THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
Nov 21 2022
S.C. SUPREME COURT

APPEAL FROM BERKELEY COUNTY
Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2021-001520
Case No. 2016-CP-08-0131

Jeffrey Lance Cruce, ... Petitioner,

v.

Berkeley County School District, ... Respondent.

BRIEF OF RESPONDENT

Andrew F. Lindemann
LINDEMANN & DAVIS, P.A.
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

E. Brandon Gaskins
MOORE & VAN ALLEN, PLLC
78 Wentworth Street
Post Office Box 22828
Charleston, South Carolina 29401
(843) 579-7038

Richard J. Morgan
BURR & FORMAN, LLP
1221 Main Street, Suite 1800
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

Counsel for Respondent

TABLE OF CONTENTS

Table of Authorities ii

Statement of the Case 1

Standard of Review 5

Arguments 6

I. The Court of Appeals correctly ruled that Jeffrey Cruce, as the athletic director and head football coach, qualified as a public official, and as such, proof of "actual malice" is an element of his defamation claim, meaning that his claim was correctly found to be barred by sovereign immunity under Section 15-78-60(17) 6

II. If the Court reverses the decision of the Court of Appeals on the public official issue, the Court must also consider the other issues for reversal as raised by the School District on appeal but which the Court of Appeals did not find it necessary to reach 18

A. Whether Cruce was a Limited Public Figure 18

B. Whether Cruce Proved all Elements of his Defamation Claim 24

1. The January 7, 2016 Email Is Not False and Defamatory 25

2. The Jury Had No Evidence to Conclude that Chris Stevens Sent the January 7, 2016 Email with Common-Law Malice 30

3. Cruce Offered No Evidence to Show that Any Damages Were Proximately Caused by the January 7, 2016 Email 32

Conclusion 35

TABLE OF AUTHORITIES

Cases

Barry v. Time, Inc.,
584 F. Supp. 1110 (N.D. Cal. 1984) 20

Beler v. Milford Bd. of Education,
2005 WL 2008428 (Conn. Super. Ct. 2005) 23

Brewer v. Rogers,
211 Ga. App. 343, 439 S.E.2d 77 (Ga. App. 1993) 23, 24

Carr v. Forbes, Inc.,
259 F.3d 273 (4th Cir. 2001)..... 19

Chakrabarti v. City of Orangeburg,
403 S.C. 308, 743 S.E.2d 109 (Ct. App. 2013)..... 5

Cruce v. Berkeley County School District,
435 S.C. 7, 865 S.E.2d 391 (Ct. App. 2021)..... 4

Curtis Publishing Co. v. Butts,
388 U.S. 130 (1967) 13, 20

Dodrill v. Arkansas Democrat Co.,
265 Ark. 628, 590 S.W.2d 840 (1979)..... 20

Elam v. South Carolina Department of Transportation,
361 S.C. 9, 602 S.E.2d 772 (2004)..... 5

Erickson v. Jones Street Publishers, LLC,
368 S.C. 444, 629 S.E.2d 653 (2006)..... *passim*

Fesmire v. Digs,
385 S.C. 296, 683 S.E.2d 803 (Ct. App. 2009)..... 5

Fields v. Melrose Limited Partnership,
312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993) 6

Fountain v. First Reliance Bank,
398 S.C. 434, 730 S.E.2d 305 (2012) 27, 28

Garrard v. Charleston County School District,
429 S.C. 170, 838 S.E.2d 698 (Ct. App. 2019) 10, 11, 15

Gastineau v. Murphy,
331 S.C. 565, 503 S.E.2d 712 (1998) 5

Gause v. Doe,
317 S.C. 39, 451 S.E.2d 408 (Ct. App. 1994) 15, 24

Gertz v. Robert Welch,
418 U.S. 323 (1974) 18, 20

Glasscock, Inc. v. United States Fidelity & Guaranty Co.,
348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001) 6

Grayson v. Curtis Publishing Co.,
436 P.2d 756 (Wash. 1967) 20

Holtzscheiter v. Thomson Newspapers,
332 S.C. 502, 506 S.E.2d 497 (1998) 26, 30

Johnson v. Southwestern Newspapers Corp.,
855 S.W.2d 182 (Tex. App. 1993) 11

Johnston v. Corinthian TV Corp.,
583 P.2d 1101 (Okla. 1978) 12

Mahoney v. Adirondack Publishing Co.,
71 N.Y.2d 31, 517 N.E.2d 1365 (N.Y. 1987) 24

McBride v. School District of Greenville County,
389 S.C. 546, 698 S.E.2d 845 (Ct. App. 2010) 26

McGarry v. Univ. of San Diego,
64 Cal.Rptr.3d 467 (Cal. Ct. App. 2007) 20

McKnight v. South Carolina Department of Corrections,
385 S.C. 380, 684 S.E.2d 566 (Ct. App. 2009) 32

Rosenblatt v. Baer,
383 U.S. 75 (1966) 7, 12, 18

Standridge v. Ramey,
733 A.2d 1197 (N.J. Super. Ct. App. Div. 1999) 13, 17

Time, Inc. v. Johnson,
448 F.2d 378 (4th Cir. 1971) 8

Vandenburg v. Newsweek, Inc.,
507 F.2d 1024 (5th Cir. 1975) 20

Warner v. Rudnick,
280 S.C. 595, 313 S.E.2d 359 (Ct. App. 1984) 29

Weinberger v. Maplewood Review,
668 N.W.2d 667 (Minn. 2003) 13

White v. Wilkerson,
328 S.C. 179, 493 S.E.2d 345 (1997) 26

Statutes and Rules

S.C. Code § 15-78-60(17) ..... *passim*

Rule 242(d)(2), SCACR 16

STATEMENT OF THE CASE

This is an appeal from a defamation action brought against the Respondent Berkeley County School District ("School District") pursuant to the South Carolina Tort Claims Act. The Petitioner Jeffrey Cruce is the former head football coach and athletic director at Berkeley High School. Following the 2015 football season, Cruce was relieved of his duties in those two positions and was transferred to a counselor position at a middle school in the School District. Cruce later left the employment of the School District following the 2015-2016 school year.

