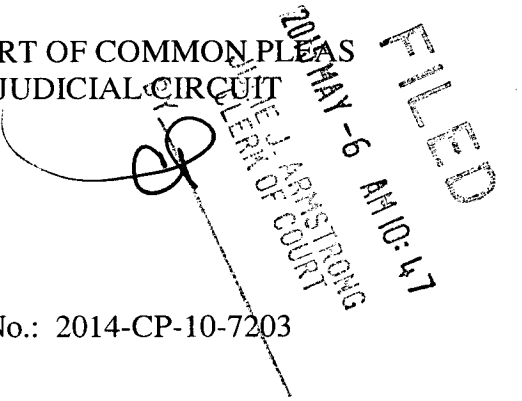
STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT



JAMES R. MOORE, JR. and BETTY MOORE, Guardians Ad Litem for R. A. M., a Minor; AMY GARRARD and LEE GARRARD, Guardians Ad Litem for R.C.G., a Minor; and DEAN FRAILEY and KATHRYN FRAILEY, Guardians Ad Litem for C.F., a Minor,

Plaintiffs,

vs.

CHARLESTON COUNTY SCHOOL DISTRICT, KEVIN CLAYTON, AXXIS CONSULTING COMPANY, and JONES STREET PUBLISHERS, LLC,

Defendants.

C.A. No.: 2014-CP-10-7203

DEFENDANT JONES STREET PUBLISHERS, LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

Defendant Jones Street Publishers, LLC, ("Jones Street") respectfully submits this Memorandum of Law in Support of Its Motion to Dismiss.

BACKGROUND AND SUMMARY

This action, and several related cases filed by the same law firm that are virtually identical to this one, 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.

The plaintiffs are members of the Academic Magnate High School ("AMHS") football team, on whose behalf their parents and legal guardians have brought this lawsuit. The related cases have been filed on behalf of other members of the team and the head football coach, Eugene "Bud" Walpole, and Jones Street has moved to dismiss those actions as well.

In the fall of 2014, Walpole was fired from his coaching position because of a bizarre and inflammatory postgame practice of the team in which players smashed a watermelon painted with a caricature face bearing physical traits often depicting derogatory connotations historically associated with African Americans. The players called the watermelon "Bonds Wilson" after a former segregated school named for two African American educators, and chanted "ooh ooh ooh" while smashing the watermelon (hereinafter referred to as the "watermelon ritual"). The District Superintendent fired Walpole from his coaching position following an official investigation of the watermelon ritual. Walpole was later reinstated under pressure from the Charleston County School Board, which led to the resignation of the Superintendent. The controversy was covered widely in both local and national news media.

The plaintiffs' Complaints in all of these related actions allege a single cause of action for defamation, arising from statements allegedly made by defendants and two non-party School District officials concerning the public controversy over the watermelon ritual. Defendant Jones Street owns and publishes the *Charleston City Paper* weekly newspaper (the "*City Paper*"). The plaintiffs' claims against Jones Street are based upon an opinion editorial, or "op-ed," published in the *City Paper* about the controversy. The plaintiffs contend that the op-ed is defamatory because of its statement that the football team had engaged in a " 'ritual that would be perceived as racist by any sensible outside observer.' " Complaint ¶ 13 (quoting the *City Paper*). Plaintiffs further allege that the op-ed, "when read as a whole, falsely accuses the football team and the plaintiff of being racist." *Id.* A copy of the newspaper's op-ed is attached as Exhibit A to the Motion and this Memorandum.[1]

[1] *See Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) (holding that the trial court may consider documents referenced in but not attached to the complaint without converting

Accepting all of the allegations as true for purposes of this motion, the Complaints fail to state facts constituting a valid cause of action against Jones Street, for several independent but related reasons. First, all statements of fact contained in the *City Paper* op-ed are merely restatements of the public comments of School District officials concerning the watermelon ritual controversy. Accordingly, those statements are protected by the fair report privilege, which precludes liability for accurately reporting statements of government officials and agencies. Second, to the extent that the op-ed goes beyond such factual statements, its content is indisputably an expression of the editorial writer's opinions, ideas, and rhetorical commentary concerning the facts as reported by the School District officials. Under the First Amendment, a citizen of this country cannot be held liable for expressing opinions, ideas or rhetorical hyperbole concerning a matter of public interest. Finally, the allegedly defamatory statements were not "of and concerning" the plaintiffs, since they referred only to the football team as a whole and did not refer to any individual players, including any of the plaintiffs.

For these reasons, the Court should dismiss all of these cases as a matter of law.

THE PLAINTIFFS' COMPLAINTS

The Complaints allege that the defendant Charleston County School District, through its Assistant Superintendent of Education Louis Martin, defamed the plaintiffs by (1) publishing that the Academic Magnet High School's football team made animal or monkey sounds and drew a monkey face on a watermelon during the teams' celebrations after a win; (2) accusing the

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a motion to dismiss into a motion for summary judgment, because otherwise plaintiffs could "surviv[e] a motion to dismiss by intentionally omitting documents upon which their claims are based").

team of intending to cast African American opponents in a derogatory light; and (3) portraying the team as being racially prejudiced. Complaint ¶¶ 8 and 9.

