

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
Appellant Case Number 2012-212219

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case # 2009-CP-32-5708

MICHAEL MAULDIN.....Respondent

v.

CAROL VANDER HEIDE, MURRAY
MITCHELL, PAMELA WEISS, ELAINE
KORPITA, KARL WERDUNN, DEBRA
WERDUNN, AND MARK KOSOBUCKI,

of whom MURRAY MITCHELL and PAMELA WEISS are Appellants

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Table of Authorities	3
Statement of Issues on Appeal	5
Statement of the Case	6
1. Procedural History	6
2. Evidence presented to Trial Court	9
3. Standard of Review	12
Arguments	
1. THE APPELLANTS WERE ENTITLED TO AN AWARD OF SANCTIONS AS THEY ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE THAT THEY ARE ENTITLED TO RECOVER THE LITIGATION COSTS AND FEES THEY INCURRED.	13
A.) The circuit court erred when it denied sanctions under SCRCP 11 by erroneously considering incomplete discovery as a relevant factor and discounting the evidence in the record that entitled the Appellants to an award of sanctions.	14
B.) The trial court erred when it denied sanctions under the FCPSA as it applied standards set by a repealed code section and failed to award sanctions when the Appellants met the burden of proof set by the current provisions of the FCPSA.	16
2. THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO IMPOSE SANCTIONS PURSUANT TO SCRCP 11 AND THE FCPSA AS SUCH A FAILURE ALLOWED THE RESPONDENT TO USE CHILLING LITIGATION TO RETALIATE AGAINST SPEECH PROTECTED BY THE FIRST AMENDMENT RIGHTS WITHOUT ANY CONSEQUENCE.	21
Conclusion	23

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MAY 16 2013

SC Court of Appeals

TABLE OF AUTHORITIES

CASES

<i>Ex parte Dibble</i> , 279 S.C. 592, 310 S.E.2d 440 (Ct. App. 1983)	21
<i>Ex parte Gregory</i> , 378 S.C. 430, 663 S.E.2d 46 (2008).....	12,13,14,17,19
<i>Father v. S.C. Dep't of Soc. Servs.</i> , 353 S.C. 254, 578 S.E.2d 11 (2003).....	13
<i>In re Beard</i> , 359 S.C. 351, 597 S.E.2d 835 (Ct. App. 2004).....	12,13
<i>Johnson v. Dailey</i> , 318 S.C. 318, 457 S.E.2d 613 (1995).....	14
<i>LoBiondo v. Schwartz</i> , 970 A.2d 1007 (2009).....	22
<i>Protect Our Mountain Environment, Inc. v. District Court in and For Jefferson County</i> (<u>"POME"</u>), 677 P.2d 1361 (Colo. 1984).....	22
<i>Runyon v. Wright</i> , 322 S.C. 15, 471 S.E.2d 160 (1996)	14
<i>Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm)</i> , 371 S.C. 91, 637 S.E.2d 316 (Ct. App. 2006).....	16,18
<i>Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors, LLC</i> , 394 S.C. 97, 713 S.E.2d 650 (Ct. App. 2011)	12,21
<i>Soukup v. Law Offices of Herbert Hafif</i> , 139 P.3d 30 (2006).....	21
<i>United Mine Workers of America v. Illinois State Bar Ass'n</i> , 389 U.S. 217, 222 (1967).....	23
<i>Troxell v. Granville</i> , 530 U.S. 57 (2000)	23

CONSTITUTIONAL OR STATUTORY AUTHORITIES

U.S. Const, amend. 1	23
S.C. Const. art. I, § 2.....	23
S.C. Code Ann. § 15-36-10 (SC Frivolous Civil Proceedings Sanction Act, "FCPSA")....	12,16,17

S.C. Code Ann. § 15-36-10 (SC Frivolous Civil Proceedings Sanction Act, “FCPSA” ,passed in 2002, repealed and replaced in 2005) 13,16

S.C. Code Ann. § 63-7-10 *et seq* 9,19

RULES

Rule 11, S.C.R.C.P. 8,12,13,14

Rule 12 (b)(6), S.C.R.C.P. 6

Rule 41, S.C.R.C.P. 7.8

OTHER AUTHORITIES

H.R. 4364, 111th Cong. (2009).....22

H.R. 3587, 118th Leg., Reg. Sess. (S.C. 2009).....22

George Pring & Penelope Canan, “SLAPPs: Getting Sued for Speaking Out” (1996).....21

