

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.

RECORD ON APPEAL – VOLUME I OF III

RECEIVED
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SC Court of Appeals

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STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

The State of South Carolina,

Petitioner,

v.

Amy Kovach,

Respondent.

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15 NOV 20

IN THE COURT OF GENERAL SESSIONS
NINTH JUDICIAL CIRCUIT

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

2014-GS-08-0266; 2015-GS-08-01073

RULE TO SHOW CAUSE

TO: Amy Kovach

YOU ARE HEREBY ORDERED TO APPEAR before the Honorable W. Jeffrey Young, Presiding Judge of the State Grand Jury, at the Berkeley County Courthouse on January 4, 2016, at 10:00 o'clock to show cause, if any you can, why based on the allegations contained in the attached petition you should not be held in contempt of court based on actions relating to your plea of guilty before the Court on August 28, 2015.

This Order and Rule to Show Cause may be served on the above-named person by any means allowable under Rule 4(d), SCRCP.

W. Jeffrey Young
The Honorable W. Jeffrey Young
Presiding Judge

Moncks Corner, SC

Dated: 20 Nov 2015

CERTIFIED TRUE COPIES OF RECORD
IN THIS COUNTY

Mary P. Brown
CLERK OF COURT C.P. & G.S.

DATE 11-23-15 BERKELEY COUNTY SC

004

Wren T. Pettard - email
C: Michael D. Conrell - email

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

FILED
CLERK OF COURT
BERKELEY COUNTY, S.C.

16 OCT 24 PM 1:41

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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, SCRCP, 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) 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.

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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.

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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 if 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 Generals' 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), SCRCF; 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), SCRCP, 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, SCRCP.").

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

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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.

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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

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).

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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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JST
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:

- #16
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- 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

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.

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JBS
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.

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8/18/17

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.

FILED DW

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MARY P. SROWK
CLERK OF COURT
BERKELEY COUNTY, S.C.

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY

AMY KOVACH,

Plaintiff,

v.

Civil Action No. 2015-CP-08-2380

JOSHUA S. WHITLEY and
KAREN WHITLEY in her
Individual Capacity,

Defendants.

JOSHUA S. WHITLEY,

Defendant/Counterclaimant,

v.

AMY KOVACH,

Plaintiff/Counterclaim Defendant.

JOSHUA S. WHITLEY,

Defendant/Third-Party Plaintiff,

v.

RODNEY THOMPSON

Third-Party Defendants.

#1883

**ORDER DENYING MOTIONS FOR RECONSIDERATION AND
AWARDING SANCTIONS**

This matter is before the Court on the Motions for Reconsideration filed herein by Plaintiff Amy Kovach ("Ms. Kovach" or "Plaintiff") and her former counsel, Nancy Bloodgood, Esq. ("Ms. Bloodgood"), in which they seek reconsideration of the Court's Order entered on October 21, 2016 (the "October 21 Order") granting the motions for sanctions filed herein by Defendants, Josh Whitley ("Mr. Whitley") and Karen Whitley ("Dr. Whitley") (together, "the Whitleys"), under Rule 11 of the South Carolina Rules of Civil Procedure ("SCRCP"), and the South Carolina Frivolous Civil Proceedings Sanctions Act ("FCPSA"), S.C. Code Ann. § 15-36-10, *et seq.*

Upon consideration of the arguments raised in the parties' briefs and during oral argument on January 17, 2017, the Court DENIES the respective motions to reconsider, but will amend several factual errors in the October 21 Order that were brought to the Court's attention during the hearing on January 17, 2017. The merits of the October 21 Order awarding sanctions against both Ms. Kovach and Ms. Bloodgood under both Rule 11, SCRCP, and the FCPSA, remain in effect, and the factual findings and conclusions of law in the October 21 Order are incorporated herein by reference.

Having denied the motions for reconsideration, the Court has considered the amount of sanctions to be awarded. The Court finds that Ms. Kovach deliberately and intentionally pursued a lawsuit against the Whitleys and others premised on facts at complete variance with her sworn admissions to the comprehensive factual recital of the Attorney General in her original pleas as well as her admission to the specific elements of the two counts to which she entered pleas of guilty on August 28, 2015. Ms. Kovach has

#2885

since blamed Ms. Bloodgood for her part in the frivolous filing and has never been able to unconditionally accept responsibility for her actions in this matter.

The Court further finds that Ms. Bloodgood originally lodged the suit against the Whitleys based on an affidavit created by Ms. Kovach in connection with the pursuit of an employment grievance against the Berkeley County School District. Ms. Bloodgood only learned after she filed the suit on October 15, 2015, that the plea judge, the Honorable W. Jeffrey Young, would conduct a Rule to Show Cause hearing on February 8, 2016, on the question of whether the matters alleged in the grievance filing and in the Complaint were false in light of Ms. Kovach's earlier plea. However, as the Court observed in its October 21 Order, Ms. Bloodgood had knowledge that Ms. Kovach's claims against the Whitleys lacked viability prior to the filing of the Complaint, yet she filed it anyway. Ms. Bloodgood cannot claim that she had to rely merely upon her client's representations, because she had in her possession, and had reviewed, (1) the hearing transcript from the August 28, 2015, plea hearing; and (2) the letter of Deputy Assistant Attorney General Creighton Waters dated August 31, 2015, detailing the facts supporting the charges that Ms. Kovach admitted to during the guilty plea proceedings, and therefore should have known that her client's sworn admissions and the facts detailed in Waters' letter were at complete variance with the allegations of her Complaint. As such, Ms. Bloodgood unreasonably trusted Ms. Kovach's assertions. The Court regards Ms. Bloodgood's sins as sins of omission, in that she did not tell a very aggressive client "no." The Court notes that Ms. Bloodgood did make efforts to dismiss the lawsuit against the Whitleys, but only after the hearing on the Rule to Show Cause on February 8, 2016.

#3 JBT

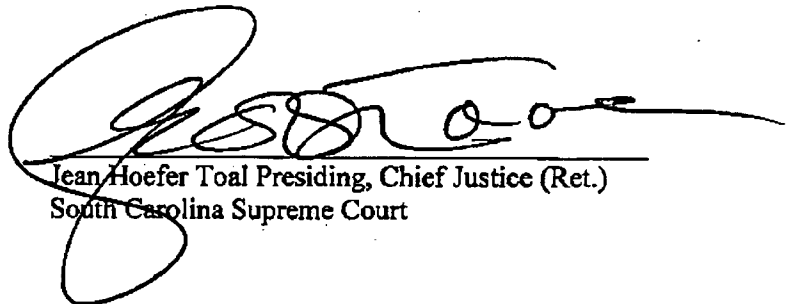
In accordance with the foregoing findings, and upon consideration of the sanctions available under Rule 11, SCRCP, and Section 15-36-10G(1) of the FCPSA, the Court awards the following attorneys' fees and costs, which account for the legal fees occurring at various stages after the filing of the frivolous lawsuit, efforts on the part of Ms. Bloodgood and Ms. Kovach to dismiss the matter, and the efforts of counsel to pursue sanctions:

The Court finds that Dr. Whitley is entitled to a total of \$15,000 in attorneys' fees. Ms. Kovach shall pay \$13,000, and Ms. Bloodgood shall pay \$2,000 of the fee.

The Court further finds that Mr. Whitley is entitled to a total of \$50,000 in attorneys' fees. Ms. Kovach shall pay \$35,000, and Ms. Bloodgood shall pay \$15,000 of the fee.

Payment on the sanctions award shall be made within thirty days of the entry of this Order.

IT IS SO ORDERED.



Jean Hoefer Toal Presiding, Chief Justice (Ret.)
South Carolina Supreme Court

Feb. 13
January __, 2018

#4

AFFIDAVIT OF AMY KOVACH IN SUPPORT OF GRIEVANCE

I am over the age of twenty-one (21) years and am competent to testify to the matters stated herein. I have read the foregoing paragraphs, and all matters stated therein are correct and true and based on my personal knowledge and belief, except as to those matters stated on information and belief and as to those matters I believe them to be true.

PERSONALLY APPEARED before me Amy Kovach who, being duly sworn, states as follows:

1. I am the EMPLOYEE in this action, and I am submitting this Affidavit in support of my Grievance to appeal my termination per a Termination of Employment Letter received on September, 4, 2015, signed by Dr. Michael Turner.

2. I began working for the Berkeley County School District ("BCSD") on July 11, 2011, on a contract basis as coordinator of community relations. On July 1, 2012, I applied for and was chosen for the position of Director of Communications. In that position, I initially conducted all media interviews and publicly spoke at events and community meetings. Almost immediately, my duties expanded to include coordinating all communications for the District such as media relations and event planning, preparation, and implementation, as well as providing support for the Yes4Schools campaign.

3. The Board's Policy "CA- General Administration Goals and Objectives" required me to "encourage community participation" and "develop and maintain close working relationships between the school system and the community" which I did. (Policy, Ex. A.)

4. I have never personally profited from my position with the Berkeley County School

District ("BCSD") I, therefore, was surprised in January 2013 to learn that the South Carolina Law Enforcement Division was investigating my involvement in a 2012 bond Referendum to raise funds to renovate and build new schools in Berkeley County. I understand an attorney named Josh Whitley, an opponent of the referendum and son of BCSD Associate Superintendent Dr. Karen Whitley, complained to the Attorney General's office about my involvement, and that of my supervisors, Dr. Rodney Thompson and Mr. Archie Franchini.

5. At all times and in all matters related to my employment as Director of Communications for Berkeley County School District, I acted at the direct orders and under the supervision of Dr. Rodney Thompson, Mr. Archie Franchini, and the elected officials of the Board of Education. All of these persons supervised and approved my work regarding the Referendum. Everything I did, I did at the Board's direction and in good faith, as the Board has already acknowledged by paying my legal fees associated with this matter.

6. As my supervisors, the Board was well advised of all details of my work; Board members were often present with me at community meetings; I was required Dr. Rodney Thompson, Mr. Archie Franchini to check with me daily in my office (or I was requested to appear in their office) to receive directives for work to be created, revised or prepared throughout the entire Referendum process. I have attached sample emails and hand-written notes instructing me of work expected from me regarding the Referendum. (See attached emails and notes, Ex. B.)

7. At no time did Dr. Thompson or Mr. Franchini or any member of the Board ask me to not work, change my work, or restrict my work in any way. In fact, both Dr. Thompson and Mr. Franchini were highly complementary of my efforts to support the dual role assigned to me by them. I was the Director of Communications and the Liaison to the Yes4Schools Campaign at the Board's

request. I am certain that my direct supervisors would not have supported and directed my efforts without continuing Board approval.

8. I was required to attend a Board Meeting Workshop on June 29, 2012, where Mr. Herman Gaither, retired and former superintendent of Beaufort County Schools and currently a consultant to school districts, gave you a presentation on how best to "win" a referendum campaign. All Board members, except Mr. Frank Wright, were present, as were other members of Dr. Thompson's staff including Dr. Karen Whitley, Dr. Glenda Levine, Dr. Susan Gehlmann, and Mr. Archie Franchini. Dr. Thompson specifically told the Board that I would be the district liaison to the volunteer campaign and that all questions or information could and should be funneled to me as needed. No one questioned or suggested a different scenario. (See attached Board Meeting Minutes, June 29-30, 2012 and handouts regarding other districts' campaigns, Ex. C.) As the volunteer campaign unwittingly often provided inaccurate information, I was the designated BCSD employee responsible for providing correct information to the volunteer committee to ensure the public had all of the facts about the Referendum -- what it would do and what it would not do.

9. I presented a Campaign Update and Overview directly and transparently to the elected officials of the Board of Education on five separate occasions: April 24, 2012; June 29, 2012; July 24, 2012; August 28, 2012; and September 25, 2012. (Letter re Board presentations, Ex. D.) I responded to numerous email and telephone requests from individual Board Members asking for information, data, prepared scripts and talking points, signage, and handouts. I was specifically asked to support the following individual Board Members at community meetings:

- a. Philip Obie and Shannon Lee at a meeting of members of the Berkeley County Republican Tea Party 911 group;

- b. Kathy Schwalbe at a meeting held at Goose Creek Primary School on October 4, 2012;
- c. Dr. Kent Murray and Philip Obie at a meeting held at Ibis Glade Community Center, October 11, 2012;
- d. Mr. Frank Wright at a meeting of the Cainhoy Community held at a community church, October 16, 2012;
- e. Mr. Doug Cooper requested an updated Fact Sheet to use at meetings he attended;
- f. Mr. Philip Obie came to my home on Saturday, October 6, 2012, to collect campaign signs for his distribution in his district.

10. At no time, did any Board of Education official ask me to refrain, stop or change my activities in any manner and it was my sincere belief I was meeting the Board's expectations. I never exceeded the authority I was given by the Board or acted in any manner other than per the Board's directives.

11. Further, at the Board of Education meeting on July 24, 2012, Mr. Philip Obie, upon having heard my public presentation regarding the work of the campaign committee specifically asked questions regarding campaign fundraising and questioned "why are we waiting until September 5 to start the campaign." (See attached Board Meeting Minutes, July 24, 2012, Ex. E.)

12. All legal questions regarding the campaign, its work and the process being used were made clear to District legal counsel, Childs & Halligan. In fact, Childs & Halligan donated to the campaign and directly contacted me about fundraising and how firm members could assist. At no time did the attorneys representing the district question, ask for clarity, or better define the work in

progress as being unusual or abnormal in any way. I assumed that all work I was asked to perform was per the advice of legal counsel as I was aware of numerous telephone calls to and from legal counsel throughout this period of time.

