THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
In the Court of Common Pleas for the Ninth Circuit

Jean H. Toal, Circuit Court Judge

Appellate Case No.: 2018-000467

Amy Kovach ..... Plaintiff

v.

Joshua S. Whitley and Karen Whitley, in her Individual Capacity, ... Respondents

And

Joshua S. Whitley..... Defendant/Counterclaimant,

v.

Amy Kovach ..... Plaintiff/Counterclaim Defendant,

And

Joshua S. Whitley..... Defendant/Third-Party Plaintiff,

v.

Rodney Thompson ..... Third-Party Defendant,

Of Whom Amy Kovach is the ..... Appellant.

APPELLANT'S INITIAL REPLY BRIEF

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A. The Trial Court Erred in Imposing Sanctions on Appellant Amy Kovach, Because There Is No Evidence in the Record of Any Culpable Conduct on Her Part and She Relied Upon Counsel in Filing The Complaint

The Court should reverse the imposition of sanctions upon Amy Kovach ("Mrs. Kovach") with regard to her filing of the October 15, 2015 Complaint ("Complaint") in this matter. Mrs. Kovach properly relied upon the advice of her attorney, Nancy Bloodgood, Esq. ("Attorney Bloodgood"), who drafted, signed and filed the Complaint on her behalf. While Mrs. Kovach believes that Attorney Bloodgood conducted ample due diligence and exercised professional judgment in filing the Complaint and thus should not have been sanctioned, Attorney Bloodgood has not appealed the award of sanctions against her. If any sanction is warranted in this case, it must be only against Attorney Bloodgood.

Respondents sought sanctions against Mrs. Kovach under S.C.R.C.P., Rule 11, and the South Carolina Frivolous Civil Proceedings Sanction Act ("SCFCPSA"), S.C. Code § 15-36-10. As an initial matter, is it clear that Respondents were not entitled to sanctions from Mrs. Kovach under the SCFCPSA, as that statute *only* authorizes sanctions against "[a]n attorney or *pro se* litigant participating in a civil or administrative action or defense." *See* S.C. Code § 15-36-10(A)(4). The statute does *not* authorize sanctions against a party represented by an attorney, as Mrs. Kovach was in this case. Therefore, if Respondents seek to impose sanctions on Mrs. Kovach, they must find another legal basis.

South Carolina Rule of Civil Procedure 11 provides in relevant part (emphasis added):

> The written or electronic signature of an attorney or party 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 there is good ground to support it; and that it is not interposed for delay. . . . If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, *a represented party*, or both, 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, motion or other paper, including a reasonable attorney's fee.

See S.C.R. Civ. P. 11(a). "A court imposing sanctions under Rule 11 should, in its order, describe the conduct determined to constitute a violation of the Rule and explain the basis for the sanction imposed." *Ex parte Gregory*, 378 S.C. 430, 438, 663 S.E.2d 46, 50 (2008).

This Court has discussed some of the policies underlying Rule 11, relying upon case law decided under the similar counterpart under the Federal Rules of Civil Procedure:

> Although the current version of Rule 11 of the Federal Rules of Civil Procedure, unlike our state rule, contains a safe harbor provision, we find the U.S. Court of Appeals for the Fourth Circuit's explanation of the purposes behind the rule instructive. *Cf. Renner v. Hawk*, 125 N.C. App. 483, 481 S.E.2d 370, 374 (1997) (stating decisions pertaining to the federal version of Rule 11 are "pertinent to [the] analysis" of the state rule). "Under Rule 11, the primary purpose of sanctions against counsel is not to compensate the prevailing party, but to 'deter future litigation abuse.'" *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 151 (4th Cir. 2002) (*quoting In re Kunstler*, 914 F.2d 505, 522 (4th Cir. 1990)). The expenses opposing counsel incurs in combatting frivolous claims is an appropriate factor for a court to consider when determining whether to issue a monetary sanction. *In re Kunstler*, 914 F.2d at 522. "[O]ther purposes of the rule include compensating the victims of the Rule 11 violation, as well as punishing present litigation abuse, streamlining court dockets[,] and facilitating court management." [Citation omitted.]

