THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge
Consolidated C.A. No. 2015-CP-10-2389

Appellate Case No.: 2016-002525

Amy Garrard and Lee Garrard, Guardians Ad Litem for R.C.G., a Minor; Dean Frailey and Kathryn Frailey, Guardians Ad Litem for C.F., a Minor; Richard Nelson and Cherly Nelson, Gaurdians Ad Litem for D.G.N., a Minor; Adam Olsen Ackerman; and AEP, III, ...Plaintiffs,

v.

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

And

Eugene Walpole, ... Plaintiff,

v.

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

Of Whom Eugene Walpole, Amy Garrard and Lee Garrard, Guardians Ad Litem for R.C.G., a Minor; Dean Frailey and Kathryn Frailey, Guardians Ad Litem for C.F., a Minor; Richard Nelson and Cherly Nelson, Gaurdians Ad Litem for D.G.N., a Minor; Adam Olsen Ackerman; and AEP, III are the ..... Appellants,

And

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

FINAL BRIEF OF RESPONDENT JONES STREET PUBLISHERS, LLC

Wallace K. Lightsey
Meliah Bowers Jefferson
Christopher B. Schoen
WYCHE, P.A.
44 East Camperdown Way
Greenville, South Carolina 29601
(864) 242-8200

Attorneys for Respondent Jones Street Publishers, LLC

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(864) 242-8200

Attorneys for Respondent Jones Street Publishers, LLC

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STATEMENT OF ISSUES PRESENTED

1. Did the trial court correctly find that the statements of fact, as taken from official reports made by Charleston County School District officials, and accurately republished in the City Paper publications, are protected by the fair report privilege?

2. Did the trial court correctly determine that the Appellants had no actionable claim against Respondents for the statements of opinion and rhetorical hyperbole contained in the City Paper publications?

3. Did the trial court correctly grant summary judgment to Respondent where Appellants failed to present any evidence of injury to their reputations attributable to the City Paper publications?

4. Where the City Paper made no mention of any individual player on the team in any of its publications, did the trial court correctly find that the individual student Appellants were not defamed by statements made about the team in general?

5. Did the trial court correctly grant summary judgment against Appellant Walpole because of his failure to show the existence of any clear and convincing evidence of actual malice in the City Paper publications?

STATEMENT OF THE CASE

This case arises from the Academic Magnet High School's ("AMHS") football team's decision to engage in a post-game ritual that was widely perceived as racially offensive and insensitive, the coach's firing because of the ritual and later reinstatement, and the community's reaction to those incidents, a controversy that received extensive national and local media attention in the autumn of 2014.[1] *See* (R. pp. 221-233.) Respondent Jones Street Publishers, LLC, ("Jones Street") owns and publishes the *Charleston City Paper* weekly newspaper (the "City Paper"), which ran two opinion editorials, or "op-eds," and a news article about the controversy. Appellants commenced these actions for defamation against Jones Street, the Charleston County School District (the "School District"), and others, in the Court of Common Pleas for Charleston County alleging claims for defamation of character. As to Jones Street, the Appellants contend that the City Paper publications are defamatory because they imply that the football team and Walpole are racist.

Jones Street filed motions to dismiss the claims, which the trial court denied in a Form 4 Order on the basis of being premature. Appellants then amended their complaints. Following a substantial period of discovery, Jones Street moved for summary judgment as to all claims made against it by Appellants. *See* (S.R. pp. 2-6; R. pp. 32-36.) After conducting a hearing on Jones Street's Motions for Summary Judgment, acting Circuit Court Judge Jean H. Toal granted the motions as to all Appellants on grounds of privilege

[1] The Appellants are the head coach and five members of the AMHS football team. Appellants originally filed separate actions on behalf of six student plaintiffs and Coach Eugene "Bud" Walpole. The student plaintiffs' cases were consolidated on May 24, 2016 under case number 2015-CP-10-2389. For convenience, Respondents will reference the paragraph numbers of the Amended Complaint filed in the A.E.P. case. (R. pp. 221-233.) The amended complaints filed by the other student plaintiffs and Coach Walpole may reference different paragraph numbers, but contain the same statements as referenced herein.

and Appellants' failure to show any evidence that the Jones Street publications in particular – apart from all of the other publicity concerning the ritual – had caused them any injury. *See* R. pp. 3-25.) Judge Toal also granted summary judgment against the student plaintiffs on the ground that none of them had been identified in the publications, which were about the team in general, and against Appellant Walpole (the coach of the team) on the ground that he was a public official and did not adduce any evidence of actual malice on the part of Jones Street. *See id.* This appeal followed.

STATEMENT OF THE FACTS

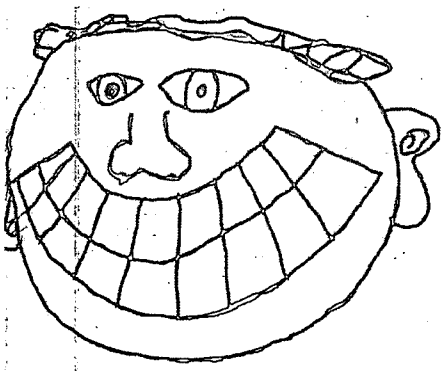
In the fall of 2014, Coach Eugene "Bud" Walpole ("Walpole"), the head coach of the AMHS football team, was fired from his coaching position because of a bizarre and inflammatory post-game practice of the team in which players chanted ape-like sounds while they smashed a watermelon that had been painted with a caricature face bearing features similar to derogatory depictions historically used to mock African-Americans. This ritual was perpetuated by the team after six games during the season until it was halted by school administrators. At the time, all of the players on the AMHS team except for one were white, and the teams they defeated were predominantly African-American. The players called the watermelon "Bonds Wilson" after a formerly segregated school named for two African American educators in the Charleston area, and chanted "ooh ooh ooh" while smashing the watermelon (hereinafter referred to as the "watermelon ritual").

The Charleston County School District Superintendent fired Walpole from his coaching position following an official investigation of the watermelon ritual prompted by a complaint to a School District board member from a concerned parent. Walpole was

reinstated a week later under pressure from the School Board, which led to the resignation of the Superintendent. The controversy was covered widely in both local and national news media.

