

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

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SC Court of Appeals

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

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STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court err in refusing to award sanctions under either S.C.R.C.P. 11 (“Rule 11”) or under the Frivolous Civil Proceeding Sanctions Act, S.C. Code Ann. § 15-36-10 (2005) (“FCPSA”), based on Respondent having sued for redress because of Appellants’ dissemination of false and defamatory charges that Respondent engaged in sexual misconduct with young female soccer players he coached, where: (1) both Respondent’s employer, School District Five of Lexington and Richland Counties, and the Office for Civil Rights of the U.S. Department of Education investigated the charges and found them meritless; and (2) Appellants have admitted their charges of sexual misconduct by Respondent were untrue?
2. Did the circuit court abuse its discretion by failing to accept Appellants’ invitation to engage in judicial activism by creating an anti-SLAPP civil remedy in order to award sanctions to Appellants?
3. Assuming sanctions are warranted, which is denied, are the pro se Appellants entitled to \$39,423.98, to compensate them personally for “time and effort” they personally devoted to defending Respondent’s lawsuit?

STATEMENT OF THE CASE

Respondent sued Appellants and others seeking damages based on Appellants having led an organized campaign to oust Respondent as their daughters' varsity soccer coach. The complaint was filed on December 21, 2009. (R. pp. 16-22) Appellants' campaign to oust Respondent featured a bullet-point list of 33 different accusations variously charging Respondent with sexually harassing his players, engaging in unprofessional activities, and with general unfitness to serve as a high school soccer coach.

A copy of the bullet-point list was attached to the complaint. (R. pp. 20-22) This 33-point list set forth either directly or by insinuation false statements accusing the Respondent of inappropriate behavior of a sexual nature, including: 1) commenting on the girls' shorts and underwear, 2) encouraging a girl to make out with her boyfriend; 3) "routinely" asking girls about their relationships with their boyfriends; 4) continuing to physically touch a girl despite repeatedly being told, "Please don't touch my shoulder." and 5) stating that he was okay with the girls "getting naked." (R. pp. 20-22)

Prior to the complaint being filed, Appellants presented this same set of charges to Respondent's employers, Irmo High School and District Five of Lexington and Richland Counties ("Lexington Five"). As Respondent's defamation complaint states, "After a thorough and comprehensive review of the charges made, the principal of Irmo High School [and] the Superintendent and Human Resources Director for the school district came to the conclusion that they lacked any basis and dismissed the same." (R. p. 17, lines 10-13)

Thus, at the time suit was brought, Appellants' charges had already been evaluated and rejected by an independent fact-finder. Nonetheless, the uproar and unpleasantness generated by Appellants' campaign to smear Respondent caused him to step down from his job as girls' varsity soccer coach at Irmo High School. This was in response to the message from Lexington Five's Director of Human Resources that "it was getting costly for the District to represent [him]." Respondent felt he had no choice but to resign from his position. (R. pp. 61-62)

The complaint alleged two causes of action: interference with contractual relations and defamation. (R. pp. 17-18) Of the 33 items listed by Appellants on their bullet point chart of purported "Inappropriate Behavior" by Respondent, many have sexual misbehavior or sexual harassment overtones. According to the cover memo used by Appellants to transmit the bullet point listing to Irmo High School officials in June of 2009, the voluminous list purports to "represent only the handful of events that we have documented." (R. p. 114)

As noted above, an investigation by the Human Resources Officer for Lexington Five culminated "in no findings of sexual harassment toward any of the girls on the Irmo High School soccer team on your part." (R. p. 287) Unhappy with Irmo High School's investigation regarding her complaints, on October 6, 2009, Appellant Weiss filed sexual harassment charges against Respondent with the U.S. Department of Education's Office for Civil Rights ("OCR"). (R. p. 141) A memo subsequently obtained by Appellant Weiss under FOIA from OCR reported that "OCR . . . investigated three separate allegations and that we did not find that the conduct of [Respondent] rose to the level of sexual harassment." (R. p. 167) Subsequently, the OCR's Final Report of Findings after

investigating Appellants' allegations of sexual harassment failed to substantiate Appellants' allegations. (R. pp. 148, 161)

