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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. 2020-000605
Published Opinion No. 5691 (S.C. Ct. App. Filed Nov. 6, 2019)

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.

BRIEF OF PETITIONERS

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III. Whether the Court of Appeals erred in finding that Petitioners did not adduce at least a mere scintilla of evidence of injury to reputation, embarrassment, personal humiliation, and mental anguish and suffering.

IV. Whether the Court of Appeals erred in finding that as a matter of law, the allegedly defamatory statements in this matter were not "of and concerning" the individual members of the Academic Magnet High School football team, even though the team only consisted of 28 members.

V. Whether the Court of Appeals erred by failing to consider Coach Walpole's lack of control or responsibility over government affairs in determining that he was a public official.

VI. Whether the Court of Appeals erred in finding that Coach Eugene Walpole did not demonstrate actual malice through clear and convincing evidence, even though Respondent had reliable information prior to publication that its accusations of racism were untrue and unsupported by the evidence.

INTRODUCTION

Unfortunately, we live in a time where blindly labeling a person as being racist has become routine. From Reddit threads to Twitter feeds, it has become commonplace to see individuals hurling the term racist at one another as a catchall insult. Some courts have even opined that accusations of racism have become so common that they are no longer harmful to one's reputation. However, the extent of the impact caused by accusations of racism is rightfully and best assessed by those harmed by its invocation, and not by the academic or passive observer. Only those falsely accused of racism, especially when it occurs in the most public manner, could possibly know and possess an accurate gauge on the humiliation, mental suffering, and emotional strain it leaves behind, especially when it has been falsely alleged that those individuals perpetuated racist acts and engaged in racist conduct.

The damage is most acutely felt when those individuals occupy a position of prominence within their immediate community. The fact that accusing another of racism has become somewhat commonplace only reinforces that the term is still viewed as particularly harmful in today's society, given the prevalence of angry and toxic content one can find on social media. It is clear that such accusations are designed to wound and as such are embraced to a certain extent by modern social media culture.[1] It should not be for a court to decide as a matter of law that calling someone a racist is no longer harmful or defamatory.

[1] One is only required to casually peruse the contents of social media sites to note the alacrity with which users "slam" and "blast" opponents for having differing views.

It is true that calling someone a racist, without support, under some circumstances can be merely opinion and constitutionally protected with regard to matters of public concern. It is also true that simply calling someone a racist without citing any supporting evidence is not likely to cause much harm to one's reputation. The listener can easily distinguish when the accuser is merely name-calling as opposed to seriously charging an individual with racism. On the other hand, when an accuser not only labels someone as being a racist, but also accuses them of engaging in specific racially-motivated acts and conduct, the specific factual allegations lend a false sheen of authenticity to the accusation, amplifying the harm.

These specific factual allegations, if untrue, are also unquestionably defamatory in the event that the accused is able to prove their falsity by a preponderance of the evidence. Thus, where allegations of racism contain specific accusations of racially motivated acts and conduct, it is for a jury, and not a court, to decide whether the allegations are capable of possessing a defamatory meaning. It rings as true today as it did a century ago that untrue information harmful to one's reputation has no place in our public discourse, even if it is contained in an "Opinion" piece and is intended to be entertaining.

STATEMENT OF THE CASE

This Appeal arises from the alleged publication of false and defamatory statements by Respondent Jones Street Publishers, LLC ("City Paper")[2] about the members of the Academic Magnet High School ("AMHS") football team and Coach

[2] Jones Street owns and operates the *Charleston City Paper*, a free weekly newspaper offering news coverage that is distributed throughout Charleston, South Carolina.

Eugene Walpole (collectively "Petitioners") that injured their reputations in violation of South Carolina's defamation principles. The Students filed a Complaint against the City Paper and other Defendants on November 21, 2014, which was followed by Walpole's Complaint filed on December 16, 2014, both in the Charleston County Court of Common Pleas.[3] (App. pp. 223-227; pp. 228-235).

On January 20, 2015, the City Paper moved to dismiss Petitioners' Complaints pursuant to Rule 12(b)(6), SCRCP, on the grounds that (1) the defamatory statements were not "of and concerning" the Students, (2) the alleged defamation constituted opinion, hyperbole, or epithet and therefore was not actionable, and (3) the City Paper was protected by the fair report privilege for relying on fair and accurate reports of statements from public officials. (App. pp. 29-33). The Circuit Court heard the City Paper's Motion to Dismiss on May 8, 2015, and, in an Order filed July 7, 2015, the Circuit Court denied the Motion. (App. p. 28). On April 29, 2016, the City Paper moved for summary judgment on the basis that there was no genuine issue of material fact on largely the same grounds as the Motion to Dismiss. (App. pp. 34-38). The Circuit Court heard the City Paper's Motion for Summary Judgment on October 11, 2016. (App. p. 7). Petitioners received written notice of entry of the Order granting the Motion for Summary Judgment on November 21, 2016. (App. pp. 7-28; 913).

The Petitioners timely filed their Notices of Appeal on December 19, 2016. (App. pp. 912-14; pp. 915-18). Following oral argument on April 1, 2019, the Court of

[3] Petitioners filed five distinct actions against the City Paper and other Defendants from November 21, 2014 through April 27, 2015, which were consolidated for discovery purposes by Order of the Circuit Court on October 26, 2015.

Appeals issued a published opinion, *Garrard v. Charleston Cty. Sch. Dist.*, 429 S.C. 170, 838 S.E.2d 698 (Ct. App. 2019), on November 6, 2019, in which it affirmed the Circuit Court's Order granting Summary Judgment. (App. pp. 1036-64). Petitioners timely filed their Petition for Rehearing on November 21, 2019. (App. pp. 1065-75). The Court of Appeals denied the Petition in an Order filed March 18, 2020. (App. pp. 1076-77). Petitioners timely filed their Petition for a Writ of Certiorari with this Court on April 16, 2020. This Court granted the Petition on March 15, 2022.

STANDARD OF REVIEW

"When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is proper when there is no genuine issue as to any material fact . . . ." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 524, 787 S.E.2d 485, 489 (2016). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). Summary judgment is a drastic remedy that should be cautiously granted. *BPS, Inc. v. Worthy*, 362 S.C. 319, 326, 608 S.E.2d 155, 159 (Ct. App. 2005).

"In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006). Once the moving party carries its initial burden, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial.

Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). "In order to withstand a motion for summary judgment 'in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence.'" *Fountain v. First Reliance Bank*, 398 S.C. 434, 441, 730 S.E.2d 305, 308 (2012) (quoting *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)). However, to prove fault in a defamation action arising from a matter of public concern, a plaintiff who is a public official must prove actual malice, and the appropriate standard at the summary judgment phase on the issue of actual malice is the clear and convincing standard. *George v. Fabri*, 345 S.C. 440, 454, 548 S.E.2d 868, 875 (2001).