The story of the watermelon ritual broke on October 21, 2014. On that day, the School District issued a press release stating that, after hearing of "inappropriate post game celebrations" by the AMHS football team, an investigation was conducted by the School District and "as a result of the investigation, the head football coach will no longer be serving as a coach for Charleston County School District." *See* Media Release. The District also announced that School District Superintendent Nancy McGinley would be holding a press conference open to the public that day at the School District offices.

City Paper reporter Paul Bowers attended the press conference and wrote an article about it based on what he heard and observed there. As reported in the article, Superintendent McGinley stated at the press conference 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." Superintendent McGinley described the chanting sounds as "monkey sounds" and stated that School Board trustee Michael Miller had reported that the football team engaged in a "tribal-like chant that is animalistic or monkey-like." She also stated that the watermelon was nick-named "Bonds Wilson" and that it had a face drawn on it "that could be considered a caricature." A copy of the caricature drawn by the same football player who drew it on many of watermelons used in the watermelon ritual was shown to the persons attending the press conference. A copy of the drawing is reproduced below:



The article written by Paul Bowers is a completely accurate statement of the official comments made by Superintendent McGinley at the press conference. The headline of 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." – is a completely accurate summary of the official statements that Superintendent McGinley made at the press conference. Additionally, Paul Bowers wrote his article in good faith. As he states in his affidavit:

> At the time of the press conference, I knew Superintendent McGinley in a professional capacity and considered her to be a completely credible and reliable news source, especially in connection with official statements such as those made at the press conference. I accepted the statements she made during the press conference as accurate representations of the School District's official position and findings concerning the watermelon ritual.

(R. pp. 854-55, ¶ 6.) Appellants did not produce any evidence to contradict this. The article includes comments from parents of AMHS students made in support of Walpole at or following the press conference. Mr. Bowers attempted to reach Walpole to ask for his comments, and left a voice mail message for him, but Walpole did not return the call. (R. pp. 855, ¶ 7.)

The *City Paper* did not break this story and was only one of many media outlets to report on the watermelon ritual and the subsequent events. In fact, it was widely covered

by numerous other news media, on the internet, in print, on the radio, and on television. Many of these other publications and broadcasts were made to a much greater audience, readership, or viewership than the small readership of the *City Paper*, and they also reported the statements by Superintendent McGinley that the ritual included "monkey like" or "animalistic" sounds and a "caricature" face drawn on the watermelon. (R. pp. 855, ¶ 8; *see* R. pp. 618-19, ¶¶ 13-14 and R. pp. 626-852, Ex. D.) In media outlets ranging from national publications to the local AMHS school newspaper, various commentators expressed the opinion that the behavior of the football players in the watermelon 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. (R. pp. 855-56, ¶ 10; R. pp. 619, ¶ 14.)

For example, the Huffington Post – an internet news service with approximately 40 million readers a month – published an article entitled, "Was This High School Football Team's Watermelon-Smashing Ritual Racist?" The article noted that "[t]he story has sparked outrage and debate nationwide." It also quoted a commentator who said, "The idea that these kids were unaware that there may be a racial connotation to anything that they did,that is patently false." *See* http://www.huffingtonpost.com/2014/10/27/south-carolina-high-school-football-watermelon_n_6054702.html; (R. pp. 74-82.)

In addition to national press attention, the story also received extensive coverage and commentary in local and regional publications. Indeed, one of the students at the AMHS wrote an editorial in the school newspaper entitled, "Sometimes a Watermelon isn't Just a Watermelon." In his editorial, the student expressed his opinion in this way:

> Black stereotypes are present in today's society, and the students at Academic Magnet are aware of this. ... I feel that it is impossible that the

> team or individual who started this ritual did not know of any correlation between the watermelon and [the] African American race. The wide grin, large nose, and "twig-like hair" characteristics drawn on the melon are distinctly similar to depictions of Blacks during both slavery and post-slavery time periods. As if this wasn't enough, the team decided it was appropriate to name one or more of the watermelons "Bonds-Wilson", the name of the AMHS campus. The campus was named after the original all black high school that was built during segregation ... Granted, some of the students may not have known this, but it leads me to ask, "why name the melon 'Bonds-Wilson' in lieu of a name like 'Academic Magnet'? As far as the "chanting" noises are concerned, ... with the other facts presented, it makes me wonder even more "what were my peers thinking"? ... No one has stood up to tell them that their actions were wrong, and it's time for that to change.

William Pugh, *Sometimes a Watermelon isn't Just a Watermelon*, The Talon, Nov. 5, 2014, http://amhsnewspaper.com/3368/news/sometimes-a-watermelon-isnt-just-a-watermelon/.

Superintendent McGinley's press conference and the factual statements 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. (R. pp. 42-43); *See also* (R. pp. 626-852, Ex. D.) Most of these publications and media have substantially greater viewership than the *City Paper* – for example, the *Post & Courier* has a daily readership of over 180,000; *USA Today* is read by over 3 million people every day; and HuffPost (a/k/a The Huffington Post) has a monthly unique visitor count of more than 50 million.

See http://www.postandcourieradvertising.com/readership.html; http://marketing.usatoday.com/about; http://www.businessinsider.com/huffington-post-faces-several-challenges-without-its-founder-2016-8.

Chris Haire is the Editor of the *City Paper* and wrote the two opinion editorials that are the subject of the lawsuits: "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. *See* (R. pp. 602, 606, and 620-23.) Mr. Haire watched Superintendent McGinley's press conference by a live television broadcast from the School District's public hearing room. As he affirms in his affidavit:

> I distinctly remember Superintendent McGinley stating that the watermelon ritual involved "monkey-like" chants of "ooh ooh ooh ooh," the drawing of a caricature face on a watermelon, the naming of the watermelon as "Bonds Wilson," and the smashing of the watermelon while the players chanted the "monkey sounds."

