THE STATE OF SOUTH CAROLINA
In The Supreme Court

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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.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Respondent Berkeley County School District has petitioned this Court for a rehearing of the recent decision in *Cruce v. Berkeley County School District*, Op. No. 28186 (S.C. S.Ct. filed January 17, 2024). The Respondent respectfully submits that the following points were overlooked or misapprehended by this Court.

I.

The School District disagrees with the Court's ruling that the Petitioner Jeffrey Cruce, as a high school football coach and athletic director, is not a public official under First Amendment jurisprudence or, at the very minimum, a limited public figure under the facts presented. The School District further disagrees that "public official" includes only those persons who possess

"official influence or decision-making authority about serious issues of public policy or core government functions, such as defense, public health and safety, budgeting, infrastructure, taxation, or law and order." (Slip Op. at 4). Notably, the Court cited no authority for that holding.

In fact, in its briefs, the School District cited numerous cases to counter that premise. This Court overlooked those authorities. Specifically, 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. As the School District pointed out in its brief, the Fourth Circuit case pre-dated the existence of the internet as a source for sports news, cable sports networks such as ESPN, fantasy leagues, and the like which have transformed sports into an even bigger and more popular industry today than in 1971.

The School District also cited to *Chuy v. Philadelphia Eagles Football Club*, 431 F.Supp. 254 (E.D. Pa. 1977), *aff'd,* 595 F.2d 1265 (3d Cir. 1979) (en banc), where the court writes: "We obviously cannot say that the public's interest in professional football is important to the commonweal or to the operation of democratic society in the same sense as are political and ideological matters. However, the fabric of our society is rich and variegated ... [Interest] in professional football must be deemed an important incident among many incidents, of a society founded upon a high regard for free expression." 431 F. Supp. 254, 267.

The Fourth Circuit's decision in *Time, Inc. v. Johnson*, *supra,* is not antiquated or obsolete. In fact, the Sixth Circuit favorably cited that decision and the above citation in a 2020 case finding that a basketball referee is a public figure. In *Higgins v. Kentucky Sports Radio, LLC*, 951 F.3d 728 (6th Cir. 2020), the Sixth Circuit did not find that commentary about sports is not worthy of First Amendment protections or application of the *New York Times* standard. In fact, as that court noted, "[p]ublic commentary about sports, some have said, is no less protected than commentary about 'economics [or] politics.'" 951 F.3d at 735, *citing Regan v. Time, Inc.*, 468 U.S. 641, 678 (1984) (Brennan, J., concurring in part and dissenting in part, joined by Marshall, J.).

In short, a public official is not limited to a person in government who formulates or implements public policy within the political realm. To the contrary, sports are the subject of intense public interest, controversy, and scrutiny – including the conduct, performance, and success of coaches. Indeed, the initial case from the United States Supreme Court to recognize the concept of a public figure in a defamation context involved a sports-related controversy and, in particular, a football coach as the plaintiff. In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), 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 the position of athletic director and head football coach at the University of Georgia. Butts was, in actuality, employed by the Georgia Athletic Association, a private corporation. Nonetheless, as overlooked by this Court, 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.

There are ample other cases overlooked by this Court where numerous state and federal courts have applied First Amendment protections and the *New York Times* standard to comments made about persons involved in sports. In other words, courts have routinely held that public controversies and scrutiny within the scope of First Amendment protections 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 Court is respectfully requested on rehearing to consider this extensive case law and reconsider its ruling that controversies and matters of public interest involving sports are not entitled to First Amendment protection.

II.

The School District agrees with the dissent of Justice Few that this Court should have applied the rule of constitutional avoidance and not reached the First Amendment issue as to whether Cruce is a public official or a public figure to whom the *New York Times* standard applies.[1] This case could be fully adjudicated on the simple issue of law that 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 was not defamatory as a matter of law. (R. 532). 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. 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). As recognized by Justices Few and James in their dissents, the email was not defamatory as a matter of law. The majority is respectfully requested on rehearing to re-assess that issue and to agree with the legal determination made by the dissenters, which would thereby allow the Court to avoid the First Amendment issue.

To reiterate a few points, even beyond what Justices Few and James noted, the Court should recognize that the Stevens email was a minor – even trivial – part of Cruce's claims

[1] In *Riverwoods, LLC v. County of Charleston*, 349 S.C. 378, 563 S.E.2d 651 (2002), this Court explained that "[i]t is this Court's firm policy to decline to rule on constitutional issues unless such a ruling is required." 563 S.E.2d at 652.

against the School District and a minor part of the trial of this case – certainly nothing to support a $200,000 judgment for defamation. As the School District pointed out, the testimony elicited from Chris Stevens at trial was exceedingly brief. Stevens was not even called as a witness in Cruce's case-in-chief, and hence, his testimony was not in the record when the trial court denied the School District's initial directed verdict motion. On cross-examination, Cruce's counsel did not ask Stevens even the first question about the content, meaning, or intent of the email. (R. 396-398). Likewise, there was no extrinsic testimony presented to support any insinuation or innuendo associated with the email. 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 head football coach and athletic director. It was 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.

