THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Kristi Lea Harrington, Circuit Court Judge

Supreme Court Case No. 2021-001520
Appellate Case No. 2018-000791
Case No. 2016-CP-08-0131

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S.C. SUPREME COURT

Jeffrey Lance Cruce, Petitioner,

v.

Berkeley County School District, Respondent.

# BRIEF OF PETITIONER

Nancy Bloodgood, Esquire
Lucy C. Sanders, Esquire
BLOODGOOD & SANDERS, LLC
242 Mathis Ferry Road, Suite 201
Mt. Pleasant, SC 29464
(843) 972-0313
*Counsel for the Petitioner*

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2. Whether the Court of Appeals erred by relying on its holding in Garrard v. Charleston County School District, 429 S.C. 170, 838 S.E.2d 698 (2019) to support its holding in this case.

## INTRODUCTION

South Carolina law regarding the definitions of public officials and limited public figures has previously been based on the holdings of the United States Supreme Court and an analysis of the First Amendment in the context of the public's right to criticize government. Here, the Court of Appeals erred as a matter of law by not following Federal and State precedent. As Justice Toal noted in 1998:

> Since the 1960's, the Supreme Court has attempted "to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325, 94 S. Ct. 2997, 3000, 41 L.Ed.2d 789, 797 (1974). The effect of these decisions has been the interweaving of federal constitutional principles into the fabric of state defamation law. Because state defamation rules have become inextricably tied to these constitutional principles, it is not possible to review defamation issues in a state law vacuum.

Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 517, 506 S.E.2d 497, 505 (1998) (Toal, J., concurring) (referred to as Holtzscheiter II). In this case, the Court of Appeals erred by failing to follow federal precedent when it decided Petitioner should have less protection from defamation as a result of his status as a public employee.

This case involves a defamation *per se* claim brought by a former high school athletic director and football coach based on an email a jury found to be defamatory. The email was circulated to scores of persons after Respondent terminated Petitioner's employment as athletic

director and football coach. The email stated Petitioner's maintenance of student files had created a liability to the school.

The Tort Claims Act exempts governmental entities from liability arising from employee conduct which constitutes actual malice, yet in this case Petitioner never alleged or argued actual malice was present. However, in defending Petitioner's claim, Respondent alleged Petitioner was a public official or limited public figure because if Petitioner was classified in either of these two (2) categories he would be required to prove actual malice to support his defamation claim, which would subject his claim to possible dismissal pursuant to the South Carolina Tort Claims Act, S.C. Code §15-78-10 *et seq*.

The Lower Court properly held Petitioner was not a public official or limited public figure. The Court of Appeals reversed the Lower Court's finding but erred in failing to follow precedent. Not only did the Court of Appeals err by ignoring precedent, it erred by deciding this case solely based on its previous decision in Garrard v. Charleston County School Dist., 429 S.C. 170, 838 S.E.2d 698 (Ct. App. 2019), a case which also misapplied the standard for public officials and for which this Court has accepted a Petition for Certiorari.

## STANDARD OF REVIEW

"When reviewing a trial court's ruling on a directed verdict motion, [an appellate] court will reverse if no evidence supports the trial court's decision or the ruling is controlled by an error of law." Burnett v. Family Kingdom, Inc., 387 S.C. 183, 188, 691 S.E.2d 170, 173 (Ct. App. 2010). "When reviewing a ruling on a motion for a directed verdict, we must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party." Hurd v. Williamsburg County, 363 S.C. 421, 426, 611 S.E.2d 488, 491 (2005) (citing F & D Elec. Contractors, Inc. v. Powder Coaters, Inc., 350 S.C. 454, 458, 567 S.E.2d 842, 843 (2002)).