(R. p. 616, ¶ 5.) The drawing of the caricature face depicted previously in this brief was shown on the television broadcast. As Mr. Haire states:

> There was no question in my mind then, and there is no question in my mind now, that the drawing was intended to be a caricature of an African-American person – the broad nose, kinky hair, big ears and eyes, and big toothy grin immediately brought to my mind the "Sambo" caricatures of the past.
>
> Moreover, "Bonds Wilson" is the name of the formerly segregated African-American school that had been located at the site of the Academic Magnet High School campus. The name "Bonds Wilson" was taken from the names of two prominent African-American educators of early 20th-century Charleston.
>
> Based on the facts as stated by the School District at the public press conference, I formed the opinions that the watermelon ritual involved offensive racist behavior on the part of the football players, and that the players and coaches should have known that this behavior would be perceived as offensive and racist. I believed that the apparent failure of the players and coaches to recognize the possibility of such a perception of their actions was "indicative of the casual acceptance of racism in Charleston today, even among the best and brightest," as I stated in the first editorial.

(R. pp. 616-17, ¶¶ 7, 8, 9.)

As with Paul Bowers, Chris Haire wrote what he did in total good faith:

> At the time of the press conference, I knew Superintendent McGinley well and had known her for some time. I have always considered her to be completely honest and trustworthy. I have never had any reason to doubt the truth of what she said, particularly in the context of official announcements such as those made at this public press conference, and I

had no reason to doubt the truth of the statements she made during the press conference. I accepted them as true and reliable.

...

With both of my editorials on the watermelon ritual, my whole purpose in writing the editorials was to state my opinions concerning the ritual, the firing and reinstatement of Coach Walpole, and the resignation of Superintendent McGinley. I held these opinions in good faith at the time they were published, and I continue to hold them and to believe that they express a valid point of view. In writing these editorials, my sole intent was to express my views based on the official statements of the School District officials ...

(R. p. 616, 618, ¶¶ 6, 11.)

Appellants' position throughout the course of this litigation is hinged on the flawed idea that no one can criticize or judge them on the watermelon ritual unless and until there is a thorough examination of the AMHS football team's intentions. However, the trial court succinctly comprehended Jones Street's motions for summary judgment as follows:

Mr. Parker, what is contended by the Defendants in this matter is that any reasonable objective look at the caricature as drawn on that watermelon and what those boys did in circling around it and naming of that watermelon Bonds Wilson leads to the conclusion that that was an attempt to racially caricature. And whether the folks that say oh, in their hearts they meant it to be a Castaway in Wilson and Castaway or not, what the Defendants contend is that some adult in the mixture should have had the good sense to realize given the history of the use of the watermelon as a caricature for blacks over time and the monkey sounds as a caricature of African-Americans and the use of the name Bonds Wilson someone, some adult in the world should have realized that that had great potential for being perceived as a racist ritual. That's what the contention is.

(R. pp. 297-98.)

Throughout these legal actions against Jones Street, Appellants have ignored the very logical synopsis above. Like the circumstances under which the watermelon ritual was perpetuated, Appellants have only been capable of focusing on themselves. By bringing these actions and continuing this appeal, Appellants seek not only to absolve themselves of taking responsibility for their own actions, but also seek to profit from their

claim of willful ignorance of the implications of their racially insensitive conduct. Perhaps they were embarrassed by the whole controversy, but under our system of freedom of expression, the public, including the media, has a right to publish both factual reports and opinion commentary on it without being subject to a suit for defamation.

ARGUMENT

Summary of Argument

Appellants attempt to sanitized the facts of this case in hopes of persuading this Court to allow them to profit from and to stifle public debate about their very public disregard for and/or ignorance of the racial insensitivity of their actions related to the watermelon ritual. The issues on appeal in this case strike at the heart of freedom of speech and of the press, for they attempt to impose liability on the publisher of a newspaper for doing nothing more than expressing an editorial opinion and engaging in public discourse on a matter of substantial public controversy.

As aptly determined by the trial court in examining relevant law and the evidence presented by the parties during the hearing, Appellants have no viable claim for defamation against Jones Street. Appellants conceded and the trial court found that all statements of fact contained in the *City Paper* publications are merely restatements of the official, public comments of the School District Superintendent concerning the public controversy protected by the fair report privilege. To the extent that the op-eds go beyond such factual statements, their content is indisputably an expression of the editorial writer's opinions, ideas, and rhetorical commentary concerning the facts as reported by the School District Superintendent, for which liability for defamation does not lie. Furthermore, Appellants presented no evidence to the trial court that the *City Paper* publications at issue caused any

damage to their reputations, and proof of injury to reputation is required as a matter of law in this case.

Also fatal to the success of Appellants claims is that the allegedly defamatory statements were not "of and concerning" the student plaintiffs, because the statements referred only to the football team as a whole and did not refer to any individual players, including any of the Appellants. Walpole's claims suffer the same fate as he is a public official as a matter of law, and therefore is required to present clear and convincing evidence that Jones Street published the allegedly defamatory matter with actual malice. At the hearing, Walpole submitted no evidence of actual malice, much less clear and convincing proof.

For these reasons and the others discussed further below, the Court should affirm.

I. Standard of Review.

"When ruling on a motion for summary judgment or directed verdict in a defamation action, the court must review the evidence using the same substantive evidentiary standard of proof the jury is required to use in a particular case." *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 464, 629 S.E.2d 653, 663 (2006) (citing *George v. Fabri*, 345 S.C. 440, 451-54, 548 S.E.2d 868, 874-75 (2001)). Unlike the usual standard of review on a motion for summary judgment:

> where the constitutional prerequisites of falsity and actual malice are at issue 'an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the [field] of free expression." While Bose and prior cases involved appellate review of trial verdicts in libel actions, logic and considerations of judicial administration dictate that the same level of review apply to the granting of summary judgment.

Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1293 (D.C. Cir. 1988) (citations omitted; emphasis added) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984)), *cert. denied*, 488 U.S. 825 (1988). This Court, like the trial court, is required to exercise its independent judgment in assessing whether the plaintiffs have presented sufficient evidence to survive summary judgment:

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold ....

Bose, 466 U.S. at 511(emphasis added).

