigation and the decision to relieve Mr. Walpole of his coaching duties.

> On Monday, October 13, 2014, an allegation was brought to my attention from one of the board members that the Academic Magnet football team has practiced a watermelon ritual with students making monkey sounds as part of a postgame celebration. This board member was clearly concerned about racial stereotypes related to this type of ritual. I immediately called Principal Peterson and she agreed to investigate. After she spoke with the Head Coach, Assistant Coach, and one player, she reported back to me that the coaches said they were aware of this ritual following victories and that they did not see any...observe any cultural insensitivity. The tone of the report given back to me implied that this was an innocent ritual.

(R. p. 614). Following this initial report, Superintendent McGinley deployed Associate Superintendent Louis Martin to further investigate in order to "surface the facts related to this alleged ritual." (R. p. 614). According to Superintendent McGinley, this investigation revealed that

> there was a tradition that the team participated in as a group following the games, following the victories. . . . The watermelon was taken to all games on a bus. It was carried to the field and placed on the team bench. . . . Players would gather in a circle, smash the watermelon, while others either were standing in a group or locking arms and making chanting sounds that were described as 'ooh, ooh, ooh.' The watermelon was inscribed with a face . . . that could be considered a caricature. . . . Additionally, the watermelon was named at each game. At game one, the watermelon was named Junior. For games two through six, the watermelon was named Bonds Wilson 1, 2, 3, 4, or 5.

(R. p. 614). Superintendent McGinley then stated that based upon their interviews of the students and the coaches, "the accountability lies with the adults." (R. p. 614). Later in the press conference, Superintendent McGinley stated that "again these were allegations, ok these [sic] are what we were investigating." (R. p. 614). At no point during the press conference that day did Superintendent McGinley say that the students or Coach Walpole were racist. Furthermore, she

did not make any statement as to whether or not Coach Walpole was even aware of the details of the celebration.

IV. THE CITY PAPER'S PUBLICATIONS

On October 21, 2014, the City Paper published an article by Editor Chris Haire entitled "Melongate: Big toothy grins, watermelons, and monkey sounds don't mix." (R. p. 602). The article states:

> 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.***
>
> ***Apparently not. And apparently not the coaching staff and the players on the Academic Magnet Raptors.***
>
> Somewhere along the way in this year's unexpectedly successful season, the Raptors took a liking to buying watermelons before their games. They apparently drew a face on it each time – a big toothy, grinning face. The first time the watermelon was named Junior. The next time it was Bonds Wilson, the name of the campus the AMHS shares with School of the Arts. That name stuck.
>
> But here's where the things get even worse. At the close of each game, the players smashed the watermelon on the ground while reportedly making the monkey-like sounds of 'ooh ooh ooh ooh.' Apparently, the players did this after four or five games, each time evidently after the largely white Raptor squad beat one of their opponents, each one largely an African-American team. Parents of players on one of the opposing teams reportedly brought this to the attention of African-American Board member Michael Miller last week.
>
> ***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.*** After all, AMHS is not only the No. I ranked school in the state, it's one of the tops in the nations.
>
> 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.
>
> Even more troubling is the degree to which Raptor Nation has circled the wagons around Walpole and the team. Frankly, this has nothing to do with the fact that the coach is by all accounts a good man. Walpole's merits are meaningless.
>
> 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.

(R. p. 602) (emphasis added).

The City Paper published another article in the October 21, 2014 edition entitled "District: AMHS football team's watermelon ritual included 'monkey sounds,' 'caricature.' Coach removed after complaint of 'animalistic' sounds following defeat of majority-black team." (R. pp. 603-605). Following this article, Coach Walpole was reinstated and Superintendent McGinley resigned from her position.