## STATEMENT OF THE CASE

Petitioner filed a Complaint in Berkeley County Court of Common Pleas on January 20, 2016 alleging two (2) causes of action: wrongful discharge in violation of public policy and defamation *per se*. (App. pp. 18-34.) Respondent filed an Answer on April 25, 2016 generally denying the allegations. (App. pp. 35-45.) A trial was held September 5-7, 2017, presided over by Judge Kristi Harrington. (App. p. 146.) At the close of Petitioner's case-in-chief and again at the close of evidence, Respondent made a motion for a directed verdict. Respondent moved for a directed verdict on the wrongful discharge claim and stated only three (3) bases for its directed verdict motion as to the defamation claim: Respondent was a "limited public figure" (App. p. 429¸ line 21—p. 449, line 8); the January 7th email was not false and defamatory (App. p. 465, lines 11-18); and the January 7th email was privileged. (App. p. 474, lines 1-4.) Appellant included only two (2) of these three (3) directed verdict arguments in its appeal; specifically, Respondent is a "limited public figure" (App. p. 1006)[1] and the January 7th email was not false and defamatory (App. p. 1013). The trial court granted Respondent's motion for directed verdict as to the wrongful termination claim but denied Respondent's motion as to the defamation claim and allowed the defamation *per se* claim to proceed to the jury. The jury deliberated more than six (6) hours and returned a verdict in favor of Petitioner. (App. pp. 16-17; pp. 519-521.)

[1] Respondent argued after the trial was over, in its post-trial motion for JNOV, that Petitioner was a "public official." As a JNOV under Rule 50 (b) SCRCP is essentially a renewal of the motion for a directed verdict (Chapman v. Upstate RV & Marine, 364 S.C. 82, 88, 610 S.E.2d 852, 856 (Ct. App. 2005)), the trial court could not consider argument on matters that were not raised in the directed verdict including whether Petitioner was a public official. "A motion for judgment notwithstanding the verdict is a renewal of the directed verdict motion and cannot raise grounds beyond those raised in the directed verdict." Roland v. Palmetto Hills, 308 S.C. 283, 286, 417 S.E.2d 626, 628 (Ct. App. 1992) The issue of whether Petitioner is a public official should not have been considered by the Court of Appeals as it was not raised or ruled on at the directed verdict stage of trial and the terms public official and limited public figure are not synonymous.

Respondent filed a Motion for Judgment Notwithstanding the Verdict or in the Alternative a New Trial Absolute or a New Trial Nisi Remittitur September 26, 2017. (App. pp. 46-64.) Petitioner filed a Response on October 4, 2017 (App. pp. 65-73) and Respondent filed a Reply (App. pp. 70-83). A hearing was held on Respondent's Motion before the trial judge on March 7, 2018. (App. pp. 84-145.) Judge Harrington issued an Order denying Respondent's post-trial Motion on March 29, 2018. (App. p. 5.)

Respondent appealed to the Court of Appeals. A hearing was held before the Court of Appeals on February 2, 2021. On September 1, 2021, the Court of Appeals issued an Order in this matter, reversing the trial court and the verdict on the basis Petitioner was a public official. Cruce v. Berkeley County School Dist., 435 S.C. 7, 21, 865 S.E.2d 391, 398 (Ct. App. 2021), reh'g denied (Dec. 2, 2021), cert. granted (Sept. 7, 2022).

Petitioner filed a Motion for a Rehearing on September 15, 2021. (App. pp. 1080-91.) An Order denying the Petition for a Rehearing was issued on December 2, 2021. (App. p. 1092.) Petitioner filed a Petition for Certiorari on December 29, 2021. Respondent filed a Return to Petitioner's Writ of Certiorari on February 17, 2022, Petitioner filed a Reply Brief, and Certiorari was granted on September 7, 2022.

## STATEMENT OF FACTS

Petitioner was a high school teacher in Berkeley County for 28 years, an athletic director in at various high schools for a total of 21 years, and head football coach at Berkeley High School before he was terminated as the athletic director and football coach, and reassigned to teach at a middle school in January of 2016. (App. p. 173, lines 6-22; p. 175, lines 2-8; p. 176, line 11—p. 178, line 4; p. 183, lines 13-16; p. 246, line 19—p. 247, line 20; p. 539.) Berkeley High School is

one of seven (7) high schools located in Berkeley County. Berkeley County is one of forty-six counties in South Carolina.

In the 28 years he was a teacher, Petitioner was never disciplined. (App. p. 177, lines 8-10.) Petitioner was "Athletic Director of the Year" for his region the year before he was terminated. (App. p. 218, lines 21-22.) As athletic director, Petitioner was the only person certified to maintain student athlete eligibility files ("eligibility files") in Berkeley County and the eligibility files Petitioner maintained were audited by the State high school league three (3) times a year. (App. p. 224, line 18- p. 225, line 14; p. 226, lines 2-6.) Petitioner had received a clean audit from the high school league a few months before he was terminated as athletic director. (App. p. 226, lines 16-24.)