During his tenure at head football coach at Berkeley High School, Cruce had only one winning season and several losing seasons capped by a 3-7 record during the 2015 football season. (R. 253-254). That season was notable for Cruce's use of a controversial and well-publicized no-punt strategy. Under that approach, Cruce vowed never to punt on fourth downs regardless of field position or the distance required for the offense to achieve a first down. He believed that the "analytics" supported such an unconventional strategy. (R. 254-259, 268-269, 362-366, 919). Cruce publicized his new approach prior to the season and spoke often to the media, both local and national, about that specific strategy. In doing so, Cruce developed notoriety for himself. He also created and fostered substantial

controversy and public scrutiny for himself and his football program. (R. 538-544, 897, 901-903, 904-905, 908-909, 910, 912-914, 918, 919-920, 945, 948, 966, 970).

In 2016, Cruce brought a civil action against the School District for wrongful termination and defamation. Those causes of action proceeded to trial before Circuit Court Judge Kristi Lea Harrington and a jury on September 5, 2017. At the close of the plaintiff's case-in-chief and again at the close of all the evidence, the School District made motions for a directed verdict on numerous grounds, including sovereign immunity under Section 15-78-60(17) of the Tort Claims Act. The School District also argued that Cruce failed to satisfy each of the elements of his defamation claims.

Ultimately, the trial court granted a directed verdict in the School District's favor on the wrongful termination claim. (R. 460). The trial court also granted a directed verdict in the School District's favor on the defamation claim which was based on the School District's silence when it removed Cruce as the head football coach and athletic director. (R. 468-469). No appeal was filed from those dispositive rulings.

The only claim that was submitted to the jury was the defamation claim arising from a single email dated January 7, 2016, sent by Chris Stevens, who was Berkeley High School's head athletic trainer. That email was sent to the athletic coaches, paid and volunteer, as well as select administrators at the school. (R.

532). There were no other recipients of that email. The email was entitled "Student Athlete Eligibility and Medical Files" and addressed Stevens' attempt to make certain that the student-athletes' eligibility files were complete and in order. In the email, Stevens expressed uncertainty as to whether the files were complete, and he requested assistance from the coaches to provide rosters of their student-athletes so that he could make sure that files were complete for all competing student-athletes. (R. 532).

The trial court denied the School District's directed verdict motions as to the defamation claim pertaining to the January 7, 2016 email. (R. 469). In so doing, the trial court ruled as a matter of law that Cruce did not qualify as a "public official" or a "limited public figure" under prevailing defamation law. (R. 461-462). On that basis, the trial court ruled that the School District was not entitled to sovereign immunity under Section 15-78-60(17). The trial court also rejected other arguments with respect to the email. That claim was submitted to the jury, which ultimately returned a verdict of $200,000 in actual damages in Cruce's favor. (R. 12-13, 509-510).

The School District then moved for a JNOV and new trial absolute on the same grounds previously raised. By order filed March 29, 2018, the trial court denied the School District's post-trial motions. (R. 1-9). The School District thereafter filed a timely appeal to the Court of Appeals.

On September 1, 2021, the Court of Appeals issued a published decision reversing the trial court's denial of the motions for directed verdict and JNOV on the remaining defamation claim. The Court of Appeals concluded that "the Tort Claims Act bars the action as Cruce was required to prove actual malice because he was a public official." *Cruce v. Berkeley County School District*, 435 S.C. 7, 865 S.E.2d 391, 399 (Ct. App. 2021). Cruce filed a petition for rehearing which was denied.

This Court subsequently granted Cruce's petition for writ of certiorari.

STANDARD OF REVIEW

When reviewing the trial court's ruling on a motion for a directed verdict or JNOV, the South Carolina appellate courts apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 602 S.E.2d 772, 782 (2004). With respect to factual issues, "a motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 503 S.E.2d 712, 713 (1998). In other words, a court should grant a JNOV motion whenever there is no evidence to support the jury's verdict. *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 743 S.E.2d 109, 112 (Ct. App. 2013).

However, as to the trial court's rulings on questions of law, the appellate courts review those rulings *de novo*. *Fesmire v. Digs*, 385 S.C. 296, 683 S.E.2d 803, 807 (Ct. App. 2009) ("[t]his Court reviews all questions of law *de novo*").

ARGUMENTS

I. The Court of Appeals correctly ruled that Jeffrey Cruce, as the athletic director and head football coach, qualified as a public official, and as such, proof of "actual malice" is an element of his defamation claim, meaning that his claim was correctly found to be barred by sovereign immunity under Section 15-78-60(17).

The Petitioner Jeffrey Cruce contends that the Court of Appeals' decision conflicts with prior decisions of this Court and the United States Supreme Court. That is not the case. In fact, the Court of Appeals correctly applied the precedents from this Court and the United States Supreme Court on identifying a public official.[1]

[1] In his petition for writ of certiorari, Cruce raised the following question for review: "Did the Court of Appeals fail to consider that an issue not raised during Appellant's directed verdict is not preserved for appeal." The Court of Appeals had rejected Cruce's claim that the School District did not raise the public official argument in its directed verdict motion. The Court carefully reviewed the directed verdict colloquy and concluded that "the issue was sufficiently argued to the circuit court to address it on appeal." *Cruce*, 865 S.E.2d at 398. Nonetheless, in his opening brief, Cruce has now abandoned that issue. The issue is mentioned in a four-sentence footnote in his Statement of the Case. *See*, Petitioner's Brief, p. 3, n.1. An issue is typically treated as abandoned where it is stated "in a short, conclusory statement without supporting authority." *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285, n.3 (Ct. App. 1993). *See also*, *Glasscock, Inc. v. United States Fidelity & Guaranty Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001).