Therefore, the "scintilla of evidence" standard does not apply to the review of the trial court's decision on Jones Street's motions for summary judgment, because of the First Amendment values at stake here. Numerous courts, including the state and federal courts of South Carolina, have recognized that the high cost and unpredictability associated with the defense of libel actions, and the "chilling effect" that these factors may exert upon freedom of speech and of the press, require that summary judgment be viewed differently in such actions as compared with other civil actions. For example, the South Carolina U.S. District Court explicitly held:

> Summary judgment occupies a position of great importance in libel actions as compared with other civil actions, due to the possible chilling effect on constitutionally protected speech which would result from the defense of defamation claims. Courts have expressed a preference for the dismissal by summary judgment of libel cases in order to prevent all but the strongest cases from proceeding to trial.

MRR Southern, LLC v. Citizens for Marlboro County, 2012 WL 1016180, at *2 (D.S.C. Mar. 26, 2012) (emphasis added) (citing *Peeler v. Spartanburg Herald-Journal*, 681 F. Supp. 1144, 1146 (D.S.C. 1988); *Sunshine Sportswear & Elec. Inc. v. WSOC Television,*

Inc., 738 F. Supp. 1499, 1505 (D.S.C. 1989)). Indeed, the United States Supreme Court in *Anderson v. Liberty Lobby, Inc.*, 417 U.S. 242, 255-56 (1986), held that the clear and convincing evidence standard was proper when considering a summary judgment motion on an issue on Constitutional privilege requiring evidence of actual malice. The South Carolina Supreme Court has held likewise. *George*, 345 S.C. at 440, 548 S.E.2d at 868; and *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002).

Thus, the Appellants were required to provide concrete evidence in opposition to the motion; they cannot merely "assert[] that the jury might, and legally could, disbelieve the defendant." *Anderson,* 417 U.S. at 256, 106 S. Ct. at 2514. "The plaintiff cannot rely upon the hope that witness cross-examination will raise a credibility issue." *Fazekas v. Crain Consumer Group Division*, 583 F. Supp. 110, 114 (S.D. Ind. 1984).

As discussed below, the Appellants showed no such evidence to the trial court to overcome Jones Street's constitutional defenses, much less the clear and convincing evidence required to defeat summary judgment.

II. The Circuit Court Correctly Found the Statements of Fact in the City Paper Publications 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 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). This view coincides with that of the Fourth Circuit jurisprudence. *See Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 712 (4th Cir. 1991); *George v. Kay*, 632 F. 2d 1103, 1105 (4th Cir. 1980), *cert. denied*, 450 U. S. 1029 (1981).

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 at 712.

The standard of accuracy is one of substantial truth, except that it applies with respect to the act or statement on which the report is based rather than the underlying truth of the matter. "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). As long as the report is a fair and accurate summary of a statement made by a public official or agency, the person reporting it does not have 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.

In short, 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 constitutional values underlying this privilege are heightened significantly when, as in this case, the matter at issue is one of substantial public interest. In this type of situation in particular, the press should not refrain from reporting statements by a public official on the matter for fear that they could be held liable if the official's statements turn out to be untrue.

The Court need look no further than the Amended Complaints to establish that the allegedly defamatory factual statements of the *City Paper*'s op-eds – as alleged by the very words used by the Appellants in their Amended Complaints – fall within this privilege. The Student's Amended Complaint state that School District officials made the following public statements concerning the watermelon ritual:

- "the football team made animal sounds and drew a monkey face on the watermelon during these celebrations," (R. p. 214, ¶ 8.)
- "the team made monkey sounds and drew a monkey face on the watermelon," (R. p. 214, ¶ 8.)
- "the plaintiffs [intended] to cast African American opponents in a derogatory light," (R. p. 214, ¶ 8.)
- "[t]he defendants by their statements falsely accused the team and plaintiffs of being racially prejudiced," (R. p. 214, ¶ 8.)
- "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 animal noises,' " (R. p. 215, ¶ 9.)
- "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,' " (R. p. 215, ¶ 9.)
- "the sounds were 'monkey sounds,' " (R. p. 215, ¶ 10.)

- "[plaintiffs' actions were] racially derogatory actions intended to equate black members of opposing football teams with monkeys," (R. p. 215, ¶ 10.)

The affidavits of Paul Bowers and Chris Haire also establish that all of the factual statements contained in the pieces that they wrote were in fact taken from, and were accurate restatements of, the statements made by Superintendent McGinley at the press conference. There is no evidence contradicting this conclusion.

In fact, the Appellants conceded in their depositions that the factual statements contained in the *City Paper* publications are accurate restatements of what was said in the public and official comments of the School District Superintendent concerning the watermelon ritual. (R. p. 103; R. p. 535-36, 546-48). The Appellants further concede in their opening brief to this Court that those factual statements fall squarely within the privilege of fair report. *See* Appellant's Final Brief at 13 ("Any factual reporting by the City Paper regarding actual statements made by Academic Magnet or CCSD officials is protected by the fair report privilege"). Consequently, the Appellants should not be heard to complain about that which they did not dispute. The trial court correctly found the statements of fact relayed in the *City Paper* publications to be protected by the fair report privilege.

III. The Circuit Court Correctly Found the Statements of Opinion and Rhetorical Hyperbole Are Not Actionable.

Appellants argue that any characterization of the Appellants as racists in the *City Paper* publications constitutes abuse of privilege for which there is no protection under the law. This argument is simply false. Appellants acknowledged at the motions hearing that "[i]f, in fact, being called a racist douche bag is not defamatory then obviously we have no case." (R. p. 285.) The trial court made that exact determination in finding that, after removing the factual statements protected by the fair report privilege, the remaining

statements in the *City Paper* publications "are merely expressions of the writer's opinions and ideas on a matter of public concern" that could not form the basis of their defamation claims. (R. p. 11). This Court should affirm that ruling.