Nathan M. Crystal, “If Someone Must Pay ...,” S.C. Lawyer, September 2008 17,18

STATEMENT OF ISSUES ON APPEAL

- I. Did the circuit court err in denying Appellants' motion for S.C.R.C.P. 11 ("SCRCP 11") and S.C. Code Ann. § 15-36-10 ("FCPSA") sanctions by applying an incorrect standard in its sanctions determination and by discounting the fact that the Respondent, through his counsel, commenced and continued to pursue his claims despite total lack of legal or factual basis, resulting in litigation costs and fees for Appellants?
- II. Did the circuit court abuse its discretion when its failure to award sanctions under SCRCP 11 and the FCPSA, allowed the Respondent to use chilling litigation to retaliate against the Appellants' exercise of First Amendment rights without consequence?

STATEMENT OF THE CASE

1. Procedural History

This Appeal arises from an Order of the Court of Common Pleas in Lexington County, denying a motion for sanctions filed by Appellants, Murray Mitchell and Pamela Weiss (“Parents”). The Parents’ motion sought attorney’s fees and costs they incurred from having to defend against the lawsuit brought by Respondent Michael Mauldin (“Coach”).

On December 21, 2009, the Coach, through his attorneys, sued the Parents and five other parent defendants who are no longer party to the suit. (Motion for Frivolous Proceeding and Sanctions, hereinafter “Motion for Sanctions,” R.p.71) The Complaint included two causes of action: defamation of character and interference with contractual relations. (R. pp.16-22) The Parents, appearing *pro se*, filed a motion for dismissal pursuant to SCRCP 12(b)(6), and requested attorney’s fees and costs for having to defend against Mauldin’s “frivolous, unreasonable, and groundless” claims. (R. p. 5). In support of defendants’ motion to dismiss, the American Civil Liberties Union of South Carolina filed an *amicus* brief, alerting the circuit court to the possibility that the Coach’s suit was an inherently meritless S.L.A.P.P. (Strategic Lawsuit Against Public Participation, hereinafter “SLAPP”) as it was filed to chill defendants’ First Amendment right to petition their government for a redress of grievances. (R. pp.28-38) The court refused to dismiss the case, arguing that it must allow the Coach the opportunity to prove his case through discovery, even if there is reason has reason to doubt the lawsuit’s merit. (R.p.5s)

Five out of the seven original defendants were dismissed from the case. The Parents, Appellant Mitchell and Appellant Weiss, continued to defend themselves. On November 30,

2010, the Parents moved for summary judgment, claiming that all speech about which the Coach complained about was privileged and protected by the First Amendment. (R.p. 39) The Coach, through his counsel, replied that summary judgment was inappropriate and premature because at that time the parties had only engaged in written discovery and no depositions had been taken yet. (R. pp 55-56) Parents rebutted that Mauldin's supporting Affidavit failed to provide assert any material fact that was in dispute. (R. pp.64-65)

After the summary judgment motion was heard, but before an order had issued, the Parents continued to pursue discovery. On February 21, 2011, the Parent's filed a motion to compel discovery. (R. pp. 49-51) A month later, the Honorable Judge William P. Keesley issued a Scheduling Order. On the day of the scheduling conference, the Coach filed a motion to dismiss pursuant to SCRCP 41(a)(2), which he withdrew the next day.

On or about June 21, 2011, the Coach, once again sought dismissal of the case, with the stipulation that each party would bear responsibility for his or her own litigation costs. (R.pp.66-67) The Coach stated that since he had already reached resolution with five other Defendants and because proceeding with discovery was cost-prohibitive; dismissing the suit was a sensible option. (R. pp. 66-67) Parents agreed to the proposed dismissal, but maintained their position that they were entitled to recover costs and attorneys' fees they incurred

from having to defend against Mauldin's frivolous lawsuit. (R.p.68)

On October 10, 2011, the Honorable Judge William P. Keesley dismissed the Coach's suit without prejudice pursuant to SCRCF 41, and chose not to delineate responsibility for costs due to the parties' disagreement. (R.pp.8-9) This Order also rendered Parents' pending motion for summary judgment moot.