Nonetheless, if the Court does not treat the issue as abandoned, the record does demonstrate that the School District raised to the trial court the alternative theories that Cruce was a public official or a limited public figure. (R. 429, 441-442). The trial judge even asked Cruce's counsel whether she agreed that Cruce was a public official. (R. 441-442). In addition, there were numerous comments by Cruce's counsel and the trial judge as to whether Cruce was a "limited public official." (R. 434-436, 438, 441, 443). Cruce's counsel even discussed limited public figure as being "a subset of public official." (R. 436). Thus, the colloquy at directed verdict demonstrates that the "public official" issue was raised.

That is also supported by the post-trial proceedings where the parties discussed in detail the public official issue. Cruce's counsel never objected to the trial court's consideration of that

This Court has explained that "an important initial step to analyzing any defamation case is determining whether a particular plaintiff is a public official, public figure, or private figure." *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 629 S.E.2d 653, 666 (2006). "This determination is a matter of law which must be decided by the court on a case by case basis after a careful examination of the facts and circumstances." *Id*.

While recognizing there is no "all-encompassing definition of 'public official,'" this Court applies the general rule that "a public official is a person who, among the hierarchy of government employees, has or appears to the public to have substantial responsibility for or control over the conduct of governmental affairs." *Id*., *citing Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). "In considering the question of whether one is a public official, the employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." *Id*. Importantly, "[t]he status of a public official may be deemed sufficient to warrant application of the *New York Times* privilege, *not because of*

---

issue, and in fact, she made the same argument that "[a] limited public official is a subset of a public official." (R. 100). She also argued that "[i]f he's not a limited public official, he's not a public official." (R. 100). In addition, in its written order, the trial court clearly addresses the "public official" issue and even acknowledges that "[t]he Defendant makes excellent arguments in support of its position that Plaintiff should be classified as a public official." (R. 4). In sum, the public official issue was certainly raised, argued, and adjudicated in the court below, and, as the Court of Appeals concluded, that issue is sufficiently preserved for appellate review.

*the government employee's place on the totem pole, but because of the public interest in a government employee's activity in a particular contex*t." *Id.* (Emphasis added).

In this case, the Court of Appeals correctly held that Cruce, as the athletic director and head football coach, qualified as a public official. Cruce disputes this by downplaying or deliberately misstating the public interest, the public and media scrutiny, and the actual role that the athletic director and head football coach play, particularly under the facts of this case. He insists that high school football coaches and athletic directors "have no substantial responsibility for or control over the conduct of governmental affairs." *See*, Petitioner's Brief, p. 21. However, as this Court establishes in *Erickson* and other cases, the real focus is on whether the employee's position is one which "would invite public scrutiny and discussion of the person holding it." *Erickson*, 629 S.E.2d at 666.

Notwithstanding Cruce's commentary to the contrary, it is well settled that high school and college sports can be and often are the subject of intense public controversy and scrutiny. In *Time, Inc. v. Johnson*, 448 F.2d 378 (4th Cir. 1971), the Fourth Circuit explained that "the *New York Times* privilege is not confined to 'political expression or comment upon public affairs,' nor even matters of social utility or educational value. It embraces the entire range of legitimate public interest." 448 F.2d at 382-383. The Fourth Circuit further recognized that "[s]uch

a test clearly is sufficient to cover sports and sports figures, whose 'public interest' character is amply demonstrated by the elaborate sports section in every daily newspaper published in this nation and by the numerous periodicals, such as that involved here, exclusively devoted to sports." 448 F.2d at 383. That Fourth Circuit case, of course, pre-dates the existence of the internet as a source for sports news, cable sports networks such as ESPN, social media, fantasy leagues, and the like which make sports an even bigger subject of intense public interest today than in 1971. In short, sports is an important part of people's lives and very clearly is part of the public discourse, including intense public interest and scrutiny of its coaches even on the high school level.

As the record amply reflects, Cruce's position as coach and athletic director drew far more public attention than the average government employee's position. As a coach, his team's games were covered routinely by the local media, as were his efforts as the athletic director to create a hall of fame for Berkeley High School. (R. 552-973). This media attention reflected the public's interest in the Berkeley High School football team, which was as intense (according to Cruce's wife) as fans' interest in NFL teams. (R. 387-389). Moreover, as an athletic director, Cruce oversaw all of the sports at Berkeley High School, which fielded at that time every sport offered in South Carolina except lacrosse. (R. 179). As the record clearly reflects, Cruce's level of public attention and scrutiny stands in stark contrast to the

lack of public attention and scrutiny typically shown to other teachers at Berkeley High School.

This was particularly true during the 2015 football season given Cruce's use of a controversial and well-publicized no-punt strategy. Prior to that season, Cruce vowed never to punt on fourth down, which was unconventional, and thus commanded substantial public attention and scrutiny. Cruce's no-punt strategy and his team's performance were the subject of numerous local media articles. (R. 897, 901-903, 904-905, 908-909, 910, 912-914, 918, 919-920, 945, 948, 966, 970). The no-punt strategy was even the subject of an article in the September 21, 2015 edition of the *Kansas City Star*, in which Cruce was frequently quoted as a proponent of that strategy. (R. 538-544). In employing such an unconventional approach and then defending it in numerous media opportunities, Cruce brought greater than normal attention to himself and his football team. In effect, Cruce's no-punt strategy commanded greater public attention and scrutiny than a more conventional football coach would receive. The record further reflects that Cruce's strategy was the subject of tremendous public discussion and displeasure. Principal Steven Steele, in fact, testified about a planned fan protest and also the need to provide the coach with police protection at games. (R. 364-365, 546-547).

