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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

**RECEIVED**  
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SC Court of Appeals

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' PETITION FOR REHEARING

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellants move the Court for Rehearing and/or to Alter its Published Opinion number 5691 of November 6, 2019, which affirms the lower court's grant of summary judgment to Respondent, Jones Street Publishers, LLC.

As an initial matter, the Court stated in its Opinion that the lower court "made no findings to suggest that Jones Street Publishers' use of the word 'racist' was either protected or not protected under the fair report privilege" and that Appellants had conceded that "[a]ny factual reporting by the *City Paper* regarding actual statements made by Academic Magnet or [Charleston County School District] officials is protected by the fair report privilege." To the extent that it could be construed that the fair report privilege extends to Respondent's defamatory statements, it is the Appellants' position that the defamatory statements at issue are not qualifiedly privileged. The fair report privilege only protects "a report of the contents of the public record *and any matter added to the report by the publisher, which is defamatory of the person named in the public records, is not privileged.*" *Jones v. Garner*, 250 S.C. 479, 487, 158 S.E.2d 909, 913 (1968) (emphasis added). The defamatory statements included in the *City Paper* pieces were extrinsic to any factual reporting of the events surrounding the Academic Magnet football team and its post-game celebrations. Therefore, the fair report privilege should not apply to any statements by Respondent proclaiming the football team and its coaching staff to be racist.

Even if the statements were qualifiedly privileged, their contents would constitute an abuse of the privilege. The defense of a qualified privilege will not apply if it has been abused or exceeded. Abuse of the privilege has been described as occurring when "a communication or statement . . . goes beyond the requirement" of the reporting occasion. *Id.* That is exactly what occurred when Respondent chose to supplement its factual reporting of the football team's

celebrations, Coach Walpole's firing and reinstatement, and the school district's press conference with accusations of racism. The question of whether a qualified privilege has been abused is a jury issue. *West v. Morehead*, 396 S.C. 1, 8, 720 S.E.2d 495, 499 (Ct. App. 2011). Consequently, Respondent cannot avail itself of any argument that the fair report privilege should serve to dispose of Appellants' claims through summary judgment.

Second, the Opinion incorrectly holds that labelling an individual as a racist cannot be interpreted as a defamatory statement of fact. Regardless of whether the statements at issue were couched as opinion, opinions may imply an assertion of objective fact. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990). "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." *Id.*

Whether or not an individual engages in racist ideologies or behavior is certainly provable by fact. The question of whether something or someone is racist or racially motivated is litigated every day in our sister state and federal courts. The notion that calling someone a "racist douchebag" is defamatory is not a novel idea, as multiple jurisdictions have found that calling someone a racist is or could be a defamatory statement of fact. *See Taylor v. Carmouche*, 214 F.3d 788, 793 (7th Cir. 2000) ("'Felton is a racist' is defamatory, and a person who makes an unsupported defamatory statement may be penalized without offending the first amendment."); *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 840 F. Supp. 697, 707 (E.D. Mo. 1993) (finding that the defamatory nature of the term "racist" is to be determined by "the temper of the times" and the "current of contemporary public opinion."); *Sheridan v. Carter*, 48 A.D.3d 444, 446-47, 851 N.Y.S.2d 248, 252 (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.”); *see also Webber v. Ohio Dep’t of Public Safety*, 103 N.E.3d 283 (Ct. App. 2017).

The two *City Paper* articles discussed in the Court’s opinion are replete with assertions and innuendo that the Appellants are racist. “[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). “School district forces out superintendent who fired coach who condoned racist ritual.” (R. p. 606). Whether or not Appellants are racists is certainly provable through testimonial evidence. The record contains evidence that Appellants and the celebration ceremony were not in fact racist or racially motivated. (R. pp. 354-55, 393, 409-10, 604-605).

The Court’s opinion essentially finds that a publication may brand anyone a “racist douchebag”, including private individuals, so long as the assertion is contained in an “opinion” piece, even if the piece’s thrust is to report and inform readers of the facts of a newsworthy occurrence. This finding is overbroad and will sweep under the First Amendment’s protection defamatory statements, specifically those accusing individuals of racism, that are couched as “opinions.” In today’s knee-jerk, reactionary political climate, publicizing that someone or something is racist is certain to become more commonplace, and private individuals should be protected from having such accusations publicized about them under a veil of factual authority masquerading as “opinion.” The Court’s Opinion should be altered and/or amended to address under what circumstances a publicized accusation of racism could be defamatory, regardless of whether it is presented as an “opinion” piece. The Opinion should also be amended to consider the evidence offered by Appellants proving that they are not racist, in light of the summary judgment standard.