The Complaints further allege that the then-Superintendent Nancy McGinley defamed the plaintiffs by stating to the public that "the 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,' " and stating that the sounds were "monkey sounds." Complaint ¶ 10.

The Complaints allege that in the November 5, 2014 edition of the *Charleston City Paper*, Jones Street published an editorial entitled, "Mob Rules." The editorial, which appeared in the "Views" section of the paper, states "The Academic Magnet coach had to know that his players were engaging in a ritual that would be perceived as racist by any sensible outside observer. If you don't already know, a racist caricature had been drawn on a watermelon and then smashed each time the largely white football team defeated their predominantly African-American competitors. Even worse, they reportedly made monkey sounds when they did it." Complaint ¶ 14.

The editorial further stated: "Perhaps [Superintendent McGinley] too had bought into the hype that the Holy City had shaken off its racist past, that our Lowcountry home had been born anew as America's most beloved tourist town. Perhaps she genuinely thought that the community would rise up with her and condemn this racist behavior. But it didn't." Complaint ¶ 14.

The Complaints allege that the editorial further stated: "As the controversy unfolded, the black community largely remained silent, while the entire Academic Magnet community rallied behind Coach Walpole, with some even going as far as to deny any racist connection between

watermelons, Sambo-like caricatures, monkey noises, and black people." The plaintiffs contend that the editorial, when read as a whole, falsely accuses the football team and the plaintiffs of being racist. Complaint ¶ 14.

ARGUMENT

1. The Importance of Summary Disposition in First Amendment Cases

Because of the high cost and unpredictability associated with the defense of libel actions, and the "chilling effect" that these factors may exert upon the exercise of the constitutional rights of free speech and freedom of the press, summary disposition occupies a position of greater importance in such actions as compared with other civil actions. In the context of summary judgment, for example, the South Carolina District Court explicitly recognized that

> 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) (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)).

This principle applies with even greater force in the context of a rule 12(b)(6) motion to dismiss, which when granted against a facially deficient complaint like the ones at issue here, can avoid forcing the defendant to incur substantial costs in discovery that are completely unnecessary and that can chill the exercise of free speech simply by forcing a publisher to incur such costs. Accordingly, the First Amendment values at issue in this case require serious

consideration of the grounds of Jones Street motions to dismiss and the injury to freedom of speech and press that will be caused if Jones Street is compelled to litigate these cases further.

2. The Fair Report Privilege

All factual statements contained in the *City Paper* op-ed are – by the allegations of the Complaints themselves – merely restatements of what was said in the public and official comments of School District officials concerning the watermelon ritual. Accordingly, those statements in the op-ed published by the *City Paper* fall squarely within the privilege of fair report.

The "fair report" privilege has long been recognized in South Carolina courts both under the common law and as a constitutional protection, and has been expressly adopted by the Fourth Circuit. *See Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 712 (4th Cir. 1991); *George v. Kay*, 632 F. 2d 1103, 1105 (4th Cir. 1980), *cert. denied*, 450 U. S. 1029 (1981); *Eubanks v. Smith*, 292 S. C. 57, 354 S. E. 2d 898 (1987); *Padgett v. Sun News*, 278 S. C. 26, 292 S. E. 2d 30 (1982); *McClain v. Arnold*, 275 S. C. 282, 270 S. E. 2d 124 (1980); *Jones v. Garner*, 250 S. C. 479, 158 S. E. 2d 909 (1968); *Lybrand v. State Co.*, 179 S. C. 208, 184 S. E. 580 (1936); *Oliveros v. Henderson*, 116 S. C. 77, 106 S. E. 855 (1921). While the early cases apply the privilege as a matter of common law, in *Padgett v. Sun News, supra*, the South Carolina Supreme Court recognized that there is a constitutional basis for the common law privilege, in that holding a publisher liable for an accurate report of a government official's statement or action would constitute liability without fault in violation of *Gertz v. Robert Welch, Inc.*, 418 U. S. 323 (1974).

The privilege protects those who accurately report the substance of statements, actions, proceedings, reports, or records of public officials or agencies, even if what was stated by the

government official turns out to be false and defamatory. As the Fourth Circuit has explained:

> "[The] fair report privilege shields news organizations from defamation claims when publishing information originally based upon government reports or actions. ... Government documents serve as 'the basic data of governmental operations.' *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492, 95 S. Ct. 1029, 1044, 43 L. Ed. 2d 328 (1975). The fair report privilege encourages the media to report regularly on government operations so that citizens can monitor them."

Reuber v. Food Chemical News, Inc., 925 F.2d at 712.