The Court of Appeals' determination that Cruce qualified as a public official is also fully supported by the Court's earlier decision in *Garrard v. Charleston*

County School District, 429 S.C. 170, 838 S.E.2d 698 (Ct. App. 2019). In that case, the Court of Appeals found that the head football coach at Academic Magnet High School in the Charleston area qualified as a public official. In addition to holding several coaching positions, Coach Walpole in *Garrard* was found to "interact[] with the parents of the athletes after each game and he participates in newspaper and television interviews. Furthermore, as head coach, he is responsible for the oversight of the teams' activities." 838 S.E.2d at 719. The public interest in Cruce and his team, and the public notoriety that arose from Cruce's unconventional approach to football, clearly made Cruce a public official under the *Erickson* analysis.

As the Court of Appeals also noted in *Garrard* and this case, there are numerous cases from other jurisdictions that support the conclusion that a high school athletic director and head football coach qualifies as a "public official." In *Johnson v. Southwestern Newspapers Corp.,* 855 S.W.2d 182 (Tex. App. 1993), the Texas Court of Appeals concluded that a high school athletic director and head football coach qualifies as a "public official." The Texas court first explained that "[t]he 'public official' designation does not apply to all government employees, but applies where 'a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and

performance of all government employees.'" 855 S.W.2d at 186, *citing* *Rosenblatt*, 383 U.S. at 86. In applying that test, the Texas court explained as follows:

> This dual position [as head football coach and athletic director] was, so the record reveals, of such apparent importance that the public had an independent interest in the qualifications and performance of the person who occupied the positions, beyond the general public interest in the qualifications and performance of all government employees.
>
> * * * * *
>
> Johnson's position of and activities as athletic director ... show that he was vested with and exercised significant governmental responsibility on behalf of the school district in his sole operation of the athletic department. As head football coach, Johnson filled a position of such importance that the public not only had, but exhibited, an independent interest in his qualifications and performance, transcending any interest shown in other employees of the school system.

855 S.W.2d at 186-187.

Likewise, the Oklahoma Supreme Court held that a wrestling coach was a public official because his position "was of apparent importance in that public school's athletic program for the public to have an independent interest in [the coach's] performance." *Johnston v. Corinthian TV Corp.*, 583 P.2d 1101, 1103 (Okla. 1978).

A New Jersey court has similarly reasoned that a public-school athletic director is a public official. In *Standridge v. Ramey,* 733 A.2d 1197 (N.J. Super. Ct. App. Div. 1999), that court explained:

> As athletic director, plaintiff was responsible for managing and supervising all the athletic programs in the Roxbury school district, including twenty-four athletic teams. In performing these responsibilities, plaintiff administered a substantial budget and supervised approximately sixty coaches and other employees. He also spoke at booster club meetings and various other community functions. Moreover, we take note of the fact that the performance of high school athletic teams is often a matter of substantial public interest within a community. Therefore, we conclude that plaintiff was a "public official" and must show actual malice to establish his defamation claims.

733 A.2d at 1201-02.

Moreover, in *Weinberger v. Maplewood Review*, 668 N.W.2d 667 (Minn. 2003), the plaintiff, who was a high school head football coach, brought a defamation action based on allegedly false information published about him in a local newspaper. The Minnesota court determined that the coach was a "public official" and was required to prove actual malice. 668 N.W.2d at 673.

The seminal United States Supreme Court decision in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), is also instructive. The plaintiff was Wally Butts, who, as the athletic director and head football coach at the University of Georgia, was accused in a newspaper article of "fixing" the outcome of a football game.

The Supreme Court ultimately treated Butts as a "public figure" rather than a "public official" only because he was "not technically a state employee" in holding those positions. Butts was, in actuality, employed by the Georgia Athletic Association, a private corporation. Nonetheless, the Supreme Court acknowledged that "the public interest in education in general, and in the conduct of athletic affairs of educational institutions in particular, justifies constitutional protection of discussion of persons involved in it equivalent to the protection afforded discussion of public officials." 388 U.S. at 146. The Supreme Court further recognized the "public interest in the materials here involved" and that Butts, as the head football coach, commanded a "substantial amount of public interest." 388 U.S. at 154. Given the Court's analysis, it is clear that, had Butts been employed by the State of Georgia rather than a private corporation, the Supreme Court would have clearly concluded that Butts qualified as a "public official" in his roles as athletic director and head football coach.

Thus, there is ample support for the Court of Appeals' ruling as a matter of law that Jeffrey Cruce, as the athletic director and head football coach, qualifies as a public official. Notably, Cruce does not contest the Court of Appeals' ruling that, as a public official, he had the burden of proving actual malice. *See*, *Erickson,* 629 S.E.2d at 665 ("to prove fault in a defamation action, a plaintiff who is a public official or public figure must prove by clear and convincing evidence that the

defendant acted with actual malice in publishing a false and defamatory statement about the plaintiff"). Likewise, Cruce does not contest that Section 15-78-60(17) of the Tort Claims Act provides that the School District enjoys absolute sovereign immunity for any employee conduct constituting actual malice, and as a result, Cruce's defamation claim against the School District is barred as a matter of law to the extent he qualifies as a public official (or, for that matter, as a limited public figure). *See*, *Gause v. Doe*, 317 S.C. 39, 451 S.E.2d 408 (Ct. App. 1994).

In his opening brief, however, Cruce attempts to erroneously broaden the Court of Appeals' ruling in this case and in *Garrard*. Cruce incorrectly writes that the Court of Appeals' "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." *See*, Petitioner's Brief, p. 10. However, in both this case and *Garrard*, the Court of Appeals never suggested that a teacher – with no other role or other unique facts – is to be treated as a public official. Similarly, Cruce questions whether "all teachers [are] now considered public officials in this State?" *See*, Petitioner's Brief, p. 21. That, of course, is not the Court's holding – the Court of Appeals addressed Cruce's status as the athletic director and head football coach, including the public interest and notoriety he fostered in those roles. The Court of Appeals did not hold that every classroom teacher is a public official.

