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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
Consolidated C.A. No. 2015-CP-10-2389

Appellate Case No.: 2020-000605

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

v.

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

And

Eugene Walpole, ... Plaintiff,

v.

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

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

And

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

BRIEF OF RESPONDENT JONES STREET PUBLISHERS, LLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Was the Court of Appeals correct to affirm the Circuit Court's conclusion that all of the statements of fact contained in the *City Paper* publications at issue, which Petitioners agree were accurately republished from official comments made by Charleston County School District officials, are protected by the fair report privilege, which Petitioners concede applies to such statements?

2. Was the Court of Appeals correct to affirm the Circuit Court's conclusion that the remainder of the *City Paper* publications consists of statements of opinion and rhetorical hyperbole, which are not actionable?

3. Was the Court of Appeals correct to affirm the Circuit Court's conclusion that Petitioners failed to present any evidence of injury to their reputations attributable specifically to the *City Paper* publications?

4. Was the Court of Appeals correct to affirm the Circuit Court's conclusion that the *City Paper* publications were not "of and concerning" any individual player on the team, because they merely referenced the team as a whole?

5. Was the Court of Appeals correct to affirm the Circuit Court's conclusion that Petitioner Walpole, a public official, failed to present clear and convincing evidence of actual malice?

STATEMENT OF THE CASE

This appeal is from the Court of Appeals' affirmance of the Circuit Court's grant of summary judgment to Respondent Jones Street Publishers, LLC ("Jones Street"). *Garrard v. Charleston County Sch. Dist.*, 429 S.C. 170, 838 S.E.2d 698 (Ct. App. 2019). The case arises from a controversy over a post-game ritual adopted by the football team of the Academic Magnet High School ("AMHS") in Charleston that was widely perceived as racially offensive and insensitive, the head coach's firing over the ritual and his later reinstatement, the School District Superintendent's resignation in protest of that reinstatement, and the community's reaction to those incidents, a controversy that received extensive national and local media attention in the autumn of 2014. (App. 44-47, 633-858)

After the story broke, the *Charleston City Paper* (the "*City Paper*"), then owned and published by Jones Street,[1] ran two opinion editorials, or "op-eds," and a news article about it. Petitioners commenced these actions in late 2014 against Jones Street, the Charleston County School District (the "School District"), and others, in the Court of Common Pleas for Charleston County alleging claims for defamation. Petitioners' original and amended Complaints allege that School District officials made the following public statements concerning the watermelon ritual:

- "the football team made animal sounds and drew a monkey face on the watermelon during these celebrations" (App. 216 ¶ 8);
- "the plaintiffs [intended] to cast African American opponents in a derogatory light" (*id.*);

[1] In the nearly eight years that this case has been pending, the circumstances of the parties have significantly changed. The *City Paper* was sold to a different, entirely unrelated company. Jones Street is defunct; the newspaper's former publisher is deceased; the author of the opinion editorials at issue in this case now writes for a different publication; and the editors who oversaw the publications at issue no longer work at the *City Paper*.

- "the team and plaintiffs [were] racially prejudiced" (*id.*);
- "the members of the Academic Magnet High School football team 'had engaged in a game ritual after football games in which the football team would draw a monkey face on a watermelon and after a victory, would smash the fruit and make animal noises'" (App. 217 ¶ 9) (quoting Louis Martin, School District Assistant Superintendent);
- "players would gather in a circle and squash the watermelon while others were either standing in a group or locking arms and making sounds described as 'ooh, ooh, ooh,'" (*id.* ¶ 10) (quoting Nancy McGinley, School District Superintendent);
- "the sounds were 'monkey sounds,'" (*id.*) (same);
- "[plaintiffs engaged in] racially derogatory actions intended to equate black members of opposing football teams with monkeys," (*id.* ¶ 11).

As to Jones Street, the Petitioners contend that the *City Paper* publications are defamatory because they imply, based on the statements of the School District officials quoted above, that the football team and head coach are racists.

Jones Street filed motions to dismiss the claims, which the Circuit Court denied in a Form 4 Order as premature. (App. 28) Petitioners then amended their complaints. Following substantial discovery, Jones Street moved for summary judgment. (App. 34-38, 922-26) After conducting a hearing on Jones Street's motion, acting Circuit Court Judge Jean H. Toal granted summary judgment for Jones Street as to all Petitioners. (App. 5-27)

In her ruling, Judge Toal determined that the factual statements in the *City Paper's* publications were protected by the fair report privilege and that all other statements were non-actionable statements of opinion or hyperbole. (App. 4-13) In addition, Judge Toal found that Petitioners failed to provide any evidence that the *City Paper* publications – separate and apart from all of the other negative publicity concerning the ritual – caused injury to their reputations. (App. 13-15) The Circuit Court also granted summary judgment against the student Petitioners on the ground that none of them had been

identified in the publications, which were not "of and concerning" any individual player but about the team in general, and against Petitioner Walpole (the head coach of the team) on the ground that he was a public official and did not offer any evidence to the Circuit Court of actual malice on the part of Jones Street. (App. 15-20)

Petitioners appealed all grounds of the Circuit Court's decision. The Court of Appeals, per Judge Geathers, issued a published opinion on November 6, 2019, unanimously affirming each of the Circuit Court's dispositions of Petitioners' claims. Petitioners' motion for rehearing was summarily denied on March 18, 2020. On March 15, 2022, this Court granted a writ of certiorari to review the Court of Appeals' decision.

STATEMENT OF THE FACTS

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

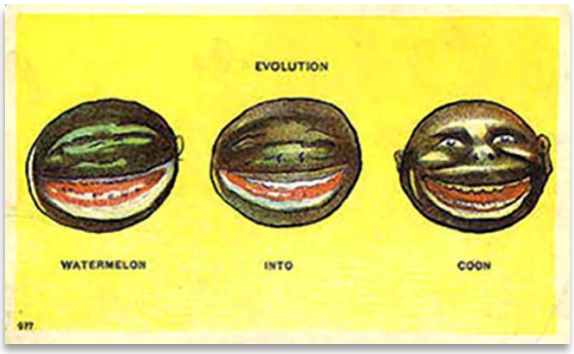
The School District Superintendent fired Walpole from his coaching position following an official investigation of the watermelon ritual prompted by a complaint to a School Board member from a concerned parent. Walpole was reinstated a week later under pressure from the School Board, which led to the resignation of the Superintendent. The controversy was covered widely in local and national news media.

The story of the watermelon ritual broke on October 21, 2014. On that day, the School District issued a press release stating that, after hearing of "inappropriate post game celebrations" by the AMHS football team, an investigation was conducted by the School District and "as a result of the investigation, the head football coach will no longer be serving as a coach for Charleston County School District." (App. 74) The District also announced that Superintendent Nancy McGinley would be holding a press conference open to the public that day at the School District offices.

City Paper reporter Paul Bowers attended the press conference and wrote an article about it based on what he heard and observed there. As reported in the article, Superintendent McGinley stated at the press conference that "Players would gather in a circle and smash the watermelon while others either were standing in a group or locking arms and making chanting sounds that were described as 'Ooo ooo ooo,' and several players demonstrated the motion." (App. 609) Superintendent McGinley described the chanting sounds as "monkey sounds" and stated that board trustee Michael Miller had reported that the football team engaged in a "tribal-like chant that is animalistic or monkey-like." (App. 610) She also stated that the watermelon was nick-named "Bonds Wilson" and that it had a face drawn on it "that could be considered a caricature." (App. 609) A copy of the caricature drawn by the same football player who drew it on many of the

watermelons used in the watermelon ritual was shown during the press conference. (App. 610) A copy of the drawing is reproduced below:

The features of the caricature and the fact that it was drawn on a watermelon are obviously evocative of racist images of the past century associating African American stereotypes with watermelons, such as the following:



(App. 872-79) Use of the watermelon as a racist trope has continued through recent times in references to Tiger Woods and the Obama presidency. (App. 701, 878)

The article written by Paul Bowers is a completely accurate statement of the official comments made by Superintendent McGinley at the press conference. The headline of the article – "District: AMHS football team's watermelon ritual included 'monkey sounds,' 'caricature.' Coach removed after complaint of 'animalistic' sounds following defeat of majority-black team" – is a completely accurate summary of the official statements that Superintendent McGinley made at the press conference. The article includes comments from parents of AMHS students made in support of Walpole at or following the press conference. Mr. Bowers attempted to reach Walpole to ask for his comments, and left a voice mail message for him, but Walpole did not return the call. (App. 861 ¶ 7)

While Petitioners assert – and put much emphasis on their assertion – that Superintendent McGinley stated that the watermelon ritual had been determined to be "innocent" of racial animus, this assertion is not correct but rather is a misrepresentation of the record. In truth, what she stated was that the initial investigation into the matter resulted in a report with a "tone" that "implied that this was an innocent ritual," (App. 620) but that she had sent the matter back for further investigation. Upon such further investigation, the School District official reached "significantly different" conclusions. (App. 614) Dr. McGinley's ultimate conclusion that the players may not have understood the negative implications of the ritual was not made public until after the publications at issue here. (App. 614-16) As discussed further below, moreover, whether or not the players' intent was "innocent" (and there is significant evidence that it was not) is not material to the legal issues in this appeal.

