

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20-CVS-11891

J. NICHOLAS FOY, NATALIE S. FOY,
BRYAN CRUTCHER, SANDY BLAKKELY
WHITE and STEPHEN LONNEN,

Plaintiffs,

v.

CHARLOTTE-MECKLENBURG BOARD OF
EDUCATION, EARNEST WINSTON,
Superintendent of Charlotte-Mecklenburg Schools
and Chief Executive Officer of the Charlotte-
Mecklenburg Board of Education in his official
capacities, ELYSE DASHEW, Chairperson of
Charlotte-Mecklenburg Board of Education in her
official capacity, the NORTH CAROLINA
ASSOCIATION OF EDUCATORS, INC., and
the CHARLOTTE-MECKLENBURG UNIT OF
THE NORTH CAROLINA EDUCATORS
ASSOCIATION, INC.,

Defendants.

ORDER

This matter came before the Court at the June 25, 2021 session on the Amended Motion of the Defendant North Carolina Association of Educators (NCAE) and its local chapter, the Defendant Charlotte-Mecklenburg Association of Educators (CMAE), for an award of attorneys' fees against the Plaintiffs pursuant to N.C.G.S. § 6-21.5 and against Plaintiffs' counsel pursuant to

Rule 11(a) of the Rules of Civil Procedure. Based on the following findings of fact and conclusions of law, the Court granted the motion in open court and now reduces the Order to writing.

FINDINGS OF FACT

1. Plaintiffs sued NCAE and CMAE and the other named defendants in September 2020, challenging the decision of the Charlotte-Mecklenburg school board to start the 2020-21 school year using only remote instruction, a learning option authorized by the Governor and Legislature in response to the COVID-19 pandemic.

2. The events leading to the lawsuit are set out in the Complaint and have been detailed in prior briefing and in this Court's Order of March 5, 2021 dismissing all of Plaintiffs' claims against all Defendants. The entirety of the March 5, 2021 Order is incorporated by reference into this Order, but pertinent portions of that Order are also excerpted and relied upon as specific findings.

3. Plaintiffs alleged that NCAE had advocated for remote instruction as a safety and health measure on social media and that members of its local chapter, CMAE, had advocated at public hearings and by direct communications with elected board members for using virtual instruction as a school health and safety measure.

4. Though the Complaint identified them as non-profit, private entities, Plaintiffs alleged that NCAE and CMAE had violated the state constitution and the duties of school boards under N.C.G.S. § 115C-1 in advocating for remote instruction.

5. Further, Plaintiffs alleged that this advocacy constituted unlawful collective bargaining and an unlawful strike by a work slowdown in violation of N.C.G.S. § 95-98, *et seq.*

6. Exhibit 1 to the motion for fees, and Exhibit A to the Brief submitted in support of the motion, contains a series of emails between counsel for NCAE/CMAE and counsel for Plaintiffs on November 5 - 19, 2020 about the allegations before the filing of any responsive pleading.

7. NCAE/CMAE's counsel asked on November 5, 2020 that Plaintiffs dismiss the claims against NCAE and CMAE voluntarily as legally unfounded. Counsel wrote, as this Court would later find, that NCAE and CMAE were not state actors and thus could not violate the state constitution or N.C.G.S. 115C-1, a statute that prescribes the duties of school boards.

8. Counsel also wrote that NCAE/CMAE members' advocacy for remote instruction as a workplace health and safety issue was expressly allowed by N.C.G.S. § 95-98.2 under a provision quoted in Plaintiffs' Complaint.

9. Plaintiffs' counsel responded on November 6, 2020. "You raise a good point. I'll think about it."

10. NCAE/CMAE's counsel then followed up on November 18, 2020 to ask if Plaintiffs were going to dismiss the claims against NCAE/CMAE.

11. Plaintiffs' counsel responded the next day, November 19, 2020, writing that, "My clients intend to move forward with their claims against your clients."

12. The matter was set for hearing before the Hon. Casey Viser on December 8, 2020 and the parties submitted briefs prior to the hearing.

13. Judge Viser announced at the hearing that he had decided to recuse himself and the matter was continued.

14. As a result of the briefing NCAE/CMAE submitted for that hearing, Plaintiffs and their counsel were fully apprised on the legal insufficiency of the claims against NCAE and CMAE. They did not dismiss those claims but continued to litigate.

15. The matter was then heard by the undersigned on January 15, 2021.

16. Counsel for Plaintiffs admitted at oral argument that the constitutional and statutory duty claims against NCAE and CMAE were not proper. And Plaintiffs' counsel failed to articulate any

reasonable, good faith theory for extending the prohibitions against public employee strikes to the manner in which NCAE and CMAE members had advocated for remote instruction.

17. This Court then wrote and issued an Order on March 5, 2021 dismissing all claims against NCAE and CMAE with prejudice, finding in pertinent part (with reference to the paragraphs in that Order) that:

39. Defendants NCAE and CMAE are not state agents and cannot violate the state constitution.

51. The NCAE and CMAE have no duties under the N.C.G.S. § 115C-1.

52. Plaintiffs conceded during the January 15, 2021 hearing that the constitutional and statutory claims against Defendant North Carolina Association of Educators, Inc. and Defendant Charlotte-Mecklenburg Unit of the North Carolina Educators Association, Inc. **were not proper**. These two Defendants are private associations. (Emphasis added.)

