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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM THE COURT OF APPEALS

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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 CERTIORARI

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CERTIFICATION

Undersigned counsel hereby certifies that a Petition for Rehearing was filed with the Court of Appeals on September 16, 2021. On December 2, 2021, the Court of Appeals issued an Order denying Respondent's Petition for Rehearing.

QUESTIONS PRESENTED FOR REVIEW

1. Does the Court of Appeals' decision in this case which involves substantial constitutional issues, conflict with prior decisions of the United States Supreme Court and the South Carolina Supreme Court?

2. Are all high school football coaches/athletic directors/teachers in South Carolina "public officials" or "limited public figures?"

3. Did the Court of Appeals fail to consider that an issue not raised during Appellant's directed verdict is not preserved for appeal?

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 the athletic director and football coach, and reassigned to teach at 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 by the State high school league three (3) times a year. (R. p. 220, line 18—p. 221, line 14; p. 222, lines 2-6.) Respondent had 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.)

The three (3) stated reasons why Respondent was fired as athletic director and football coach, and transferred to teach at a middle school had nothing to do with maintaining student athlete files. (R. pp. 530-531.) After Respondent was fired as football coach, several of Appellant's employees, including athletic trainer Chris Stevens, went into Respondent's office and started going through the student athlete files. (R. p. 394, line 1—p. 395, line 4.) Chris Stevens thought there were documents missing from the files and he 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 had been unfit as an 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.)

LEGAL ARGUMENT

I. The Court of Appeals' decision involves substantial constitutional issues and conflicts with prior decisions of the United States Supreme Court and the South Carolina Supreme Court.

This Court's decisions regarding public officials and limited public figures are based on the holdings of several United States Supreme Court decisions in which the United States Supreme Court considered the effect of the First Amendment in the context of the public's right

to criticize government. Here, the Court of Appeals erred as a matter of law by not following the holdings in federal cases which this Court has previously followed and, thus, the decision of the Court of Appeals involves substantial constitutional issues and conflicts with previous decisions of this Court that follow United States Supreme Court precedent. As Justice Toal noted in 1998:

> Since the 1960's, the Supreme Court has attempted "to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." Gertz v. Robert Welch, Inc., 418 U.S. 323, 325, 94 S. Ct. 2997, 3000, 41 L.Ed.2d 789, 797 (1974). The effect of these decisions has been the interweaving of federal constitutional principles into the fabric of state defamation law. Because state defamation rules have become inextricably tied to these constitutional principles, it is not possible to review defamation issues in a state law vacuum.

Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 517, 506 S.E.2d 497, 505 (1998) (referred to as Holtzsheiter II.)

A. Applicable constitutional law and United States Supreme Court decisions

In New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964), the United States Supreme Court addressed for the first time the issue of defamatory criticism of a public official as it relates to the First Amendment. The Supreme Court held that public officials acting in an executive, legislative or judicial capacity must expect criticism, and unless the criticism is accompanied by actual malice, public officials cannot prevail on a defamation claim.

> 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.

376 U.S. at 298–99, 84 S. Ct. at 736 (emphasis added).

The rationale underlying the New York Times holding was that "[t]he right of free public discussion of the stewardship of public officials was … a fundamental principle of the American form of government." 376 U.S. at 275, 84 S. Ct. at 723. "[F]or 'public men, are, as it were, public property,' and 'discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled.'" 376 U.S. at 268, 84 S. Ct. at 720.

Two years later, the United States Supreme Court decided the case of Rosenblatt v. Baer, 383 U.S. 75, 86 S. Ct. 669 (1966). In Rosenblatt, the Court reiterated that a strong debate on public issues should be protected as well as the criticism of governmental officials who have, or appear to have, substantial responsibility for or control over the conduct of governmental affairs:

> We remarked in New York Times that we had no occasion "to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included." 376 U.S., at 283, n. 23, 84 S. Ct., at 727. No precise lines need be drawn for the purposes of this case. The motivating force for the decision in New York Times was twofold. We expressed 'a profound national commitment to the principle that debate on public issue should be uninhibited, robust, and wide-open, and that (such debate) may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' 376 U.S., at 270, 84 S. Ct., at 721. (Emphasis supplied.) There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the 'public official' designation applies at the very least to those 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.