It is highly significant that both the local school district and OCR reviewed Appellants' contentions as sexual harassment claims, which they were. At the sanctions motion hearing before the court below, Appellants accused Respondent of misrepresenting that he had been charged with sexual harassment of his players. (R. p. 94, line 13-p. 95, line 13) According to Appellants, Respondent made up the sexual harassment charges on his own. (R. p. 94, line 13-p. 95, line 4) See also (R. 107, lines 1-3) (Appellant Weiss stating: "Opposing counsel also continually talks about the sexual harassment. This isn't about sexual harassment."). Respondent was faulted for not making "[a] simple inquiry [which] would have revealed that *none of the parties involved shared this perspective.*" (R. p. 95, lines 3-4) (Emphasis added.) Among the "parties involved" were Appellants, the same Appellants whose sexual harassment charges were reviewed as sexual harassment charges and rejected by both Lexington Five and OCR.

In an affidavit subsequently filed in the case, Respondent explained he was seeking redress for "[t]he false and misleading allegations made against me, especially those concerning sexual harassment." (R. p. 62) Naming Appellants explicitly, Respondent explained that they "began a campaign to incite certain parents, defame me and ultimately remove me as head girls' soccer coach for personal and malicious reasons." (R. p. 62) Respondent explained that the "allegations and charges" being advanced by Appellants "have no substantial basis, and many of the charges are false and misleading and are based on second or third-hand information." (R. p. 60) He further stated that the falsehoods spread by Appellants "have injured my reputation and caused me embarrassment, humiliation, mental anguish and emotional distress." (R. p. 62)

Supporting Respondent's contention that, in essence, he was the subject of an organized smear campaign were four affidavits filed on his behalf by players' parents who had been contacted by one or more of the parties sued by Respondent. Respondent's affiants reported that Appellants and their co-defendants' professed aim was to "deal with" or "go after" Respondent in part, according to one affiant, by "making false claims against him." (R. pp. 295-302) Respondent thus had reason to believe he was the subject of an organized campaign to injure him with false defamatory statements being published far and wide.

As a result of Appellants' campaign and the uproar and adverse publicity it engendered, Respondent relinquished his varsity coaching job at Irmo High School, moving to a lesser position (assistant and junior varsity girls' soccer coach) at Dutch Fork High School. (R. p. 154)

After settling with some defendants, Respondent moved on June 21, 2011, to dismiss all claims, contingent only on each party bearing its own costs. (R. pp. 66-67) Appellants refused to agree to the motion, contending they were entitled to Rule 11 sanctions. (R. p. 68)

Respondent subsequently dismissed his lawsuit against Appellants, with the issue of sanctions being left open. (R. pp. 8-9) Appellants then sought sanctions against Respondent under Rule 11 and the FCPSA. (R. pp. 71-78) Appellants' request for sanctions included a demand for payment to them personally of \$39,423.98 reflecting compensation for time purportedly invested by them as pro se litigants. (R. p. 369)

After receiving voluminous filings and hearing oral argument, on May 8, 2012, Judge Keesley issued his order denying Appellants' motion for sanctions, finding that Appellants failed to show by a preponderance of the evidence "that no reasonable plaintiff

or plaintiff's attorney would have initiated the plaintiff's claim" (R. p. 14, line 23-p.
15 line 1)

ARGUMENTS

1. HAVING FALSELY BEEN ACCUSED OF SEXUALLY HARASSING PLAYERS HE COACHED, RESPONDENT DID NOT ACT FRIVOLOUSLY IN SEEKING JUDICIAL REDRESS.

“The determination of whether attorney’s fees should be awarded under Rule 11 or under the Act is treated as one in equity.” Southeastern Site Prep, LLC v. Atlantic Coast Builders & Contractors, LLC, 394 S.C. 97, 713 S.E.2d 650 (Ct. App. 2011). Therefore, the appellate court reviews the decision de novo with “its own view of the preponderance of the evidence.” Id.

“De novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court’s findings.’ However, this broad standard of review does not require the appellate court to disregard the factual findings of the trial court or ignore the fact that the trial court is in the better position to assess the credibility of the witnesses.” Pinckney v. Warren, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001) (citations omitted). Nutt Corp. v. Howell Rd., LLC, 396 S.C. 323, 327, 721 S.E.2d 447, 449 (Ct. App. 2011)

When the appellate court agrees with the trial court’s findings of fact, it reviews the decision regarding sanctions under an abuse of discretion standard. Southeastern Site Prep, LLC v. Atlantic Coast Builders & Contractors, LLC, 394 S.C. 97, 713 S.E.2d 650 (Ct. App. 2011).

