THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM BERKELEY COUNTY
Kristi Lea Harrington, Circuit Court Judge

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Appellate Case No. 2018-000791

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Jeffrey Lance Cruce, Respondent,

v.

Berkeley County School District, Appellant.

RESPONDENT'S PETITION FOR REHEARING

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LEGAL ARGUMENT

I. The Court overlooked the fact that Appellant failed to argue Respondent was a public official in its motion for directed verdict so this issue was not preserved for appellate review. Additionally, the Court misapprehended the fact that the terms "public official" and "limited public figure" describe two separate legal doctrines.

Appellant never argued in its directed verdict motion that Respondent was a public official. Rather, Appellant stated three (3) bases in its directed verdict motion as to why Respondent's defamation claim should not go to the jury: 1) Respondent was a "limited public figure" (R. p. 425, line 21—p.445, line 8); 2) the January 7th email was not false and defamatory (R. p. 461, lines 11-18); and 3) the January 7th email was privileged. (R. p. 470, lines 1-4.) At the end of its argument, Appellant repeated the "[t]hree bases for a directed verdict." (R. p. 470.) The issue of whether or not Respondent was a public official was not preserved as it was not part of Appellant's motion for directed verdict, and it should not have been addressed or ruled on by this Court.

Although Appellant did not raise the issue of "public official" in its motion for directed verdict, the Court held the issue had nevertheless been preserved for appellate review. The Court held the issue of whether Respondent was a public official was preserved as the term "public official" was mentioned in Appellant's oral argument. In support of its holding that the issue of "public official" was preserved, this Court misapprehended the holdings in the two (2) cases it relied on in its Order, Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) and Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012).

The Court misapprehended the holding and rationale of Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) when it held that Herron stood for the proposition that "[A] party is not required to use the exact name of a legal doctrine in order to preserve the issue." This particular sentence is actually qualified by the sentence following it: "Nonetheless, the issue must

be sufficiently clear to bring into focus the precise nature of the alleged error so it can be reasonably understood by the judge." Herron, 395 S.C. at 466, 719 S.E.2d at 642. (emphasis added). As the Supreme Court held in Herron:

> Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review. At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. It is axiomatic that an issue cannot be raised for the first time on appeal. Imposing such a requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.

395 S.C. at 465, 719 S.E.2d at 642 (internal quotations and citations omitted).

Similarly, in the second case the Court cited as support for appellate review of the issue of whether Respondent was a public official, Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282 (2012), the Court's Order takes another statement out of context to justify preservation, "…it may be good practice for us to reach the merits of an issue when error preservation is doubtful." The full sentence in this case actually reads, "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 is clearly unpreserved." (398 S.C. at 330, 730 S.E.2d at 285) (emphasis added). The Court misapprehended the significance of these two (2) cases. These two cases do not support the Court's holding that the issue of "public official" was preserved. The term "public official" is not the same as the term "limited public figure," the meaning of the term "public official" was never in doubt, and Appellant only argued in its Directed Verdict motion that Respondent was a limited public figure. Appellant did not preserve the argument that Respondent was a public official.

As the terms "public official" and "limited public figure" are two (2) distinct legal doctrines, this is factually not a case where there could be confusion about a doctrine or where

a doctrine was mislabeled. The issue in this case was not whether Appellant used the correct name to reference the doctrine of "public official." The legal doctrines of "public official" and "limited public figure" are separate legal doctrines which are analyzed using different tests[1] and in every brief filed in this case by Appellant, Appellant addressed these two (2) legal doctrines separately and never failed to use the exact name of each. In South Carolina, in order to be considered a "public official," a plaintiff must "achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." Goodwin v. Kennedy, 347 S.C. 3, 552 S.E.2d 319 (Ct. App. 2001) (internal citations omitted). Whereas, to determine if someone if a "limited public figure" there is a separate five-prong test: (1) whether the plaintiff had access to channels of effective communication; (2) whether the plaintiff voluntarily assumed a role of special prominence in the public controversy; (3) whether the plaintiff sought to influence the resolution or outcome of the controversy; (4) whether the controversy existed prior to the publication of the defamatory statement; and (5) whether the plaintiff retained public-figure status at the time of the alleged defamation. See Erickson v. Jones St. Publrs., LLC, 368 S.C. 444, 473, 629 S.E.2d 653 (2006). The Court overlooked the fact that Appellant only cited one of two legal doctrines as the basis for its motion for directed verdict, the doctrine of "limited public figure," so the doctrine of "public official" was not preserved.

The record is clear as to the three (3) stated bases of Appellant's motion for directed verdict. The transcript of the trial indicates that twice Appellant named only three (3) bases, and whether Respondent is a public official was not one of the bases. Appellant knew the difference between

[1] "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) (internal citations omitted).

the legal doctrines of "public official" and "limited public figure," and it did not argue Respondent was a public official in its directed verdict motion. The Court misapprehended the holdings in Herron and Atlantic Coast regarding issue preservation, and overlooked existing law regarding preservation. The issue of whether Respondent was a public official was not preserved so the Court should not have addressed or ruled on that issue on appeal.