The three (3) stated reasons why Petitioner was fired as athletic director and football coach, and transferred to teach at a middle school had nothing to do with maintaining student athlete files. (App. pp. 541-542.) After Petitioner was fired as football coach, several of Appellant's employees, including athletic trainer Chris Stevens, went into Petitioner's office and started going through the student athlete files. (App. p. 398, line 1- p. 399, line 4.) Chris Stevens thought there were documents missing from the files and he prepared and sent an email on January 7, 2016 to 45 persons, some of whom Petitioner did not know, stating there were records missing from the eligibility files and the files created a liability to the school, inferring Petitioner was unfit for his job. (App. pp. 282-284 line 7; p. 399; pp. 543-44.) Petitioner alleged the statements were false and defamatory.

## LEGAL ARGUMENT

### I. The Court of Appeals failed to follow Federal and State precedent regarding the definitions of Public Official and Limited Public Figure.

#### A. The Court of Appeals failed to follow Federal and State precedent regarding the definition of Public Official.

The Court of Appeals erred in holding that the Petitioner, a public school employee, was a public official.[2] Although the definition of public official has been broadened since 1964 to include persons other than only appointed and elected persons, few states have gone so far as to apply the concept of public official to high school football coaches and teachers. This Court has always followed federal precedent when deciding under what circumstances a person should have less protection from defamation due to his or her position in government, yet the Court of Appeals failed to properly apply and follow federal precedent in deciding this case.

In New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964), the United States Supreme Court addressed for the first time the issue of defamatory criticism of a public official as it relates to the First Amendment.[3] The Supreme Court held that public officials acting in an executive, legislative or judicial capacity must expect criticism, and unless the criticism is accompanied by actual malice, public officials cannot prevail on a defamation claim.

> The theory of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of

[2] The issue of whether Petitioner was a public official was not properly preserved for review. Respondent's appeal was based solely on the trial court's ruling on its motion for directed verdict and was, therefore, limited to the issues raised and ruled upon by the trial court regarding Respondent's motion. As stated above, Respondent stated only three (3) bases for its directed verdict motion as to the defamation claim, one of which was that Petitioner was a limited public figure. Respondent never argued during its directed verdict motion that Petitioner was a public official or a public figure, only that he was a limited public figure.

[3] It is important to note that this case is not a First Amendment case and does not involve any statements published in newspapers as is the case in Garrard, *supra*. The defamation here took the form of a derogatory email published to scores of people stating Petitioner was a liability to the County.

> public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious. In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity must expect that his official acts will be commented upon and criticized. Such criticism cannot, in my opinion, be muzzled or deterred by the courts at the instance of public officials under the label of libel.

376 U.S. at 298–99, 84 S. Ct. at 736 (Goldberg, J., concurring) (emphasis added).

The rationale underlying the New York Times holding was that "[t]he right of free public discussion of the stewardship of public officials was … a fundamental principle of the American form of government." Id. at 275, 84 S. Ct. at 723. "[F]or 'public men, are, as it were, public property,' and 'discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled.'" Id. at 268, 84 S. Ct. at 720 (quoting Beauharnais v. Illinois, 343 U.S. 250, 263-64, 72 S. Ct. 725, 734 (1952)).

Two years later, the United States Supreme Court decided the case of Rosenblatt v. Baer, 383 U.S. 75, 86 S. Ct. 669 (1966). In Rosenblatt, the Court reiterated that strong debate on public issues should be protected as well as the criticism of governmental officials who have, or appear to have, substantial responsibility for or control over the conduct of governmental affairs:

> We remarked in New York Times that we had no occasion "to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included." No precise lines need be drawn for the purposes of this case. The motivating force for the decision in New York Times was twofold. We expressed 'a profound national commitment to the principle that debate on public issue should be uninhibited, robust, and wide-open, and that (such debate) may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very

> center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.

383 U.S. at 85, 86 S. Ct. at 675-676 (internal citations omitted) (emphasis added).

Thus, although the definition of public official in Rosenblatt was expanded to include government employees who had "substantial control of or responsibility for governmental affairs," the definition of public official remained limited. As Justice Douglas noted in his concurrence in Rosenblatt, whereas the New York Times case dealt only with an elected official, Rosenblatt expanded the definition to unelected government officials. 383 U.S. at 88, 86 S. Ct. at 677. However, those public officials were still required to have substantial responsibility for or control over the conduct of governmental affairs.