From Respondent’s standpoint, the charges against him were very, very serious. He was charged in various ways, principally by Appellants, of being a sexual predator; using his coaching position to prey on young women. Appellants took their charges to two different independent fact finders. On December 21, 2009, the same day the instant

complaint was filed, a detailed written report was issued by the Lexington Five's Chief Human Resources Officer concluding that there were "no findings of sexual harassment toward any of the girls on the Irmo High School soccer team on your part." (R. p. 287) Subsequently, on July 23, 2010, the U.S. Department of Education's Office for Civil Rights wrote Appellants from OCR's Washington headquarter to report its findings on Appellants' allegations that Respondent had "sexually harassed members of the team." (R. p. 148) The OCR investigation concluded Appellants' defamatory allegation was not supported by the evidence. (R. p. 156)

These findings by independent investigative bodies are significant and are entitled to considerable weight in the context of the present sanctions motion. First, the test for whether sanctions apply under the FCPSA is basically one of frivolity; no sanction may be imposed under the Act "[u]nless the court finds by a preponderance of the evidence that an attorney . . . engaged in advancing a frivolous claim." S.C. Code Ann. § 15-3610(C)(2).

In their Brief at 13, Appellants erroneously argue that the former FCPSA standard of frivolity has been replaced by a "reasonable attorney" standard. Respondent begs to differ. By its terms, S.C. Code Ann. § 15-36-10(C)(2), quoted above, creates a safe harbor protecting non-frivolous decision-making. Further, it is unethical for a lawyer to assert frivolous positions under SCACR 407, Rule 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."). In any

event, the tri-partite test established by the Act has been met here, in that, in light of all relevant facts: (1) a reasonable attorney would believe that the claims asserted by Respondent were warranted by existing law or there is a good faith argument for the modification of the existing law; (2) a reasonable attorney would believe that the claims had not been raised “merely to harass or injure the other party”; and (3) a reasonable attorney would believe that the claim is not frivolous and has not been raised for a purpose other than the proper prosecution or defense of the action. FCPSA §15-36-10(C)(1). Appellants are required to prove these issues by a preponderance of the evidence. In this matter and in the hearing before the court, the Appellants presented no evidence that a reasonable attorney would not believe the complaint’s claims asserted by Respondent were warranted and proper.

One way a party charged with sanctions can use to show that the frivolity test has not been met is to show that the charged party’s position withstood a summary judgment motion. This test stems from our Supreme Court’s decision in Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903 (1997). In Hanahan, the Supreme Court reversed an award of sanctions under the previous version of the Act. Id. at 158, 485 S.E.2d at 913. The court stated: “[W]here a party survives a summary judgment motion, it is not subject to sanctions after a trial on the merits of the surviving claims.” Id. The court concurred with the view that “a party who survives pre-trial motions to dismiss and for summary judgment [is] not subject to sanctions after a trial on the surviving claims. The theory behind these cases is that if a case is submitted to the jury, it cannot be deemed frivolous.” Id. By its express terms, the

Frivolous Civil Proceeding Sanctions Act only applies to *frivolous* lawsuits; Respondent's lawsuit was not frivolous, and it was not brought for any ulterior purpose.

In this case, there was no summary judgment finding of a triable issue in Respondent's favor. But here the facts are even more favorable to Respondent. Two separate independent factual investigations, one by Lexington Five and the other by OCR, took up Appellants various allegations and found the charges of sexual harassment unsupported. Having accused Respondent of flagrantly improper sexual misconduct, Appellants resorted at the sanctions motion hearing to advancing two equally unsupported contentions.

First, they asserted their 33-bullet point set of accusations did not charge Respondent with "sexual harassment . . . unprofessional activities [or] unfitness to serve," because those exact words do not appear on the list. (R. p. 94 lines 13-24) Nonetheless, Lexington Five and OCR both evaluated Appellants' charges as accusing Respondent of sexually harassing the players he coached, conduct that is unprofessional and demonstrates unfitness for the position. Defamation per se is defined as a false statement about the plaintiff that charges adultery, unchastity, or unfitness in one's business or profession, among other things. Fountain v. First Reliance Bank, 398 S.C. 434, 730 S.E.2d 305 (2012). Here, the charges leveled against Respondent by Appellants fill the bill. Having engaged in slander per se, Appellants can hardly argue that the resulting defamation lawsuit against them was frivolous.