ARGUMENT

Petitioners respectfully request that this Court reverse the Court of Appeals' Published Opinion, *Garrard v. Charleston Cty. Sch. Dist.*, 429 S.C. 170, 838 S.E.2d 698, of November 6, 2019. The Court of Appeals erroneously affirmed the Circuit Court's grant of Summary Judgment on the basis that (1) the allegedly defamatory articles in the *Charleston City Paper* were protected by the fair report privilege, (2) characterizing a person and his acts as racist is opinion and not a verifiable, objectively provable statement of fact, (3) Petitioners did not establish a mere scintilla of evidence showing that they suffered "actual injury," (4) defamatory statements about a high school football team in general are not actionable because they are not "of and concerning" the individual students on the team, (5) Coach Walpole was a

public official, and (6) as a public official, Coach Walpole did not demonstrate constitutional actual malice through clear and convincing evidence.

For the first issue, the question of whether or not the fair report privilege was abused is a jury issue that should have been left to the factfinder.[4] For the second issue, 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. However, the concept that allegations of racism can be defamatory is not revolutionary and is supported by the law of other jurisdictions. For the third issue, there is ample evidence in the record demonstrating that Petitioners were embarrassed, humiliated, and suffered damage to their reputations. For the fourth issue, the court erred in determining that under the relevant circumstances, the football team was too large for the defamatory statements to be understood as referring to each individual member of the team. For the fifth issue, Coach Walpole is not a public official because he did not have substantial responsibility for or control over the conduct of governmental affairs. For the sixth issue, Coach Walpole introduced evidence showing that the City Paper and its editor Chris Haire were aware of information from a trusted source indicating that the Petitioners' conduct was not racially motivated, yet they published the defamatory articles anyway. Lastly, for each issue, the Court of Appeals' analysis is fatally and fundamentally erroneous, and this Court should review the issues and reverse.

[4] Petitioners recognize that the Court of Appeals and Circuit Court made no findings that the City Paper's use of the term "racist" would fall under the fair report privilege. Petitioners have only raised the issue of the fair report privilege to the extent that the City Paper could argue that the entirety of its publications are protected by the privilege.

I. The factual background of this case creates jury issues with regard to Petitioners' defamation claims.

A. Petitioners' post-game rituals were innocent and impromptu celebrations that culminated from an unfortunate but unintentional series of spur-of-the moment decisions.

Following a win against Military Magnet in the second game of the 2014 season, the AMHS football team began a celebration of smashing a watermelon after a winning game. (App. p. 334, line 20 – p. 335, line 8; p. 368, line 20 – p. 369, line 13; p. 391, lines 6-9). Before this particular game, a team member had purchased a watermelon on the way back to the school after getting dinner at Subway with his teammates. (App. p. 334, line 25 – p. 335, line 2; p. 405, lines 15-22; p. 424, lines 1-6). While the team was getting ready in the locker room, the player decided to draw a face on the watermelon, inspired by the movie *Castaway* starring Tom Hanks. (App. p. 336, lines 6-14). None of the coaches were in the locker room at this time. (App. p. 450, line 23 – p. 451, line 6). The player also named the watermelon Bonds-Wilson Junior, a reference to the volleyball in *Castaway*,[5] as well as to the name of the Academic Magnet High School campus. (App. p. 336, lines 6-18; p. 388, line 22 – p. 389, line 2; p. 447, lines 9-11). A picture of "Wilson" from *Castaway* is reproduced here:

[5] Tom Hanks' character in *Castaway* draws a face on a volleyball and names it "Wilson." The volleyball becomes his imaginary companion while he is stranded on an uninhabited island.

The players would continue to draw different faces, sometimes taking turns, on a watermelon for subsequent games.[6] (App. p. 344, line 23 – p. 345, line 9; p. 406, lines 7-19). The faces have been described as "simple smiley faces." (App. p. 726).

The player brought the watermelon on the bus with him and then placed it on his team's bench before the game. (App. p. 337, lines 14-18; p. 338, lines 2-16; p. 390, lines 22-23; p. 426, lines 11-20). At the end of the game, the players gathered around Coach Walpole, and he made a brief speech before dismissing the team. (App. p. 339, line 20 – p. 340, line 13; p. 427, line 18 – p. 428, line 1; p. 370, lines 13-16). Typically, after his post-game speech, Coach Walpole would speak to the parents and other fans, while the assistant coaches ensured that the players collected the equipment and cleaned up the bench area. (App. p. 507, line 22 – p. 509, line 3). At this point, a player brought the watermelon over to the team and they began a football chant. One of the players smashed the watermelon on the ground and then they ate it.[7] (App. p. 340, lines 3-8; p. 445, line 18 – p. 446, line 10). Following this celebration, the players threw away any watermelon pieces that were left and returned to the bus. (App. p. 342, lines 3-7; p. 370, line 25 – p. 371, line 3).

Subsequent to the victory over Military Magnet, the AMHS football team repeated this celebration after each game that they won. (App. p. 448, line 18 – p. 449, line 3; p. 372, lines 3-10; p. 373, line 23 – p. 374, line 4; p. 374, line 22 – p. 375,

[6] A reproduction of one of the caricatures supposedly drawn on the watermelon may be found in the record, although some AMHS team members disputed or were uncertain as to its accuracy. (App. p. 346, lines 8-19, p. 355, lines 1-24, p. 390, lines 11-15, p. 407, lines 17-25).
[7] This player was likely Darius Nwokike, the sole African-American player on the AMHS team for 2014. (App. p. 428 lines 2-8).

line 12). The players credited the ritual as leading to their success. (App. p. 344, lines 2-8; p. 430, lines 2-12; p. 443, lines 8-19). The same player bought the watermelon for all but possibly one game. (App. p. 343, lines 5-8; p. 429, line 24 – p. 430, line 1). The characteristics of the face on the watermelon varied each week as it was drawn by several different players over the course of the season. (App. p. 406, line 10 – p. 407, line 5; p. 425, lines 5-11; p. 344, line 20 – p. 345, line 4; p. 346, lines 8-25; p. 390, lines 3-8). The players chanted or cheered each time before the watermelon was smashed. (App. p. 347, lines 3-10; p. 348, lines 1-10; p. 452, line 23 – p. 453, line 3).

Players described the chanting as like the chants heard in the movie *Remember the Titans*, a college football pre-game chant, and football grunts. (App. p. 341, lines 7-10; p. 408, lines 2-8; p. 444, lines 17-18). Coach Walpole was aware that the team was celebrating their wins by cheering and smashing a watermelon, but he did not know that the watermelons had a face or a name. (App. p. 509, lines 7-25; p. 512, lines 11-23; p. 517, lines 3-6).

The watermelon was accidentally left on the bus during the game against Garrett. (App. p. 409, lines 6-9; p. 431, line 24 – p. 432, line 11; p. 376, line 15 – p. 377, line 6). The players were unable to return to the bus to get it, so the team waited until they had returned to their school to perform their celebration. (App. p. 432, line 22 – p. 433, line 8; p. 349, line 23 – p. 350, line 8). Once back at AMHS, the team gathered in the courtyard to smash the watermelon. (App. p. 410, lines 19-23; p. 454, lines 1-8). The freshmen lock-in was taking place at that same time, so various other students and AMHS teachers were also in the courtyard during the celebration. (App.

p. 454, lines 1-17; p. 455, lines 20-25; p. 434, lines 2-11; p. 435, lines 16-21; p. 378, lines 4-17). The players were subsequently reprimanded for disturbing the freshmen lock-in. (App. p. 351, lines 16-20).

