THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2018-000791
Case No. 2016-CP-08-0131

Jeffrey Lance Cruce,..... Respondent,

v.

Berkeley County School District,..... Appellant.

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in failing to grant a directed verdict and JNOV to the Berkeley County School District based on absolute sovereign immunity under Section 15-78-60(17) of the South Carolina Tort Claims and, more specifically, in failing to rule that Jeffrey Cruce, as a head football coach and athletic director, did not qualify as either a "public official" or "limited public figure" for purpose of defamation?

II. Did the trial court err in failing to grant a directed verdict and JNOV to the Berkeley County School District on the bases that Jeffrey Cruce failed to prove each of the elements of his defamation claim based on the January 7, 2016 email sent by Chris Stevens?

A. Did the trial court err in ruling that the January 7, 2016 email sent by Chris Stevens was defamatory and false?

B. Did the trial court err in ruling that the record includes any evidence to support a finding of common law malice?

C. Did the trial court err in ruling that the record includes any evidence to support a finding that the damages claimed were proximately caused by the January 7, 2016 email sent by Chris Stevens?

STATEMENT OF THE CASE

This is an appeal from a defamation action brought against the Appellant Berkeley County School District ("School District") pursuant to the South Carolina Tort Claims Act. The Respondent 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. 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. 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.

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. (Tr. 416). 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. No appeal has been 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. (Ex. 13). 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, Steven 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. (Ex. 13).

The trial court denied the School District's directed verdict motions as to the defamation claim pertaining to the January 7, 2016 email. 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. 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.

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. The School District thereafter filed a timely appeal to this Court.

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. Digh*, 385 S.C. 296, 683 S.E.2d 803, 807 (Ct. App. 2009) ("This Court reviews all questions of law *de novo*").

ARGUMENTS

I. The trial court erred in failing to grant a directed verdict and JNOV to the Berkeley County School District based on absolute sovereign immunity under Section 15-78-60(17) of the Tort Claims and, more specifically, in failing to rule that Jeffrey Cruce, as a head football coach and athletic director, did not qualify as either a "public official" or "limited public figure" for defamation purposes.

The Berkeley County School District moved for a directed verdict and JNOV on the basis that Jeffrey Cruce qualifies as a public official or alternatively as a limited public figure. As such, Cruce was necessarily required to prove actual malice to prevail on his defamation claim.

The South Carolina appellate court have repeatedly made clear that "[t]he Tort Claims Act governs all tort claim against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees." *Proctor v. Department of Health & Environmental Control*, 368 S.C. 279, 628 S.E.2d 496, 502 (Ct. App. 2006). Governmental entities are "liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained" within the Tort Claims Act. S.C. Code Ann. § 15-78-40. The General Assembly did not intend to waive all sovereign immunity. Rather, it "intend[ed] to grant the State, its political subdivisions, and employees,

while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter." S.C. Code Ann. § 15-78-20(b).

Specifically, the School District is entitled to absolute sovereign immunity under Section 15-78-60(17) of the Tort Claims Act. Section 15-78-60(17) provides that a governmental entity is not liable for a loss resulting from "employee conduct outside the scope of his official duties or which constitutes actual fraud, *actual malice*, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-60(17). (Emphasis added). Because proof of "actual malice" is an element of his claim, Cruce's defamation claim is barred by sovereign immunity. The trial court, however, rejected this position and erroneously concluded that Cruce is neither a public official nor a limited public figure.