Appellants' fallback argument, noted above, was equally vacuous. Appellants' now contend Respondent's belief that he was the target of Appellants' sexual harassment claims was all based on his misunderstanding of their list of wrongdoings. According to Appellants, they never charged Respondent with sexual harassment, using that exact verbiage. His understanding to the contrary was, according to Appellants, attributable to Respondent's personal lack of diligence in investigating Appellants' claims. According to Appellants, "A simple inquiry," had Respondent merely taken the time to make one, "would have revealed that none of the parties involved shared this perspective," with "this perspective" being that Respondent was guilty of sexual harassment. (R. p. 94 line 25-p. 95, line 4) Since the "parties involved" included Appellants, one can only assume that they intentionally made defamatory statements accusing Respondent of sexual misconduct calculated to injure Respondent, well knowing those statements were false.

The Appellants' own words, delivered at the sanctions hearing below, show their disingenuous claims:

The plaintiff and his attorney also claimed in their lawsuit that there was a, quote, a bullet — bullet point list of complaints accusing the plaintiff of sexual harassment toward players, unprofessional activities, unfitness to serve as a high school coach.

Your Honor, nowhere in the 33 concerns included in Exhibit 3 do the words complaints, charges sexual harassment, unprofessional activities or unfitness to serve appear. The plaintiff himself later admitted this during discovery as shown in Exhibit 25.

Despite this, the plaintiff still claimed that charges by parents carried an insinuation that the plaintiff was guilty of sexual harassment. A simple

inquiry would have revealed that none of the parties shared this perspective. (R. p. 94 line 13-p. 95 line 4)

The issue is not, of course, what Appellants thought their words meant, but rather what a reasonable person would think their words meant. See White v. Wilkerson, 328 S.C. 179, 493 S.E.2d 345 (1997) (summary judgment granted only if the publication incapable of any reasonable construction which will render words defamatory). Here, both Lexington 5 and the OCR reasonably believed the words meant that Respondent was being accused of engaging in sexual harassment. Both independent evaluators were correct in their assessment, since Appellants clearly charged Respondent with sexual misconduct toward the young women he coached.

Appellants contend that “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.” Appellants’ Br. at 18. The exact standards that Appellants insist need to be applied in cases under the modern FCPSA are set forth in the lower court’s order and were applied in this case. Compare Appellants’ brief at 16 with R. pp. 13-15.

Though the lower court clearly applied the correct legal standard, Appellants insist that the court’s reasoning was wrong. According to Appellants, supposedly application of the seven-part test in S.C. Code Ann. § 15-36-10(E)(1)-(7) would have established a basis for sanctions. However, they fail to explain how any of the listed factors, considered individually or in concert with other factors, would compel a decision in their favor.

For example, as for the first factor, “the number of parties,” there is no dispute that five other parties were sued, and that amicable settlements were reached with each of the other parties. As for the second FCPSA factor, the suit’s “complexity,” Respondent notes that Appellant Mitchell admitted in court below that, “It’s a . . . long and confusing case.” (R. p. 109, line 2) As is discussed above, one thing that made the case confusing was Appellants attacking Respondent for sexual harassment, and then attacking Respondent for contending they had done so.

The third and fourth factors, “the length of time available . . . to investigate,” and information obtained “through discovery and investigation” do not support Appellants’ position; two independent investigations of Appellants’ false sexual misconduct charges determined them to be unsubstantiated.

The FCPSA’s fifth factor likewise does not cut in Appellants’ favor, since there is no proof, nor can there be, that Respondent’s counsel or Respondent himself ever violated the FCPSA.

As for the FCPSA’s sixth factor, Respondent’s response to Appellants’ allegations, Respondent calls attention to the factual representations in his Memorandum in Opposition to the Motion for Sanctions (R. pp. 79-87), plus excerpts the Sanctions Hearing transcript (R. p. 96, line 25-p. 106, line 19) which makes clear the good faith and reasonableness of Respondent and his counsel. As stated in Respondent’s Memorandum in Opposition to the Motion for Sanctions, the time demands and financial costs of maintaining the litigation simply overwhelmed him. (R. p. 87, lines 21-23)

The seventh FCPSA factor was obviously considered by Judge Keesley when he wrote, “Although the defendants’ first amendment rights are substantial and are a serious consideration, those rights must be evaluated in this context against the plaintiff’s right to access to the courts.” (R. p. 14, lines 16-18) Weighing this factor and all other relevant factors, the lower court correctly determined that, “[T]he defendants have failed to meet their burden of showing that no reasonable plaintiff or plaintiff’s attorney would have initiated plaintiff’s claim against the moving defendants.” (R. p. 14 line 22-p. 15 line 1) The lower court’s ruling was correct.