B. The subsequent investigation culminated with Coach Walpole being relieved of his coaching position.

On Monday, October 13, 2014, Charleston County School Board member Michael Miller emailed Charleston County School District (CCSD) Superintendent Nancy McGinley, alleging that the students would destroy a watermelon while making monkey noises after victories, and asking for an inquiry into the matter. (App. p. 614). Superintendent McGinley requested that AMHS principal Judith Peterson perform an investigation. (*Id.*). Principal Peterson spoke with the head coach, an assistant coach, the athletic director, and the team captain. Although Principal Peterson's report concluded that there were no racial overtones to the celebration, Superintendent McGinley requested further investigation. (*Id.*).

On October 16, the football team was called to the auditorium for interviews regarding the watermelon celebration. The members of the football team were asked to report to the auditorium at the start of the day and were told to sit apart from one another and not talk. (App. p. 456, line 21 – p. 457, line 16; p. 379, line 8 – p. 380, line 19; p. 436, line 8 – p. 437, line 13; p. 392, line 16 – p. 393, line 4). Players were called individually to be questioned by Associate Superintendent Lou Martin and Kevin Clayton, the CCSD Diversity Committee Advisor, in a classroom next to the auditorium. (App. p. 353, lines 5-11; p. 438, line 16 – p. 439, line 18). Some players waited over four hours to be interviewed. (App. p. 460, lines 6-13; p. 352, line 12 – p.

353, line 4). Players were asked what they knew about the watermelon ritual and specifically about the face drawn on the watermelon and the sounds made during the celebration. (App. p. 458, line 17 – p. 459, line 3; p. 394, lines 1-23; p. 354, line 21 – p. 356, line 15). The players were also asked whether they knew about the negative connotations or racial overtones surrounding watermelons, and if the students replied in the negative, they were told to look it up. (App. p. 392, lines 1-7; p. 411, line 12 – p. 412, line 7; p. 461, lines 10-18). At the end of each interview, the player was sent back to class after being told not to tell anyone what was discussed. (App. p. 413, lines 11-15; p. 357, lines 12-25).

Following the player interviews, Coach Walpole was also interviewed by Mr. Martin and Mr. Clayton, with Principal Peterson present. (App. p. 534, lines 14-23). During the interview, Mr. Martin informed Coach Walpole that the watermelons had a drawing on them and the players made monkey sounds during the celebration. (App. p. 529, line 24 – p. 530, line 9). Coach Walpole was also told that having a watermelon on the bench was like running up and down the sideline with a Confederate flag. (App. p. 528, lines 3-7). On October 20, 2014, the CCSD relieved Coach Walpole of his coaching duties. (App. p. 620).

C. Superintendent McGinley's declares at a press conference that an investigation into the Petitioners' celebration activities revealed that they were "an innocent ritual".

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

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

(App. p. 620) (emphasis added).

Following this initial report, Superintendent McGinley deployed Associate Superintendent Louis Martin to further investigate in order to "surface the facts related to this alleged ritual." (App. p. 620). According to Superintendent McGinley, this investigation revealed that

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

(App. p. 620). Superintendent McGinley then stated that based upon their interviews of the students and the coaches, "the accountability lies with the adults." (App. p. 620). Later in the press conference, Superintendent McGinley stated that "again these were allegations, ok these [sic] are what we were investigating." (App. p. 620). At no point during the press conference that day did Superintendent McGinley say that the students or Coach Walpole were racist or had engaged in racist acts.

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

D. After the press conference, the City Paper publishes articles accusing Petitioners of drawing racist caricatures on the watermelons, participating in racist acts or rituals, and condoning racist acts.

On October 21, 2014, the City Paper published an article by Editor Chris Haire entitled "Melongate: Big toothy grins, watermelons, and monkey sounds don't mix." (App. p. 608). The article was written and published after Haire viewed Superintendent McGinley's press conference in which she stated that the post-game celebration was an "innocent ritual." (App. p. 608). The article states:

> Today, Charleston was consumed by one story and one story only: the removal of Academic Magnet football coach Bud Walpole amid allegations that his players more or less behaved like racist douchebags. And if there's one lesson to be learned from all of this it's this: big toothy grins, watermelons, and monkey noises don't mix. Any sensible person can see that.
>
> Apparently not. And apparently not the coaching staff and the players on the Academic Magnet Raptors.
>
> Somewhere along the way in this year's unexpectedly successful season, the Raptors took a liking to buying watermelons before their games. They apparently drew a face on it each time – a big toothy, grinning face. The first time the watermelon was named Junior. The next time it was Bonds Wilson, the name of the campus the AMHS shares with School of the Arts. That name stuck.
>
> But here's where the things get even worse. At the close of each game, the players smashed the watermelon on the ground while reportedly making the monkey-like sounds of 'ooh ooh ooh ooh.' Apparently, the players did this after four or five games, each time evidently after the largely white Raptor squad beat one of their opponents, each one largely an African-American team. Parents of players on one of the opposing teams reportedly brought this to the attention of African-American Board member Michael Miller last week.

That the coaching staff of the Academic Magnet Raptors and none of its players, including at least one African American, didn't see the trouble with this toxic combination of monkey sounds, toothy grins, and watermelons is at best baffling and at worst indicative of the casual acceptance of racism in Charleston today, even among the best and brightest that the county has to offer. After all, AMHS is not only the No. I ranked school in the state, it's one of the tops in the nations.

Seriously, did everyone at AMHS forget the last 100 years of American history? Did they forget about blackface, Buckwheat, and *Birth of a Nation*? Did they forget about minstrel shows? Did they forget about Coons Chicken, lawn jockeys, golliwogs, and the like? Apparently so, I don't know about you, but I think it's time to reconsider Academic Magnet's rankings because clearly they are producing nothing more than grade-A dumbasses.

Even more troubling is the degree to which Raptor Nation has circled the wagons around Walpole and the team. Frankly, this has nothing to do with the fact that the coach is by all accounts a good man. Walpole's merits are meaningless.

The point is that an entire team of players thought it was Ok to draw a grinning face on a watermelon, smash it on the ground each time they beat a largely black team, and make monkey noises – and no one apparently told them to stop.

No one said, 'Hey guys, I know not a single one of you has a racist bone in your body, you know, because that's a bad thing, and well, you're an Academic Magnet kid, and you come from a good middle-class white family and you're going to college, and there's no way in hell you'd, you know, ***draw a racist caricature on a watermelon*** and make monkey noises and do it fully aware of, like, what all that stuff means, because if you did, knowing all that stuff, then yikes, people might start thinking you're racists. Hell, I'd think you're a racist, and, well, ***I just don't know if I can deal with the fact that Charleston's best and brightest students are racist douchebags. I mean, it's just a joke right? Right?'***

Actually, it's not. It's the sad truth about life here in Charleston, S.C. today.