In the October 30, 2014 edition, the City Paper published another article by Mr. Haire entitled "Mob Rules. School district forces out superintendent who ***fired coach who condoned racist ritual***." (R. p. 606) (emphasis added). The article states:

> But goddammit, this town is rotten with racists.
>
> Not only do we have a Confederate-flag waving, Southern apologist heading up the College of Charleston, now 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.***

Honestly, I had no idea that this was how the Coach Bud Walpole controversy would play out. I don't think anyone really did. The ouster of McGinley is every bit as surprising as one of George R.R. Martin's wedding-day bloodbaths. But it's even more brutal than the *Game of Thrones* author could have conjured up because 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. If you don't already know, a racist caricature had been drawn on a watermelon and then smashed each time the largely white football team defeated their predominantly African-American competitors. Even worse, they reportedly made monkey sounds when they did it.

And based on what has been reported, it appears that McGinley in part was motivated to remove Walpole because he apparently didn't see anything disturbing himself, a stance that more than strains credulity given the coach's 50-some-odd-years on this planet.

. . .

In hindsight, there's no denying that McGinley simply misjudged her fellow Charlestonians. Perhaps she too had bought into the hype that the Holy City had shaken off its racist past, that our Lowcountry home had been born anew as America's most beloved tourist town. Perhaps she genuinely thought that the community would rise up with her and condemn this racist behavior. But it didn't.

As the controversy unfolded, the black community largely remained, silent, while the entire Academic Magnet community rallied behind Coach Walpole, with some even going as far as to deny any racist connection between watermelons, Sambo-like caricatures, monkey noises, and black people. Because one single coach had been fired, they were willing to ignore America's shameful racist past. Apparently, 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. Now that Nancy McGinley has been forced out of office, perhaps that realization will happen much sooner rather than later.

(R. p. 606) (emphasis added). Being referred to as "racist douchebags" and as a coach "who condoned a racist act" damaged the Appellants' reputations.

STANDARD OF REVIEW

The standard governing summary judgment is well established, and appellate courts apply the same standard as the trial court. Summary judgment is only appropriate where there is no genuine issue of material fact, and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). On a motion for summary judgment, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-S. Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." Murphy v. Tyndall, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009).

ARGUMENT

The central issue in this case is whether being referred to as a "racist douchebag" and someone that condones a "racist act" is defamatory. Even if it is not defamatory, the lower court incorrectly held that the City Paper has a right to rely on Superintendent McGinley's press conference under the fair report privilege when she unequivocally did not state such things about the Students or Walpole. Referring to someone as a racist douchebag clearly tarnishes ones

reputation in the community. See, e.g., Sheridan v. Carter, 48 A.D.3d 444, 446–47 (N.Y. App. Div. 2008) ("In the first instance, Carter's published statements, which depicted the plaintiffs as racists who physically abused and economically exploited their domestic employee, were clearly defamatory per se.").

Defamation common-law principles exist in tension with the protections afforded to the media by the First Amendment. However, these protections do not extend to shield the media defendant when commenting on a private individual's private matters. In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), the United States Supreme Court held that a private individual does not have to prove a heightened standard of "actual malice" in order to recover presumed damages where the defamatory statements do not involve matters of public concern. This leaves any defamation suit on private matters to be adjudicated on state common law principles.

I. THE LOWER COURT ERRED IN HOLDING THAT THE STATEMENTS OF FACTS IN THE ARTICLES ARE PROTECTED BY THE FAIR REPORT PRIVILEGE.

The lower court incorrectly granted summary judgment based on the evidence in this case in contravention of established South Carolina law. In its Order, the Court acknowledges that "[t]he [fair report] privilege protects those who ***accurately*** report the substance of statements, actions, proceedings, reports, or records of public officials or agencies . . ." (R. p. 9) (emphasis added). In this case, however, the City Paper did not accurately report the statements made by Superintendent McGinley at the press conference. The fair report privilege was originally articulated to protect fair and accurate reports of judicial records and proceedings. See Padgett v. Sun News, 278 S.C. 26, 31, 292 S.E.2d 30, 33 (1982); Herring v. Retail Credit Co., 266 S.C. 455, 460, 224 S.E.2d 663, 665 (1976). This privilege has since been extended to all matters of

