

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.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Respondent was a high school teacher in South Carolina for 28 years, an athletic director in Berkeley County at various high schools for a total of 21 years, and head football coach at Berkeley High School before he was terminated as athletic director and football coach and reassigned to a middle school in January of 2016. (R. p. 169, lines 6-7; p. 172, lines 2-8; p. 173, line 11—p. 174, line 4; p. 179, lines 13-16; p. 242, line 19—p. 243, line 20; p. 528.) Berkeley High School is one of seven (7) high schools located in Berkeley County. Berkeley County is one of forty-six counties in South Carolina. In the 28 years he was a teacher, Respondent was never disciplined. (R. p. 173, lines 8-10.) Respondent was “Athletic Director of the Year” for his region the year before he was terminated. (R. p. 214, lines 21-22.) As athletic director, Respondent was the only person certified to maintain student athlete eligibility files (“eligibility files”) in Berkeley County and the eligibility files Respondent maintained were audited three (3) times a year. (R. p. 220, line 18—p. 221, line 14; p. 222, lines 2-6.) Respondent had just received a clean audit from the high school league a few months before he was terminated as athletic director. (R. p. 222, lines 16-24.)

After Respondent was transferred to a middle school for three (3) stated reasons that had nothing to do with maintaining eligibility files (R. pp. 530-531), several of Appellant’s employees, including athletic trainer Chris Stevens, went into Respondent’s office and started going through the eligibility files. (R. p. 394, line 1—p. 395, line 4.) Mr. Stevens thought there were documents missing from the files and prepared and sent an email on January 7, 2016 to 45 persons, some of whom Respondent testified he did not know, stating there were records missing from the eligibility files (which Respondent explained was false) and the files created a liability

to the school, inferring Respondent was unfit as athletic director. (R. p. 176, lines 15-22; p. 279, line 1—p. 283, line 7; p. 395, lines 1-9; p. 532.)

The issue before the jury was whether the January 7th email was defamatory. The jury deliberated more than six (6) hours, sent two (2) notes to the judge, and returned a verdict in favor of the Respondent. (R. p. 508, line 14- p. 510, line 18.)

STANDARD OF REVIEW

"When reviewing a trial court's ruling on a directed verdict motion, this court will reverse if no evidence supports the trial court's decision or the ruling is controlled by an error of law." *Burnett v. Family Kingdom, Inc.*, 387 S.C. 183, 188, 691 S.E.2d 170, 173 (Ct. App. 2010). When reviewing the trial court's decision on a motion for directed verdict, this court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Id.* "The trial court must deny a directed verdict motion where the evidence yields more than one inference or its inference is in doubt." *Id.*

ARGUMENT

I. As Appellant's appeal deals solely with objections to the trial court's denial of Appellant's directed verdict motion, issues not raised during Appellant's directed verdict motion are not preserved for appeal and not properly before this Court.

Appellant's appeal is based solely on the trial court's ruling on its motion for directed verdict and is, therefore, limited to the issues raised and ruled upon by the trial court regarding Appellant's motion. Appellant stated only three (3) bases for its directed verdict motion as to the defamation claim: Respondent was a "limited public figure" (R. p. 425, line 21—p.445, line 8); the January 7th email was not false and defamatory (R. p. 461, lines 11-18); and the January 7th email was privileged. (R. p. 470, lines 1-4.) Appellant includes only two (2) of these three (3) directed verdict arguments on appeal; specifically, Respondent is a "limited public figure"

(Appellant's Br., Argument I. C.) and the January 7th email is not false and defamatory (Appellant's Brief, Argument II A.)

Appellant now makes two (2) arguments that were not presented to the trial court during its directed verdict motion. (R. p. 425, line 21—p. 470, line 4.) Appellant argues in its brief that the trial court failed to grant a directed verdict in its favor as Respondent is a public official (Appellant's Brief, Argument I. B.) and that there was insufficient evidence for a jury to find common law malice. (Appellant's Brief, Argument II.B.)

