

RECEIVED

Jun 05 2020

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No.: 2020-000605

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 Petitioners,

And

Jones Street Publishers, LLC, is the Respondent.

RESPONDENT'S RETURN TO PETITION FOR A WRIT OF CERTIORARI

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

Attorneys for Respondent Jones Street Publishers, LLC

On the morning of May 26, 2020, we saw a video showing a man plead for his life and then take his last breath as another man held him down with a knee placed on the side of the dying man's neck. His final words – "I can't breathe."

People around the world have seen this same video. Some people see a criminal, who happens to be black, whose noncompliance required restraint by a police officer, who happens to be white; he was just doing his job and all of this could have been avoided if the criminal would have complied with police orders. Some people see an isolated incident of a police officer using excessive force to control a suspect; he went rogue and probably deserves to be fired, maybe even prosecuted, but he doesn't represent all law enforcement officers. Some people see systemic racism resulting in yet another unarmed black man senselessly dying at the hands of law enforcement who seem to choose escalation more often when interacting with minorities; a heartbreaking metaphor for the centuries-old legacy of oppression of minorities, particularly African-Americans, in the United States.

Which of these accurately describes the video? All of them? None of them?

Were the officer's actions racist? Should a newspaper be subject to liability for calling them racist in an editorial?

Whether you agree or disagree with any of these viewpoints will largely depend on the self-schema from which you process it. Undeniably, your viewpoint is uniquely your own. And one of the fundamental tenants of this great democracy is your right to express that viewpoint; particularly in regard to matters of public concern, and even if it offends others. The law is clear that the same right extends to Respondent Jones Street Publishers, LLC ("Jones Street").

The instant petition is just Petitioners' unrelenting effort to stifle Jones Street's right to engage in public debate about Petitioners' very public disregard for and ignorance of the racial insensitivity of their actions related to the watermelon ritual. In our current climate of public speech and action addressing the United States' long and enduring legacy of racism, inequality, and disparate treatment of marginalized communities, it is critically important for the media to be actively engaged in reporting various perspectives and commenting on such events of public interest, to serve as a catalyst for public discourse about racism in this country, if there is to be any hope for healing and reconciliation.

State and federal courts have consistently acknowledged and upheld the media's right to participate in this important work. The Circuit Court applied well-established principles of law in disposing of Petitioners' defamation claims against Jones Street. The Court of Appeals fully reviewed the Circuit Court order and issued a detailed and thorough decision affirming the same. The Circuit Court and the Court of Appeals got it right, and we respectfully submit that the best resolution of this case, particularly at this moment in our nation's history, is to end as presently adjudicated.

Petitioners may disagree with the conclusions made by the Court of Appeals, but they have not identified any true errors of law in the decision. Allowing Petitioners to proceed with further appellate review only serves to discourage media commentary on important matters of public concern due to the threat of protracted litigation such as this. For these reasons and the others discussed further below, the Court should deny certiorari.

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether the petition presents special and important circumstances justifying a discretionary writ of certiorari pursuant to Rule 242(b), SCACR.
2. Whether the Court of Appeals erred in affirming the trial court's grant of summary judgment in favor of Jones Street where:
 - (a) the factual statements at issue are protected under the fair report privilege;
 - (b) the statements in the subject publications, beyond those taken from official reports, are opinion or rhetorical hyperbole;
 - (c) Petitioners failed to present any evidence of injury to their reputations attributable to the publications at issue in this case, separate and apart from the substantial other publicity labeling their conduct as racist;
 - (d) the student Petitioners have no actionable claim for defamation because the publications made no mention of any individual player on the team; and
 - (e) Petitioner Walpole failed to show any clear and convincing evidence of actual malice in the publications.