public interest. Jones v. Garner, 250 S.C. 479, 487, 158 S.E.2d 909, 913 (1968) ("Fair and impartial reports in newspapers of matters of public interest are qualifiedly privileged."). However, "***any matter added to the report by the publisher***, which is defamatory of the person named in the public records, is not privileged." West v. Morehead, 396 S.C. 1, 8, 720 S.E.2d 495, 499 (Ct. App. 2011) (quoting Jones, 250 S.C. at 487, 158 S.E.2d at 913) (emphasis added). The fair report privilege is a qualified privilege, and as such, subsequent determinations must be made by the court and the factfinder as to whether the conditions give rise to the privilege, and whether the privilege has been abused. Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 485, 514 S.E.2d 134 (1999).

Any factual reporting by the City Paper regarding actual statements made by Academic Magnet or CCSD officials is protected by the fair report privilege. However, this privilege does not extend to assertions regarding racism made by the City Paper under the guise of "opinion," as has been explained above. For the fair report privilege to protect a statement, the statement must be "fair and accurate," and not contain any material added by the publisher. Padgett, 278 S.C. at 31, 292 S.E.2d at 33; West, 396 S.C. at 8, 720 S.E.2d at 499. Therefore, assertions that the students' motives were racist, as well as characterizing any symbolism associated with the students' celebrations as racist, does not fall under the umbrella of the fair report privilege. The statements by the City Paper labeling the celebration as racially motivated do not reflect a "fair and accurate" representation of information disseminated by CCSD through press releases or news conferences. At worst, Superintendent McGinley's only reference to racism during the press conference was a statement that a CCSD board member's concern "about racial stereotypes related to this type of ritual" led to the investigation. (R. p. 614). Superintendent McGinley, stating the results of the investigation, said that "it was our conclusion that the accountability lies

with the adults. That the perceptions and the practices that were part of this ritual were not something that the adults should have sanctioned and therefore we took action yesterday to relieve the head coach of his responsibilities." (R. p. 614). As of the press conference, Superintendent McGinley had yet to speak personally with Coach Walpole. (R. p. 614). Nowhere within the press releases or news conferences issued by CCSD or Superintendent McGinley were the individual members of the Academic Magnet football team or Coach Walpole referred to as racists. In fact, Superintendent McGinley's statements to the public concerning the controversy characterized the celebration as "an innocent ritual." (R. p. 614). Later in the press conference, Superintendent McGinley stated that "again these were allegations, ok these [sic] are what we were investigating." (R. p. 614). These statements clearly illustrate that the City Paper did not fairly and accurately report the statements of Superintendent McGinley and the CCSD when they referred to the individuals as "racist douchebags" in defaming the Appellants. Therefore, based on the evidence, a reasonable jury could find that any statements made by the City Paper that assign racist motivations to the celebration and football team members are not protected by the fair report privilege. The lower court's order on this ground should be reversed.

II. THE LOWER COURT ERRED IN HOLDING THAT THE OPINIONS EXPRESSED IN THE ARTICLES ARE NOT ACTIONABLE

In its Order Granting Summary Judgment, the lower court claims that "it is settled law that expressions of opinion on matters of public concern are immune from liability for defamation." (R. p. 12). This statement attempts to give a free pass to all "opinion," construing it as non-defamatory comment without qualification. See Goodwin v. Kennedy, 347 S.C. 30, 41, 552 S.E.2d 319, 325 (Ct. App. 2001). In order to prevail under the qualified privilege of fair comment, which "holds matters of public interest and concern to be legitimate subjects of

criticism," any published statements of opinion must be presented "fairly and with an honest purpose." Oswalt v. State-Record Co., 250 S.C. 429, 433, 158 S.E.2d 204, 206 (1967). Under a qualified privilege, "one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused." Swinton Creek, 334 S.C. at 469, 484, 514 S.E.2d at 126, 134 (citing Restatement (Second) of Torts § 593 (1977)). It is a question of law for the court to decide whether the occasion gives rise to a qualified privilege. Id. at 485, 514 S.E.2d at 134. The determination of whether the privilege has been abused should be left to the factfinder if there is conflicting evidence. Id.