On October 20, 2011, the Parents filed their timely motion for sanctions under the FCPSA and SCRCF 11. (Defendants' Motion for Frivolous Proceeding and Sanctions, R. pp. 71-78 hereinafter "Motion for Sanctions;" see also R.pp. 306-369: Documentation of Litigation Costs and Legal Fees Incurred by Defendants) In his opposing memorandum, the Coach and his attorneys argued that they filed and proceeded with the suit reasonably and in good faith. (R.pp 79-88) The memorandum also discounted Parents' anti-SLAPP arguments, stating that Parents cannot rely on them as those arguments are not recognized under South Carolina law. (R.p. 83)

The Honorable Judge William P. Keesley heard the parties' oral arguments on January 17, 2012. (R.pp 10-16) He issued an order denying sanctions on May 7, 2012, finding that Parents failed to establish by preponderance of the evidence that Mauldin or his attorneys violated the SCRCF 11 or the FCPSA. (R. pp. 10-16.)

On June 7, 2012, Parents filed a Notice of Appeal with the South Carolina Court of Appeals, seeking review and reversal of the circuit court's order denying Parents' motion for sanctions.

2. The evidence presented to the trial court

During the 2008 – 2009 school year, the Coach the head coach of Irmo High School (“IHS”)’s varsity girls’ soccer team. All of the Defendant were parents of teen-aged girls who played on the team. (R. pp.71-78) The Parents grew concerned when their daughters complained about the hazing and mistreatment of younger players, as well as the Coach’s conduct toward some of the players. (R.pp.40-43, R pp.44-48) The Parents, exercising their First Amendment right to petition and their parental obligations as required by S.C. Code of Laws § 63-7-10 *et seq.*, communicated their concerns to parents of other soccer players, Mauldin, the school’s principal, and to the School District’s Human Resources Department. (R.p.72) After IHS’ administration and the School District trivialized and ultimately dismissed their complaints without explanation, the Parents contacted the Office for Civil Rights (“OCR”) of the U.S. Department of Education for help. (R.p. 72)

As per the OCR’s recommendation the School District engaged in conflict resolution with Parents. (R. pp. 40-43, R. pp. 44-48) During mediation, the School District offered to remove the Coach from his coaching position if that action would resolve the complaint. (R. pp. 40-43, R. pp. 44-48) Before the Parents accepted the offer, they were reassured by the OCR that no retaliatory action would be taken against them or against their daughters. (R. pp. 40-43, R. pp. 44-48).

On December 11, 2009, Mauldin tendered his voluntary resignation. (R.p. 144) Subsequently, Parents withdrew their OCR complaint. Within a week of his resignation and prior to filing his lawsuit, Mauldin accepted a coaching position at a neighboring high school, leaving virtually no gaps in his employment. (R.P. 62 ¶18) In subsequent OCR investigations, which Parents asked to have re-opened shortly after Mauldin filed his lawsuit, Mauldin confirmed that he resigned voluntarily. (R. p. 154) On July 23, 2010, the OCR terminated its investigations, noting insufficient evidence for a determination of sexual harassment, but concluding that the district's failure to follow its guidelines and procedures had to be remedied. (R. pp. 161-162)

By the summer of 2010, both parties had engaged in written discovery. On July 27, 2010 Appellant Weiss requested under the Freedom of Information Act (FOIA) a record of the OCR investigations. (R.pp.165-198) In August of 2010, Parents mailed their first set of interrogatories and requests for documents to the Coach. He replied in March of 2011. (R.pp.263-286) The only documents produced in discovery by the Coach were copies of his correspondence with the district's Human Resources Officer. (R. pp. 287-294)

After the circuit court's scheduling order and in anticipation of a summary judgment hearing, the Parents continued with discovery. Parents also secured their affidavits from members of the soccer team and submitted their own affidavits with their motion for summary judgment. (R. pp.198-222 and R. pp. 40-44 and R. pp. 44-48.)