STATEMENT OF THE CASE

Procedural Background

This petition arises out of the affirmance by the Court of Appeals of the Circuit Court's grant of summary judgment to Jones Street on Petitioners' claims for defamation. *See Garrard v. Charleston County School District*, 429 S.C. 170, 193, 838 S.E.2d 698, 710 (Ct. App. 2019). During the football season of the 2014-15 academic year, players on the Academic Magnet High School's ("AMHS") football team decided to engage in a post-game ritual that was widely perceived as racially offensive and insensitive. The ritual, the coach's firing because of the ritual and later reinstatement, and the community's reaction to those incidents received extensive national and local media attention in the autumn of 2014. *See* (App. 223-235.) The *Charleston City Paper* (the "*City Paper*"), then owned

and published by Jones Street,¹ ran two opinion editorials, or “op-eds,” and a news article about the controversy.

In late 2014, Petitioners commenced two separate suits 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 – one action was brought by or on behalf of six players on the AMHS football team and another action was brought by the head coach of the team, Eugene Walpole.² As to Jones Street, the Petitioners contend that the *City Paper* publications are defamatory because they imply that the football team and Walpole are racist.

Following a substantial period of discovery, Jones Street moved for summary judgment as to all claims made against it by Petitioners. *See* (App. 922-26; App. 34-38.) 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 Petitioners. In her ruling, the court determined the factual statements in the *City Paper*’s publications were protected by the fair report privilege and that the other statements were non-actionable statements of opinion or hyperbole. Further, in any event, the court found that Petitioners failed to provide evidence that these particular publications – apart from all of the other publicity concerning the ritual – caused them any injury. *See* (App. 5-28.) The court also granted

¹ Ownership of the *City Paper* has since changed hands.

² Petitioners 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. (App. 223-235.) 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.

summary judgment against the student Petitioners on the ground that none of them had been identified in the publications, which were about the team in general, and against Petitioner 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.*

Petitioners filed their notices of appeal on December 19, 2016, and subsequently filed their brief challenging the Circuit Court's determinations that: 1) the publications contained statements of fact protected by the fair report privilege; 2) the publications contained statements of opinion and rhetorical hyperbole that were not actionable; 3) the Petitioners failed to present evidence of injury attributable to Jones Street; 4) the players failed to establish the publications were "of and concerning" any of them individually; and 5) Walpole failed to show any clear and convincing evidence of actual malice.³ The Court of Appeals held oral arguments on April 1, 2019, and issued a published opinion on November 6, 2019, affirming the Circuit Court's disposition of Petitioners' claims. Petitioners now seek a writ of certiorari for review by this Court.

Factual Background

In the fall of 2014, Petitioner Walpole was fired from his position as head coach of the AMHS football team 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 adorned 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, the

³ As noted below, Petitioners did not preserve the issue whether Coach Walpole was properly categorized as a public figure for purposes of the First Amendment, which they improperly attempt to raise in their Petition for Certiorari. *See infra*, Part II.e., at p. 22.

overwhelming majority of the players on the AMHS team were white – only one of the players was African-American, and the teams they defeated were predominantly African-American. The players called the watermelons “Bonds Wilson” in reference to a formerly segregated school named for two African American educators in the Charleston area, and chanted “ooh ooh ooh” while smashing the watermelons (referred to herein as the “watermelon ritual”).

The 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 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.” (App. 74-75) The District also announced that 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 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.

(App. 860-61, ¶ 6.) Petitioners 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. (App. 861, ¶ 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. (App. 861, ¶ 8; see App. 624-25, ¶¶ 13-14 and App. 632-858, Ex. D.) In media outlets ranging from national publications to the local AMHS school newspaper, commentators expressed the opinion that the behavior of the football players in the watermelon ritual was racist, and that either the players or the coaches had to have known or should have known that the ritual would be perceived as racist. (App. 861-62, ¶ 10; App. 625, ¶ 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; (App. 76-84.)

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 broad range of views on the story, including the opinion that the actions of the team were racist. (App. 44-45); See also (App. 632-858, 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.⁴

Chris Haire was 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* (App. 608, 612, 626-29.) 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.”