13. Dr. Thompson also requested I coordinate communications with Dorchester District Two, which I did. Dorchester District Two was holding a referendum that year called "Yes4Schools."

14. In mid-October 2012, I was alerted by Dr. Thompson that there was opposition to the Referendum led by Attorney Josh Whitley on Daniel Island. Whitley had requested that all District work on the campaign stop. Mr. Whitley made his objections to the District's actions known when he met alone with Dr. Thompson and Mr. Brantley Thomas at Mr. Whitley's law office on Daniel Island, though Whitley had full knowledge that Dr. Thompson and Mr. Thomas were represented by legal counsel.

15. On November 4, 2012, Mr. Whitley demanded in a Post and Courier article an apology by Dr. Thompson to the community for using District resources on the campaign. I learned later that Dr. Thompson, on the advice of legal counsel, did not offer the requested apology because there was nothing to apologize for.

16. In mid-November 2012, Dr. Thompson and I were asked to meet with the District's attorneys at their offices in Columbia regarding a FOIA request that had been made by Mr. Whitley.

We were asked to review documents, which we did.

17. I specifically asked one District attorney if I had done something wrong or inappropriate and if I should be concerned or worried in any way regarding the FOIA or Mr. Whitley's actions. She replied that I had done nothing wrong, that I should not worry or be

concerned; that Mr. Whitley was "family," that he would "get bored with this and move on," that "Mr. Whitley's actions were self-serving to further his own career" and; that I did not require independent legal counsel, however, if at any time that changed, she would let me know.

18. In February 2013, I was interviewed by SLED in the presence of a District attorney. At no time did the District attorney tell me or my husband (who was in attendance) that I had acted contrary to the District's wishes and leadership. And, I had not and never have acted contrary to the District's wishes and leadership.

19. On March 5, 2013, my husband, Christopher Kovach, received a phone call from Dr. Thompson, telling us that he had been informed by one of the District attorneys that we should seek separate legal counsel. At Dr. Thompson's suggestion, Chris called Attorney Joe Griffith. Mr. Griffith advised contacting Mr. Jerry Theos, which we did immediately. Mr. Theos met with us in his offices on March 6, 2013 and we retained his services.

20. On Friday, November 22, 2013, in Mr. Theos' office, and under his advisement with a proffer signed by me, I met with SLED a second time. On Monday, November 25, 2013, I provided to Mr. Theos all materials that SLED had requested of me.

21. On February 11, 2014, I learned that I had been indicted for "use of public funds to influence an election." The indictment alleged that I used public funds to pay for a referendum campaign video and other campaign material, and performed various other acts in support of the referendum and the related "Yes4Schools" campaign. No public funds were used to create or pay for any campaign video. The video I created for the District had been started months earlier than the start of the Referendum campaign.

22. In response to the indictment, BCSD placed me on administrative leave with pay on

February 11, 2014. Per Board policies, my attorney fees could ONLY be paid if I acted in good faith in the course of my employment, thus necessarily requiring the District to defend me. The District has paid my attorney fees on a monthly basis and has, therefore, admitted I have acted in good faith and within the scope of my employment.

23. Since February 2014, I have had limited contact with my professional community and colleagues and have lost all ability to practice at my successful 22-year career. I have not been in the District Office building, attended any BCSD meetings, or appeared publicly at any time during the course of this matter.

24. After my attorney moved to dismiss the first indictment, the Attorney General sought and, on September 9, 2014, obtained a second indictment, this time falsely accusing me of forging a backdated invoice related to the Yes4Schools campaign. The document was reviewed by two separate forensic analysts/scientists of international renown and have proven beyond a reasonable doubt using electromagnetic and highly technical laboratory equipment (the same used by the Federal Bureau of Investigation), that the document was indeed not forged, but created on the posted date. (Forensic report, Ex. F)¹ SLED and the Attorney General's Office eventually dismissed this charge against me.

25. After my Attorney moved to disqualify the Attorney General from the case and change venue, I was further retaliated against by the Attorney General's office with three (3) additional indictments, including a perjury and forgery charge both of which were completely bogus and later dismissed.

26. SLED and the Attorney General's office did not provide any documentation or

¹ The second forensic report done to disprove SLED's false allegations is in SLED's possession.

evidence to my Attorney, Jerry Theos, regarding the perjury charge. To date, I have no idea or information regarding why this charge was brought against me or what/when/where it was that I allegedly perjured myself. This charge was subsequently dismissed by the Attorney General's office.

27. Regarding the indictment of forgery, I was presented with an allegedly doctored invoice on May 28, 2015. The document was not mine, nor was it created by me or ever in my possession. The document appeared two and half years after the start of SLED's investigation, having never before been in any file previously appropriated from BCSD by SLED. The aforementioned document is a poorly created copy, not an original, which makes forensic analysis impossible. SLED and the Attorney General's Office could not provide me any information regarding its origin and could not provide detail about its creation. The Attorney General alleged that I snuck into the District Office building and planted the document in the procurement file. I have not been in the District Office; I have had no access to the building since being put on Administrative Leave; and I have never had access to financial or procurement files.

28. On May 29, 2015, I undertook a polygraph test with a nationally renowned polygraph examiner, Mr. Frank Bloomingburg. I passed the polygraph test regarding this document. Mr. Bloomingburg shared the polygraph materials with SLED and the Attorney General's office dismissed this indictment also.

29. At my hearing on August 28, 2015, the attorney from the Attorney General's office submitted this allegedly doctored document as evidence of misconduct in office even though he knew he could not prove it was mine and, to the contrary, there was substantial evidence that it was NOT mine, which he well knew at the time.

30. Regarding the misconduct in office indictment, I was told that I violated the State of

South Carolina Procurement Code and there was an allegation I was dishonest in a cover up scheme that the Attorney General's office called "smurfing." This is factually untrue. The video contract (Ex. G) indicates on its face half was to be paid prior to the shoot and the balance due "upon receipt." Emails between myself, Brantley Thomas, Chief Financial Officer for the District, Marcie Abrahamson of the district, and Julie Hedrick, also of the District, prove that there was no "smurfing" and that this charge was patently false. I followed Mr. Thomas's directions for the procurement process to the letter, documented the changes requested of me, and submitted all paperwork as requested. It is my belief that Mr. Thomas, as the District CFO, is the authority on procurement related matters and, thus, in following his instruction to the letter I was in full compliance with his advice. Had the Interim Superintendent asked any questions regarding this issue of the procurement department, he would know that I did not act in any matter dishonestly. However, as I had to plead guilty to this charge, the District is equally guilty as I only did as instructed by the procurement officer on behalf of the Board.

31. The Attorney General's prosecution was clearly politically motivated, and I became the target of retaliation by powerful members of the Republican Party who opposed the Referendum to raise money for the Berkeley County public schools. On August 24, 2015, I made the decision to negotiate a plea agreement with the Attorney General's office to bring this matter to a close as my family and I needed closure.

32. This decision came at great cost and much personal struggle but by doing so, I saved the Berkeley County School District an additional \$200,000 in additional related legal fees.

33. Further, because of my actions, my colleagues at BCSD and individual Board members were spared the trauma of testifying for or against me in a grueling two week trial.

34. The investigation and indictments have been heavily reported in the press. By my count, local news outlets have published 32 reports on the subject. Most articles include a picture of me.

35. The publicity from all of this has caused severe distress and damage to my family. I cannot shop or use services in Berkeley County without someone saying something to me. Strangers have approached me and said things like "I hope you go to jail," and "Your children should be taken from you."

36. Some parents have told my husband and me that our children may not play with their children anymore. A child at school told my now fifth grade daughter "your mommy is going to jail." My daughter came home panicked and in tears, and we are having ongoing issues about how to reduce her anxiety and keep her calm.

37. My high school teenager has mean things said to her by other students, and even teachers. She is now seeing a psychiatric therapist to help her assess and work through anxiety caused by this situation.

38. I have required psychiatric counseling and medical care for treatment of depression, anxiety, insomnia, and a stress-induced gastrointestinal issues, all caused by the indictments and the surrounding publicity.

39. Social media sites such as Berkeley County Republican Party Facebook page (Official Page of BCRP), Berkeley County Republican Party SC Facebook page, and Berkeley County Republican Party Public Group Facebook Page have posted defamatory information about me, including photos of me, on their sites. Phrases such as "...she gets hurt," "...gets what she deserves," and "...put her in jail with other criminals" are routinely shared on these sites.

40. Withstanding a trial, including the extended publicity, was simply not mentally or emotionally feasible for my family or me. This ordeal has caused undue stress and strain on my 21-year marriage, on the lives of our children, and on my physical, emotional and mental wellbeing.

41. At no time, has any Board member publicly stood up for me or provided relief beyond the minimum legally required of them in the District's policies. As I worked at the Board's behest and at their explicit direction, I fully expected that they would do the right thing to resolve this matter after the criminal case was over.

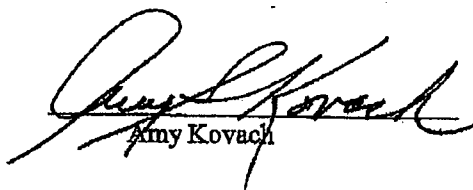
42. However, on September 2, 2015, Dr. Turner asked me to appear before him in his office in Moncks Corner, SC, to allegedly hear my information in order to make an informed decision regarding my reinstatement, resignation or termination from the Berkeley County School District. Dr. Turner duly listened as required by the policy process, took notes and then immediately asked for my resignation and/or choice to be terminated, effective the following day at 12:01 p.m. The process was a farce as there was no reason to bring me to Moncks Corner when the end result was already a foregone conclusion.

43. On September 3, 2015, I retained Attorney Nancy Bloodgood to represent me in this employment matter as I believe Dr. Turner and the Berkeley County School District Board of Education have not only permitted me to be their scapegoat, but also violated their contractual obligations to me.

44. I hope this matter can be resolved without litigation and in a way that will protect the Board members from the horrible treatment I received. Specifically, I want a public hearing to expose SLED and the Attorney General's conduct, issuance by the BCSD Board of a public statement of support, and a commitment by the Board that it will fulfill the remainder of its

contractual obligations to me.

FURTHER, DEPONENT SAYETH NOT.


Amy Kovach

SWORN to before me this
8th day of September, 2015


Nancy Bloodgood
Notary Public for South Carolina
My commission expires: 8-4-2016

IN THE COURT OF COMMON PLEAS FOR
THE NINTH JUDICIAL CIRCUIT

Case No.: 2015-CP-8-

Case No.: 2015-CP-8- 2380

**COMPLAINT
(JURY TRIAL REQUESTED)**

2015 OCT 15 PM 12:55
JERRY F. BROWN
CLERK OF COURT
SHELLEY COUNTY, SC
UNTESTED

Defendants.

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as an employee of Defendant BCSD.

7. The Berkeley County Republican Party, LLC is a for profit South Carolina corporation doing business in Berkeley County, South Carolina.

8. All actions pertinent to the allegations in this Complaint took place in Berkeley County.

9. Jurisdiction and venue is proper in this Court.

FACTS

10. Plaintiff is the mother of three (3) children and had a successful twenty year career working in the field of marketing and communications for large private corporations before accepting a position at Defendant BCSD.

11. Plaintiff began working for Defendant BCSD on July 11, 2011, on an interim contract basis as a coordinator of community relations.

12. Between May and June 2012, Plaintiff applied for and was chosen for the position of BCSD Director of Communications & Community Relations. She officially assumed the position on July 1, 2012 by entering into a one year contract with Defendant BCSD.

13. In the position of Director of Communications & Community Relations, Plaintiff initially conducted all media interviews and publicly spoke at BCSD events and community meetings.

14. At all times during her employment, Plaintiff had a written employment contract with Defendant BCSD; she was never an at will employee.

15. After July 2012, Plaintiff's duties expanded to include coordinating all communications for the District such as media relations and event planning, preparation, and implementation.

16. In January 2012 Defendant BCSD had voted to pursue a bond referendum but at that time, Plaintiff was not yet a full-time employee of the District.

17. After Plaintiff became a full-time employee of the District in July of 2012, her duties expanded to include providing support for Defendant BCSD's January 2012 decision to pursue a school bond referendum.

18. As part of her job, Plaintiff was often required to obtain and prepare information for the Board regarding its Board Agenda items in advance of its meetings.

19. Dorchester District Two was also holding a referendum in 2012.

20. As part of her job duties, Plaintiff was requested by Defendant BCSD to coordinate communications with Dorchester District Two, which she did.

21. At all times and in all matters related to her employment as Director of Communications for Berkeley County School District, Plaintiff acted pursuant to the direct orders and under the direct supervision of the BCSD Board and unfailingly followed the BCSD Board's instructions.

22. Any and all actions Plaintiff took in her job were taken at the BCSD Board's direction and in good faith.

23. Defendant BCSD's satisfaction with Plaintiff's actions is evidenced by its agreement to pay Plaintiff's legal fees associated with this matter, which it did.

24. As Plaintiff's supervisor, BCSD was well advised of all details of Plaintiff's work; individual BCSD Board members were often present with Plaintiff at community meetings; and Plaintiff was required to receive directives for work to be created, revised or prepared throughout the entire Referendum process as evidenced by multiple emails and handwritten notes instructing Plaintiff of the work expected of her regarding the Referendum.