Next, the Opinion contains an error as to whether the record contains evidence of general damages arising from injury to the Appellants' reputations. A private-figure plaintiff involved in an issue of public controversy may produce evidence of general damages to show actual injury. *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 466, 629 S.E.2d 653, 665 (2006). General damages may include "*injury to reputation*, mental suffering, *hurt feelings*, and other similar types of injuries [that] are incapable of definite money valuation." *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 510 n.4, 506 S.E.2d 497, 502 n.4 (1998) (emphasis added). Appellants have pointed to testimonial evidence in the record showing that Appellants were embarrassed and that their reputations were injured. (R. pp. 398, 438, 464-66, 550-52, 559).

The Court found that evidence the Appellants felt more "self-conscious" was not sufficient to show that Appellants had suffered general damages, citing *Murray v. Holnam*, 344 S.C. 129, 452 S.E.2d 743 (Ct. App. 2001), for the proposition that the focus of defamation is not on the hurt to the defamed party's feelings. However, the cited proposition from *Murray* was not referring to general damages, which the Court had previously addressed in its Opinion as including "hurt feelings" and other types of injury that are incapable of monetary valuation. Regardless, a full reading of the quoted testimony reveals that Appellants not only felt "self-conscious" about the defamatory accusations, but they also experienced mental pain and suffering: "It doesn't feel good to be called a racist when you're not." (R. p. 398). General damages, by definition, include hurt feelings and encompass this type of harm.

Under the summary judgment standard, Appellants only had to produce a mere scintilla of evidence of actual injury, with all inferences drawn in the light most favorable to Appellants. In finding that Appellants have not produced any evidence of general damages, the Court has misapplied defamation law and the summary judgment standard to the Appellants' offered

evidence. Thus, the Court's Opinion should be altered to properly apply the summary judgment standard to the damages evidence offered by Appellants, with all inferences resolved in favor of Appellants.

Fourth, the Court found that the statements could not be "of and concerning" the individual students because the defamatory statements could not reasonably be understood to refer to the individual members. As noted in the Court's Opinion, the general rule is that an individual member of a group may not maintain an action for defamation of the group. However, individual members of a small group may maintain a defamation action for false statements made about the group as a whole. *Holtzscheiter*, 332 S.C. at 514, 506 S.E.2d at 504. The rationale behind this exception to the general rule is that in a small group, a defamatory statement about the group may be reasonably understood to refer to the individual members. *Evans v. Chalmers*, 703 F.3d 636, 659-60 (4th Cir. 2012).

Appellants presented evidence that the Academic Magnet football team only had 28 players. The entire team participated in the post-game celebrations at issue in this appeal. The defamatory statements contained in the articles at issue referred to the entire team. The Court bases its finding on the fact that the defamatory statements did not single out any members of the team or include their pictures. These findings are irrelevant to the analysis, as the proper question for the Court to consider was whether the football team was small enough such that any defamatory statements about the team would be ascertainable to the individual members. The Court did not engage in any such analysis in its Opinion. The cases cited by the Court in support of its finding all refer to groups much larger in size than the football team at issue. *See Hospital Care Corp. v. Commercial Cas. Ins. Co.*, 194 S.C. 370, 9 S.E.2d 796 (1940) (defamatory statements were made about "small insurance companies."); *Burns v. Gardner*, 328 S.C. 608,

493 S.E.2d 356 (Ct. App. 1997) (defamatory statements were about “blind people.”). It should be left to a jury to decide whether the statements accusing the entire Academic Magnet football team of being racist and participating in racist rituals were “of and concerning” the individual members of the team, in light of the fact that the team only had 28 members. *See Wilhoit v. WCSC, Inc.*, 293 S.C. 34, 39, 358 S.E.2d 397, 400 (Ct. App. 1987) (“Whether a written defamatory statement refers to a particular plaintiff, normally, is a question of fact for a jury.”).