(App. 622, ¶ 5.) The drawing of the caricature face depicted previously in this return 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

⁴ 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>.

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.

(App. 622-23, ¶¶ 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 ...

(App. 622, 624, ¶¶ 6, 11.)

Petitioners’ 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.

(App. 299-300.)

Throughout these legal actions against Jones Street, Petitioners have ignored the very logical synopsis above. Like the circumstances under which the watermelon ritual was perpetuated, Petitioners have only been capable of focusing on themselves. By bringing these actions and seeking to further drag out this appeal, Petitioners endeavor not only to absolve themselves of responsibility for their own actions and to profit from their claim of willful ignorance of the implications of their racially insensitive conduct, but to also punish Jones Street for daring to call them on their actions.

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. Both the Circuit Court and the Court of Appeals – four distinguished judges including the former Chief Justice of this Court – have fully considered Petitioners' claims and found them to be insufficient to proceed to a jury trial. Petitioners do not identify any valid reason for this Court to engage in further review; they merely take issue with the lower courts' failure to conclude in their favor. Neither Jones Street nor this Court need expend further resources on this matter.

ARGUMENT

I. Petitioners Fail to Present Any Special and Important Reason Justifying Discretionary Review of the Court of Appeals' Decision by this Court.

Petitioners seek to continue this appeal purely as retribution against a local media outlet for engaging in clearly sanctioned public discourse on the racial tensions that persist

in South Carolina and throughout the United States. The Court of Appeals' decision applies well-established law regarding publications on matters of public concern. The instant petition does not raise any special and important reason warranting review of that decision by this Court, and therefore, Petitioners' request for a writ of certiorari to the Court of Appeals should be denied.

“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242(b), SCACR. Rule 242(b) provides a list of illustrative, but not controlling or exhaustive, circumstances in which certiorari may be considered including: (1) cases in which there are novel questions of law; (2) those in which there is dissent in the Court of Appeals decision; (3) those in which the Court of Appeals decision conflicts with a prior decision of this Court; (4) those involving substantial constitutional issues; and, (5) those involving a federal question and a conflict between the Court of Appeals decision and one of the United States Supreme Court. *Id.*

Three of the reasons listed in Rule 242(b) are facially inapplicable and do not require extensive discussion. There was no dissent in the Court of Appeals, the case does not involve any federal questions, and there is no conflict between the Court of Appeals' decision and any prior decision of this Court or the United States Supreme Court. Recognizing that they must invoke some reason for this Court to exercise discretionary review, Petitioners mention, without analysis or elaboration, that “the question of whether it is defamatory to label someone as a racist is a novel issue of South Carolina law and implicates the constitutional tension between protected and defamatory speech.” Petition at 11. However, contrary to Petitioners' efforts to reframe the issues so as to trigger review

under Rule 242(b), the Court of Appeals' decision simply involves the application of established legal principles to the circumstances of this particular case. The relevant issues of law examined by the Court of Appeals are not novel and, while the case does involve analysis of the First Amendment, the constitutional matters involved in this case are well-settled. At bottom, without any application of the relevant standards, Petitioners simply ask this Court to undertake a discretionary review of a Court of Appeals decision because they disagree with the outcome in the lower courts. That is not the purpose of certiorari, and the Court should decline to issue a writ in this case.

The Court of Appeals got this one right and it does not serve the ends of justice to entertain Petitioners' continuation of this appeal at Jones Street's expense.⁵

II. The Court of Appeals correctly affirmed the Circuit Court's grant of summary judgment to Jones Street.

a. The Statements of Fact in the City Paper Publications Are Protected by the Fair Report Privilege.

