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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The 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.

REPLY BRIEF OF PETITIONER

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I. The Court of Appeals' decision conflicts with federal precedent and prior decisions of this Court by not recognizing that substantial responsibility for, or control over, the conduct of governmental affairs is a mandatory part of the definition of a public official.

Respondent's analysis of this Court's decision in Erickson, which is based on Rosenblatt v. Baer, 383 U.S. 75, 86 S. Ct. 669 (1966), misapprehends the definition of a public official. In Rosenblatt, a controversy arose concerning how an elected Commission operated a County ski resort. 383 U.S. at 77-78, 86 S. Ct. at 671-72. The petitioner generally criticized the Commission's operation of the ski resort in a letter published in a newspaper. Id. The Supreme Court addressed the definition of public official in the context of whether or not actual malice needed to be proven explaining, "The thrust of New York Times is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation." Id. at 86, 86 S. Ct. at 676. The Court in Rosenblatt acknowledged the "motivating force for the decision in New York Times was two-fold," and explained the two motivating factors behind its decision in New York Times were "first, a strong interest in debate on public issues, and, second, a strong interest in debate about persons who are in a position significantly to influence the resolution of those issues." Id. (citing New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964)).

This Court, in Erickson, recognized the importance of allowing uninhibited debate on a public issue in a democracy and permitting the criticism of persons who were in a position to significantly influence that public issue, but refused to designate a guardian *ad litem* as a public official as she was not "an official who has or would appear to the public to have substantial responsibility for or control over the conduct of government affairs." Erickson v. Jones Publishers, LLC, 368 S.C. 444, 471, 629 S.E.2d 653, 668 (2006). Respondent's attempt to expand

the holding of Erickson to apply to non-governmental scenarios such as high school sports and persons involved in high school sports on the basis that the public is interested in sports expands the New York Times standard beyond recognition.

This Court followed the holding in Rosenblatt in its decision in Erickson. "In general, a public official is a person who, among the hierarchy of government employees, has or appears to have, 'substantial responsibility for or control over the conduct of governmental affairs.'" Erickson, 368 S.C. at 469, 629 S.E.2d at 666 (citing Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 520 n. 4, 506 S.E.2d 497, 507 n.4 (1998) (Toal, J., concurring) (quoting Rosenblatt, 383 U.S. at 85, 86 S. Ct. at 676, 15 L.Ed.2d at 605)). The Court of Appeals relied on this same definition from Rosenblatt when it held in Goodwin v. Kennedy that an assistant principal was not a public official. 347 S.C. 30, 552 S.E.2d 319 (Ct. App. 2001). In short, there is no Federal or State precedent permitting a finding that someone is a public official absent the existence of a public question or evidence that the person being defamed "has or would appear to the public to have substantial responsibility for or control over the conduct of government affairs." Erickson, 368 S.C. at 471, 629 S.E.2d at 668.

Here, following Federal and State precedent, the Lower Court correctly held Berkeley County High School's defensive football strategy is not an issue that warrants particularly strong public discussion and a high school football coach and athletic director is not a person who has substantial responsibility for or control over the conduct of government affairs. (App. pp. 8-9.) Petitioner urges this Court to reverse the decision of the Court of Appeals holding that Petitioner was a public official.

II. The other issues raised by Respondent on appeal do not require reversal of the Lower Court's legal holdings.

A. Petitioner was not a limited public figure.

Similarly, the designation of a limited public figure is also premised on the existence of a public issue. A limited-purpose public figure is defined as someone who has assumed a "role of public prominence in [a] *broad question of concern.*" Hutchinson v. Proxmire, 443 U.S. 111, 135, 99 S. Ct. 2675 (1979) (emphasis added). Furthermore, the broad question of public concern must be a public controversy. As explained in Carr v. Forbes, Inc., 259 F.3d 273 (4th Cir. 2001), an individual cannot be a limited-purpose public figure in the absence of a "public controversy [which] gave rise to the defamatory statement." 259 F. 3d at 278. "A 'public controversy' does not encompass every conceivable issue of interest to the public . . . [it] is a legal term of art; the term only encompasses a dispute 'that in fact has received public attention because its ramifications will be felt by persons who are not direct participants.'" Id. at 278-79 (quoting Time, Inc. v. Firestone, 424 U.S. 448, 454, 96 S. Ct. 958 (1976) and Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1554 (4th Cir. 1994)).

In Carr, the Fourth Circuit Court of Appeals found there was a public controversy involving a failed sewer system on the brink of bankruptcy; the Court held public projects "exist for the public at large [and] [w]hen public projects are mismanaged and bonds issued to finance those projects fail, those projects may in turn fail, thereby harming the public." 259 F.3d at 279. This case is easily distinguished from Carr, because a high school's football strategy causes no harm to the public, nor did the strategy receive public attention because its ramifications would be felt by persons who were not direct participants. The Lower Court did not err when it held Berkeley County High School's defensive football strategy did not rise to the level of a public controversy because it was not a broad question of concern. The Lower Court's holding was in line with Federal and State precedent. Additionally, as argued previously, the defamatory email at issue in this case had nothing to do with Petitioner's coaching strategy. Even if Petitioner's

high school football strategy was a public controversy, the subject matter of the defamatory email was Petitioner's maintenance of student athlete files.