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

numerous other local and national news media, on the internet, in print, on the radio, and on television. Many of these other publications and broadcasts were made to a much greater audience, readership, or viewership than the small readership of the *City Paper*, and they also reported the statements by Superintendent McGinley that the ritual included "monkey like" or "animalistic" sounds and a "caricature" face drawn on the watermelon. (App. 624-25 ¶¶ 13-14; App. 632-858; App. 861 ¶ 8) In media outlets ranging from national media conglomerates to the local AMHS school newspaper, commentators expressed the opinion that the behavior of the football players in the watermelon ritual was racist or racially insensitive, and that either the players or the coaches must or should have known that the ritual would be perceived negatively by some observers of it. (App. 861-62 ¶ 10; App. 625 ¶ 14)

For example, the Huffington Post – an internet news service with tens of millions of readers a month – published an article entitled, "Was This High School Football Team's Watermelon-Smashing Ritual Racist?" The article noted that "[t]he story has sparked outrage and debate nationwide." (App. 667) It also quoted a commentator who said, "The idea that these kids were unaware that there may be a racial connotation to anything that they did, that is patently false." (App. 668)

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

> Black stereotypes are present in today's society, and the students at Academic Magnet are aware of this. … I feel that it is impossible that the team or individual who started this ritual did not know of any correlation between the watermelon and [the] African American race. The wide grin,

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

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

The record contains a voluminous, but partial, compilation of news coverage and commentary from various news media besides the *City Paper* concerning the watermelon ritual and its aftermath, many of which expressed the view that the ritual and those who participated in it or allowed it were not just racist but "horribly racist," that the ritual was meant to mock African Americans, and that the players had to have been aware of the offensive racial connotations of what they were doing. (*See* App. 633-858) Most of these publications and media have substantially greater viewership than the *City Paper* – for example, the *Post & Courier* boasts 2.7 million unique visitors per month; *USA Today* has a monthly unique visitor count of approximately 150 million; and HuffPost (a/k/a The Huffington Post) once had a monthly unique visitor count of more than 50 million.[2]

[2] See https://postandcourieradvertising.com/online-advertising/ (last visited May 9, 2022); https://marketing.usatoday.com/about-us/ (last visited May 9, 2022); https://www.businessinsider.com/huffington-post-faces-several-challenges-without-its-founder-2016-8 (last visited May 9, 2022). Petitioners assert that the Huffington Post piece was viewed only 132 times, Pet. Br. at 30, but that is not correct – that number refers to how many times the article had been shared on Facebook, Twitter, Pinterest, or by email or messaging, not how many times it was viewed.

Chris Haire was the Editor of the *City Paper* in 2014 and wrote the two opinion editorials that are the subject of this appeal: "Melongate" and "Mob Rules." (App. 608, 612) Mr. Haire watched Superintendent McGinley's press conference by a live television broadcast from the School District's public hearing room. As he affirms in his affidavit:

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

(App. 622 ¶ 5) The drawing of the caricature face depicted previously in this brief was shown on the television broadcast. As Mr. Haire states:

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

(App. 623 ¶¶ 7, 8, 9)

As did Paul Bowers (App. 860-61 ¶ 6), Chris Haire wrote what he did in total good faith:

> At the time of the press conference, I knew Superintendent McGinley well and had known her for some time. I have always considered her to be

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

(App. 622, 624 ¶¶ 6, 11)

Petitioners' position throughout the course of this litigation has been hinged on the flawed idea that no one can criticize or judge them on the watermelon ritual unless and until there is a thorough examination of the AMHS football team's subjective intentions. However, the stated intentions of the Petitioners do not bear on the court's determination of whether a commentor's opinion that the ritual should have been perceived as racist constitutes defamation. Here, the Circuit Court succinctly comprehended Jones Street's motions for summary judgment as follows:

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

(App. 299-300)

Throughout these legal actions against Jones Street, Petitioners have ignored the very logical synopsis above. Like the circumstances under which the watermelon ritual was perpetrated, Petitioners have been capable of focusing only on themselves. Perhaps they were embarrassed by the whole controversy, but under our system of freedom of expression, the public, including the media, had every right to publish both factual reports and opinion commentary on the watermelon ritual without being sued for defamation.

Both the Circuit Court and the entire panel of the Court of Appeals – comprising four of the State's most distinguished appellate judges, including the former Chief Justice of this Court – fully considered Petitioners' claims and found them to be without merit under established First Amendment jurisprudence. Petitioners now would have this Court find that all four of these outstanding jurists got every issue wrong. Petitioners' position will not stand. They do not identify any valid reason for this Court to reverse the conclusions of the lower courts, and this Court can finally put the matter to rest by affirming the Court of Appeals' decision.

STANDARD OF REVIEW

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

> where the constitutional prerequisites of falsity and actual malice are at issue 'an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment

> does not constitute a forbidden intrusion on the [field] of free expression." While *Bose* and prior cases involved appellate review of trial verdicts in libel actions, logic and considerations of judicial administration dictate that the same level of review apply to the granting of summary judgment.

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

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

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

Therefore, the "scintilla of evidence" standard does not apply to the review of the Circuit Court's decision on Jones Street's motions for summary judgment because of the First Amendment principles governing this appeal. Indeed, numerous courts, including the state and federal courts of South Carolina, have recognized that the high cost and unpredictability associated with the defense of libel actions, and the "chilling effect" that these factors may exert upon freedom of speech and of the press, require that summary judgment be viewed differently in such actions as compared with other civil actions. For example, the United States District Court for the District of South Carolina, per Judge Childs, explicitly held:

> Summary judgment occupies a position of great importance in libel actions as compared with other civil actions, due to the possible chilling effect on constitutionally protected speech which would result from the defense of defamation claims. Courts have expressed a preference for the

> dismissal by summary judgment of libel cases in order to prevent all but the strongest cases from proceeding to trial.

MRR Southern, LLC v. Citizens for Marlboro County, 2012 WL 1016180, at *2 (D.S.C. Mar. 26, 2012) (emphasis added) (citing *Peeler v. Spartanburg Herald-Journal*, 681 F. Supp. 1144, 1146 (D.S.C. 1988); *Sunshine Sportswear & Elec. Inc. v. WSOC Television, Inc.*, 738 F. Supp. 1499, 1505 (D.S.C. 1989)). Likewise, the United States Supreme Court held in *Anderson v. Liberty Lobby, Inc.*, 417 U.S. 242, 255-56 (1986), that the clear and convincing evidence standard is required when considering a summary judgment motion based upon a constitutional privilege or defense. This Court has held to the same effect. *See George*, 345 S.C. at 451, 548 S.E.2d at 873; *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857, 860 n.6 (2002).

Thus, Petitioners were obliged to provide concrete evidence in opposition to Jones Street's motions; they cannot merely "assert[] that the jury might, and legally could, disbelieve the defendant." *Anderson,* 417 U.S. at 256. "The plaintiff cannot rely upon the hope that witness cross-examination will raise a credibility issue." *Fazekas v. Crain Consumer Group Div.*, 583 F. Supp. 110, 114 (S.D. Ind. 1984). As discussed below, the Petitioners presented no such evidence to the Circuit Court to overcome Jones Street's constitutional defenses, much less the clear and convincing evidence required to defeat summary judgment.

ARGUMENT

Summary of Argument

In May of 2020, the world saw a video of George Floyd plead for his life and then take his last breath as a police officer held him down on the pavement of a Minneapolis street for nine minutes with a knee placed on the side of Floyd's neck. Two other officers

stood by without intervening or allowing others to intervene to save Floyd's life. This sparked world-wide outrage, protests, and conversations about race and the impact of racial bias in our society. These conversations are continuing ... in homes, classrooms, boardrooms, churches, social media, print media, and on television.