Further, as recently held by a South Carolina Circuit Court Judge, the privilege is not limited to official records or formal proceedings, but also applies to information provided informally by authorized public officials to the press. In *Brewster v. Laurens County Advertiser*, 40 Media L. Rep. 1978 (S.C. Cir. Ct. April 10, 2012) (copy attached), Judge Frank Addy, Jr., granted summary judgment for the defendant newspaper on the basis of the fair report privilege, holding that the privilege extended to information provided by email to the paper by a county sheriff's department employee. Many courts from other jurisdictions have held likewise, concluding that the fair report privilege covers the reporting of public statements made by public officials. *See, e.g.*, *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1992) (public statement of congressman); *Kilgore v. Younger*, 640 P.2d 793 (Cal. 1982) (report of statement made by official at press conference); *ELM Medical Laboratory, Inc. v. RKO General, Inc.*, 532 N.E.2d 675, 678 (Mass. 1989) (privilege extends to statements of public officials in news releases and interviews).

The standard of accuracy is one of substantial truth, except that it applies with respect to the act or statement on which the report is based rather than the underlying truth of the matter. "It is not necessary that [the report] be exact in every immaterial detail. ... It is enough that it conveys to the persons who read it a substantially correct account of the proceedings." RESTATEMENT (SECOND) OF TORTS § 611 comment f (1977). As long as the report is a fair and

accurate summary of a statement made by a public official or agency, the person reporting it does not have to investigate the underlying truth of the matter, nor may he be held liable for the negligence or bad faith of the person who was the source of the defamatory charge. *See Padgett,* 278 S.C. at 31, 292 S.E.2d at 34.

In short, regardless of whether the statement made by the public official is true or not, if the press accurately reports the content of that statement, the press is immune from liability. The constitutional values underlying this privilege are heightened significantly when, as in this case, the matter at issue is one of significant public interest and controversy. In this type of situation in particular, the press should not refrain from reporting on the matter for fear that they could be held liable for defamation if the official's statements turn out to be untrue.

The plaintiffs' own Complaints establish beyond dispute that the allegedly defamatory factual statements of the *City Paper*'s op-ed – as alleged by the very words used by the plaintiffs in their Complaints – fall within this privilege. The Complaints state 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," Complaint ¶ 8;
- "the team made monkey sounds and drew a monkey face on the watermelon," Complaint ¶ 8;
- "the plaintiffs [intended] to cast African American opponents in a derogatory light," Complaint ¶ 8;
- "[t]he defendants by their statements falsely accused the team and plaintiffs of being racially prejudiced," Complaint ¶ 8;
- "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,' " Complaint ¶ 9;

- "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,' " Complaint ¶ 9;
- "the sounds were 'monkey sounds,' " Complaint ¶ 10;
- "[plaintiffs' actions were] racially derogatory actions intended to equate black members of opposing football teams with monkeys," Complaint ¶ 10.

All statements to this effect contained in the op-ed are, by the allegations of the plaintiffs' Complaints, accurate reproductions of comments made publicly by School District Officials, and thus are protected by the fair report privilege. It is immaterial that the op-ed summarized or paraphrased the officials' comments. "The privilege does not require that the published report be verbatim of the official report but it must only be substantially correct." *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 254 (4th Cir. 1988). Because the *City Paper* presented a substantially accurate summary of the facts as represented by School District officials, Jones Street is immune from liability as a matter of law under the fair report privilege.

3. Protection for Expression of Opinion, Ideas, and Rhetorical Commentary

When the factual statements listed above are removed from the *City Paper* editorial, the allegedly defamatory content of what remains are statements that are clearly expressions of the writer's opinions, ideas and comments of rhetorical hyperbole. Under established doctrine, Jones Street cannot be held liable for such statements. This is an issue of law for the court to

decide. *E.g.*, *Chau v. Lewis*, 771 F.3d 118, 128 (2d Cir. 2014) ("Determining whether a statement is an allegation of fact or mere opinion is a legal question for the court.").

It is settled law that expressions of opinion are immune from liability for defamation. The reasons are manifold. They include the need to protect self-expression – "the freedom to speak one's mind ... [as] an aspect of individual liberty – and thus a good unto itself"[2] – and the societal and political value of public debate – "the common quest for truth and the vitality of society as a whole."[3] Against this backdrop, the United States Supreme Court declared at the outset of its opinion in *Gertz v. Robert Welch, Inc.*:

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

418 U.S. 323, 339-40 (1974).

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). Additionally, statements are protected if they "cannot 'reasonably [be] interpreted as stating actual facts' about an individual." This protection is important because it "provides assurance that public debate will not suffer for lack of 'imaginative expression' or 'rhetorical hyperbole' which has traditionally added much to the discourse of our nation." *Id.* at 20. In determining whether a statement can be "reasonably interpreted as an actual fact," the court considers the nature and purpose of the publication and whether the statement is "easily

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[2] *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503 (1984).

[3] *Bose,* 466 U.S. at 503-04.

susceptible (if at all) to 'proof' one way or the other." *Faltas v. State Newspaper*, 928 F. Supp. 637, 649 (D.S.C. 1996).

More recently, the Supreme Court recently explained that a fact, in contrast to an opinion, must assert something verifiable.

> A fact is "a thing done or existing" or "[a]n actual happening." Webster's New International Dictionary 782 (1927). An opinion is "a belief[,] a view," or a "sentiment which the mind forms of persons or things." *Id.*, at 1509[;] 7 Oxford English Dictionary 151 (1933) (an opinion "rests[s] on grounds insufficient for complete demonstration").

Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1325 (2015). Whether the use of a term is a hyperbolic expression of ideas or whether it implies a fact depends on the context in which the term is used. *Faltas,* 928 F. Supp. at 648. 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 v. Lewis, supra*, 771 F.3d at 129.

The crux of plaintiffs' Complaint against Jones Street involves the claim that the op-ed purportedly depicts plaintiffs as racists. Removing the statements that merely repeated what School District officials stated publicly about the watermelon ritual, the *City Paper* op-ed contains the following arguably defamatory statements concerning the AMHS football team and coach:

- "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."

None of these statements, to the extent they can be argued to have defamed the plaintiffs, 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. Whether the watermelon ritual was a "racist ritual" or "racist behavior," an act that "any sensible outside observer" would "perceive[] as racist," an example of "inadvertently ... hurtful racially offensive behavior" – these are all statements on which different persons may have different views and

sentiments. They are not facts that can be proved or disproved in a court of law, like whether the traffic light was green or red. They are the op-ed writer's opinions about what had been reported by School District officials in their public statements on the controversy.

Furthermore, the context of the op-ed was the "Views" section of the newspaper, and the watermelon ritual was a matter of public concern widely covered by local and national media. *See Snyder v. Phelps*, 562 U.S. 443, 131 S. Ct. 1207, 1216 (2011) (noting that, although "the boundaries of the public concern test are not well defined," its scope encompasses matters of public concern that can "be fairly considered as relating to any matter of political, social, or other concern to the community") (internal citations and quotation marks omitted). In the context of this public controversy, the op-ed published in the *City Paper* is a fundamental example of the type of public discourse protected by the First Amendment. *See Faltas*, 928 F. Supp. at 647 (discussing the circumstance under which the publication of a letter to the editor calling the plaintiff a liar was "simply 'hyperbole' which a reasonable reader would not take as stating actual facts").

By invoking the term "racist" in an opinion editorial about a sequence of events that involved facts disclosed by the School District Officials of and concerning a racially sensitive matter, the *City Paper* was simply publishing the editorial writer's views on a matter of public concern. As explained recently by the federal district court in *Forte v. Jones*,

> [T]he allegation that a person is a "racist" ... is not actionable because the term "racist" has no factually verifiable meaning. *See Overhill Farms, Inc. v. Lopez*, 190 Cal. App. 4th 1248, 1262, 119 Cal. Rptr. 3d 127 (4 Dist. 2010) ("charging a person with being racist, unfair or unjust – without more – [...] constitute mere name calling and do not contain a probably false assertion of fact" as is required to state a claim for defamation).
>
> ... [E]ven seen in the worst possible light, [the publication at issue] is merely an indication that someone (not necessarily Defendant) is of the impression that Plaintiff is a racist. Again, pursuant to *Overhill Farms*, where someone thinks

> another person is a racist and says so to a third person does not constitute publication of a defamatory statement because the statement is one of factual opinion that cannot be proven or disproven.

2013 WL 1164929, at *6 (E.D. Cal. 2013).

Indeed, it is telling that the *City Paper* is the only publication that the plaintiffs have attacked, despite the widespread coverage of the controversy in local and national news media. This fact demonstrates that it is the *City Paper*'s editorial expression of opinion, not any factual statements reported by the newspaper, with which the plaintiffs take issue. All of the factual statements on which these lawsuits are predicated, the facts as represented by the School District officials, were reported by numerous other publications and broadcast media. Yet plaintiffs have not sued any of those media companies – only the small business that publishes the *Charleston City Paper.* The only thing that distinguishes Jones Street from the other media that reported on this matter is the strong editorial position taken in the *City Paper*'s op-ed. That editorial position is a constitutionally protected expression of opinion and commentary.

The op-ed's use of strong rhetoric to express its writer's opinions does not remove this protection – "rhetorical hyperbole" and "vigorous epithet" do not give rise to liability for defamation. *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 14 (1970); *see also 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 v. Colangelo*, 434 F. Supp. 2d 1369, 1385 (S.D. Fla. 2006) (quoting *Time, Inc. v. Johnston*, 448 F.2d 378, 384 (4th Cir. 1971); *Roth v. United States*, 354 U.S. 476, 484 (1957)).

In short, all factual statements in the *City Paper*'s op-ed are protected by the fair report

privilege, and all other allegedly defamatory statements are protected expressions of ideas, opinions, and rhetorical commentary. Nothing remains on which a valid claim of defamation can be based.

4. Individual Plaintiffs Were Not Defamed by Derogatory Statements about their Team

Plaintiffs' defamation claims also fail because nothing in the op-ed refers to any individual member of the AMHS football team, including any of the plaintiffs. The law does not allow individuals to bring actions for defamation where there is no reasonable identification of the individual as the subject of the alleged defamatory statement.

"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 op-ed article 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. 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 (2nd 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) (copy attached). The court 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.

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).