And, on the unlawful bargaining and unlawful “strike” by public employees claim, the Court found:

62. Advocacy of a position on an issue is not equal to negotiation and representation of a group in the labor context. See *Hickory Fire Fighters Asso., etc. v. Hickory*, 656 F.2d 917, 921 (4th Cir. 1981)

66. N.C.G.S. § 95-98.2 specifically allows public employees to express opinions about work conditions and health and safety unless those expressions are ‘designed to and do interfere with the full, faithful, and proper performance of the duties of employment.

68. Plaintiffs do not allege an interference with performance of the teachers' duties of employment, but instead allege a narrower interference with a desire to return to in-person instruction.

69. The facts alleged by Plaintiffs are insufficient to support a claim of an illegal strike due to a work stoppage.

18. Plaintiffs did not appeal the Court’s ruling, and NCAE and CMAE then moved for fees under N.C.G.S. § 6-21.5.

19. After a hearing on the fee motion on May 6, 2021, the Hon. Daniel Kuehnert directed that the matter should be reset before the undersigned.

20. NCAE and CMAE then amended their motion to seek attorneys' fees under Rule 11 as well as under § 6-21.5 and this matter was set for hearing on June 25, 2021.

Based on these Findings of Fact as well as the more detailed findings in the March 5, 2021 Order, the Court reaches the following Conclusions of Law.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the motion. The prior dismissal of an action "does not deprive the court of jurisdiction to consider collateral issues such as sanctions that require consideration after the action has been terminated." *Bryson v. Sullivan*, 330 N.C. 644, 653, 412 S.E.2d 327, 331 (1992), citing *In re Peoples*, 296 N.C. 109, 146, 250 S.E.2d 890, 911 (1978), cert. denied, 442 U.S. 929, 99 S.Ct. 2859, 61 L.Ed.2d 297 (1979); and *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990).

2. The provision in the Court's March 5, 2021 Order that each party must bear its own costs referred to statutory court costs in the proceeding. It did not address any entitlement to attorneys' fees, as fees are an exception to statutory costs, and the issue of sanctions was not before the Court at that time.

3. The Plaintiffs are subject to a sanction for attorneys' fees under N.C.G.S. § 6-21.5 for persisting with their claims against NCAE and CMAE after notice that they were not justiciable.

4. The Legislature has declared in that statute that attorney's fees can be awarded against a losing party if a court finds there was no justiciable issue of law or fact in that party's pleading. The statute reads:

In any civil action, . . . the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. The . . . the granting of any preliminary motion, such as a . . . motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), . . . is not in itself a sufficient reason for the court to award attorney's fees, but may be evidence to support the court's decision to make such an award. A party who advances a claim or defense supported by a good faith argument for an extension, modification, or

reversal of law may not be required under this section to pay attorney's fees. The court shall make findings of fact and conclusions of law to support its award of attorney's fees under this section.

5. This Court found no justiciable claims against NCAE and CMAE in the pleadings in this matter, but that finding alone does not warrant sanctions.

6. Instead, “in deciding a motion brought under N.C.G.S. § 6–21.5, the trial court is required to evaluate whether the losing party persisted in litigating the case after a point where he should reasonably have become aware that the pleading he filed no longer contained a justiciable issue.”

Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 258, 400 S.E.2d 435, 438 (1991)

7. This Court found no justiciable claims here on the very ground presented to Plaintiffs twice before the January 15, 2021 hearing -- that NCAE and CMAE, as private entities, could not be sued under the state constitution and had no duties under G.S. § 115C-1, and that the association and its members were expressly permitted under N.C.G.S. § 95-98.2 to advocate for workplace safety in the manner alleged in the Complaint.

8. Plaintiffs had been notified in writing on November 5, 2020 that their claims against NCAE and CMAE were untenable for those very reasons.

9. Plaintiffs’ counsel replied on November 6, 2020, “Good point.” But he then responded two weeks later that his “clients intend to move forward with their claims against your clients.”

10. Plaintiffs were then apprised in more specific detail of the non-justiciability of their claims against in NCAE/CMAE’s in the briefing filed in early December; but they persisted with their claims after the case was continued.

11. Importantly for this Order, at the January hearing their counsel conceded that the state constitutional and statutory duty claims “were not proper.” And he did not present any written or oral argument that NCAE/CMAE members transparent, public advocacy for remote instruction involved either unlawful collective bargaining or a work slowdown or strike.

12. The Plaintiffs' persistence with their claims against NCAE/CMAE after their counsel acknowledged they were deficient warrants sanctions under N.C.G.S. § 6-21.5 and *Sunamerica, supra*.