In contrast, the affidavits submitted by the Coach failed to establish any issue of material fact in relating to any communication by the Parents that was defamatory or unprivileged. (See , R. pp. 58-63, R. pp.64-65 and R.pp.295-305.) The Coach's Witness' Affidavits recounted conversations that occurred between Parents and the parents of other soccer players. (R. pp. 295-306.) In their Responses, the Parents maintained that these privileged communications, even if true, could not be defamation. (R. pp. 295-306.) At the hearing of the motion for summary judgment, the Coach's attorneys were unable to identify any non-privileged communication or material fact showing that Parents had any control over Mauldin's employment contract.

After the Coach, through his attorneys, agreed to dismissal, Parents' motion for summary judgment became moot. (R. pp.8-10) Then the Parents petitioned the court for sanctions underscoring the failure of the Coach and his attorney to gather any material evidence prior to filing suit or during more than two years of litigation and protracted discovery efforts. (R.pp. 71-78) During this time, these Parents, who bravely refused to be silenced by the Coach's lawsuit, incurred costs in defending against the litigation. (R.71-72; see also R. pp.306-369: Documentation on Costs and Fees Incurred by Defendants)

In the Order Denying Sanctions, the Honorable Judge William P. Keesley not only relied on the wrong standard to make his sanctions determination, but also failed to acknowledge the gravity of the constitutional rights at issue. (R.pp. 10-16) Parents appeal the lower court's decision.

Standard of review

The determination of whether sanctions should be awarded under SCRCP 11 or under the

FCPSA is treated as one in equity. S.C. Code Ann. § 15–36–10 (2011); SCRCP 11; *Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors, LLC*, 394 S.C. 97, 104, 713 S.E.2d 650, 653-54 (Ct. App. 2011). In an action in equity tried by the judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *In re Beard*, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004).

When the appellate court agrees with the trial court's findings of fact, it reviews the decision to award sanctions under an abuse of discretion standard. *Southeastern* at 104, 653-54. Under the abuse of discretion standard, the imposition of sanctions will not be disturbed on appeal unless the decision is controlled by an error of law or is based on unsupported factual conclusions. *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008).

ARGUMENTS

- I. THE APPELLANTS WERE ENTITLED TO AN AWARD OF SANCTIONS AS THEY ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE THAT THEY ARE ENTITLED TO RECOVER THE LITIGATION COSTS AND FEES THEY INCURRED DEFENDING THIS MERITLESS CASE.

The analysis for awarding sanctions pursuant to SCRCP 11 and the former version of the FCPSA (repealed in 2005) used to be essentially the same. See *Father v. S.C. Dep't of Soc. Servs.*, 353 S.C. 254, 261-62, 578 S.E.2d 11, 15 (2003) (holding that under both SCRCP 11 and the former FCPSA, the standard for imposing sanctions is frivolity); *In re Beard*, 359 S.C. at 360, 597 S.E.2d at 839.

The current, substantially amended, FCPSA, creates substantive rights and imposes new obligations by effectively changing the standard for imposing sanctions to from frivolity to actions that could have been undertaken by “reasonable attorney.” Compare S.C. Code Ann. § 15-36-10 (2011), with S.C. Code Ann. §§ 15-36-10, 15-36-20 (2005); See *Southeastern*, 394 S.C. 97, 713 S.E.2d 650. Absent legislation amending SCRCP 11 to reflect changes made to the FCPSA, the analysis for sanctions under the rule will not be the same as the analysis under the amended FCPSA due to the subjective good faith analysis of SCRCP 11 versus the objective “reasonable attorney” paradigm of the current FCPSA.

The difference in sanctions analysis under SCRCP 11 and the current FCPSA is acknowledged by the lower court. (R.pp. 12-13) Nevertheless, the circuit court misapplied both SCRCP 11 and the FCPSA, and erred in finding that Parents did not establish their burden of proof by preponderance of the evidence under both.

A.) The circuit court erred when it denied sanctions under SCRCP 11 by erroneously considering incomplete discovery as a relevant factor and discounting the evidence in the record that entitled the Appellants to an award of sanctions.