25. At no time did any member of the Board ask Plaintiff to not perform her assigned work, change her work, or restrict her work in any manner. In fact, Defendant BCSD Board members were highly complementary of Plaintiff's efforts to perform the dual role assigned to her by them which was Director of Communications and the Liaison between Defendant BCSD Board and the public for the referendum process.

26. Plaintiff was required to attend a Board Meeting Workshop on June 29, 2012, where Mr. Herman Gaither, a retired and former superintendent of Beaufort County Schools and consultant to school districts, gave Defendant BCSD Board a presentation on how best to "win" a referendum campaign.

27. All BCSD Board members, except Mr. Frank Wright, were present, as were other members of Dr. Thompson's staff including Defendant Karen Whitley, Dr. Glenda Levine, Dr. Susan Gehlmann, and Mr. Archie Franchini. Dr. Thompson specifically told the BCSD Board Plaintiff would be the District's liaison for the referendum process and that all questions or information could and should be funneled to Plaintiff as needed. No Board member questioned or suggested Plaintiff act in any different manner.

28. Defendant BCSD Board members participated in a Referendum Kick-Off Rally at Stratford High School on September 4, 2012.

29. As the volunteer Referendum Committee unwittingly often provided inaccurate information to the public, Plaintiff was the designated BCSD employee responsible for providing correct information to the volunteer committee and to the public so they had all of the necessary facts about the Referendum, e.g., what projects the bonds would fund and what projects the bonds would not fund.

30. Plaintiff presented a Referendum Update and Overview directly and transparently

to the elected officials of the BCSD Board on five (5) separate occasions: April 24, 2012; June 29, 2012; July 24, 2012; August 28, 2012; and September 25, 2012.

31. Plaintiff responded to numerous emails and telephone requests from individual BCSD Board Members asking for information and data; she prepared scripts and talking points; and she distributed signage and handouts to BCSD Board members.

32. For example, Plaintiff was specifically asked to support the following individual Board Members at community meetings:

a. Philip Obie and Shannon Lee at a meeting of members of the Berkeley County Republican Tea Party 911 group;

b. Kathy Schwalbe at a meeting held at Goose Creek Primary School on October 4, 2012;

c. Dr. Kent Murray and Philip Obie at a meeting held at Ibis Glade Community Center, October 11, 2012; and

d. Mr. Frank Wright at a meeting of the Cainhoy Community held at a community church, October 16, 2012.

e. Additionally, Mr. Doug Cooper requested an updated Fact Sheet to use at meetings he attended; and Mr. Philip Obie came to Plaintiff's home on Saturday, October 6, 2012, to collect campaign signs for his distribution in his district.

33. At no time, did any BCSD Board member ask Plaintiff to refrain, stop or change her activities in any manner as Plaintiff was clearly meeting the Defendant BCSD's expectations.

34. Plaintiff never exceeded the authority she was given by the BCSD Board or acted in any manner other than pursuant to the BCSD Board's directives; she acted as Defendant BCSD's agent at all times.

35. Further, at a BCSD Board meeting on July 24, 2012, Philip Obie, upon having

heard Plaintiff's public presentation regarding the work of the Referendum Committee specifically asked questions regarding campaign fundraising and chastised Plaintiff for not doing enough work on the Referendum stating, "Why are we waiting until September 5th to start the Campaign?"

36. Prior to the time Plaintiff became a full time employee in July of 2012 and prior to the time Defendant BCSD voted to hold a bond Referendum in January 2012, Plaintiff had started work on a video to promote and highlight the achievements of schools in the School District.

37. The creation of this video was part of Plaintiff's specific job description and expectations and was done at the express direction of Defendant BCSD.

38. The video Plaintiff was working on was not prepared in anticipation of the Referendum and even after Defendant BCSD voted to have a Referendum, the video was never used by the volunteer Referendum committee.

39. A BCSD Policy entitled "CA- General Administration Goals and Objectives" required Plaintiff to "encourage community participation" and "develop and maintain close working relationships between the school system and the community," which she did.

40. Plaintiff never personally profited from her position with the Berkeley County School District ("BCSD") and no one has ever alleged that she did.

41. A short time after the Referendum, Defendant Joshua S. Whitley, an attorney practicing law on Daniel Island, strongly opposed the bond referendum (which ultimately passed) and led an organized bond referendum opposition group. Part of the time Defendant Joshua S. Whitley opposed the Referendum he was the Chairman of the Berkeley County Republican Party.

42. Defendant Joshua S. Whitley is the son of BCSD Associate Superintendent Karen Whitley.

43. Shortly after Dr. Rodney Thompson was hired as Superintendent, Defendant Karen Whitley had been laterally transferred to a position with less authority and she had expressed dissatisfaction publicly with Dr. Thompson as a result of that move.

44. Upon information and belief, Defendant Karen Whitley believed one of her direct reports, Gwen Scarborough, should have been assigned Plaintiff's job responsibilities and accordingly, Defendant Karen Whitley held a personal vendetta against Plaintiff.

45. Upon information and belief, one of Defendant Karen Whitley's objectives was to cause harm and embarrassment to her supervisors Mr. Franchini and Dr. Rodney Thompson so she would be able to rise in leadership at Defendant BCSD.

46. Scott Marino is Defendant Joshua S. Whitley's brother-in-law. After Dr. Rodney Thompson was hired as Superintendent, Scott Marino's wife (Defendant Joshua S. Whitley's sister and Defendant Karen Whitley's daughter) did not receive a principal position from Superintendent Rodney Thompson which angered Scott Marino and Defendant Joshua S. Whitley.

47. In October of 2012, Plaintiff showed a draft of the video she had been working on for the School District to Defendant Karen Whitley. Plaintiff showed no one else the draft video. Defendant Karen Whitley complimented Plaintiff on the video.

48. On information and belief, Defendant Karen Whitley then misrepresented this video to her son, Defendant Joshua S. Whitley, because at the next BCSD Board meeting Defendant Board Member Donna Marino, who is Scott Marino's mother read a prepared statement created by Defendant Joshua S. Whitley to the BCSD Board about a video and in the

statement she asserted Plaintiff had created for the bond referendum.

49. In fact, the video Defendant Joshua S. Whitley's mother-in-law, Donna Marino, complained to the BCSD Board about was a video created by Laura Varn of Santee Cooper featuring Jane Pulling speaking about safety issues associated with maintenance issues at various school buildings. Donna Marino expressed displeasure that the video portrayed the school building conditions in a negative fashion.

50. At the time, Laura Varn, who was Santee Cooper's Vice President of Corporate Communications, worked part-time for Santee Cooper and part-time for the volunteer Referendum committee whose job it was to ensure passage of the bond Referendum. Laura Varn, not Plaintiff, had created the video Donna Marino complained about at Defendant BCSD's Board meeting. Plaintiff had no knowledge of this video and played no role in its planning, creation or release.

51. Board member, Philip Obie is an employee of Santee Cooper and, upon information and belief, had knowledge of Varn's role and actions for the bond referendum campaign.

52. In mid-October 2012, Plaintiff was alerted for the first time that there was opposition to the Referendum. The opposition was led by Defendants Joshua S. Whitley and The Berkeley County Republican Party, LLC.

53. In a Post and Courier article, Defendant Joshua S. Whitley had demanded an apology by Dr. Thompson to the community for allegedly using District resources to support the Referendum. Plaintiff learned later that Dr. Thompson, on the advice of District legal counsel, did not offer the requested apology as there was no reason to apologize for Defendant BCSD's support of the school bond Referendum. Plaintiff took no part in reaching any decision

regarding an apology to any persons or groups and was not consulted for her opinion on this decision.

54. In mid-November 2012, Dr. Thompson and Plaintiff were asked to meet with the District's legal counsel regarding a FOIA request that had been made by Defendant Joshua S. Whitley.

55. Defendant Joshua S. Whitley's FOIA request asked for emails between BCSD employees regarding the school bond Referendum.

56. When Defendant Joshua S. Whitley received the emails from Defendant BCSD, he picked and chose among them, selecting a few out of context which he evidently considered most harmful to the District and its employees, and then he created a power point which he first showed to the Attorney General and then to the Defendant Berkeley County Republican Party, LLC.

57. The emails merely indicated Plaintiff and other BCSD employees were responding to questions about the school bond referendum, providing correct information to the volunteer Referendum committee, and preparing Defendant BCSD Board members for public presentations.

58. Thereafter, Defendant Berkeley County Republican Party, LLC passed a Resolution requesting the Attorney General prosecute to the fullest extent of the law any person in the Berkeley County School District found to have violated any ethics laws relating to the school bond referendum.

59. After learning of Defendant Joshua S. Whitley's FOIA request, Plaintiff specifically asked one BCSD attorney if she had done anything wrong or inappropriate and if she should be at all concerned or worried regarding the FOIA request or Defendant Joshua S.

Whitley's actions.

60. Plaintiff was advised by BCSD counsel, whom she understood at the time to be representing her best interests, that she had done nothing wrong; that she should not worry or be concerned; that Mr. Whitley was "family," that he would "get bored with this and move on," that "Mr. Whitley's actions were self-serving to further his own career," and that Plaintiff did not require personal legal counsel.

61. Defendant Joshua S. Whitley then contacted the Attorney General and provided documents, newspaper articles, and emails detailing his beliefs regarding Defendant BCSD's and its employees' alleged violations of the Ethics Act for their involvement in a 2012 bond Referendum to raise funds to renovate and build new schools in Berkeley County.

62. Defendant Joshua S. Whitley specifically alleged that Plaintiff and others worked on the Referendum bond campaign during work hours and used District resources to promote its passage.

63. Even though numerous elected officials and school district employees routinely support school bond referendums and did so in 2012 at the same time as the BCSD only a few BCSD District employees, including Plaintiff, apparently were of any interest to the Attorney General.

64. The Attorney General's decision to make an example of Plaintiff while turning a head to many other similarly situated public entities and employees is incomprehensible.

65. For instance, the Attorney General showed no interest in the fact that Santee Cooper, a quasi-public entity, donated money and provided resources to the volunteer Referendum campaign and had its employee Laura Varn running that committee. Furthermore, upon information and belief, campaign-related emails were sent to Santee Cooper employees,

including board member, Philip Obie at Santee Cooper email addresses.

66. Laura Varn was paid her full salary by Santee Cooper while she worked full time on the volunteer Referendum campaign three (3) days per week while continually asking Plaintiff for information and assistance during the referendum process. There is no difference at all between what Defendant BCSD asked Plaintiff to do on its behalf and what Santee Cooper asked Laura Varn to do and yet the Attorney General only attacked Plaintiff.

67. Based upon information and belief, Laura Varn made material misrepresentations of fact to law enforcement and the State Grand Jury regarding Plaintiff's actions and Varn's actions during the campaign.

68. Defendant Joshua S. Whitley requested information about the District work on the Referendum issue and had complained to the Attorney General's office specifically about Plaintiff's involvement in the bond campaign, as well as that of her supervisors, Dr. Rodney Thompson and Mr. Archie Franchini and several other individual Defendant BCSD members.

69. Upon information and belief, Defendant Joshua S. Whitley directed his complaints to a close friend of his in the Attorney General's office in order to receive special attention.

70. About January 2013, Plaintiff became aware that the South Carolina Law Enforcement Division (SLED) was investigating Defendant Joshua S. Whitley's complaint.

71. All legal questions regarding the Referendum, its work and the process being used were made clear to District legal counsel, Childs & Halligan. In fact, Childs & Halligan donated to the Volunteer Campaign through Plaintiff and also directly contacted Plaintiff about fundraising and how firm members could assist.

72. At no time did the attorneys representing the District question, ask for clarity, or

better define Plaintiff's work in progress as being unusual or abnormal in any way so Plaintiff assumed that all work she was asked to perform was per the advice of legal counsel. Plaintiff was aware of numerous telephone calls to and from legal counsel throughout this period of time regarding the Referendum and she was never told not to follow Defendant BCSD's directives.

73. In February 2013, Plaintiff was interviewed by SLED in the presence of a BCSD attorney. At no time was Plaintiff or her husband (who was also in attendance) told that Plaintiff had acted contrary to BCSD's wishes.

74. Plaintiff has not acted, and never did act, contrary to BCSD's wishes.

75. On March 5, 2013, Plaintiff's husband received a phone call telling him that Plaintiff should seek separate legal counsel, which Plaintiff did immediately.

76. Defendant BCSD failed to advise Plaintiff that its previous requirement that she be the Liaison with the volunteer Referendum committee was inaccurate and could expose her to possible criminal and/or civil liability.

77. Defendant BCSD continually failed to protect Plaintiff from the serious ramifications of the wrong instructions it gave Plaintiff regarding her Referendum job duties.

78. Defendant BCSD intentionally failed to accept responsibility for its reckless actions regarding using BCSD personnel to provide information regarding the Referendum.

79. Defendant BCSD knew or should have known that it should not have required Plaintiff or any other employees to provide information about the Referendum during work hours.

80. Defendant BCSD should have hired outside consultants to provide information about the Referendum rather than requiring Plaintiff to perform that duty as part of her job.

81. On Friday, November 22, 2013, in her attorney's office, and under his advisement

with a proffer signed by Plaintiff, Plaintiff met with SLED a second time. On Monday, November 25, 2013, Plaintiff provided all written materials that SLED had requested of her for the first time on November 22, 2013.

82. On February 11, 2014, Plaintiff learned that she had been indicted for "use of public funds to influence an election." The indictment alleged that Plaintiff used public funds to pay for a referendum campaign video and other campaign material, and performed various other acts in support of the referendum such as drafting and disseminating speeches during her employment for District officials intended to persuade the voting public, which was true, as that was her job and what she had been instructed to do by her employer Defendant BCSD.