(App. p. 608) (emphasis added).

The City Paper published another article in the October 21, 2014 edition entitled "District: AMHS football team's watermelon ritual included 'monkey sounds,' 'caricature.' Coach removed after complaint of 'animalistic' sounds following defeat of majority-black team." (App. pp. 609-611). The article detailed the overwhelming response from the AMHS community following Coach Walpole's removal, noting that parents and students within the community were requesting his reinstatement and asserting that the celebration was not racially motivated. (*Id.*). Following this article, Coach Walpole was reinstated and Superintendent McGinley resigned from her position.

In the October 30, 2014 edition, the City Paper published another article by Haire entitled "Mob Rules. School district forces out superintendent who fired ***coach who condoned racist ritual***." (App. p. 612) (emphasis added). The article states:

> But goddammit, this town is rotten with racists.
>
> Not only do we have a Confederate-flag waving, Southern apologist heading up the College of Charleston, now the Charleston County School District Board of Trustees has forced Superintendent Nancy McGinley out of her job because she dared to fire a ***football coach who condoned a racist act.***
>
> Honestly, I had no idea that this was how the Coach Bud Walpole controversy would play out. I don't think anyone really did. The ouster of McGinley is every bit as surprising as one of George R.R. Martin's wedding-day bloodbaths. But it's even more brutal than the *Game of Thrones* author could have conjured up because McGinley was in the right to give Walpole the boot – and the board should've backed her.
>
> The Academic Magnet coach had to know that his players were engaging in a ritual that would be perceived as racist by any sensible outside observer. ***If you don't already know, a racist caricature had been drawn on a watermelon*** and then smashed each time the largely white football

team defeated their predominantly African-American competitors. Even worse, they reportedly made monkey sounds when they did it.

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

***

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

As the controversy unfolded, the black community largely remained silent, while the entire Academic Magnet community rallied behind Coach Walpole, with some even going as far as to deny any racist connection between watermelons, Sambo-like caricatures, monkey noises, and black people. Because one single coach had been fired, they were willing to ignore America's shameful racist past. Apparently, to admit that their coach, their children, might be just a smidgen racist was simply too much to bear.

Coach Walpole's firing should have been a teachable moment, the kind that instructs the largely white student body of Academic Magnet High School in the ways that white people, even good ones, can inadvertently engage in hurtful racially offensive behavior. Instead what the students got was a teachable lesson in mob rule and white privilege. Days after his removal, Walpole was reinstated.

Many years from now, I know that many of these same AMHS students who defended Walpole and his players will see the error of their ways. I know that they will realize that it was wrong to turn a blind eye to how much pain the team's actions caused the African American community, some of them their fellow students. Now that Nancy McGinley has been forced out of office, perhaps that realization will happen much sooner rather than later.

(App. p. 612) (emphasis added). Being referred to as "racist douchebags" who drew "racist caricatures", engaged in "racist behavior" and participated in a "racist act," and as a coach "who condoned a racist act," damaged the Petitioners' reputations.

II. The fair report privilege does not apply to the defamatory statements in the Charleston City Paper articles, and even if it did, the allegations of racism constitute an abuse of the privilege.

The Court of Appeals stated in its opinion that the Circuit 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 Petitioners 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." (App. p. 1050). To the extent that it could be construed that the fair report privilege extends to the City Paper's defamatory statements characterizing Petitioners and their conduct as racist, it is the Petitioners' 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). The accusations of racism included in the *Charleston City Paper* pieces were extrinsic to any factual reporting of the press conference and events surrounding the AMHS football team and its post-game celebrations. Therefore, the fair report privilege should not apply to any statements

by the City Paper proclaiming the football team, its coaching staff, and their acts 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 the City Paper 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. When there is conflicting evidence, the question of whether the 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, the City Paper cannot avail itself of any argument that the fair report privilege should serve to dispose of Petitioners' claims through summary judgment, as there is evidence in the record creating a genuine dispute of material fact as to whether the privilege was abused.[8]

III. In labeling Petitioners and their actions as racist, the City Paper published verifiable and actionable statements of fact, regardless of whether they were contained in an "opinion" piece.

Second, the Court of Appeals' decision incorrectly holds that labelling an individual or his acts as racist cannot be interpreted as a defamatory statement of

[8] Even if the fair report privilege did apply and was not abused, Petitioners have presented clear and convincing evidence that the defamatory statements were published with actual malice. *See* discussion *infra* Section VII. A qualified privilege, even if it does apply, does not prevent liability for defamation where the statements were made with actual malice. *Eubanks v. Smith*, 292 S.C. 57, 63, 354 S.E.2d 898, 902 (1987).

fact. The question of whether the term racist can be defamatory is a novel question of South Carolina law. Ultimately, the issue of whether statements are defamatory is a question for the jury as the finders of fact. *Goodwin v. Kennedy*, 347 S.C. 30, 38-41, 552 S.E.2d 319, 323-25, (Ct. App. 2001). 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.; see also Goodwin*, 347 S.C. at 40-41, 552 S.E.2d at 325 ("In *Milkovich,* the United States Supreme Court rejected the creation of an artificial dichotomy between opinion and fact, holding that the Constitution does not require a wholesale defamation exemption for anything that might be labeled 'opinion.'"). Therefore, the question for the Court is not whether calling Petitioners "racist" is a protected opinion, but whether the City Paper accused Petitioners of specific conduct that is provably false.

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 accusing someone of being a "racist douchebag" or participating in a "racist act" is defamatory is not a novel idea, even though it has not been addressed by South Carolina courts, as multiple jurisdictions have found that calling someone

a racist is or could be a defamatory statement of fact, especially when the defamatory accusation is accompanied by other defamatory statements of specific fact:

> Instances may arise in which claiming someone is a bigot will become more than non-actionable insult. Whether an accusation of bigotry is actionable depends on whether the statement appeared to be supported by reasonably specific facts that are capable of objective proof of truth or falsity. The statement might explicitly refer to those specific facts or be made in such manner or under such circumstances as would fairly lead a reasonable listener to conclude that he or she had knowledge of specific facts supporting the conclusory accusation. For example, a claim of bigotry could include claims that the selected person had engaged in specific acts such as making racist statements, failing to associate with or to act with courtesy toward people of a particular race, denying another employment or advancement because of race or religion, or posting signs that carried a racist message.

Ward v. Zelikovsky, 136 N.J. 516, 539, 643 A.2d 972, 983–84 (N.J. 1994) ; *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."); *Puchalski v. Sch. Dist. of Springfield*, 161 F. Supp. 2d 395, 408 (E.D. Pa. 2001) ("To impute racism to a plaintiff, particularly one for whom such an attitude could be incompatible with the proper performance of his public responsibilities, may be defamatory."); *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 (N.Y. App. Div. 2008) ("In the first instance, Carter's published statements, which depicted the plaintiffs as racists who physically abused and economically exploited their domestic

employee, were clearly defamatory per se."); *Lennon v. Cuyahoga Cty. Juvenile Court*, Case No. 86651, 2006 WL 1428920, at *6 (Ohio Ct. App. 2006) ("[B]eing referred to as a racist may, at times, constitute defamation per se . . . ."); *see also Webber v. Ohio Dep't of Public Safety*, 103 N.E.3d 283 (Ohio Ct. App. 2017); *Como v. Riley*, 287 A.D.2d 416, 731 N.Y.S.2d 731 (N.Y. App. Div. 2001); *George v. Fabri*, 345 S.C. 440, 457, 548 S.E.2d 868, 877 (2001).