Appellant argued after trial, as part of its post-trial motion for JNOV, that Respondent was a "public official." As a JNOV under Rule 50 (b) SCRPC is essentially a renewal of the motion for a directed verdict (*Chapman v. Upstate RV & Marine*, 364 S.C. 82, 88, 610 S.E.2d 852, 856 (Ct. App. 2005)), the trial court could not consider argument on matters that were not raised in the directed verdict including whether Respondent was a "public official." "Failure to raise the issue that is now on appeal in the directed verdict motion bars review on appeal." *See, In re McCracken*, 346 S.C. 87, 93, 551 S.E.2d 235, 238 (2001); *Roland v. Palmetto Hills*, 308 S.C. 283, 286, 417 S.E.2d 626, 628 (Ct. App. 1992) ("A motion for judgment notwithstanding the verdict is a renewal of the directed verdict motion and cannot raise grounds beyond those raised in the directed verdict."). The issue of whether Plaintiff is a "public official" cannot be raised on appeal as it was not raised or ruled on at the directed verdict stage of trial and is not properly before the Court.

Appellant also did not argue during its directed verdict motion that there was insufficient evidence the January 7th email was sent with common law malice, which argument it now includes in its brief as Argument II. B. (R. p. 425, line 21—p. 470, line 4.) The only time the issue of common law malice came up during the trial was when Respondent's counsel asked for

a defamation *per se* jury charge which the trial court refused. (R. p. 472, lines 10-22.) The jury charges were not objected to by Appellant. (R. p. 503, lines 13-17.)

Appellant's arguments I. B and II. B. are not properly before the Court as they were not raised during Appellant's directed verdict motion. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) citing *Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997).

II. The trial court did not err in denying 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 Act as there is no South Carolina law supporting Appellant's argument that Respondent was either a "public official" or a "limited public figure" and the court properly viewed the evidence in the light most favorable to the non-moving party.

A. The trial court did not err in ruling that the Tort Claims Act does not provide Appellant absolute immunity as actual malice is not an element of a defamation or libel *per se* claim.

Appellant asserts in its brief that "actual malice" is an element of Respondent's defamation claim. That is not true. Respondent alleged only defamation *per se*. (R., p. 16, ¶¶ 102, 103; p. 62.) When a statement is classified as actionable *per se*, the defendant is presumed to have acted with common law malice and actual malice need not be proven. *Castine v Castine*, 403 S.C. 259, 743 S.E.2d 93 (Ct. App. 2013). The trial court understood Respondent's argument as it charged the jury only regarding common law malice; there was no jury charge regarding actual malice. (R. p. 494, lines 17-22.) As explained further below, there was sufficient evidence from which the jury could conclude that the content of the email inferred Respondent was unfit to perform his job as athletic director, which is defamation *per se*, requiring no proof of actual

malice as actual malice is not necessary to prove defamation *per se*. S.C. Code § 15-78-60 (17), which provides immunity to public entities when their employees act with actual malice, does not provide Appellant immunity and the trial court did not err in failing to grant Appellant's directed verdict motion.

B. The trial court did not err in denying directed verdict on the issue of whether or not Respondent is a "public official."

Notwithstanding Respondent's argument that this issue is not preserved for appeal, the trial court did not err in denying Appellant's motion for directed verdict and judgment JNOV based on the assertion that Respondent was a public official. *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964) involved a libel claim brought by an elected Montgomery City Commissioner against the New York Times after an article was written inferring the Commissioner (Sullivan) had responded to Dr. Martin Luther King's protests by ordering the police to use intimidation and violence against King, bomb King's home and assault King, among other things. 376 U.S. at 256-258, 84 S. Ct. at 713-714. The Supreme Court held that because the elected City Commissioner was a public official, he was prohibited from recovering damages for a falsehood relating to his official conduct unless a statement was made with actual malice. 376 U.S. at 279-280, 84 S. Ct. at 726.