The *City Paper's* op-ed made only general statements about the editorial writer's perception of the watermelon ritual and the conduct of the AMHS football team as a whole. The *City Paper* did not publish any facts or commentary specific to any particular member of the AMHS football team, and none of the plaintiffs can specifically demonstrate to the Court any statement in the op-ed that reasonably refers to any of them individually. Accordingly, Jones Street is entitled to the dismissal of the defamation claims against it.

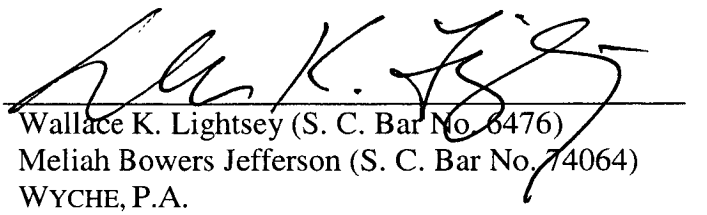
CONCLUSION

Our system of freedom of speech and of the press does not allow someone to bring suit against the news media for accurately and truthfully reporting the substance of public comments made by public officials on a matter of public controversy. Our system of freedom of speech and of the press does not allow someone to sue another based on expressions of opinion. Our system

of free speech and press does not allow a member of a group to bring suit because the group has been criticized without singling out individuals.

The Court should dismiss this action as against Jones Street with prejudice.

Respectfully submitted,



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ATTORNEYS FOR DEFENDANT JONES STREET PUBLISHERS, LLC

Date: May 6, 2015

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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CERTIFICATE OF SERVICE

This is to certify that I have this date caused to be served a true and correct copy of the within and foregoing defendant Jones Street Publishers, LLC's Memorandum in Support of Its Motion to Dismiss on counsel of record in this action by causing the same to be deposited in the United States mail, first class postage affixed, addressed as follows:

John E. Parker, Esq.
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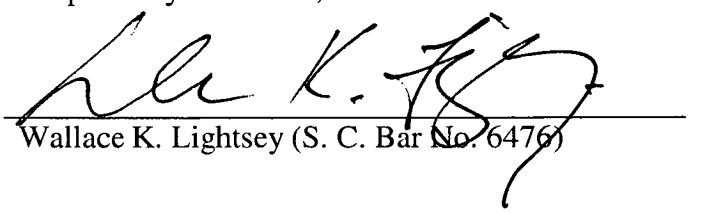

Date: May 6, 2015

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

EXHIBIT A

HAIRE OF THE DOG | BY CHRIS HAIRE

Mob Rules

School board forces out superintendent for firing coach who condoned racist ritual

My friends across the United States, don't believe the hype. Charleston is not the No. 1 city in the United States. I'm sorry you've been led to believe this. I truly am.

Yes, we have a great and wonderful town, full of colonial charm and history and friendly pride. We're home to great chefs and great restaurants, a truly great arts festival, and a music scene that's on the edge of breaking through.

Cary Ann and Michael, love ya. Sean Brock, I just ordered your cookbook. Spoleto, Memorial Day weekend can't get here soon enough.

From the Battery to Upper King, the Ashley to the Cooper, we are truly one of the most beautiful cities in the country, if not the world. I love Charleston more than I've loved any other city — and I lived in Honolulu with the ocean right out my bedroom window and the mountains to my back.

But goddammit, this town is rotten with racists.

Not only do we have a Confederate flag-waving, Southern apologist heading up the College of Charleston, now the Charleston County School District Board of Trustees has forced Superintendent Nancy McGinley out of her job because she dared to fire a football coach who condoned a racist act.

Honestly, I had no idea that this was how the Coach Bud Walpole controversy would play out. I don't think anyone really did. The ouster of McGinley is every bit as surprising as one of George R. R. Martin's wedding-day bloodbaths. But it's even more brutal than the *Game of Thrones* author could have conjured up because McGinley was in the right to give Walpole the boot — and the board should've backed her.

The Academic Magnet coach had to know that his players were engaging in a ritual that would be perceived as racist by any sensible outside observer. If you don't already know, a racist caricature had been drawn on a watermelon and then smashed each time the largely white football team defeated their predominantly African-American competitors. Even worse, they reportedly made monkey sounds when they did it.

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

But none of that explains how we got here — with Charleston's most successful superintendent being escorted from office by pitchfork.

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

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

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

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

UNPUBLISHED OPINIONS

2012 WL 4767052 (S.C.Com.Pl.), 40 Media L. Rep. 1978 (Trial Order)
Court of Common Pleas of South Carolina.
Laurens County

Edward C. BREWSTER, Plaintiffs,

v.

LAURENS COUNTY ADVERTISER, Defendant.

No. 2010-CP-30-1186.
April 6, 2012.

Order Granting Defendant's Motion for Summary Judgment

Hon. Frank R. Addy, Jr., Judge.

***1** This matter is before the Court on Defendant Laurens County Advertiser's motion for summary judgment. For the reasons stated below, the Court grants the motion.

The material facts are not in dispute. This lawsuit arises from Defendant's publication of a newspaper article concerning an arrest, entitled "Agencies collaborate to end recent robberies," printed on July 15, 2009. The article included Plaintiff's mug shot and reported that "Edward Brewster, 52, of South Harper Street Extension" was one of four men arrested by the Laurens County Sheriff's Office, Laurens Police Department, and Spartanburg County Sheriff's Office in response to a series of armed robberies.

