

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

AMY KOVACH,

Plaintiff,

vs.

JOSHUA S. WHITLEY AND KAREN WHITLEY, IN HER INDIVIDUAL CAPACITY,

Defendants.

JOSHUA S. WHITLEY,

Defendant/
Counterclaimant,

vs.

AMY KOVACH,

Plaintiff/Counterclaim
Defendant.

JOSHUA S. WHITLEY,

Defendant/
Third-Party Plaintiff,

vs.

RODNEY THOMPSON,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO: 2015-CP-8-2380

ORDER GRANTING DEFENDANTS
JOSHUA S. WHITLEY'S AND KAREN
WHITLEY'S MOTIONS FOR SANCTIONS

CLERK OF COURT
BERKELEY COUNTY, S.C.

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FILED

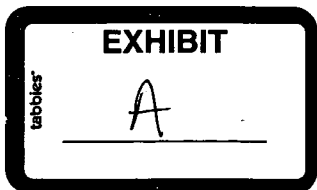
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SC Court of Appeals

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This matter is before the Court on the Amended Motions for Sanctions (the Motions) filed herein by Defendants Joshua S. Whitley (Mr. Whitley) and Karen S. Whitley (Dr. Whitley) (collectively, Defendants) against Plaintiff Amy Kovach (Ms. Kovach) and her former counsel,



Nancy Bloodgood, Esquire (Ms. Bloodgood), pursuant to Rule 11, SCRCPP, and the South Carolina Frivolous Proceedings Act, section 15-36-10 of the South Carolina Code (2005) (the FCPSA). Arguments on the Motions were heard on September 16, 2016, where all parties were represented by counsel.

After considering the arguments of counsel, the exhibits submitted, and all filings including post-hearing submissions, the Court grants Defendants' Motions for Sanctions against Ms. Kovach and Ms. Bloodgood and awards Defendants their costs and reasonable attorneys' fees incurred in defending against the frivolous filings and monetary sanctions pursuant to the FCPSA and Rule 11. Respective counsel for Defendants are directed to submit affidavits of attorneys' fees and related defense costs to the Court for consideration of reasonableness within seven (7) days of receipt of this Order. The Court will set a hearing regarding attorneys' fees and related costs and the amount of the monetary sanctions, if any.

FINDINGS OF FACT

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1. Ms. Kovach is the former Director of Communications and Community Relations for the Berkeley County School District (BCSD). She was fired from that position after she pled guilty to two crimes related to her leadership role in Berkeley County's 2012 School Bond Referendum (the Referendum). The Referendum called for a \$198 million bond offering to pay for the building of five (5) new schools and renovations on nineteen (19) schools. In support of the Referendum, a campaign known as the "Vote Yes 4 Schools" was established.

2. During the campaign, Mr. Whitley, a private citizen, attorney, and taxpayer in Berkeley County, became concerned that Ms. Kovach and others at the BCSD were campaigning in favor of the Referendum using the BCSD's resources in violation of section 8-13-1346 of the South Carolina Code. Mr. Whitley investigated the matter by gaining access to relevant

documents from the BCSD through the South Carolina Freedom of Information Act (the FOIA).

3. After the election, the BCSD responded to the FOIA request and provided e-mail communications demonstrating that Ms. Kovach was actively campaigning for passage of the Referendum using the BCSD's resources in violation of state law. Mr. Whitley brought this information to the attention of the Attorney General of South Carolina and, thereafter, the South Carolina Law Enforcement Division (SLED) began an investigation into Ms. Kovach's activities.

4. SLED's investigation eventually led the Attorney General's office to indict Plaintiff on five charges: (1) misconduct in office in violation of the common law of South Carolina; (2) criminal use of public funds to influence an election in violation of section 8-13-1346 of the South Carolina Code; (3) two counts of forgery based on Ms. Kovach's efforts to cover up her criminal misconduct; and (4) and one count of perjury related to fraudulently conducting procurement matters to cover up her criminal misconduct related to the campaign and use of district resources.

5. Ms. Kovach was provided with a defense attorney by her employer (the BCSD), pursuant to section 59-17-110 of the South Carolina Code, based on her claim that she had done nothing illegal and had always acted in good faith.

6. After spending eighteen months on paid leave from the school district, Ms. Kovach ultimately pled guilty in a negotiated plea to the misconduct in office and criminal use of public funds charges in exchange for dismissal of the remaining three charges. Ms. Kovach's guilty plea and sentencing occurred on August 28, 2015. During the proceedings, Ms. Kovach admitted under oath to the material facts supporting all five charges against her, including the two felony forgery charges and the perjury charge related to her efforts to cover up her misconduct.

7. At the hearing on August 28, 2015, Assistant Deputy Attorney General Creighton Waters set forth the factual predicate for the charges and the state's proof in detail. See generally, Transcript of Record of Guilty Plea and Sentencing, Aug. 28, 2015 at 8-28. After hearing the State's recitation of the facts, Ms. Kovach told the Court under oath that she "agre[ed] with the facts as stated by the attorney general." *Id.* at 28. As part of the guilty plea, Plaintiff also admitted to the facts underlying the charges against her that were dismissed as part of the negotiated plea deal. *Id.* at 3, 10 (stating plea to misconduct covers and incorporates all of the charged conduct in addition to the underlying ethics act count); *id.* at pp. 6-7 (Ms. Kovach admitting that the allegations in the indictment were truthful after the Court read them to her, including the statement that she engaged in "covering up her actions with dishonesty"); *id.* at 28 (Ms. Kovach agreeing under oath with the facts that the State set forth including those supporting the forgery and perjury charges); *id.* at 30, 33-35 (Ms. Kovach agreeing under questioning from the Court that she was guilty of the charges).