B. Petitioner put forth sufficient evidence of each of the element of his defamation claim.

1. The Jury did not err in finding statements made in the January 7th email were false and defamatory.

There was ample evidence for the jury to conclude statements in the email about Petitioner were false. The athletic trainer who wrote the email was not a certified athletic director and he was not certified to handle student athlete files; he did not know what documents had to be in student athlete files. (App. 220, line 18- p. 225, line 14; p. 398, lines 1-8; p. 401- p. 402, line 1). Sufficient evidence existed for the jury to conclude the athletic trainer did not know whether the eligibility files were "out of order" and whether the way Petitioner kept the files could really be a liability for the school, as stated in the email. Further, Petitioner testified his files had been audited three (3) times a year over the past 25 years, with the last audit (which found no issues) occurring only a few months earlier. (App. p. 226, lines 2-24.) Petitioner also testified the statement contained in the email regarding what documents had to be included in the files was false. (App. p. 284, line 8- p. 286, line 18.) Specifically, Petitioner testified the risk acknowledgement and consent to participate form was attached to the physical form, so they were not missing from the eligibility files; that no HIPPA form or FERPA form had to be in the eligibility files; information about special accommodations for a student are always written by the doctor on the physical form so that was not missing; and there was no requirement that a social security card be in the student athlete files. (App. p. 284, line 8- p. 286, line 18.) Therefore, there was sufficient evidence presented from which a jury could conclude the January 7th email communicated false and defamatory information inferring Petitioner had created a liability for

the school through his failure to properly maintain student athlete eligibility files in his capacity as athletic director. The job of an athletic director is to determine if students are qualified academically and physically to participate in sports; the failure to perform such tasks properly, as alleged by Respondent in the January 7th email, indicates because Petitioner failed to perform his job duties he was unfit for his job, which was false.

2. The jury was presented sufficient evidence of common law malice.

The jury was charged, "Common law malice means the defendant acted with ill will towards the plaintiff, or acted recklessly or wantonly with conscious indifference to the plaintiff's rights." (App. p. 505, lines 19-22.) There was sufficient evidence from which the jury could conclude Respondent's athletic trainer acted recklessly or with conscious indifference to Petitioner's rights when he sent an email to 45 people alleging Petitioner's student athlete files could create a liability for the school. Some of the recipients were no longer coaches (App. p. 396) and at the time the email was sent, the author of the email was not certified to review, audit, or maintain eligibility files (App. p. 397). When he sent the email, the athletic trainer did not what information had to be in the eligibility files. (App. p. 224, line 18- p. 225, line 14.) There was no need to send an email because if the athletic trainer had questions, he could have called Petitioner or another athletic director and asked for help. Importantly, the athletic trainer's principal testified the January 7th email inferred Petitioner was doing a bad job maintaining student athlete files, it should not have been sent out as it was, and that the recipients should have later been told the information in the January 7th email was false. (App. p. 352, line 22- p. 356, line 15.) All of these facts were sufficient evidence for a jury to conclude the athletic trainer acted recklessly or with conscious indifference to Petitioner's rights.

3. There was sufficient evidence from which a jury could find the January 7th email was the proximate cause of Petitioner's damages.

There was ample evidence from which the jury could find proximate cause. The jury heard evidence that prior to the January 7th email Petitioner had served as an athletic director for 25 years and he had received many accolades as an athletic director that were awarded by his peers. (App. p. 190, line 2- p. 191, line 18.) Petitioner testified the email told coaches his office had been searched, and things were missing or misplaced and because he was the only person authorized to look at student grades and personal health information as athletic director, his actions were a liability. (App. pp. 224-25.) The email infers Petitioner did not know how to do his job, a job he had been doing for decades, which means Petitioner may have been unfit for his job for years. Petitioner testified after he was fired everyone asked him what he had done wrong and he was humiliated. (App. p. 229.) He further testified, "They took everything from me. They took my name, they took my reputation, they took everything from me based off a lie." (Id.) The jury also heard evidence indicating after the January 7th email, Petitioner tried but could not get a job in South Carolina, and there was an implication he had been fired for cause because he had been so suddenly fired as athletic director and football coach and Respondent refused to comment on the reason for his sudden termination. (App. p. 229, line 2—p. 231, line 12.) Petitioner testified he considered the email fraudulent because the information in it was wrong. (App. p. 286, lines 13-18.) There was ample evidence to support the jury's determination of damages caused by this email.

CONCLUSION

Respondent urges this Court to declare that a local high school athletic director and coach is a public official who has no more protection from defamation than a governor, mayor, or superintendent. Specifically, as a result of the Tort Claims Act, Respondent's requested ruling would create a situation in which Petitioner has no protection from defamation by his public

employer or its employees. Petitioner had no substantial responsibility for or control over the conduct of governmental affairs and Berkeley County High School's football strategy is not a matter of broad concern or a public controversy. The Lower Court correctly found Petitioner was a private citizen when he was defamed. This Court should overturn the Court of Appeals' decision and reinstate the jury's verdict in this case so Federal and State precedent remain intact.

Respectfully submitted,

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