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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

Appellate Case No. 2016-002525

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 .... Petitioners,

And

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

REPLY TO RESPONDENT'S RETURN TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENTS

In its Return, Respondent makes several claims that are factually inaccurate or unsupported by law. First, Respondent misconstrues the defamatory statements in Editor Chris Haire's articles as mere expressions of his ideas and opinions, when in fact they are articulations of objectively verifiable events. Second, Respondent maintains that because the activities of the Academic Magnet High School ("AMHS") football team were widely covered in local, regional, and national media, it is impossible for Petitioners to attribute any evidence of general damages to reputation to Respondent. Third, Respondent claims that the issue of whether Coach Eugene Walpole is a public official is not preserved for review. For the following reasons, the Court should grant the Petition for a Writ of Certiorari and consider Petitioners' appeal on the merits.

I. WHETHER A RITUAL, DRAWING, INDIVIDUAL OR ACT IS RACIST IS OBJECTIVELY VERIFIABLE.

In its opinion, the Court of Appeals explained that "a statement of opinion relating to matters of public concern [that] does not contain a provably false factual connotation will receive full constitutional protection. We do not find that the term 'racist douchebag' can 'reasonably [be] interpreted as stating actual facts' about Appellants." (App. p. 1054). However, this Court has previously found that calling someone a "paranoid sonofabitch" is capable of a libelous construction. In *Capps v. Watts*, 271 S.C. 276, 246 S.E.2d 606 (1978), the Executive Director of the South Carolina Commission for the Blind made the following statement to a newspaper about the plaintiff, an officer of a nonprofit organization devoted to the improvement of the quality of life for blind individuals: "I don't believe I ever called Don Capps (the plaintiff) a paranoid bastard. I called him a paranoid sonofabitch." *Id.* at 280, 246 S.E.2d at 608-09.

In its analysis, the Court acknowledged that the term "paranoid sonofabitch" was not libelous on its face and constituted "mere words of abuse and scurrility." However, the Court found

that when viewed in the context of extrinsic facts, such as the parties' positions within the community, a defamatory meaning could be inferred from the term. "It is not the words alone but the circumstances surrounding their publication which renders them susceptible of a libelous construction. It is for the jury to determine whether they were used in a libelous sense given the circumstances." *Id.* at 282, 246 S.E.2d at 610. It is difficult to comprehend how referring to someone as a "paranoid sonofabitch" can be actionable under this Court's precedents, while calling Petitioners "racist douchebags" under the relevant circumstances is not.

Regardless, the opinion is silent on whether Mr. Haire's further statements accusing individuals of participating in a "racist act" or drawing "a racist caricature on a watermelon" can reasonably be interpreted as stating actual facts and having a defamatory meaning. The aforementioned defamatory statements accused the members of the AMHS football team of participating in a racist act involving a racist caricature drawn on a watermelon; therefore, even if calling someone a "racist douchebag" is not an actionable statement of fact, if it is objectively verifiable that an act or drawing is racist, then publishing such statements would have a defamatory imputation to Petitioners' reputations. Plaintiffs' participation in a high school sport inextricably links their identity with their membership on the football team. High school student athletes routinely wear identifying athletic gear and letter jackets while attending classes, school functions, and around their respective communities. An individual's participation in team sports, especially one as prominent as high school football is in the region, is widely known within any particular high school's community. By virtue of the entire team's participation in the celebration ceremony, Respondent's defamatory statements impute certain personality traits and judgment deficiencies to each individual member of the team that are incompatible with the individual team members' roles as representatives of their high school. *See id.* at 282, 246 S.E.2d at 609.

Whether an act, ceremony, or drawing is racist is an objectively verifiable fact. Racism is defined as "a belief that race is the primary determinant of human traits and capacities and that racial differences produce an inherent superiority of a particular race" and "racial prejudice or discrimination." *Racism*, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/racist (last visited June 19, 2020). Contrary to the Court of Appeals and Respondent's positions, whether someone has a belief in the inherent superiority of a particular race or engages in racial prejudice or discrimination is absolutely capable of being objectively proven. The denotation of the term "racism" does not incorporate a subjective, fluid standard; it objectively requires a reprehensible belief in the superiority of one race over another, or an application of that belief to one's acts. Our federal court system has an entire body of case law devoted to the determination of whether certain actions are predicated on racial animus, bias, prejudice or discrimination. *See Brewer v. Bd. of Trs. of Univ. of IL*, 479 F.3d 908, 922 (7th Cir. 2007) ("A jury could find no racism here"); *Lawson v. KFH Indus., Inc.*, 767 F. Supp. 2d 1233, 1245 (M.D. Ala. 2011) ("[S]uch circumstantial evidence is only relevant to the extent that it shows the decisionmaker who terminated Plaintiffs was motivated by racism"); *Kerckhoff v. Kerckhoff*, 369 F. Supp. 1165, 1166 (E.D. Mo. 1974) (Noting that in order to prevail under 42 U.S.C. § 1981, a plaintiff must prove "racial, or perhaps otherwise class based, invidiously discriminatory animus behind the [defendants'] action"); *McClung v. Songer Steel Servs., Inc.*, 1 F. Supp. 3d 443, 450 (W.D. Pa. 2014) ("Racial discrimination may be established by direct or indirect evidence").