South Carolina Supreme Court cases that have addressed this subject have all acknowledged there is a constitutional basis underpinning the definition of public official. In fact, this Court has never deviated from the premise that public officials are persons who have significant control over or responsibility for governmental affairs. This Court has consistently followed federal precedent when deciding under what circumstances a person should have less protection from defamation due to his or her position in government as illustrated by the cases of Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 506 S.E.2d 497 (1998) (Holtzscheiter II) and Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 629 S.E.2d 653 (2006).

Although the issue of whether the plaintiff was a public official was not at issue in Holtzscheiter II, Justice Toal cited federal case law in her concurring opinion to define the test for determining classification as a public official. She wrote:

> [T]he 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. In considering the question whether one is a 'public official,' the 'employee's position must be one [that] would invite scrutiny and discussion of the person holding it, entirely apart from the particular scrutiny and discussion occasioned by the particular charges in controversy.'

332 S.C. at 520 n.4, 506 S.E.2d at 507 n.4 (Toal, J., concurring) (quoting Rosenblatt, 383 U.S. at 85-86, 86 S.Ct. at 676) (emphasis added). Further, as this Court noted in Erickson, "no one factor is dispositive in the analysis" of whether a particular individual is a public official for purposes of a defamation action. 368 S.C. at 471, 629 S.E.2d at 667. In Erickson, this Court found a plaintiff who was a private guardian *ad litem* was not a public official because she was not a government employee, "much less an official who has or would appear to the public to have substantial responsibility for or control over the conduct of government affairs." Id. Similarly in this case, Petitioner as a public high school football coach, athletic director, and teacher did not have substantial responsibility for, or control over, the conduct of governmental affairs because coaching football, teaching and maintaining student athlete files as athletic director are not governmental affairs. Moreover, at the time he was defamed, Petitioner only held a position as a public school teacher.

As this Court noted in Erickson:

> Since *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964), federal and state courts have 'sought to define the accommodation required to assure the vigorous debate on public issues that the First Amendment was designed to protect while at the same time affording protection to the reputations of individuals.' *Hutchinson v. Proxmire,* 443 U.S. 111, 133–34, 99 S. Ct. 2675, 2687 (1979).

368 S.C. at 467, 629 S.E.2d at 665. The Court of Appeals' decision in this case is in direct conflict with federal precedent. The New York Times standard allows defamatory criticism of persons in

elected offices who acted on behalf of the public in an executive, judicial or legislative manner. 376 U.S. at 298-299, 84 S. Ct. at 736. Although Rosenblatt expanded the definition of public officials to include not only elected and appointed government officials, but also some unelected officials and employees, the definition of public official remained quite narrow and was only expanded to include those government employees "who have, or appear to have, substantial responsibility for or control over the conduct of government affairs." 383 U.S. at 85, 86 S. Ct. at 675-676. (emphasis added). As explained in Rosenblatt and cited in Holtzscheiter II, the position must be a position that invites scrutiny of the person holding it, not only scrutiny of the issue. Thus, the analysis is two-fold: does the government employee have substantial responsibility for or control over the conduct of governmental affairs and does the employee's position invite scrutiny of the person, apart from scrutiny of the issue?

Until 2019, the Court of Appeals adhered to this Court's decisions regarding public officials. In 2001, the Court of Appeals followed precedent established in this Court's holdings in Holtzscheiter II and Erickson and held an assistant principal was not a public official because "[h]is position as assistant principal is not one 'among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.'" Goodwin v. Kennedy, 347 S.C. 30, 45, 552 S.E.2d 319, 327 (Ct. App. 2001) (citing Rosenblatt v. Baer, 383 U.S. 75, 85, 86 S. Ct. 669 (1966)). Instead of using the same rationale in this case, the Court of Appeals held Petitioner was a public official because it had recently decided in Garrard, *supra* that a football coach at another high school was a public official. Even though the Court of Appeals previously held in Goodwin v. Kennedy that assistant principals were not public officials, its decision here infers teachers are public officials as

Petitioner was a teacher at the time the defamatory email was sent, not a football coach or athletic director.