In *Beverly Hills Foodland*, the United States District Court for the Eastern District of Missouri examined whether a union's use of the term "racist" to describe an employer was defamatory. *Beverly Hills Foodland*, 840 F. Supp. at 700-01. The union did not dispute that its members accused the employer of being racist, rather, it took the position that the term was ill-defined and not defamatory. *Id.* at 707. The court disagreed:

> [T]his Court does not agree that the word "racist", even when used in the context of a labor dispute, is nondefamatory as a matter of law . . . . "Racism" or "racist" is defined as 1) 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; or 2) racial prejudice or discrimination. *Webster's Ninth New Collegiate Dictionary* (1984). One of the generally accepted definitions of "prejudice" is "an irrational attitude of hostility directed against an individual, a group, a race, or their supposed characteristics" . . . . Given the accepted definition of racism and prejudice, the Court believes that such an argument presents an issue of fact for a jury to decide; i.e. whether the word "racist" was used in such a way to convey a false representation of fact.

Beverly Hills Foodland, 840 F. Supp. at 707.

The two *Charleston City Paper* articles discussed in the Court of Appeals' opinion are replete with assertions and innuendo that the Petitioners are racist and

engaged in racist acts. "'[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." (App. p. 608). "School district forces out superintendent who fired coach who condoned racist ritual." (App. p. 612). The articles also asserted that team members drew "a racist caricature on a watermelon" in a "racist act" and smashed it on the ground after beating "a largely black team" while making "monkey sounds". (App. pp. 608, 612). Thus, the City Paper did not solely call Petitioners racists; the accusations were accompanied by factual allegations that the team members made monkey sounds and drew racist caricatures on a watermelon in a "racist act", and that Coach Walpole condoned racist rituals performed by Petitioners.

These statements accused Petitioners of participating in and condoning racist activities and make the present facts distinguishable from those in which other jurisdictions have found that merely labeling someone as a racist, without further factual allegations, is not actionable. Furthermore, the statements were not framed as opinion. The articles did not solely state that the team was "acting like" racist douchebags; it stated that Petitioners "**are** racist douchebags" who either condoned or participated in a "racist act." Contrary to the City Paper's position, it was not simply publishing Haire's "views"; it was publishing assertions about Petitioners that are verifiably false. Whether or not Petitioners and their acts are racist is certainly provable through testimonial evidence. The record contains evidence that Petitioners and the celebration ceremony were not in fact racist or racially motivated. (App. pp. 356-357, 395, 411-412, 610-611).

The Court of Appeals' opinion essentially finds that, as a matter of law, 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 defamatory statements under the First Amendment's umbrella, 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 question of whether the statements were defamatory is supported by evidence in the record lending a factual basis to Petitioners' arguments, creating a dispute that must be resolved by the factfinder. The Court of Appeals' Opinion should be reversed, and clarity provided addressing under what circumstances a publicized accusation of racism could be defamatory, regardless of whether it is presented as an "opinion" piece. Neither the Circuit Court nor the Court of Appeals appropriately considered the evidence offered by Petitioners proving that they did not engage in or condone racist conduct, in light of the summary judgment standard.

IV. Under the summary judgment standard, there is more than a mere scintilla of evidence demonstrating that Petitioners suffered general damages in the form of injury to their reputations, embarrassment, humiliation, and mental anguish.

A. The Circuit Court and Court of Appeals inappropriately weighed the evidence and misapplied defamation law in finding that Petitioners did not submit proof of actual injury.

Next, the Opinion contains an error as to whether the record contains evidence of general damages arising from injury to the Petitioners' 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). Furthermore, actual injury "is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S. Ct. 2997, 3012 (1974). Petitioners have pointed to the following testimonial evidence in the record showing that they were embarrassed or humiliated, and that their reputations were injured:

> Q. Okay. What damages or injury do you allege to have incurred as a result of this article?
>
> A. Can you define damages and injury for me?
>
> Q. I –
>
> A. I'm not sure I –
>
> Q. Okay. So I – I need you to tell me what –
>
> A. What has come as a result?
>
> Q. What – what happened to you, what – what are you seeking redress for?

A. Okay. So we can start in many ways. First, my peers and fellow classmates think lower of me.

Q. Can you – let's stop one second. Well, no, actually, you go ahead. Keep going.

A. Okay. My peers and classmates think lower of me. They call my teammates and I racist. I can't determine if they were joking or not. How am I – I faced harassment for weeks, still face harassment. Faced harassment in spring - the spring semester as part of the soccer team.

I've had other professionals – I've had professors – a professor in particular, my thesis advisor at the College of Charleston, talk to me about it, he thought what we were doing was questionable, and so I have to face that in every – in every situation.

Two weeks – not even two weeks ago, last week at work, a co-worker of mine is a teacher at Cane Bay High School, was talking about that – was talking about Academic Magnet, not knowing that I went to Academic Magnet, not knowing that I went – was on the football team, saying, you know, at least – "At least we're not smashing watermelons and being racist," and I – I have to defend that, like I can't let my school be – or my teammates be portrayed that way. And so having that – that idea surround your school and being defamed in that way is a damage.

I have friends in North Carolina who, like I said earlier, were texting me about this saying, "Is this true," because they see on the news, you know, these – these allegations, and so I have to defend that in other states.

Talking about colleges, so in my pre-admission decision interview with Columbia, I'm asked that question. How do I defend that? Like I shouldn't have to defend that. That shouldn't be associated with me. Any college could look that up. It came up immediately. Look up Academic Magnet High School. I have football on my extra curricular activities as part of my common application.

In my interview with UNC Chapel Hill, me and two people, they're asking me about this incident. Who is to say – I didn't get accepted into Columbia. I didn't get the scholarship from USC. That's a $30,000 scholarship. Who's to say that's not why.

Because they could think it speaks to my character when really it doesn't.

***

Q. Well, tell me how your reputation was damaged.

A. Again, because of false statements made by Lou Martin –

Q. I understand why. I'm asking how.

A. - that were published, even though they found no racial reason during the interview for the celebration, were published and, in my opinion, were defamatory. And because of that, I mean, I was told by Lou Martin in this letter, No. 1, that I was being terminated from my position as head coach and basketball coach, that I was not allowed to contact any parents or players, that I was not allowed to coach for CCSD ever again, and that I was not allowed to set foot on the Academic Magnet campus without permission. And these false reports depicted me as a racist, damaged my reputation, it caused public humiliation, emotional distress, depression.

What's even more depressing is that my grandchildren or anyone else can now just click on the Internet and read all about it. There were some remarks made in the city paper that damaged my reputation and our team's reputation, remarks that were very inappropriate and very ugly, to be honest.