A. Sovereign Immunity under Section 15-78-60(17)

In *Gause v. Doe*, 317 S.C. 39, 451 S.E.2d 408 (Ct. App. 1994), this Court examined whether the South Carolina Tort Claims Act barred the plaintiff's defamation cause of action against the Myrtle Beach Police Department. The parties did not dispute that the plaintiff, as a police officer, was a "public official" for purposes of the defamation action.[1] This Court explained that "[i]n a case involving

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[1] This Court recognized in *Gause* that there was controlling authority in this State providing that a police officer is a "public official" for purposes of defamation. *See*, *Botchie v. O'Dowd*, 315 S.C. 126, 432 S.E.2d 458 (1993) (a deputy sheriff was a public official for the purposes of his defamation action against his employer, the sheriff, and was therefore required to prove actual malice); *McClain v. Arnold*, 275 S.C. 282, 270 S.E.2d 124 (1980) (a police officer is a public official for the purposes of a defamation action).

defamation of a public official, the plaintiff must prove the defendant acted with actual malice." 451 S.E.2d at 409. Citing Section 15-78-60(17), this Court also recognized that the Tort Claims Act "clearly excludes a governmental entity's liability for an individual's loss stemming from a state employee's conduct that constitutes actual malice." *Id.* Based on that provision, this Court "agree[d] with the trial court that the SCTCA bars Gause's slander claim against the MBPD because Gause must prove the MBPD employee's conduct constituted actual malice in order to recover on this claim." *Id.*

This case requires the same result. Jeffrey Cruce, as the athletic director and head football coach, qualifies as a "public official," or alternatively, as a "limited public figure." As such, he was required to prove actual malice in order to prevail on his defamation claim, but pursuant to Section 15-78-60(17), the School District enjoys absolute sovereign immunity for conduct constituting actual malice. Accordingly, Cruce's defamation claim against the School District is barred.

B. Public Official

The South Carolina Supreme Court has held that "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." *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 629 S.E.2d 653, 665 (2006). Actual malice

requires proof that the statement was made "with knowledge that it was false or with reckless disregard of which it was false or not." 629 S.E.2d at 666, *citing New York Times Co. v. Sullivan*, 376 U.S. 256, 279-280 (1964). As the South Carolina Supreme Court has cautioned, "[a]ctual malice under the *New York Times* standard should not be confused with the concept of common law malice as an evil intent or a motive arising from spite or ill will." *Erickson*, 629 S.E.2d at 666. *See also*, *Sanders v. Prince*, 304 S.C. 236, 403 S.E.2d 640 (1991).

Accordingly, the Supreme 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*, 629 S.E.2d at 666. "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,'" the Supreme 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.* "The status of a public official may be deemed sufficient to warrant application of the *New York Times* privilege, not because of the government employee's place on the totem pole, but because of the public interest in a government employee's activity in a particular context." *Id.*

Thus, the dispositive question asks whether the status of a high school athletic director and head football coach makes him a "public official." In other words, the Court must focus not only on whether those government positions are ones that invite public scrutiny and discussion, but also on whether the employee's activity in a particular context invites public scrutiny and discussion.

The South Carolina appellate courts have not, as yet, had the opportunity to address whether a high school athletic director and head football coach qualifies as a "public official." However, a number of cases from other jurisdictions support that conclusion.

For instance, 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 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.

The reasoning in these cases applies with equal force to Jeffrey Cruce. Like those coaches and athletic directors, 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. (Ex. 27). 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. (Tr. 342-344). 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. 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 was the subject of numerous local media articles. (Ex. 27). It 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 the non-punt strategy. (Ex. 20). 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. (Tr. 319-320, Ex. 21).

As recognized 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. The same is certainly true in Berkeley County during the 2015-2016 school year – even more so given Cruce's no-punt strategy. In short, Cruce qualifies as a "public official" under *New York Times*, *Rosenblatt,* and their progeny. The trial court committed reversible error in failing to hold that Cruce was a public official.

C. Limited Public Figure

Even if not a public official, Jeffrey Cruce qualifies at the very least as a "limited public figure." 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).

The South Carolina Supreme 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.*" (Order, p. 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 plaintiffs "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.,* 590 S.W.2d 840, 843 (Ark. 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 plaintiffs "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." (Ex. 20). 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. (Tr. 206, Ex. 27). 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. 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 a story in the *Kansas City Star*. 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. (Ex. 27, Tab 160). 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. (Ex. 27, Tab 161). 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. (Ex. 27, Tab 168).