Some people believe police conduct is grounded in systemic racism resulting in the preventable and disproportionate deaths of people from racial and ethnic minority groups. Others believe police officers act without the influence of racial bias. Some people believe that everyone suffers from unconscious biases that result in racism and discrimination, regardless of intent. Others believe that racism and discrimination require intent.

Which of these beliefs are true? All of them? None of them? And, who gets to decide? Under our system of freedom of speech and of the press, may civil liability for expressing the opinion that someone is racist or has engaged in a racist act depend on whether the particular judge or jury drawn agrees with that opinion?

Whether you agree or disagree with any of these viewpoints will largely depend on the self-schema from which you process it. Whether something or someone is "racist" is inherently a matter of opinion, and each person will have their own unique view of what is "racist" based on their life experiences, social philosophy, political ideology, religious beliefs, and similar subjective factors. Undeniably, your viewpoint is uniquely your own. And one of the fundamental tenets of this great democracy is your right to express that viewpoint, particularly in regard to matters of public concern, and even if it offends others.

The *City Paper* publications at issue in this appeal consist of two types of statements: statements of fact describing what the watermelon ritual consisted of, and statements of opinion about whether those actions were racist. As to the first category, the

Circuit Court and Court of Appeals found – and Petitioners concede – that the statements are accurate republications of official comments made by School District officials and are therefore immune from civil liability under the fair report privilege. All remaining statements in the publications are expressions of opinion, commentary, and rhetorical hyperbole. These statements constitute what courts have labeled "pure opinion," where the writer fully discloses all the facts on which the opinion is based and does not suggest that there are undisclosed defamatory facts that support the opinion. The law is well-established that such statements are absolutely immune from liability.

Furthermore, Petitioners presented no evidence to the Circuit Court that the *City Paper* publications caused any damage to their reputations separate and apart from the extensive negative publicity concerning the controversy by other media outlets, and concrete proof of injury to reputation is required as a matter of law in this case.

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

The Circuit Court applied well-established principles of law in disposing of Petitioners' defamation claims against Jones Street at the summary judgment stage. The Court of Appeals fully reviewed the Circuit Court order and issued a detailed, thorough, and well-reasoned decision affirming the same. While Petitioners may dislike the

conclusions made by the courts below, they cannot identify any errors of law in the decisions. For these reasons and the others discussed further below, this Court should affirm the Court of Appeals' ruling and finally conclude this litigation.

I. The Court of Appeals and Circuit Court Correctly Held that All Statements of Fact in the City Paper Publications Are Protected by the Fair Report Privilege, and Petitioners Concede the Same.

Petitioners contend that "the factual background of this case creates a jury issue" as to whether the *City Paper* publications are protected by the fair report privilege. However, this assertion overlooks both Jones Street's and the lower courts' limitation of the fair report privilege to only specific portions of the publications – the factual statements describing the watermelon ritual. In this regard, it is critically important that in their summary judgment argument in the Circuit Court and in their brief before the Court of Appeals, Petitioners chose to confine their argument on the scope of the fair report privilege to the use of the terms "racist" and "racist douchebag" in the subject publications. They conceded that "[s]tatements describing the students' post-game celebrations, as well as the firing of Coach Walpole and resignation of Superintendent McGinley, would be protected by the fair report privilege." (App. 211)[3] Likewise, in this Court the Petitioners acknowledge 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." Pet. Br. at 7 n.4. This

[3] *See also, e.g.*, App. 979 ("Any factual reporting by the City Paper regarding actual statements made by Academic Magnet or CCSD officials is protected by the fair report privilege.").

concession waives Petitioner's request for further review of the Court of Appeals' holding on the fair report privilege, which was limited to the factual descriptions of the ritual.

In any event, the Court of Appeals properly applied the privilege, as the facts describing the watermelon ritual in the *City Paper* article and editorials were accurate restatements of what School District officials said publicly.[4] In examining the relevant statements from the articles, the Court of Appeals appropriately found:

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

Garrard, 429 S.C. at 193, 838 S.E.2d at 710 (citations omitted and alterations in original). This was the only context in which the lower courts found the privilege to apply.

Petitioners do not allege any error in this conclusion. Nor could they, as their own pleadings and deposition testimony explicitly confirm that the *City Paper*'s statements describing the watermelon ritual accurately restated the official comments of School District officials. (*E.g.*, App. 105 lines 14-17; App. 114 lines 6-13; App. 115 lines 15-25; App. 216-17 ¶¶ 8-11) Instead, Petitioners complain that the Court of Appeals should have found that there was a material issue of fact as to whether the articles exceeded the scope of the fair report privilege by using the terms "racist" and "racist douchebag." However,

[4] As Jones Street explained in its brief to the Court of Appeals, the fair report privilege extends as a matter of law to accurate repetition of public statements made by government officials. *See* Respondent's Court of Appeals Brief at pp. 13-16 [pages missing in the Appendix]. The Court of Appeals agreed, and Petitioners concede this principle of law.

there is no question of fact regarding abuse of the fair report privilege where there is no conflicting evidence. *See West v. Morehead*, 396 S.C. 1, 7, 720 S.E.2d 495, 498 (Ct. App. 2011); *see also Woodward v. S.C. Farm Bureau Ins. Co.*, 277 S.C. 29, 32–33, 282 S.E.2d 599, 601 (1981) ("While abuse of privilege is ordinarily an issue for the jury, ... in the absence of a controversy as to the facts ... it is for the court to say in a given instance whether or not the privilege has been abused or exceeded.") (internal citations omitted) (emphasis added).

In this case, Jones Street has never asserted that the use of these terms was protected under the fair report privilege. To the contrary, throughout its briefing in the Circuit Court and Court of Appeals, Jones Street acknowledged that these terms were not included in the comments of the School District officials and therefore did not come within the privilege, but rather were constitutionally protected as expressions of opinion. Accordingly, as recognized by the Circuit Court and the Court of Appeals, is unnecessary to address whether there was any abuse of the privilege.

Petitioners should not be heard to complain about that which they did not dispute. The Circuit Court and the Court of Appeals correctly found that the fair report privilege protects the statements of fact relayed in the *City Paper* publications as quoted above from Petitioners' pleadings.

II. The Court of Appeals and Circuit Court Correctly Found that the Remainder of the *City Paper* Publications Consist of Statements of Opinion and Rhetorical Hyperbole, Which Are Not Actionable.

It is settled law that expressions of pure opinion are absolutely immune from liability for defamation. *Cummings v. City of N.Y.,* 2020 U.S. Dist. LEXIS 31572 (S.D.N.Y. Feb. 24, 2020) ("As a matter of law, 'pure' opinions are absolutely privileged

and will not support an action for defamation."); *accord McCafferty v. Newsweek Media Group, Ltd*., 955 F.3d 352, 357 (3d Cir. 2020) ("[P]ure opinions cannot be defamatory. Under the First Amendment, opinions based on disclosed facts are 'absolutely privileged,' no matter 'how derogatory' they are.").

"Pure opinion" consists of "a comment or opinion based on facts which are set forth in the article or which are otherwise known or available to the reader or listener as a member of the public. … It is for the Court to decide, as a matter of law, whether the complained of words are actionable statements of fact or non-actionable expressions of pure opinion and/or rhetorical hyperbole." *Fortson v. Colangelo*, 434 F. Supp. 2d 1369, 1378-79 (S.D. Fla. 2006); *see also Chau v. Lewis*, 771 F.3d 118, 129 (2nd Cir. 2014) ("Pure opinion is a 'statement of opinion which is accompanied by a recitation of the facts upon which it is based' or does not imply that it is based on undisclosed facts.") (quoting *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289-90 (1986)); RESTATEMENT (SECOND) OF TORTS § 566 ("a statement in the form of an opinion … is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.").

As the U.S. Court of Appeals for the Third Circuit explained: "The privilege makes sense. When an article discloses the underlying facts, readers can easily judge the facts for themselves." *McCafferty*, 955 F.3d at 357. This Court made the same observation in finding a newspaper editorial comment immune under the fair comment privilege: "The facts upon which the editorial is based are stated in the news stories and in the editorial itself sufficiently full that the reader can draw his own conclusions." *Oswalt v. State-Record Co.*, 250 S.C. 429, 434, 158 S.E.2d 204, 206 (1967).