8. Based on Ms. Kovach's representations to the Court, the Honorable W. Jeffrey

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Young accepted the negotiated plea.

9. Judge Young sentenced Ms. Kovach to five years' imprisonment, suspended upon the completion of two years' probation and payment of a \$25,000 fine. The judge characterized Ms. Kovach's actions as follows:

All right, I've considered the presentations given by the attorney general and Mr. Theos; and even in my limited exposure to this case was [sic] started a month ago, what I see here is lies, lies, and lies. Ms. Kovach from what I see ignored every warning sign that was available to her. Again, she lied to every opportunity reading one's emails somebody warned her that this was not the right thing to do. The email says all fixed. Well, it's not all fixed. Her actions included, again, lies, fabrication of document, and at every opportunity she chose deceit over the truth.

Id. at 55-56.

10. In light of the guilty plea and admissions to her illegal role in the Referendum, the superintendent of the BCSD recommended Ms. Kovach's termination to the Berkeley County School Board (the Board).

11. The Board sought input from the Attorney General's office regarding the evidence in the criminal case against Ms. Kovach. To this end, on August 31, 2015, Deputy Assistant Attorney General Waters wrote a lengthy letter to the Board detailing the facts supporting the charges that Ms. Kovach admitted to during the guilty plea proceedings.

12. On or about September 3, 2015, Ms. Kovach met with Ms. Bloodgood to discuss filing a grievance with the BCSD and filing civil claims in circuit court. Ms. Bloodgood apparently agreed to assist Plaintiff with these filings after reviewing "voluminous documents" related to the criminal matter and speaking with Ms. Kovach's criminal defense attorney.

13. After having Ms. Bloodgood review materials prepared by her, they submitted a grievance package to the Board, which included an Affidavit signed by Ms. Kovach and notarized by Mrs. Bloodgood and dated September 8, 2015. The essence of her Affidavit is that Ms. Kovach was falsely accused, that SLED and the Attorney General's Office had improper motives, and that the perjury and forgery charges "were completely bogus." Additionally, Ms. Kovach's affidavit contains material contradictions of her sworn admissions made during the guilty plea hearing. By way of example, Ms. Kovach stated under oath that "[n]o public funds were used to create or pay for any campaign video." Affidavit, ¶ 21. However, at her guilty plea and sentencing on August 28, 2015, Ms. Kovach admitted under oath that she "did use public funds to pay for the creation of a campaign video," which admission was material to her indictments and guilty plea.

14. On or about September 16, 2015, the Board denied Ms. Kovach's employment

grievance appeal, which finalized her termination.

15. Beginning in October 2015, Ms. Bloodgood began drafting the Complaint in the present action. To accomplish this, Ms. Bloodgood met with Ms. Kovach on several occasions and reviewed the guilty plea transcript. Ms. Bloodgood had received a copy of the criminal hearing transcript on October 13, 2015, wherein her client admitted to all of the charged conduct. Further, Ms. Bloodgood had in her possession Mr. Waters' letter to the Board prior to filing the Complaint, as she submitted a FOIA request for the letter on September 24, 2015. Ms. Bloodgood received the documents sometime in early October, as her billing records indicate that she reviewed the Waters letter and edited the Complaint based on the letter on October 6 and 7, 2015. The Waters letter set forth specific proof for the several charges for which Ms. Kovach had been indicted.

16. Nevertheless, on October 15, 2015, Ms. Kovach, through her attorney, filed the instant civil action against the BCSD, Mr. Whitley, Scott Marino, Dr. Whitley, Terry Hardesty, and the Berkeley County Republican Party, LLC. The Complaint is thirty pages in length and continues with the central theme contained in Ms. Kovach's affidavit—that she was not in fact guilty of the crimes to which she pled guilty and others were to blame for her conduct.

17. The Complaint alleges the following causes of action: (1) breach of the covenant of good faith and fair dealing against the BCSD; (2) grossly negligent and/or intentional misrepresentation against the BCSD; (3) breach of fiduciary duty against the BCSD; (4) civil conspiracy against Mr. Whitley, Terry Hardesty, Scott Marino, Dr. Whitley, and the Berkeley County Republican Party, LLC; and (5) civil assault against Terry Hardesty.

18. As noted, the fourth cause of action contains allegations for civil conspiracy against Defendants and others, and is the subject of the Motions for Sanctions. The essence of

the conspiracy allegation is that Defendants conspired with others to have Ms. Kovach prosecuted. More specifically, the Complaint alleges that Defendants conspired with others to bring Ms. Kovach's criminal conduct to the attention of the Attorney General's Office, which ultimately resulted in Ms. Kovach's indictment and admission to the criminal conduct.

19. The Complaint also contains various allegations of wrongdoing against non-parties. More specifically, the Complaint alleges obstruction of justice, fraud on the court, and ethical breaches against the Attorney General, his lawyers, SLED, and one of its agents. (See, e.g., Complaint at ¶¶ 104–06: perjury and forgery indictments were "retaliatory" and "completely bogus;" ¶ 110: SLED agent "drafted a false interview report with witness . . . ;" ¶ 112: the Attorney General attributed a doctored document to Ms. Kovach knowing that it was not her document, and a SLED agent "obstructed justice;" ¶ 115: SLED knew that "smurfing" charges were "patently false;" and ¶ 117: the Attorney General's Office "manufactured" smurfing charge to injure Ms. Kovach). While these allegations do not comprise actual claims against these parties, the Complaint questions the credibility of the investigation and indictment and implies that Ms. Kovach was not actually guilty of the crimes to which she pled guilty or the indicted charges dismissed in her plea deal. Indeed, Plaintiff alleges that the dismissed charges were "completely bogus." (Complaint, ¶ 106).