When the factual statements listed above are removed from the *City Paper* editorials, the allegedly defamatory content of what remains are statements that are unquestionably expressions of the writer's opinions and ideas, and comments of rhetorical hyperbole. Under established doctrine, Jones Street cannot be held liable for such statements. This is an issue of law for the court to decide. *E.g.*, *Chau v. Lewis*, 771 F.3d 118, 128 (2d Cir. 2014) ("Determining whether a statement is an allegation of fact or mere opinion is a legal question for the court."). Even to the extent that Appellants couch these statements as an abuse of the privilege, the court must determine the issue where the facts are not disputed. *See Woodward v. S.C. Farm Bureau Ins. Co.*, 277 S.C. 29, 32–33, 282 S.E.2d 599, 601 (1981) ("While abuse of privilege is ordinarily an issue for the jury, ... in the absence of a controversy as to the facts ... it is for the court to say in a given instance whether or not the privilege has been abused or exceeded.") (internal citations omitted) (emphasis added).

It is settled law that expressions of pure opinion are immune from liability for defamation. The reasons are manifold. They include the need to protect self-expression – "the freedom to speak one's mind … [as] an aspect of individual liberty – and thus a good unto itself" – and the societal and political value of public debate – "the common quest for truth and the vitality of society as a whole." *Bose Corp.*, 466 U.S. at 503-04. Against this backdrop, 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. at 339-40.

In the leading decision applying the First Amendment protection for expression of opinion, the Supreme Court 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). Additionally, statements are protected if they "cannot 'reasonably [be] interpreted as stating actual facts' about an individual." 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.* at 20. 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).

More recently, the Supreme Court explained that a fact, in contrast to an opinion, must assert something verifiable:

> A fact is "a thing done or existing" or "[a]n actual happening." Webster's New International Dictionary 782 (1927). An opinion is "a belief[,] a view," or a "sentiment which the mind forms of persons or things." *Id.*, at 1509[;] 7 Oxford English Dictionary 151 (1933) (an opinion "rests[s] on grounds insufficient for complete demonstration").

Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1325 (2015). 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 at 129 (emphasis added).

The crux of the Appellants' allegations against Jones Street involves the claim that the opinion editorials depict Appellants as racists. Removing the statements that merely repeated or summarized what School District officials stated publicly about the watermelon 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."
- "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."

(R. p. 602.)

In "Mob Rules":

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

- "[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."

(R. p. 606.)

None of these statements, to the extent they can be argued to have defamed the plaintiffs, asserts any verifiable, provable fact. They are expressions of the editorial writer's ideas and opinions, using rhetorical hyperbole to give color and emphasis to 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, and in fact many people did express different views on this matter.

None of these statements are statements of fact that can be objectively proved or disproved in a court of law – unlike a statement about the color of a traffic light or who had the right of way. Instead, they are the op-ed writer's opinions about what had been reported by School District officials in their public statements on the controversy. Indeed, the Appellants agreed in their depositions that "whether or not something is racist is a matter of opinion." (R. p. 382, ll. 16-18; *see also* R. p. 101, ll. 10-18 (agreeing that whether the watermelon ritual was racist "is a matter of opinion"); R. p. 467, ll. 3-5 (stating "[a]bsolutely" that "people can have different opinions as to what is racist"); R. p. 584, l. 22 – p. 585, l. 1 (affirming that whether or not something is racist is a matter of "individual interpretation").)

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 watermelon 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. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983) ("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."). *See also 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").

Contrary to Appellants' position, the *City Paper* was simply publishing the editorial writer's views on a matter of public concern. The *City Paper* publications by Chris Haire are opinion editorials discussing a sequence of events that involved facts disclosed by the School District Officials about multiple incidents of a racially inflammatory nature occurring during public school athletic events. The watermelon ritual, the resulting investigation, and the public response to the School District's actions are quintessentially matters of public concern on which the media had a right to comment, and which did receive widespread media attention on a local, regional, and national level. It is unfortunate that Appellants are unable to look beyond themselves to understand the implications of the watermelon ritual and take offense to any criticism of them and their actions as racist. However, even if Appellants were personally offended, the use of the epithet "racist" in the context of this controversy is clearly protected as an expression of opinion. As explained recently by the federal district court in *Forte v. Jones*,

> [T]he allegation that a person is a "racist" ... is not actionable because the term "racist" has no factually verifiable meaning. *See Overhill Farms, Inc. v. Lopez*, 190 Cal. App. 4th 1248, 1262, 119 Cal. Rptr. 3d 127 (4 Dist. 2010) ("charging a person with being racist, unfair or unjust – without more – [...] constitute mere name calling and do not contain a probably false assertion of fact" as is required to state a claim for defamation).
>
> ... [E]ven seen in the worst possible light, [the publication at issue] is merely an indication that someone (not necessarily Defendant) is of the impression that Plaintiff is a racist. Again, pursuant to *Overhill Farms*, 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.

2013 WL 1164929, at *6 (E.D. Cal. Mar. 20, 2013) (emphasis added); *see also Silverman v. Daily News, LP,* 129 A.D.3d 1054, 1055 (N.Y. App. Div. 2015) (defendant's publication that plaintiff authored "racist writings" is statement of opinion, not fact particularly given that "the context of the complained-of statements was such that a reasonable reader would have concluded that he or she was reading opinions, and not facts, about the plaintiff"); *Covino v. Hagemann*, 627 N.Y.S.2d 894 (Sup. Ct. 1995) (allegation of racism is "an expression of opinion [that] is not actionable as a defamation, no matter how offensive, vituperative, or unreasonable it may be").