A trial court may impose sanctions on a party, a party's attorney, or both for filing a frivolous pleading, motion, or other paper when no good grounds exist to support the filing. SCRCP 11; *Ex parte Gregory*, 378 S.C. at 437, 663 S.E.2d at 50; *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996). The rule further provides that sanctions may be warranted whether or not there are good grounds to support a claim if the claim was filed for an impermissible purpose such as harassment or unnecessary delay. SCRCP 11; *Johnson v. Dailey*, 318 S.C. 318, 323, 457 S.E.2d 613, 616 (1995). "A court imposing sanctions under Rule 11 should, in its order, describe the conduct determined to constitute a violation of the Rule and explain the basis for the sanction imposed." *Ex parte Gregory*, at 438, 50.

The trial erred in denying SCRCP 11 sanctions by over-emphasizing the fact that discovery had never been completed. There was abundant evidentiary basis warranting SCRCP 11 sanctions. In its Order, the lower court expressed its frustration about the absence of discovery, but then stated that for purposes of its sanctions analysis the court was "required to accept as a given that the discovery would have uncovered no evidence or reasonable inference supporting plaintiff's beliefs about the defendant's conduct." (R. p. 11) Having correctly stated the standard, the circuit court held that the premature stage of discovery was a factor to consider in SCRCP 11 analysis. (R.p. 13) For legal support, the Order cited *Runyon*, 322 S.C. at 19, S.E.2d at 162; even though, neither *Runyon*, nor the cases cited within state or imply that discovery being in its early stages is a factor in SCRCP 11 sanctions considerations. The trial court's SCRCP 11 analysis erroneously shifted to the lack of discovery and to the speculation of

discovery that may or may not have been discovered, instead of examining the voluminous record before the court.

The evidence before the court reveal no investigation prior to filing and no circumstance that required a filing without investigation—such as evidence solely controlled by the Defendants. The Coach's suit is not only baseless, but is also in bad faith. The only purpose that can be inferred for the Coach's bringing and maintaining the suit was to harass Parents and to use the court procedures to frustrate and exasperate Parents who had raised questions about his coaching. The Coach became eager to dismiss suit against the remaining two Parents as soon as he would have had to invest in the costs of depositions. (R. pp. 66-67)

The trial judge, even as he relied upon the incomplete discovery as a reason to deny sanctions, determined that the Parents were partially responsible for cost and time consumed by the case as they delaying proceeding by refusing the Coach's earlier proposals to dismiss. (R.p 10) The Parents clearly refused because these proposals maintained that each party would be responsible for bearing his or her own costs. (R. p. 10) Thus, accepting Mauldin's early proposals to dismiss would have left Parents without any recourse, without any mechanism for asserting protection of their constitutional rights. (R.p.10) Through proper application of SCRCP 11, the record offers sufficient evidentiary basis to find that the Coach and his attorneys, not only initiated without investigation, but also maintained the meritless lawsuit in bad faith.

B.) The trial court erred when it denied sanctions under the FCPSA as it applied standards set by a repealed code section and failed to award sanctions when the Appellants met the burden of proof set by the current provisions of the FCPSA.

The SC Frivolous Civil Proceedings Sanction Act (FCPSA) codifies sanctions dealing with “the procurement, initiation, continuation, or defense” of civil proceedings for an improper purpose. S.C. Code Ann. § 15-36-10. Under a prior version of the FCPSA (which was replaced by the current legislation in 2005), sanctions were warranted if a party was able to establish the following five elements by preponderance of the evidence:

- (1) the other party has procured, initiated, continued, or defended the civil proceedings against him;
- (2) the proceedings were terminated in his favor;
- (3) the primary purpose for which the proceedings were procured, initiated, continued, or defended was not that of securing the proper discovery, joinder of parties, or adjudication of the civil proceedings;
- (4) the aggrieved person has incurred attorney’s fees and court costs; and
- (5) the amount of fees and costs set forth in item.

Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm), 371 S.C. 91, 97, 637 S.E.2d 316, 320 (Ct. App. 2006) (quoting S.C. Code Ann. § 15-36-40). However, under the amended FCPSA, which is applicable to claims arising on or after July 1, 2005, an attorney may be sanctioned for: (a) filing a frivolous pleading, motion, or document if:

- ... (ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
- (iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or
- (iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based.