83. No public funds were used by Plaintiff to create or pay for any Referendum campaign video. The video Plaintiff finalized for the District in September of 2012 had been started months before the beginning of the Referendum process and for an entirely different purpose.

84. In response to the indictment, Defendant BCSD placed Plaintiff on administrative leave with pay on February 11, 2014.

85. Thereafter, Defendant BCSD asked Judge A. Victor Rawl, Sr. to determine whether Plaintiff was acting in good faith in the course of her employment, thus, requiring it to pay Plaintiff's attorney fees pursuant to S.C. Code § 59-17-110.

86. Judge A. Victor Rawl, Sr. concluded "Mrs. Kovach's activities were clearly within the course and scope of her employment and clearly performed in good faith with her only concern being the benefit and best interests of the Berkeley County School District."

87. Thereafter, in April of 2014, Charleston School of Law Professor John P. Freeman, an expert in Ethics, opined to Defendant BCSD in response to the Attorney General's

attempt to stop the payment of Plaintiff's attorney fees by Defendant BCSD, "it is my professional opinion that Mrs. Kovach's indictment does not preclude the board from appearing or defending the action on her behalf."

88. Defendant BCSD subsequently reimbursed Plaintiff for 16 invoices from Plaintiff's criminal defense attorney's fees. These reimbursements were approved by Defendant BCSD's legal counsel.

89. The Attorney General provided an opinion instructing Defendant BCSD to refrain from reimbursing Plaintiff for her criminal defense attorney's fees.

90. Plaintiff's criminal defense lawyer filed a motion to disqualify the Attorney General from prosecuting Plaintiff on the basis the Attorney General was committing professional misconduct and violating the Sixth Amendment "by prosecuting Mrs. Kovach while at the same time undermining her statutory right to have BCSD provide her a defense."

91. Charleston School of Law Professor Nathan M. Crystal agreed with Professor Freeman that the Attorney General's prosecution of Plaintiff was "obviously and egregiously wrong" and he further opined "the Attorney General has not only interfered with Mrs. Kovach's statutory and constitutional right to counsel, but has also engaged in a number of other actions that affect the integrity of this prosecution."

92. Dr. Gregory Adams, a law professor at USC School of Law, issued an expert opinion in January 2015 opining "the Attorney General's conduct in prosecuting Ms. Kovach has been unethical and unconstitutional, warranting his disqualification from further prosecuting her."

93. Based on its experts' and legal counsel's advice, Defendant BCSD subsequently voted to continue paying Plaintiff's attorney fees in accordance with its policies and state law,

S.C. Code § 59-17-110, thereby acknowledging Plaintiff acted in good faith in the course of her employment.

94. However, Defendant BCSD knew or should have known that based on the Attorney General's conduct that Plaintiff was at great risk of being harmed, especially after a circuit court judge refused to disqualify the Attorney General from prosecuting Plaintiff.

95. Even though Defendant BCSD knew the harm to which Plaintiff was exposed was attributable only to her being its employee, it failed to make any appearance in Plaintiff's case as required by state law.

96. The Attorney General's prosecution of Plaintiff has been devastating to her and her family. Since February 2014, Plaintiff has had very limited contact with her professional community and colleagues and she has lost all ability to practice at her previously successful career.

97. A few months after Plaintiff was placed on paid administrative leave by Defendant BCSD, Superintendent Rodney Thompson requested of Defendant BCSD in executive session that he be permitted to bring Plaintiff back and put her in another position.

98. Such action by Defendant BCSD would have helped mitigate Plaintiff's professional career damages and indicated she had done nothing wrong as far as Defendant BCSD was concerned.

99. However, Defendant BCSD Board member Philip Obie objected to Dr. Thompson's request and stated the Board needed to terminate Plaintiff.

100. At the time there was pressure from Defendant Berkeley County Republican Party, LLC to replace Obie if he did not come around to their side and oppose the Referendum.

101. Superintendent Rodney Thompson asked Philip Obie in executive session how he

could recommend the Board terminate Plaintiff when Philip Obie had been the Board member who had scolded Plaintiff publicly and demanded that she to do more on the Referendum issue than she had previously done.

102. Shortly after this allegedly confidential executive session, Special Agent Ryan Kelly from SLED called Superintendent Thompson and told him to stop bullying Philip Obie, indicating someone who had attended the executive session had provided confidential information to Kelly.

103. In fact, oftentimes before Superintendent Thompson, Plaintiff or her Counsel knew what SLED or the Attorney General was saying or doing, Brenda Rindge, a reporter with the Post and Courier knew and reported this information.

104. After Plaintiff's criminal defense attorney moved to dismiss the first indictment against her, the Attorney General sought and, on September 9, 2014, obtained a second retaliatory indictment, this time falsely accusing Plaintiff of forging a backdated invoice related to the Referendum. The original of the alleged forged document was reviewed by a forensic analyst/scientist of international renown who opined that beyond a reasonable doubt, using electro-spectrographic analysis with highly technical laboratory equipment, the document was indeed NOT forged, but created on the posted date as Plaintiff had told SLED.

105. SLED and the Attorney General's Office eventually dismissed this second unsupported and false indictment against Plaintiff.

106. Then, after Plaintiff's Attorney moved to disqualify the Attorney General from the case and change venue, Plaintiff was further retaliated against by the Attorney General's office with three (3) additional indictments, including a perjury and forgery charge, both of which were completely bogus and were later dismissed by the Attorney General.

107. Regarding the second false indictment for forgery, Plaintiff was presented with an allegedly doctored invoice on May 28, 2015. The document was not Plaintiff's, nor was it created by her or at her direction and it was never in her possession. The document appeared two and a half years after the start of SLED's investigation, having never before been in any file previously provided by Defendant BCSD to SLED.

108. The only evidence SLED and the Attorney General's Office provided regarding this document's origin or creation was disputed as to its accuracy and then refuted by Plaintiff's criminal defense attorney.

109. Plaintiff had not been in the District Office since she was placed on Administrative Leave. Further, at no time while Plaintiff was employed did she ever have any access to BCSD financial files or to BCSD procurement files.

110. Upon information and belief, Special Agent Ryan Kelly drafted a false interview report with witness Julie Hedrick in which he stated Hedrick informed him that Plaintiff had provided her with the second invoice when, in fact, Hedrick had informed him that she did not know where this document had come from and did not recall receiving it from Plaintiff.

111. On May 29, 2015, Plaintiff took a polygraph test with a nationally renowned polygraph examiner, Mr. Frank Bloomingburg regarding this issue. Plaintiff passed the polygraph test regarding this document. Mr. Bloomingburg shared the polygraph materials with SLED and the Attorney General's office. The indictment was false and unfounded, as was the first indictment, and was ultimately dismissed.

112. However, at a hearing on August 28, 2015, the Attorney General submitted this allegedly doctored document as evidence of Plaintiff's misconduct in office even though he knew at the time he could not prove it was Plaintiff's and, to the contrary, the best evidence was

that it was NOT Plaintiff's, which the Attorney General knew full well at the time. Special Investigator Ryan Kelly then instructed Julie Hedrick not to speak to Plaintiff's criminal defense lawyer, which was an obstruction of justice and harmed Plaintiff's defense.

113. Regarding the basis for the misconduct in office indictment, the Attorney General contended Plaintiff violated the State of South Carolina Procurement Code. Specifically, there was an allegation she was dishonest in a cover up scheme that the Attorney General's office called "smurfing" (which means splitting up the cost of an item over time so the total cost appears to be less than what was quoted.)

114. There was no "smurfing" and the Attorney General knew or should have known there was no "smurfing." The video at issue was purchased through a contract that on its face clearly indicated the full cost, and clearly indicated that half of the full cost was to be paid prior to the video shoot and the balance due "upon receipt."

115. Emails provided to SLED that were between Plaintiff, Brantley Thomas (the Chief Financial Officer (CFO) for BCSD), BCSD employee Marcie Abrahamson, and BCSD employee Julie Hedrick proved there was no "smurfing" and that this charge was again patently false.

116. Plaintiff followed Brantley Thomas's directions for the procurement process to the letter, she documented the changes requested of her, and submitted all paperwork as requested. Brantley Thomas, as Defendant BCSD's CFO, was the authority on procurement related matters and, thus, in following his instructions to the letter Plaintiff was in full compliance with his advice.

117. In fact, had Plaintiff not requested assurances and advice from Brantley Thomas in an email, there would have likely been no allegation that there was any technical violation of

the procurement code as it was Plaintiff's request to Brantley Thomas for advice that was SLED's excuse for this particular allegation. The Attorney General's Office manufactured this charge in order to injure Plaintiff and justify its' actions.

118. The investigation and indictments against Plaintiff were heavily reported in the press. Local news outlets have published at least 32 reports on the subject. Most articles included a picture of Plaintiff.

119. The publicity caused severe distress and damage to Plaintiff and her family. Plaintiff cannot shop or use services in Berkeley County without someone saying something mean to her. Strangers have approached her and said things like "I hope you go to jail," and "Your children should be taken from you."

120. Plaintiff has required psychiatric counseling and medical treatment for depression, anxiety, insomnia, and a stress-induced gastrointestinal issues, all caused by the indictments and the surrounding publicity.

121. The Berkeley County Republican Party Facebook page (Official Page of BCRP), Berkeley County Republican Party SC Facebook page, and Berkeley County Republican Party Public Group Facebook Page have posted defamatory information about Plaintiff, including photos of her, on their sites. Phrases such as "....she gets hurt," "....gets what she deserves," "she didn't know whether to defecate or go blind" "...put her in jail with other criminals" and "isn't it great when a plan comes together" are routinely shared on these sites.

122. Withstanding a trial, including the extended publicity, was simply not mentally or emotionally feasible for Plaintiff or her family.

123. After receiving no support from Defendant BCSD, Plaintiff eventually pled guilty to this particular charge because she had to end the criminal proceedings for her own mental

health, yet Plaintiff had only ever done as instructed by the BCSD procurement officer on behalf of Defendant BCSD.

124. During the time these comments were being made, Defendants Joshua S. Whitley and Terry Hardesty were the Chairmen of the Berkeley County Republican Party and often posted comments about Plaintiff or spoke out against her in public.

125. When BCSD refused to allow Defendant Hardesty to disparage Plaintiff's role as a district employee at public school board meetings, Defendant Hardesty sued the School District and Defendant Joshua S. Whitley represented Defendant Hardesty as his lawyer.

126. At no time, has any Defendant BCSD Board member publicly stood up for Plaintiff, suggested the Board make an appearance, or provided relief beyond the minimum monetary relief legally required of them in the District's policies and state law.

127. On September 2, 2015, Interim Superintendent Turner asked Plaintiff to appear before him in his office in Moncks Corner, SC, to allegedly receive information so he could make an informed decision regarding her reinstatement, resignation or termination from the Berkeley County School District.

128. Interim Superintendent Turner listened as required by the grievance policy process, took notes and then immediately asked for Plaintiff's resignation and/or choice to be terminated, effective the following day at 12:01 p.m. No "informed decision" was ever attempted; the meeting was a farce.

129. Interim Superintendent Turner recommended to Defendant BCSD in writing that it terminate its contract with Plaintiff based on a letter Defendant BCSD received from the Attorney General AFTER Plaintiff had pled guilty to two charges. Plaintiff was not provided a copy of the letter from the Attorney General and, therefore, she could not rebut the charges made

against her in that letter.

130. Upon information and belief, Interim Superintendent Turner based his statement in part in what was stated in a seven (7) page August 31, 2015 letter to Defendant BCSD from an attorney named S. Creighton Waters in the Attorney General's office which cited a 1993 case to support the statement that because Plaintiff had pled guilty to an ethical violation, she was guilty of a crime of moral turpitude and dishonesty. In fact, the case cited in the Attorney General's letter (AG letter) was about a magistrate in Horry County who had used his office to obtain sexual favors from at least twelve different women, who was charged with assault of a high and aggravated nature, and who had violated the Code of Judicial Conduct. The case was not relevant at all to Plaintiff's situation and it was false and misleading of the Attorney General's office to even cite the case in its letter.

131. Defendant BCSD Board members were grossly negligent not to read the cited case and relying on this letter when making their decision to terminate Plaintiff's contract.

132. The AG letter contained numerous false statements which Creighton Waters knew or should have known were false including, but not limited to: a) Waters stated in the letter Plaintiff wrote the contract for the video at issue, made the video and failed to obtain three (3) estimates. In fact, Jason Bennett, a contractor for Go To Team Video wrote the contract, which provided for \$2,500 to be paid for the shoot and \$2,500 to be paid for the post-production work (proving no "smurfing"), made the video, and Plaintiff did obtain three (3) estimates for the video at the direction of the BCSD procurement department and Brantley Thomas.

133. Waters also fails to mention in the AG letter that the first forgery indictment he mentions in his letter was proven baseless based on scientific exonerating evidence produced by Plaintiff which required the AG's Office to drop this charge.

134. Waters' statement in the AG letter that Plaintiff organized rallies for the campaign is false.

135. Had Interim Superintendent Turner investigated the facts before interfering with Plaintiff's employment contract, he would have known other statements in the Attorney General letter were also false. Instead, relying on multiple false statements contained in a letter from the Attorney General's Office, he took actions to bring about the end of Plaintiff's contract with Defendant BCSD.