20. Further, the Complaint impugns State Senator Larry Grooms (a Vice President of Santee Cooper) and his wife, and the law firm that represented the BCSD. However, the Complaint does not allege an actual claim against these parties. (Complaint, ¶¶ 60, 65–66, 71, 163–64).

21. In sum, the Complaint contains numerous material contradictions of Ms. Kovach's sworn testimony at her guilty plea hearing. In response to the sworn contradictions in Ms.

Kovach's affidavit and her allegations of misconduct by SLED and the Attorney General's Office, on November 9, 2015, the Attorney General filed with plea and sentencing judge, W. Jeffrey Young, a Petition for Rule to Show Cause "why Amy Kovach should not be held in contempt of court for her statements to this Court and her subsequent actions relating to her plea of guilty before this Court on August 28, 2015."

22. Meanwhile, on November 3, 2015, in this civil action, Mr. Whitley filed: (1) and Answer containing affirmative defenses, counterclaims, and a third-party complaint against Rodney Thompson (the former superintendent of the BCSD); (2) a motion to dismiss with an accompanying memorandum; and (3) a motion for sanctions against Ms. Bloodgood.

23. On November 16, 2015, Dr. Whitley filed: (1) a motion to dismiss pursuant to Rule 12(b)(6), SCRCP; and (2) a motion for sanctions against Ms. Bloodgood.

24. Judge Young signed the Rule to Show Cause on November 20, 2015, requiring Ms. Kovach to attend a hearing on February 8, 2016.

25. At the hearing on the Rule to Show Cause on February 8, 2016, the Attorney General alleged that Ms. Kovach committed perjury when she submitted her affidavit directly contradicting her previous sworn testimony, and committed constructive contempt "by making a mockery of the criminal justice system and false statements after her solemn plea of guilty before this Court." At the hearing, the Court addressed the Complaint in this action, which largely contains the same material contradictions as Ms. Kovach's affidavit.

26. Ultimately, Judge Young agreed not to hold Ms. Kovach in contempt based on her sworn reaffirmation that her admissions under oath at her guilty plea were in fact true and her express representation that she would immediately dismiss with prejudice the civil Complaint against all parties.

27. Ms. Kovach also admitted under oath that her Complaint contained information that was inconsistent with her sworn testimony at the guilty plea hearing.

28. Ms. Kovach and her criminal attorney attempted to shift the blame for the filing of the Complaint to Ms. Bloodgood, claiming that Ms. Bloodgood failed to perform due diligence before filing the Complaint.

29. Shortly after the hearing on the Rule to Show Cause, Ms. Kovach and Ms. Bloodgood began the process of trying to dismiss the lawsuit against all of the Defendants.

30. However, Dr. Whitley and Mrs. Whitley objected to their attempted dismissals on the grounds that they had pending motions for sanctions, the proposed dismissal was "without prejudice" as to Defendants, and, in the case of Mr. Whitley, counterclaims against Ms. Kovach were pending.

31. On February 12, 2016, Mr. Whitley filed an amended motion for sanctions, adding a claim for sanctions against Ms. Kovach.

32. On February 23, 2016, Dr. Whitley filed an amended motion for sanctions, adding a claim for sanctions against Ms. Kovach.

33. At the hearing on September 16, 2016, Dr. Whitley requested to be dismissed with prejudice from the lawsuit, which was consented to at that time.

CONCLUSIONS OF LAW

I. Dr. Whitley's Motion Is Properly before the Court.

As a threshold matter, this Court has jurisdiction over Dr. Whitley's Motion. Ms. Bloodgood's attorneys contend that Dr. Whitley's motion was not properly before this Court because Kovach, acting through Ms. Bloodgood, had dismissed Dr. Whitley from this case before she answered.

The Court rejects this argument for three reasons. First, Ms. Kovach's attempted dismissal of Dr. Whitley was procedurally improper and therefore is invalid. Second, even if Ms. Kovach had voluntarily dismissed Dr. Whitley, such dismissal is ineffective if legal prejudice is shown or important issues of public policy are present, and this matter involves both. *Burry & Son Homebuilders, Inc. v. Ford*, 310 S.C. 529, 531, 426 S.E.2d 313, 314 (1992). Finally, assuming arguendo that Dr. Whitley was no longer a party to this action, this Court retains jurisdiction to consider post-dismissal motions such as a motion for sanctions and/or motion for sanctions and attorneys' fees.¹

Ms. Kovach filed this lawsuit on October 15, 2015. Dr. Whitley was not served until October 27, 2015. On November 9, 2015, Dr. Whitley filed and served both a Rule 12(b)(6) Motion to Dismiss the Complaint and a Notice and Motion for Rule 11 Sanctions. On November 23, 2015, Ms. Kovach filed a purported "Stipulation of Dismissal" as to Dr. Whitley, which counsel for Dr. Whitley received on December 1, 2015.² The transmittal letter, dated November 24, 2015, included no certificate of service. Although captioned a "Stipulation of Dismissal," the filing contained only the signature of Ms. Kovach's counsel, and not any of the other parties to the action.