In the leading decision applying the First Amendment protection for expression of opinion, the Supreme Court held that "a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least ... where a media defendant is involved." *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 19-20 (1990) (emphasis added). While the *Milkovich* decision rejects the notion of "a wholesale defamation exemption for anything that might be labeled 'opinion,'" *id.* at 18, it reaffirms the principle that full constitutional protection is afforded to statements regarding matters of public concern that are not sufficiently factual to be capable of being proved false. *Id.* at 19-20. The dispositive question in this context is whether a statement of opinion implies an assertion of objective defamatory fact on which the opinion is based. *Id.* at 21. If no such statement is implied and all the bases of the opinion are fully disclosed, the statement is one of "pure opinion" entitled to absolute immunity.

More recently, the Supreme Court explained that a fact, in contrast to an opinion, must assert something objectively verifiable. A fact is "a thing done or existing" or "[a]n actual happening." An opinion is "a belief[,] a view," or a "sentiment which the mind forms of persons or things." *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 183 (2015) (citing Webster's New International Dictionary 782 (1927) and 7 Oxford English Dictionary 151 (1933)). Statements of fact "are readily understood by the reader to have a precise, unambiguous and definite meaning and can be objectively characterized as true or false." *Chau,* 771 F.3d at 128 (emphasis added).

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

ritual, which Petitioners have conceded are protected under the fair report privilege, the editorials contain the following statements concerning the AMHS football team and coach:

In "Melongate":

- "Today, Charleston was consumed by one story and one story only: the removal of Academic Magnet football coach Bud Walpole amid allegations that his players more or less behaved like racist douchebags. And if there's one lesson to be learned from all of this it's this: big toothy grins, watermelons, and monkey noises don't mix. Any sensible person can see that."

- "Apparently not. And apparently not the coaching staff and the players on the Academic Magnet Raptors."

- "That the coaching staff of the Academic Magnet Raptors and none of its players, including at least one African American, didn't see the trouble with this toxic combination of monkey sounds, toothy grins, and watermelons is at best baffling and at worst indicative of the casual acceptance of racism in Charleston today, even among the best and brightest that the county has to offer."

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

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

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

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

(App. 627)

In "Mob Rules":

- "School board forces out superintendent for firing coach who condoned racist ritual"
- "[N]ow the Charleston County School District Board of Trustees has forced Superintendent Nancy McGinley out of her job because she dared to fire a football coach who condoned a racist act."
- "McGinley was in the right to give Walpole the boot – and the board should've backed her."
- "The Academic Magnet coach had to know that his players were engaging in a ritual that would be perceived as racist by any sensible outside observer."
- "Perhaps [McGinley] genuinely thought that the community would rise up with her and condemn this racist behavior. But it didn't."
- "Apparently, [for Walpole supporters] to admit that their coach, their children, might be just a smidgen racist was simply too much to bear."
- "Coach Walpole's firing should have been a teachable moment, the kind that instructs the largely white student body of Academic Magnet High School in the ways that white people, even good ones, can inadvertently engage in hurtful racially offensive behavior. Instead what the students got was a teachable lesson in mob rule and white privilege. Days after his removal, Walpole was reinstated."
- "Many years from now, I know that many of these same AMHS students who defended Walpole and his players will see the error of their ways. I know that they will realize that it was wrong to turn a blind eye to how much pain the team's actions caused the African-American community, some of them their fellow students."

(App. 629)

None of these statements, to the extent they can be argued to have defamed the Petitioners, asserts any verifiable, provable fact. They are expressions of the editorial writer's ideas and opinions, using rhetorical hyperbole to give color and emphasis to his

views. Moreover, the essential facts leading to the opinions expressed in the City Paper were the statements taken from the School District's investigation and press conference, which were repeated by news outlets and widely covered in the local and national media. The editorials made full disclosure of the facts provided by the School District that supported the opinions and laid out precisely what conduct led to the writer's opinion; specifically, the drawing of a caricature face on a watermelon, giving the watermelon a name with direct ties to a formerly segregated school, smashing it after the predominantly white team defeated predominantly African American teams, and making sounds described by observers as animalistic or monkey sounds.

Whether the football players "more or less behaved like racist douchebags," whether the team's failure to perceive the negative racial connotations of their actions is "indicative of the casual acceptance of racism in Charleston today," whether the watermelon ritual was an act that "any sensible outside observer" would "perceive[] as racist," or an example of "inadvertently … hurtful racially offensive behavior" – these are all statements of "pure opinion" on which different persons could have different views and sentiments, and in fact many people did express different views on this matter. Indeed, the Petitioners agreed in their depositions that "whether or not something is racist is a matter of opinion." (App. 384 lines 16-18; *see also* App. 103 line 17; App. 469 lines 3-5; App. 590 line 22 – App. 591 line 1)

For the first time in this case, Petitioners argue that labeling their acts as racist is a statement of fact and that "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." Pet. Br. at 20. This argument has never been made before

and thus is not preserved for appeal. To the contrary, Petitioners made the exact opposite argument to the Court of Appeals: "[T]he central question becomes whether a reasonable factfinder could conclude the *City Paper*'s publications contained assertions that the members of the Academic Magnet's football team and Coach Walpole are racists." (App. 982) In the proceedings below Petitioners consistently maintained that what was actionable about the *City Paper* editorials was that it labeled them as racists and racist douchebags. (*E.g.*, App. 287, lines 13-15 (Mr. Parker: "If, in fact, being called a racist douche bag is not defamatory then obviously we have no case."); App. 302, lines 17-22 (Mr. Parker: "Had they reported what had been reported about Superintendent McGinley … we would have no case. …But … they went further and labeled the team and the coach absolutely racists and also labeled them as racist douche bags."))

In any event, this is a distinction without a difference. If the *City Paper* had stated or implied, for example, that the Petitioners had attended a KKK meeting at some point during the football season, that would be a legitimate example of specific conduct that could be objectively proved true or false. But that is not the scenario before the Court. Here, the facts as to what the watermelon ritual consisted of were fully disclosed, and as conceded by Petitioners, were accurate restatements of official comments by School District officials and are therefore protected by the fair report privilege. There was no implication of an unstated defamatory fact, nor was there any explicit statement of a defamatory fact that is not protected by the fair report privilege. On the basis of the fully disclosed facts, the *City Paper* editorials expressed the opinion that the ritual was racist in nature and that those who participated in it "more or less behaved like racist douchebags." This is a statement of pure opinion and is absolutely immune from liability.

Petitioners may disagree, but the *City Paper*'s interpretation of the conduct is non-actionable. In this context, the Court of Appeals correctly held:

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

489 S.C. at 200, 838 S.E.2d at 714. Given such "varying viewpoints and interpretations" that come to bear on the issue, whether certain conduct is or is not "racist" is incapable of being proved false by objective evidence.

This is an entirely different question from, for example, proving whether an employer's differential treatment of an employee in a protected class was motivated by the employee's race or gender. In the context of the *City Paper*'s editorial comments, Petitioners' protestations of innocent intent are irrelevant. Whether or not bad intent is necessary to make a person or his actions "racist" is a question open to debate.[5] Many thoughtful writers and speakers on the issue have posited that racism can be institutional, systemic, endemic, implicit, and unconscious. Indeed, the whole concept of "micro-aggression" is based on the notion that conduct can be totally innocent but nonetheless racist. This, precisely, was the larger point of Chris Haire's editorials:

> 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.

[5] Moreover, Petitioners have conceded that School District officials made public statements to the effect that "the plaintiffs [intended] to cast African American opponents in a derogatory light," (App. 216 ¶ 8) and that Petitioners engaged in "racially derogatory actions intended to equate black members of opposing football teams with monkeys." (App. 217 ¶ 11) If these statements are actionable statements of fact, any republication of them would be protected by the fair report privilege for the reasons stated above.

(App. 629) (emphasis added)

In terms of legal liability, it is completely immaterial, and under the First Amendment must be immaterial, whether one agrees or disagrees that racism can be unintentional, how one personally defines racism, and whether one agrees or disagrees with the *City Paper*'s editorial opinion that Petitioners' conduct was racist. Thus, for example, in connection with a claim of defamation over the accusation that a plaintiff was a white supremacist based on a photograph of the plaintiff's car with a Confederate flag bumper sticker, a Tennessee appellate court succinctly reasoned:

> It is, therefore, of no moment to the resolution of this appeal whether the conclusion expressed [by defendant] was correct. Readers could view the same photograph and decide for themselves. We hold, as a matter of law, that the communication at issue, an opinion based upon disclosed facts, when viewed in its entirety could not convey a defamatory meaning.