Unfortunately, it was Plaintiff's brother Teddy who was arrested for the robberies, not Plaintiff. Plaintiff and Teddy reside at the same address and were born just one year apart. Plaintiff and Teddy were arrested on July 3 and July 10, 2009, respectively, and the Laurens County Sheriff's Office mistakenly emailed Plaintiff's name and mug shot to Defendant's reporter in connection with their report of the arrest. Plaintiff's name and mug shot appeared in the article in question exactly as they appeared in the report sent from the police to Defendant's reporter. The information provided to the Defendant by the Sheriff's Office came from an official, authorized source within the Sheriff's Office, and was information provided "on the record" from the official source to the news media.

It is undisputed that the article is a completely accurate report of the information provided by the police agency responsible for the arrests, which Defendant's reporter considered reliable. He had no knowledge of the mistake made by the Sheriff's Office at the time the article was published, and there is no evidence that Defendant's reporter knew or should have known of the mistake on the part of the police agency. Defendant asserts, and the Court agrees, that these facts bring the newspaper article within the "fair report" privilege.

This privilege has been recognized in South Carolina both under the common law and as a constitutional protection. The privilege applies to fair and accurate reports of judicial records and proceedings and other governmental actions, reports, and documents. *See Cobin v. Hearst-Argyle Television, Inc.,* 561 F. Supp. 2d 546, 550 (D.S.C. 2008) ("South Carolina recognizes the fair report privilege."); *see also George v. Kay,* 632 F. 2d 1103, 1105 (4th Cir. 1980) (applying South Carolina law), *cert. denied,*450 U. S. 1029 (1981); *Eubanks v. Smith,* 292 S. C. 57, 354 S. E. 2d 898 (1987); *Padgett v. Sun News,* 278 S. C. 26, 292 S. E. 2d 30 (1982); *McClain v. Arnold,* 275 S. C. 282, 270 S. E. 2d 124 (1980); *Jones v. Garner,* 250 S. C. 479, 158 S. E. 2d 909 (1968); *Lybrand v. State Co.,* 179 S. C. 208, 184 S. E. 580 (1936); *Oliveros v. Henderson,* 116 S. C. 77, 106 S. E. 855 (1921). While the early cases discuss and apply the privilege under the common law, in *Padgett v. Sun News, supra,* the South Carolina Supreme Court recognized that there is a constitutional basis for the common law privilege, in that holding a publisher liable for

an accurate report of information obtained from a governmental record or proceeding would constitute liability without fault in violation of *Gertz v. Robert Welch, Inc.*, 418 U. S. 323 (1974).

***2** In general, the "fair report" privilege protects those who accurately report the substance of government proceedings, acts, reports, or documents that turn out to contain false and defamatory information about a person. To come within the privilege, the report must be accurate, fair, and impartial; it may not contain defamatory matter extraneous to the record, act, document, or proceeding being reported; and it may not be made with actual malice. *See Jones v. Garner, supra,*250 S.C. at 158; *Lybrand v. State Co., supra; Oliveros v. Henderson, supra.* As the Fourth Circuit has explained:

"[The] fair report privilege shields news organizations from defamation claims when publishing information originally based upon government reports or actions.... Government documents serve as 'the basic data of governmental operations.' *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 492, 95 S. Ct. 1029, 1044, 43 L. Ed. 2d 328 (1975). The fair report privilege encourages the media to report regularly on government operations so that citizens can monitor them."

Reuber v. Food Chemical News, Inc., 925 F.2d 703, 712 (4th Cir. 1991).

As long as the report is a fair and accurate summary of the governmental act, proceeding, or record, the person reporting it does not have to investigate the underlying truth of the matter, nor may he be held liable for the negligence or bad faith of the person who was the source of the information reported. *See Padgett, supra,* 278 S.C. at 31, 292 S.E.2d at 34. Thus, the privilege protects the publisher from liability even if the information provided by the government is discovered to be false and defamatory. *Cobin v. Hearst-Argyle Television, Inc.*, 561 F. Supp. 2d 546, 550 (D.S.C. 2008) (applying South Carolina law). The privilege "is not measured by the legal sufficiency of the charges made ... or the truth of those charges. The privilege consists of making a fair and substantially true account of the particular proceeding or record." *Padgett,* 278 S.C. at 31, 292 S.E.2d at 33 (quoting *Alexandria Gazette v. West,* 198 Va. 154, 160, 93 S.E.2d 274, 279 (1956)). Therefore, if a publication is a fair and accurate summary of a police report, the publisher has no duty to investigate the underlying truth of the report and he is protected by the privilege, even if the information in the police report is discovered to be false.

That is exactly the case here. The article that printed Plaintiff's name and mug shot in connection with arrests for several armed robberies was a fair and accurate report of information provided to Defendant's reporter on the record by an official and authorized source within the Laurens County Sheriff's Office.