Rule 41(a)(1), SCRPC, provides the procedure for the Plaintiff to voluntarily dismiss an

¹ See *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 395 (1990) (recognizing that courts "may consider collateral issues after an action is no longer pending," including "motions for costs or attorney's fees."); *Sequa Corp v. Cooper*, 245 F.3d 1036, 1037 (8th Cir. 2001) ("As to the jurisdictional argument, a voluntary dismissal without prejudice under Rule 41(a)(1)(i) does not deprive a District Court of its authority to award costs."); *Kurkowski v. Volcker*, 819 F.2d 201, 203 (8th Cir. 1987) (holding that a district court had jurisdiction to impose Rule 11 sanctions on plaintiffs after voluntary dismissal without prejudice); *Nelson v. QHG of S.C., Inc.*, 354 S.C. 290, 302, 580 S.E.2d 171, 177 (Ct. App. 2003) (stating that federal version of rule 41 "is identical to Rule 41, SCRPC.").

² Prior to receiving service, Dr. Whitley filed her Answer that same morning with the Clerk of Court.

action. Subsection (A) allows the filing of a notice of dismissal "at any time before service by the adverse party of an answer or motion for summary judgment" If a defendant has already so answered or moved, then a plaintiff can only voluntarily dismiss under subsection (a)(1)(B), which allows the filing of a stipulation of dismissal with the consent of all parties. Ms. Kovach's attempted dismissal of Dr. Whitley from this action followed the procedure of neither subsection. The "Stipulation of Dismissal" does not specify which subsection Ms. Kovach is filing under and contains only the signature of Ms. Kovach's counsel and none of the other parties to the action. It was, therefore, invalid as a stipulation under subsection (a)(1)(B).³

Ms. Bloodgood's counsel argued at the motions hearing that the "Stipulation of Dismissal" was intended to be a Notice of Dismissal under Rule 41(a)(1)(A), and the caption was a typographical error. Regardless, the Court need not reach this issue because, had Ms. Kovach intended to file under subsection (A) as a voluntary dismissal, this was not an available option to her, as Dr. Whitley had previously filed her Motion to Dismiss the Complaint and her Motion for Sanctions.⁴

Even had Plaintiff followed the proper procedure for voluntary dismissal, such dismissal is ineffective if "legal prejudice is shown by the defendant or important issues of public policy are present." *Burry & Son Homebuilders, Inc. v. Ford*, 310 S.C. 529, 531, 426 S.E.2d 313, 314

³ Dr. Whitley's counsel argues that Ms. Kovach's purported filing was also objectionable to Defendant for being *without* prejudice. On December 2, 2015, Dr. Whitley filed a timely Notice and Motion to Strike Stipulation of Dismissal as to Defendant Karen Whitley.

⁴ Ms. Bloodgood argues that since Dr. Whitley had not answered or moved for summary judgment, Ms. Kovach was free to voluntarily dismiss. However, Dr. Whitley's Motion to Dismiss and Motion for Sanctions precluded Ms. Kovach from voluntarily dismissing. Ms. Kovach's Motion to Dismiss attached, incorporated, and relied upon Ms. Kovach's guilty plea transcript, which would have converted that motion into one for summary judgment. See *Johnson v. Dailey*, 318 S.C. 318, 321, 457 S.E.2d 613, 615 (stating that 12(b)(6) motion is converted into summary judgment if court is presented with, and does not exclude, matters outside the pleadings). This Court does consider the attached transcript.

(1992). The facts of this matter involve both.

In *Newman v. Old West, Inc.*, 286 S.C. 394, 334 S.E.2d 275 (1985), the Supreme Court of South Carolina upheld a trial judge's decision to deny the plaintiff's request for voluntary dismissal where the defendants had "expended significant sums of money" *Id.* at 396, 334 S.E.2d at 276. The record reflects that Dr. Whitley's attorney had likewise expended significant effort in defending the claim against his client prior to its dismissal and in attempting to secure dismissal. Should Dr. Whitley be procedurally barred from pursuing her motion for sanctions, she would suffer the full impact of being forced to defend against a frivolous claim without recourse. It would not be equitable to permit a party to knowingly file a patently frivolous civil claim, thus forcing a defendant to the trouble and expense of formally defending, only to later permit plaintiff—after being confronted with the repercussions—to dismiss the frivolous claim without consequence. Therefore, the Court finds that Dr. Whitley should be able to proceed with her Motion for Sanctions against Ms. Kovach and Ms. Bloodgood.

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The Court notes that at the September 16, 2016 hearing, Dr. Whitley requested to be dismissed from the lawsuit with prejudice, which was consented to at that time; therefore, she is hereby dismissed with prejudice, except as to her Motion for Sanctions disposed of herein.