II. The Court overlooked and misapprehended state and federal law regarding the legal definition of "public official."

Notwithstanding the above, the Court overlooked state and federal law precedent when it held Respondent was a public official. The test for determining whether a person is a public official and, thus, whether actual malice must be proven in a defamation suit is set forth in Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997 (1974). In Gertz, the Supreme Court held a person is considered a public official by achieving such fame and notoriety that he becomes a public figure for all purposes and in all contexts. Gertz also held that "[a]bsent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." Gertz, 418 U.S. 323, 352, 94 S. Ct. 2997, 3013. This Court overlooked the requirement that a public official must have general fame or notoriety and pervasive involvement in the affairs of society and failed to address these issues in its Order.

The holding in Gertz was based on the recognition that "[p]ublic officials … usually enjoy significantly greater access to channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals enjoy." 418 U.S. 323, 344, 94 S. Ct. 2997, 3009. Here, the Court overlooked the fact there is nothing in the record indicating that at the time the defamatory email was published Respondent had significantly greater access to channels of effective communication then other private individuals. The Court's

misapprehension of the law results in what the Supreme Court was concerned would happen in Gertz when the Supreme Court refused to hold lawyers in a very public case were public officials because such a holding would "distort the plain meaning of the 'public official' category beyond all recognition." 418 U.S. 323, 351, 94 S. Ct. 2997, 3012.

This Court overlooked federal and state law when it held Respondent was a public official based on the Garrard case without any analysis as to whether Respondent had achieved fame and notoriety and had pervasive involvement in the affairs of society. Garrard v. Charleston Cnty. Sch. Dist., 429 S.C. 170, 838 S.E.2d 698 (Ct. App. 2019), *pet. for cert. filed*. In fact, the Order is silent as to why maintaining high school student athlete files involves fame, notoriety, or is involvement in an affair of society.

Further, this Court completely overlooked the law in this state that requires a public official to have substantial responsibility for or control over the conduct of governmental affairs. See Goodwin v. Kennedy, 347 S.C. 30, 44–45, 552 S.E.2d 319, 327 (Ct. App. 2001). Goodwin addressed the issue of whether an assistant principal was a public official and relying on New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964), held:

> ("[U]nder normal circumstances, a principal simply does not have the relationship with government to warrant 'public official' status under *New York Times.* Principals, in general, are removed from the general conduct of government, and are not policymakers at the level intended by the *New York Times* designation of public official."), *cert. denied,* 507 U.S. 1025, 113 S. Ct. 1833, 123 L.Ed.2d 460 (1993)…. *McCutcheon v. Moran,* 425 N.E.2d 1130, 1133 (1981) ("The relationship a public-school teacher or principal has with the conduct of government is far too remote, in our minds, to justify exposing these individuals to a qualifiedly privileged assault upon his or her reputation…..Goodwin was an assistant principal whose duties included ninth-grade discipline. In the context of this case, we believe Goodwin was not a public official. His position as assistant principal is not one "among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer,* 383 U.S. 75, 85, 86 S. Ct. 669, 15 L.Ed.2d 597 (1966). Accordingly, we agree with the trial judge that Goodwin, as an assistant principal, is not a public official.

Goodwin v. Kennedy, 347 S.C. 30, 44–45, 552 S.E.2d 319, 327 (Ct. App. 2001) (emphasis added). The Court, thus, overlooked existing South Carolina case law when it concluded Respondent was a public official simply because he "was an athletic director, a football coach, and a teacher, similar to Coach Wadpole in Garrard." A high school coach does not have substantial responsibility for or control over the conduct of governmental affairs.

> The theory of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious. In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity must expect that his official acts will be commented upon and criticized. Such criticism cannot, in my opinion, be muzzled or deterred by the courts at the instance of public officials under the label of libel.

New York Times Co. v. Sullivan, 376 U.S. 254, 298–99, 84 S. Ct. 710, 736, 11 L. Ed. 2d 686 (1964) (emphasis added).

Additionally, this Court erred when it overlooked the requirement that a person who is a public official is someone who acts in an executive, legislative, or judicial capacity; football does not fall into any of these categories. The Court also misapprehended the relevancy of cases it relied upon in determining Respondent was a public official, as these on cases do not involve teachers or football coaches.[2] The Court overlooked the fact that the law in South Carolina at the time Appellants made their directed verdict motion held an assistant principal was not a public official. In no case until Garrard has a South Carolina court held someone who is not in law enforcement,

[2] The Court cited two (2) South Carolina cases in support of its holding that Respondent was a public official but both of these cases concerned elected officials. Sanders v. Prince, 304 S.C. 236, 403 S.E.2d 640 (1991) involved elected school board members and Scott v. McCain, 272 S.C. 198, 250 S.E.2d 118 (1978) involved an elected school trustee. Respondent is not an elected official.

or elected or appointed, is a "public official."[3] This Court also misapprehended Goodwin's requirement that a public official have responsibility for or control over the conduct of governmental affairs when it held a football coach has responsibility for or control over the conduct of governmental affairs, but an assistant principal does not.