In an effort to dress up their grave charges of professional and personal misconduct in the face of repudiation by independent fact-finders, Appellants have resorted to casting additional personal aspersions. Thus, Appellants charge that Respondent and his attorneys “not only initiated without investigation but maintained the meritless lawsuit in bad faith.” Appellants’ Br. 15. These completely unsubstantiated charges ignore the fact that the suit was filed simultaneously with receipt of a written report, prepared by an independent fact-finder (Lexington Five) repudiating Appellants’ sexual predator charges. (R. p. 287) Appellants likewise turn a blind eye to the fact that while the suit was being continued, Lexington Five’s findings favorable to Respondent were reiterated in a detailed report prepared by OCR’s Washington D.C. office. (R. p. 156, lines 4-5)

According to Appellants, Respondent’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.” Appellants’ Br. 19. To

the contrary, what better corroboration for Respondent's claim of wrongful conduct on Appellants' part would exist than two independent factual investigations showing both that Appellants actually charged Respondent with sexual harassment, and that those hurtful claims were unfounded? In truth, those independent fact-finders' conclusions completely disprove Appellants' contention that it was wrong for Respondent to complain about being charged with "sexual harassment toward players . . . as a high school coach." (R. p. 94 line 13-p. 95 line 4)

Appellants lamely claim it was wrong for Respondent to so contend in his lawsuit because "nowhere in the 33 [bulleted] concerns . . . do the words . . . sexual harassment . . . appear." (R. p. 94, lines 19-22) Both Lexington Five's investigators and the Office for Civil Rights correctly interpreted what Appellants were saying: Respondent was unfit to serve as a coach of young women because he sexually harassed them. Both sets of investigators found Appellants to be charging Respondent with sexual harassment, and labeled those charges to be groundless.

Respondent has acted in complete good faith in this case, and so has his counsel. Given that the substance of Appellants' allegations targeted Respondent's personal behavior, his counsel were reasonably entitled to rely on their client's story, particularly since it had been corroborated by independent fact finders.

This is not a case like Ex parte Gregory, 378 S.C. 430, 663 S.E.2d 46 (2006). In *Gregory* a lawyer was sued for converting client funds even though the money had never left his trust account. When it imposed Rule 11 sanctions in *Gregory*, the court made it clear that it was *not* creating "a blanket rule that an attorney is

precluded from obtaining a reasonable belief in the merits of a case based solely on information related to him by a client.” Id. at 439, n.3, 663 S.E.2d at 51 n.3. The court explained that, “[o]ur conclusion that an attorney must conduct a reasonable investigation beyond what is related to the attorney by the client is limited to the situation where a client is alleging conversion against his or her former attorney for misappropriation of client funds or legal malpractice.” Id. Here there can be no showing of a Rule 11 violation based on an inadequate investigation.

Likewise wide of the mark is Appellants’ contention that there was no evidence showing “negative impact on [Respondent’s] employment.” Appellants’ Br. p. 19. In truth, Appellants’ smear campaign cost Respondent his varsity coaching job; he is now an assistant coach and a junior varsity coach at a different high school. (R. p. 61, line 7-p. 62, line 14) Having broadcast unfounded charges claiming that Respondent was, in essence, a sexual predator, it ill-becomes Appellants to now assert that Respondent “and his counsels failed to offer even a scintilla of material evidence justifying the commencement or maintenance of the lawsuit.” Appellants’ Br. 20. Appellants’ statements would have entitled Respondent to damages because the statements were defamation per se.

The court below found that “at a minimum, it appears from the facts that would have been known to the plaintiff prior to the initiation of the lawsuit that there was a legitimate purpose in securing discovery through litigation.” (R. p. 11, lines 19-21) In other words, as the lower court implicitly held, the FCPSA does not require a certainty of prevailing on a claim prior to filing, but merely enough information that

warrants the use of the tools of discovery to develop the claim. In many cases it may be ultimately that after initiation of the claim there is a piece of evidence or testimony uncovered that destroys the claim that was believed in good faith to have existed at the time of filing. The mere discovery later of strong contrary evidence does not render the filing of a case frivolous. Here, no strong contrary evidence in Appellants' favor ever surfaced.