II. Sanctions are Appropriate in this Matter.

Distilled to its essence, Defendants argue that Ms. Bloodgood and Ms. Kovach should not have filed the Complaint containing allegations of civil conspiracy against them based upon two items: (a) Ms. Kovach's criminal plea testimony; and (b) the August 31, 2015 letter from Assistant Attorney General Waters to the BCSD. Further, Mr. Whitley argues that a civil conspiracy claim is not colorable against him because he was a "private citizen" reporting what he believed to be criminal conduct. According to their arguments, these two items absolutely preclude a civil conspiracy claim against them. Ms. Bloodgood and Ms. Kovach argue that the

essence of the Complaint does *not* revolve around Ms. Kovach's prosecution or Defendants' participation in encouraging it, but rather the appropriateness of her termination by the BCSD. Ms. Bloodgood argues that Defendants took inappropriate and conspiratorial actions in furtherance of securing Ms. Kovach's termination from employment. She further argues that: (a) Ms. Kovach's criminal plea does not preclude the filing of the civil conspiracy claim; and (b) that Assistant Attorney General Waters' August 31, 2015 letter has no precedential value and, in fact, misrepresented both fact and law to the BCSD in an ongoing effort (at the behest of Mr. Whitley) to secure Ms. Kovach's termination.

The Court finds that Defendants are entitled to sanctions and sanctions are appropriate against both Ms. Kovach and Ms. Bloodgood on the basis that both directly participated in and contributed to the filing of a frivolous claim. The Complaint itself contradicts Ms. Kovach's admissions under oath during her guilty plea, which was known by Ms. Kovach and Ms. Bloodgood at the time of the filing of the Complaint.⁵ The facts admitted under oath at the guilty plea, and the plea itself, foreclosed the claim against Defendants for civil conspiracy, because the allegations against them directly contradict Ms. Kovach's material admissions under oath. In addition to the guilty plea transcript that Ms. Bloodgood possessed, the detailed elaboration on those predicate facts, set forth in the letter of Deputy Assistant Attorney General Creighton Waters of August 31, 2015, was available to Ms. Bloodgood contemporaneous with the preparation, filing, and service of the Complaint and should have served to drive home the point that the civil action was irreconcilable with Ms. Kovach's admissions in the matter and resulting

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⁵ To this end, the civil conspiracy cause of action as pled in the Complaint plainly centers around Defendants role in the criminal prosecution of Ms. Kovach—and not in her termination from the BCSD, as now argued by Ms. Bloodgood and Ms. Kovach. However, even if the Complaint centered on Defendants' role in Ms. Kovach's termination, Ms. Kovach's admissions in her guilty plea of misconduct in office and illegal use of BCSD funds and resources would fully justify—and even mandate—her termination.

in her criminal conviction. *See Heck v. Humphrey*, 512 U.S. 477, 484-85 (1994) (discussing the "hoary legal principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments" and holding state prisoner cannot bring a civil claim for constitutional tort that necessarily implies the invalidity of his criminal conviction unless the conviction was previously invalidated); *see also Tozier v. City of Temple Terrace*, No. 8:10-cv-2750, 2011 WL 3961816 (M.D. Fla. 2011) (applying *Heck* as a basis for an award of sanctions against an attorney).

A. Legal Standard

Defendants have moved for sanctions pursuant to both Rule 11 of the South Carolina Rules of Civil Procedure and the FCPSA. The Court is also vested with inherent authority to award sanctions. *See Holmes v. Haynsworth Sinkler Boyd, P.A.*, 408 S.C. 620, 641, 760 S.E.2d 399, 410 (2014) (abrogated on other grounds).

Under Rule 11(a) a party and/or the party's attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments. *Ex Parte Gregory*, 378 S.C. 430, 438, 663 S.E.2d 46, 51 (2008) (citing *Runyon v. Wright*, 322 S.C. 15, 471 S.E.2d 160 (1996)). Further, "[w]hile [R]ule 11 is evaluated by a subjective standard, the rule still may be violated with a filing that is so patently without merit that no reasonable attorney could have a good faith belief in its propriety." *Ex parte Bon Secours St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 597-98, 713 S.E.2d 624, 628 (2011). Our Supreme Court has affirmed sanctions against a lawyer for filing a frivolous suit without first conducting a reasonable investigation into the facts underlying the claim. *See Gregory*, 378 S.C. at 430, 663 S.E.2d at 46.

The FCPSA provides for liability for attorneys' fees and costs of frivolous suits. *See S.C.*

Code Ann. § 15-36-10 (2005). The FCPSA provides that any person who takes part in the procurement, initiation, and continuation of any civil proceeding is subject to being assessed for payment of all or a portion of the attorney fees and court costs of the other party if . . . (2) the proceedings have terminated in favor of the person seeking an assessment of the fees and costs. Sanctions are appropriate where "a reasonable attorney in the same circumstances would believe that the case or defense was frivolous as not reasonably founded in fact." *Id.* The Act utilizes a reasonable attorney standard to determine whether sanctions are warranted. *See Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (Ct. App. 2011). In determining if an attorney or party has violated the Act, the court shall take into account, *inter alia*, the length of time available to the attorney or party to investigate the claims and the information disclosed to the attorney/party. *See* S.C. Code §15-36-10(E).

B. Ms. Kovach's Guilty Plea and Admissions Under Oath Foreclosed Her Claim for Civil Conspiracy Against Defendants.

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Ms. Kovach's Complaint, filed on her behalf by Ms. Bloodgood, alleges a cause of action against Defendants for civil conspiracy. Pursuant to several legal doctrines, no actionable claim for civil conspiracy could exist against Defendants because of Ms. Kovach's admissions under oath at the sentencing hearing.

