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.

REPLY BRIEF OF APPELLANT

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STANDARD OF REVIEW

The Appellant Berkeley County School District takes issue, in part, with the standard of review as expressed in the response brief filed by the Respondent Jeffrey Cruce. The threshold issue on appeal is whether Cruce, as the athletic director and head football coach at Berkeley High School, qualified as a public official or alternatively a limited public figure for purposes of his defamation cause of action. Indeed, the South Carolina Supreme Court has held 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.* Thus, as purely an issue of law for the court to determine, that threshold question is not subject to the deferential standard of review described by Cruce in his brief. To the contrary, as a question of law, the standard of review is *de novo* -- which Cruce does not acknowledge. *See*, *Fesmire v. Digh*, 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 issues raises on appeal by the Berkeley County School District were raised to and decided in the trial court and are properly preserved for appellate review.

As an initial argument, the Respondent Jeffrey Cruce argues that certain issues raised by the School District on appeal have not been properly preserved for appellate review. Cruce argues that the School District has not preserved the public official and common law malice arguments. The School District disagrees.

Issue preservation "is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants." *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, S.E.2d 282, 285 (2012). The Supreme Court has explained: "While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it *clearly* is unpreserved." 730 S.E.2d at 285. (Emphasis added). "[W]here the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." 730 S.E.2d at 287. (Toal, C.J., concurring in result in part and dissenting in part). "At the very least, the matter must have definitely been called to the attention of the trial court sufficiently to obtain a ruling thereon." *Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543, 546 (2000).

In the present case, the School District raised to the trial court the alternative theories that Cruce was a public official or a limited public figure. Admittedly, the emphasis during the directed verdict motion was the latter, but the record shows that counsel for the School District also addressed whether Cruce was a public official. (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 strongly suggests that the "public official" issue was raised.

That is certainly 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 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 that issue is sufficiently preserved for appellate review.

The School District also argues that Cruce did not present any evidence from which the jury could have concluded that Chris Stevens, the author of the allegedly defamatory email, acted with common law malice. At the directed verdict stage, the trial judge had not ruled on whether the court would charge defamation *per se* or would instead require the jury to find common law malice. That decision was made after a charge conference. (R. 472). Thereafter, in returning a verdict for Cruce and based on the charge given by the trial court, the jury necessarily found common law malice. Yet, there is no evidence to support that element of the proof. The School District timely raised that issue as to the insufficiency of the proof in its post-trial motions, and the trial court considered that issue without objection. The School District submits that the issue was timely raised and adjudicated and hence is preserved for appellate review. If the Court determines the issue is not properly preserved for JNOV purposes, the issue has been timely raised certainly for purposes of obtaining a new trial absolute.

II. 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. However, the School District is entitled to sovereign immunity under Section 15-78-60(17) of the Tort Claims Act for any employee conduct rising to the level of actual malice.

Although not acknowledged by Cruce, this presents purely an issue of law for the court to decide, and the applicable standard of review is *de novo*. Contrary to Cruce's suggestion, this Court is not bound by the trial court's rulings in any respect.

In response to the School District's position that Cruce, as the athletic director and head football coach, qualifies as a public official, Cruce cites only inapposite cases that hold that teachers or school principals are not public officials. But reliance on those cases misses the larger point. The head football coach is not just a teacher or a principal -- not in South Carolina and not in Berkeley County.

Importantly, the South Carolina Supreme Court has explained that "[i]n 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." *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 629 S.E.2d 653, 666 (2006). "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. That is what distinguishes a head football coach from a classroom teacher or even a school administrator.

Without reasonable dispute, high school football is important, newsworthy, and subject to intense public interest and scrutiny in this State. The record fully supports that, and frankly, the Court can probably take judicial notice of that very point. Moreover, within the context of this case, Coach Cruce brought even more than normal notoriety and scrutiny upon himself during the 2015 football season by adopting a controversial and well-publicized no-punt strategy. Cruce discounts

this in his response brief by labeling it as merely "offensive football strategy." That shows a lack of understanding of the basics of the game. The no-punt strategy was not on par which deciding what kind of offense to run. In sharp contrast, the no-punt strategy was a radical departure from typical football where the offense *never* punts on fourth down regardless of field position or the score of the game. That radical departure cannot be downplayed or disputed on this record. The Court need only to refer to the article in the September 21, 2015 edition of the *Kansas City Star* as well as the numerous local media reports in the record. This was not a situation where the head football coach decided to pass the ball more or run more. This represented a radical change from how the game was typically played -- an innovation that ultimately proved to be an abject failure that resulted in several huge losses for Cruce's team.

Even if this Court does not agree that a head football coach in South Carolina is a public official, there should be no doubt that Cruce qualifies as a limited public figure under the facts of this case. Cruce argues in a conclusory manner that he "did not voluntarily assume any role of special prominence in society regarding a public controversy; he merely changed his offensive football strategy in 2015." *See*, Respondent's Brief, p. 10. As discussed above, Cruce cannot downplay his no-punt strategy and its inherent controversy.