Respondent has characterized Mr. Haire's statements as opining about whether the Petitioners "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,' [and] 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."

(Resp't's Return to Pet. for Writ of Cert. at 17). Respondent ignores that Mr. Haire also explicitly stated that the team members "***are*** racist douchebags" who engaged in "racist behavior" by drawing a "racist caricature" on a watermelon and smashing it in front of "predominantly African-American competitors" in a "racist act." (App. pp. 608-12) (emphasis added). While it may have been Chris Haire's opinion that Petitioners are "racist douchebags," whether they engaged in racist behavior by participating in a racist ritual involving racist caricatures is provable and defamatory if false. It was error for the Court of Appeals to hold as a matter of law that Mr. Haire's statements were not capable of possessing a defamatory meaning.

II. RESPONDENT'S LOCAL COVERAGE OF THE CELEBRATION CEREMONY WENT BEYOND OTHER LOCAL, REGIONAL, AND NATIONAL MEDIA COVERAGE IN ITS PERSONAL ATTACKS ON PETITIONERS.

Respondent claims that Petitioners cannot provide any evidence that its publication of the defamatory articles injured Petitioners' reputations because there was widespread coverage of the controversy "portraying them and their actions as racist." Respondent provided over 200 pages of local, regional, and national media coverage of the controversy to support its argument that "widespread coverage of the controversy in news media" portrayed Petitioners and their actions as racist. (App. pp. 633-858; Resp't's Return to Pet. for Writ of Cert. at 19). However, a review of the media publications submitted by Respondent actually supports Petitioners' claim that Respondent's publications were far more controversial and factually accusatory in content than other publications read within the community, distinguishing them from other local, regional, and national publications reporting on the incident. Out of the roughly 60-plus articles contained within these submissions, virtually none of the local, regional, or national newsprint or television sources overtly and unequivocally accused Petitioners of being racist, or of participating in a racist act that

involved drawing a racist caricature.[1] The submissions include articles published by *The Post & Courier*, WCIV ABC News 4 Charleston, the *Moultrie News*, *The Chronicle*, WCSC Live 5 News Charleston, the Associated Press, *USA Today*, CNN, and *The Atlantic*. Articles printed by these media sources and publications were confined to only include factual reporting of the incident, even within opinion pieces. Even an article published in the school newspaper acknowledged that "racism may not be the appropriate word to use" even if the post-game celebrations were "racially insensitive." (App. p. 651-52).

Only one national article, contained in the online "Black Voices" section of the Huffington Post, questions whether the incident was racially motivated and contains an opinion that the team members were aware of the racial connotations presented by the celebration ceremony. (App. pp. 667-68). Despite Respondent's contention that this publication is viewed by "40 million readers a month," the article appears to have possibly only been shared or viewed 132 times. (App. p. 667). Furthermore, the article does not contain outright and clear assertions that the Petitioners are racist or that they participated in or condoned racist acts. Approximately eight articles submitted by Respondent do contain some accusations of racism against Petitioners. (App. pp. 633-37, 639-40, 669, 673, 784). However, these "articles" consist of blog posts gleaned from relatively obscure and primarily nonlocal sources on the internet and not from newsprint or television media. Many are published under anonymous names.[2] There is no evidence in the record that any member of the Academic Magnet community ever read or widely discussed any of this material.

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[1] Many of the articles are replicas or contain nearly identical written material, making it difficult to assess exactly how many individual articles are contained within the Appendix.

[2] By way of example, an online article published by the Daily Kos states "I don't buy that the Academic Magnet team engaged in its little ritual without nefarious intent." This "article" was written and submitted by an anonymous poster known as "Grizzard" to a community blog on the website. Another story was posted by a user known as "Chief" on the website "charlestonTHUGlife.net."