The elements of a civil conspiracy in South Carolina are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages. *See Pye v. Estate of Fox*, 369 S.C. 555, 566-67, 633 S.E.2d 505, 511 (2006); *see also LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988); *Peoples Federal Savings & Loan Ass'n of S.C. v. Resources Planning Corp.*, 358 S.C. 460, 470, 596 S.E.2d 51, 56-57 (2004) (holding "[a] civil conspiracy is a combination of two or more parties joined for the purpose of injuring the plaintiff and thereby causing special damage"). It is essential that the plaintiff prove

all of these elements in order to recover. *See Lyon v. Sinclair Refining Co.*, 189 S.C. 136, 200 S.E. 78 (1938).

The conspiracy claim filed by Ms. Kovach and Ms. Bloodgood against Defendants had no "good ground to support it." The sum total of the conspiracy allegations against Defendants are as follows:

- a) Defendants and others "conspired with each other" to file a complaint with the Attorney General, and took actions to ensure a Resolution was passed by the Berkeley County Republican Party, LLC encouraging the Attorney General to prosecute Plaintiff. (Complaint, ¶ 159.)
- b) Defendants and others "played an active and inappropriate role in SLED's investigation and upon information and belief provided false statements to SLED and the Attorney General." (Complaint, ¶ 160.)
- c) Defendants and others "suggested stories and provided false information to the press" and "communicated directly with Defendant BCSD Board members to turn them against Plaintiff." (Complaint, ¶¶ 161-162.)
- d) State Senator Larry Grooms, who sat in the front row at Plaintiff's criminal case hearings and "acknowledged [Mr. Whitley's] actions towards [Ms. Kovach] when he stated publicly, 'Josh has got the goods on her.'" (Complaint, ¶ 163.)
- e) Defendants exchanged emails regarding the lease of Dr. Whitley's private property while Dr. Whitley was at work. (Complaint ¶ 168.)
- f) Dr. Whitley used her work computer to negotiate the lease of her private property. (Complaint, ¶ 167.)
- g) Mr. Whitley "knew and encouraged his mother [Dr. Whitley] to use public

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resources while she was working to lease her personal property which personally benefited her." (Complaint, ¶ 174).

- h) Dr. Whitley advocated and spoke publicly in favor of the Referendum. (Complaint, ¶ 166.)
- i) Mr. Whitley violated Rule 3.6 of the Professional Rules of Conduct for Lawyers by repeatedly commenting on a pending matter that SLED was investigation in order to influence the outcome of the SLED investigation. (Complaint, ¶ 170.)
- j) Mr. Whitley "threatened to sue volunteer Campaign Coordinator Co-Chair Jane Pulling if she continued to support [Ms. Kovach]." (Complaint, ¶ 171).
- k) Mr. Whitley "bragged publically that he hoped to harm the [BCSD]." (Complaint, ¶ 172).
- l) Mr. Whitley "issued multiple FOIA requests for emails of other BCSD employees who publically expressed support for Plaintiff." (Complaint, ¶ 173).

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The gravamen of Ms. Kovach's conspiracy claim against Defendants is that they and others conspired to report to the Attorney General as to Ms. Kovach's criminal activity and to encourage the Berkeley County Republican Party to pass a resolution encouraging her prosecution. (See Complaint, ¶159). Thus, the only specific actions alleged by Ms. Kovach and Ms. Bloodgood to support the claim for civil conspiracy between Defendants and others were that they: (1) filed a complaint with the Attorney General, and (2) ensured a Resolution was passed by the Berkeley County Republican Party, LLC, encouraging the Attorney General to prosecute Ms. Kovach. Both Defendants were within their rights when they undertook these actions. Even if they had so conspired, bringing Ms. Kovach's now-admitted criminal activity to the attention of the authorities, resulting in her indictment and conviction, is not actionable as a

matter of law.

The Complaint also alleged that Defendants and others made false statements to SLED and the press, but they fail to identify any such statements. They complain that Mr. Whitley sought information through the FOIA, which is a right reserved to any person under section 30-4-30 of the South Carolina Code. They assert that Mr. Whitley violated Rule 3.6 of the Rules of Professional Conduct, Rule 407, SCACR, which is inapplicable to Defendant's speech as a concerned private citizen and taxpayer and does not prevent Mr. Whitley from exercising his First Amendment rights. To the contrary, Mr. Whitley's action in bringing Ms. Kovach's criminal activity to the attention of the authorities, resulting in her indictment and conviction, is not actionable as a matter of law.

First, a citizen's efforts to have a corrupt public employee prosecuted are not actionable in a civil case. This Court notes that "a public official is answerable to the public; members of the public are not third-party interlopers." *See Angus v. Burroughs & Chapin Co.*, 368 S.C. 167, 170, 628 S.E.2d 261, 262 (2006) (holding terminated County Administrator could not sue county council, newspaper or a private citizen for civil conspiracy to have her terminated). Defendants had every legal right as citizens to report Ms. Kovach's illegal acts to the authorities.

Furthermore, Defendants' actions are protected by the doctrine of judicial privilege. Ms. Kovach alleges that Defendants' roles as witnesses in SLED's investigation are actionable civil conspiracy. To the contrary, such statements provided as part of the judicial process are absolutely privileged and cannot be the basis for a civil conspiracy claim. *See Crowell v. Herring*, 301 S.C. 424, 430, 392 S.E.2d 464, 467 (Ct. App. 1990) (holding that an "absolute privilege exists as to any utterance arising out of the judicial proceeding and having any reasonable relation to it, including preliminary steps leading to judicial action of any official

nature . . .").