Here, the Court of Appeals failed to identify how Petitioner had "substantial" control or responsibility over governmental affairs. County athletic directors are simply not persons who have substantial responsibility for or control over governmental affairs, nor are teachers or football coaches. In a 1974 Opinion, the United States Supreme Court expressed concern that extension of the term "public official" to lawyers would distort the meaning of the term beyond all recognition. Gertz v. Robert Welch, Inc., 418 U.S. 323, 352, 94 S. Ct. 2997, 3013 (1974). Here, our Court of Appeals has done just that; its decision distorts the definition of public official beyond all recognition by holding that Petitioner, "an [former] athletic director, a [former] football coach, and a teacher" was a public official. Importantly, Petitioner was not a football coach or athletic director at the time he was defamed; he was only a teacher. The holding of the Court of Appeals ignored federal precedent and extended the constitutional privilege allowing openly defamatory criticism of public officials to include openly defamatory criticism of all public school teachers. The Court of Appeals erred in holding that Petitioner was a public official and its decision should be reversed.

B. The Court of Appeals failed to follow Federal and State precedent regarding the definition of Limited Public Figure and failed to apply the Erickson factors.

In a 1974 Opinion, the United States Supreme Court revisited its decade long attempt to "define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." Gertz, 418 U.S. at 325, 94 S. Ct. at 3000. In Gertz, the Court acknowledged that its 1967 decision, Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S. Ct. 1975 (1967), had expanded the constitutional privilege protecting defamatory criticism of public officials to public figures (persons who are "intimately involved in the resolution of

important public questions" or who "by reason of their fame, shape events in areas of concern to society at large"). Id. at 336-37, 94 S.Ct. at 3005. The Court further explained that an individual could be classified as a public figure (1) because he has achieved "such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts" (subsequently defined by numerous courts as a general public figure) or (2) because he "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues" (subsequently defined as a limited public figure). Id. at 351, 94 S. Ct. at 3013. In either category, the public figure "assume[s] special prominence in the resolution of a public questions." Id.

This Court has consistently followed the precedent of Gertz in its analysis of public figures and limited public figures. In Erickson, this Court clearly defined public figures and limited public figures and differentiated between the two categories.

> The United States Supreme Court generally has defined a public figure as follows: 'For the most part those who attain this status [of public figure] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.' *Gertz*, 418 U.S. at 345, 94 S. Ct. at 3009, 41 L.Ed.2d at 808 (an attorney was not a public figure even though he voluntarily exposed himself in a case certain to receive extensive media exposure)……. [Whereas, a] limited public figure, the type more commonly found, is an individual who 'voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.' *Gertz*, 418 U.S. at 351, 94 S. Ct. at 3013, 41 L.Ed.2d at 812. In determining whether a claimant is a private or public figure, the court must focus on the 'nature and extent of an individual's participation in the particular controversy

> giving rise to the defamation.' *Gertz,* 418 U.S. at 352, 94 S. Ct. at 3013.

368 S.C. at 472, 629 S.E.2d at 668 (some internal citations omitted). Adopting a federal case's analysis (Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1553 (4th Cir. 1994)), this Court then utilized a five-prong test to determine if the plaintiff in Erickson was a limited public figure. 368 S.C. at 474, 629 S.E.2d at 669. The five (5) requirements for a limited purpose public figure as outlined by the Fourth Circuit Court of Appeals and adopted by this Court in Erickson are: (1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in a public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statements; and (5) the plaintiff retained public figure status at the time of the alleged defamation. Id.

This Court's holding in Erickson followed federal precedent and differentiated between: 1) a public official (a person who has substantial responsibility for or control over the conduct of governmental affairs ); 2) a public figure (a person who has attained special prominence in the affairs of society and occupies positions of such persuasive power and influence they are deemed public figures for all purposes); and 3) a limited public figure (a person who voluntarily injects himself into a public controversy becomes a public figure for limited issues and assumes special prominence in the resolution of public questions). 368 S.C. at 469-73 (internal citations omitted.) Here, the second category, a general public figure, is not and never has been argued by Respondent to be at issue; the only two (2) categories argued in Respondent's directed verdict motion, JNOV, appeal, final and reply briefs, and addressed by the Court of Appeals, was whether Petitioner was a public official or limited public figure.