Appellant acknowledges there is no South Carolina law establishing that an athletic director or head football coach is a public official. Appellant cites numerous cases in other states for support of its argument, but fails to alert the Court to the many cases in other states that do not support its argument. *See, e.g., Ellerbee v. Mills*, 422 S.E.2d 539 (Ga. 1992) (a high school principal is not a public official as they are removed from the general conduct of government and are not policy makers); *Richmond Newspapers, Inc. v. Lipscomb*, 362 S.E.2d 32 (Va. 1987), cert

denied, 486 U.S. 1023, 108 S. Ct. 1997 (1988) (public high school teacher was not a public official as he did not influence or control any public affairs or school policy); *McCutcheon v. Moran*, 425 N.E.2d 1130 (Ill. App. Ct. 1981) (relationship a public school teacher or principal has with the conduct of government is far too remote to justify a qualifiedly privileged assault upon their reputation.) *Franklin v. Benevolent etc. Order of Elks*, 97 Cal. App. 3d 919 (1979) (public high school teachers are not public officials); and *Poe v. San Antonio Exp.-News*, 590 S.W.2d 537 (Tex. App. 1979) (summary judgment proof failed to establish plaintiff was a public official).

Further, the cases cited by Appellant to support its argument that Respondent was a public official are factually very different from this case. For instance, in *Johnson v. Southwestern Newspapers Corp.*, 855 S.W.2d 182 (Tex. App. 1993), the plaintiff was solely responsible for the operation of the district's athletic department. Here, Respondent's actions were subject to review, criticism and correction by his Principal. Respondent testified at trial that Principal Steele was Respondent's supervisor (R. p. 194, lines 5-13); Principal Steele discussed Respondent's performance as head coach with Respondent; he had philosophical differences with Respondent about his coaching style and had accordingly threatened to fire him (R. p. 195, lines 11-24); he did not like Respondent's fast-paced offense or lack of punting (R. p. 196, lines 2-14; p. 204, lines 6-18); he ordered Respondent to perform written evaluations of the football coach staff (R. p. 199, line 25—p. 200, line 8); he had considered firing Respondent because Respondent was not making the students hit enough at practice (R. p. 208, line 18—p. 210, line 5); and the Respondent acknowledged the Principal could terminate him at any time as he was the Principal had total authority over the whole school. (R. p. 210, line 23—p. 211, line

3.) Clearly, this is not a situation where Respondent was solely responsible for the operation of the athletic department.

Additionally, in the case of *Johnson v. Corinthian TV Corp.*, 583 P.2d 1101 (Okla. 1978), the court found that although a wrestling coach did not have substantial responsibility for or control over the conduct of government affairs, after he disciplined a student who wanted to rejoin the wrestling team by being whipped while crawling naked with his legs tied through the legs of other team members, and the issue of student discipline was widely publicized on television, the public developed an independent interest in this wrestling coach's qualifications and job performance beyond the public's interest in all government employees' job performance, turning him into a public official.

This set of facts differs dramatically from the facts in this case because the public's interest in the physical abuse of children in school is far different than how a football coach decides to run his offensive strategy. Appellant cites other out of state cases that are not on point. For instance, in *Standridge v. Ramey*, 733 A. 2d 1197 (N.J. Super. Ct. App. Div. 1999), an athletic director who managed all of the athletic programs in the entire school district, including 24 athletic teams, and who supervised approximately 60 coaches and employees was accused in a letter sent to the athletic director's principal and to the superintendent of schools (while he was still employed) of illegal and immoral behavior and sexually harassing female coaches and discriminating against them. As the result of the letter, the athletic director was fired. The New Jersey court acknowledged that New Jersey courts took an expansive view of the types of government employees who qualify as public officials. That is not the case in South Carolina. In fact, there are no South Carolina cases finding that a high school coach or athletic director qualifies as a public official. Contrary to the New Jersey athletic director, Respondent coached

one of seven (7) high school football teams in Berkeley County and disagreement with his offensive strategy was not a stated reason for his termination.¹ In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), a university football coach was involved in fixing football games and the scandal was widely reported. Although the college football coach was not held to be a public official, the court considered him a limited public figure due to the public's interest in fixing college football games. Here, Respondent was only a high school coach, not a university coach and the issue which was arguably of "public interest" was his offensive strategy which is far different than issues related to fraud (fixing games.) None of these out of state cases cited by Appellant is factually similar to Respondent's situation as Respondent's offensive strategy for Berkeley High School was not widely televised and there was no evidence the general public developed an independent interest in Respondent's football strategy any more than any other high school football coach's strategies. The Court did not err when, as a matter of law, she found a high school teacher and football coach at a high school in one county in South Carolina was not a public official.