The civil conspiracy claim was also foreclosed by the related doctrines of collateral and judicial estoppel. In essence, Ms. Kovach's Complaint represents an attempt to re-litigate the factual basis for her indictment and re-litigate the question of her guilt or innocence. But Ms. Kovach was *bound by her guilty plea* and could not take a position contrary to her previous admissions under oath at the guilty plea hearing during her civil action. In South Carolina, "once a person has been criminally convicted, the person is bound by that adjudication in a subsequent civil proceeding based on the same facts underlying the criminal conviction." *Doe v. Doe*, 346 S.C. 145, 146, 551 S.E.2d 257, 258 (2001). In this context, a plea of guilty is a "confession of guilt, made in a formal manner and has the same effect in law as a verdict of guilty." *Sanders v. Leeke*, 254 S.C. 444, 447, 175 S.E.2d 796, 797 (1970). Thus, a defendant who enters a guilty plea "may be collaterally estopped from litigating the same issue in a subsequent civil suit." *Zurcher v. Bilton*, 379 S.C. 132, 666 S.E.2d 224 (2008).

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Finally, the Court finds that Ms. Kovach has not alleged—and could not allege—any special damages flowing from the conspiracy. Ms. Kovach's purported damages flowing from the conspiracy (for example, public humiliation, reputational damage, loss of career opportunities) proximately flow not from the alleged conspiracy but from the SLED investigation, the criminal indictments, Ms. Kovach's guilty plea, sentencing, resulting termination from her employment, and the public notoriety surrounding all of those proceedings that were brought upon her by her own criminal acts. These damages cannot qualify as special damages required supporting a claim for civil conspiracy. *See, e.g., Lawson v. S.C. Dept. of Corrections*, 340 S.C. 346, 352, 532 S.E.2d 259, 261 (2000) (finding summary judgment proper where no special damages alleged).

Ms. Bloodgood argued in her Affidavit that the type of conduct alleged in the civil conspiracy claim is similar to conduct alleged in other reported civil conspiracy cases. She cites the following cases in support of this theory: *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 326, 701 S.E.2d 39, 46 (Ct. App. 2010); *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 677 S.E.2d 574 (2009); *Gynecology Clinic, Inc. v. Cloer*, 334 S.C. 555, 514 S.E.2d 592 (1999); *Coleman v. Stevens*, 124 S.C. 8, 117 S.E. 305 (1923). However, none of these cases are relevant to the facts at hand, because none involved a plaintiff who pled guilty, admitted to her crimes and subsequently sued a defendant for conspiring to have her prosecuted. There simply exists no legal basis to support the alleged civil conspiracy claim against Defendants. The guilty plea and admissions under oath at the sentencing foreclosed the possibility of such an action as a matter of law.

A. The Civil Conspiracy Claims Against Defendants Are Sanctionable.

The Court finally addresses the question of whether the filing of the civil conspiracy claims brought against Defendants warrant sanctions. The Court finds that they do as against both Ms. Kovach and Ms. Bloodgood.

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"[T]he standard for sanctions under Rule 11 is essentially the same as that of the FCPSA," and the Court finds that Ms. Kovach and Ms. Bloodgood are subject to sanctions under both. *See Father v. S.C. Dept. of Social Servs.*, 353 S.C. 254, 261, 578 S.E.2d 11, 15 (2003). There was no factual or legal basis to support the conspiracy claim, and the inference is unavoidable that improper motives on the part of Ms. Kovach and poor judgment on the part of Ms. Bloodgood drove the filing of the complaint against Defendants. Further, the attorney's filing of allegations that are directly contradicted by her client's previous sworn admissions and plea is troubling. While it appears to the Court that Ms. Bloodgood's actions in the filing of the Complaint may have been the result of a combination of factors, including pressure from her

client, it was not reasonable to do so in light of the information Ms. Bloodgood had at her disposal.

To this end, Ms. Bloodgood's conduct in the instant case is similar to that which the Supreme Court found to be sanctionable in *Ex Parte Gregory*, 378 S.C. 430, 438, 663 S.E.2d 46, 51 (2008). In *Gregory*, the Court upheld a sanctions award against a plaintiff's attorney who failed to contact the defendant, plaintiff's previous attorney, before filing suit against him for conversion of settlement funds. The Court deemed the reliance by the plaintiff's counsel solely on information received from the plaintiff to be a breach of counsel's duty to conduct a reasonable investigation.

Here, before filing her Complaint, Ms. Bloodgood had available to her the transcript of her client's plea and an explanatory letter from the Attorney General's Office that directly contradicted the allegations in the Complaint, yet she proceeded to file the Complaint anyway. Thus, if the *Gregory* scenario were adjusted such that the plaintiff's counsel in that case actually contacted the defendant before filing suit, learned through that contact that no viable claim for conversion could be maintained, and still filed suit, it would be comparable to the situation at bar. In other words, plaintiff's counsel in *Gregory* simply failed to take an act the Court properly believed he should, whereas in the present case Ms. Bloodgood had knowledge of the claim's lack of viability prior to filing the Complaint. Thus, sanctions are appropriate as to Ms. Bloodgood.

Ms. Bloodgood maintains that she conducted a thorough investigation into the facts, and that the Complaint was carefully considered. Ms. Bloodgood offers evidence that she performed some thirty-seven (37) hours of work on the Complaint, talked with Ms. Kovach's criminal defense attorneys, reviewed all relevant documents, including the criminal transcript, and went

through multiple versions of the Complaint. The Court does not discount Ms. Bloodgood's diligence or professionalism, as attested to by the character affidavits submitted by lawyer colleagues on her behalf. However, Rule 11's requirement for the attorney to make a reasonable investigation necessarily means that an attorney cannot contradict sworn testimony from his or her own client regarding the same facts and circumstances. Ms. Bloodgood had a copy of the guilty plea transcript and the letter of Deputy Assistant Attorney General Creighton Waters at the time she filed the Complaint. She cannot claim that she had to rely merely upon her client's representations.