S.C. Code Ann. § 15-36-10(A)(4)(a)(ii)-(iv). The current statute also directs courts to take into account the following factors when determining whether an attorney has violated the FCPSA:

- (1) the number of parties;
- (2) the complexity of the claims and defenses;
- (3) the length of time available to the attorney or party to investigate and conduct discovery for alleged violations of the provisions of subsection (A)(4);
- (4) information disclosed or undisclosed to the attorney, party, or pro se litigant through discovery and investigation;
- (5) previous violations of the provisions of this section;
- (6) the response, if any, of the attorney, party, or pro se litigant to allegation that the he violated the provisions of this section; and
- (7) other factors the court considers just, equitable, or appropriate under the circumstances.

S.C. Code Ann. § 15-36-10(E)(1)-(7).

There is no South Carolina precedent applying the current FCPSA, but the reasonable attorney standard is elaborated in *Ex parte Gregory*, 378 S.C. 430, 663 S.E.2d 46. In *Ex parte Gregory*, the court affirmed an award for sanctions where the attorney failed to conduct reasonable investigation before filing a conversion and malpractice action against his client's former attorney. *Id.* at 438, 51. The court emphasized that had the sanctioned attorney attempt to contact his client's former counsel, he would have realized that his client's claims were unsubstantiated. *Id.* However, the court was also careful to limit the requirement of conducting reasonable investigations (beyond what is related to the attorney by the client) to cases brought against attorneys that involve misappropriation or malpractice. Notwithstanding *Gregory's* per se rule, Professor Crystal forewarned that: ...

it is not hard to imagine the court extending the principle of the case to other situations in which the client alleges intentional wrongdoing by a defendant and the only evidence offered by the client is the client's own testimony, which may be vague, incomplete, or sometimes inconsistent.

A prudent lawyer who wishes to minimize the possibility of sanctions in such cases will not rely simply on the client, but will conduct a reasonable investigation before filing suit.

Nathan M. Crystal, “If Someone Must Pay ...,” S.C. Lawyer, September 2008, at 8, 9.

The FCPSA and its “reasonable attorney” standard were misapplied by the trial court because the lower court relied on the repealed sections of the former act and disregarded the factors enumerated in the current FCPSA. When the correct factors are used, Parents establish their burden of proof and are entitled to sanction awards.

The Coach commenced this case on December 21, 2009, thus the current version of the FCPSA applies. The trial judge began his FCPSA analysis by citing to the current subsections of the FCPSA, but then proceeded to cite *Rutland*, 371 S.C. at 97, 637 S.E.2d at 320 (quoting the repealed S.C. Code Ann. § 15-36-40) for the five elements that Parents were supposed to satisfy. (R.pp. 13-14; see also Plaintiff’s Memorandum, R. pp. 86-87 (relying on Rutland and thus, the repealed code section)) This was in error because § 15-36-40 was repealed in 2005. Parents should not be required to establish elements that are no longer in effect.

Had the trial court performed the correct analysis, using the seven factors provided in the current FCPSA’s subsection (E), it would have found that Parents met their burden of proof by preponderance of the evidence in favor of FCPSA sanctions. Whether considering the seven original defendants or only the two remaining Appellant Parents, the parties are not numerous and the claims are not complex.

As for the “ the length of time available to the attorney or party to investigate and conduct discovery,” and “the information disclosed to the attorney or party through discovery and

investigation,” consideration of these factors shows that a reasonable attorney knew or should have known at the onset or in maintenance of the suit that no legitimate claims existed against the Parents who merely exercised their First Amendment right to petition the government and acted upon their duty to protect their children’s interests pursuant to S.C. Code of Laws § 63-7-10 *et seq.*

After reasonable and diligent investigation consistent with the current FCPSA’s and *Ex Parte Gregory*’s reasonable attorney standard, and particularly after constitutional issues had been raised in a motion to dismiss and after almost two years or protracted discovery, Mauldin’s attorneys knew or should have known that there were absolutely no material facts and no legal basis to support Mauldin’s defamation and contractual interference claims. Since the commencement of the suit in December 2009, Mauldin and his attorney were unable to produce any evidence showing negative impact on his employment, loss of reputation, mental anguish, or distress attributable to Parents’ actions. In fact, Mauldin admitted that he did not have a gap in his employment, a fact easily determined before this case was filed.