C. The trial court did not err in denying directed verdict on the issue of whether or not Respondent is a "limited public figure."

"Limited public figures," as enlarged by subsequent cases, are "those persons who, though not public officials are 'involved in issues in which the public has a justified and important interest'" and "include artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done." *Time Inc. v. Johnston*, 448 F. 2d 378, 380 (4th Cir. 1971) citing *Cepeda v. Cowles Magazines and Broadcasting, Inc.* 392 F.2d

¹ In *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 673 (Minn. 2003) and *Weinberger v. Maplewood Review*, 648 N.W. 2d 249 (Minn. Ct. App. 2002), the lower court's determination that plaintiff was a public official was merely accepted by both appellate courts with no discussion by either appellate court regarding why lower court determined plaintiff was a public official.

417, 419 (9th Cir. 1968) cert. denied 393 U.S. 840, 89 S. Ct. 117 (1968). Respondent is not a famous person and how a high school football coach decides to handle his high school football team's offense from year to year is not a matter of important public interest.

The United States Supreme Court generally has defined a public figure as follows: "For the most part those who attain this status [of public figure] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Erickson v. Jones St. Publr., LLC, 368 S.C. 444, 472, 629 S.E.2d 653, 668 (2006).

The trial court properly denied Defendant's motion for a directed verdict when it ruled that a high school football coach's offensive strategy does not involve "an issue in which the public has an important and justified interest" and did not err when it refused to charge the jury that Respondent was a "limited public figure."

The "designation of a person as a public figure may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all concepts. More commonly, an individual 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.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 351, 94 S. Ct. 2997 (1974).

In the case of *Haskins v. Baylis*, 440 F. Supp. 2d 455, 463 (D. Md. 2006), the District Court held that a dog breeder although well known in the small world of dog breeding and showing purebred dogs, did not assume "any special prominence with respect to any public controversy that he might be considered a public figure for a limited purpose." (citing *Time, Inc.*

v. Firestone, 424 U.S. 448, 453, 96 S. Ct. 958 (1976)) ("Respondent did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it."). *See also, St. Luke's Evangelical Lutheran Church v. Smith*, 74 Md. App. 353, 537 A.2d 1196, 1203-04 (Md. Ct. Spec. App. 1988) (associate director of church ministry is not a public figure absent clear evidence of general fame or notoriety), *rev'd in part on other grounds*, 318 Md. 337, 568 A.2d 35 (Md. 1990). Defendant admitted there are no cases in South Carolina that hold a high school coach and athletic director is a limited public figure and, thus, there is no precedent to support Defendant's argument.

Further, the evidence clearly indicated Respondent did not meet all five (5) of the requirements necessary to become a limited public figure. The five (5) requirements for a limited purpose public figure as decided by a federal court in the district of Maryland are: (1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in a 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 statements; and (5) the plaintiff retained public figure status at the time of the alleged defamation. *Fitzgerald v. Penthouse Int'l*, 691 F.2d 666, 668 (4th Cir. 1982).