Weidlich v. Rung, 2017 Tenn. App. LEXIS 714, at *18-19 (Tenn. App. Oct. 26, 2017).

Here, likewise, the facts on which the editorials' opinions were based were fully disclosed, and the reader was free to reach his or her own conclusion about them. Contrary to Petitioners' assertions, therefore, the Court of Appeals did not make any broad pronouncement expanding protections for opinion statements; it simply recognized a settled legal principle and applied it to the undisputed facts of this case.

While the issue has not previously been addressed in South Carolina, a vast multitude of courts from other jurisdictions have reached the same conclusion as the Court of Appeals in cases arising from analogous factual settings and presenting the same or similar issues. *Cummings v. City of N.Y.*, 2020 U.S. Dist. LEXIS 31572 (S.D.N.Y. Feb. 24, 2020), is noteworthy for being strikingly similar to the case at hand. In the aftermath of an incident where a white social studies teacher made the black students in her class simulate conditions of slavery by having them lie down on the floor in close proximity, the

New York Daily News published a series of articles on the matter recounting the teacher's actions with regard to the students, which sparked significant public controversy. One of the articles published by the newspaper was titled, "Bronx educators accused of racism still under investigation, still on payroll." *Id*. at *16. Additionally, a media personality from a different company "described Plaintiff as a 'racist' [and] a 'bigot'" on a radio show. *Id*. at *23.

Applying the state law equivalent of the fair report privilege, the *Cummings* court determined that the plaintiff could not maintain an action against the media defendants because they accurately recounted the facts of the matter as described in the school's investigation. The court also dismissed the defamation claims against the media defendants arising from the description of the plaintiff as "racist" because "[i]mputing a motive or state of mind to a person based on that person's publicly reported conduct is not actionable in defamation." *Id*. at *62. The court also noted that "[t]he fact that [the plaintiff] may disagree with the sources' characterizations of her or wish that the articles painted her in a different light, does not alter this conclusion." *Id*. at *60.

Similarly, in *McCafferty v. Newsweek Media Group, Ltd*., 955 F.3d 351, 355 (3d Cir. 2020), the plaintiff sued Newsweek for accusing him of "defending raw racism and sexual abuse." In affirming the dismissal of the case, the U.S. Court of Appeals for the Third Circuit explained that "the article contained derogatory opinions based only on disclosed facts, which are not enough to show defamation or false light. … there can be no liability when a statement includes the facts upon which the opinion was based. Everyone is free to speculate about someone's motivations based on disclosed facts about that person's behavior." *Id*. at 355, 359.

The Seventh Circuit Court of Appeals aptly summarized the matter in *Stevens v. Tillman*, 855 F.2d 394 (7th Cir. 1988) as follows:

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

Id. at 402.

Consistent with these decisions, and based on the same reasoning and principles, courts throughout the United States have consistently found that statements like the ones at issue in this appeal amount to expressions of opinion or rhetorical hyperbole that do not amount to defamation.[6] This is only a partial listing – there are literally dozens more to the

[6] *See, e.g., Jorjani v. N.J. Inst. of Tech.*, 2019 U.S. Dis. LEXIS 39026, at *19 (D.N.J. Mar. 11, 2019) (statement that the plaintiff was "full of racism, hatred … bigotry" is not actionable; "insults, epithets, name-calling, and other forms of verbal abuse, although offensive, are not defamatory… calling someone a racist, hater, or bigot—without more—will not result in defamation liability."); *Squitieri v. Piedmont Airlines, Inc.*, 2018 WL 934829, at *4 (W.D.N.C. Feb. 16, 2018) (statements that plaintiff is "racist" "are clearly expressions of opinion that cannot be proven as verifiably true or false" and are therefore not actionable); *Forte v. Jones*, 2013 WL 1164929, at *6 (E.D. Cal. Mar. 20, 2013) ("[T]he allegation that a person is a "racist" … is not actionable because the term "racist" has no factually verifiable meaning."); *Baca v. Moreno Valley Unified Sch. Dist.*, 936 F. Supp. 719, 728 n.6 (C.D. Cal. 1996) (statement such as '"X is a racist'[ ] is legally an expression of opinion rather than a statement of fact and hence not actionable as slander"); *Cibenko v. Worth Publishers, Inc.*, 510 F. Supp. 761, 765 (D.N.J. 1981) (accusation of racism "is simply the author's commentary on undisputed facts. As such, it is editorial opinion, safeguarded by the First Amendment."); *Martin v. Brock*, 2007 WL 2122184, at *3 (N.D. Ill. July 19, 2007) ("racist" not actionable); *Jackson v. United Steel Workers Int'l Union*, 2009 WL 10704261, at *39 (N.D. Ala. Feb. 23, 2009) ("racist" not actionable); *Smith v. Sch. Dist.*, 112 F. 2upp. 2d 417, 429 (E.D. Pa. 2000) ("racist and anti-Semitic" not actionable); *In re Green*, 11 P.3d 1078, 1086 (Colo. 2000) (accusations of bigotry and racism were based on non-defamatory disclosed facts and thus were nonactionable); *Williams v. Kanemaru*, 2013 Haw. App. LEXIS 489, at *5-*6 (Haw. Ct. App. 2013) (accusation of racism based on disclosed facts not actionable for defamation); *Meissner v. Bradford*, 156 So.3d 129 (La. Ct. App. 2014) (comments accusing a former president of youth football league of having "a problem with people of color" was an opinion rather than an actionable statement of fact); *Silverman v. Daily News, LP,* 129 A.D.3d 1054, 1055 (N.Y. App. Div. 2015) (defendant's publication that plaintiff authored "racist writings" is statement of opinion, not fact); *Covino v. Hagemann*, 627 N.Y.S.2d 894 (Sup. Ct. 1995) (allegation of racism is "an expression of opinion [that] is not actionable as a defamation, no matter how offensive, vituperative, or unreasonable it may be"); *Goetz v. Kuntsler*, 625 N.Y.S.2d 447, 452 (Sup. Ct. 1995) (statement that plaintiff had "venomous feelings against black people" and "developed hatred toward all blacks" was protected opinion); *see also Turner v. Wells*, 879 F.3d 1254, 1264 (11th Cir. 2018) (referring to a coach's treatment of one of his players as "homophobic taunting" constitutes an opinion that is not actionable in defamation); *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995) (accusation of being "anti-semitic" not actionable); *Ward v. Zelikovsky*, 643 A.2d 972, 983-84 (N.J. 1994)

same effect. The handful of cases relied upon by Petitioners for the contention that an accusation of racism is actionable, Pet. Br. at 21-22, are readily distinguishable from the plethora of decisions to the contrary, as none of the cases cited by Petitioners involved the publication of an opinion based on wholly disclosed facts that were either non-defamatory or (as in this case) protected by a privilege such as the fair report privilege.

Furthermore, the writer's use of strong rhetoric to express his opinions in this instance, such as "behaved like racist douchebags," does not remove protection from liability – "rhetorical hyperbole" and "vigorous epithet" cannot be the basis of a claim for defamation. *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970); *see also Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 339-40 (1974); *Milkovich*, 497 U.S. at 16-17, 20. "To foreclose the use of hyperbole, under the threat of civil liability, 'would condemn [commentary] to an arid, desiccated recital of bare facts.' Such a result would ill-serve the interests of the First Amendment in 'assur[ing] [the] unfettered exchange of ideas' among the American people." *Fortson*, 434 F. Supp. 2d at 1385 (quoting *Time, Inc. v. Johnston*, 448 F.2d 378, 384 (4th Cir. 1971); *Roth v. U.S.*, 354 U.S. 476, 484 (1957)).

Indeed, a writer's use of hyperbole reinforces that what is being expressed is opinion rather than fact. *Neumann v. Liles*, 358 Ore. 706, 721 (2016). For example, courts have held the following expressions to be mere "name calling," "hyperbole," and "vigorous epithet," and thus immune from liability for defamation:

- "two faced, crooked, and rude" – *Neumann v. Liles*, *supra*
- "bastard" (when used as epithet) – *Curtis Publ'g Co. v. Birdsong*, 360 F.2d 344

(statements that plaintiffs "hated Jews" were not actionable); *Vail v. The Plain Dealer Publ'g Co.*, 649 N.E.2d 182, 186 (Ohio 1995) (accusations of bigotry and homophobia in newspaper opinion piece were nonactionable); *Rybas v. Wapner*, 457 A.2d 108. 110 (Pa. 1983) ("anti-Semitic" is not actionable).