136. Defendant's BCSD's subsequent "grievance process" was a farce and not surprisingly Defendant BCSD Board subsequently voted unanimously to accept Dr. Turner's recommendation of termination without a public hearing.

FIRST CAUSE OF ACTION

(Breach of the Covenant of Good Faith and Fair Dealing against Defendant BCSD)

137. Plaintiff incorporates all prior allegations, where not inconsistent, as if fully set forth herein.

138. Plaintiff and Defendant BCSD entered into an annual employment contract on that most recently was scheduled to terminate on June 30, 2016.

139. All contracts include an implied covenant of good faith and fair dealing.

140. Defendant BCSD breached the implied covenant of good faith and fair dealing in Plaintiff's employment contract in the following ways:

- a. Defendant BCSD voted to approve a Referendum in order to issue bonds to provide funds for new school facilities in Berkeley County and instructed Plaintiff what her job responsibilities were regarding providing the public correct information concerning the Referendum;
- b. Plaintiff followed Defendant BCSD's instructions, never acting outside her job

duties but when there were false allegations made against Plaintiff from persons opposing the Referendum, instead of supporting Plaintiff's actions as its employee, Defendant BCSD was silent, failed to protect Plaintiff from harm; and allowed Plaintiff to be harmed for actions that were all attributable the BCSD Board pursuant to S.C. Code § 59-17-110;

- c. Individual Defendant BCSD Board members participated in the same school bond promotion activities Plaintiff was indicted for;
- d. Defendant BCSD has not only refused to acknowledge Plaintiff did nothing wrong, or that she could no longer emotionally handle the abuse she was receiving so she had no choice but to plead guilty to two minor charges, but the BCSD Board has also refused to pay the penalty that rightly should have been imposed against it as Plaintiff's employer and terminated Plaintiff for actions she took as its agent, all of which were done on Defendant BCSD's behalf and with its express permission.

141. As a result of Defendant BCSD's breach of the covenant of good faith and fair dealing, Plaintiff has suffered (and continues to suffer) damages in the form of severe psychological harm, emotional distress, anxiety, pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, embarrassment, humiliation, physical injuries, lost past and future wages and benefits, and she seeks actual and consequential damages, costs of this action and interest from Defendant BCSD.

SECOND CAUSE OF ACTION

(Grossly Negligent and/or Intentional Misrepresentation against Defendant BCSD)

142. Plaintiff hereby repeats and realleges each and every allegation contained in the Paragraphs above as fully as if set forth verbatim.

143. Defendant BCSD was grossly negligent in making representations to Plaintiff that Plaintiff was required to provide information and assist a volunteer Referendum committee as a condition of her job.

144. Plaintiff did not know that the representations the BCSD Board made to her regarding her job duties related to the Referendum were untruthful.

145. Defendant BCSD was grossly negligent in not warning Plaintiff about and protecting Plaintiff from the individual Defendants' personal animosity towards her and the egregious actions of SLED and the Attorney General.

146. Defendant BCSD benefitted by saving money by not hiring an outside consultant firm to provide correct information about the school bonds to the public and using Plaintiff's services instead.

147. Defendant BCSD communicated to Plaintiff and required as part of her job duties that she spend time during the work day providing accurate information to the volunteer Referendum committee so the committee could advocate for the passage of the Referendum that Defendant BCSD wanted passed.

148. Defendant BCSD should have known that Plaintiff could be perceived as violating ethics laws if she spent time while employed by Defendant BCSD helping the volunteer Referendum committee, and that it was also putting her at risk of being accused of acting improperly by vocal opponents of the Referendum.

149. Defendant BCSD owed a duty of care to communicate truthful information to Plaintiff because Plaintiff was an employee of Defendant.

150. Defendant breached its duty of care by intentionally and recklessly communicating false and misleading information to Plaintiff as to what her job responsibilities were.

151. Defendant breached its duty of care by intentionally and recklessly failing to resolve the Referendum issues with SLED and/or the Attorney General's Office. Instead, Defendant BCSD required Plaintiff, who was acting on Defendant BCSD's behalf, to assume all legal responsibility for its actions and inactions.

152. As a result of Defendant BCSD's gross negligence and/or intentional misrepresentations, Plaintiff has suffered damages in the form of severe psychological harm, emotional distress, anxiety, pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, embarrassment, and humiliation.

THIRD CAUSE OF ACTION
(Breach of Fiduciary Duty against Defendant BCSD)

153. Plaintiff incorporates all prior allegations, where not inconsistent, as if fully set forth herein.

154. Pursuant to state law, S.C. Code § 59-17-110, Defendant BCSD had a duty to "appear and defend" Plaintiff from the allegations made against her.

155. Defendant BCSD failed to make any appearance with either SLED or the Attorney General's Office to defend Plaintiff.

156. Defendant BCSD breached its fiduciary and statutorily created duty to Plaintiff.

157. As a result of Defendant BCSD's breach of its fiduciary duty to Plaintiff, Plaintiff has suffered (and continues to suffer) damages in the form of severe psychological harm, emotional distress, anxiety, pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, embarrassment, humiliation, physical injuries, lost past and future wages and benefits,

and she seeks actual and consequential damages, costs of this action and interest from Defendant BCSD.

FOURTH CAUSE OF ACTION

(Civil Conspiracy against Defendants Joshua S. Whitley, Terry Hardesty, Scott Marino, Karen Whitley, the Berkeley County Republican Party, LLC.)

158. Plaintiff incorporates all prior allegations, where not inconsistent, as if fully set forth herein.

159. Defendants Joshua S. Whitley, Terry Hardesty, Scott Marino, Karen Whitley, and The Berkeley County Republican Party, LLC conspired with each other to harm Plaintiff. Specifically, after 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.

160. These Defendants played an active and inappropriate role in SLED's investigation and upon information and belief these Defendants provided false statements to SLED and the Attorney General.

161. These Defendants suggested stories and provided false information to the press and Defendant Terry Hardesty appeared on a local television news station publically disparaging Plaintiff with inaccurate information.

162. These Defendants communicated directly with Defendant BCSD Board members in order to turn them against Plaintiff.

163. State Senator Larry Grooms, who sat on the front row at Plaintiff's criminal case hearings, acknowledged Defendant Joshua S. Whitley actions towards Plaintiff when he stated publicly, "Josh has got the goods on her."

164. Yet, when Senator Larry Grooms was running for re-election, his wife obtained a list of BCSD employees' email addresses and emailed some of them at their BCSD email addresses asking for their support in the election. Such action arguably violated the Ethics Act in the same manner the Attorney General believed Plaintiff violated the Ethics Act, specifically Senator Grooms' wife induced public employees to use their public computers (which are public resources) to endorse Senator Grooms' reelection while they were working.

165. SLED and the Attorney General took no action against Senator Grooms.

166. Defendant Karen Whitley advocated and spoke publicly in favor of the Referendum as an employee of the District, knowing that the speeches she gave had been written by Plaintiff.

167. As evidenced by multiple emails, Defendant Karen Whitley used public resources (employees and copying machines and computers) while negotiating a lease of her private property in Moncks Corner during work hours.

168. Defendant Joshua S. Whitley exchanged many emails with his mother about leasing her private property while she was at work; Defendant Karen Whitley was clearly repeatedly and often using BCSD resources to conduct her private business.

169. This use of public BCSD resources to personally benefit Defendant Karen Whitley was reported to SLED but SLED took no action against Defendant Karen Whitley and the Attorney General refused to prosecute her.

170. Defendant Joshua S. Whitley violated Rule 3.6 of the Professional Rules of Conduct for Lawyers by repeatedly commenting on a pending matter that SLED was investigating in order to influence the outcome of the SLED investigation.

171. Defendant Joshua S. Whitley threatened to sue volunteer Campaign Coordinator Co-Chair Jane Pulling if she continued to support Plaintiff. Ms. Pulling is retired from the BCSD.

172. Defendant Joshua S. Whitley bragged publically that he hoped to harm the School District.

173. Defendant Joshua S. Whitley issued multiple FOIA requests for emails of other BCSD employees who publically expressed support for Plaintiff.

174. Defendant Joshua Whitley knew and encouraged his mother to use public resources while she was working to lease her personal property which personally benefited her.

175. SLED and the Attorney General took no action against Defendant Joshua S. Whitley.

176. Defendant Terry Hardesty posted nasty comments about Plaintiff on multiple websites and as Chairman of Defendant Berkeley County Republican Party, LLC he encouraged SLED and the Attorney General to prosecute Plaintiff for using public resources to promote the Referendum, while totally ignoring the fact that some members of Defendant Berkeley County Republican Party, LLC., such as Senator Grooms and Defendant Karen Whitley, were using public resources to support their reelection campaigns or for their own personal benefit.

177. Although Santee Cooper paid a full-time employee to work to support the passage of the Referendum, SLED and the Attorney General took no action at all to investigate or prosecute this Santee Cooper employee whereas the Attorney General filed multiple indictments against Plaintiff, three (3) of which were absolutely without any basis in fact and were ultimately dismissed.

178. These Defendants took the above stated actions solely for the purpose and with the intent of intimidating and harming Plaintiff.

179. Plaintiff has suffered and continues to suffer special damages due to this conspiracy in the form of injury to her personal and professional reputation and injury to her 22 year career and the loss of future Marketing and Communication career opportunities, and she seeks special damages, costs of this action and punitive damages from these Defendants.

FIFTH CAUSE OF ACTION
(Civil Assault against Defendant Terry Hardesty)

180. Plaintiff incorporates all prior allegations, where not inconsistent, as if fully set forth herein.

181. On November 6, 2012, the day the Referendum ballot was being voted on, while Plaintiff was working at the polls and while she was on personal leave and NOT working for Defendant BCSD, Defendant Hardesty intentionally approached Plaintiff and started yelling at her, coming too close to her physically and shaking his finger at Plaintiff, threatening her that she was not supposed to be volunteering at the polls.

182. At the time, Plaintiff was more than 200 feet from the entrance to the voting place.

183. At the time, there were multiple other BCSD employees and BCSD Principals who had volunteered to help campaign at the polls for the bond Referendum as all of the public schools were closed for the day.

184. Plaintiff reasonably believed that Defendant Hardesty was going to physically cause her harm because he had previously made nasty and false statements about her and he was so angry and too close to her.

185. Plaintiff was so scared and upset by Defendant Hardesty's conduct that she left and had to call her husband and was crying.

186. Defendant Hardesty's conduct was intentional, willful, wanton, and reckless and it was intended to make Plaintiff fear she was going to be harmed.

187. Plaintiff suffered damages from Defendant Hardesty's conduct in the form of severe psychological harm, emotional distress, anxiety, pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, embarrassment, humiliation and physical injuries. Plaintiff seeks actual, consequential and punitive damages from Defendant Hardesty for his civil assault against her.

Wherefore, having fully stated her Complaint against Defendants, Plaintiff prays for such actual, equitable damages and punitive damages, attorney fees pursuant to S.C. Code §15-77-300, and costs, pre and post judgment interest and other relief as this Court deems appropriate.

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Attorneys for Plaintiff

Charleston, South Carolina

Date: 10-14-15

**STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY**

AMY KOVACH,

Plaintiff,

v.

CA No. 2015-CP-08-2380

**THE BERKELEY COUNTY SCHOOL DISTRICT,
JOSHUA S. WHITLEY, TERRY HARDESTY,
SCOTT MARINO, KAREN WHITLEY in her Individual
Capacity, and THE BERKELEY COUNTY REPUBLICAN
PARTY,**

Defendants.

JOSHUA S. WHITLEY,

Defendant/Counterclaimant,

v.

AMY KOVACH,

Plaintiff/Counterclaim Defendant.

FILED
15 NOV -3 AM 10:03
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

JOSHUA S. WHITLEY,

Defendant/Third-Party Plaintiff,

v.

RODNEY THOMPSON,

Third-Party Defendant.

**DEFENDANT JOSHUA S. WHITLEY'S ANSWER, AFFIRMATIVE DEFENSES,
COUNTERCLAIM AND THIRD PARTY COMPLAINT**

Subject to the Rule 12(b) motion filed contemporaneously with the filing of this Answer, Defendant/Counterclaim Plaintiff/Third-Party Plaintiff Joshua S. Whitley, by counsel,

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sets forth the following as his Answer, Affirmative Defenses, and Counterclaim to Plaintiff/Counterclaim Defendant Amy Kovach's Complaint; and Third-Party Complaint against Rodney Thompson:

ANSWER AND AFFIRMATIVE DEFENSES TO COMPLAINT

ANSWER

1. As to the allegations contained in Paragraph 1 of Plaintiff's Complaint, Defendant admits that Plaintiff is a citizen of Berkeley County, but denies that Plaintiff was wrongfully terminated, as she is a convicted criminal as a result of her plea of guilty to misconduct in office in violation of the common law of South Carolina for acts of public dishonesty and the criminal use of public funds to influence an election in violation of Section 8-13-1346 of the South Carolina Code of Laws. It would be unprecedented for Plaintiff's employment to continue based on her convictions. The Plaintiff was convicted of the same crime (plus more) as former Speaker of the House Harrell and Lt. Governor Ard, both of whom lost their positions, as well. These criminal convictions demonstrate the frivolous nature of Plaintiff's lawsuit, and form the basis for Defendant's motion to dismiss and motion for sanctions. Counsel for the Plaintiff had an obligation to order and review the transcript of Plaintiff's guilty plea hearing, wherein Plaintiff was under oath, and which materially contradicts this frivolous Complaint. Upon information and belief, Counsel did not order the transcript, and Counsel's failure to order and review this hearing transcript (or ignoring the same) and the filing of a civil complaint arising out of the very acts for which Plaintiff has pleaded guilty warrant the imposition of sanctions pursuant to Rule 11 of the South Carolina Rules of Civil Procedure and Frivolous Civil Proceedings Sanctions Act codified at S.C. Code Ann. § 15-36-10.