At the motion hearing, counsel for the Plaintiff argued that the privilege was not applicable, citing to the following language from the South Carolina Court of Appeals decision in *West v. Morehead,* 2011 WL 4025724 (S.C. App. 2011): "[t]he privilege extends only to a report of the contents of the public record and any matter added to the report by the publisher, which is defamatory of the person named in the public records, is not privileged." *Id.* at *2 (quoting *Jones, supra,* at 487, 158 S.E.2d at 913). Plaintiff asserts that because the information concerning the Plaintiff was provided to the Defendant by email rather than through an official press release or other formal document, the privilege does not apply here. The Court finds that this is not a material distinction. Neither *West v. Morehead* nor any other case cited by the parties has held the privilege to be limited in this manner. Because the information provided to the Defendant by the Sheriff's office was on the record, concerned an official act by the Sheriff's Department (the arrest of Plaintiff's brother), and came from an official, authorized, and proper source within the Sheriff's Department, the Court finds that the privilege applies to the Defendant's publication of the information.

***3** In a nearly identical factual scenario, the Missouri Court of Appeals in *Biermann v. Pulitzer Publ'g Co.*, 627 S.W.2d 87, 87-88 (Mo. Ct. App. 1981), found summary judgment for the defendant newspaper to be appropriate when the newspaper erroneously reported that the plaintiff was arrested on several drug charges. The newspaper received the defendant's name from the local police department, and the reporter believed the information contained in the article was true when it was published. *Id.* Like the newspaper in *Biermann,* Defendant is immune from liability. The article was a fair and accurate report of information provided by the Laurens County Sheriff's Office, thus Defendant had no duty to investigate the underlying truth of the arrest report, and it is immaterial that Plaintiff was not actually arrested in connection with the charges reported in the newspaper

article (though, as noted above, he was arrested just a week before that). Accordingly, Defendant's publication, as a matter of law, comes within the protection of the fair report privilege.

In order to overcome the privilege, the Plaintiff bears the burden of presenting clear and convincing evidence of common law actual malice as well as constitutional actual malice. A defendant acts with common law actual malice when he acts "with ill-will towards the plaintiff or ... recklessly or wantonly, meaning with conscious indifference toward plaintiff's rights." *Padgett,* 278 S.C. at 32, 292 S.E.2d at 34 (quoting *Rogers v. Florence Printing Co.,* 233 S.C. 567, 577, 106 S.E.2d 258, 263 (1958)). By contrast, constitutional actual malice means knowledge of falsity or reckless disregard for the truth. *See, e.g., Anderson v. Augusta Chronicle,* 365 S.C. 589, 594, 619 S.E.2d 428, 431 (2006); *Fleming v. Rose,* 350 S.C. 488, 567 S.E.2d 857 (2002); *George v. Fabri,* 345 S.C. 440, 548 S.E.2d 868 (2001); *Holtzscheiter v. Thompson Newspapers, Inc.,* 332 S.C. 502, 506 S.E.2d 497 (1999). In *George v. Fabri,* the South Carolina Supreme Court adopted as a matter of state law the holding of *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S. Ct. 2505 (1986), that the standard of "clear and convincing evidence" of actual malice applies to summary judgment motions when a constitutional privilege requires a showing of actual malice. This standard was reaffirmed in *Fleming v. Rose, supra.*

The Plaintiff concedes that he has no evidence of malice on the part of the Defendant. Accordingly, the Plaintiff has not presented sufficient proof to withstand Defendant's motion for summary judgment.

In a very similar case, the defendant newspaper in *Wilson v. Capital City Press,* 315 So.2d 393, 398 (La. Ct. App. 1975), received a list of suspects who were arrested in a drug raid directly from the police department responsible for organizing the raid. *Wilson,* 315 So.2d at 395. The plaintiff's name was on the list and printed in the newspaper, but the plaintiff had not been arrested. *Id* at 393. The Louisiana Court of Appeals held that the newspaper was not liable for defamation as a matter of law, because the publication of plaintiff's name was based on information received from a proper and authorized source within the police department; thus there was no duty on the part of the publisher to investigate further and no showing of actual malice. *Id.* at 397-98. As in *Wilson,* there is no proof here that Defendant's reporter acted recklessly or wantonly with conscious indifference toward Plaintiff's rights, or had knowledge or reason to know that the Sheriff's Office had provided the wrong name.

Consequently, Plaintiff is unable to overcome the fair report privilege. Defendant is immune from liability as a matter of law. For these reasons, the Court grants Defendant's motion for summary judgment and dismisses Plaintiff's Complaint with prejudice.

So ordered.

April 6, 2012

<<signature>>

Hon. Frank R. Addy, Jr. Judge, South Carolina Circuit Court

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122 F.3d 1062
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. See CTA4 Rule 32.1.
United States Court of Appeals, Fourth Circuit.

James F. OUTLAW, Plaintiff-Appellant,
v.
STANDARD PRODUCTS COMPANY, Defendant-Appellee.

No. 96-1960. | Submitted August 5, 1997. | Decided September 17, 1997.