(5th Cir. 1966)

- "scum" – *Lamelza v. Bally's Park Place, Inc.*, 580 F. Supp. 445 (E.D. Pa. 1984)
- "horse's ass," "jerk," "idiot," "paranoid" – *Blouin v. Anton*, 431 A.2d 376 (Vt. 1981)
- "thug" – *Fortson*, 434 F. Supp. 2d at 1385

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

Whether the use of a term is a hyperbolic expression of ideas or whether it implies an undisclosed defamatory fact also depends on the context in which the term is used. *Faltas v. State Newspaper*, 928 F. Supp. 637, 648 (D.S.C. 1996); *Fortson*, 434 F. Supp. 2d at 1381-81. In this case, the context in which the op-eds were published was the "Views" section of the newspaper – a section devoted to opinion and commentary – and the watermelon ritual was a matter of great public concern widely covered by local and national media. "Where an issue is controversial, evoking strongly held views, statements relating thereto are more likely to be deemed rhetorical hyperbole." *Id.* at 1381.

In the instant case, after removing the statements that merely repeated or summarized what School District officials stated publicly, considering the overall tenor and language of the editorials, and viewing them in the light of the context of the section of the paper in which they were published and the overall controversy to which they related, the opinion statements in the *City Paper* publications are not "an articulation of an objectively verifiable event." *Milkovich*, 497 U.S. at. 20-21. They are expressions of the editorial writer's ideas and opinions, using rhetorical hyperbole for color and emphasis. In short, all statements of fact in the *City Paper*'s op-eds are protected by the fair report

privilege, and all other allegedly defamatory statements are protected expressions of ideas, opinions, and rhetorical commentary.

III. The Court of Appeals and the Circuit Court Correctly Determined that Petitioners Failed to Present Any Proof of Injury to Reputation Attributable Specifically to the *City Paper* Publications.

Petitioners have never presented any evidence of injury to reputation or other damages attributable to the *City Paper* publications separate and apart from the other negative publicity concerning the ritual, and they do not identify any such evidence in their Brief to this Court. In affirming the Circuit Court on this issue, the Court of Appeals noted that

> Appellants could not identify individuals who read the City Paper's publications and as a result of those publications, viewed Appellants in a different light. Nor did Appellants provide evidence of any lost opportunities as a result of the articles. Appellants agreed that they did not lose any friends, remained employed at their places of employment, and were accepted to the colleges they desired to attend. . . .
>
> Some Appellants indicated that they had been questioned about the watermelon incident by various people; however, Appellants were unable to identify those individuals and unable to concretely state whether those individuals were questioning them as a result of reading the City Paper's publications. . . .
>
> As previously stated, the watermelon ritual controversy gained local and national attention resulting in reports by media outlets, including television and radio broadcasts, throughout the United States. Importantly, the City Paper was not the first medium to produce a story on the events.

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

Petitioners mis-state the law in arguing that actual evidence of injury to repetition is unnecessary. Injury to reputation is an essential element of a defamation claim. *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 341 S.E.2d 622, 625 (1986). Unlike invasion of privacy, in which "the interest to be vindicated is the injury to the person's own

feelings," *Zeran v. Diamond Broadcasting, Inc.*, 203 F.3d 714, 719 (10th Cir. 2000), in a defamation case "the primary harm being compensated is damage to reputation," not "the mental distress from having been exposed to public view," as in a privacy case. *Time, Inc. v. Hill*, 385 U.S. 374, 384 n.9 (1967); *see also Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971) ("[D]amage to reputation is, of course, the essence of libel."); *Capps v. Watts*, 271 S.C. 276, 283, 246 S.E.2d 606, 610 (1978) ("The essence of a defamation suit is recovery for injury to reputation."). Therefore, as one court explained:

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

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

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

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

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

Thus, Petitioners' suggestion that general damages in a defamation case may consist solely of hurt feelings, Pet. Br. at 28, is simply wrong as a matter of law. While

compensation for embarrassment and mental distress can be recovered as a part of general damages in defamation, they must be predicated upon proof of injury to reputation or a presumption of injury to reputation:

> [T]he plaintiff in an action for defamation must first offer proof of harm to reputation; any claim for mental anguish is "parasitic," and compensable only after damage to reputation has been established.
>
> During the trial of the action below, plaintiff offered no evidence of harm to his reputation, no evidence of damage by reason of injury to his reputation, no proof of financial loss flowing therefrom. He cannot recover in a defamation action for mental anguish in the absence of proof of the principal injury with which a defamation action is concerned – injury to reputation.

Gobin v. Globe Publishing Co., supra, 649 P.2d at 1244.

> Tort law has historically required injury to reputation as a prerequisite to other emotional damage in defamation actions. "Defamation is not concerned with the plaintiff's own humiliation, wrath or sorrow, except as an element of 'parasitic' damages attached to an independent cause of action." WILLIAM L. PROSSER, THE LAW OF TORTS, § 111, at 737 (4th ed. 1971). "Harm to reputation or good name is the essence of libel and slander, so the plaintiff can have no recovery in libel or slander for emotional distress or economic loss unless her reputation is implicated." DAN B. DOBBS, THE LAW OF TORTS, § 400, at 1117 (2001).

Kenney v. Wal-Mart Stores, Inc., 100 S.W.3d 809, 813 (Mo. 2003).

Although the common law presumes damages in cases involving defamation *per se*, this Court has squarely held that damages may not be presumed in a case, like this one, involving a media defendant and a matter of public concern:

> [I]n a case involving an issue of public controversy or concern where the libelous statement is published by a media defendant, the common law presumptions the defendant acted with common law malice and the plaintiff suffered general damages do not apply. Instead, the private-figure plaintiff must plead and prove common law malice and show "actual injury" in the form of general or special damages.

Erickson v., 368 S.C. at 466, 629 S.E.2d at 665 (emphasis added); *accord Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 511-12, 506 S.E.2d 497, 502-03 (1998).

General damages "are imposed for the purpose of compensating the plaintiff for the harm that the publication has caused to his reputation." RESTATEMENT (SECOND) OF TORTS, § 621 comment a (1977) (emphasis added). Special damages consist of some provable material loss to the plaintiff as a result of the injury to his reputation; hurt feelings do not suffice as proof of special damages. *Wardlaw v. Peck*, 282 S.C. 199, 318 S.E.2d 270 (Ct. App. 1984). Petitioners conceded at the motion hearing that the publications at issue in this case involved a matter of public concern. (*See* App. 297 line 25 – 298 line 2 ("I don't seriously contend that it is not a matter of public interest. I think that it probably was and is.")) Therefore, this Court should not entertain arguments to apply a different standard on appeal. Petitioners are required to provide actual proof of injury to reputation.

Petitioners did not identify any evidence of either special damages or general damages arising from injury to reputation as a result of the *City Paper* publications in opposing Jones Street's summary judgment motion. In an interrogatory to Petitioners, Jones Street specifically asked them to identify any person who read the *City Paper* publications and, as a result of those publications (and not the numerous other news stories and editorials about the watermelon ritual), thought less of any of the Petitioners or their reputations. The Petitioners admitted that they could not identify any such person – not even one. (App. 149)

Coach Walpole was not even aware of the *City Paper* publications over which he has brought suit until his attorney showed them to him. (App. 119 lines 16-23) When questioned in their depositions about injury from the *City Paper*, none of the Petitioners could identify any evidence that the article or editorials in the *City Paper* – as opposed to the other extensive media coverage of the controversy – was the proximate cause of any

damage to their reputations. (App. 132-34 (Ackerman); App 95-102, 104 (Frailey); App. 143-44 (Moore); App. 157-63 (Nelson); App. 170-76 (Perry); App. 184-89 (R.C.G.); App. 120-24 (Walpole))

This is not surprising – to the contrary, it makes perfect sense. The players on the team were never even identified by the *City Paper*. Coach Walpole was reinstated to his position the very next week after being fired, with no loss of income. (App. 113) The *City Paper* did not break the story about the watermelon ritual – it was already the subject of extensive publicity, both local and national, on the radio and television as well as in print and on the internet, including publicity of the "monkey sounds" and racial caricature drawn on the watermelons. This point is not a "playground excuse of 'but they did it too,'" as Petitioners glibly characterize it, Pet. Br. at 32, but rather is recognition of the fact that any inference of racism that might be drawn from the facts reported about the ritual had already been made in local and national media coverage of the story.[7]

Petitioners themselves allege against the School District that its statements about them and the publication of those statements by the national media are what hurt their reputations. (*See* App. 230-31 ¶¶ 7-12) As Walpole testified in his deposition:

> Well, I believe that the statements made by the superintendent and the associate superintendent, as well as Kevin Clayton [the School District's diversity consultant], were falsely made, were falsely published, that I knowingly allowed our team to draw a monkey face on a watermelon and make monkey noises. Those statements were defamatory and were published in the print media, they were on national TV, and on the Internet.