Appellants' reliance on *Sheridan v. Carter*, 48 A.D. 3d 44 (N.Y. App. Div. 2008), is of no avail to them here because, unlike in *Sheridan*, the *City Paper* editorials fully disclosed the facts upon which their opinion was based, allowing the reader to make his or her own conclusion. The Seventh Circuit Court of Appeals aptly summarized the matter in *Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988) as follows:

> Accusations of "racism" no longer are "obviously and naturally harmful". The word has been watered down by overuse, becoming common coin in political discourse. Tillman called Stevens a racist; Stevens issued a press release calling Tillman a "racist" and her supporters "bigots". Formerly a "racist" was a believer in the superiority of one's own race, often a supporter of slavery or segregation, or a fomenter of hatred among the races. Stevens, the principal of a largely-black school in a large city, obviously does not believe that blacks should be enslaved or that

> Jim Crow should come to Illinois; no one would have inferred these things from the accusation. Politicians sometimes use the term much more loosely, as referring to anyone (not of the speaker's race) who opposes the speaker's political goals-on the "rationale" that the speaker espouses only what is good for the jurisdiction (or the audience), and since one's opponents have no cause to oppose what is beneficial, their opposition must be based on race. The term used this way means only: "He is neither for me nor of our race; and I invite you to vote your race." . . . That may be an unfortunate brand of politics, but it also drains the term of its former, decidedly opprobrious, meaning. The term has acquired intermediate meanings too. The speaker may use "she is a racist" to mean "she is condescending to me, which must be because of my race because there is no other reason to condescend"-a reaction that attaches racial connotations to what may be an inflated opinion of one's self-or to mean "she thinks all black mothers are on welfare, which is stereotypical". Meanings of this sort fit comfortably within the immunity for name-calling.
>
> Language is subject to levelling forces. When a word acquires a strong meaning it becomes useful in rhetoric. A single word conveys a powerful image. When plantation owners held blacks in chattel slavery, when 100 years later governors declared "segregation now, segregation forever", everyone knew what a "racist" was. The strength of the image invites use. To obtain emotional impact, orators employed the term without the strong justification, shading its meaning just a little. So long as any part of the old meaning lingers, there is a tendency to invoke the word for its impact rather than to convey a precise meaning. We may regret that the language is losing the meaning of a word, especially when there is no ready substitute. But we serve in a court of law rather than of language and cannot insist that speakers cling to older meanings. In daily life "racist" is hurled about so indiscriminately that it is no more than a verbal slap in the face; the target can slap back (as [the plaintiff] did). It is not actionable unless it implies the existence of undisclosed, defamatory facts. . . .

The writer's use of strong rhetoric to express his opinions in this instance, such as "behaved like racist douchebags," does not remove protection from liability – "rhetorical hyperbole" and "vigorous epithet" cannot be the basis of a claim for defamation. *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 14 (1970); *see also Gertz*, 418 U.S. at 339-40 (holding that the first amendment prohibits civil liability for statements of opinion); and *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)). Indeed, a writer's use of hyperbole reinforces that what is being expressed is opinion rather than fact. *Neumann v. Liles*, 358 Ore. 706, 2016 WL 852812, 44 Media L. Rptr. 1433, 1439 (Ore. Mar. 3, 2016).

For example, courts have held the following expressions to be mere "name calling," "hyperbole," and "vigorous epithet," and thus immune from liability for defamation:

- "yes man" – *Bidzirk, LLC v. Smith*, 2007 WL 3119445 (D.S.C. Oct. 22, 2007);
- "two faced, crooked, and rude" – *Neumann v. Liles*, 358 Ore. 706, 2016 WL 852812, 44 Media L. Rptr. 1433 (Ore. Mar. 3, 2016);
- "bastard" (when used as epithet) – *Curtis Publishing Co. v. Birdsong*, 360 F.2d 344, 348 (5th Cir. 1966);
- "scum" – *Lamelza v. Bally's Park Place, Inc.*, 580 F. Supp. 445 (E.D. Pa. 1984);
- "horse's ass," "jerk," "idiot," "paranoid" – *Blouin v. Anton*, 431 A.2d 376 (Vt. 1981);
- "anti-semitic" – *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995); *Ward v. Zelikovsky*, 643 A.2d 972, 983-84 (N.J. 1994).

As one court put it, "the law affords no redress for insult alone." *Mann v. Roosevelt Shop, Inc.*, 41 So. 2d 894, 895 (Fla. 1949).

In short, all 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. There are no questions of fact to be resolved for the court's application of privilege and Appellants have pointed to nothing that would support a valid claim of defamation. Therefore this Court should affirm the trial court's ruling that Jones Street has no liability to Appellants for the opinion statements in the *City Paper* editorials.

IV. Because Plaintiffs Failed to Show Any Proof of Injury to Reputation, the Circuit Court Correctly Granted Summary Judgment in Favor of Respondent.

Appellants mistakenly argue that the law allows them to pursue their defamation claims against Jones Street without any evidence of injury caused by Jones Street. Indeed, it is telling that the *City Paper* is the only publication that the plaintiffs have pursued for defamation, despite the widespread coverage of the controversy in news media portraying Appellants and their actions as racist. It is further revealing that Appellants have never presented any evidence of injury to reputation or other damages attributable to the *City Paper* publications separate and apart from the other publicity concerning the ritual.

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.").

Therefore, as one court explained:

> Unless injury to reputation is shown, plaintiff has not established a valid claim for defamation, by either libel or slander, under our law. It is reputation which is defamed, reputation which is injured, reputation which is protected by the laws of libel and slander.

Gobin v. Globe Publishing Co., 649 P.2d 1239, 1243 (Kan. 1982). The same thought was echoed in *Tatum v. Philip Morris, Inc.*:

> The issue in a defamation case is whether the plaintiff's reputation has been harmed. It is the injury to reputation and not to the feelings of the individual that is the subject of redress.

809 F. Supp. 1452, 1470 (W.D. Okla. 1991), *aff'd*, 16 F.3d 417 (10th Cir. 1993).

The court put it even more directly in *Zeran*: "Plaintiff's defamation claim fails because Plaintiff has not shown that any person thinks less of him, Kenneth Zeran, as a result of the broadcast." 203 F.3d at 719. Likewise, in *Hussain v. Palmer Communications, Inc.*, the court affirmed summary judgment for the defendant on this ground: "Although our plaintiff may have suffered an injury, he did not suffer injury to his reputation, as he could point to no one who thought he was John Doe #2 as referred to in KFOR's news reports." 60 Fed. Appx. 747, 751-52 (10th Cir. 2003).