See Pee Dee Health Care, P.A. v. Estate of Thompson, 418 S.C. 557, 567, 795 S.E.2d 40, 45-46 (Ct. App. 2016), reh'g denied (Feb. 21, 2017).

"'[A] court will determine a party's responsibility for a violation by analyzing the facts leading up to the violation, rather than by reference to whose signature appears on the paper.' [Citation omitted.] Courts generally allocate sanctions between the client and his or her attorney based on their respective culpability, and *where the client misleads the attorney by providing incorrect information, the client should bear the sanctions.*" *See In re Kilgore*, 253 B.R. 179, 187 (Bankr. D.S.C. 2000) (emphasis added); *accord United States v. Milam*, 855 F.2d 739, 743 (11th Cir. 1988) ("[F]ining a represented party is a very severe sanction that should be imposed with sensitivity to the facts of the case and to the party's financial situation."). Where sanctions are based on the alleged assertion of a claim that is not legally supportable, that is not sufficient grounds for imposing sanctions on the client, who relied upon counsel for legal guidance. *See*

Kirk Capital Corp. v. Bailey, 16 F.3d 1485, 1492 (8th Cir. 1994) ("The trouble here was: the facts alleged would not have formed a legal basis for the relief sought. This was an issue of law that the law firm, not the lay client, was called upon to make."). Normally, to support the imposition of sanctions on a represented party, there must be a showing of the client's specific culpable conduct:

> [W]hen the offending conduct concerns the scope or quality of the counsel's competence—especially when the material is beyond the understanding of the client or when the client is unaware of the attorney's wrongful conduct—counsel alone should be sanctioned. Conversely, sanctions should fall on the client rather than on counsel when the attorney has relied reasonably on the client's misrepresentations or the client failed to disclose relevant facts—but the reliance by the attorney on the client must be reasonable under the circumstances.

See Wright & Miller, 5A Fed. Prac. & Proc. Civ. § 1336.2 (3d ed.).

Mrs. Kovach did not subject herself to Rule 11 by signing the Complaint; rather, Attorney Bloodgood, Mrs. Kovach's able and trusted lawyer, did so. Therefore, the allocation of any Rule 11 sanction to Mrs. Kovach — as opposed to counsel actually signing the pleading — should be based on her actual culpability. Respondents have not presented any evidence showing that Mrs. Kovach herself was culpable in any way with regard to any claimed Rule 11 violation. There is no evidence that Mrs. Kovach lied to her attorney in any way about the facts underlying her Complaint. To the contrary, it is undisputed that Mrs. Kovach relied heavily on her counsel for guidance with regard to the Complaint. Respondents cite no authority supporting the imposition of Rule 11 sanctions on a represented party who relied upon the advice of counsel, in the complete absence of any evidence of that party engaging in culpable conduct relating to the filing.

The record shows that Attorney Bloodgood undertook reasonable efforts to investigate Mrs. Kovach's claims before filing the Complaint. For example, Attorney Bloodgood affirmed that she undertook the following due diligence (in addition to numerous meetings and telephone calls with Amy Kovach and her husband):

- "[T]hroughout my drafting process, I reached out to her criminal attorney Jerry Theos, Joe Griffith (who represented the former Superintendent), and to others involved to ask questions or to request information. The individuals were professional and responsive to my specific requests. My partner and I also spent a great deal of time researching the applicable law." (*See* Nov. 16, 2016 Affid. of Nancy Bloodgood, Esq. ¶ 7).