Petitioners contend that the Court of Appeals wrongly determined that the *City Paper* publications are protected by the fair report privilege. However, Petitioners overlook the lower courts' limitation of the fair report privilege to only specific portions of the publications. More significantly, Petitioners ignore their own concession of this point in their brief before the Court of Appeals, wherein they chose to confine their argument on

⁵ Alternatively, this Court may summarily affirm and dispense with Petitioners' appeal now. *See e.g., Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 15, 459 S.E.2d 318, 319 (Ct. App. 1994), *granting cert and aff'd without briefing*, 321 S.C. 310, 468 S.E.2d 304 (1996) (granting certiorari but dispensing with further briefing and affirming because the Court agreed with the reasoning and holding of the Court of Appeals); and *Hook v. Rothstein*, 281 S.C. 541, 316 S.E.2d 690, *cert denied with express approval of Court of Appeals' decision*, 283 S.C. 64, 320 S.E.2d 35 (1984).

the scope of the fair report privilege to the use the terms “racist” and “racist douchebag” in the subject publications. *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”). This concession is fatal to Petitioner’s request for further review on this issue.

In any event, the Court of Appeals properly determined the privilege applied in this case because the *City Paper* publications included fair and substantially accurate statements from official reports. In examining the relevant statements from the articles, the Court of Appeals appropriately found:

All of those statements [in the publications concerning the watermelon ritual] were in fact made by Superintendent McGinley at the press conference. The article included details of how the ritual was performed, the sounds that were allegedly made by the players as described by Superintendent McGinley, and a description of the caricature that was shown at the press conference. Furthermore, Superintendent McGinley stated that all of the details she described were allegations that the school district was investigating, and the first paragraph of the article informs the reader that “allegations” were made against the football team.

Garrard, 429 S.C. at 193, 838 S.E.2d at 710 (“Whether the occasion is one [that] gives rise to a qualified privilege is a question of law.”) (citations omitted and alternations in original). This was the only context in which the lower courts found the privilege to apply. Petitioners do not allege any error in this conclusion.

Instead, Petitioners complain that the Court of Appeals should have found that there was a material issue of fact as to whether the articles exceeded the scope of the fair report privilege by using the terms “racist” and “racist douchebag.” Petitioners conveniently omit that there is no question of fact regarding abuse of the fair report privilege where there is no conflicting evidence. *See West v. Morehead*, 396 S.C. 1, 7, 720 S.E.2d 495, 498 (Ct.

App. 2011); *see also* *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).

In this case, Jones Street never asserted that the use of these terms was privileged. Accordingly, as recognized by the Circuit Court and the Court of Appeals, it was unnecessary to address whether there was any abuse of the privilege.

b. The Statements of Opinion and Rhetorical Hyperbole in the Publications Are Not Actionable.

Next, Petitioners contend that any characterization of their actions as racists in the *City Paper* publications constitutes defamatory statements of fact and the Court of Appeals erred in affirming the Circuit Court’s ruling that such statements were nonactionable opinions or rhetorical hyperbole. The Court of Appeals agreed with the Circuit Court’s finding that the publications addressed matters of great public interest and concern. Petitioners conceded this point during the motion hearing before the trial court and do not challenge the determination of this threshold issue in its petition to this Court. The Court of Appeals further agreed with the Circuit Court’s application of long-standing law affording special protection under the First Amendment to publications by the media on issues of public interest. *See Garrard*, 429 S.C. at 195, 838 S.E.2d at 711.

The Court of Appeals acknowledged United States Supreme Court precedent providing that

statement[s] on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, ... where a media defendant is involved. Moreover, a statement of opinion

relating to matters of public concern [that] does not contain a provably false factual connotation will receive full constitutional protection.

Id. at 199-200, 838 S.E.2d at 713 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19–20 (1990) (quotation marks omitted) (alterations in original). In applying these principles to the circumstances at hand, the Court of Appeals determined

whether someone “more or less behaved like [a] racist douchebag” or whether someone condoned an act that was “racist” is susceptible to varying viewpoints and interpretations. One person may view certain behavior as disrespectful and offensive, but another person might view the same behavior as non-controversial and socially acceptable.

Id. at 200, 838 S.E.2d at 714.