383 U.S. at 85, 86 S. Ct. at 675-676 (emphasis added).

Thus, although the definition of public official in Rosenblatt was expanded to include government employees who had "substantial control of or responsibility for governmental affairs," the definition of public official remained limited. As Justice Douglas noted in his concurrence in Rosenblatt, whereas the New York Times case dealt only with an elected official, Rosenblatt expanded the definition to unelected government officials. Rosenblatt, 383 U.S. at 88, 86 S. Ct. at 677. However, those public officials still had to have substantial responsibility for or control over the conduct of governmental affairs.

In 1974, the United States Supreme Court again addressed the definition of public official, this time differentiating between two types of public officials, general and limited, and emphasized that both types of public officials still had to "assume special prominence in the resolution of a public question."

> 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, 3031 (1974) (emphasis added).[1]

In Gertz, the United States Supreme Court refused to hold that lawyers in a very public case were public officials on the basis that 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. The Gertz Court reasoned "[a]bsent clear evidence of general fame or notoriety in the community, and

[1] After Gertz, the term "limited public figure" began being used to describe public figures who were only involved in a particular public controversy.

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. at 352, 94 S. Ct. at 3013. "[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." 418 U.S. 323, 345, 94 S. Ct. 2997, 3010 (internal citations omitted).

In 1971, in Time Inc. v. Johnston, 448 F. 2d 378, 380 (4th Cir. 1971), a case involving Bill Russell, a star on the professional basketball team of the Boston Celtics, the Fourth Circuit held persons with persuasive involvement in the affairs of society could also be considered public officials within the meaning of the qualified privilege rule:

> [T]those persons who, though not public officials are involved in issues in which the public has a justified and important interest …. include artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done.

quoting Cepeda v. Cowles Magazines and Broadcasting, Inc., 392 F.2d 417, 419 (9th Cir. 1968) cert. denied.

Although the Fourth Circuit Court of Appeals in Time Inc. recognized that qualified privilege under certain circumstances could be expanded, importantly, the Fourth Circuit retained the requirement that the speech must concern a subject "in which the public has a justified and important interest." Id. The South Carolina Supreme Court cases that have addressed this subject have all acknowledged the constitutional bases for the definitions of public official and limited public figure in the context of defamation. This Court has not deviated from the premise that public officials are persons in positions which significantly influence public concerns so their speech needs more protection under the First Amendment. The Court of

Appeals erred in narrowly defining the term public to be a small group of people; in this case, Berkeley High School football fans.

The Court of Appeal's' decision conflicts with federal precedent. The New York Times case only protected persons in elected offices who acted on behalf of the public in an executive, judicial or legislative manner. 376 U.S. at 298-299, 84 S. Ct. at 736. Respondent was not authorized to act on behalf of anyone in a governmental fashion. Rosenblatt extended protection in libel cases to unelected officials, but "public officials" still were defined as government employees "who have, or appear to have, substantial responsibility for or control over the conduct of government affairs." 383 U.S. at 85, 86 S. Ct. at 675-676. High school football coaches and athletic directors who maintain student athlete files are not persons who have substantial responsibility for or control over governmental affairs. The United States Supreme Court expressed concern in Gertz that over extension of the term "public official" would distort the meaning of the term beyond all recognition. 418 U.S. at 352, 94 S. Ct. at 3013. Here, the Court of Appeals has done just that; its decision distorts the definition of "public official" beyond all recognition by holding a high school football coach, athletic director and teacher is a "public official." Finally, Fourth Circuit case law has established a five-prong test for deciding if a person is a public official in a limited manner (in the context of a single issue) but the Court of Appeals failed to apply this test to Respondent. For all of these reasons, the Court of Appeals' decision contradicts applicable constitutional law.

B. South Carolina Supreme Court decisions have followed federal precedent regarding the concepts of "public official" and "limited public figure."