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, like this one, 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, 368 S.C. at 466, 629 S.E.2d at 665 (emphasis added). 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, § 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). While Appellants now ask this court to find otherwise, they conceded at the hearing that is the publications at issue in this case involved a matter of public concern. *See* (R. pp. 295, l. 25 – 296, l. 2 (Mr. Parker: "I don't seriously contend that it is not a matter of public interest. I think that it probably was and is.").) Therefore, this Court should not entertain arguments to apply a different standard on appeal. Appellants are required to show injury to reputation or actual injury and malice.

Appellants did not identify any evidence of either special damages or general damages arising from injury to reputation or other injury 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 watermelon ritual), thought less of any of the plaintiffs or their reputations. The plaintiffs admitted that they could not identify any such person – not even one. (R. p. 147.)

Coach Walpole was not even aware of the *City Paper* publications over which he has brought suit until his attorney showed them to him. (R. pp. 114, ll. 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 – was the proximate cause of any damage to their reputations. *See* (R. pp. 130-32; R. pp. 93-102; R. pp. 141-42; R. pp. 155-61; R. pp. 168-74; R. pp. 182-87; R. pp. 118-22.) The sole, specific reference to the *City Paper* publications that Appellants note for this Court was made by Appellant Connor Frailey, and he relates the publications impact on the reputation of the school as opposed to his personal reputation. (R. pp. 99.)

This is not surprising – to the contrary, it makes perfect sense. The student plaintiffs were never even identified by the *City Paper*. Coach Walpole was reinstated to his position the very next week after being fired, with no loss of income. (R. pp. 111.) The *City Paper* did not break the story about the watermelon 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.[2] *See* (R. pp. 626-852)

The plaintiffs themselves assert this in their allegations against the School District. *See* (R. p. 215, ¶ 13; R. p. 229, ¶ 12.) As Coach Walpole testified in his deposition:

> Well, I believe that the statements made by the superintendent and the associate superintendent, as well as Kevin Clayton [the School District's diversity consultant], were falsely made, were falsely published, that I knowingly allowed our team to draw a monkey face on a watermelon and make monkey noises. Those statements were defamatory and were published in the print media, they were on national TV, and on the Internet.
>
> And by making those false statements, they were intended – their intentions were to depict me as a racist and to falsely accuse me of casting African-Americans in a derogatory light.

(R. pp. 113, l. 15 – p.114, l.1.)

In attempting to argue evidence of injury in their appellate brief, Appellants are making factual assertions that were never presented or offered to the trial court for its consideration. Specifically, Appellants cite to multiple excerpts of deposition testimony that appears in no filing made in the circuit court and have never been referenced in any

[2] It is also worth noting that some of the plaintiffs had previously made racially offensive social media posts. *See, e.g.*, (R. pp. 598-603; 878-81.)

lower court proceeding in any manner, despite those materials being readily available to Appellants. South Carolina Appellate Court Rules clearly provide that the Record on Appeal "shall not, however, include matter which was not presented to the lower court or tribunal." SCACR 210(c). Therefore, Appellants attempt to put before this Court that which they failed to present to the trial court is improper and should be disregarded. *See Solley v. Navy Fed. Credit Union, Inc.,* 397 S.C. 192, 214, 723 S.E.2d 597, 608 (Ct. App. 2012) (stating "the appellant has the burden of providing an adequate record on appeal"); Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which does not appear in the Record on Appeal."). Moreover, the evidence Appellants cite does not support the statements and arguments for which it is cited.

In short, the *City Paper* publications did not cause any injury to the plaintiffs' reputations, and the plaintiffs have no evidence to prove otherwise. Because the plaintiffs have no proof of injury 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 the trial court correctly granted summary judgment in favor of Jones Street.

V. The Circuit Court Correctly Found that the Individual Student Plaintiffs Were Not Defamed by Statements about their Team in General.

The Appellants' defamation claims on behalf of the six football team members also fail as a matter of law because nothing in the *City Paper* publications refers to any individual member of the AMHS football team, including any of the student Appellants. The law does not allow a person to sue for defamation where there is no reasonable identification of the individual as the subject of the alleged defamatory statement.

"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) (emphasis added). 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.") (emphasis added; 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 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, 25 Media L. Rptr. 2470 (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., 25 Media L. Rptr. 2470, at *2.

Likewise, the Second Circuit Court of Appeals has noted that cases sustaining "small group libel" claims "usually have involved numbers of 25 or fewer." *Algarin* , 421 F.3d at 139 (quoting RESTATEMENT (SECOND) OF TORTS § 564A cmt. B (1977)). These cases show that claims brought by an individual concerning statements made about groups of 17, 23, and over 25 cannot be sustained. In this case, the AMHS football team had 29 members at the time of the publications.

The public controversy that forms the context of this action heightens the First Amendment implications of this common law doctrine. As explained by a Michigan federal district judge, in dismissing a libel action brought by a member of a group allegedly defamed:

> To avoid conflict with First Amendment values ... this court must reaffirm the general tort principle which requires that a publication specifically refer to or point to the plaintiff before he is permitted to maintain suit.

Michigan United Conservation Clubs v. CBS News, 485 F. Supp. 893, 900 (W.D. Mich. 1980), *aff'd*, 665 F.2d 110 (6th Cir. 1981). Likewise, a federal court in Minnesota found that constitutional values play a role in application of this common law doctrine to debate over a public controversy:

> To hold that statements commenting generally on the laetrile controversy are of and concerning individuals prominent in the controversy would chill heated public debate into lukewarm pap. The first amendment does not countenance such a deterrent of free speech.

Schuster v. U.S. News & World Report, Inc., 459 F. Supp. 973, 978 (D. Minn. 1978), *aff'd*, 602 F.2d 850 (8th Cir. 1979).

The Appellants' reliance on *Fawcett Publications, Inc. v. Morris*, 377 P.2d 42 (Okl. 1962), in support of their claim of error by the trial court is misplaced. The *Morris* decision departs from the majority rule and the jurisprudence followed by courts in South Carolina. Additionally, the article in *Morris* inferred that the "regular members" on the University of Oklahoma football team took illegal drugs and the plaintiff presented evidence showing he was a "regular member" of the team to which there was a strong inference that he participated in the drug activity. *Id.* at 52 ("We are not inclined to follow such a rule where, as here, the complaining member of the group is as well-known and identified in connection with the group as was the plaintiff in this case."). Appellants have never argued that any of the student plaintiffs were so intrinsically identified with the AMHS football team that that the average lay reader would have understood the *City Paper* publications to defame him, individually. Even if they had made that argument, *Morris* is an outlier and is not the law followed by South Carolina courts or the courts of this country generally.