South Carolina courts have long held that even opinions may not be protected by the privilege if the content of the opinion is false. "A newspaper is privileged to publish accounts of a public meeting, provided such publication does not contain charges or statements, made by the paper . . . which are false and malicious." Jackson v. Record Pub. Co., 175 S.C. 211, 216, 178 S.E. 833, 835 (1935). Indeed, the Supreme Court of the United States has stated that there is no "wholesale defamation exemption for anything that might be labeled 'opinion.'" Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990).

> [E]xpressions of "opinion" may often imply an assertion of objective fact. If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar."

Milkovich, 497 U.S. at 18-19. Under this line of reasoning, the central question becomes whether a reasonable factfinder could conclude the *City Paper*'s publications contained assertions that the members of the Academic Magnet's football team and Coach Walpole are racists.

Furthermore, the lower court's granting of summary judgment should not prevail under the doctrine of fair comment because the City Paper's statements concerned the character and beliefs of the individual members of the Academic Magnet's football team. As described above, these statements did not concern a public matter, but a private one. See Parker v. Evening Post Pub. Co., 317 S.C. 246, 452 S.E.2d 646 (1994). The fair comment privilege only extends to "matters of public interest and concern," and not private matters. See Oswalt, 250 S.C. at 433, 158 S.E.2d at 206. Additionally, the City Paper's published statements should not be protected by the fair comment privilege because the statements are assertions that the members of the Raptor football team are racist, and the City Paper did not raise the defense of truthfulness with regard to its statements in its Motion for Summary Judgment. In the article "Melongate: Big toothy grins, watermelons, and monkey sounds don't mix," in reference to the football team, the City Paper states, "'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." (R. p. 602). In "Mob Rules. School district forces out superintendent who fired coach who condoned racist ritual," the City Paper 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." (R. p. 606). The City Paper proceeded to admonish the Academic Magnet community by noting that "[a]pparently, to admit that their coach, their children, might be just a smidgen racist was simply too much to hear." (R. p. 606).

As written, these statements are presented as factual assertions cloaked in the guise of opinion. The evidence in this case presents a question of fact as to whether the City Paper abused a qualified privilege in failing to fairly and accurately report opinions related to the AMHS watermelon ritual. Oswalt, 250 S.C. at 433, 158 S.E.2d at 206.

A reasonable jury could find that the printed statements are defamatory and not opinion on a matter of public concern, and as such, should not be protected by the qualified privilege of fair comment. The lower court's order granting summary judgment on this ground should be reversed.

III. THE LOWER COURT ERRED IN HOLDING THAT PLAINTIFFS HAVE NOT SHOWN PROOF OF INJURY TO REPUTATION

The lower court also held that "[b]ecause 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." (R. p. 19). This finding is premised upon a faulty analysis of the facts under federal and state defamation law. To prove defamation, a plaintiff is required to show "*either* actionability of the statement irrespective of special harm *or* the existence of special harm caused by the publication." Banks v. St. Matthew Baptist Church, 406 S.C. 156, 161, 750 S.E.2d 605, 607 (2013) (emphasis added).

A. Under Common Law Principles, Libel Is Actionable *Per Se* and Does Not Require Proof of Actual Damages

A defamation action is analyzed primarily under the common law when the plaintiff is a private figure. Erickson v. Jones St. Publrs., LLC, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006). Under the common law, libel is actionable *per se* if it involves "written or printed words which tend to degrade a person, that is, to reduce his character or reputation in the estimation of his friends or acquaintances, or the public, or to disgrace him, or to render him odious,

contemptible, or ridiculous . . . ." Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 510, 506 S.E.2d 502 (1998) (quoting Lesesne v. Willingham, 83 F. Supp. 918, 921 (E.D.S.C. 1949)). "Essentially, all libel is actionable *per se* . . . ." Erickson, 368 S.C. at 466, 629 S.E.2d at 664.