Finally, the Opinion does not fully consider the entire record of evidence when finding that Coach Eugene Walpole, as a public official, did not demonstrate actual malice. Actual malice may be present “where one fails to investigate and there are obvious reasons to doubt the veracity of the [information].” *Elder v. Gaffney Ledger*, 341 S.C. 108, 114, 533 S.E.2d 899, 902 (2000). The two *City Paper* articles which labeled the Appellants and their celebration ceremony as racist were published on October 21, 2014, and October 30, 2014. (R. pp. 602, 606). Yet, the same day the first article was published, the *City Paper* published an additional article which included assertions by members of the Academic Magnet community, some of whom had close ties with the football program, stating that Coach Walpole, the team members, and the celebration ceremony were not racist. (R. pp. 604-605).

When considered in conjunction with the fact that Superintendent Nancy McGinley’s October 21, 2014, press conference indicated that the celebration was not racist, and Chris Haire’s statement that he considered Superintendent McGinley to be “completely honest and trustworthy” to the extent that he had “no reason to doubt the truth of the statements she made during the press conference,” the only reasonable inference is that Haire had multiple obvious reasons to doubt the veracity of his erroneous conclusion that the team was racist and engaged in racially motivated celebrations. (R. pp. 614-616). When viewed in the light most favorable to

Appellants, the most reasonable conclusion is that Haire was cognizant of multiple sources in the Academic Magnet community, at least one of whom he trusted implicitly, who asserted that the ceremony, students, and football coaching staff were not racist or racially motivated. He was aware of this information prior to publishing his accusations of racism. The Court's Opinion should be altered to find that in the light most favorable to the Appellants, there is clear and convincing evidence that the accusations of racism were published with actual malice, as Haire had obvious reasons to doubt the truth of his accusations of racism.

### CONCLUSION

The findings of this Opinion will allow publications to level false accusations of racism at private individuals at-will, so long as the accusation is couched as an "opinion" piece. While the articles at issue in this appeal may have contained some statements of opinion, they also contained bald assertions, as well as innuendo, claiming that the Academic Magnet football team, its coach, and its celebration ceremonies were racist. These statements are not protected by the fair report privilege. Additionally, the Opinion does not view the evidence through the proper lens, which is in the light most favorable to the Appellants.

The questions of whether the Appellants provided evidence of general damages, as well as whether the defamatory statements were "of and concerning" the Appellants, are jury issues, as the Appellants have presented more than the requisite mere scintilla of evidence to survive summary judgment. Finally, Chris Haire's awareness of contrary sources of information, one of which he absolutely trusted, prior to the publication of his statements establishes clear and convincing evidence that he had obvious reasons to doubt the veracity of his claim of racism. For these and all other reasons previously put forth by Appellant, the Court should rehear this case.

Respectfully submitted,

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

November \_\_\_\_\_, 2019  
Hampton, South Carolina

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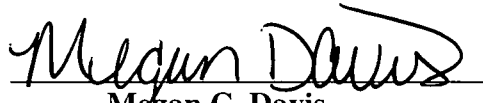
**CERTIFICATE OF SERVICE**

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This is to certify that I, *Megan C. Davis*, with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Attorneys for the Appellant, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within *Appellants' Petition for Rehearing* to:

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Meliah Bowers Jefferson, Esquire  
WYCHE, P.A.  
44 E. Camperdown Way  
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Megan C. Davis

November 21, 2019  
Hampton, South Carolina

# PMPED

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November 21, 2019

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The Honorable Jenny Abbott Kitchings  
S.C. Court of Appeals Clerk of Court  
Post Office Box 11629  
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*Re: Eugene Walpole, et al. v. Charleston County School Dist, et al.  
Consolidated Civil Action No.: 2015-CP-10-2389  
Appellate Case No.: 2016-002525*

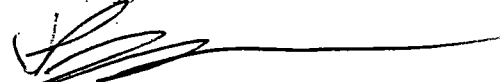
Dear Ms. Kitchings:

Please find enclosed the original and seven (7) copies of Appellants' Petition for Rehearing and Certificate of Service in the above-referenced matter. Please file the original and return a clocked copy of same in the self-addressed stamped envelope provided. Also enclosed is our firm's check in the amount of \$50.00 for the filing fee.

By copy of this letter, Appellants' Petition for Rehearing is being served on all counsel of record.

With kind regards, I am

Sincerely,



Jay Parker

JEP/mcd  
Enclosures as stated

cc: Wallace K. Lightsey, Esquire  
Meliah Bowers Jefferson, Esquire  
William H. Davidson, II, Esquire

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