1. Holtzscheiter v. Thomson Newspapers, Inc., d/b/a The Florence Morning News, 332 S.C. 502, 506 S.E.2d 497 (1998) (Holtzscheiter II)

Although the issue of whether the plaintiff was a public official was not at issue in Holtzscheiter II, in a concurring opinion, Justice Toal cited federal case law when she explained that only speech regarding public issues requires actual malice in a defamation claim. She wrote:

> The Supreme Court wrote in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., "We have long recognized that not all speech is of equal First Amendment importance. It is speech on matters of public concern that is at the heart of the First Amendment's protection." 472 U.S. 749, 758–59, 105 S. Ct. 2939, 2944–45, 86 L.Ed.2d 593, 602 (1985) (internal citations omitted). It then quoted Connick v. Myers, 461 U.S. 138, 145, 103 S. Ct. 1684, 1689, 75 L.Ed.2d 708, 718–19 (1983): The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. [S]peech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection. Dun & Bradstreet, Inc., 472 U.S. at 759, 105 S. Ct. at 2945, 86 L.Ed.2d at 602–03 (citations and quotations omitted).

332 S.C. at 520, 506 S.E.2d at 507 (1998).

In Holtzscheiter II, this Court noted that speech concerning public affairs occupies the highest values of the Constitution and deserves more protection than speech on other topics. Despite this Court' holding in Holtzscheiter II, the Court of Appeals applied a different definition of public official to Respondent. The Court of Appeals found Respondent was a public official based on a previous decision it issued after this case was tried involving an athletic director/ football coach/ teacher at a different high school. As argued below, the two cases are factually distinct. And, as this Court noted in Erickson v. Jones St. Publrs., LLC, 368 S.C. 444, 471, 629 S.E.2d 653, 667 (2006), "no one factor is dispositive in the analysis" of whether a particular individual is a public official for purposes of a defamation action. The Court of Appeals erred by holding that because both individuals were high school athletic directors, coaches and teachers, they were both public officials.

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

The decision of the Court of Appeals in this case also conflicts with this Court's decision in Erickson, supra which incorporates the Rosenblatt decision.

> In general, 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." Holtzscheiter II, 332 S.C. at 520 n. 4, 506 S.E.2d at 507 n. 4 (Toal, J., concurring) (quoting Rosenblatt, 383 U.S. at 85, 86 S. Ct. at 676, 15 L.Ed.2d at 605). "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. (quoting Rosenblatt) (internal quotes omitted).

Erickson v. Jones St. Publrs., LLC, 368 S.C. at 469, 629 S.E.2d at 666.

In Erickson, relying on the Gertz case, this Court differentiated between public officials and limited public figures.

> 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.' Gertz, 418 U.S. at 345, 94 S. Ct. at 3009, 41 L.Ed.2d at 808 (an attorney was not a public figure even though he voluntarily exposed himself in a case certain to receive extensive media exposure)……. [Whereas, a] limited public figure, the type more commonly found, 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.' Gertz, 418 U.S. at 351, 94 S. Ct. at 3013, 41 L.Ed.2d at 812. In determining whether a claimant is a private or public figure, the court must focus on the "nature and extent of an individual's participation in the particular controversy

> giving rise to the defamation.' *Gertz,* 418 U.S. at 352, 94 S. Ct. at 3013.

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

In Erickson, applying federal law, this Court held a plaintiff who was a private guardian ad litem was not a public official or a limited public figure. This Court decided first that the plaintiff was not a public official because she was not a government employee, "much less an official who has or would appear to the public to have substantial responsibility for or control over the conduct of government affairs." 368 S.C. at 471, S.E.2d 668.

Adopting a Fourth Circuit case's analysis (Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541 (4th Cir. 1994)), this Court then utilized a five-prong test to determine if plaintiff was a "limited public figure": (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. 368 S.C. at 474, 629 S.E.2d at 669.

In the case at hand, the Court of Appeals' decision did not apply the five-part Erickson test and did not find Respondent was a limited public figure; it merely stated Respondent was a public official based on a previous decision it made about a different high school football coach:

> Based on this court's decision in Garrard, the circuit court erred in not finding Cruce was a public official or limited public figure. Cruce was an athletic director, a football coach, and a teacher, similar to Coach Wadpole in Garrard, who was a coach of two different teams, including football, and a teacher. Accordingly, Cruce was a public official.

The Court of Appeals only held Respondent was a public official; there is no language indicating Respondent was a limited public figure in its Order; in fact, the Court of Appeals entirely failed to differentiate between the two types of public figures which is essential as they are two different concepts. In Erickson, after deciding the plaintiff was not a public official, this Court quoted noted that a limited public figure "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." 368 S.C. at 472, 629 S.E.2d at 668, quoting Gertz.