The Court of Appeals held that Petitioner was a public official (which was erroneous as discussed in Section A, *supra*) or a limited public figure (not a general public figure). While an individual who voluntarily injects himself or is drawn into a particular public controversy can become a public figure for a limited range of issues, Gertz, 418 U.S. at 351, 94 S. Ct. at 3013 (emphasis added), the Lower Court properly denied Respondent's motion for a directed verdict holding Petitioner was not a limited public figure because the Court was required to "focus on the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." (App. p. 466.) Furthermore, the Lower Court did not err when it refused to charge the jury that Petitioner was a "limited public figure."

Respondent contends that Petitioner's controversial offensive football strategy at Berkeley County High School made him a limited public figure, yet the defamatory email was written and published after Petitioner was terminated as football coach and the topic of the defamatory email concerned Petitioner's alleged mishandling of student athlete files, an issue that had never previously been a controversy. The Lower Court properly denied Respondent's directed verdict motion on this issue as all five (5) Erickson factors were not met regarding Petitioner's handling of student athlete files. Petitioner was defamed after he had been fired as athletic director and football coach and there is nothing in the record indicating that at the time the defamatory email was published Petitioner had significantly greater access to channels of effective communication than any other private individual. Addressing the second Erickson factor, Petitioner did not voluntarily assume any role of special prominence in society regarding a public controversy. Petitioner was not a limited public figure regarding a public controversy because there had never been any public controversy regarding how he maintained student athlete files. The third factor is whether the Petitioner sought to influence the resolution of any controversy.

The defamatory email concerned Petitioner's position as athletic director but as it is undisputed in the record that Petitioner always received a clean audit, there was no controversy for Petitioner to influence. The fourth factor also was not met as the issue of Petitioner's maintenance of student athlete files was never a controversy; he had been audited by the State three (3) times a year, had a clean audit from the high school league a few months before the derogatory email, and had once been named been Athletic Director of the Year. (App. p. 218, lines 21-22; pp. 224-26.) The fifth factor, that Petitioner retained public figure status at the time the defamatory email was sent, cannot be met, as even if Respondent was a limited public figure regarding the issue of his football strategy, the subject of the email was not about his football coaching and he was no longer a football coach at the time the defamatory email was sent. At the time the defamation occurred, Petitioner was a public school teacher.

The Lower Court was correct in ruling at the directed verdict stage of trial that after viewing the evidence and all inferences in a light most favorable to Petitioner, Petitioner was not a limited public figure so dismissal pursuant to the Tort Claims Act was not warranted and the jury charge did not need to include the element of actual malice. The Court of Appeals erred in reversing the Lower Court.

Here, the Court of Appeals failed to apply the Erickson test to Petitioner even though it held Petitioner was a "public official or limited public figure" and held the "circuit court erred in not finding [Petitioner] was a public official or limited public figure." Cruce, 435 S.C. at 22 n.5, 865 S.E.2d at 399 n.5. It was error for the Court of Appeals to hold Petitioner was a limited public figure without applying the Erickson test. If the test had been applied, it would have been clear Petitioner did not meet its five (5) requirements. The Court of Appeals' failure to use the Erickson test results in public high school coaches, athletic directors and teachers being afforded very little

protection from defamation. These lower-level state employees (especially teachers, which was Petitioner's only role at the time the defamation occurred) assume no special prominence in the resolution of public questions and they deserve to have their reputations protected in the same manner as ordinary citizens. The Court of Appeals erred by not analyzing the facts in this case using the test established by this Court in Erickson, and if it had done so, it would have been clear that Petitioner was not a limited public figure.

C. The Court of Appeals erred in relying on out-of-state cases in its Order.

The determination of whether a person is a public official or a limited public figure is a fact specific analysis and many courts have found, in accordance with Rosenblatt, that school officials do not have substantial responsibility for or control over the conduct of governmental affairs. In Richmond Newspapers, Inc. v. Lipscomb, the Supreme Court of Virginia court held a public high school teacher was not a public official as he did not influence or control any public affairs or school policy. 362 S.E.2d 32 (Va. 1987), cert denied, 486 U.S. 1023, 108 S. Ct. 1997 (1988). In McCutcheon v. Moran, an Illinois Appellate Court held the relationship public school teachers or principals have with the conduct of government is "far too remote" to justify a qualifiedly privileged assault upon their reputation. 425 N.E.2d 1130, 1131 (Ill. App. Ct. 1981). In Franklin v. Benevolent etc. Order of Elks, a California Appellate Court held public high school teachers are not public officials. 97 Cal. App. 3d 919 (1979).