***

Q. Can you tell me today sitting here the name of anyone you know that thinks less of you today as a result of these events?

A. I would say yes.

Q. Tell me their names and their addresses, please.

A. I don't know the name, but the – one of the assistant coaches at North Charleston High School this past season, after the game was over that we won 19 to nothing, we were going through the line exchanging handshakes, and according to two of our assistant coaches, one of the North Charleston coaches refused to shake hands with us and stated that, "We do not have any respect for you-all because of what happened last year."

(App. pp. 466-468, 556-558, 565; *see also* App. pp. 400, 440).

The Court of Appeals found that evidence the Petitioners felt more "self-conscious" was not sufficient to show that they 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. In fact, the court had previously addressed in its opinion that general damages include "hurt feelings" and other types of injury that are incapable of monetary valuation. (App. p. 1057). Regardless, a full reading of the quoted testimony reveals that Petitioners 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." (App. p. 400). General damages by definition include hurt feelings, embarrassment, and humiliation and encompass this type of harm.

Under the summary judgment standard, Petitioners only had to produce a mere scintilla of evidence of actual injury in the form of general damages, with all inferences drawn in the light most favorable to Petitioners. In finding that Petitioners have not produced any evidence of general damages, the court misapplied defamation law and the summary judgment standard to the Petitioners' offered evidence. Thus, the court's decision should be reversed to properly apply the summary judgment standard to the damages evidence offered by Petitioners, with all inferences resolved in their favor.

B. There is both direct and circumstantial evidence in the record indicating that the City Paper's reporting on the AMHS football team went beyond other local, regional, and national media coverage in its personal attacks on Petitioners and incited widespread discussion and comment amongst the AMHS community.

The City Paper 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." The City Paper 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 the City Paper actually supports Petitioners' claim that the City Paper'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.[9] The submissions include articles published by *The Post & Courier*, WCIV ABC News 4 Charleston, the *Moultrie News*,

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

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 the City Paper'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 the City Paper 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, television media, or any other form of media in relatively widespread circulation. Many are published under anonymous names.[10]

[10] 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."

Importantly, these sources lack the credibility attached to print news sources such as the *Charleston City Paper*. There is no evidence in the record that any member of the AMHS community ever read or widely discussed any of this material.

On the other hand, there is more than a mere scintilla of evidence in the record demonstrating that the *Charleston City Paper* articles were widely read and discussed by the AMHS and local community. Petitioner Connor Frailey said that the *Charleston 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, lines 18-25). He also stated that the *Charleston City Paper*'s articles were responsible for the harm Petitioners suffered to their reputation among their peers, claiming that the *Charleston 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, lines 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, lines 9-14). Statements by other members of the AMHS football team support that the *Charleston City Paper* articles in particular overtly accused the Petitioners of being racist and were widely read by their peers. (App. p. 133, line 20 – p. 134, line 3, p. 172, line 1 – p. 173, line 8; p. 188, lines 5-10). Since Petitioners can point to testimonial evidence in the record showing that the *Charleston 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 City Paper's articles. The playground excuse of "but they did it too" should not serve as a legal justification for the dismissal of a defamation case through summary judgment. Resolving the issue of whether the *Charleston City Paper*'s articles damaged Petitioners' reputations should be left to the factfinder.

V. A reasonable jury could find that the City Paper's defamatory statements concerning the AMHS football team could be understood to refer to the individual student Petitioners.

Fourth, the Circuit Court and Court of Appeals erred in finding that the statements could not be "of and concerning" the individual student Petitioners because the defamatory statements could not reasonably be understood to refer to the individual members of the AMHS football team. 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. *Hospital Care Corp. v. Commercial Cas. Ins. Co.*, 194 S.C. 370, 377, 9 S.E.2d 796, 800 (1940). 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. Another court has stated that "[i]t is not necessary that the world should understand the libel; it is sufficient if those who know the plaintiff can make out that she is the person meant." *Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980). "To support an action for a libel, the plaintiff's name need not be mentioned in the writing; it is sufficient that there is a description of, or reference to, him, by which he may be known." *Nash v. Sharper*, 229 S.C. 451, 456, 93 S.E.2d 457, 459 (1956).

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). The question of whether a statement is "of and concerning" an individual member of a group is a jury issue. *Holtzscheiter*, 332 S.C. at 514, 506 S.E.2d at 504. South Carolina has not explicitly adopted a test to determine whether a group is small enough such that its individual members may commence their own defamation actions for statements made about the group as a whole. Other jurisdictions have relied on two tests to assist in this determination: the Restatement test, and the "intensity of suspicion" test. However, the Court need not explicitly adopt either test to determine this issue, as both embrace run-of-the-mill, common-sense principles to determine whether an individual member of a group could be identified as the subject of a defamatory statement about the group. Regardless, under either test, it should have been left for the jury to determine whether the defamatory statements were "of and concerning" the student Petitioners.

A. Under the Restatement approach, a publisher of defamatory statements about a group may be liable to individual members if the circumstances of the publication could lead to their identification.

Under the Restatement (Second) of Torts section 564A, the focus of the analysis is on the size of the group:

> One who publishes defamatory matter concerning a group or class of persons is subject to liability to an individual member of it if, but only if,
>
> (a) the group or class is so small that the matter can reasonably be understood to refer to the member, or
>
> (b) the circumstances of publication reasonably give rise to the conclusion that there is particular reference to the member.

Restatement (Second) of Torts § 564A (Am. L. Inst. 1965). Therefore, while defamatory comments about a large group will generally not be "of and concerning" its individual members, there may be circumstances surrounding the publication, the group, and the individuals which would enhance the personal application of the comments to the individual members, even if it is a large group. *Id.* cmt. a.

While a comment to section 564A provides that there is a presumption that only the individual members of a group of 25 or less may generally recover for defamation under the Restatement approach, the number 25 is not set in stone, and members of larger groups may recover depending on the circumstances. *Id.* cmt. d. Additionally, the guideline of 25 persons appears to be completely arbitrary, as section 564A otherwise analyzes the characteristics of the group, the plaintiff(s), the defendant, and the individual himself to determine if the individual has been defamed. *Id.* cmt. a, d. In South Carolina, there has never been a pronounced limit on

size for group defamation actions, and the Court should decline to suggest one today. Other courts have found an arbitrary limit on size to be "inequitable and illogical":

> I cannot assent to the idea, that the number of persons who may be libelled, affords the rule to determine whether or not an action will lie. Such a rule would be unjust and arbitrary. The libeller who calumniates a number of persons, by name, is liable to an action by each; and, in such a case, he would hardly be allowed to say, even in extenuation of his offence, much less in bar to the action, that, because he had exposed himself to so many actions, he ought not, therefore, to be punished at all. If such a rule should be adopted, the calumniator, who assails and reviles a great number of individuals in the same malicious publication, will escape; while the less guilty and less hardy slanderer, who as traduced the character of a single man only, shall be punished.