2. As to the allegations contained in Paragraph 2 of Plaintiff's Complaint, Defendant admits that the School Board is the elected body charged with operating a public school system in Berkeley County and denies any inconsistent allegation.
3. As to the allegations contained in Paragraph 3 of Plaintiff's Complaint, Defendant admits that he was elected and served as Chairman of the Berkeley County Republican Party, LLC, until he was elected to the Berkeley County Council. Defendant was not a member of the Republican Party until 2013 (the year after the Referendum) and, therefore, denies the inconsistent allegation. Defendant admits he is a current and lifelong resident of Berkeley County, excluding his college years at Wofford College, his years at William & Mary Law School, and his two year clerkship on the United States Court of Appeals for the Fourth Circuit. Following his education and post-education clerkship, Whitley chose to return to Berkeley County to make a difference for the good, which is evidenced by his holding school officials accountable by taking legitimate complaints to law enforcement and which resulted in historic convictions, including the convicted criminal Plaintiff.
4. Defendant admits the allegations contained in Paragraph 4 of Plaintiff's Complaint, but denies any insinuation that the Berkeley County Republican Party had any role whatsoever in the opposition to the Referendum.
5. Defendant admits the allegations contained in Paragraph 5 of Plaintiff's Complaint.
6. As to the allegations contained in Paragraph 6 of Plaintiff's Complaint, Defendant admits that Defendant Karen Whitley ("Dr. Whitley" or "Karen Whitley") is a resident of Berkeley County but denies the remainder of that paragraph. Dr. Whitley would have no information regarding the convicted criminal Amy Kovach and would not know the convicted criminal Amy Kovach but for her work in her official capacity at the Berkeley County School District. Further answering, Dr. Whitley does not knowingly socialize with convicted criminals or dishonest persons.

7. Defendant denies the allegations contained in paragraph 7 of Plaintiff's Complaint.
8. As to the allegations contained in Paragraph 8 of Plaintiff's Complaint, Defendant is not aware of where the convicted criminal Plaintiff was located during all pertinent times of her criminal enterprise and, therefore, denies the same.
9. As to this Defendant, the Defendant admits the allegations contained in Paragraph 9 of Plaintiff's Complaint.
10. As to the allegations contained in Paragraphs 10 and 11 of Plaintiff's Complaint, the Defendant is unaware of the amount of success or lack thereof that the convicted criminal Plaintiff has had during her career. Further answering, and upon information and belief, Plaintiff has misstated publicly (including her attorney's argument at her criminal sentencing in this Court) that she accepted the position at BCSD to make a difference and left high paying positions. Upon information and belief, Plaintiff had been laid off or otherwise terminated or downsized from her position in the private sector and came to work at the BCSD on a part-time basis in order to have gainful employment.
11. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 12 through 18 of Plaintiff's Complaint and, therefore, denies the same.
12. Defendant admits the allegations contained in Paragraph 19 of Plaintiff's Complaint.
13. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 20 through 24 of Plaintiff's Complaint and, therefore, denies the same. As to the allegation that payment of her attorney's fees was evidence of the Board's satisfaction with the convicted criminal Plaintiff's work, Defendant further answers that the Board publicly voted to pay these fees when the Plaintiff continued to deny her illegal conduct. As the sentencing judge pointed out, the entire time Plaintiff was paid to stay at home and paid for her legal fees, she knew she

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had committed criminal acts to which she eventually pled guilty. Therefore, her actions were not in "good faith" as required to pay her legal fees and all such fees must be returned to the public coffers.

14. Defendant denies the allegations contained in Paragraph 25 of Plaintiff's Complaint.

Further, this allegation is inconsistent with Plaintiff's allegations at Paragraph 48, as former Trustee Donna Marino, on October 9, 2012, publicly called upon all illegal activities to cease and desist, including the making of campaign videos with district resources. Instead of heeding Ms. Marino's warning, the convicted criminal Plaintiff lied about her role in the making of the video and took steps to cover up her illegal conduct. She was convicted of her activities, and the judge pointed out that all he saw [with respect to Kovach's conduct] was "lies, lies, lies." Accordingly, Defendant denies the allegations of this paragraph.

15. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 26 and 27 of Plaintiff's Complaint and, therefore, denies the same. Further answering, it is obvious that providing information regarding the Referendum is legal and appropriate; however, Ms. Kovach knowingly committed illegal acts for which she ultimately pled guilty.

16. As to the allegations contained in Paragraph 28 of Plaintiff's Complaint, Defendant admits that Superintendent Rodney Thompson instructed employees to attend the pep rally. Further answering, the convicted criminal Plaintiff also coordinated the campaign's activities for the rally, even though Plaintiff was explicitly instructed that "Vote Yes" pep rallies were illegal. See Exhibit A, Do's and Don'ts. All remaining allegations in this paragraph are denied.

17. As to the allegations contained in Paragraph 29 of Plaintiff's Complaint, Defendant admits that the volunteer Referendum committee would provide inaccurate information to

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the public, including specifically Referendum co-chair Jane Pulling who knowingly provided inaccurate information even after given the correct information by Defendant Josh Whitley. Defendant confronted Pulling in a private lunch meeting about the misinformation and in a public debate. Further, on October 1, 2012, Dr. Karen Whitley addressed the fact that Jane Pulling gave misinformation to a group at Whitesville Elementary, which Rodney Thompson told Dr. Whitley there was nothing he could do. Further answering, and upon information and belief, not only did the volunteer committee give misinformation, including Jane Pulling, but so did the convicted criminal Plaintiff. Further answering, on information and belief, on September 19, 2012, Dr. Karen Whitley attended a meeting at Highland Park Baptist where both Jane Pulling and convicted criminal Plaintiff gave out misinformation.

18. Defendant is without information or knowledge sufficient to form a belief as to the allegations contained in Paragraphs 29 through 32 (including subparts (a) through (e)) of Plaintiff's Complaint and, therefore, denies the same. Further answering, Defendant Josh Whitley did witness the convicted criminal Plaintiff give a presentation at a late summer board meeting.

19. Defendant denies the allegations contained in Paragraph 33 of Plaintiff's Complaint. Further, this allegation is inconsistent with Plaintiff's allegation at Paragraph 48, as former Trustee Donna Marino publicly called upon all illegal activities to cease and desist, including the making of campaign videos with district resources. Instead of heeding Ms. Marino's warning, the convicted criminal Plaintiff lied about her role in the making of the video and took steps to cover up her illegal conduct. She was convicted of her activities, and the judge pointed out that all he saw [with respect to Kovach's conduct] was "lies, lies, lies." Accordingly, the Defendant denies the allegations of this paragraph.

20. Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 34. of Plaintiff's Complaint and, therefore, denies the same. To the extent this allegation is true, the convicted criminal Plaintiff is alleging that she was in a criminal conspiracy with members of the board and her superiors, and although this certainly may implicate others, it cannot absolve her criminal wrongdoing.
21. Defendant admits the allegations contained in Paragraph 35 of Plaintiff's Complaint. Of course, further answering, had a school board member asked the convicted criminal Plaintiff to embezzle or commit any other illegal act, it is still the convicted criminal Plaintiff's responsibility to not knowingly violate the law. As Plaintiff admitted during her August 28, 2015 plea hearing, Plaintiff knew that her actions were in violation of the law at the time she acted, and she plead guilty to those violations. Further answering, the convicted criminal Plaintiff, as usual, completely misleads in her accusation that Phillip Obie chastised her for asking, "Why are we waiting until September 5th to start the Campaign;" but even if true, what is telling was the convicted criminal's response wherein she stated that they were waiting so as to not give any opposition time to organize against the campaign. In other words, she was blatantly strategizing illegally in support of the Referendum.
22. As to the allegations contained in Paragraphs 36 and 37 of Plaintiff's Complaint, Defendant answers that upon information and belief, the convicted criminal Plaintiff worked with a videographer on or about September 21 2012, touring schools and shooting a video to be used for the campaign. Further answering, Dr. Karen Whitley saw the convicted criminal Plaintiff with the videographer on September 21, 2012, at the Stratford High School football game. Of course, on numerous occasions, Plaintiff denied publicly and to the Post & Courier and to SLED any knowledge whatsoever of the video

which ultimately was proven to be an outright lie, and she pled guilty to the making of the illegal video. In fact, her criminal fine was based on the amount of district funds she used to make the illegal video. As to the allegation of Paragraph 37, to the extent this allegation is true, the convicted criminal Plaintiff is alleging that she was in a criminal conspiracy with members of the board and her superiors, and although this certainly may implicate others, it cannot absolve her criminal wrongdoing. Accordingly, the Defendant denies any inconsistent allegation.

23. As to the allegations contained in Paragraph 38 of Plaintiff's Complaint, Defendant answers that the convicted criminal Plaintiff admitted under oath that the video was made for purposes of the campaign. This allegation, *inter alia*, renders this lawsuit frivolous and sanctionable under Rule 11. It further indicates that Plaintiff is either lying in this lawsuit or committed perjury at her sentencing or both. The fact that the campaign ultimately did not use the video because it did not like the convicted criminal Plaintiff's work, or for other reasons, did not absolve her criminal activities for which she pled guilty related to the making of the campaign video.

24. Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 39 of Plaintiff's Complaint and, therefore, denies the same. Defendant is unaware of this policy. Further denying the allegations of this paragraph, and specifically the allegation that Plaintiff developed close working relationships between the school system and the community, Defendant answers that due to Plaintiff's criminal actions, the relationship of the school district and community has never been so strained, and Plaintiff specifically caused severe mistrust in the community due to her criminal activities. It is noteworthy that Plaintiff is the first school official in state history to be convicted of these crimes, which is indicative of the severity and pervasiveness of her criminal wrongdoing.

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25. Defendant denies the allegations contained in Paragraph 40 of Plaintiff's Complaint. In fact, as part of Plaintiff's plea deal, the Attorney General read from Plaintiff's emails indicating that her career would benefit from the passage of the bond Referendum. Further answering, upon information and belief, the convicted criminal Plaintiff received a large pay increase and promotion (from part-time or contract to a Directorship) during her work on this bond Referendum. This allegation, *inter alia*, renders this lawsuit frivolous and sanctionable under Rule 11, as Plaintiff admitted to the Attorney General's factual recitation regarding the benefit of her illegal conduct on her career.

26. As to the allegations contained in Paragraph 41 of Plaintiff's Complaint, Defendant admits that he is an attorney practicing law on Daniel Island and that he opposed the bond Referendum. All remaining allegations are denied. Defendant opposed the Referendum *before* the vote, and he was not the Chairman of the Berkeley County Republican Party until a significant time after the Referendum. In fact, he was not a member or in any elected position with the Party during the Referendum. It was not until after the election that the Party, which appreciated Defendant's principled stand on this Referendum and particularly against the convicted criminal Plaintiff's activities and those of her superiors, that he was recruited to serve in leadership of the Party. This allegation is proof that the convicted criminal Plaintiff utterly failed under her objective at work to "develop and maintain [a] close working relationship[] between the school system and the community," as she was completely unfamiliar with the leadership of the predominant political party of the County. At all times pertaining to the convicted criminal Plaintiff, Defendant Whitley acted as a concerned citizen and not as an attorney, other than at any time that he offered counsel to his mother Karen Whitley

27. Defendant admits the allegations contained in Paragraph 42 of Plaintiff's Complaint.

Further answering, Defendant Whitley is the proud son of Dr. Karen Whitley who has a

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distinguished career in Berkeley County. During Whitley's entire career, he could not go in public in Moncks Corner and beyond without young and old, rich and poor, and ethnically diverse persons beaming with excitement in spotting their former teacher or principal and she replying by name to each of them, including former students or parents from decades before.

28. Defendant denies the allegations contained in Paragraph 43 of Plaintiff's Complaint.

Defendant further points out the deficiency of Plaintiff's pleading, as she does not describe in any detail the nature of how Dr. Whitley expressed publicly her dissatisfaction. Further answering, Dr. Karen Whitley never applied to be Chief Academic Officer but rather the previous Superintendent asked her to serve him as his Chief Academic Officer. A short time after Thompson was elected Superintendent, he told Dr. Whitley he needed her strengths in different areas, including supervising of all schools, supervision of athletics, transportation, Head Start, School Nurses, and other auxiliary services.

29. Defendant denies the allegations contained in Paragraphs 44 and 45 of Plaintiff's

Complaint. Specifically, Gwen Scarborough asked Dr. Whitley why the "Principal for the Day" program had been given to Plaintiff. Dr. Whitley simply inquired to Dr. Thompson to be able to answer Ms. Scarborough. It is beyond silly and narcissistic to believe that is a basis for some fictitious vendetta by Dr. Whitley against the convicted criminal Plaintiff. This allegation evinces Plaintiff's inability to accept responsibility for her criminal conduct, for which she seeks to blame others. Moreover, Plaintiff had mentioned to Dr. Whitley that her husband had difficulty finding a job as a lawyer and would be interested in working for Defendant Josh Whitley. Further responding, Plaintiff's allegations regarding Dr. Whitley's objectives is beyond absurd and lacks the particularity of minimal pleading standards. In fact, Dr. Whitley has had a stellar and

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award-winning career as a teacher, assistant principal, principal, supervisor of elementary schools, Chief Academic Officer, and Associate Superintendent. When the Superintendent's position became vacant, Dr. Whitley chose to not apply for the vacant position, even after the Chairman of the Board called and asked her to do so. In other words, even though the convicted criminal plaintiff sought to commit crimes in order to rise in leadership and advance her career, Dr. Whitley was at the top of her career and had no desire to go beyond the great success that she had achieved.