In its opinion, this Court rejects the School District's attempt "to resurrect the ancient doctrine of *miltior sensus*." (Slip Op. at 9). There was no such attempt, nor was that doctrine cited at any stage of this case, including before this Court. However, the School District did argue that Cruce's defamation claim is premised entirely on a *conditional* statement about documents that "could" be misplaced or out of order. (R. 532). The use of "could" makes this sentence conditional, and under South Carolina law, 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 of Appeals 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.*

The majority of this Court did not even address this issue but rather addressed a defunct theory that was not asserted.

Additionally, the majority overlooks that 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, however, the email states.

Instead, the majority focused on the word "liability" in the email and suggests that Stevens attributed something "illegal" to have occurred. (Slip Op. at 9). That is not, in fairness, a reasonable inference to be drawn from the evidence for several reasons, all of which the majority overlooks. First, Stevens makes no reference to Cruce in the email. Moreover, during his testimony, Stevens was never asked what the "liability" language meant or was intended to convey. (R. 396-398). It is clear, however, that Stevens was trying to convey the importance of his request to the coaches, who were the recipients of the email, that they assist him by providing the requested roster of their participating student-athletes so that he could check that every student had the required paperwork. (R. 532). The email must be read as a whole to properly determine its meaning and whether it was defamatory -- rather than singling out one word as a "buzzword." (Slip Op. at 9). Moreover, Stevens did not say and was not insinuating any *existing* liability on the part of the School District that could be attributed to Cruce or anyone else. Certainly, Stevens never said anything was "illegal" as the majority unfairly reads into the language.

In addressing common law malice, the majority also overlooks that Cruce failed to present any evidence that Chris Stevens acted with common law malice in sending the January 7, 2016 email. No testimony was elicited from Stevens or Cruce as to any ill will between the two.

The majority appears to concede that point. Instead, the majority states that Stevens "rummaged through the files and broadcast his belief about their integrity to forty-five of Cruce's peers." (Slip Op. at 10). Based on that unfair characterization of the evidence, the majority concludes that "Stevens' review of the files before sending the email was cursory and incomplete," and thus "there was sufficient evidence of recklessness to withstand a JNOV motion." (Slip Op. at 10).

However, recklessness is a heightened standard not met by the evidence as described by the majority. In *Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011), this Court defined "recklessness" as follows:

> "Recklessness implies the doing of a negligent act knowingly"; it is a "conscious failure to exercise due care." *Yaun v. Baldridge,* 243 S.C. 414, 419, 134 S.E.2d 248, 251 (1964) (citation omitted). If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care. *Id.; see also Rogers v. Florence Printing Co.,* 233 S.C. 567, 577, 106 S.E.2d 258, 263 (1958) ("The test by which a tort is to be characterized as reckless, wil[l]ful or wanton is whether it has been committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights."). The element distinguishing actionable negligence from willful tort is inadvertence. *Rogers,* 233 S.C. at 578, 106 S.E.2d at 264.

709 S.E.2d at 612. The evidence does not suggest that Stevens merely "rummaged" through the files. Indeed, the email states: "*After spending some time looking through 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). (Emphasis added). That statement does not infer recklessness. Moreover, Stevens was not questioned about his review of the file. In short, the inferences to be drawn

from the evidence must be reasonable,[2] and quite frankly, the record does not support a reasonable inference that Stevens' review of the files was so "cursory and incomplete" to rise to the level of recklessness. It is, at best, speculation and conjecture which does not support the verdict.

Interestingly, in an attempt to salvage his verdict, Cruce concocted a speculative tale that Stevens was in cahoots with the District Superintendent to "create" evidence to support Cruce's "termination" as athletic director. There is no evidence to support that. The majority apparently agrees that the evidence does not support Cruce's explanation of "common law malice." However, the evidence also does not support the alternative explanation that the majority formulated *sua sponte*. A finding of recklessness by Stevens on this record is simply not a fair interpretation of the evidence -- mere inadvertence perhaps, but not recklessness or any degree of *conscious* wrongdoing. Again, Stevens was not even asked by Cruce's counsel any questions that would reflect his state of mind, and hence, there is no evidence of conscious wrongdoing to support the verdict.

In sum, the majority is respectfully requested to reconsider the application of the rule of constitutional avoidance and to join Justices Few and James in finding that the Stevens email quite simply was not defamatory as a matter of law.

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[2] The applicable standard for directed verdict or JNOV motions requires consideration only of "reasonable inferences." This Court has explained that "[w]hen considering a directed verdict motion, the trial court should view the evidence and all *reasonable inferences* in the light most favorable to the non-moving party." *South Carolina Federal Credit Union v. Higgins*, 394 S.C. 189, 714 S.E.2d 550, 552 (2011). (Emphasis added). In *Jones v. Sun Publishing Co., Inc.*, 278 S.C. 12, 292 S.E.2d 23 (1982), this Court also explained: "South Carolina adheres to the 'scintilla of evidence' rule which requires submission of an issue to a jury whenever there is competent and relevant evidence tending to establish the issue in the mind of a reasonable juror. The rule does not authorize submission of speculative, theoretical or hypothetical views nor does it permit a verdict to stand upon surmise, conjecture or speculation." 292 S.E.2d at 27.

Respectfully submitted,

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