The trial judge properly denied Appellant's directed verdict motion on this issue as all five (5) factors were not met when Respondent changed his offensive football strategy. First, all high school football teams are covered every week in local papers. Respondent testified his team received the same amount of coverage in the local papers as all of the other high school teams. (R. p. 252, lines 14-25.) Second, Respondent did not voluntarily assume any role of special prominence in society regarding a public controversy; he merely changed his offensive football

strategy in 2015. Third, it is true that Respondent sought to have his fast offensive strategy succeed as all high school coaches want to win games, however his offensive strategy was not a public controversy, thus he did not seek to influence the resolution of a public controversy. The fourth requirement also cannot be met as the controversy as to whether or not Respondent should use a fast offense for his high school football team did not rise to the level of a matter of public interest. In *Time Inc. v. Johnston*, 448 F. 2d 378, 383 (4th Cir. 1971), based on the facts in that case, the Fourth Circuit found there was a public interest in sports when sports matters were reported in national papers or in newspapers that dealt exclusively with sports. The local Berkeley County newspaper and Post and Courier are not national papers and do not deal exclusively with sports issues. The fifth requirement was also not met as Respondent did not retain his alleged public status as football coach when the defamatory email was sent as he had already been terminated as coach and athletic director and transferred to a middle school by then. The trial court was correct in ruling at the directed verdict stage of trial that viewing the evidence and all inferences in a light most favorable to Respondent, Respondent was not a limited public figure so the jury did not have to be charged on the issue of actual malice. *See, e.g., Gertz v. Robert Welch*, 418 U.S. 323, 345, 94 S. Ct. 2997, 3010 (1974) (internal citations omitted) (“[a private individual] has not accepted public office or assumed an influential role in ordering society. He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood.”)

III. The trial court did not err in denying Appellant’s directed verdict as to Respondent’s defamation claim as the evidence regarding the elements of Respondent’s claim yielded more than one inference, and a jury could have

found that the statements in the January 7th email were false and that it was reckless to send the email to forty-five (45) recipients.

A. There was sufficient evidence from which a jury could find the statements in the January 7th email were false.

Respondent testified the athletic trainer at the high school who wrote the email (Chris Stevens) was not certified to handle student athlete files and he did not know what documents had to be in student athletes' files. (R. p. 220, line 18—p. 221, line 14.) Chris Stevens testified his job was to take care of athletic injuries and illnesses; he admitted he was not an athletic director. (R. p. 394, lines 1-8; p. 397, lines 23-25.) Respondent testified only athletic directors are certified to maintain the athlete files and there was no evidence put forth rebutting Respondent's testimony. (R. p. 220, line 18—p. 221, line 14; p. 397, line 1—p. 398, line 1.) Based on this testimony, a jury could conclude Chris Stevens did not know when he wrote the January 7th email whether the eligibility files were "out of order" as he stated in the email. Further, Respondent testified the statement in the email that the files could be a liability was false as his files were audited three (3) times a year and the last audit that occurred was only a few months before the January 7th email was written and it was a clean audit. (R. p. 222, lines 2-24.) Principal Steele testified Respondent had not been terminated based on his performance as athletic director, which supports the fact that the email falsely communicated Respondent was incompetent as athletic director. (R. p. 323, lines 2-17.)

Respondent also testified the information contained in the email about what documents should be in the eligibility files was false. (R. p. 280, line 8—p. 282, line 18.) Respondent testified the risk acknowledgement and consent to participate form was attached to the physical itself so they were not missing from the eligibility files; no HIPPA form or FERPA form had to be in the eligibility files; information about special accommodations for a student are also written

by the doctor on the physical form so that was not missing; and no social security card had to be in the eligibility file. (R. p. 280, line 8—p. 282, line 18.) Therefore, there was sufficient evidence presented to the jury for it conclude the January 7th email communicated false information alleging Respondent had created a liability for the school through his failure to properly maintain eligibility files.

B. Although common law malice is presumed in defamation *per se* and does not need to be proven, there was sufficient evidence presented from which a jury could find 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.” (R. p. 494, lines 19-22.) There was sufficient evidence presented to the jury from which the jury could conclude Chris Stevens acted recklessly or with conscious indifference to Respondent’s rights when he sent an email to 45 people alleging Respondent’s eligibility files could create a liability for the school as Chris Stevens did not know what information had to be in the eligibility files. A jury could find Chris Stevens acted recklessly and with conscious indifference to Respondent’s rights by making false statements about student eligibility files when he had never been certified to do eligibility files. (R. p. 220, line 18—p. 221, line 14.) Principal Steele testified the January 7th email 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. (R. p. 348, line 22—p. 352, line 15.)