But, in a general sense, Cruce also suggests that sports are not the type of public controversy that can make a football coach a limited public figure for purposes of defamation law. That basic premise is flawed. In its opening brief, the School District cited numerous cases showing that sports can be and often are the subject of intense public controversy and scrutiny. Indeed, the initial case from the United States Supreme Court to recognize the concept of a public figure in a defamation context involved a football coach as the plaintiff. *See*, *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

Likewise, 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 Court 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. Cruce misconstrues that language from the Fourth Circuit decision to suggest that sports are only of "public interest" where it is written about in "sports only" media, and hence, any sports stories in a local newspaper or any multi-subject media cannot be within the

"public interest." Instead, the Fourth Circuit was recognizing the obvious -- that sports is an important part of people's lives and very clearly falls within the "public interest" so that its leading figures including coaches do qualify as limited public figures.[1] *See also*, *Chuy v. Philadelphia Eagles Football Club*, 431 F.Supp. 254, 267 (E.D. Pa. 1977), *aff'd,* 595 F.2d 1265 (3d Cir. 1979) (en banc) ("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").[2]

In sum, the record clearly shows that Coach Cruce was, at the very minimum, a limited public figure and certainly during the 2015-2016 school year during which Cruce created and fostered intense public attention and scrutiny by adopting and publicizing unorthodox and controversial football tactics, namely the no-punt strategy. He widely addressed his controversial approach to football in the

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[1] The Court should take judicial notice that 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 make sports an even bigger industry today than in 1971.

[2] This reference to a case involving the Philadelphia Eagles is particularly apropos given that 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).

local media and was even interviewed for a story in the *Kansas City Star*. (R. 538-544). Cruce did not just assume a role of special prominence in the public controversy; he indeed made the controversy what it was and made himself the central figure in it. The trial court erred in failing to rule that Cruce was either a public official or a limited public figure to which the *New York Times* standard applies. Because Cruce was required to prove actual malice as an element of his defamation claim, the School District was entitled to absolute sovereign immunity under Section 15-78-60(17). This case should never have been submitted to the jury. The School District was entitled to a directed verdict as a matter of law.[3]

III. 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

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[3] In his brief, Cruce argues that he was not a limited public figure "so the jury did not have to be charged on the issue of actual malice." *See*, Respondent's Brief, p. 11. To be clear, the School District does not contend that the trial judge erred in failing to charge actual malice and have the jury determine whether actual malice was proven. Instead, because Cruce qualified as a public official or limited public figure, actual malice was a required element of his proof, and accordingly, the defamation claim as brought against the School District is barred by Section 15-78-60(17). *See*, *Gause v. Doe*, 317 S.C. 39, 451 S.E.2d 408, 409 (Ct. App. 1994) ("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.*

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.

On these latter points, the primary argument made by Cruce is that he presented a claim for defamation *per se*. That is incorrect and is not the law of the case. By Cruce's own admission, the trial court did not agree with that theory. The trial judge denied Cruce's request to charge defamation *per se*. (R. 472). While Cruce preserved an objection with respect to the jury charge, he never filed a cross-appeal to assert that the trial court's ruling was in error. It is well settled that "an unappealed ruling, right or wrong, is the law of the case." *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 285 (2012). Thus, the trial court's ruling that the defamation claim is not *per se* is the law of the case. In fact, the law of the case as to the elements to be proven may be gleaned from the trial judge's charge, which includes the following:

> The plaintiff must prove that the statement made -- was made with common law malice. 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.

> Finally, 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). Thus, as the trial judge charged, Cruce was required to prove common law malice as well as proximate cause. Cruce cannot fall back on an unappealed argument that he stated a claim for defamation *per se* as a *post hoc* justification for his lack of proof on these elements.

As to the merits, Cruce has failed to show 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. Additionally, there is no evidence to support any finding of recklessness or conscious indifference by Stevens -- which is a heightened standard that the evidence does not remotely satisfy. Instead, 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. Inferences must be reasonable,[4] and quite frankly, that is *not* a

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[4] The applicable standard for directed verdict or JNOV motions requires consideration only of "reasonable inferences." The Supreme 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), the Supreme 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

reasonable inference. It is, at best, speculation and conjecture which does not support the verdict.

The same is true with respect to the issue of proximate cause. Cruce has not shown that the January 7, 2016 email positively or negatively impacted his reputation. He has also not shown that the email proximately caused him any of the damages he claimed, including lost salary, lost retirement, and relocation expenses to the Charlotte area. Lastly, Cruce has not and cannot dispute that the January 7, 2016 email did not proximately cause him to be removed from his positions as head football coach and athletic director. Without dispute, that change in his employment had already occurred by January 7, 2016.

Finally, with respect to the defamatory nature of the January 7, 2016 email, Cruce focuses on the following sentence from the email: "From a liability stand point with competing sports and athletes it is necessary that all of the files be present to safeguard the athletes as well as to maintain the proper care for those athletes if something were to happen." (R. 532). Cruce claims that Stevens was stating that Cruce "has created liability for the school through his failure to properly maintain eligibility files." *See*, Respondent's Brief, p. 13. That is not the case. Stevens makes no reference to Cruce. Moreover, during his testimony,

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hypothetical views nor does it permit a verdict to stand upon surmise, conjecture or speculation." 292 S.E.2d at 27.

Stevens was never asked what the "liability" language meant. (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. 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.

For each of these reasons, the verdict cannot stand, and the School District was entitled to a directed verdict and JNOV on the defamation claim.

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 or alternatively for a new trial absolute.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant Berkeley County School District certifies that the Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant Berkeley County School District certifies that the Final Reply Brief of Appellant complies with the Supreme Court's Revised Order of April 15, 2014, regarding personal identifiers and sensitive information.

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