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 none of these plaintiffs can direct the Court to any statement in the *City Paper* that refers to any of them individually. Indeed, as noted above, the plaintiffs have all conceded that they do not know of any person who read the *City Paper* publications and, as a result, thought any less of any of them. For this reason, the trial court's decision granting summary judgment to Jones Street should be affirmed.

VI. The Circuit Court Correctly Granted Summary Judgment Against Plaintiff Walpole Because He Failed to Present Clear and Convincing Evidence of Actual Malice.

As a public official, 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 Corp.*, 466 U.S. at 511 n.30 (emphasis added; 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) (emphasis added). These rigorous standards have been 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 v. Gaffney Ledger, 341 S.C. 108, 114, 533 S.E.2d 899, 902 (2000) (emphasis in original) (quoting *St. Amant, supra; Garrison*, 379 U.S. at 74).

Walpole has as much as conceded that he has no evidence of actual malice. There is a reason for this – it is undeniable that all factual statements contained in the Jones Street publications were simply paraphrased summaries of public statements made by School District officials concerning the watermelon ritual. Further, as the Complaints themselves acknowledge, those statements were picked up and reported widely in both local and national news media. *See* (R. p. 219, ¶ 20; R. p. 229, ¶ 12.) Accordingly, Jones Street and its writers had no reason to doubt that what they were reporting on the watermelon ritual was completely true and accurate.

As the newspaper's reporter states in his sworn affidavit:

> At the time of the press conference, I knew Superintendent McGinley in a professional capacity and considered her to be a completely credible and reliable news source, especially in connection with official statements such as those made at the press conference. I accepted the statements she made during the press conference as accurate representations of the School District's official position and findings concerning the watermelon ritual.

R. pp. 854-55 ¶ 6.) Likewise, the *City Paper*'s editor affirmed in his sworn affidavit:

> At the time of the press conference, I knew Superintendent McGinley well and had known her for some time. I have always considered her to be completely honest and trustworthy. I have never had any reason to doubt the truth of what she said, particularly in the context of official announcements such as those made at this public press conference, and I had no reason to doubt the truth of the statements she made during the press conference. I accepted them as true and reliable.
>
> ...
>
> With both of my editorials on the watermelon ritual, my whole purpose in writing the editorials was to state my opinions concerning the ritual, the firing and reinstatement of Coach Walpole, and the resignation of Superintendent McGinley. I held these opinions in good faith at the time they were published, and I continue to hold them and to believe that they express a valid point of view. In writing these editorials, my sole intent was

> to express my views based on the official statements of the School District officials ...

(R. p. 616, ¶ 6, and p. 618 ¶ 11.)

Walpole has presented no evidence to the contrary and it is a complete red herring to suggest that Jones Street had actual malice because the tone of the initial report on the watermelon ritual was relayed to the School District Superintendent as "an innocent ritual." Failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard" to constitute actual malice. *Elder*, 341 S.C. at 114, 533 S.E.2d at 902 (emphasis added) (quoting *St. Amant*, 390 U.S. at 731).

The uncontroverted evidence in the record is that Jones Street submitted an interrogatory to Walpole asking him to identify the factual and evidentiary basis for the allegation that Jones Street published the allegedly defamatory statements about him with actual malice. Initially, Walpole did not provide any response other than to assert generally that Jones Street "either did not investigate and with reckless disregard for plaintiffs' rights, published these articles, or, if it did investigate it, published the articles with actual malice." (S.R. p. 17-29, No. 4, at pp. 21-22.) (emphasis added). Jones Street moved to compel, and in response Walpole provided a supplemental response stating, "See plaintiffs' depositions ... and the articles published in the City Paper ..." (S.R. p. 30-40, No. 4, at pp. 33-34).

To this day, Walpole has identified absolutely nothing in the depositions or articles referred to 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. And as discussed above, failure to investigate does not constitute actual malice, as a matter of federal constitutional law. *St. Amant,* 390 U.S. at 731. In short, there is

absolutely no proof of actual malice. Accordingly, this Court should affirm the trial court's ruling on this issue

CONCLUSION

The trial court gave Appellants ample opportunity to present evidence in support of their claims against Jones Street. As they do now, the Appellants failed to provide the trial court with any evidence and instead misrepresented the facts and misapplied the law. After reviewing the parties' arguments and written submissions, the Circuit Court correctly granted summary judgment in favor of Jones Street. Accordingly, we ask this Court to affirm.

Respectfully submitted,

Wallace K. Lightsey (S.C. Bar No. 6476)
Meliah Bowers Jefferson (S.C. Bar No. 74064)
Christopher B. Schoen (S.C. Bar No. 80735)
WYCHE, P.A.
44 East Camperdown Way
Greenville, SC 29601
Telephone: 864-242-8200
Telecopier: 864-235-8900
E-Mail: wlightsey@wyche.com
mjefferson@wyche.com

Attorneys for Respondent Jones Street Publishers, LLC.

Greenville, South Carolina
Dated: August 14, 2017

Certificate of Compliance with Rule 211(b), SCACR

Respondent hereby certifies that it has complied with the requirements of Rule 211(b), SCACR.

Respectfully submitted,

Wallace K. Lightsey (S.C. Bar No. 6476)
Meliah Bowers Jefferson (S.C. Bar No. 74064)
Christopher B. Schoen (S.C. Bar No. 80735)
WYCHE, P.A.
44 East Camperdown Way
Greenville, SC 29601
Telephone: 864-242-8200
Telecopier: 864-235-8900
E-Mail: wlightsey@wyche.com
mjefferson@wyche.com

Attorneys for Respondent Jones Street Publishers, LLC.

Greenville, South Carolina
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