Nonetheless, Appellants falsely contend, without evidence, that Respondent's "attorneys simply relied on their client [sic] 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." Appellants' Br. 20. This heated rhetoric invites several responses.

First, Appellants are experts when it comes to baseless charges. When they were packaged and delivered to "appropriate fact-finders," Appellants' bulleted concerns were found meritless on two separate occasions. Second, the charge that Respondent's legal counsel "simply relied on their clients [sic] self-serving analysis" is unsupported and unsupportable. The record reflects that two separate sets of independent fact finders reviewed Appellants' allegations and found them wanting. Third, nowhere in their Brief do Appellants offer any competent, credible, persuasive support for their contention that a male coach publicly accused of sexually preying on young women on his team has no right to legal redress when those heinous charges are false.

As stated at p. 21 of their Brief, Appellants profess to be big believers in “[p]rinciples of equity . . . especially when the rights at stake are precious.” Appellants’ Br. at 21. Respondent respectfully submits that a male coach’s right to a good name free from false charges of sexual misdeeds with adolescent girls on his team is a precious asset, and that Appellants vehemently attacked his good name. Finally, at the hearing below on their sanctions motions Appellants conceded that their volatile, hurtful charges of sexual misconduct on Respondent’s part were false, i.e., that belief Respondent committed sexual harassment was shared by “none of the parties involved,” which would include Appellants themselves. (R. p. 95, lines 2-4)

According to Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 510-11, 506 S.E.2d 497, 502 (Ct. App. 1998):

Libel is actionable per se if it involves “written or printed words which tend to degrade a person, that is, to reduce his character or reputation in the estimation of his friends or acquaintances, or the public, or to disgrace him, or to render him odious, contemptible, or ridiculous. . . .” Lesesne v. Willingham, 83 F. Supp. 918, 921 (E.D.S.C.1949). In other words, if the trial judge can legally presume, because of the nature of the statement, that the plaintiff’s reputation was hurt as a consequence of its publication, then the libel is actionable per se.

Appellants’ charges of sexual misconduct were libelous per se, they were false, and they were known to be false when they were published.

Malice is present. because Appellants have freely admitted that “none of the parties involved [a group that includes Appellants] shared [the] perspective,” (R. p. 95, lines 2-4), that Respondent was guilty of sexually harassing the young women he coached, even though that is what the Appellants charged in their complaints before Lexington Five and before OCR. There simply is no First Amendment right to

deliberately make false charges of sexual misconduct on the part of a coach vis-à-vis his players

2. RULE 11 IS NOT VIOLATED WHEN THE TRUTH OF THE KEY PLEADING ALLEGATIONS IN QUESTION HAS BEEN VALIDATED BY AN INDEPENDENT THIRD PARTY AND ARE SUBSEQUENTLY CONFIRMED BY THE PARTIES MOVING FOR SANCTIONS.

The Complaint in this lawsuit was filed only after Appellants' roster of charges had been reviewed and rejected by Lexington Five. This "thorough and comprehensive" third-party vetting was expressly cited in the Complaint's text. (R. p. 17, lines 10-12) Lexington Five's finding of no sexual harassment subsequently was replicated by OCR which considered and rejected Appellants' charge that, quote, "the Coach of the girls' varsity soccer team sexually harassed members of the team," (R. p. 148) OCR found that the facts did not amount to sexual harassment. (R. p. 156)

Thus, we see that Appellants plainly charged Respondent with sexual misconduct in the form of sexual harassment of his players before two fact-finding bodies, Lexington Five and OCR. Appellants now contend that "this perspective," i.e., that Respondent was guilty of sexual misconduct, was all a misunderstanding. Appellants now concede that their exceedingly damaging charge that Respondent had engaged in sexual misconduct is truly shared by "none" of the accusers, including themselves. (R. p. 94, line 13-p. 95, line 4)

According to Appellants' twisted logic, the fact that they had no good faith belief in their sexual harassment claims actually cuts in their favor. This is because, according to Appellants, Respondent deserves to be blamed for failing to conduct

“a simple inquiry” that would have established Appellants did not actually believe the hurtful sexual harassment charges they were making. (R. p. 95 lines 2-4) Actually, what such a “simple inquiry” would have established is point-blank proof of malice on Appellants’ part, a lawsuit element which was pleaded in the Complaint, with its existence later being confirmed by Appellants’ admission in open court.