30. As to the allegations contained in Paragraph 46 of Plaintiff's Complaint, Defendant admits that Scott Marino is Josh Whitley's brother in-law but denies the ridiculous proposition that Marino and Whitley were angered regarding a principalship. In fact, during the very time of the investigation of the criminal defendant Plaintiff, Dr. Lindsey Marino was named South Carolina Assistant Principal of the Year.

31. As to the allegations contained in Paragraph 47 of Plaintiff's Complaint, Defendant admits that Plaintiff showed her illegal video to Dr. Karen Whitley, even though the convicted criminal Plaintiff continuously denied the existence of the video to the Post & Courier and even to authorities, which she later pled guilty to, including acts of dishonesty (i.e., forgery) in trying to cover up her acts. Upon information and belief, the convicted criminal Plaintiff is an attention-seeker and sought praise on the making of the campaign video and, therefore, would not have been able to resist showing multiple persons the video, including Lara Varn, the Third-Party Defendant Thompson, and others. Moreover, this allegation is frivolous and sanctionable as it admits she made an illegal video and showed Dr. Whitley but then claims elsewhere in the pleading that she did not make a video for the campaign. All other inconsistent allegations are denied.

32. As to the allegations of Paragraphs 48 and 49 of Plaintiff's Complaint, Defendant admits that Donna Marino read a statement that district resources should not be used for illegal

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purposes, but denies that Defendant Dr. Karen Whitley misrepresented the video to Defendant Josh Whitley. As to the allegation of the Pulling video versus the illegal video made by the convicted criminal Plaintiff, Defendant does not recall the genesis but only that it appeared that district resources were being used for illegal purposes. This caused Defendant Josh Whitley to issue the FOIA request, which conclusively demonstrated the illegal conduct for which Plaintiff eventually pled guilty. Prior to the FOIA request, Defendant Josh Whitley was unaware of the extent of Plaintiff's illegal conduct, if any. After the FOIA documents were produced, Defendant was convinced that Plaintiff knowingly and repeatedly broke the law, and lied about her conduct, which is why he went to the Attorney General with the emails he had received pursuant to his FOIA request.

33. Defendant lacks information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraphs 50 and 51 of Plaintiff's Complaint and, therefore, denies the same.

34. Defendant denies the allegations contained in Paragraph 52 of Plaintiff's Complaint.

Plaintiff's allegation that she did not know that an opposition to the Referendum existed until mid-October is a demonstrable lie. In fact, Plaintiff was aware of the opposition, and had Jane Pulling call Dr. Karen Whitley on September 27th and 28th at the BCSD Office regarding Defendant Josh Whitley's opposition and the letter sent by the opposition committee. Upon information and belief, the convicted criminal Plaintiff followed up with an email to Jane Pulling to inquire how the conversation with Dr. Whitley went. Also, on October 1, 2012, Rodney Thompson met with Dr. Whitley regarding Josh Whitley's opposition to the Referendum. Furthermore, on October 2, 2012, Rodney Thompson came to Defendant Josh Whitley's law office regarding the opposition to the Referendum. Further answering, the Berkeley County Republican Party

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had nothing to do with the opposition to the Referendum, and indeed, Defendant Josh Whitley had not joined or attended any Berkeley County Republican meetings prior to the Referendum. In fact, Josh Whitley was invited for the first time by the party to discuss his opposition to the Referendum at the November monthly breakfast (just days before the vote), which was also attended by "Vote Yes" Co-Chairs John Matthews and Jane Pulling. This Defendant denies, on information and belief, that the Director of Communications, who in Paragraph 39 of her Complaint stated that she maintained close relationships with members of the community, did not know that the Berkeley County Republican Party had no role in the opposition to the Referendum.

35. As to the allegations contained in Paragraph 53 of Plaintiff's Complaint, Defendant Josh Whitley admits that he gave the district / Dr. Thompson several opportunities to apologize to the community and if they did so, he would withdraw his FOIA request. At first, Dr. Thompson appeared willing to apologize, but then Defendant received an email from attorney Kathy Mahoney on November 1, 2012, stating that the district declined Josh Whitley's proposal for the district to issue an apology in exchange for the withdrawal of the FOIA request. All remaining allegations are denied.

36. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 54 of Plaintiff's Complaint and, therefore, denies the same.

37. Defendant admits the allegations contained in Paragraph 55 of Plaintiff's Complaint. Further answering, requesting and receiving public documents pursuant to FOIA is a right of citizens of the State, and Plaintiff's claim against Defendant arising out of inculpatory information contained in those documents is frivolous and sanctionable. There can be no basis for a conspiracy against a citizen requesting the documents

pursuant to FOIA when those documents lead to evidence of criminality for which the public employee then enters a plea of guilty.

38. As to the allegations contained in Paragraph 56 of Plaintiff's Complaint, Defendant admits that he had to selectively choose emails for his Powerpoint presentation. This, however, was not to mislead; instead, it was due to the vast amount of evidence of the Plaintiff's criminality among the documents produced. There were simply too many incriminating emails from which to choose. Further answering, the Defendant did not alter (other than obvious highlights / annotations) the emails in any way and simply uploaded the emails into the presentation. It was Plaintiff's own words that were incriminating, not Defendant's selection of the emails.

39. As to the allegations contained in Paragraph 57 of Plaintiff's Complaint, the Defendant denies that the emails "merely indicated Plaintiff ... [was] responding to questions about the school bond Referendum, providing correct information to the volunteer Referendum committee...." In fact, the plain reading of these emails shows the frivolity and sanction-worthy nature of this allegation, including the fact that Plaintiff pled guilty under oath to advocating for the bond Referendum and not merely just providing information. Consistent with the contemporaneously filed motion for sanctions and motion to dismiss, the criminally convicted Plaintiff cannot plead guilty under oath to violating the law and then claim in this lawsuit that she did not commit the criminal acts to which she voluntarily entered her guilty plea. Moreover, the Attorney General stated that the evidence of the Plaintiff's guilt and criminal activities came mostly from her emails. This allegation is fraudulent, frivolous, and sanctionable.

40. As to the allegations contained in Paragraph 58 of Plaintiff's Complaint, the Defendant admits this allegation and affirmatively alleges that this allegation highlights the absurdity of the lawsuit in that all the Republican Party allegedly did was ask the

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Attorney General to prosecute any person who violated any ethics laws relating to the school bond Referendum. Further answering, this resolution and Party activity came the following year after the Referendum. Further answering, and upon information and belief, the Party took this action on this Defendant's request after he received word that the convicted criminal Kovach's attorney was stating that there was not much to this case. In other words, the only reason the Party passed the resolution was to request the Attorney General take this matter seriously and prosecute only persons who violated criminal law.

41. Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraphs 59 through 60 of Plaintiff's Complaint and, therefore, denies the same.
42. As to the allegations contained in Paragraphs 61 and 62 of Plaintiff's Complaint, the Defendant admits he contacted the Attorney General with evidence of criminality of employees of the school district, and that he alleged that Plaintiff and others worked on the Referendum and used District resources to promote its passage. Thereafter, the Defendant Josh Whitley was proven correct, as Plaintiff pled guilty to charges that she used district resources illegally. This was an historic and important moment for the State of South Carolina to hold public officials accountable for acts of public corruption.
43. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 63 through 67 of the Plaintiff's Complaint and, therefore, denies the same. Further answering, what is incomprehensible is not the prosecution of Plaintiff but rather how Plaintiff could plead guilty to her public acts of corruption and do so under oath and then file this frivolous lawsuit that demonstrates she is either lying here or perjured herself at her hearing.

44. As to the allegations contained in Paragraph 68 of Plaintiff's Complaint, Defendant admits he complained of the Plaintiff's (and others') criminal wrongdoings to the Attorney General. The Attorney General asked SLED to investigate and, thereafter, there were numerous indictments (six total – five against Kovach and one against Thompson) and two convictions of the criminal Plaintiff. Accordingly, not only was this Defendant within his rights to take evidence to the Attorney General of criminal wrongdoing; ultimately, he was proven correct.

45. As to the allegations contained in Paragraph 69 of Plaintiff's Complaint, the Defendant vehemently denies this frivolous allegation. To the Defendant Josh Whitley's knowledge, he had no known relationship with any person at the Attorney General's office prior to taking his complaint to the Attorney General. In fact, he directed his complaint directly to Attorney General Alan Wilson and gave his presentation to General Wilson and several other high level members of Wilson's administration. Prior to approaching General Wilson with his Complaint, Whitley had never met or spoken to the Attorney General.

46. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 70 of Plaintiff's Complaint and, therefore, denies the same. Defendant is unaware of when the convicted criminal Plaintiff learned of the investigation, and due to her inability to relate truthful information regarding timelines and other information, the Defendant must deny this allegation and not rely on Plaintiff's ability to truthfully allege information.

47. As to the allegations contained in Paragraphs 71 and 72 of Plaintiff's Complaint, Defendant admits that Childs & Halligan was district legal counsel and donated to the "Vote Yes" campaign after the convicted criminal Plaintiff illegally used district resources to solicit funds directly from Ken Childs. Defendant denies that all legal

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questions were made clear to Childs & Halligan as John Reagle of Childs & Halligan told Defendant Josh Whitley that he was unaware of the pre-election illegal activities of the Plaintiff and others and was only called after the District received Defendant's FOIA request. Further answering, Plaintiff admitted to knowingly breaking the law and knowingly committing forgeries and perjury to cover up her crimes. Therefore, reliance on counsel is no defense, as Plaintiff must have realized when she pled guilty to her crimes.

48. As to the allegations contained in Paragraph 73 of Plaintiff's Complaint, Defendant is unaware of when the convicted criminal Plaintiff met with SLED in the presence of her husband. Further answering, Defendant points out that the Plaintiff's husband is an attorney and was an attorney during the entirety of Plaintiff's criminal activities.

49. As to the allegations contained in Paragraph 74 of Plaintiff's Complaint, the Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegation that Plaintiff was acting at the wishes of the BCSD and, therefore denies the same. Further answering, the Defendant notes that Plaintiff pled guilty to knowingly violating criminal laws and, therefore, the wishes of the BCSD are immaterial. For example, if Plaintiff was told to embezzle money and was caught, she would still be guilty of embezzling money. As she admitted during the hearing on her guilty plea, she was aware of the criminal law, chose to violate it, and pled guilty to the same. Further answering, to the extent this allegation is true, it is an admission of a criminal conspiracy, but it does not absolve the Plaintiff of her criminal wrongdoing.

50. As to the allegations contained in Paragraph 75 of Plaintiff's Complaint, Defendant is without information or knowledge sufficient to form a belief as to the truth of Plaintiff's allegations concerning any phone calls received by the convicted criminal Plaintiff's attorney husband and, therefore, denies the same. Further answering, Plaintiff hired and

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was reimbursed by the taxpayers for separate counsel, even though at all times, she knew she had knowingly committed criminal acts.

51. As to the allegations of Paragraphs 76 through 80 of Plaintiff's Complaint, Defendant is without information or knowledge sufficient to form a belief as to the truth of Plaintiff's allegations relating to the actions of BCSD as alleged and, therefore, denies the same. Further answering, based on these allegations alone, it is clear the Complaint against the remaining Defendants is completely frivolous and sanctionable and only meant to harass those who held the Plaintiff responsible for her criminal activities. Plaintiff cannot allege on one hand that BCSD did wrong because they did not properly supervise her and warn her of her criminal activities and then on the other hand state that the remaining Defendants did anything wrong as to reporting those same criminal activities to the proper authorities.

52. As to the allegations contained in Paragraph 81 of Plaintiff's Complaint, the Defendant is without information or knowledge sufficient to form a belief as to the truth of Plaintiff's allegations concerning her proffer with SLED and, therefore, denies the same. Further, upon information and belief, the convicted criminal plaintiff admitted under oath to lying to SLED in that November proffer.

53. As to the allegations contained in Paragraph 82 of Plaintiff's Complaint, Defendant admits that Plaintiff was indicted for "use of public funds to influence an election" on February 11, 2014. Defendant denies the remainder of the allegations regarding what Plaintiff's employer instructed her to do and points out that the convicted criminal Plaintiff denied on many occasions that she had done anything to influence the election. Now, she admits that she did so, but claims it was done at the directive of her employer. Defendant points out that Plaintiff's numerous lies were explicitly recognized by this Court at her guilty plea hearing. Further answering, Defendant notes that the Plaintiff

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pled guilty to these charges of knowingly violating the criminal statute prohibiting the use of public resources for a campaign and of misconduct in office. To the extent her allegation implicates a conspiracy with others, it nevertheless does not absolve her criminal wrongdoing.

54. Defendant denies the allegations contained in Paragraph 83 of Plaintiff's Complaint, and further notes that Kovach pled guilty under oath that she used public funds for the making of a campaign video in excess of \$5,000.00. In fact, the Judge set her \$25,000 fine based on the cost of that video (the statute allowed for a 500% fine of the monies used). For Plaintiff to now file this lawsuit and claim no monies were used demonstrates the frivolous nature of this lawsuit and is a basis for the motions to dismiss and for sanctions.