In making this point, Cruce also raises a new issue that was not first raised in the court below or, more importantly, in his petition for rehearing.[2] In addition to not being properly raised or preserved, any suggestion that Cruce was not correctly treated as a public official because he had been removed as the athletic director and head football coach when the allegedly defamatory email was sent is clearly invalid. Without dispute, the email addressed Cruce's job performance as athletic director and not his job performance as a middle school counselor. Cruce's theory at trial was that the email was defamatory because it challenged Cruce's fitness for handling the athletic director's position. In his current brief, Cruce, in fact, acknowledges just that: "the defamatory email concerned Petitioner's position as athletic director." *See,* Petitioner's Brief, p. 15. As the athletic director, Cruce was a public official, and therefore, any statement or critique of his job as athletic director is one for which he was properly treated as a public official. Moreover, a public official does not instantaneously lose that status for defamation purposes the minute he leaves that position. Cruce, in fact, remained a subject of media attention after his job reassignment.

Finally, Cruce is also critical that the Court of Appeals did not engage in the five-factor test that this Court (and the Fourth Circuit) employs to determine whether

[2] Cruce never raised this issue in the Court of Appeals nor in his petition for rehearing. It was a new issue raised for the first time in his petition for writ of certiorari, which is improper under Rule 242(d)(2), SCACR.

a plaintiff qualifies as a limited public figure. That test, however, has no applicability to determining whether a plaintiff qualifies as a public official. Hence, because the Court of Appeals found Cruce to be a public official, the Court did not find it necessary to address that five factor test and ultimately did not rule whether or not Cruce met the test to be a limited public figure. That was an alternative position asserted by the School District, but, as indicated, it was not necessary for the Court to reach that issue. However, as argued below, should this Court reverse the Court of Appeals on the public official determination, that alternative theory would need to be addressed, as potentially would other grounds for reversal on the defamation verdict that the Court of Appeals did not find it necessary to reach.

In sum, as aptly observed by the New Jersey court in the *Standridge* case, "the performance of high school athletic teams is often a matter of substantial public interest within a community." *Standridge*, 733 A.2d at 1202. To a even more heightened degree, that is the case in South Carolina where high school athletics does garner tremendous public interest and media attention. And that is certainly the case in Berkeley County during the 2015-2016 school year – even more so given Cruce's no-punt strategy and its media coverage and notoriety.[3] In short, the Court of Appeals correctly applied the prevailing precedents and held

[3] Notably, Wendy Cruce, the coach's wife, testified that her husband's position as the head football coach at Berkeley High School was "sort of like being a coach for the Philadelphia Eagles or something like that." (R. 387).

that Cruce qualifies as a "public official" under *New York Times*, *Rosenblatt*, and their progeny.

II. If the Court reverses the decision of the Court of Appeals on the public official issue, the Court must also consider the other issues for reversal as raised by the School District on appeal but which the Court of Appeals did not find it necessary to reach.

A. Whether Cruce was a Limited Public Figure

As an alternative position, the School District argued that Cruce, even if not a public official, qualified at the very least as a limited public figure. The trial court erred in rejecting that argument. A limited public figure "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.'" *Erickson*, 629 S.E.2d at 668, *citing Gertz v. Robert Welch*, 418 U.S. 323, 351 (1974). In the lower court and again in its briefs filed in the Court of Appeals, the School District analyzed that issue by applying the five-factor test from *Erickson*. The evidence supports a finding that Cruce, as the athletic director and head football coach, at the very least, qualified as a limited public figure. The School District also cited numerous cases from other jurisdictions supporting a finding that a high school football coach and athletic director qualifies as a limited public

figure. Therefore, if this Court concludes that Cruce did not qualify as a public official, the School District requests that the Court address, in the alternative, whether Cruce was a limited public figure. That is an issue raised by the School District in the Court of Appeals, but the Court did not need to reach that issue.

This Court has provided five factors to consider in determining whether a plaintiff is a limited public figure:

> (1) The plaintiff had access to channels of effective communication;
>
> (2) The plaintiff voluntarily assumed a role of special prominence in the 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 statement; and
>
> (5) The plaintiff retained public-figure status at the time of the alleged defamation.

Erickson, 629 S.E.2d at 669.

In denying the School District's JNOV motion, the trial court ruled that "[a] high school football team's defensive strategy was not a matter of public controversy as contemplated by *Erickson*." (R. 5). That is clearly in error. A public controversy is one that "has received public attention because its ramifications will be felt by persons who are not direct participants." *Carr v. Forbes, Inc.*, 259 F.3d 273, 279 (4th Cir. 2001). Courts have routinely held that

public controversies and scrutiny arise from sports news, sporting events, and sports figures. *See e.g., Curtis Publishing Co. v. Butts,* 388 U.S. 130, 154 (1967) (holding that a university football coach was a limited public figure); *Vandenburg v. Newsweek, Inc.,* 507 F.2d 1024, 1025, n.1 (5th Cir. 1975) (holding that a college track coach was a limited public figure); *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1118 (N.D. Cal. 1984) (holding that a plaintiff's "voluntary decision to become head basketball coach is a sufficient 'thrust' within the meaning of *Gertz* to create limited public figure status, since the responsibilities of the position he accepted inevitably put him at the center of public attention regarding a continuing public controversy"); *Dodrill v. Arkansas Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840, 843 (1979) ("[t]he definition of 'public figure' is quite broad and, indeed, one may be held a public figure for limited purposes. Various courts have held included within the definition a football coach"); *McGarry v. Univ. of San Diego,* 64 Cal.Rptr.3d 467, 477 (Cal. Ct. App. 2007) (holding that a plaintiff's "role as head coach of a local university's football team already made him a public figure, and his employment termination was already a topic of widespread public interest"); *Grayson v. Curtis Publishing Co.*, 436 P.2d 756, 762 (Wash. 1967) (holding that a university basketball coach was a limited public figure).