Mere belief in the truth of its statement does not justify its publication if the statement is published with an improper and unjustified manner or with improper and unjustified motives and the speaker must be careful to go no further than his interests or duties require. *Fulton v. Atlantic Coast Line R. Co.*, 220 S.C. 287, 296-97, 67 S.E.2d 425, 429 (1951). *See also, Tyler v. Macks*

Stores of South Carolina, Inc., 275 S.C. 456, 272 S.E. 2d 633 (1980). (“Words or conduct or the combination of words and conduct can communicate defamation.”); *Mains v. K Mart Corp.*, 297 S.C. 142, 149, 375 S.E.2d 311, 315, (Ct. App. 1988) (“The time, place and other circumstances of the publication of defamatory charges, as well as the language of the publication itself, are admissible as evidence to show that the false charge was made with malice.”) There was sufficient evidence from which a jury could conclude sending this email to 45 recipients who were not all employees of the school district, and some of whom Respondent testified he did not know (R. p. 221, lines 15-22) was reckless and intended to disgrace Respondent. Respondent testified that only head coaches were allowed to review student eligibility files and most of the 45 recipients were not head coaches so they had no need to know information about eligibility files. (R. p. 279, line 18—p. 280, line 4; p. 283, lines 2-7.)

Further, the jury saw a letter dated January 8th, the day before the defamatory email was sent, indicating Respondent and his attorney met with the District Superintendent on January 4th to discuss, among other issues, his termination as athletic director. (R. pp. 534-536.) The timing was such that the jury could reasonably draw the reasonable conclusion from this evidence that the review of eligibility files and preparation of the January 7th email the next day was an attempt after the fact to create evidence to support the Appellant’s reason for terminating Respondent as athletic director. The timing of the email is evidence of ill will towards Respondent as Chris Stevens could have called Respondent if he had questions about the eligibility files before he recklessly told forty-five (45) people Respondent’s eligibility files were a liability to the school. This is especially true due to the animosity the Principal held towards Respondent.²

² Respondent testified the Principal told him, “I really didn’t like you”; the Principal threatened to fire Respondent; he criticized how Respondent handled football practices; he created a blank

A jury could have reasonably concluded the email was only sent to humiliate Respondent and make him appear incompetent in this former job. The timing and content of this email and the manner it was sent all support a finding of recklessness on the part of Appellant.

C. Proximate cause does not need to be proven in a defamation case that is actionable *per se*.

Damages are presumed in defamation that is actionable *per se*, therefore, it is not necessary to prove that any damages are proximately caused.³ “If the defamation is actionable *per se*, the law presumes the defendant acted with common law malice and that the plaintiff suffered general damages.” *Parrish v. Allison*, 376 S.C. 308, 313, 656 S.E.2d 382, 385 (Ct. App. 2007). There was no jury charge as to defamation *per quod* which would require actual malice

template to evaluate Respondent and then used it after Respondent was terminated as athletic director and head football coach on December 18th to justify his termination as football coach and athletic director; tried to fire him in November of 2015; fired him as athletic director for allegedly not doing coaches evaluations that were in fact done but never asked for; and he kept a secret file on Respondent. (R. p. 192, lines 14-16; p. 195, lines 10-21; p. 197, lines 7-21; p. 200, line 17—p. 209, line 12;p. 297, line 3- p.298, line 10; p. 304, lines 1-12; p. 331, line 14—p. 332, line 11; pp. 526-527; p. 529; p. 530-531.)