Similarly, the Coach and his counsel are also unable to offer any material fact evidencing that Parents’ communications were defamatory. Mauldin and his attorneys point to the OCR’s final disposition finding no sexual harassment by Mauldin, but the OCR’s Final Report does not deny the Parents’ legitimate concerns about the Coach’s conduct towards the teenagers. The final resolution by a governmental agency of a legitimate citizen complaint does not make the complaint itself unprotected speech.

In addition, Mauldin’s attorneys had the same timeframe to conduct discovery as Parents had. Arguably, Mauldin’s attorneys had better resources to conduct an efficient discovery than

the *pro se* Parents. Nevertheless, Mauldin and his counsels failed to offer even a scintilla of material evidence justifying the commencement or maintenance of the lawsuit.

Reasonable attorneys, such as Mauldin's counsels, knew or should have discovered the above-detailed discrepancies and the utter absence of material facts behind Mauldin's allegations. Arguably they should even be held to a higher standard of investigation when speech protected by the Frist Amendment may be chilled by the onerous burden of defending against a lawsuit. But instead of conducting any investigation, Mauldin's attorneys simply relied on their clients self-serving analysis, filed their client's baseless and frivolous lawsuit and diligently pursued it, even though they knew or should have realized that Mauldin's primary purpose was to harass Parents for taking their concerns to appropriate fact-finders. And they should have been concerned about the chilling effect such a suit could have on other parents. (R.pp.198-222: Affidavits of Defendants' Daughters (explaining that fellow team members and their parents are afraid to come forward); R. pp.146-148: E-mail From a Player's Parent (expressing concern over being "dragged into the suit" if she allows daughter to participate in OCR interview)).

Considering the sixth factor, "the response of the attorney or party to allegations that the act was violated," the trial court heavily relied on and liberally borrowed from the Coach's Memorandum in reaching its decision to deny sanctions. The trial court's Order Denying Sanctions mirrors Mauldin's Memorandum because it cites the same cases and applies the same repealed section of the FCPSA.

The seventh factor, "other facts which to the court are just, equitable, and appropriate," underscores the trial court's authority to consider equitable principles in making sanctions determinations. As elaborated in the following section, the trial court erred in failing to

appreciate the gravity of the constitutional rights that were encroached by the Coach's lawsuit. In such situations, the courts may use the FCPSA as a remedial measure to reimburse defendants, like Parents, who are burdened by having to defend against inherently meritless, retaliatory, chilling suits.

II. THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO IMPOSE SANCTIONS PURSUANT TO SCRCF 11 AND THE FCPSA AS SUCH A FAILURE ALLOWED THE RESPONDENT TO USE CHILLING LITIGATION TO RETALIATE AGAINST SPEECH PROTECTED BY THE FIRST AMENDMENT RIGHTS WITHOUT ANY CONSEQUENCE

Arguing against the court's consideration of anti-SLAPP arguments, Respondent's Memorandum states that SCRCF 11 and the FCPSA constitute the only remedies available to Parents. (R. p. 83) Although this is correct, it is equally well-established that sanctions determinations are proceedings in equity. See S.C. Code Ann. § 15-36-10 (2011); SCRCF 11; see also *Southeastern*, 394 S.C. at 104, 713 S.E.2d at 653-54. Principles of equity empower South Carolina courts to consider anti-SLAPP arguments, especially when the rights at stake are precious and when, in the absence of anti-SLAPP legislation, sanctions are the only gatekeeping tools that the Court has at its disposal.. See *Ex Parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983) (courts are vested with the "inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible").

SLAPPs¹ are retaliatory lawsuits that masquerade as ordinary lawsuits. See *Soukup v. Law Offices of Herbert Hafif*, 139 P.3d 30 (2006). The SLAPP's purpose is not to succeed on

¹ The acronym was introduced by University of Denver Professors George W. Pring and Penelope Canan. George Pring & Penelope Canan, *SLAPPs: Getting Sued for Speaking Out*, p. 8 (1996). SLAPPs are suits that "(1) involve communications made to influence a government action or outcome, (2) which result in civil lawsuits (3) filed against non-governmental actors (4) on a substantive issue of some public interest or social significance"--to intimidate individuals and organizations that speak out against government actions or operations. *Id.* at p. 209.