[7] In this regard, it is worth noting that some of the Petitioners had previously posted or shared racially offensive material on social media. (*See, e.g.*, App. 882-87) Jones Street points this out not to invite the Court to weigh evidence, as Petitioners suggest, but rather to highlight not only that Petitioners lack any evidence that the *City Paper*'s use of the term "racist" caused injury to their reputations, but also that what evidence there is actually undermines their claim.

> And by making those false statements, they were intended – their intentions were to depict me as a racist and to falsely accuse me of casting African-Americans in a derogatory light.

(App. 552 line 15 – 553 line 1)

In attempting to argue evidence of injury in their brief, Petitioners are making factual assertions that were never presented or offered to the Circuit Court for its consideration. Specifically, Petitioners cite to multiple excerpts of deposition testimony that were not included in any filing made in the Circuit Court and were never referenced in the lower court proceedings in any manner. Pet. Br. at 25-27, 31-32. South Carolina Appellate Court Rules clearly provide that the Record on Appeal "shall not, however, include matter which was not presented to the lower court or tribunal." SCACR 210(c). Therefore, Petitioners' attempt to put before this Court that which they failed to present to the Circuit Court is improper and should be disregarded. *See* Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which does not appear in the Record on Appeal.").[8]

Moreover, none of the deposition testimony cited by Petitioners contains actual evidence (as opposed to mere claims by Petitioners themselves) of injury to reputation (as opposed to embarrassment or discomfort) that is attributed specifically to the *City Paper* editorials or article (as opposed to the extensive negative publicity in general). To the contrary, Connor Frailey's testimony about the *City Paper* editorials merely state his opinion that the editorials were defamatory as to all of the students at AMHS and that the

[8] Jones Street objected on this ground to the inclusion of these deposition excerpts in the Record on Appeal in the Court of Appeals. *See* Designation of Matter by Respondent Jones Street Publishers, LLC, and Objection to Designation of Appellants, at 3 (S.C. App. June 12, 2017).

students were talking a lot about what the *City Paper* said. (App. 100-102, 440) Robert Garrard's only reference to harm caused specifically by the *City Paper* was that its editorials made him "feel more self-conscious." (App. 41 line 22) Arthur Perry candidly acknowledged that he did not know that the *City Paper* publications were the cause of any injury to his reputation. (App. 417 line 22; App. 420 lines 6-8) Daniel Nelson testified that it was "the media" that made people question his character, not the *City Paper* specifically. (App. 162 line 21 – 163 line 2)

Only two of the Petitioners (Walpole and Moore) made any reference at all to the *City Paper* coverage as harmful to their reputation, but neither one put forth any evidence to substantiate or support their bare assertions. Coach Walpole specifically testified in his deposition that "the statements made by the superintendent and the associate superintendent, as well as Kevin Clayton, ... published in the print media, … on national TV, and on the Internet" were the source of his alleged distress. (App. 552 lines 15-17, 20-22) Similarly, Reece Moore testified that his classmates "think lower of me"[9] (App. 466 line 22) but this portion of his testimony was in the context of what "they see on the news" rather than the *City Paper* in particular. (App. 466-67) Obviously, if simply asserting that a publication hurt one's reputation were considered sufficient, without any actual evidence to support the assertion, the law's requirement of proof of injury to reputation would be rendered meaningless.

[9] This testimony is from a deposition excerpt that was not submitted in opposition to Jones Street's motion for summary judgment and is not a proper part of the record. Moreover, Moore is no longer a party to the suit, having decided to drop his claim and dismiss it with prejudice. *See* Consent Order of Dismissal with Prejudice of Moore Plaintiffs' Amended Complaint Against Jones Street Publishers (S.C. Cir. Ct. Jan. 24, 2017).

In short, the Petitioners have no evidence of injury to reputation as a proximate result of the *City Paper* publications, an essential element of the cause of action of defamation. The Circuit Court correctly granted summary judgment in favor of Jones Street, and the Court of Appeals correctly affirmed.

IV. The Court of Appeals and the Circuit Court Correctly Held that the Statements in the *City Paper* Publications Were Not "Of and Concerning" the Individual Players Because the Statements Merely Referenced the Team as a Whole.

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

"To prevail in a defamation action, the plaintiff must establish that the defendant's statement referred to some ascertainable person and that the plaintiff was the person to whom the statement referred." *Burns v. Gardner*, 493 S.E.2d 356, 359, 328 S.C. 608, 615 (Ct. App. 1997) (emphasis added). Therefore, where defamatory language is applied broadly in discussing the members of a class or group, without any specific circumstances pointing to a particular member, no individual member has a right to maintain an action for defamation. *See AIDS Counseling and Testing Centers v. Group W Television, Inc.,* 903 F.2d 1000, 1005 (4th Cir. 1990) ("In order to actionably defame an individual, a publication must contain some special application of the defamatory matter to the individual. The

circumstances of the publication [must] reasonably give rise to the conclusion that there is a particular reference to the individual.") (emphasis added; citations and quotation marks omitted)).

Nothing in the *City Paper* publications makes specific reference to any individual team member or any characteristic of a team member that would make him identifiable as the subject of the article or editorials. Courts examining analogous circumstances have found that the individual member of a group could not maintain an action for defamation. For example, in *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012), members of a college lacrosse team brought a section 1983 action against a police spokesperson and others, seeking to assert, *inter alia*, a "due process stigma-plus" claim based on several allegedly defamatory statements made concerning a rape investigation. The court reversed the trial court's denial of the defendant's motion to dismiss and the concurring opinion noted that the plaintiffs could not even meet the requirements of traditional defamation law because they were attempting to hold a spokesperson liable for statements about the team when no individual had been referenced. *Id*. at 660; *see also Algarin v. Town of Wallkill,* 421 F.3d 137 (2d Cir. 2005) (affirming the dismissal of 23 individuals' stigma-plus claims because the alleged defamatory statements did not sufficiently identify any specific officers).

Similarly, the Fourth Circuit Court of Appeals affirmed a decision of the South Carolina District Court holding that a defamatory statement about a company's "management" was not "of and concerning" one of 17 individual members of the company management team. *Outlaw v. Standard Products Co.*, 122 F.3d 1062, 25 Media L. Rptr. 2470 (4th Cir. 1997). The Fourth Circuit reasoned:

> [R]eference to a group does not implicate the individual members of the group. As the district court noted, in this case none of the articles mentions

> Outlaw [the plaintiff] or any other employee by name or title. The reference to "management" refers to a group, and therefore does not implicate Outlaw.

Id., 25 Media L. Rptr. 2470, at *2.

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

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

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

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

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

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

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

Petitioners further contend that whether the football team qualifies as a small group is a question of fact. However, the *Holtzscheiter* decision cited by Petitioners does not support this premise. In *Holtzscheiter*, the Court was called upon to determine whether the plaintiff could maintain a defamation claim against a newspaper that published a statement about a victim's lack of "family" support. The Court concluded that a "family" was a sufficiently small group in which an individual member could maintain a defamation claim. It was only after making this conclusion regarding the availability of the defamation claim as a matter of law that the Court found that a jury could determine whether the plaintiff had actually proven that the statement was "of and concerning" her. *Holtzscheiter*, 332 S.C. at 514, 506 S.E.2d at 504. The lower courts' decisions in the instant case are wholly consistent with *Holtzscheiter*.