³ "Normally, proximate cause is a question of fact for the jury, and it may be proved by direct or circumstantial evidence." *J.T. Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006). In this case, it was not necessary to prove that damages were proximately caused, but even if it had been a required element there was sufficient evidence from which a jury could determine damages that were fair, just and reasonable and attributable to the January 7th email. The January 7th email only addressed Respondent's performance as athletic director, not that of a teacher. The jury heard evidence that prior to the email the Respondent had received many accolades as athletic director voted on by his peers. (R. p. 186, line 2—p. 187, line 18.) The jury also heard evidence that after the email, Respondent could not get a job in South Carolina and there was an implication that he had been fired as athletic director and football coach for cause. (R. p. 225, line 2—p. 227, line 12.) Respondent also testified everything was taken from him based on a "lie" and it was humiliating. (R. p. 225, line 12-16.) Respondent testified he considered the email fraudulent because the information in it was wrong. (R. p. 282, lines 13-18.) Respondent's wife testified Respondent struggled to get his footing after his termination. (R. p. 376, lines 17-23.) In short, there was ample evidence related to the damages suffered by Respondent due to his termination as athletic director and the email.

and as Appellant did not object to the Court's jury charges, Appellant cannot now argue that the jury found defamation *per quod*.

Defamation "is actionable *per se* when the defendant's alleged defamatory statements charge the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession." *Fountain v. First Reliance Bank*, 398 S.C. 434, 442, 730 S.E.2d 305, 309 (2012) quoting *Goodwin v. Kennedy*, 347 S.C. 30, 36, 552 S.E.2d 319, 322–23 (Ct. App. 2001).

"[L]ibel is actionable *per se* if it involves written or printed words which tend to degrade a person, that is, to reduce his character or reputation in the estimation of his friends or acquaintances, or the public, or to disgrace him, or to render him odious, contemptible, or ridiculous." *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 465–466, 629 S.E.2d 653, 664 (2006) (internal citations omitted). When a claim is actionable *per se*, the plaintiff is presumed to have suffered general damages. *Parrish v. Allison, supra*. As general damages are presumed, no finding of proximate cause was necessary by the jury. *Gertz v. Robert Welch*, 418 U.S. 323, 375, 94 S. Ct. 2997, 3024 (1974) (ordinary citizen can make out a prima facie case without proving more than a defamatory publication and recover general damages for injury to his reputation unless defeated by the defense of truth).

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred.

Supra, 418 U.S. at 349, 94 S. Ct. at 3012.

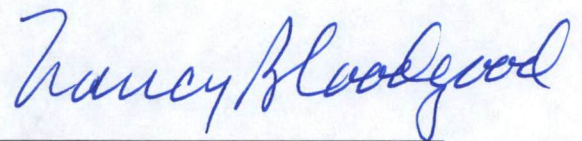
Therefore, damages are presumed and no proof of proximate cause is necessary. *See, Fountain v. First Reliance Bank*, 398 S.C. 434, 730 S.E.2d 305 (2012) and *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 629 S.E.2d 653 (2006) (If the statement is actionable per se, then the defendant "is presumed to have acted with common law malice and the plaintiff is presumed to have suffered general damages.") The fact that the trial court charged the jury with proximate cause and common law malice is merely harmless error.

Erroneous jury instructions are subject to harmless error analysis. *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014). When considering whether an error with respect to a jury instruction was harmless, a court must "determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." *State v. Kerr*, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998) (citation omitted). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." (*Id.*) Here, the jury returned a verdict finding general damages due to defamation. The jury charge for proximate cause actually created a more burdensome standard for finding damages from defamation than the law requires, thus the higher, more burdensome charge did not contribute to the verdict in a manner which harmed the Appellant.

CONCLUSION

Based on the foregoing discussion and analysis, the trial court did not err when it denied Appellant's directed verdict motion and submitted Respondent's defamation claim to the jury. Respondent respectfully requests Appellant's appeal be dismissed and the jury's verdict be upheld.

Respectfully submitted,



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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

RECEIVED
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SC Court of Appeals

Jeffrey Lance Cruce,

Respondent,

v.

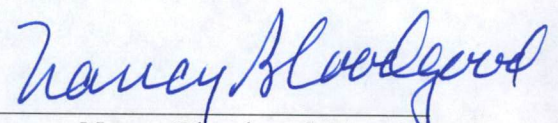
Berkeley County School District,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that this Final Brief complies with Rule 211(b), SCACR.

January 30, 2019



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