If the libel is actionable *per se*, then under common law principles it is presumed that the plaintiff suffered general damages. Capps v. Watts, 271 S.C. 276, 281, 246 S.E.2d 606, 609 (1978). General damages include things such as injury to reputation, mental suffering, and other types of injuries that cannot be assigned an absolute monetary valuation. Holtzscheiter, 332 S.C. at 510, 506 S.E.2d at 502 n.4. Additionally, an actionable *per se* libel does not require the pleading and proof of special damages. Capps, 271 S.C. at 281, 246 S.E.2d at 609. Special damages are measurable losses that are capable of being assessed monetarily, which result from injury to the plaintiff's reputation. Holtzscheiter, 332 S.C. at 510, 506 S.E.2d at 502 n.4. The issue of whether a statement is actionable *per* se is always a question of law for the court. See id. at 510, 506 S.E.2d at 501. Therefore, a libel of a private individual will generally not require a showing of general or special damages to be actionable.

B. Actual Malice and Proof of Actual Damages Are Not Constitutionally Required Where a Private Figure Has Been Defamed Over a Private Matter

In Holtzscheiter, the South Carolina Supreme Court attempted to reconcile common law defamation principles with the constitutional issues implicated by the First Amendment.

> At common law, defamation was a "strict liability" tort, but where the constitution is involved, the common law rules are altered. For example, since respondent relied on the newspaper's negligence here to establish liability, the constitution requires she prove "actual injury": She may not rely on the common law presumption of general damages arising from a defamation actionable *per se*.

Id. at 512, 506 S.E.2d at 503 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)). However, the Holtzscheiter and Gertz requirement of proof of "actual injury" only applies in instances where the First Amendment's protection of speech is heightened, such as when the

defamatory statements concern a matter of public interest. See Dun & Bradstreet, 472 U.S. at 757-761; Rosenbloom v. Metromedia, 403 U.S. 29, 43-44 (1971); Erickson, 368 S.C. 466, 629 S.E.2d at 665. It is for the court to decide whether the evidence shows that an individual is a public or private figure. Rosenblatt v. Baer, 383 U.S. 75, 88 (1966). Thus, the City Paper's assertion that proof of injury to reputation is required under the facts of this case hinges upon whether its published statements involve public figures or a matter of public concern.

Media defendants commenting on public figures are afforded the constitutional protections outlined in New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

> For the most part those who attain this status [of public figure] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Gertz, 418 U.S. at 345. On the other hand, no clear test has been delineated by South Carolina or federal courts to determine whether a controversy is a matter of public concern. Most courts approach the issue on an ad hoc, "I-know-it-when-I-see-it" basis. Carl Willner, Defining a Public Controversy in the Constitutional Law of Defamation, 69 Va. L. Rev. 931, 944 (1983).

Here, the Students are student members of the Academic Magnet's football team and Walpole is their Coach. The students were drawn into the controversy after Mr. Martin and Mr. Clayton disseminated statements concerning their post-game celebrations to the media. The students are clearly private individuals for the purposes of a defamation suit. See Gertz, 418 U.S. at 345. The students have neither assumed roles of prominence in society nor do they possess influence or power within the community. See id. The students did not purposefully inject themselves into the public eye or invite comment on their activities. See id. Under Gertz, the

students must be classified as private individuals, and thus are not constrained by the heightened protections afforded to defendants by the *New York Times* decision. See Erickson, 368 S.C. at 472-474, 629 S.E.2d at 668-669.

In sum, the Students are private figures, and the defamatory statements by the City Paper involved a matter of private, not public, concern. The lower court held that Coach Walpole was a public figure. Walpole does not concede he is a public figure, and this matter is not of public concern. If it is a public concern merely by being reported, then media defendants have the ability to require a heightened burden of proof merely by publishing statements regarding a private individual. As such, the action should be analyzed under common-law defamation principles. See Erickson, 368 S.C. at 465, 629 S.E.2d at 664. The City Paper's printed statements, as libel, are actionable *per se*. See id. at 466, 629 S.E.2d at 664. Therefore, it is presumed that the Appellants suffered general damages, and proof of damages is not required to defeat the City Paper's Motion for Summary Judgment. See Capps, 271 S.C. at 281, 246 S.E.2d at 609.