Appeal from the United States District Court for the District of South Carolina, at Spartanburg. Henry M. Herlong, Jr., District Judge. (CA-95-1787)

Attorneys and Law Firms

J. Andrew Williams, Greenville, South Carolina, for Appellant.

Louis A. Colombo, Michael K. Farrell, BAKER & HOSTETLER, Cleveland, Ohio, for Appellee.

Before HALL, WILKINS, and NIEMEYER, Circuit Judges.

PER CURIAM:

OPINION

*1 James Outlaw appeals from the district court's order and order on reconsideration granting summary judgment to Standard Products Company ("Standard"), Outlaw's former employer, in this action alleging that Standard defamed Outlaw by allegedly making false statements to two industry trade journals and a Cleveland, Ohio, daily newspaper, about the circumstances surrounding Outlaw's termination. Outlaw was one of seventeen managers terminated by Standard after Corporate executives determined that the plant was being managed poorly. The two trade journals published very similar articles, and reported that a Standard "spokesman" said that "cost control, pricing and management issues were at the core of the problems at the Spartanburg plant." The daily paper reported the same problems at the plant but did not attribute any statements to a company spokesperson. All three articles reported that Ted Zampetis, the president of Standard, stated that the managers at the plant did not appreciate the gravity of the problems at the plant. The two trade journals quoted Zampetis as saying that "management there didn't seem to realize how serious the problem was," while the daily paper quoted him as saying that "[s]ome people just had their heads in the clouds."

Outlaw alleges that these statements are the "heart" of his defamation claim. The district court granted Standard summary judgment, and subsequently denied reconsideration, on the grounds that no publication occurred, that the allegedly defamatory statements were not "of and concerning the plaintiff," and that the statements were either substantially true or nonprovable opinions. The district court's opinion relies in part on state law, and in part on First Amendment law, to support its holdings. The extent, however, to which First Amendment protections usurp state standards in defamation cases depends on factors such as whether the plaintiff is a private individual or a public official, whether the defendant is a media entity, and whether the statements at issue are of public or private concern. *See Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1091-92 (4th Cir.1993); *Faltas, MD, MPH v. State Newspaper*, 928 F.Supp. 637, 644 (D.S.C.1996). The district court did not discuss these factors. We, however, will generally decline to consider constitutional issues in a defamation case where it can be disposed of under state defamation law. *See Lapkoff v. Wilks*, 969 F.2d 78, 81 (4th Cir.1992). Because we find that this case can be decided under state defamation law, we decline to determine the extent, if any, to which First Amendment protections insulate Standard from liability in this case.

While the parties disagree over whether Ohio or South Carolina law applies to this case, the dispute is inconsequential because both states require, among other things, publication, falsity, and that the defamation be about the plaintiff. *See Parker v. Evening Post Publishing Co.*, 452 S.E.2d 640, 644 (S.C.Ct.App.1994); *National Media Serv. Corp. v. E.W. Scripps Co.*, 573 N.E.2d 1148, 1149 (Ohio App.1989). To survive Standard's summary judgment motion, Outlaw had to produce evidence of specific facts establishing each of these essential elements. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is appropriate unless the evidence favoring the non-moving party is sufficient for a jury to return a verdict for that party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

***2** In this case, we find that there is no genuine issue for trial concerning the falsity of the statements asserted in the articles. Outlaw does not deny that the problems mentioned in the articles existed at the plant. Instead, he asserts that these problems could not have been his fault because they existed before he arrived at the plant. He therefore reasons that the articles are false because they inaccurately imply that he, as a member of "management," was at least partly responsible for these problems. We disagree.

The information contained in the articles does not logically support the inference that Outlaw was guilty of mismanagement at the plant, or personally responsible for any of the problems there. The articles merely state that there were problems at the plant attributable to mismanagement, an assertion which Outlaw does not dispute is true. A reasonable person could only conclude that Outlaw bore personal responsibility for problems at the plant based on information extrinsic to the articles, such as the fact that Outlaw was a manager at the plant, and that he was terminated from his position. The articles therefore neither state nor imply any falsity.

We also agree with the district court that the articles do not refer to Outlaw specifically. Construing the reference requirement in the context of Maryland law, we have held that the publication at issue "must contain some 'special application of the defamatory matter' to the individual." *Aids Counseling & Testing Ctrs. v. Group W Television, Inc.*, 903 F.2d 1000, 1005 (4th Cir.1990) (quoting *Arcand v. Evening Call Pub. Co.*, 567 F.2d 1163, 1164 (1st Cir.1977)). We concluded that reference to a group does not implicate the individual members of the group. *Id.* As the district court noted, in this case none of the articles mentions Outlaw or any other employee by name or title. The reference to "management" refers to a group, and therefore does not implicate Outlaw.

Accordingly, we conclude that under either Ohio or South Carolina law, there is insufficient evidence to create a genuine issue for trial as to whether the statements at issue were false or concerned the Plaintiff. Because Outlaw's inability to establish these essential elements of his action is dispositive, we need not address the parties' remaining contentions. We therefore affirm the decision of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

Parallel Citations

1997 WL 577579 (C.A.4 (S.C.)), 25 Media L. Rep. 2470

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