Brady v. Ottaway Newspapers, Inc., 84 A.D.2d 226, 234-35, 445 N.Y.S.2d 786, 792 (N.Y. App. Div. 1981) (quoting *Sumner v. Buel*, 12 Johns. 475, 482 (N.Y. 1815)).

Further, under section 564A an action may be maintained by individuals in a group of greater than 25 persons in size when there exists extrinsic evidence by which the defamatory words may be shown to have referred specifically to the individual. *Pratt v. Nelson*, 164 P.3d 366, 382 (Utah 2007); Restatement (Second) of Torts § 564A cmt. d ("Even when the group or class defamed is a large one, there may be circumstances that are known to the readers or hearers and which give the words such a personal application to the individual that he may be defamed as effectively as if he alone were named.").

The cases cited by the Court of Appeals in support of its finding that the City Paper's publications were not "of and concerning" the individual members of the AMHS football team all refer to groups much larger in size than the AMHS football team. *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"). The Court of Appeals found that since the *Charleston City Paper* articles only referenced the team as a whole and did not include any pictures, facts, or commentary specific to any of the individual team members, that Petitioners did not provide the mere scintilla of evidence necessary to survive summary judgment on the issue of whether they were individually defamed. However, the facts in this case easily distinguish the Petitioners' claims from those of the plaintiffs in *Hospital Care Corp.* and *Burns*.

Petitioners presented evidence that the Academic Magnet football team only had 28 players. (App. p. 990). Petitioners also provided independent sources existing on the internet by which *Charleston City Paper* readers could identify the individual members of the team. (App. P. 990). Classmates of the Petitioners were in fact able to identify them individually as the subject of the City Paper's articles. (App. pp. 101, 132, 162). Individual Petitioners had also been publicly identified within the media throughout the season as being members of the AMHS team, particularly because they were having a successful season, which was unusual at the time. (App. p. 143).

The entire team participated in the post-game celebrations. The defamatory statements contained in the articles at issue referred to the entire team. Team members, including Petitioners, held prominent positions within the AMHS community and represented AMHS in a very public manner. (App. 144). The Court of Appeals based its finding on the fact that the defamatory statements did not single

out any members of the team or include their pictures. However, these findings should not have been the end of the analysis, as the Court of Appeals should have additionally considered whether the football team was small enough such that any defamatory statements about the team would be ascertainable to the individual members, whether Petitioners and the team in general were prominent and readily identifiable members of the academic community, and whether other evidence demonstrated that individual Petitioners were readily and easily ascertainable by the *Charleston City Paper*'s readership as members of the AMHS football team. The Court did not engage in any such analysis in its Opinion, and its decision should be reversed.

B. Under the intensity of suspicion approach, the prominence of the AMHS football team within the community and other factors must be considered, establishing that the defamatory statements were "of and concerning" the individual student Petitioners.

While the Restatement focuses on group size as the primary thrust of its analysis, with deference given to the group number of 25, the intensity of suspicion test is more comprehensive and takes into account a variety of factors. The only case Petitioners could find discussing the defamation of a sports team as a group utilizes the intensity of suspicion test to determine whether an individual member of the team was defamed by statements made about the team as a whole. In *Fawcett Publ'ns, Inc. v. Morris*, 377 P.2d 42 (Okla. 1962), the Supreme Court of Oklahoma found that an individual member of the Oklahoma University football team, a much larger group than the AMHS football team, could pursue a defamation claim even though the

defamatory statements only referred to the football team in general and not the individual player.

In *Fawcett*, a *True Magazine* article entitled "The Pill That Can Kill Sports" accused substantially all of the Oklahoma team of using performance enhancing amphetamines during games. *Id.* at 46-47. However, the evidence showed that the substance that had been administered to players was peppermint spray used to alleviate dryness of the mouth, and not amphetamines. *Id.* at 47. The team's fullback brought an action for defamation, even though he was not named personally in the *True Magazine* article. The relevant circumstances included evidence that he was on "the alternate squad", the team had a successful ten-win season, the plaintiff played in all but two of the games, and that there were sixty to seventy members of the team. *Id.*

Noting that historically recovery was never barred in the common law for group defamation cases unless the group was extremely large, the court concluded that there was no reason why size alone should be conclusive as to whether a plaintiff could recover for a group libel. *Id.* at 51. "A more realistic approach would recognize that even a general derogatory reference to a group does affect the reputation of every member, and would adopt as its test the intensity of the suspicion cast upon the plaintiff." *Id.* at 52 (quoting *Liability for Defamation of a Group*, 34 Colum. L. Rev. 1322, 1325 (1934)). Therefore, the court chose instead to focus on the team's prominence within the community, the knowledge that a casual reader who was

familiar with the team would possess as to individual team members, and the percentage of team members defamed by the article. *Id.*

The intensity of suspicion test has been more recently described as follows. First, size must be considered, with the degree of suspicion cast upon an individual member shrinking as the size of the group increases. *Brady*, 84 A.D.2d at 237-38, 445 N.Y.S.2d at 794. Second, the higher the degree of organization of the group, the more likely that a recipient of the defamatory publications will understand the group libel to pertain to the individual members of the group. *Id.* Obviously, it is much easier to ascertain who a defamatory comment applies to when it is alleged against a specific high school football team, as opposed to blind people, or "small insurance companies". Under this factor, courts may also look to whether the composition of the group was definite and its size fixed during the time in which it was defamed. *Id.* Lastly, courts may evaluate the prominence of the group and its individual members within the community and region of publication. *Id.* at 239, 445 N.Y.S.2d at 794-95.

Here, while the AMHS football team was composed of 28 members, it was not so large that it would have diluted the defamatory accusations' impact upon the individual team members, nor was the team's membership so large as to be practically indefinite, as was the case in *Hospital Care Corp.* and *Burns*. The team was highly organized, as all football teams are, with each member fulfilling specific positions on the team and having a unique identifying number. Team membership was highly visible due to the very nature of being a participant in a high school football team, including the use of uniforms, letter jackets, and other team gear, and

the membership and composition of the team was set for the entire duration of the 2014 season. (App. p. 143). The Academic Magnet community is small, and Charleston is not a large city. The AMHS team took special prominence within the Academic Magnet community, particularly because of the success they were having during the 2014 season and the media attention that their success was drawing.[11]

The record contains a mere scintilla of evidence supporting that the Petitioners could have been individually ascertainable from the defamatory articles published by the City Paper. It should be left to a jury to decide whether the statements accusing the entire AMHS football team of being racist and participating in racist rituals were "of and concerning" the individual members of the team, in light of the relevant circumstances. *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.").[12]

VI. Coach Walpole is not a public official, as he does not have substantial responsibility for or control over the conduct of governmental affairs.

Fifth, the Court of Appeals erred when it affirmed the Circuit Court's conclusion that Coach Walpole is a public official for the purposes of a defamation action. The question of whether a high school football coach is a public official is a novel issue of state law. The determination of whether the plaintiff in a defamation action is a private figure, public figure, or public official is for the court and is subject

[11] The 2014 season was the first winning season the AMHS team had ever achieved. (App. p. 143).