- "After Ms. Kovach's grievance process concluded, a Board member contacted Mr. Kovach and told him the Attorney General's Office had provided a letter to the Board after the criminal hearing and prior to the Interim Superintendent's recommendation for termination. Even though it was apparently provided to the Board before they made their final grievance decision, I was neither told about this letter nor provided a copy, I asked one of the District attorneys for a copy, and I was surprised that they required me to make a formal FOIA request to receive it, which I did. (Ex. 4) I was further shocked to find that this seven (7) page letter (summarizing this particular Assistant Deputy Attorney General's opinion of the events involving Ms. Kovach) stated Ms. Kovach was guilty of a crime of moral turpitude." (*See id.* ¶ 9).

- "I spoke with others with knowledge of the underlying facts and criminal proceedings." (*See id.* ¶ 10).

- "Ms. Kovach was eager to file the suit, and I let her know that I was waiting to file to be sure there were no additional suggested changes from the criminal counsel who were reviewing the Complaint for accuracy. Additionally, I understood that the criminal transcript would be transcribed shortly and was waiting for Jerry Theos to forward a copy of it to me so that I could review before filing, which I did." (*See id.* ¶ 11).

- "On October 13, 2015, Jerry Theos' assistant sent me the transcribed copy of the criminal hearing. (Ex. 6.) I reviewed the transcript in full, again went through the Complaint - piece by piece (my then-associate and now-partner had a long telephone call with Jerry Theos on October 13th (see notes in Ex. 6). Mr. Theos provided my office with those allegations and factual recitations which were inaccurate and recommended that they be deleted. He further reiterated that we should review the criminal transcript before filing, which we did." (*See id.* ¶ 12).

- "Prior to filing, the Complaint had been revised eight times: September 18th; September 21st; September 22nd; September 23rd; September 28th; September 29th; October 10th; and October 14th." (*See id.* ¶ 13).

Attorney Bloodgood further stated that she "was careful in seeking out additional information to confirm the pleading was accurate." (*See id.* ¶ 14). In other words, even if the Complaint violated Rule 11, the record does not support that Mrs. Kovach's actions gave rise to that violation. Instead, the evidence shows that Mrs. Kovach relied on her attorney, who herself

conducted a full and complete investigation and obtained additional information from third parties to support the allegations in the Complaint and did not simply rely on what Mrs. Kovach told her. Indeed, much of the information Attorney Bloodgood learned from third parties during her investigation was previously unknown to Mrs. Kovach, including the controversy surrounding her hiring.

The Court's imposition of sanctions against Mrs. Kovach is tantamount to a "loser pays" rule. There was no discovery -- let alone a basis for adjudication -- that Mrs. Kovach's claim was meritless. She is being punished for voluntarily abandoning her lawsuit even though she believed, and her attorney affirmed, that she had a viable claim. For these reasons, this Court should reverse the trial judge's imposition of monetary sanctions on Mrs. Kovach.

B. Respondents Are Incorrect in Their Suggestion That Appellant Amy Kovach Could Not Assert a Conspiracy Claim Because She Was a "Public Official"

Respondents argue in their Brief that Mrs. Kovach's Complaint against them was frivolous because she could not sue them for civil conspiracy as a matter of law. For the reasons that follow, Respondents' contention is wrong.

In support of their contention, Respondents cite *Angus v. Burroughs & Chapin Co.*, 368 S.C. 167, 628 S.E.2d 261 (2006). In *Angus*, the plaintiff was hired as the county administrator for Horry County. Horry County operated under the council-administrator form of government, pursuant to S.C. Code § 4-9-610. Under § 4-9-620, the plaintiff, as county administrator, was the administrative head of county government. Horry County Council terminated plaintiff, and plaintiff filed suit against newspaper publishers and developers, alleging that they conspired to have her fired because of her opposition to several projects in Horry County. The trial judge granted summary judgment, holding that termination of at-will employment cannot support a civil conspiracy claim, citing *Ross v. Life Ins. Co. of Virginia*, 273 S.C. 764, 259 S.E.2d 814 (1979). The South Carolina Supreme Court upheld the grant of summary judgment, stating:

> The critical factor here is Angus's status as an at-will public official. In our democratic society, a public official is answerable to the public; members of the public are not third-party interlopers. Because of Angus's status as a public official,

> we conclude her action for civil conspiracy cannot be maintained against any of these defendants. The Court of Appeals' decision overturning the grant of summary judgment to Newspaper and Developer is therefore reversed.