The same is particularly true in the present case. As already discussed above, the 2015 football season at Berkeley High School brought considerable

public attention, scrutiny, and controversy. Cruce actually created that controversy by adopting an unorthodox no-punt strategy that proved to be unsuccessful as his team finished with a 3-7 record and gave up more than 70 points in several games. He deliberately adopted such a strategy knowing that it would be controversial. In the *Kansas City Star* article, Cruce is quoted as acknowledging that "[t]his could be a career-ending decision that I've made." (R. 543). Clearly, Cruce's tenure as the head football coach at Berkeley High School, and particularly the 2015 season, fostered public controversy sufficient to make him a limited public figure. As indicated, Cruce was at the center of that controversy. He created it and fostered it by his public discourse defending his unconventional approach and the novel use of "analytics" in sports decision-making. Contrary of the trial court's assessment, Cruce was intricately involved in a public controversy. No other conclusion can be reached from the evidence in the record.

In light of its decision that Cruce's coaching strategy was not a "public controversy," the trial court did not address the other factors of the *Erickson* test for a limited public figure. The evidence in the record, nonetheless, fully supports each of those factors.

First, Cruce had significant access to the media. He testified that he had a radio show, and as the 197 newspaper articles in evidence demonstrate, Cruce had regular access to and discussions with local and even national reporters. (R. 251,

552-973). Reporters sought out Cruce to discuss the Berkeley High School football team's games and, in particular, during the 2015 football season, his use of a no-punt strategy. (R. 538-544, 897, 901-903, 904-905, 908-909, 910, 912-914, 918, 919-920, 945, 948, 966, 970). Cruce was thus in a unique position regarding access to the media when it came to the football team and Berkeley High School sports.

Second, Cruce voluntarily assumed a public role regarding the football team and Berkeley High School sports. He was not forced to be the coach, nor was he coerced into talking with reporters. Indeed, he willingly broadcast his controversial no-punt strategy, including being interviewed for the story in the *Kansas City Star*. (R. 538-544). Cruce did not just assume a role of special prominence in the public controversy; as stated above, he actually created and fostered the controversy by adopting and publicizing unorthodox and controversial football tactics and strategy.

Third, Cruce sought to influence the outcome of this controversy. He repeatedly defended his new strategy during the 2015 season. On one occasion after a loss, he implored people (through the media) to "have patience" because his strategy would eventually work. (R. 902). To a different reporter, Cruce noted that he knew he would get criticized for not punting, but that "is not going to deter" him from sticking to his plan. (R. 905). And after picking up a win against

Timberland High School in 2015, Cruce defended his strategy by proclaiming that he had "done [his] homework" on it. (R. 919).

Fourth, the controversy over Cruce's tenure as athletic director and head football coach existed before the January 7, 2016 email. That email was written shortly after Cruce was removed from those positions and was reassigned to Sedgefield Middle School, although the email addressed actions taken (or not taken) in his capacity as the athletic director and head football coach.

Fifth, Cruce was still in the public eye when the January 7, 2016 email was written. This email came less than a month after Cruce was removed as head football coach and athletic director. That decision received media attention. (R. 941-944). And the email came shortly before there was even more media coverage of Cruce because of the lawsuit that he filed against the School District. (R. 945-949).

Accordingly, there is clearly evidence to support each of the five elements identified by the Supreme Court in *Erickson*. Additionally, there is authority from other states that supports finding that a high school football coach and athletic director qualifies as a limited public figure. *See, Beler v. Milford Bd. of Education,* 2005 WL 2008428, *2 (Conn. Super. Ct. 2005) (noting that a plaintiff "concedes, as he must, that as a public school teacher and coach he is considered a 'public figure' for purposes of his defamation claim"); *Brewer v. Rogers*, 211 Ga. App.

343, 439 S.E.2d 77, 81 (Ga. App. 1993) (holding that a high school football coach was a "public figure"); *Mahoney v. Adirondack Publishing Co.,* 71 N.Y.2d 31, 517 N.E.2d 1365, 1366 (N.Y. 1987) (noting that the plaintiff conceded that he was a "public figure" as a high school football coach).

In sum, the trial court erred in failing to rule, at a minimum, that Jeffrey Cruce qualified as a limited public figure for purposes of his defamation claim against the School District. As such, there is no dispute that Cruce was required to prove actual malice as an element of his claim. Accordingly, the School District is entitled to absolute sovereign immunity under Section 15-78-60(17) for employee conduct that constitutes actual malice, and consistent with the decision in *Gause v. Doe*, the School District was entitled to a directed verdict and JNOV on the defamation claim.

B. Whether Cruce Proved all Elements of his Defamation Claim

In addition to its sovereign immunity defense, the School District also moved for a directed verdict and JNOV on the basis that Jeffrey Cruce failed to prove each element of his defamation claim. The School District contends that the January 7, 2016 email that that was sent by Chris Stevens, the head trainer at Berkeley High School, was not false and defamatory. In addition, the School District argues that Cruce presented no evidence that Stevens acted with common

law malice as well as no evidence that the January 7, 2016 email proximately caused any damages. In footnote 5 of its opinion, the Court of Appeals acknowledged that these issues were raised but were not necessary to reach because sovereign immunity under Section 15-78-60(17) disposed of the defamation claim. *Cruce*, 865 S.E.2d at 399, n.5. The trial court's rulings on these issues were in error.

1. The January 7, 2016 Email Is Not False and Defamatory.

As discussed above, the only defamation claim that was submitted to the jury pertained to the January 7, 2016 email that was sent by Chris Stevens, the head athletic trainer at Berkeley High School, to the athletic coaches, paid and volunteer, as well as select administrators at the school. (R. 532). There were no other recipients of that email. The email was entitled "Student Athlete Eligibility and Medical Files" and addressed Stevens' attempt to make certain that the student eligibility files were complete. In the email, Stevens expressed uncertainty as to whether the files were complete, and he requested assistance from the coaches to provide rosters of their student-athletes so that he could make sure that files were complete for all competing student-athletes. (R. 532).