Based on the evidence in this case when viewed in a light most favorable to Appellants, a reasonable jury could find the defamatory statements printed by the *City Paper* caused actual injury to the Appellants. Under Gertz, if a private figure is defamed in a public matter, the plaintiff must prove actual injury, and may not rely on the common law presumption of general damages if the defamation is actionable *per se*. Holtzscheiter, 332 S.C. at 512, 506 S.E.2d at 504 (citing Gertz, 418 U.S. 323). Actual damages should not be confused with special damages. F. Patrick Hubbard & Robert L. Felix, The South Carolina Law of Torts § 7.A.3.b (2014). In Gertz, the Court did not define actual injury, opting to leave it to the trial courts to define the term. Gertz, 418 U.S. at 349-50. However, the Court did state that "actual injury is not limited to out-

of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include *impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.*" Id. (emphasis added).

Here, there is evidence in the record from which a reasonable jury could conclude the Appellants have suffered actual injury to their reputation and standing in the community, as well as personal humiliation and mental anguish. Furthermore, there is evidence in the record that could lead a reasonable jury to conclude that the City Paper's statements proximately injured the Appellants. Reece A. Moore, one of the members of the 2014 Raptor team, testified that his classmates' perceptions of himself and his teammates were changed by the incident and that he was questioned about the incident during university pre-admission decision interviews. (R. p. 464, line 19 – p. 466, line 11). Coach Walpole testified that the reputation of the team and its members was tarnished as a result of the defamatory statements. (R. p. 550, line 19 – p. 552, line 5). At one point a North Charleston coach refused to shake hands with Coach Walpole's assistants and told them, "We do not have any respect for you-all because of what happened last year." (R. p. 559, lines 10-18).

Appellant Robert Garrard said that the City Paper articles had made him "feel more self-conscious. It doesn't feel good to be called a racist when you're not." (R. p. 398, lines 22-24). Appellant Connor Frailey stated that the City Paper's articles were responsible for the harm Appellants suffered to their reputation among their peers, claiming that the City Paper "Mob Rules" article was the article "that everyone around had read because . . . it was on a different level than all the other articles . . . ." (R. p. 438, lines 1-4). He also emphasized that the article took center-stage amongst the publications reporting on the matter:

> A 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 Who – who asked you that specifically?

A I have no idea.

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

A Just classmates . . . .

(R. p. 438, lines 9-19).

In conclusion, there is evidence in the record when viewed in a light most favorable to the Appellants showing that they did suffer harm from the defamatory statements within the articles published by the City Paper. Statements by the Appellants and Coach Walpole show that they not only suffered a loss of reputation and standing amongst their peers but were also harassed as a result of the articles, experiencing personal humiliation and embarrassment. Mr. Frailey's statements indicate that the articles were the primary and proximate cause of the sentiments displayed by the Academic Magnet student body at the time of the articles. Therefore, summary judgment is improper even if actual damages must be proven, as there are genuine issues of material fact that should be resolved by a jury. The lower court's grant of summary judgment on this ground should be reversed.

IV. THE LOWER COURT ERRED IN HOLDING THAT THE ALLEGED DEFAMATORY STATEMENTS WERE NOT 'OF AND CONCERNING' THE STUDENTS

The lower court incorrectly granted summary judgment on the grounds 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." (R. p. 19). The issue of whether the City Paper's statements are "of and concerning" the Appellants at the very least presents a triable issue of fact from which a

reasonable jury could determine that the statements were referring to the members of the 2014 Academic Magnet football team.