See id., 368 S.C. at 170-71, 628 S.E.2d at 262. Importantly, the plaintiff in *Angus* was not just an employee of a large government organization; she was the administrative *head* of the county and occupied the highest non-elected position in the county and whose position was defined by statute. As a result, her work would clearly be of great public interest.

In the instant case, Mrs. Kovach is arguably not a "public official" for purposes of the *Angus* decision. "The definitions of public official and state employee are many and may vary depending upon the purpose for which the terms are used. . . . As is provided in a legal treatise, the terms 'office,' 'officer,' 'public office,' and 'public officer' are terms of vague and variant import, the meaning of which necessarily varies with the connection in which they are used." *See S.C. Attorney General Op.*, 1992 WL 682846, at *1 (S.C.A.G. Sept. 28, 1992). Indeed, under South Carolina law, a "'Public official' means an elected or appointed official of the State, a county, a municipality, or a political subdivision thereof, including candidates for office." *See* S.C. Code. § 8-13-100(27). At the same time, a "'Public employee' means a person employed by the State, a county, a municipality, or a political subdivision thereof." *See* S.C. Code§ 8-13-100(26). The trial judge did not hear any evidence or conduct any legal analysis to determine whether Mrs. Kovach was a "public official." No discovery was conducted on that subject. Simply put, Respondents have not set any factual predicate to determine this question. As discussed above, there is no "one-size-fits-all" definition of who is a "public official" for purposes of *Angus*. The South Carolina Supreme Court has stated, at least in one context, that:

> One who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent, is a public officer. Conversely, one who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about a public work or business, is a mere employé. The position of superintendent of the poorhouse and farm is created by statute law, and not by the county board of commissioners. The person to be appointed to the position is designated by statute a "superintendent," and that term itself connotes the assumption of

> responsibility and the exercise of discretion in the details of the management of the poorhouse and farm, though subject to the general supervision of the county board of commissioners. The care for the indigent is universally recognized as falling within the sovereign power of the state, and hence the superintendent, in managing the details of the institution provided by the state for the indigent and helpless, exercises a part of the sovereign power.

See Sanders v. Belue, 78 S.C. 171, 58 S.E. 762, 763–64 (1907). In the context of a defamation claim, the Supreme Court has stated:

> Neither the Supreme Court nor this Court has provided a precise or all-encompassing definition of "public official," although it is clear the category does not include all public employees. [Citation omitted.] In general, a public official is a person who, among the hierarchy of government employees, has or appears to the public to have "substantial responsibility for or control over the conduct of governmental affairs." [Citation omitted.] "In considering the question of whether one is a public official, the employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy."

See Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 469, 629 S.E.2d 653, 666 (2006).

Unlike the county administrator in *Angus*, Mrs. Kovach was not the head executive of the school district. She did not have overall policymaking authority. She had no ability to exercise sovereign power and she took her employment instructions from the superintendent of education and the county school board, which held the authority to exercise such sovereign power. There is at least a genuine issue of fact as to whether she performed such a role that she was answerable to the public in such a way that she could not assert a conspiracy claim. She was not acting in a special capacity created by statute or other laws. To the contrary, Mrs. Kovach's position could be viewed — for purposes of her conspiracy claim — of being more akin to an employee. As a result, there is at least a reasonable, colorable chance that a court could conclude that she could succeed on a conspiracy claim, notwithstanding *Angus*.

In any event, even if Mrs. Kovach's claim was not cognizable under the law, Respondents can make no showing that she actually was aware of the state of South Carolina employment and civil conspiracy law. To the contrary, Mrs. Kovach had no expertise on that topic and relied entirely on Attorney Bloodgood to advise her on whether the claims were legally supportable.