The out of state cases cited by the Court of Appeals in support of its finding that Petitioner was a public official or limited public figure are factually distinguishable from this case and should not have been relied on to support the Court's holding. For instance, in Johnson v. Southwestern Newspapers Corp., 855 S.W.2d 182 (Tex. App. 1993), the plaintiff was solely

responsible for the operation of the district's athletic department.[4] Here, Petitioner's actions were subject to review, criticism and correction by his principal. The Principal of the school was Petitioner's supervisor (App. p. 198, lines 5-13); Petitioners' Principal discussed Petitioner's performance as head coach with Petitioner and had philosophical differences with Respondent about his coaching style, threatening to fire him (App. p. 199, lines 11-24); the Principal did not like Petitioner's fast-paced offense or lack of punting (App. p. 200, lines 2-14; p. 208, lines 6-18); the Principal ordered Petitioner to perform written evaluations of the football coach staff (App. p. 203, line 25- p. 204, line 8); the Principal had considered firing Petitioner because Petitioner was not making the students hit enough at practice (App. p. 212, line 18- p. 214, line 5); and Principal could terminate Petitioner at any time as the Principal had total authority over the whole school. (App. p. 214, line 23- p. 215, line 3.) Clearly, this is not a situation where Petitioner was solely responsible for the operation of the athletic department.

The Court of Appeals also cites to the case of Mahoney v. Adirondack Publishing Company in support of its holding. 517 N.E.2d 1365 (N.Y. 1987) Mahoney was a libel case brought against a newspaper almost 20 years before Erickson was decided. The New York Court of Appeals found that a newspaper article based on false accusations of a coach cursing at his students could have an impact on his professional reputation, especially when the article condemned the coach's behavior and questioned his fitness for coaching. Most importantly, Mahoney conceded at trial that he was a public figure and, therefore, actual malice had to be proven. 517 N.E.2d at 1369. That fact alone distinguishes Mahoney from this case.

[4] Petitioner submits that South Carolina jurisprudence should not be bound by a Texas decision determining that football and athletes are a government affair.

Additionally, the case of Johnson v. Corinthian Television Corp., 583 P.2d 1101 (Okla. 1978), concerned the issue of the physical abuse of children by coaches in school and predates Erickson and Holtzscheiter II. How an athletic director manages student athlete files is far afield from child abuse and the Court of Appeals erred in comparing this case to Johnson v. Corinthian Television Corp. None of these cases are factually similar to defamation of Petitioner related to student athlete files. The Lower Court did not err when, as a matter of law, it held at the directed verdict stage of trial that a high school teacher, football coach and athletic director at a high school in South Carolina is not a public official.

## II. The facts in Garrard v. Charleston County School Dist., 429 S.C. 170, 838 S.E.2d 698 (Ct. App. 2019) are distinguishable from the facts in this case.

The Court of Appeals erred when it held Petitioner was a public official on the basis it had already held that an athletic director/ football coach/ teacher at a different high school was a public official in Garrard.

> Based on this court's decision in Garrard, the circuit court erred in not finding Cruce was a public official or limited public figure. Cruce was an athletic director, a football coach, and a teacher, similar to Coach Walpole in Garrard, who was a coach of two different teams, including football, and a teacher. Accordingly, Cruce was a public official.

435 S.C. at 21, 865 S.E.2d at 398. There are significant factual differences and different legal issues between this case and Garrard and the Court of Appeals misapprehended the relevancy of the Garrard case. In Garrard, a football coach allowed his team to perform a watermelon ritual before games which included making monkey sounds, and this ritual was publicized and resulted in allegations of racial insensitivity and stereotyping. Garrard, 429 S.C. at 181-182, 838 S.E.2d at 704. Here, the facts do not involve any racial issues.

In Garrard, the school released a press statement and held a press conference to address the issue. Id. The defamatory email which is at issue in this case was written after Petitioner had been fired as a football coach and the derogatory statements concerned Petitioner's ability to maintain student athlete files, not his coaching. At the time of the defamation, Petitioner had no authority or control over the football program, much less substantial authority or control over the program (even if the program could somehow be construed as a governmental affair).