The tort of defamation allows a plaintiff to recover damages for injury to his reputation as the result of the publication of untrue statements "of and concerning" the plaintiff. See Wilhoit v. WCSC, Inc., 293 S.C. 34, 37, 358 S.E.2d 397, 399 (Ct. App. 1987); see also Neeley v. Winn-Dixie Greenville, Inc., 255 S.C. 301, 308, 178 S.E.2d 662, 665 (1971) ("Defendant's words are actionable only if they refer to some ascertained or ascertainable person, and to be entitled to recover, the plaintiff must show that he is the person with reference to whom the statement was made . . . .") (quoting 50 Am. Jur. 2d Libel and Slander § 143). It is not necessary for the plaintiff to be explicitly named within the defamatory publication. "To support an action for a libel, the plaintiff's name need not be mentioned in the writing; it is sufficient that there is a description of, or reference to, him, by which he may be known." Nash v. Sharper, 229 S.C. 451, 456, 93 S.E.2d 457, 459 (1956). However, when a defamatory statement refers to a class of persons, the plaintiff must establish that the statement had a personal application to maintain an action for defamation. Hospital Care Corp. v. Commercial Cas. Ins. Co., 194 S.C. 370, 377-78, 9 S.E.2d 796, 800 (1940). In South Carolina, a member of a small group does not have to be named in order to be defamed by false statements concerning the group. Holtzscheiter, 332 S.C. at 514, 506 S.E.2d at 504 ("While the general rule is that defamation of a group does not allow an individual member of that group to maintain an action, ***this rule is not applicable to a small group***.") (emphasis added). Whether a defamatory statement refers to a specific plaintiff is a question of fact that must be decided by a jury. Wilhoit, 293 S.C. at 39, 358 S.E.2d at 400.

At least one court has held that a member of a football team may be defamed even if he is not specifically named. In Fawcett Publications, Inc. v. Morris, 377 P.2d 42 (O.K. 1962), the

Supreme Court of Oklahoma held that a fullback on the alternate squad of the University of Oklahoma football team had been defamed by an article alleging that members of the team had used amphetamines, even though the player had not been named within the article. The court found that

> [T]he article libels every member of the team, including the plaintiff, although he was not specifically named therein; that the average lay reader who was familiar with the team, and its members, would necessarily believe that the regular players, including the plaintiff, were using an amphetamine spray as set forth in the article; that the article strongly suggests that the use of amphetamine was criminal; and that plaintiff has sufficiently established his identity as one of those libeled by the publication.

Fawcett Publ'ns, 377 P.2d at 52.

The facts of the present case are analogous to Fawcett Publications. Here, the Students are members of the 2014 Raptors football team with a total of 28 players. Academic Magnet Football All-Time Roster, Maxpreps.com, http://www.maxpreps.com/high-schools/academic-magnet-raptors-(north-charleston,sc)/football-fall-15/all_time_roster.htm (last visited June 3, 2016). By labeling the team as "racist douchebags," Mr. Haire was making a statement about each individual Appellant with a reference "by which he may be known," i.e., the Raptor football team. See Nash, 229 S.C. at 456, 93 S.E.2d at 459. Additionally, the published statements refer to an activity in which all members of the team participated, namely the post-game celebrations. Owing to the small number of players on the team, this gives the statement a personal application to each member and harmfully tarnishes his reputation within the local community. See Hospital Care Corp., 194 S.C. at 377-78, 9 S.E.2d at 800. At a minimum, the facts present a triable issue that should be resolved by a jury. See Wilhoit, 293 S.C. at 39, 358 S.E.2d at 400. The lower court's grant of summary judgment on this ground should be reversed.