There is no evidence that Mrs. Kovach deceived Attorney Bloodgood about her potential status as a "public official" or that Mrs. Kovach even knew this could impact her claims.

For these reasons, this Court should reverse the trial court's award of sanctions to Respondents from Mrs. Kovach.

C. Respondents Are Incorrect in Their Suggestion That Appellant Amy Kovach Could Not Assert a Claim Because of Judicial Privilege

Respondents assert that the doctrine of judicial privilege bars Mrs. Kovach's conspiracy claims against Respondents. This contention is without merit.

"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" *Pye v. Estate of Fox*, 369 S.C. 555, 566-67, 633 S.E.2d 505, 511 (2006). "A claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint." *See Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009) (*citing Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981), *rev'd on other grounds*, 283 S.C. 155, 321 S.E.2d 602 (1984), *quashed in part on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985)). Also, a civil conspiracy claim, must allege special damages that are *different* from those sought in other claims:

> [C]ivil conspiracy requires that the plaintiff claim special damages. In this case, the Gordons' amended complaint fails to allege any special damages incurred as a result of any conspiracy. They allege the same damages as they do under the other causes of action. This is insufficient to establish special damages. *See Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 117, 682 S.E.2d 871, 875 (Ct. App. 2009) ("If a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed.").

See Gordon v. Busbee, 397 S.C. 119, 136, 723 S.E.2d 822, 831-32 (Ct. App. 2011).

Respondents and the trial judge take the position that Mrs. Kovach could not assert a civil conspiracy claim on the grounds stated above because judicial privilege insulated Respondents from liability for their conduct. In support of this contention, Respondents cite *Crowell v. Herring*,

301 S.C. 424, 430, 392 S.E.2d 464, 467 (Ct. App. 1990). However, *Crowell* only recognized that privilege in connection with defamation claims based on allegedly privileged statements. *See id.*, 301 S.C. at 429, 392 S.E.2d at 466 ("All defendants moved for summary judgment on a theory any statements alleged by Crowell *to be defamatory* took place within a judicial proceeding and consequently were absolutely privileged.") (emphasis added). Notably, *Crowell* did *not* involve a claim for conspiracy, such as that at issue in the instant case.

Under South Carolina law, *even if Respondents' acts could have been privileged vis-a-vis a defamation claim,* they were not immune from potential liability for civil conspiracy. "A plaintiff *need not allege an unlawful act* to state a cause of action; *lawful acts may become actionable* as a civil conspiracy if the objective is to ruin or damage the business of another. [Citation omitted.] Therefore, the primary inquiry in civil conspiracy is whether the principal purpose of the combination is to injure the plaintiff." *See Allegro, Inc. v. Scully*, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016), reh'g denied (Oct. 26, 2016) (emphasis added). Even if Respondents' actions were completely lawful, they could nevertheless be held liable for civil conspiracy if they acted with an intention to harm Mrs. Kovach. Mrs. Kovach plainly alleged precisely that Respondents did act with the purpose of harming her. While her claims might have ultimately failed, they were clearly not frivolous.

Additionally, even if Respondents' actions were lawful, they could have formed the basis for an abuse of process claim. "To cause process to issue without justification is an essential element of malicious prosecution, but not of abuse of process. In the latter, the issuance of the process may be justified in itself; it is the malicious misuse or perversion of the process for an end not lawfully warranted by it that constitutes the tort known as abuse of process." *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 209, 153 S.E.2d 693, 695 (1967). "[L]iability for an abuse of process extends to all who knowingly participate, aid, or abet in the abuse." *Broadmoor Apartments of Charleston v. Horwitz*, 306 S.C. 482, 486, 413 S.E.2d 9, 11 (1991). Although Attorney Bloodgood did not use the words "abuse of process" in the Complaint, "it is well settled that a plaintiff need not label his cause of action, and these deficiencies do not make the