3. LAVISH LEGAL FEES FOR PRO SE LITIGANTS ARE UNAVAILABLE UNDER RULE 11 OR THE FCPSA

For a case in which no depositions were ever taken, where no trial occurred, and where no actual trial preparation time was spent, Appellants seek lavish compensation, totaling \$50,099.47 (as of 1/17/12). (R. p. 369) This sum is made up of \$8,801.78 for legal fees actually paid, \$673,71 for additional costs such as postage and copying, \$1,200.00 (reflecting 16.1% interest on money withdrawn from children’s college accounts to pay their lawyer’s retainer fee), and \$39,423.98, for their “time and effort.” (R. p. 369) No sanctions whatever are deserved, as has been discussed above. However, assuming some amount of sanctions was merited, the bulk of the sanctions sought are legally unjustified.

Like Fed. R. Civ. P. 11, SCRCP 11 allows as sanctions compensation for expenses actually “incurred” including a reasonable attorney’s fee. Most of the money Appellants seek as sanctions reflects efforts by them to be compensated for spare time they spent on the case. Such sums are not compensable under Rule 11. “Because a party proceeding pro se cannot have incurred attorney’s fees as an

expense, a district court cannot order a violating party to pay a pro se litigant a reasonable attorney's fee as part of a sanction." Massengale v. Ray, 267 F.3d 1298, 1302-03 (11th Cir. 2001). The same should go for the pro se parties' "time and effort." Fees charged by pro se litigants for the time they spend processing their cases are not "expenses incurred" within the purview of Rule 11.

As for the FCPSA, it is true that the time required of the prevailing party by the frivolous proceeding" is an element of compensable cost. However, there is no direct legislative guidance as to how the rate should be calculated or what "time" may be included. Appellants extrapolate from their purported hourly rates as employees of the University of South Carolina, demanding in excess of \$42 (Ms. Weiss) and \$52 (Mr. Mitchell) per hour for time spent, amounting to claims for time aggregating \$39,423.82 for the two of them. There is no sign in their papers that Appellants lost any compensable work time as University employees due to the lawsuit. The fees sought by these pro se defendants are far in excess of the standard fees permitted for public defenders and appointed counsel under S.C. Code Ann. § 17-3-50. Indeed, the rate for Mr. Mitchell exceeds the \$50 per hour rate set by the Court for licensed attorneys appointed to handle cases involving lawyer dishonesty affecting the Fund for Client Protection. See SC Supreme Court Order 2013-01-17-02 (Amendment to Rule 31(f), Rule 413, SCACR). The maximum rate for nonlawyers under the recent Rule amendment is \$10 per hour. Id. No South Carolina case has recognized a right to reimburse a litigant at the interest rate of 16.1% or at any other rate for that matter, "on

money withdrawn from children's college accounts to pay counsel's retainer fee." (R. p. 369)

Appellants are entitled to no compensation because they cannot prove their entitlement to sanctions. However, it is worth noting that awarding extravagant compensation to sanctions movants in the amounts sought by Appellants would be exceedingly bad policy. If these Appellants are entitled to be lavishly compensated for their time spent dealing with the case, then every successful South Carolina civil litigant, whether or not represented by counsel, potentially has a right to be richly rewarded under the FCPSA for time taken away from other activities to devote to the lawsuit. Predictably, a new cottage industry will spring up around sanctions motions, further clogging our over-burdened court system.

4. FEES FOR PRO SE LITIGANTS ARE UNAVAILABLE UNDER RULE 11 OR THE FCPSA BASED ON ANY "ANTI-SLAPP" THEORY.

The acronym SLAPP, standing for "Strategic Lawsuit Against Public Participation," is featured nineteen times in Appellants' brief. According to a Westlaw search for reported South Carolina cases decided by either our Supreme Court or Court of Appeals, no reported South Carolina case has ever used the term "SLAPP" or "anti-SLAPP."

The South Carolina General Assembly, unlike the legislatures of the 28 states cited by Appellants in their brief at 22, has considered but declined to adopt anti-SLAPP legislation. In essence, Appellants devote Part II of their brief to pleading for judicial permission to use frivolous litigation sanction devices, such as Rule 11 and the FCPSA, as anti-SLAPP tools.