Contrary to Petitioners’ assertions, the Court of Appeals did not make any broad pronouncement expanding protections for opinion statements; it simply recognized a settled legal principle and applied it to the facts. *See id.* at 200, 838 S.E.2d at 713.

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.” *Milkovich*, 497 U.S. at 20. Removing the statements that merely repeated or summarized what School District officials stated publicly, the opinion statements in the *City Paper* publications are not “an articulation of an objectively verifiable event.” *Id.* at 20-21. They are merely 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. Indeed, the Petitioners agreed in their depositions that “whether or not something is racist is a matter of opinion.” (App. 384, ll. 16-18; *see also* App. 103, ll. 10-18 (agreeing that whether the watermelon ritual was racist “is a matter of opinion”); App. 469, ll. 3-5 (stating “[a]bsolutely” that “people can have different opinions as to what is racist”); App. 590, l. 22 – App. 591, 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.”).

Contrary to Petitioners’ 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.

The Court of Appeals relied upon established law and properly applied that law in the context of the statements in the *City Paper* publications. Therefore this Court need not grant further appellate review.

c. Petitioners Failed to Show Any Proof of Injury to Reputation as a Result of the Publications.

Petitioners also continue to advance the argument 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 Petitioners have pursued for defamation, despite the widespread coverage of the controversy in news media portraying them and their actions as racist. Petitioners 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, and they do not identify any such evidence in their Petition to this Court. To the contrary, all of the evidence concerning injury relates to the controversy in general, not to the specific publications over which they brought this suit. *See* Petition at 17-20.

In affirming the Circuit Court on this issue, the Court of Appeals noted that

Appellants could not identify individuals who read the *City Paper*'s publications and as a result of those publications, viewed Appellants in a different light. Nor did Appellants provide evidence of any lost

opportunities as a result of the articles. Appellants agreed that they did not lose any friends, remained employed at their places of employment, and were accepted to the colleges they desired to attend. . . .

Some Appellants indicated that they had been questioned about the watermelon incident by various people; however, Appellants were unable to identify those individuals and unable to concretely state whether those individuals were questioning them as a result of reading the City Paper's publications. . . .

As previously stated, the watermelon ritual controversy gained local and national attention resulting in reports by media outlets, including television and radio broadcasts, throughout the United States. Importantly, the City Paper was not the first medium to produce a story on the events.

Garrard, 429 S.C. at 203-04, 838 S.E.2d at 716 (citations omitted).

Petitioners offer no challenge to the Court of Appeals' conclusions on this issue.

This Court need not conduct further review of it.

d. The Individual Student Petitioners Were Not Defamed by Statements about their Team in General.

Petitioners further complain about the Court of Appeals' conclusion that the *City Paper* publications were made in broad reference to the group and were not actionable as any particular individual member of the team. In affirming the Circuit Court, the Court of Appeals agreed that the twenty-nine member AMHS football team did not qualify for the small group exception observed by South Carolina courts. *See Garrard*, 429 S.C. at 206, 838 S.E.2d at 717 (holding that, "by any measure, a football team would not constitute a small group – at least not under the analyses of *Holtzscheiter*.").

Petitioners contend that whether the football team qualifies as a small group is a question of fact. However, the *Holtzscheiter* decision cited by Petitioner does not support this premise. In *Holtzscheiter*, the Court was called upon to determine whether the plaintiff could maintain a defamation claim against a newspaper that published a statement about a

victim' lack of "family" support. The Court concluded that a "family" was a sufficiently small group in which an individual member could maintain a defamation claim. It was only after making this conclusion regarding the availability of the defamation claim as a matter of law that the Court found that a jury could determine whether the plaintiff had actually proven that the statement was "of and concerning" her. *Holtzscheiter*, 332 S.C. at 514, 506 S.E.2d at 504. The lower courts' decisions are wholly consistent with *Holtzscheiter*.