Rule 11

13. The Court also imposes sanctions against Plaintiffs' counsel under Rule 11.

14. Subpart (a) of the Rule reads, in pertinent part.

(a) *Signing by Attorney.*--Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record(.) The signature of an attorney constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation(.) If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, . . . including a reasonable attorney's fee.

N.C. Gen. Stat. Ann. 1A-1, Rule 11.

15. The record shows that counsel for Plaintiffs signed the unverified Complaint in this action, exposing him to potential sanctions for pleading insufficient claims

16. "There are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose." *In re Will of Durham*, 206 N.C. App. 67, 71-72, 698 S.E.2d 112, 117-18 (2010), quoting *Dodd v. Steele*, 114 N.C.App. 632, 635, 442 S.E.2d 363, 365, *disc. review denied*, 337 N.C. 691, 448 S.E.2d 521 (1994) (citing *Bryson v. Sullivan*, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992)).

17. Here, this Court found the pleading legally insufficient as to the constitutional and statutory duty claims, and factually deficient as to the claim of an illegal strike or work slowdown under N.C.G.S. § 95-98, *et seq.*

18. NCAE and CMAE do not seek sanctions under the third prong – an improper purpose – but only for factual and legal insufficiency.

19. The Court finds that the claims filed against NCAE and CMAE under the state constitution and N.C.G.S. § 115C-1 were legal insufficient under Rule 11(a).

20. “To satisfy the legal sufficiency requirement, the disputed action must be warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.” *Dodd*, 114 N.C.App. at 635, 442 S.E.2d at 365, and *Bryson*, 330 N.C. at 656, 412 S.E.2d at 332.

21. In making that determination, a court only looks at the document “as of the time it was signed.” *Bryson*, 330 N.C. at 657, 412 S.E.2d at 334. It does not consider the responsive pleadings.

If the document is not facially plausible, the trial court must then ask ‘(1) whether the alleged offender undertook a reasonable inquiry into the law, and (2) whether, based upon the results of the inquiry, [he] formed a reasonable belief that the paper was warranted by existing law, judged as of the time the paper was signed.’ *Id.* ‘Rule 11 sanctions are appropriate where the offending party either failed to conduct a reasonable inquiry into the law or did not reasonably believe the paper was warranted by existing law.’ *Ward v. Jett Props., LLC*, 191 N.C.App. 605, 608, 663 S.E.2d 862, 864 (2008).

McKinnon v. CV Indus., Inc., 228 N.C. App. 190, 194, 745 S.E.2d 343, 347 (2013).

22. Here, the Complaint states on its face that NCAE and CMAE were not state actors but non-profit associations. Private actors cannot violate the state constitution.

23. On the face of the Complaint, NCAE and CMAE were sued as private actors who had no duties under N.C.G.S. § 115C-1.

24. Plaintiffs’ counsel conceded that these two claims “were not proper” and did not attempt to argue at any time prior to the sanctions hearing for the extension or modification of the law regarding the two claims.

25. Their legal insufficiency was manifest and supports an award of fees under Rule 11.

26. As for the claim that advocating for remote instruction constituted unlawful collective bargaining and a strike by a work slowdown, this Court found the allegations factually insufficient.

27. The Rule 11 standard for assessing factual insufficiency is as follows:

“In analyzing whether the [filing] meets the factual certification requirement, the court must make the following determinations: (1) whether the offender undertook a reasonable inquiry into the facts and (2) whether the offender, after reviewing the results of his inquiry, reasonably believed that his position was well-grounded in fact.”

In re Will of Durham, 206 N.C. App. 67, 71, 698 S.E.2d 112, 118 (2010), quoting *McClerin v. R-M Industries, Inc.*, 118 N.C.App. 640, 644, 456 S.E.2d 352, 355 (1995).

28. Here, the Court found no factual basis for the claims that the advocacy by NCAE and CMAE members for remote instruction constituted a strike by work stoppage.

29. The Complaint did not allege any “interference with performance of the teachers’ duties of employment,” just that NCAE/CMAE members wished to perform their work duties remotely as a matter of safety. Order, ¶¶ 68, 69.

30. Thus, the pleading of that claim was factually insufficient under Rule 11.

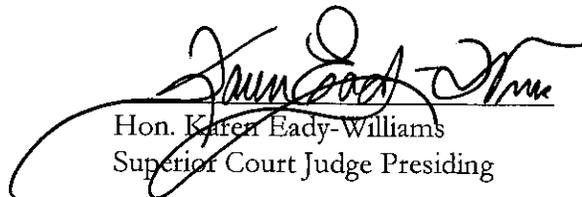
Fees

31. The Court has reviewed the Affidavit and billing records submitted by counsel for NCAE and CMAE and finds the time expended and charges of \$11,620.00 reasonable.

ORDER

Based on these Findings and Fact and Conclusions of Law, the Court hereby awards attorneys’ fees against Plaintiffs under N.C.G.S. § 6-21.5 and against Plaintiffs’ counsel under Rule 11 jointly and severally.

So ORDERED, this 18th day of July, 2021.


Hon. Karen Eady-Williams
Superior Court Judge Presiding