Even if judicial activism calculated to convert procedural requirements into anti-SLAPP weapons were a good idea, using this case to do it would be wrong. Here, the record is clear that the complaint was filed and served after, repeat, after, the investigation conducted by Lexington Five had been completed and a report issued. By the time the case was filed. Appellants and all interested persons had already enjoyed unfettered access to public servants willing to hear their grievances.

With no proof whatever, Appellants label the lawsuit as retaliatory, and therefore subject to some sort of an anti-SLAPP remedy, should one be created out of thin air as they request. The problem is that every tort lawsuit is in a sense retaliatory, since the proponent invariably is claiming to have been wronged in some way by somebody. Here, the facts are undisputed that Appellants accused Respondent of sexual misconduct (harassment) toward the young women he coached. These grave, false charges were made by Appellants to two different investigative agencies, Lexington Five and OCR, and each time they were rejected as unfounded. To top it off, after the fact Appellants insisted in open court that “none of the parties,” including presumably themselves, actually believed Respondent was “guilty of sexual harassment.” (R. p. 95, lines 2-4)

According to Appellants, Respondent and his counsel directed attention where it did not belong. In arguing to the court below in favor of sanctions, Appellants complained, “Opposing counsel also continually talks about sexual harassment. This isn’t about sexual harassment.” (R. p. 107, lines 1-3) And later, “So this is, again, not about sexual harassment.” (R. p. 108 line 7) All Appellants did, in their eyes, is

present “33 concerns . . . and asked the school district to . . . see if they consider this appropriate behavior by a coach with adolescent girls. (R. p. 107, lines 11-17) (Emphasis added.)

At the sanctions hearing, Appellant Mitchell observed, “It’s a . . . long and confusing case.” (R. p. 109, lines 1-2) Helping to make the case confusing was Appellants’ desire to have it both ways by making serious sexual misconduct charges against Respondent, and then later, in open court, denying that is what they had done.

Having falsely accused Respondent of serious professional misconduct of a sexual nature, and having falsely denied having done so, Appellants now complain that “their rights were chilled by [Respondent’s] suit.” Appellants’ Br. 23. This is flatly untrue. Appellants’ contentions were respectfully entertained by two different independent bodies who disagreed with Appellants’ harassment accusations. The underlying case was not brought by Respondent to chill anything; it was brought because Appellants falsely made very, very serious charges which they now seek to disown and backtrack from.

The sanctions hearing transcript, R. p. 96 line 25-106, line 19), sketches out the course of proceeding from the time Respondent’s counsel were hired through Respondent’s decision to drop the case. In summing up, Respondent’s counsel Lewis Cromer explained the decision to dismiss claims against Appellants after settling with the other defendants:

[W]e decided to drop this case because it’s one of many cases that all of us run into where it gets down into a tar baby case. And it’s one that you really need to put an end to it and we tried to and we did. . . .

I respect with all my heart and will that I can tell you, the positions that these defendants have espoused. . . .

We deserve the same consideration that they're talking about. Clients who have been wronged deserve the same consideration. They should not be chilled and deterred from filing defamation cases or any other kind of cases that they have

I hate it that we had to agree to the [dismissal], but it was the right thing to do for my client. It also was the right thing to do for the defendants in this case. And this is a case where no sanctions should be imposed, Your Honor.

(R. p. 105 line 17-106-19)

Respondent engaged in no conduct deserving sanctions whether under the guise of some judicially-created anti-SLAPP remedy or otherwise. Appellants' charges of sexual misconduct were wrongful and totally unjustified. They got sued for making those false charges, and they deserved to get sued for making those false charges.

CONCLUSION

For the foregoing reasons, the lower court's ruling denying Appellants' motion for sanctions should be affirmed.

Respectfully submitted,



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

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SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case # 2009-CP-32-5708

MICHAEL MAULDIN Respondent,

v.

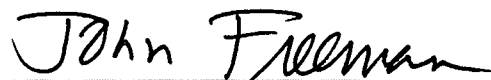
CAROL VANDER HEIDE, MURRAY
MITCHELL, PAMELA WEISS, ELAINE
KORPITA, KARL WERDUNN, DEBRA
WERDUNN, AND MARK KOSOBUCKI,

of whom MURRAY MITCHELL and PAMELA WEISS are Appellants.

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that a copy of the Final Brief of the Respondent complies with Rule 211(b)
and that it was served by first class mail on the 1st day of May, 2013, on Appellants' Attorney:

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