the merits, but to so intimidate the private citizen that petitioning activity ceases because the expense, risk, and anxiety engendered by the process of defending against a SLAPP is too great. See *LoBiondo v. Schwartz*, 970 A.2d 1007 (2009); *Protect Our Mountain Environment, Inc. v. District Court in and For Jefferson County (“POME”)*, 677 P.2d 1361 (Colo. 1984). As a result, SLAPP litigation has a chilling effect on public participation and speech, and consumes already-strained judicial resources. *Id.*

Twenty-eight states offer statutory protections against SLAPPs, which for the most part consist of quick evaluation and disposal of meritless claims. See H.R. 4364, 111th Cong. (2009) (Congress contemplating a federal anti-SLAPP statute); see also H.R. 3587, 118th Leg., Reg. Sess. (S.C. 2009) South Carolina’s legislature considered passing its anti-SLAPP legislation in order to reinforce First Amendment protections, ensure public participation in government, promote judicial economy, and protect the public from the potentially devastating impacts of SLAPPs, but has not passed such legislation. The fact that South Carolina has not passed anti-SLAPP legislation does not mean that SLAPP cases are not filed in South Carolina. While the absence of either federal or state legislation deprives South Carolina citizens of timely protection from abusive litigation and creates uncertainty, the courts have other tools at their disposal to respond to such abusive litigation. The courts retain have the power to impose sanctions pursuant to SCRCP 11 and the FCPSA. Such sanctions may come at the end of litigation rather than early in the litigation as is usually provided in the Anti-SLAPP legislation, but they remain powerful tools to address meritless litigation.

In this case, the Coach’s suit was a SLAPP case, brought and maintained in retaliation of Parents’ communications with school officials, the School District, the OCR, and other parents

whose daughters were also members of the soccer team. One of the public interest elements affected by the Coach's SLAPP suit is Parents' right to petition government, which is protected by the First Amendment's fifth clause. U.S. Const. amend. I; SC. Const. art. I, § 2; see *United Mine Workers, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967) (stating that right to petition is "among the most precious of the liberties safeguarded by the Bill of Rights"). The other public interest concern is Parents' constitutional right to make decisions concerning the care, custody, and control of their children. See *Troxell v. Granville*, 530 U.S. 57 (2000); see also S.C. Code of Laws § 63-7-10 *et seq.* (regarding obligations of parents). Accordingly, Parents acted within their rights in raising their concerns to the appropriate authorities and in alerting other parents who shared their common interest. All communications about which the Coach complained were privileged as they were all protected by the Parent's First Amendment rights. The trial court failed to acknowledge the importance of the Parents' rights that were chilled by Mauldin's suit and erred in not using its power to sanction pursuant to SCRCP 11 and the FCPSA.

When retaliatory lawsuits, like the Coach's, are dismissed without recourse, the court licenses egregious violations of First Amendment rights. By denying sanctions of litigation costs and fees, the court is communicating to future litigants (and their counsels) that South Carolina's court system may be exploited to silence individuals, even parents, who dare to voice their concerns about people into whose care they entrust their children..

CONCLUSION

For the reasons stated, Parents respectfully ask this Court to reverse the circuit court's decision denying Parents' motion for sanctions pursuant to SCRCP 11 and the FCPSA, and to

remand with directions to determine the proper award of attorney's fees and costs, entering a monetary judgment in favor of Parents.

Respectfully submitted,



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May 14th, 2013.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
Appellant Case Number 2012-212219

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case # 2009-CP-32-5708

MICHAEL MAULDIN.....Respondent

v.

CAROL VANDER HEIDE, MURRAY
MITCHELL, PAMELA WEISS, ELAINE
KORPITA, KARL WERDUNN, DEBRA
WERDUNN, AND MARK KOSOBUCKI,

of whom MURRAY MITCHELL and PAMELA WEISS are Appellants

Certificate of Compliance and Service

I hereby certify that the Final Brief of the Appellants complies with Rule 211 (b)
and that a copy of same was served by first class pre-paid mail on the 14th of May, 2013 on

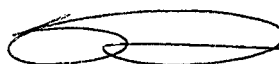
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SC Court of Appeals



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May 14th, 2013