After being rejected by the Circuit Court and the Court of Appeals on this issue, Petitioners attempt to advance new legal arguments urging this Court to adopt what Petitioners describe as "the Restatement approach" or "the intensity of suspicion approach." However, Petitioners have never made these arguments to any court below and cannot interject them at this late stage of the litigation, on appeal to this Court. *See Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the Court with a platform for meaningful appellate review."); *id*. ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." (quoting *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998))).

Petitioners have not demonstrated any error in the Court of Appeals decision on this issue. Therefore, this Court should affirm.

V. The Court of Appeals and the Circuit Court Correctly Held that Petitioner Walpole, as a Public Official or Figure, Failed To Meet His Burden of Presenting Clear and Convincing Evidence of Actual Malice.

As to Walpole individually, Petitioners contend that the Court of Appeals erred in finding that Walpole is a public official or public figure required to present evidence of actual malice and that, in the alternative, he met his burden. This argument fails as a matter of law and fact.

For purposes of First Amendment analysis, South Carolina courts have held a wide variety of public school administrators and employees to be public officials, including public school principals, school trustees, and school superintendents. *See Scott v. McCain*, 272 S.C. 198, 250 S.E.2d 118 (1978); *Sanders v. Prince*, 304 S.C. 236, 403 S.E.2d 640

(1991); *Keller-Moser Consulting, LLC v. Daniels*, 2012 WL 554643 (D.S.C. Feb. 21, 2012). Other courts have specifically found public school teachers and athletic coaches to be public officials or public figures for purposes of applying the *New York Times* doctrine. For example:

> [T]he plaintiffs, as teachers and athletic coaches in the community high school, are "public officials" or "public figures" … Plaintiffs are public employees, hired by the school board and paid with public funds. As coaches and teachers in a local high school they maintain highly responsible positions in the community. … Public school systems, their athletic programs, and those who run them are consistent subjects of intense public interest and substantial publicity.

Basarich v. Rodeghero, 321 N.E.2d 739, 742 (Ill. App. 1974); *accord Johnston v. Corinthian Television Corp.,* 583 P.2d 1101, 1103 (Okla. 1978); *Johnson v. Sw. Newspapers Corp.*, 855 S.W.2d 182, 186-87 (Tex. App. 1993); *Miller v. Minority Brotherhood of Fire Prot.,* 463 N.W.2d 690 (Wis. 1990). The law does not require the employee to have substantial control over core government functions, as argued by Petitioners. As aptly noted by this Court, "[t]he status of a public official may be deemed sufficient ... not because of the government employee's place on the totem pole, but because of the public interest in a government employee's activity in a particular context." *Erickson*, 368 S.C. at 469, 629 S.E.2d at 666-67 (quoting *McClain v. Arnold*, 275 S.C. 282, 284, 270 S.E.2d 124, 125 (1980)).

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

roles at the school. Particularly, in the context of the manner of oversight and control of the AMHS football team, it was appropriate for the Circuit Court and the Court of Appeals to categorize him as a public official.

As a public official, Walpole is required to present clear and convincing proof of actual malice, evidence "that the defendant realized that [the allegedly defamatory statement about the plaintiff] was false or that [the defendant] subjectively entertained serious doubt as to the truth of [the statement]." *Bose*, 466 U.S. at 511 n.30 (emphasis added; citations omitted).

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (emphasis added). This Court has reaffirmed these rigorous standards:

> Actual malice is a subjective standard testing the publisher's good faith belief in the truth of his or her statements. The constitutional actual malice standard requires a public official [or public figure] to prove by clear and convincing evidence that the defamatory falsehood was made with the knowledge of its falsity or with reckless disregard for its truth. A "reckless disregard" for the truth, however, requires more than a departure from reasonably prudent conduct. "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." There must be evidence the defendant had a "high degree of awareness of … probable falsity."

Elder v. Gaffney Ledger, 341 S.C. 108, 114, 533 S.E.2d 899, 902 (2000) (emphasis in original) (quoting *St. Amant, supra; Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)).

Walpole has no evidence of actual malice, much less clear and convincing proof. There is a reason for this – it is undeniable that all factual statements contained in the Jones

Street publications were simply paraphrased summaries of public statements made by School District officials concerning the watermelon ritual. Further, as Petitioners' pleadings themselves acknowledge, those statements were picked up and reported widely in both local and national news media. (App. 221 ¶ 20; App. 231 ¶ 12.) Accordingly, Jones Street and its writers had no reason to doubt that what they were reporting on the watermelon ritual was completely true and accurate.

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

Jones Street submitted an interrogatory asking Coach Walpole to identify the factual and evidentiary basis for the allegation that Jones Street published the allegedly defamatory statements with actual malice. Initially, Walpole did not provide any response other than to assert generally that Jones Street "either did not investigate and with reckless disregard for plaintiffs' rights, published these articles, or, if it did investigate it, published the articles with actual malice." (App. 941 (emphasis added)) Jones Street moved to compel, and in response Walpole provided a supplemental response stating, "See plaintiffs' depositions … and the articles published in the City Paper …" (App. 953) This response is insufficient as a matter of law. It is well-established that "[f]ailure to investigate before

publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard" to constitute actual malice. *Elder v. Gaffney Ledger*, 341 S.C. at 114, 533 S.E.2d at 902 (quoting *St. Amant*, 390 U.S. at 731).

It is a complete red herring to suggest that Jones Street had actual malice because Dr. McGinley concluded that the watermelon ritual was "an innocent ritual." As noted above, Petitioners misrepresent the record. At the press conference observed by Chris Haire and Paul Bowers, Dr. McGinley merely noted that the "tone" of the initial report "implied" that the players did not recognize the negative implications of their conduct, and that she had sent the matter back for further investigation, resulting in a report with "significantly different" conclusions. It was only later, after the publication of the *City Paper* editorials and article, that the School District made public Dr. McGinley's ultimate conclusion that the players may have failed to appreciate how their conduct might be perceived – while specifically noting that "it was clear the coaches either knew or should have known about the negative racial stereotypes of this watermelon ritual." (App. 615 (emphasis added)) Dr. McGinley's statements provide no proof of actual malice.

To this day, Walpole has identified absolutely nothing in the depositions or articles that constitutes evidence that anyone at Jones Street knew of any false statement in the editorials or articles or in fact entertained serious doubts as to the truthfulness of them. At the motion hearing, Judge Toal asked Petitioners' counsel: "what is it that demonstrates the actual malice here?" The sole basis advanced in response to the question was: "The fact that they are labeling these people as racist douche bags without any investigation." (App. 293, lines 8-12) As discussed above, failure to investigate does not constitute actual

malice. This is a settled matter of federal constitutional law. *St. Amant,* 390 U.S. at 731. Accordingly, the Court of Appeals correctly affirmed the Circuit Court's ruling.

CONCLUSION

While much progress has been made in the cause of racial justice and equity in this country, the issue remains one of pressing and enduring importance. South Carolina, and Charleston particularly, hold a unique place in the history of anti-Black bias and racial discrimination in the United States. Discussion about the persistence of racism in our state, our country, and our culture needs to be encouraged, not repressed through the threat of litigation.

This case, however, is little more than an attempt to stifle Jones Street's right to engage in public debate about Petitioners' very public disregard for and ignorance of the racial insensitivity of their actions related to the watermelon ritual. It is quite clear from Petitioners' brief that the reason they have sued Jones Street, and no other publication, is because of its editorial opinion that their conduct was racist – not because of its statements that they painted a racial caricature on a watermelon named for a formerly segregated school and that they made monkey sounds while smashing the watermelon following the defeat of predominantly African American teams. Petitioners concede (and affirmatively allege) that these facts all were included in comments by School District officials and are therefore protected by the fair report privilege, and that they were reported by numerous other media outlets, none of which have Petitioners sued. All that remains when those factual statements are filtered out is the strong editorial position taken by the *City Paper*. This is why we are here.

That editorial position is a constitutionally protected expression of opinion and commentary. In our current climate of public speech and action addressing the United States' long and enduring legacy of racism, inequality, and disparate treatment of marginalized communities, it is critically important for the media to be actively engaged in reporting various perspectives and commenting on such events of public interest, to serve as a catalyst for public discourse about racism in this country. State and federal courts have consistently acknowledged and upheld the media's right to participate in this important work.

The issues on appeal in this case strike at the heart of freedom of speech and of the press, for they attempt to impose liability on the publisher of a newspaper for doing nothing more than expressing an editorial opinion and engaging in public discourse on a matter of substantial public controversy.

This Court should affirm the Court of Appeals.

Respectfully submitted,

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