complaint vulnerable." *See Lawson v. Citizens & S. Nat. Bank of S.C.*, 255 S.C. 517, 520, 180 S.E.2d 206, 208 (1971). The facts alleged in the Complaint are plainly sufficient to state a possible claim for abuse of process. Moreover, it demands too much of Mrs. Kovach to require her to make such fine legal distinctions herself. She had a potentially viable claim against the Respondents, irrespective of how her attorney captioned her causes of action. The trial judge erred in imposing monetary sanctions on Mrs. Kovach.

D. Respondents Are Incorrect in Their Suggestion That Appellant Amy Kovach's Guilty Plea Estopped Her From Asserting Claims

Respondents also argue in their Brief that "No actionable claim for civil conspiracy could exist against the Whitleys because of Kovach' s admissions under oath at the sentencing hearing." (*See* Resp.'s Br., at 19). In this regard, Respondents argue that either collateral estoppel or judicial estoppel barred Mrs. Kovach's claims. For the reasons that follow, Respondents' arguments must fail.

1. Collateral Estoppel

Respondents argue that Mrs. Kovach's statements in her guilty plea precluded her Complaint under the doctrine of collateral estoppel. The elements of collateral estoppel are well-known:

> Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. *Judy v. Judy,* 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009). The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. *Beall v. Doe*, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189-90 n. 1 (Ct. App. 1984). . . . The doctrine of collateral estoppel should not be rigidly or mechanically applied. *Carrigg v. Cannon*, 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct. App. 2001). Thus, even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it. *State v. Bacote*, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998).

See Carolina Renewal, Inc. v. South Carolina Dep't of Transp., 385 S.C. 550, 554–55, 684 S.E.2d 779, 782 (Ct. App. 2009). Mrs. Kovach does not dispute that a guilty plea can have

preclusive effect in certain circumstances under collateral estoppel. *See Zurcher v. Bilton*, 379 S.C. 132, 136, 666 S.E.2d 224, 226-27 (2008) ("[S]o long as a defendant has entered a guilty plea freely and voluntarily, an admission of guilt fully and fairly litigates the matter in the same manner as a contested trial in which a defendant is adjudicated guilty. Accordingly, we hold that a defendant who enters a guilty plea may be collaterally estopped from litigating the same issue in a subsequent civil suit."). However, as discussed below, Respondents' collateral estoppel argument fails, as the issues raised in the Complaint are entirely different from those resolved in Mrs. Kovach's guilty plea.

In her guilty plea, Mrs. Kovach admitted to charges set forth in two indictments, as follows:

> The first one is 2015-GS-08-1073, and the charge is misconduct in office. And the indictment reads that: "Amy Kovach did in Berkeley County from on or about January 1st, 2012, to on about November 30th, 2013, while serving as director of communications and community relations for the Berkeley County school district did willfully and unlawfully commit misconduct in her public office by acts or issues of malfeasance, malfeasance and misfeasance and nonfeasance in breach of her duties to the public including her duty of good faith, honesty, and accountability, to wit, Amy Kovach, continuously used public resources and time to influence the outcome of a bond referendum while covering up her actions with dishonesty. This was done in violation of the common law of the State of South Carolina. "
>
> Is what's stated in this indictment the truth?
>
> THE DEFENDANT: Yes, sir. Yes, sir.
>
> THE COURT: The earlier indictment 2014-GS-08-266, it charges use of public funds to influence election reads as follows: "That Amy Kovach did in Berkeley County on or about the period between August 1st, 2012 and November 6, 2012, use and authorize the use of public funds, property, or time to influence the outcome of an election, to wit, while employed as communications director by the Berkeley County school district. Amy Kovach did use public funds to pay for the creation of a campaign video and production of other campaign material to draft and disseminate speeches during her public employment intended to persuade the voting public and did perform various other acts using public resources and time, all of which promoted and supported a yes vote as to the school bond referendum held on November 6, 2012 and all of which was in violation of Section 8-13-1346 of .the South Carolina Code of Laws as amended against the peace and dignity of

> the State and contrary to the statute in such case made and provided." Is what's stated in this indictment the truth?
>
> THE DEFENDANT: Yes, sir.