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 after Cruce was removed from those positions and was reassigned to Sedgefield Middle School.

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. (Ex.

27, Tabs 180, 181). And the email came shortly before there was more media coverage of the lawsuit that Cruce filed against the School District. (Ex. 27, Tabs 182, 183, 184).

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 that Jeffrey Cruce was a "public official" or at the very least a "limited public figure" for purposes of his defamation claim against the School District. As such, Cruce was required to prove actual malice as an element of his claim. However, the School District is entitled to absolute sovereign immunity under Section 15-78-60(17) for employee conduct that constitutes actual malice. Therefore, consistent with this Court's

decision in *Gause v. Doe*, the School District was entitled to a directed verdict and JNOV on the defamation claim.

II. The trial court erred in failing to grant a directed verdict and JNOV to the Berkeley County School District on the bases that Jeffrey Cruce failed to prove each of the elements of his defamation claim based on the January 7, 2016 email sent by Chris Stevens.

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 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. (Ex. 13). 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, Steven 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. (Ex. 13).

"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.*

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

"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.[2] 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." (Ex. 13). 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. (Ex 13). 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)

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[2] 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." (Order, p. 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. (Tr. 234, 237-238). There is no evidence that the email was sent to parents.

that the email contains an insinuation. The court cites to the case of *Fountain v. First Reliance Bank*, 398 S.C. 434, 730 S.E.2d 305 (2012), in which the 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." (Order, p. 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. (Tr. 351-353). 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 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. The use of "could" makes this sentence conditional. This Court 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. (Tr. 175-177). 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.

B. 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. (Tr. 451). 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] plaintiffs 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. (Tr. 349-350). 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. (Tr. 351-353). 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.'" (Order, p. 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." (Order, p. 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. (Tr. 303-307). 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." (Tr. 304). He reiterated several times that the "content" of the email was "appropriate." (Tr. 304). He also confirmed that "there were files missing." (Tr. 307).

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.

C. 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 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." (Tr. 451-452). 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." (Order,

p. 7). That is not correct.[3] 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 these 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

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[3] 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.'" (Order, p. 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. (Tr. 182).

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 and analysis, the Appellant Berkeley County School District respectfully requests that this Court 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,

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September 24, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2018-000791
Case No. 2016-CP-08-0131

Jeffrey Lance Cruce,..... Respondent,

v.

Berkeley County School District,..... Appellant.

CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Appellant Berkeley School District, does hereby certify that service of the **Initial Brief of Appellant** and **Appellant's Designation of Matter to be Included in the Record on Appeal** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 24th day of September 2018:

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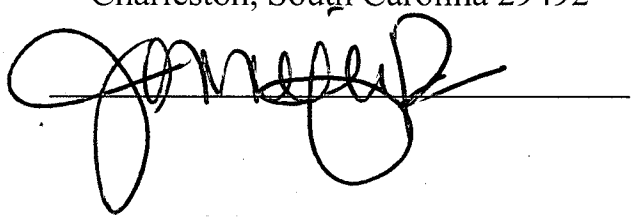

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September 24, 2018

Hand Delivered
The Honorable Jenny Abbott Kitchings
Clerk of Court
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RE: Jeffrey Lance Cruce v. Berkeley County School District
Appellate Case Number: 2018-000791
Civil Action Number: 2016-CP-08-0131
Claim Number: 17177
Our File Number: 104.20017

Dear Ms. Kitchings:

Please find enclosed the originals and one copy each of the **Initial Brief of Appellant** and **Appellant's Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. I would appreciate you filing the originals and returning a clocked-in copy of each document to me by way of my paralegal. By copy of this letter, I am serving copies on all counsel of record.

Thank you for your assistance in this matter.

Sincerely,

LINDEMANN, DAVIS & HUGHES, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: (w/ Enclosures)

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