V. THE LOWER COURT ERRED IN HOLDING THAT COACH WALPOLE HAS NOT SHOWN THAT THE CITY PAPER ACTED WITH ACTUAL MALICE

Contrary to the lower court's holding, the plaintiffs have shown that the City Paper acted with actual malice, thus overcoming any qualified privilege. "A qualified privilege, even if it does apply, does not prevent liability for defamation where the statement is made with actual malice." Eubanks v. Smith, 292 S.C. 57, 63, 354 S.E.2d 896, 902 (1987) (citing Richardson v. McGill, 273 S.C. 142, 255 S.E.2d 341 (1979); Bell v. Bank of Abbeville, 208 S.C. 490, 38 S.E.2d 641 (1947)). The Supreme Court of South Carolina has defined actual malice as "ill will, recklessness, wantonness, or conscious indifference to the plaintiff's rights." Id. (citing Padgett, 278 S.C. 26, 292 S.E.2d 30 (1982)). Constitutional actual malice has a heightened standard requiring knowledge that the defamatory statements were false or reckless disregard of whether it was false. New York Times, 376 U.S. at 280.

There are material facts that could lead a reasonable jury to conclude that both common law and constitutional malice are present in this case. Superintendent McGinley's statements at the press conference on Coach Walpole's firing indicated that the celebration was innocent and that the team members were not being culturally insensitive. (R. p. 614) ("The tone of the report that was given back to me implied that this was an innocent ritual . . . ."). In his affidavit, Mr. Haire states that he has always considered Superintendent McGinley to be "completely honest and trustworthy" and that he had "no reason to doubt the truth of the statements she made during the press conference." (R. p. 616, ¶ 6). Mr. Haire watched the live television broadcast of the news conference. (R. p. 616, ¶ 5). However, in his City Paper articles, Mr. Haire referred to the Academic Magnet team members as racists and Coach Walpole as condoning racist activity, which is at odds with the statements made by Superintendent McGinley in her press conference that the initial report concluded that the celebration was innocent. If Mr. Haire considered

Superintendent McGinley to be a reliable source, then it follows that he knew that it was probable that the students were innocent of any racial motivation behind their post-game celebrations.

The City Paper's June 25, 2013 article entitled "I am a racist and proud of it" is evidence of actual malice in publishing the articles that defamed Appellants. Mr. Haire begins the City Paper article:

> ***I realized something about myself today: I am a racist. And I'm not ashamed to admit it. In fact, I'm damn proud that I'm a racist.***
>
> The truth of the matter is I'm so proud of my racist beliefs I'm going to teach my two daughters to be racists, just like their racist old daddy. After all, if there's anything that's going to save our country from splitting in two, it's more racists.
>
> There, I said it. The U.S. needs more racists, especially now that we have a black man in the White House and Congress seems poised to grant amnesty to some 11 million illegal immigrants.
>
> . . .
>
> ***And so City Paper readers, I've come to you today to admit this truth. I'm a racist. And I'm not going to apologize for it. So all of you non-racist assholes can take Paula Deen's entire collection of cookbooks and stick them up your non-racists assess.***

(R. p. 607) (emphasis added).

The City Paper's defamatory statements not only meet the requirement of common law malice, but also the heightened requirements of constitutional malice, as Mr. Haire had knowledge of the falsity of his assertions, or at least an obvious reason to doubt the accuracy of his report. See St. Amant v. Thompson, 390 U.S. 727, 732-33 (1968). Since there is sufficient evidence to warrant such a finding by a jury, any qualified privilege may be overcome, and it should be left to the jury to decide if the privilege has been abused. See Eubanks, 292 S.C. at 63,

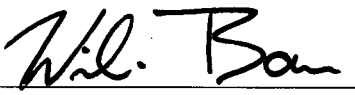
354 S.E.2d at 902; Swinton Creek, 334 S.C. at 485, 514 S.E.2d at 134. Therefore, the lower court's grant of summary judgment on this ground should be reversed.

CONCLUSION

For these and all other reasons put forth to the lower court and viewing this evidence in a light most favorable to the Students and Walpole, as the Court is required to do at summary judgment, the lower court's granting of summary judgment to Jones Street should be reversed.

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

July 13, 2017
Hampton, South Carolina

BY: 

John E. Parker
William F. Barnes, III
101 Mulberry Street, East
Post Office Box 457
Hampton, SC 29924
Phone: (803) 943-2111
ATTORNEYS FOR APPELLANTS