The Court of Appeals' decision, therefore, conflicts with this Court's decision in Erickson as the Court of Appeals failed to find there was a public controversy about how Respondent maintained student athlete files (which was the subject of the defamation), and also failed to find that at the time Respondent was falsely accused of keeping the files in such poor fashion, the maintenance of those files was a public question issue.

After Respondent was terminated as athletic director and football coach, he was not a public official as a public official is a person who retains notoriety "for all purposes and in all concepts" per the United States Supreme Court's holding in Gertz (418 U.S. at 351, 94 S. Ct at 3031.) The consequence of the Court of Appeals' failure to follow this Court's previous decisions regarding public officials is that now all teachers in South Carolina are public officials because at the time the defamatory email was sent, Respondent was only a teacher; he was no longer an athletic director or football coach.

Had the Court of Appeals applied the Erickson limited public figure test, it would have been clear that Respondent was not a limited public figure. Applying the Erickson test to the facts in this case, it is clear that Respondent is not a limited public figure. First, regarding having access to effective communication, 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.) Additionally, Gertz's holding was based on the premise that there is less damage to public officials when they are defamed because due to their greater access to channels of effective communication, they "have a more realistic opportunity to counteract false statements than private individuals enjoy." Gertz, 418 U.S. at 344, 94 S. Ct. at 3009. However, Respondent was defamed after he had been fired as athletic director and football coach so even if he had had greater access to channels of effective communication when he was a football coach there is nothing in the record indicating that at the time the defamatory email was published Respondent still had significantly greater access to channels of effective communication then other private individuals.

Also, Respondent did not voluntarily assume any role of special prominence in society regarding a public controversy. As football coach, Respondent changed his offensive football strategy in 2015. Respondent testified only athletic directors are certified to maintain student athlete files and there is no evidence in the Record rebutting that fact. (R. p. 220, line 18—p. 221, line 14; p. 397, line 1—p. 398, line 1.) The Court of Appeals failed to note that the defamatory email did not concern Respondent's offensive football strategy; rather, it concerned Respondent's actions as athletic director and how he maintained student athlete files. There is nothing in the Record indicating there was any controversy regarding how Respondent maintained student athlete files before the defamatory email was published. Respondent testified the statement in the email that the files could be a liability to the school 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 defamatory email was written; that audit was a clean audit. (R. p. 222, lines 2-24.) Clean audits do not invite public scrutiny.

The third factor is whether the plaintiff sought to influence the resolution of any controversy. Here, Respondent did not seek to influence any type of controversy regarding student athlete files. It is true that Respondent sought to have his offensive strategy succeed as all high school coaches want to win games, however his offensive strategy was not the subject of the defamation. Even if it had been the subject of defamation, the offensive strategy of a high school football coach in a Berkeley County high school does not, as a matter of law, rise to the level of a public controversy. The word "public" as used by this Court and the United States Supreme Court differentiates between public, or governmental, and private, and if not simply used to describe any particular group of people, such as Berkeley High School football fans. The law in this State is that matters of public concern are those related to the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Holtzscheiter II, 332 S.C. at 520, 506 S.E.2d at 507 (1998) quoting Connick v. Myers, 461 U.S. 138, 145, 103 S. Ct. 1684, 1689 (1983). This case does not involve political or social change.

The fourth requirement as to whether there was a public controversy before the defamation occurred cannot be met as there is no evidence in the Record that there was any controversy about student athlete files. And finally, the fifth requirement is not met as there is no evidence in the record indicating Respondent retained his public status after he was fired as football coach or at the time of the alleged defamation.

In short, the Court of Appeals erred by not applying the Erickson test to determine if Respondent was a limited public figure and just assuming he was a public official based on its decision in Garrard v. Charleston County School District, 429 S.C. 444, 838 S.E.2d 698 (Ct. App. 2019).

II. Whether all high school football coaches/athletic director/teachers in South Carolina are "public officials" or "limited public figures" are novel questions of law in this State.