"The tort of defamation permits a plaintiff to recover for injury to his reputation caused by the defendant's communication to others of a false message

about plaintiff." *McBride v. School District of Greenville County*, 389 S.C. 546, 698 S.E.2d 845, 852 (Ct. App. 2010). "To prove defamation, the plaintiff must show: (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Id*.

"In order to succeed on a defamation claim, the plaintiff must show that the challenged statement is both defamatory (tending to impeach the plaintiff's reputation) and actionable (injuring the plaintiff)." *White v. Wilkerson*, 328 S.C. 179, 493 S.E.2d 345, 347 (1997). "It is the trial court's function to determine initially whether a statement is susceptible of having a defamatory meaning." *Id*.

Under South Carolina law, a statement is defamatory only "if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Holtzscheiter v. Thomson Newspapers,* 332 S.C. 502, 506 S.E.2d 497, 512 (1998). "All of the parts of the publication must be considered in order to ascertain the true meaning, and words are not to be given a meaning other than that which the context would show them to have." *White*, 493 S.E.2d at 347.

The January 7, 2016 email, when read as a whole and within the proper context, does not have a defamatory meaning. In addition, the email was not false.

The trial court, therefore, erred in submitting the defamation claim pertaining to the email to the jury.

As indicated, Chris Stevens sent the email to all coaches and school administrators to recount his and others' efforts to ensure that students' eligibility files were complete.[4] He writes: "After spending some time looking through the files it has come to my attention that there could be some documents that could be misplaced and others that are out of order." (R. 532). He then advises that the student eligibility files need to be complete, and he enlists the help of the coaches to submit a roster of their participating student-athletes so that he can check that every student has the required paperwork. (R. 532). He did not state with any degree of knowledge or certainty that the files were indeed incomplete or had not been properly maintained. And certainly, he places no blame on anyone, including Jeffrey Cruce, nor does he directly or indirectly question Cruce's fitness for handling the athletic director's position.

In its JNOV order, the trial court suggests (although does not expressly find) that the email contains an insinuation. The trial court cites to the case of *Fountain v. First Reliance Bank*, 398 S.C. 434, 730 S.E.2d 305 (2012), in which the

[4] In its JNOV order, the trial court states incorrectly that the January 7, 2016 email was sent to "45 recipients who were employees of the district, volunteer coaches, and parents." (R. 5). That is not completely accurate. Cruce himself testified that the email recipients were all coaches employed for pay or as volunteers with Berkeley High School. (R. 279, 282-283). There is no evidence that the email was sent to parents.

Supreme Court explains that "[a] mere insinuation is as actionable as a positive assertion if it is false and malicious and the meaning is plain." 730 S.E.2d at 309. "Statements therefore may be either defamatory on their face, or defamatory by way of innuendo. Innuendo is extrinsic evidence used to prove a statement's defamatory nature. It includes the aid of inducements, colloquialisms, and explanatory circumstances." *Id*. The trial court then suggests the jury heard testimony that Stevens insinuated that Cruce "had been unfit to perform the job of athletic director" or that "the review of the student files and subsequent email was an attempt after the fact to support the district's false reason for termination." (R. 6). That makes no sense. The testimony elicited from Chris Stevens at trial was exceedingly brief. Cruce's counsel did not ask Stevens even the first question about the content, meaning, or intent of the email. (R. 396-398). Certainly, there was no extrinsic testimony presented to support any insinuation or innuendo. Stevens was not asked, nor did he testify, that he believed Cruce did anything wrong or was unfit to perform the duties of athletic director. Moreover, there is absolutely no evidence that Stevens had any involvement in or knowledge of the reasons that Cruce was removed as the head football coach and athletic director. It is pure supposition and conjecture on the part of the trial court to even suggest that the email was intended by Stevens to support the School District's reasons to remove Cruce from those positions.

Importantly, Stevens only noted in the email itself that some documents "could" be misplaced or out of order. (R. 532). The use of "could" makes this sentence conditional. The Court of Appeals has, however, ruled that a conditional statement can be the basis of a defamation claim only if the conditional statement "is known to be true." *Warner v. Rudnick*, 280 S.C. 595, 598, 313 S.E.2d 359, 360 (Ct. App. 1984). In *Warner*, the Court held that the trial court wrongly denied a motion to dismiss because the basis of the defamation claim was a conditional statement that "depends on a fact which has not and may never occur." *Id.* Similarly, in the present case, Cruce's defamation claim is premised entirely on a conditional statement about documents that "could" be misplaced or out of order.

Finally, in addition to failing to show that the statement was defamatory, Cruce has not suggested, let alone shown, that the statement was false in any respect. The evidence shows only that Stevens and Cruce disagreed about exactly what documents were required to be in a student eligibility file. (R. 220-222). But Cruce never disputes or denies that there "could" have been documents misplaced or out of order for any of the student-athletes. That is all the email states or insinuates. In short, the jury had no basis on which to conclude the email was false, and because it was not false, it cannot support Cruce's defamation claim.

2. The Jury Had No Evidence to Conclude that Chris Stevens Sent the January 7, 2016 Email with Common-Law Malice.

The trial court correctly charged the jury that Cruce had to prove the January 7, 2016 email was written with common-law malice. (R. 494). This standard requires a plaintiff to prove that the speaker "was activated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff; or that the statements were published with such recklessness as to show a conscious indifference toward [the] plaintiff's reports." *Holtzscheiter,* 506 S.E.2d at 501, n.3.