On the other hand, there is more than a mere scintilla of evidence in the record demonstrating that the *City Paper* articles were widely read and discussed by the AMHS and local community. Petitioner Connor Frailey said that the *City Paper* articles in particular were defamatory:

> Q. Okay. Other than the facts reported by the school district, was there anything else in the City Paper that defamed – that you believe defamed you?
>
> A. Again, just the way Chris Haire talked about the students at Magnet.
>
> Q. So generally characterizing –
>
> A. Just characterizing –
>
> Q. - the actions as racist?

(App. p. 105:18-25). He also stated that the *City Paper*'s articles were responsible for the harm Petitioners suffered to their reputation among their peers, claiming that the *City Paper* "Mob Rules" article was the article "that everyone around had read because . . . it was on a different level than all the other articles it seemed . . . . [I]t kind of spread through like a wildfire throughout our school community." (App. p. 101:1-8).

> And then people I talked to, it's like they weren't asking me, "Did you read the Live 5 news article about this happening?" It's like, "Oh, did you read Chris Haire's article about how – about what your school – about what your school did and how" – it just seemed much more serious than . . .

(App. p. 101:9-14). Statements by other members of the AMHS football team support that the *City Paper* articles in particular overtly accused the Petitioners of being racist and were widely read by their peers. (App. pp. 133:20-134:3, 172:1-173:8; 188:5-10). Since Petitioners can point to testimonial evidence in the record showing that the *City Paper* articles in particular were damaging to their reputations in comparison to other local, regional, and national publications, it was error for the Court of Appeals to hold that Petitioners failed to show any proof of injury to reputation caused by the Respondent's articles. The playground excuse of "but they did it too" should not

serve as a legal justification for the dismissal of a case through summary judgment. Resolving the issue of whether the *City Paper*'s articles damaged Petitioners' reputations should be left to the factfinder.

III. THE ISSUE OF WHETHER COACH WALPOLE IS A PUBLIC OFFICIAL IS PRESERVED FOR REVIEW.

Respondent maintains that the issue of whether Coach Walpole is a public official is not preserved for review because "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." (Resp't's Return to Pet. for Writ of Cert. at 22). This is not true. In opposition to Respondent's Motion for Summary Judgment, Petitioners asserted that all Plaintiffs, which includes Coach Walpole, are private figures. (App. p. 203). In its order, the trial court found that Coach Walpole was a public official. (App. p. 25). In their brief to the Court of Appeals, Petitioners reiterated that actual malice and proof of actual damages are not constitutionally required where a private figure has been defamed over a private matter, that the trial court had found that Coach Walpole was a public figure, and that Petitioners did not concede that he was a public figure. (App. pp. 984-86).

Respondent asserts that Petitioners made this argument in the context of the issue of proof of injury in support of its belief that this somehow does not preserve the issue for review. The determination of whether an individual is a private figure or a public official is a necessary prerequisite to a damages analysis in every defamation action. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757-61 (1985); *Erickson v. Jones St. Publrs., LLC*, 368 S.C. 444, 466, 629 S.E.2d 653, 665 (2006). Regardless of where Petitioners addressed the issue in their brief, the issue was raised by Petitioners not for the first time in oral arguments, but in their brief. As noted by Respondent, an issue raised in an appellant's brief is preserved for review.

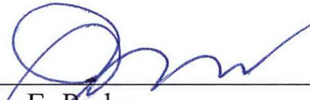
In its decision, the Court of Appeals found that Coach Walpole is a public official. (App. p. 1063). An issue is preserved when it has been raised to and ruled upon by the court. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). "[T]he issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." *Id.* at 466, 719 S.E.2d at 642 (citation omitted). "When an issue is not specifically set out in the statements of issues, the appellate court may nevertheless consider the issue if it is *reasonably clear* from an appellant's arguments. *Id.* (citation omitted). It would have been reasonably clear to the Court of Appeals that Petitioners maintained that Coach Walpole was a private figure, and the Court of Appeals ruled on the issue by finding that he was a public official. Thus, the issue is preserved for the Court's review.

CONCLUSION

For the foregoing reasons, all reasons put forth to the Court of Appeals and trial court, and those incorporated into the Petition for a Writ of Certiorari, Petitioners respectfully request that the Court review and reverse the Court of Appeals' decision affirming the trial court's granting of summary judgment.

Respectfully submitted,

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



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