There is no precedent in South Carolina holding high school football coaches, athletic directors, or teachers are public officials. Prior to Garrard, supra, a South Carolina court had never held that someone who is not in law enforcement, or in an elected or appointed position, is a "public official." The Court of Appeals erred 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. The Court of Appeals' failure to analyze the issues in accordance with this Court's precedent raises more questions than it answers. Are all teachers now considered public officials in this State and now more easily defamed? Are only teachers who are also athletic directors and football coaches considered public officials? Is a teacher who is a football coach but not an athletic director a public official? Are other high school coaches, i.e., basketball and soccer, also public officials? The Court of Appeals' failure to carefully analyze this case has expanded the definition of public official beyond recognition.

Until 2019, the Court of Appeals adhered to this Court's holdings regarding public officials. In Goodwin v. Kennedy, 347 S.C. 30, 552 S.E.2d 319 (Ct. App. 2001) the Court of Appeals had followed precedent established in this Court's holdings in Holtzscheiter II and Erickson. In Goodwin, 347 S.C. 30, 43, 552 S.E.2d 319, 326 (Ct. App. 2001), the Court of Appeals held an assistant principal was not a public official based in large part on the 1974 United States Supreme Court case of Gertz v. Robert Welch, supra. The Court of Appeals held an assistant principal is not a public official because "[h]is 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.'" Goodwin v.

Kennedy, 347 S.C. 30, 45, 552 S.E.2d 319, 327 (Ct. App. 2001) (citing Rosenblatt v. Baer, 383 U.S. 75, 85, 86 S. Ct. 669 (1966)). Instead of using the same rationale in this case, the Court of Appeals held Respondent was a public official because it had recently decided another football coach at another high school was a public official.

The Court of Appeals erred when it relied on its decision in Garrard to conclude Respondent was a public official. The Court of Appeals 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 case and Garrard are factually distinguished. 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. The defamation was contained in an email, was not about his coaching, and was published after Respondent had been replaced as athletic director and football coach. Additionally, in Garrard, there were freedom of press issues involving statements published in newspapers. Press issues were not present in this case as there was no press coverage of the defamatory email. The Court of Appeals misapprehended the significance and relevance of the Garrard case to this case.

The defamatory email which is at issue in this case was written after Respondent had been fired as a football coach and the derogatory statements concerned Respondent's ability to maintain student athlete files, not his coaching. At the time of the defamation, Respondent had no authority or control over the football program, much less substantial authority or control. The Court of Appeals erred by holding Respondent was a public official when it had previously held

an assistant principal is not a public official because an 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.'" 347 S.C. at 45, 552 S.E.2d at 327 citing Rosenblatt v. Baer, 383 U.S. 75, 85, 86 S. Ct. 669 (1966).

III. An additional important reason to overturn the Court of Appeals' decision is because the issue of whether Respondent was a "public official" was not raised during Appellant's directed verdict motion and was, therefore, not preserved for appeal.

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 included only two (2) of these three (3) directed verdict arguments in its appeal; specifically, Respondent is a "limited public figure" (Appellant's Br., Argument I. C.) and the January 7th email is not false and defamatory. (R. p. 425, line 21—p. 470, line 4.)

Appellant argued after the trial was over, in its post-trial motion for JNOV, that Respondent was a "public official." As a JNOV under Rule 50 (b) SCRCP 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" should not have been considered by the Court of Appeals as it was not raised or ruled on at the directed verdict stage of trial and was not properly before the Court.

The issue of whether Respondent is a public official was not properly before the Court as it was 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). As the issue of whether Respondent was a public official was not raised at the directed verdict stage, it was not preserved for review and the Court of Appeals should not have addressed or ruled on that issue.

CONCLUSION

For almost 80 years, the definitions of a public figure, public official, and limited public figure have been refined by our courts but always in the context of constitutional law and premised on the basic concept that criticism of government and public affairs is a necessary component of democracy. A high school football coach in one high school in South Carolina has no substantial responsibility for or control over the conduct of governmental affairs. Football is not part of the legislative, executive or judicial branches of government. Respondent did not assume special prominence in the resolution ny public question. The Court of Appeals' decision expands beyond recognition the definition of public official and allows mere public employees to be easily

defamed. This Court should overturn the Court of Appeals' decision so its holdings in Holtzscheiter II and Erickson remain intact and reinstate the jury's verdict in this case.

Respectfully submitted,

s/ Nancy Bloodgood
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