The record contains no evidence whatsoever from which a reasonable juror could have concluded that Stevens wrote the January 7, 2016 email with any ill will, spite, or malice towards Cruce. Stevens testified that he went into Cruce's old office with permission from the administration because a weightlifting coach had inquired whether a particular student had the necessary paperwork on file to be allowed to lift weights. (R. 394-395). Cruce's counsel then limited her cross-examination of Stevens to the topic of whether Stevens knew what documents had to be in the eligibility files. (R. 396-398). His counsel never broached the subject of any motive Stevens had in writing the email. Moreover, other than being the author of the January 7, 2016 email, Stevens was not mentioned in any other respect during the trial, so the jury could not have imputed any ill will to Stevens from any other evidence. Tellingly, Cruce himself was never asked nor provided

testimony of evidence of *any basis* for Stevens to have ill will towards him. For instance, there was no evidence of any history of personal or professional issues or problems between the two men.

Nonetheless, in its JNOV order, the trial court found that "there is evidence to support a claim that the email was sent with 'recklessness as to show conscious indifference to the Plaintiff.'" (R. 6). There is, however, no such evidence in the record. At most, the trial court points to testimony from Principal Steven Steele to the effect that "the email should not have been sent out in the form and manner that was used by Stevens." (R. 6). It is important to look at Steele's precise testimony. He was critical only of the "format" of the email, but he was not critical of its content. (R. 348-352). Steele explained: "Did it need to be sent out exactly the way it was sent out? No. Did the coaches need to know there might have been some files missing? Yes." (R. 349). He reiterated several times that the "content" of the email was "appropriate." (R. 349). He also confirmed that "there were files missing." (R. 352).

In short, there is no evidence from which the jury could have concluded that Stevens acted with common-law malice in sending the January 7, 2016 email. Likewise, there is no evidence that the email was sent with recklessness as to show conscious indifference. Without such evidence, an essential element of Cruce's claim is missing, and the jury verdict cannot stand.

3. Cruce Offered No Evidence to Show that Any Damages Were Proximately Caused by the January 7, 2016 Email.

In addition, the jury was presented no evidence to show that Cruce suffered any damages that were proximately caused by the January 7, 2016 email. As the trial court charged the jury, "the plaintiff must prove that his reputation was damaged by the defamatory statement. The plaintiff must prove that the damages naturally and proximately resulted from the defendant's statement." (R. 494-495). Importantly, the trial court did not charge the law on defamation *per se*. As a result, there can be no reliance on the law of "presumed damages" to uphold the verdict. Instead, as was charged, Cruce had the burden of proving that the January 7, 2016 email proximately caused damages. He did not meet that burden of proof.

Under South Carolina law, proximate cause requires evidence of causation in fact and legal cause. *McKnight v. South Carolina Department of Corrections*, 385 S.C. 380, 684 S.E.2d 566, 569 (Ct. App. 2009). "Causation in fact is demonstrated by establishing the plaintiff's injury would not have occurred 'but for' the defendant's [wrongful act], while legal cause is proved by establishing foreseeability." *Id*.

In its JNOV order, the trial court in a conclusory fashion states that "[e]vidence was submitted which would allow a jury to reasonably infer that the Plaintiff suffered damages as a proximate result of the January 7th email." (R. 7).

That is not correct.[5] Cruce offered the jury no evidence to show a causal chain connecting the January 7, 2016 email and any damages. Cruce did claim myriad damages, including lost salary, lost retirement, and relocation expenses to the Charlotte area. What Cruce never did, however, was show how any of those damages were proximately caused by the January 7, 2016 email. Most importantly, the January 7, 2016 email did not proximately cause Cruce to be removed from his positions as head football coach and athletic director. That change in his employment had already occurred by January 7, 2016. Moreover, there was no evidence that anyone who received the January 7, 2016 email was a decisionmaker or had any bearing or influence on any decisionmaker who decided at any point not to offer Cruce a subsequent coaching job, whether in or near Berkeley County or in the Charlotte area. In fact, there is *no evidence* that the January 7, 2016 email or its content was ever communicated to anyone other than the recipients of the email.

Furthermore, Cruce did not present testimony from any of the recipients of email, except for Principal Steele. Thus, there is no testimony from anyone who received the January 7, 2016 email that they thought less of Cruce because of that

[5] In its JNOV Order the trial court erroneously states that Cruce "was told that he couldn't be hired for other jobs because he was 'unfit.'" (R. 7). There is no evidence to that effect. In fact, quite the contrary -- when Cruce attempted to explain what he was told on one occasion when rejected for a job, the trial court correctly sustained the hearsay objection and struck the testimony. (R. 227).

email. In other words, there is nothing in this record to even suggest – let alone prove – that "but for" the email, Cruce would have been held in higher regard by persons in Berkeley County or elsewhere. Consequently, Cruce has not shown that the January 7, 2016 email positively or negatively impacted his reputation, and certainly he has not shown that the email proximately caused him any of the damages he claimed. For this additional reason, the verdict cannot stand, and the School District was entitled to a directed verdict and JNOV.

CONCLUSION

Based on the foregoing discussion, the Respondent Berkeley County School District respectfully requests that this Court affirm the decision of the South Carolina Court of Appeals and reverse the jury's verdict and the denial of its directed verdict and JNOV motions with respect to the defamation claim that was submitted to the jury. The School District requests a remand with instructions that judgment be entered in its favor on all causes of action.

Respectfully submitted,

LINDEMANN & DAVIS, P.A.

BY: *s/ Andrew F. Lindemann*

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

RICHARD J. MORGAN #4088
BURR & FORMAN, LLP
1221 Main Street, Suite 1800
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

E. BRANDON GASKINS #73274
MOORE & VAN ALLEN, PLLC
78 Wentworth Street
Post Office Box 22828
Charleston, South Carolina 29401
(843) 579-7038

Counsel for Respondent
Berkeley County School District

November 21, 2022