Ms. Kovach is even more responsible for making the frivolous filing. Both Ms. Kovach's Affidavit and Complaint contain factual allegations that are irreconcilable with material aspects of her sworn testimony at her guilty plea and sentencing hearing and with conduct she has admitted under oath to committing. Ms. Kovach pled guilty to a detailed and clear factual predicate to her crimes as set forth by the Attorney General. Thereafter, she perjured herself in an Affidavit to the Board in which she attempted to deny her guilt. When that was unsuccessful, she urged Ms. Bloodgood to file, and succeeded in filing, a lawsuit with similar false accusations. The Attorney General then moved for contempt, wherein Ms. Kovach reaffirmed her guilt and blamed her attorney, Ms. Bloodgood, for the filing of the lawsuit. Now, through counsel, she is qualifying what she testified to under oath at her Rule to Show Cause hearing and, through counsel, does not blame Ms. Bloodgood for the filing of the frivolous lawsuit. Thus, in one venue (the criminal one), Ms. Kovach took a position as to Ms. Bloodgood's representation to evade a finding of contempt and then in this hearing took a contrary position. In short, Ms. Kovach should be held accountable for her duplicitous and frivolous filings.

However, despite Ms. Kovach's egregious behavior throughout these proceedings,

because the suit was filed under Ms. Bloodgood's signature, the Court is compelled to order sanctions against her, as well. Neither Ms. Kovach nor Ms. Bloodgood have presented any substantive explanation for the material contradictions. At the end of the day, a complaint that materially contradicts a plaintiff's previous sworn testimony from a criminal proceeding lacks the factual foundation that is required by Rule 11 and must be deemed frivolous.

This Court is mindful that sanctions are an extreme measure not to be imposed lightly. This case warrants this measure. Rule 11 requires attorneys to make a reasonable investigation. Here, Ms. Bloodgood had the benefit of a transcript of Ms. Kovach's guilty plea proceedings. However, she signed and filed a Complaint that contradicted the transcript and made sensational and unsupported averments. Ms. Bloodgood also inexplicably ignored the letter from the Attorney General that she had in her possession prior to filing the lawsuit. By choosing to ignore the transcript and the Attorney General's letter, Ms. Bloodgood filed a frivolous lawsuit and must be sanctioned. Further, Ms. Kovach's attempt to re-litigate her criminal conviction through the civil justice system amounts to bad faith and also requires the Court to sanction her.

This Court is further mindful that not awarding sanctions sets a dangerous precedent. The Defendants in this action, who suspected criminal activity, had the right to make a complaint to the Attorney General. In fact, they had the right to be wrong, that is, had the Attorney General not found criminal activity, a civil conspiracy claim would still not exist against the persons that reported suspected criminal activity to authorities. Nevertheless, Defendants got it right, in that Ms. Kovach had indeed committed the very criminal acts they complained of to the Attorney General. In fact, Ms. Kovach admitted to committing these criminal acts, pled guilty, and was sentenced. After reviewing the guilty plea transcript, Ms. Bloodgood should have counseled Ms. Kovach that filing a civil complaint would not only subject her to Rule 11 sanctions, but it would

place her back in criminal jeopardy (as it in fact did via the Rule to Show Cause motion and order). Ms. Bloodgood's failure to properly counsel her client that a civil action would place her in jeopardy ultimately cost Defendants great expense and subjected them to needless harassment.

In sum, both attorney and client acted together to file a frivolous lawsuit and both shall be liable for sanctions, to be apportioned at a later date.

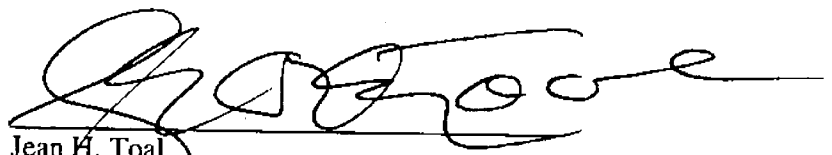
B. An Award Of Attorney Fees Is Appropriate

The Court finds that Defendants are entitled to be reimbursed their reasonable attorneys' fees and litigation costs incurred in defending this action and prosecuting his Motion for Sanctions. *See Ex parte Gregory*, 378 S.C. 430, 438, 663 S.E.2d 46, 48 (2008) (holding an order under Rule 11 sanctioning a party and/or attorney for filing a frivolous claim "may include an order to pay the reasonable costs and attorney fees incurred by the party or parties defending against the frivolous action"). In addition, the FCPSA specifically provides for liability for attorney fees, costs, and other sanctions. *See* S.C. Code Ann. § 15-36-10 (2005).

CONCLUSION

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For the reasons stated herein, the Court finds that an award of attorneys' fees and defense costs to the Defendant is reasonable and grants the Defendant's Motion for Sanctions against both Plaintiff and Bloodgood. The Court will consider the amount of attorneys' fees and costs due and any other sanctions provided for by the FCPSA and Rule 11 at a later hearing.

IT IS SO ORDERED.


Jean H. Toal
Presiding Judge, Ninth Judicial Circuit

October 21, 2016
Columbia, South Carolina.