The law simply 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. *See Burns v. Gardner*, 328 S.C. 608, 615, 493 S.E.2d 356, 359 (Ct. App. 1997); *accord Hospital Care Corp. v. Commercial Cas. Ins. Co.*, 194 S.C. 370, 378, 9 S.E.2d 796, 800 (1940) ("Where defamatory words reflect upon a class of persons impartially, and there is nothing showing which one is meant, no action lies at the suit of a member of the class.") (citations omitted); *see c.f.* 50 Am. Jur. 2d. Libel and Slander § 225 (2017) ("a plaintiff has no cause of action for a defamatory statement directed to some of, but less than, the entire group when there is nothing to single out the plaintiff; consequently, the plaintiff has no cause where the statement does not identify to which members it refers."). The *City Paper's* publications made only general statements about the conduct of the AMHS football team as a whole. Nothing in the publications makes reference to any particular team member or any characteristic of a team member that would make him identifiable as the subject of the editorials, and none of the student Petitioners can direct the Court to any statement in the *City Paper* that refers to any of them individually. Because there is no statement in the publications from which a factfinder could deduce as referencing any of the student Petitioners particularly, there is no question of fact to be resolved by a jury.

Petitioners have not demonstrated any error in the Court of Appeals decision on this issue. Therefore, review by this Court is unwarranted.

e. Walpole is a Public Official and Must Present Clear and Convincing Evidence of Actual Malice to Defeat a Motion for Summary Judgment.

As to Walpole individually, Petitioners contend that the Court of Appeals erred in finding that Walpole is a public official required to present evidence of actual malice. First, Petitioners may not challenge the Circuit Court’s determination of Walpole’s status as a public official. Petitioners did not raise or discuss this issue in their brief to the Court of Appeals, and only raised it for the first time in oral arguments. Consequently, this issue was not properly before the Court of Appeals and is not preserved for this Court’s review.⁶ *See State v. Spears*, 393 S.C. 466, 486, 713 S.E.2d 324, 334 (Ct. App. 2011) (declining to address an argument raised for the first time during oral argument and not addressed in the appellate brief); *State ex rel. Carter v. State*, 325 S.C. 204, 208 n.1, 481 S.E.2d 429, 430 n.1 (1997) (providing the appellate court would not entertain an argument raised for the first time at oral argument); *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) (“An appellant may not use ... oral argument ... as a vehicle to argue issues not argued in the appellant's brief.”).

Moreover, it is clear as a matter of law that Walpole is a public official. For purposes of First Amendment analysis, courts have held a wide variety of public school

⁶ The Petition cites page 986 of the Appendix as support for the assertion that they “have maintained that Coach Walpole is a private figure, preserving this issue for review.” Petition at 22 n.5. Appendix page 986, however, merely states that “Walpole does not concede he is a public figure” *in the context of the issue of proof of injury*. Nowhere in the Petitioners’ appellate brief do they contend that Walpole should be considered a private figure for purposes of the application of the *New York Times* actual malice doctrine.

administrators and employees to be public officials, including public school principals, school trustees, and school superintendents. *See Scott v. McCain*, 272 S.C. 198, 250 S.E.2d 118 (1978); *Sanders v. Prince*, 304 S.C. 236, 403 S.E.2d 640 (1991); *Keller-Moser Consulting, LLC v. Daniels*, 2012 WL 554643 (D.S.C. Feb. 21, 2012). Other courts have found public school teachers and athletic coaches to be public officials or public figures for purposes of applying the *New York Times* doctrine. *See Miller v. Minority Brotherhood of Fire Protection*, 463 N.W.2d 690 (Wis. 1990); *Johnson v. Southwestern Newspapers Corp.*, 855 S.W.2d 182 (Tex. App. 1993); *Mahoney v. Adirondack Publishing Co.*, 71 N.Y.2d 31 (1987); *Johnston v. Corinthian Television Corp.*, 583 P.2d 1101 (Okla. 1978); and *Basarich v. Rodeghero*, 321 N.E.2d 739 (Ill. 1974). The law does not require the employee to have substantial control over core government functions, as argued by Petitioners. As aptly noted by this Court, “[t]he status of a public official may be deemed sufficient ... not because of the government employee’s place on the totem pole, but because of the public interest in a government employee’s activity in a particular context.” *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 469, 629 S.E.2d 653, 666-67 (2006) (quoting *McClain v. Arnold*, 275 S.C. 282, 284, 270 S.E.2d 124, 125 (1980)).