Finally, rather than focusing on the requirement that there be a serious social or governmental issue involved in any defamation case brought by a public official, the Court focused on language taken from Garrard that held a "public interest in that official's activity in a particular context" is relevant to a determination of whether someone is a public official. 429 S.C. at 208, 838 S.E.2d at 718. The Court overlooked the fact that this language was taken from McClain v. Arnold, 275 S.C. 282, 284, 270 S.E.2d 124, 125 (1980) which was a case involving a police officer. As the Court held in McClain:

> In State v. Crenshaw, S.C., 266 S.E.2d 61 (1980), we held policemen were "officers" within the meaning of the statute prohibiting public officers from accepting bribes. See Code Section 16-9-220 (1976). It is both rational and logical to extend this classification to the defamation area. Simply speaking, 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.

McClain v. Arnold, 275 S.C. at 284, 270 S.E.2d at 125. Law enforcement personnel have been considered public officials in South Carolina for many years but there is a significant difference between a football coach and a police officer and the Court overlooked this important distinction.

[3] Some states have affirmatively held principals are not public officials. 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)

III. The Court misapprehended the relevancy of *Garrard v. Charleston County School District* to this case.

The Court overlooked significant factual and legal differences between this case and Garrard and, thus, misapprehended the relevancy of the Garrard case. 429 S.C. 170, 838 S.E.2d 698 (Ct. App. 2019). This Court held Respondent was a public official based entirely on its holding in Garrard. The Court failed to make the legal analysis required to determine if Respondent was a public official. Rather, it merely assumed Respondent was a public official based on its holding in Garrard. Specifically, the Court held Respondent was "an athletic director, a football coach, and a teacher, similar to Coach Walpole in Garrard" and "[a]ccordingly, Cruce was a public official."

The Court overlooked that this case and Garrard are distinguishable. In Garrard, a football coach allowed his team to perform a watermelon ritual before games which included making monkey sounds, and this ritual was publicized and resulted in allegations of racial insensitivity and stereotyping. Garrard, 429 S.C. at 181-182, 838 S.E.2d at 704. The school released a press statement and held a press conference to address the issue. Id. Here, the facts do not involve any racial issues and there was no press release or press conference. Here, the defamation involved an email about Respondent, published after Respondent had been replaced as coach. Additionally, in Garrard, there were freedom of press issues involving statements published in newspapers, which newspaper articles were not present in this case as there was no press coverage of the defamatory email. This Court misapprehended the significance of the Garrard case to the facts in this case.

CONCLUSION

The Court overlooked the fact that the legal doctrines of "public official" and "limited public figure" are different and, as Appellant was not confused about the two (2) doctrines and did not mislabel the doctrine of "limited public figure" in its motion for directed verdict, the issue of

whether Respondent was a public official was not preserved for appellate review. Further, the Court overlooked and misapprehended state and federal case law regarding the doctrine of "public official" when it held Respondent was a public official. Finally, the Court's holding that Respondent was a public official was based on a misapprehension that the Garrard case was factually similar to this case, but the Garrard case involved first amendment issues and racism which are not present in this case. For these reasons, Respondent respectfully requests the Court grant a re-hearing in this matter and require Appellant to argue only the issues preserved in its motion for directed verdict.

Respectfully submitted,

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I hereby certify that on September 15, 2021, I served a copy of Respondent's Petition for Rehearing on the following:

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by placing a copy of said documents in the United States mail with sufficient postage thereon.

s/Nancy Bloodgood
Nancy Bloodgood, Esquire, #6459

Charleston, South Carolina

Date: September 15, 2021

BLOODGOOD & SANDERS, LLC

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Sep 15 2021
SC Court of Appeals

September 15, 2021

The Honorable Jenny Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: *Jeffrey Lance Cruce v. Berkeley County School District*
Appellate Case No.: 2018-000791
State Court Case No.: 2016-CP-08-0131

Dear Ms. Kitchings:

Enclosed please find Respondent's Petition for Rehearing and a Proof of in connection with the above-referenced matter. I am copying all counsel on this electronic filing as well as mailing hard copies of the Petition to them. Please let me know if the Court requires additional copies.

With kindest regards, I remain,

Sincerely,

Nancy Bloodgood

Nancy Bloodgood

Enclosures
cc: Andrew F. Lindemann, Esquire, Lindemann, Davis & Hughes, P.A.
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