(*See* Aug. 28, 2015 Transcr. of Record, at p.6:9-7:24). Mrs. Kovach further stated during her guilty plea that she had violated the law "[b]y using resources to promote school district and its agenda of passing the referendum." (*See* Aug. 28, 2015 Transcr. of Record, at p.29:23-25).

In this regard, Mrs. Kovach's guilty plea centered on two issues: (a) a video allegedly produced for the campaign and (b) $239 in signs purchased for the campaign:

> The campaign video ultimately was 5300 dollars, and I'll get to the details of how that was paid for in a moment but that was the ultimate amount that was paid. Additionally, there was roughly 300-dollars. I think it was 294-dollars, excuse~, $259.20 that was used to pay for campaign signs . . . .

(*See* Aug. 28, 2015 Transcr. of Record, at p.14:2-8). Mrs. Kovach's guilty plea was limited to these two items, which were allegedly purchased with the school's public funds in violation of South Carolina law. By contrast, Mrs. Kovach's Complaint in this matter addressed Respondents' (and others') attempts to use these two relatively minor items to carry out a personal or political vendetta. Mrs. Kovach's Complaint asserts that a conspiracy existed, irrespective of whether Mrs. Kovach had actually engaged in the conduct to which she pled guilty. For example, Mrs. Kovach alleged that Respondents engaged in the following conspiratorial acts, *inter alia*:

- "[A]fter they worked with each other to file a complaint with the Attorney General, they took actions to ensure a Resolution was passed by The Berkeley County Republican Party, LLC encouraging the Attorney General to prosecute Plaintiff." (*See* Compl. ¶ 159).
- Provided false statements to SLED. (*See* Compl. ¶ 160).
- Provided false information to the press. (*See* Compl. ¶ 161).
- Turned school board members against Mrs. Kovach. (*See* Compl. ¶ 162).
- Acting in violation of Rule of Professional Conduct 3.6 by commenting on a pending SLED investigation in order to influence its outcome. (*See* Compl. ¶ 170).

- Threatening to sue Campaign Coordinator Co-Chair June Pulling if she continued to support Mrs. Kovach. (*See* Compl. ¶ 171).

Even if Mrs. Kovach had engaged in all of the criminal acts of which she was accused, she could certainly consistently make these allegations regarding Respondents and others who used those circumstances to exact personal or political vendettas against her. Mrs. Kovach acknowledged in her Complaint that she "had no choice but to plead guilty to two minor charges." (*See* Compl. ¶ 140(d)).

Collateral estoppel would not apply in this case, because the facts to which Mrs. Kovach pled guilty are not in any way inconsistent with the allegations in her Complaint. The Complaint states the viable claim that, even if the criminal allegations against her were true, Respondents and others acted with the intention of harming her. Mrs. Kovach's guilty plea did not foreclose the allegations of her Complaint. Therefore, the trial judge erred in imposing monetary sanctions on Mrs. Kovach.

2. Judicial Estoppel

Respondents also argue that Mrs. Kovach's Complaint was sanctionable because her claims were precluded under the doctrine of judicial estoppel. For the reasons that follow, Respondents' argument must fail.

"Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding. [Citation omitted.] The purpose of the doctrine is to ensure the integrity of the judicial process, *not to protect the parties from allegedly dishonest conduct by their adversary.*" *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004) (emphasis added). The elements of judicial estoppel are well-settled:

> For the doctrine of judicial estoppel to apply, the following elements must be satisfied: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an

intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

Equivest Fin., LLC v. Ravenel, 422 S.C. 499, 507, 812 S.E.2d 438, 442 (Ct. App. 2018), *reh'g denied* (Apr. 26, 2018). Judicial estoppel does not apply to the facts at bar.