[12] The question of whether the statements were "of and concerning" Petitioners does not apply to Coach Walpole, who was individually named in the defamatory articles.

to *de novo* review.[13] *Erickson*, 368 S.C. at 468, 629 S.E.2d at 666; *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1551 (4th Cir. 1994).

A. The issue of whether Coach Walpole is a public official is preserved for review.

In its Return, the City Paper asserted 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 the City Paper's Motion for Summary Judgment, Petitioners asserted that all Plaintiffs, which includes Coach Walpole, are private figures. (App. p. 203). In its Order, the Circuit 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 Circuit Court had found that Coach Walpole was not a private figure, and that Petitioners did not concede that he was a public figure. (App. pp. 984-86).

The City Paper 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, public 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

[13] The Court of Appeals did not address whether Coach Walpole is a public figure and instead focused on whether he was a public official.

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. It goes without saying that 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. *See Garrard v. Charleston Cty. Sch. Dist.*, 429 S.C. 170, 207, 838 S.E.2d 698, 718 (Ct. App. 2019) ("First, Appellants contend that Coach Walpole is a private figure and not a public official as the circuit court held."). Thus, the issue is preserved for the Court's review.

B. Coach Walpole is not a public official.

Public officials are prohibited from recovering damages for defamation related to their official conduct unless they can prove that the defamatory statements were

made with actual malice. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710 (1964). This higher fault requirement for public officials is based on the following two concepts: "first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues." *Rosenblatt v. Baer*, 383 U.S. 75, 85, 86 S. Ct. 669 (1966) (emphasis added). "[T]he 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Id.*

The Court of Appeals has previously determined that an assistant principal is not a public official for the purposes of a defamation claim. *See Goodwin*, 347 S.C. at 45, 552 S.E.2d at 327. It is difficult to square how a high school football coach can be a public official when an assistant principal is not. The idea that school administrators and coaches are not public officials finds favor amongst the decisions of other jurisdictions. *See Moss v. Stockard*, 580 A.2d 1011, 1029-1030 (D.C. Cir. 1990) ("[T]he office of coach of a basketball team at a public university might inherently attract scrutiny and generate public interest . . . however, any such interest would not result, even in part, from the perception or reality that the coach had 'substantial responsibility for or control over governmental affairs . . . ."'); *Verity v. USA Today*, 164 Idaho 832, 842-43, 436 P.3d 653, 663-64 (2019) (finding that a public school coach is not a public official because they do not hold a position of persuasive power and influence); *McGuire v. Bowlin*, 932 N.W.2d 819, 823-28 (Minn.

2019) ("[T]o support the conclusion that someone is a public official, his or her duties must relate to the core functions of government, such as safety and public order . . . coaching duties are ancillary to core functions of government; put simply, basketball is not fundamental to democracy."); *O'Connor v. Burningham*, 165 P.3d 1214, 1217-1221 (Utah 2007) ("The policies and actions of the coach of any high school athletic team does not affect in any material way the civic affairs of a community . . . ."); *see also Ellerbee v. Mills*, 262 Ga. 516, 422 S.E.2d 539 (1992) ("In our view, under normal circumstances, a principal simply does not have the relationship with government to warrant 'public official' status under *New York Times*.").

Coach Walpole, as a government employee, did not attempt to control public policy or opinion. He did not exert control over the conduct of government affairs. The Court of Appeals cited two Supreme Court of South Carolina decisions to support its finding that a football coach is a public official. However, the issue of whether or not the plaintiffs in those cases were public officials was not before the Court in either case, and the Court did not engage in an analysis of whether the school administrators in those cases were public officials.

In *Sanders v. Prince*, 304 S.C. 236, 403 S.E.2d 640 (1991), two members of a school board sued a third member for defamation. The decision discusses the proper jury charge for constitutional actual malice, but never analyzes whether the school board member was actually a public official, primarily because the plaintiff did not contest the assumption that he was a public official. *See id.* at 240, 403 S.E.2d at 643. In *Scott v. McCain*, 272 S.C. 198, 250 S.E.2d 118 (1978), the plaintiff was a member

of the board of trustees of a school district who brought a defamation action against the administrator for the school district. The decision refers to the plaintiff as a public official, but the issue of whether he was actually a public official or held a different status was not before the Court.

Thus, the Court's statements as to the status of school administrators in both cases was nonbinding dicta. The proper analysis of public official status asks whether the government employee had substantial responsibility for or control over the conduct of governmental affairs. Since Coach Walpole does not have a significant and controlling relationship with any core government functions or affairs, he is not a public official under *New York Times*, and he does not have to demonstrate actual malice to prevail on his defamation claim.

In its opinion, the Court of Appeals also noted that Coach Walpole was a public official because he interacted with parents and participated in newspaper and television interviews and had oversight over the team's activities. (App. p. 1063). Whether Coach Walpole participated in interviews or had oversight are factors to be considered when determining if he was a public figure, not a public official. *See Erickson*, 368 S.C. at 472, 629 S.E.2d at 668 (noting that public figures "occupy positions of . . . persuasive power and influence" while public officials "have substantial responsibility for or control over the conduct of governmental affairs."). The Court of Appeals did not fully recognize or delineate the difference between a public figure and a public official, and its meshing of the two concepts in finding that Coach Walpole was a public official was in error. Since Coach Walpole is not a public

official, the Court of Appeals' decision should be reversed so that his status as a public figure or private figure may be properly determined by the Circuit Court.

VII. Even if Coach Walpole is a public official or public figure, summary judgment was improper because he demonstrated that the City Paper published its defamatory statements with actual malice through clear and convincing evidence.

Finally, the Court of Appeals' decision did not fully consider the entire record of evidence when finding that Coach Walpole 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 *Charleston City Paper* articles which labeled the Petitioners and their celebration ceremony as racist were published on October 21, 2014, and October 30, 2014. (App. 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 AMHS 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. (App. pp. 610-611). Additionally, other local news sources were reporting as early as October 21 that several team members, including Darius Nwokike, had come forward to explain that the celebration was innocent and not racially motivated. (App. pp. 725-26).

When considered in conjunction with the facts that Superintendent Nancy McGinley's October 21, 2014, press conference indicated that the celebration was not racist or racially motivated, that Haire watched this conference by a live television broadcast prior to the publications, and that Haire 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. (App. pp. 614-616, 622). Despite this, he did nothing to investigate his claims. (*See* App. p. 622).

When viewed in the light most favorable to Petitioners, the most reasonable conclusion is that Haire was cognizant of multiple sources in the AMHS 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. Not only did Haire fail to investigate his assertions, he had obvious reasons, primarily the indications of Superintendent McGinley, to doubt the veracity of his claims. The Court of Appeals' Opinion should be reversed since, in the light most favorable to Petitioners, there is clear and convincing evidence upon which a jury could determine that the accusations of racism were published with actual malice, as Haire had obvious reasons to doubt their veracity.

CONCLUSION

For these and all other reasons put forth to the Court of Appeals and Circuit Court, when viewed in a light most favorable to Petitioners, the Court of Appeals' decision affirming the Circuit Court's granting of summary judgment to the City Paper should be reversed.

Respectfully submitted,

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