At the time of the alleged defamation, Walpole was the head football coach at AMHS, the head women’s basketball coach at AMHS, and a teacher at another Charleston County public school. (App. 492, ll. 13-15). In these positions, Walpole exercised significant authority over the athletics programs at AMHS and the students. He was the public face of these programs and engaged in public relations on behalf of these programs giving rise to substantial public interest in his administration of these influential roles at the school. Particularly, in the context of the manner of oversight and control of the AMHS

football team, it was appropriate for the Circuit Court and the Court of Appeals to categorize him as a public official.

As a public official, Walpole is required to present clear and convincing proof of actual malice; “that the defendant realized that [the allegedly defamatory statement about the plaintiff] was false or that [the defendant] subjectively entertained serious doubt as to the truth of [the statement].” *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511 n.30 (1984) (emphasis added; citations omitted). In failing to point to anything in the record, 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 Petitioners’ pleadings themselves acknowledge, those statements were picked up and reported widely in both local and national news media. (App. 221, ¶ 20; App. 231, ¶ 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.

The *City Paper’s* reporter stated in a sworn affidavit that he “knew Superintendent McGinley in a professional capacity and considered her to be a completely credible.” (App. 860-61, ¶ 6.) Similarly, the *City Paper’s* editor affirmed in his sworn affidavit that he also knew Superintendent McGinley well and always considered her to be completely honest and trustworthy. (App. 622, ¶ 6, and App. 624¶ 11.) When writing the editorial publications, the editor intended to opine of the circumstances surrounding the ritual and those opinions were made “in good faith at the time they were published.” *Id.* Walpole has presented no evidence to the contrary.

Additionally, Petitioners miss the mark in contended that that Jones Street had actual malice because it did not investigate beyond the official reports of the School District. It is well-established that “[f]ailure 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 v. Gaffney Ledger*, 341 S.C. 108, 114, 533 S.E.2d 899, 902 (2000) (quoting *St. Amant*, 390 U.S. at 731). To this day, Walpole has identified absolutely nothing in the depositions or articles 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, the Court of Appeals correctly affirmed the trial court’s ruling on this issue.

CONCLUSION

Petitioners have failed to advance any substantial reason for this Court to grant certiorari. Therefore, the petition should be denied. Should the Court decide certiorari review is appropriate here, it can and should affirm the Court of Appeals without further briefing.

Respectfully submitted,

s/Meliah Bowers Jefferson

Wallace K. Lightsey (S.C. Bar No. 6476)

Meliah Bowers Jefferson (S.C. Bar No. 74064)

WYCHE, P.A.

200 East Camperdown Way

Greenville, SC 29601

Telephone: 864-242-8200

E-Mail: wlightsey@wyche.com

mjefferson@wyche.com

Attorneys for Respondent Jones Street Publishers, LLC.

Dated: June 5, 2020

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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.: 2020-000605

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 Petitioners,

And

Jones Street Publishers, LLC, is the Respondent.

PROOF OF SERVICE

This is to certify that I have this date caused to be served a true and correct copy of the foregoing RESPONDENT’S RETURN TO PETITION FOR A WRIT OF CERTIORARI on opposing counsel in this action by causing the same to be deposited in the United States mail, first class postage affixed, addressed as follows:

John E. Parker, Esq.
William F. Barnes III, Esq.
John E. Parker, Jr., Esq.
PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.
Post Office Box 457
Hampton, SC 29924
Attorneys for Appellants

s/Meliah Bowers Jefferson

Meliah Bowers Jefferson

June 5, 2020