In Garrard, there are First Amendment issues such as the fair report privilege and the opinion defense. Such issues are not present in this case as there was no press coverage of the defamatory email. Further, Garrard was decided at the summary judgment stage, whereas a jury in this case deliberated six hours before rendering a judgment. Petitioner has always denied he was a public official or limited public figure.

Additionally, in Garrard, the Court of Appeals cited Erickson's quotation from the case of McClain v. Arnold, 275 S.C. 282, 284, 270 S.E.2d 124, 125 (1980) to justify examining the public's interest in the coach's activity in a particular context *instead of* the coach's authority over governmental affairs. However, in 2019, the Court of Appeals held that McClain was not controlling to an analysis of whether an assistant principal was a public official because McClain involved an analysis of law enforcement officers, not school employees. Goodwin, 347 S.C. at 43-44, 552 S.E.2d at 326-27. Police officers can arrest individuals, charge individuals with crimes and detain them and were determined by the Court in McClain to be "public officials" for purposes of defamation because of their status as "officers." High school athletic directors, teachers and football coaches have no such authority. The Court of Appeals erred in relying on McClain in Garrard and incorporating this reasoning into its analysis in this case.

Similarly, the other two South Carolina cases cited by the Court of Appeals in Garrard, Sanders v. Prince, 304 S.C. 236, 403 S.E.2d 640 (1991) and Scott v. McCain, 272 S.C. 198, 250 S.E.2d 118 (1978), concerned elected members of a County School Boards. High school teachers, football coaches and athletic directors are not elected by the public in South Carolina and therefore are distinguishable from elected school board members. Furthermore, the Indiana case initially relied on by this Court in McClain v. Arnold also involved an elected tax assessor. 275 S.C. at 284, 270 S.E.2d at 126 (citing Fadell v. Minneapolis Star & Tribune Co., Inc., 425 F. Supp. 1075 (N.D. Ind. 1977)). Again, teachers, public high school football coaches and athletic directors are not elected; they are hired just like hundreds of other public employees. The Court of Appeals erred when it referenced the same three (3) cases as it had in Garrard in support of its holding that Petitioner is a public official while failing to consider whether Petitioner had substantial authority over governmental affairs.

The practical result of the Court of Appeals' decision in both cases is to elevate of teachers, athletic directors and football coaches above assistant principals. The Court of Appeals previously held an assistant principal is not a public official because an assistant principal is "not one 'among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.'" Goodwin, 347 S.C. at 45, 552 S.E.2d at 327 (quoting Rosenblatt, 383 U.S. at 85, 86 S. Ct. at 676.

Finally, prior to the Garrard decision, the South Carolina Court of Appeals, nor this Court, had ever held that someone who is not in law enforcement, or in an elected or appointed position, is a public official. The Court of Appeals erred when it concluded Petitioner was a public official simply because he had job responsibilities similar to Coach Walpole's in Garrard. The Court of Appeals' failure to analyze the issues in accordance with this Court's precedent

raises more questions than it answers and creates an untenable situation for public employees. Are all teachers now considered public officials in this State and more easily defamed? Are only teachers who are also athletic directors and football coaches considered public officials? Is a teacher who is a football coach but not an athletic director a public official? Are other basketball and soccer coaches considered public officials? The Court of Appeals erred when it relied on its decision in Garrard to conclude Petitioner was a public official and its failure to properly analyze this case has expanded the definition of public official beyond recognition.

## CONCLUSION

For almost 80 years, the definitions of a public official and limited public figure have been refined by our courts but always in the context of federal and state precedent and premised on the concept that criticism of government and public affairs is a necessary component of democracy. High school teachers, athletic directors and football coaches in South Carolina have no substantial responsibility for or control over the conduct of governmental affairs. As athletic director, teacher and football coach, Petitioner did not have substantial responsibility for or assume control over the conduct of governmental affairs. The Court of Appeals' decision expands beyond recognition the definition of public official and limited public figure and allows mere public employees to be easily defamed without redress. This Court should overturn the Court of Appeals' decision so its holdings in Holtzscheiter II and Erickson remain intact, and reinstate the jury's verdict in this case.

Respectfully submitted,

*s/ Nancy Bloodgood*
Nancy Bloodgood, Esquire #6459
Lucy Sanders, Esquire #78169
Bloodgood & Sanders, LLC
242 Mathis Ferry Road, Suite 201
Mt. Pleasant, SC 29464
(843) 972-0313

*Counsel for the Petitioner*