First, as discussed in the preceding section, there is nothing inconsistent between Mrs. Kovach's guilty plea and her Complaint. Even assuming that she violated the law with regard to the video and signs, this would not foreclose her complaints against Respondents. Again, a civil conspiracy claim can survive, even where the defendants' acts are lawful, if there is an intent to harm the plaintiff. Therefore, Mrs. Kovach could state a claim against Respondents for civil conspiracy based not on the lack of merit of the criminal charges against her, but on their intention to use those charges to carry out personal or political vendettas against her.

Moreover, Mrs. Kovach did not successfully obtain any benefit with the allegedly inconsistent position. She pled guilty to a crime, the equivalent of a conviction. She received a punishment as a result of her guilty plea. She did not successfully take an inconsistent position to obtain dismissal of the criminal charges against her. As a result, judicial estoppel would not apply to the facts of this case.

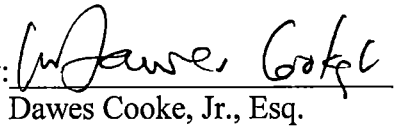
Therefore, for the foregoing reasons, the trial court erred in awarding sanctions to Respondents against Mrs. Kovach.

CONCLUSION

Appellant Amy Kovach should not have been sanctioned in this case. Her claims were legally viable; in fact, the Respondents do not even dispute the essential facts that she alleged. She was guided by able counsel. She voluntarily abandoned her claims without there ever having been any discovery in the case, let alone an adjudication of the merits of her claims. Imposition of sanctions in cases like this would force litigants to pursue all litigation to the bitter end, whether they want to or not, solely to prove that their claims were not frivolous. This is the opposite of the purpose served by Rule 11 and the Frivolous Civil Proceedings Act. The Respondents' insistence on keeping this case alive solely so that they could run up legal fees in seeking sanctions is a further perversion of the policies that these rules serve. Appellant Amy Kovach respectfully requests that this Court reverse and vacate the lower court's order granting sanctions against her.

Respectfully Submitted,

BARNWELL WHALEY
PATTERSON & HELMS, LLC

By: 
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Dated: June 21, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
In the Court of Common Pleas for the Ninth Circuit

Jean H. Toal, Circuit Court Judge

Appellate Case No.: 2018-000467

Amy Kovach ..... Plaintiff

v.

Joshua S. Whitley and Karen Whitley, in her Individual Capacity, ... Respondents

And

Joshua S. Whitley..... Defendant/Counterclaimant,

v.

Amy Kovach ..... Plaintiff/Counterclaim Defendant,

And

Joshua S. Whitley..... Defendant/Third-Party Plaintiff,

v.

Rodney Thompson ..... Third-Party Defendant,

Of Whom Amy Kovach is the ..... Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Initial Reply Brief on the above-referenced Respondents by depositing a copy of it in the United States Mail, postage prepaid, on June 21, 2018, addressed to the following parties and their attorneys of record:

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REPLY TO SOUTH CAROLINA OFFICE

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June 21, 2018

Honorable Jenny Kitchings
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Amy Kovach v. Joshua S. Whitley and Karen Whitley
Appellate Case No.: 2018-000467

Dear Ms. Kitchings:

Enclosed for filing are the original and one copy of each of the following:

(1) Appellant's Initial Reply Brief;

(2) Appellant's Supplemental Designation of Matter for Inclusion in the Record on Appeal; and

(3) Proofs of Service.

Please file the originals and return clocked copies to me in the enclosed envelope.

By copy of this letter, I am serving a copy of the Initial Reply Brief and Designation upon counsel of record.

Sincerely,

M. Dawes Cooke, Jr.

Enclosures
cc: Jeffrey A. Breit, Esquire
Wm. Howell Morrison, Esquire

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