55. As to the allegations contained in Paragraph 84 of Plaintiff's Complaint, Defendant admits the Plaintiff was placed on administrative leave after the February 11, 2014 indictment. Further answering, Defendant states that Kovach drew a \$75,000 salary during that time and even after she was indicted on felony charges, knowing she had committed crimes. This resulted in Plaintiff's unjust enrichment at the expense of taxpayers for nearly a year and a half.

56. As to the allegations contained in Paragraphs 85 through 87 of Plaintiff's Complaint, Defendant admits that the district sought review by Victor Rawl but denies he is a judge. In fact, he is an attorney that was paid to deliver his opinion and was given selective information. Moreover, Mr. Rawl admitted on the face of his letter that he was not given all information and, amazingly, that he had relied on information from Kovach's criminal attorney.. The Attorney General opined that Mr. Rawl's opinion was wrong. Likewise, Defendant also admits that John Freeman gave an opinion as to legal fees. Further answering, Mr. Rawl's and Mr. Freeman's opinions were proven emphatically wrong by

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Plaintiff's own plea under oath where she admitted to criminal acts, which can never be in "good faith." The Court appeared disgusted by Kovach's refusal to accept responsibility for her admitted crimes while taking public funds away from children. She continues deny responsibility, as evidenced by this lawsuit.

57. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 88 of Plaintiff's Complaint and, therefore, denies the same.

58. As to the allegations contained in Paragraph 89 of Plaintiff's Complaint, Defendant denies the Attorney General instructed the BCSD to refrain from reimbursing Plaintiff but did advise the district that it was in violation of the South Carolina Constitution to pay these fees and that indemnification was the proper method to handle her criminal defense, if she was found not guilty.

59. As to the allegations contained in Paragraph 90 of Plaintiff's Complaint, the Defendant admits the convicted criminal's defense lawyer filed the hasteful motion to disqualify the Attorney General, which he lost. Further answering, Plaintiff's criminal defense lawyer filed numerous motions on behalf of the convicted criminal Plaintiff, including one motion to dismiss the indictment and, upon information and belief, admitted in open court he had never filed a similar motion in 33 years. Further, he filed a motion to disqualify the Attorney General and lost. He also filed a motion to change venue and lost. These motions were extremely lengthy and likely cost the taxpayers of Berkeley County a tremendous amount of money. Indeed, criminal counsel billed approximately \$303,000.00 to defend Kovach on what began as a \$5,000 misdemeanor ethics case. Of course, Kovach was unjustly enriched by the amount of fees paid on her behalf, especially since she knew she was guilty of the crimes for which she was charged the entire time. Ultimately, even her criminal counsel stated at the hearing that he believed

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she would likely be found guilty by a jury of the charged crimes if the matter went to trial, and that it was in her best interest to plead guilty.

60. As to the allegations contained in Paragraphs 91 and 92 of Plaintiff's Complaint, upon information and belief, Defendant admits two law professors were engaged to opine on behalf of Kovach. Further answering, Defendant points out the Court rejected in whole the professors' arguments and denied Kovach's motion to disqualify the Attorney General. Unfortunately, the cost of this dubious motion was borne by the taxpayers of Berkeley County and is a basis for recovery in the counterclaims of this action.

61. As to the allegations contained in Paragraph 93 of Plaintiff's Complaint, Defendant admits the BCSD continued to pay the fees, but only as to the ethics charge – not as to the two felony forgery indictments, the perjury indictment, or the misconduct in office indictment. Or at least that is what they stated. Further answering, the school board never examined the evidence to conclude whether the acts were in "good faith," but accepted Kovach's representations that she was acting in good faith. Plaintiff ultimately admitted in Court that this was a lie and pled guilty to two of the charges, including misconduct in office for acts of public dishonesty, and admitted that she knew these actions were in violation of the law when she was committing them. Accordingly, it was Kovach's misrepresentation that led to the "good faith" conclusion and payment of her fees, which she should reimburse to the public coffers.

62. As to the allegations contained in Paragraphs 94 and 95 of Plaintiff's Complaint, Defendant is without information or knowledge sufficient to form a belief as to the truth of Plaintiff's allegations concerning BCSD's knowledge and, therefore, denies the same.

63. As to the allegations contained in Paragraph 96 of Plaintiff's Complaint, Defendant is without information or knowledge sufficient to form a belief as to the truth of Plaintiff's allegations concerning what has happened to her personally and, therefore, denies the

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same. Further answering, although it is typical of Kovach's modus operandi to blame the Attorney General for her actions and not take responsibility, Kovach can only blame herself for willfully and knowingly committing criminal acts and the consequences that arose therefrom, including the criminal mug shot taken of the convicted criminal Plaintiff that was in the Post & Courier and any and all impact her crimes have had on her career.

64. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 97-99 of Plaintiff's Complaint and, therefore, denies the same.

65. As to the allegations contained in Paragraph 100 of Plaintiff's Complaint, Defendant denies specific information regarding the Republican Party's intent to replace Phillip Obie. Further answering, the Republican Party has been interested during the investigation in holding officials accountable who waste taxpayer funds or officials who defend criminal activity and likely would be interested in replacing any board member that supported those two objectives, as has been evidenced in the last general election and likely will be evidenced in the next general election.

66. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 101-104 of Plaintiff's Complaint and, therefore, denies the same. Further answering, it is curious how Kovach would have information from privileged executive session. Further answering, regarding the forensic expert, Kovach, under oath, admitted to the underlying facts of the forgeries as part of her guilty plea for misconduct in office for acts of public dishonesty. Accordingly, this allegation proves the frivolity of the Complaint or the perjury committed by Kovach at her guilty plea hearing, or both.

67. As to the allegations contained in Paragraphs 105 and 106 of Plaintiff's Complaint, Defendant denies the Attorney General dismissed the indictments as unsupported, bogus,

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and false against the Plaintiff. These allegations are ludicrous and prove the frivolous nature of the Complaint. The Attorney General announced at the guilty plea hearing that it was dismissing the three indictments as part of the plea deal and emphatically *not because they were unsupported*. In fact, the Attorney General was clear that Kovach, under oath, still had to plead to the facts that supported the three additional indictments as part of her misconduct in office charge for acts of public dishonesty. A simple request for the transcript of the hearing would have prevented the frivolous filing of this lawsuit and is the subject, *inter alia*, of Defendant's motion for sanctions against Plaintiff and her counsel.

68. Defendant denies the allegations contained in Paragraphs 107 through 117 of Plaintiff's Complaint. In fact, the Attorney General was clear that Plaintiff, under oath, still had to plead to the facts underlying the three additional indictments as part of her misconduct in office charge for acts of public dishonesty. An easy request for the transcript of the hearing would have prevented the frivolous filing of this lawsuit and is the subject, *inter alia*, of Defendant's motion for sanctions against Plaintiff and counsel. Further answering, Kovach cannot contradict in this civil action here what she has already pled guilty to under oath in August of 2015. That act in and of itself subjects Kovach to sanctions and dismissal of this suit.

69. Defendant admits the allegations of Paragraph 118 of Plaintiff's Complaint.

70. As to the allegations of Paragraphs 119 and 120 of Plaintiff's Complaint, Defendant denies that the publicity caused distress or damage to Plaintiff and her family and states rather that any stress Plaintiff experienced was caused by Plaintiff's criminal activities and being caught for the same. Again, Plaintiff continuously attempts to blame everyone else for her criminal behavior and refuses to accept responsibility. In Defendant's opinion, there could not be a worse example for her children than the one she has set —

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both in committing crimes and in not taking responsibility. Further answering, it is incredible that Kovach now claims damages resulting from publicity, when on May 14, 2013, she stood before a large crowd at an orchestrated school board meeting and proclaimed that she was proud to be on the front page of the Post & Courier with Thompson related to the ethics investigation.

71. Defendant denies the allegations of Paragraph 121 of Plaintiff's Complaint.

72. Defendant denies the allegations of Paragraphs 122 and 123 of Plaintiff's Complaint, as Plaintiff pled guilty under oath to the charges against her. She cannot now file this lawsuit and perjure herself. Such an attempt is grounds for Defendant's motion for sanctions and dismissal. In fact, Plaintiff, under oath, told the judge that she was knowingly pleading guilty, admitting her guilt, and was doing so under her own free will.

73. As to the allegations of Paragraph 124 of Plaintiff's Complaint, the Defendant admits he made comments seeking accountability for the criminal activities of the Plaintiff and any other employee found to have violated the law. Defendant's comments in this regard are protected by the First Amendment to the United States Constitution. Similarly, Defendant is going to demand redress for the filing of this frivolous lawsuit.

74. As to the allegations of Paragraph 125 of Plaintiff's Complaint, Defendant admits that he successfully represented Hardesty in a First Amendment lawsuit when the school board chairman would not let members of the public read Ms. Kovach's emails. To the extent that Plaintiff was "disparage[d]" by the emails, her own words and criminal activities were to blame as speakers read Ms. Kovach's emails. Further answering, as the federal court has already addressed, Ms. Kovach was a public figure and this was a matter of grave public importance, which is protected under the First Amendment.

75. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 126-136 of Plaintiff's Complaint and

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therefore, denies the same. It is amazing that a convicted criminal would make the allegation that the BCSD has never supported her, as the BCSD spent \$303,000 plus hundreds of thousands more to Childs & Halligan, both related to doing everything they could to protect a person who turns out is a criminal. Moreover, although the convicted criminal Plaintiff alleges that Defendant Marino conspired to harm her (without any supporting pleaded facts), she fails to mention that Marino in point of fact voted to provide her criminal counsel. Moreover, Plaintiff's pleading that the Attorney General provided false information, manufactured evidence, and indicted her on baseless evidence is sanctionable, as the convicted criminal Plaintiff pled just two months ago to the exact opposite.

(FIRST CAUSE OF ACTION)

(Breach of the Covenant of Good Faith and Fair Dealing against Defendant BCSD)

76. As to the allegations contained in Paragraph 137 of Plaintiff's Complaint, the Defendant incorporates each and every response contained in Paragraphs 1 through 75 of this Answer as if repeated herein verbatim.

77. As to the allegations contained in Paragraphs 137 through 141 of Plaintiff's Complaint, Defendant states that these allegations are against Defendant BCSD and, therefore, no response is required. To the extent a response is required, Defendant denies the same.

(SECOND CAUSE OF ACTION)

Grossly Negligent and / or Intentional Misrepresentation against Defendant BCSD)

78. As to the allegations contained in Paragraph 142 of Plaintiff's Complaint, Defendant incorporates each and every response contained in Paragraphs 1 through 77 of this Answer as if repeated herein verbatim.

79. As to the allegations contained in Paragraphs 143 through 152 of Plaintiff's Complaint, Defendant states that these allegations are against Defendant BCSD and, therefore, no response is required. To the extent a response is required, Defendant denies the same.

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(THIRD CAUSE OF ACTION)
(Breach of Fiduciary Duty against Defendant BCSD)

80. As to the allegations contained in Paragraph 153 of the Plaintiff's Complaint, Defendant incorporates each and every response contained in Paragraphs 1 through 79 of this Answer as if repeated herein verbatim.

81. As to the allegations contained in Paragraphs 154 through 157 of Plaintiff's Complaint, Defendant states that these allegations are against Defendant BCSD and, therefore, no response is required. To the extent a response is required, Defendant denies the same.

(FOURTH CAUSE OF ACTION)
(Civil Conspiracy against Defendants Joshua S. Whitley, Terry Hardesty, Scott Marino, Karen Whitley, the Berkeley County Republican Party, LLC)

82. As to the allegations contained in Paragraph 158 of the Plaintiff's Complaint, Defendant incorporates each and every response contained in Paragraphs 1 through 81 of this Answer as if repeated herein verbatim.

83. Defendant denies the allegations contained in Paragraphs 159 through 163 of Plaintiff's Complaint. Defendant did communicate with various Board Members at times. Communicating and sharing concerns with elected officials is still permissible in the United States.

84. Defendant denies the allegations contained in Paragraph 164 of Plaintiff's Complaint. Further answering, Senator Grooms' wife was never an employee of the District and, therefore, could not illegally use District Resources, as Plaintiff suggests and as Plaintiff did.

85. As to the allegations contained in Paragraph 165 of Plaintiff's Complaint, the Defendant admits the same in so much as there was no action to be taken against Senator Grooms. Even as frivolously plead, any action would have been against Senator Grooms' wife, but still, she did not violate the law, as she was not a district employee. Again, this is

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evidence of Kovach continuously attempting to blame anyone but herself for her criminal activity. Moreover, it is a frivolous allegation as there is no basis of criminality.

86. As to the allegations contained in Paragraph 166 of Plaintiff's Complaint, Defendant denies that Dr. Karen Whitley spoke publicly in favor of the Referendum as an employee of the District. Defendant admits, however, that the convicted criminal Plaintiff did write Dr. Karen Whitley's and others' speeches. Importantly, upon information and belief, Plaintiff removed any advocacy from Dr. Karen Whitley's speech but included advocacy in other district officials' speech, which demonstrates that Kovach knew Dr. Whitley would not advocate and break the law and further demonstrates that Kovach knew what the law was. Moreover, it is very indicative of the difference in character of the convicted criminal Plaintiff and Dr. Whitley.

87. As to the allegations contained in Paragraphs 167 through 169 of Plaintiff's Complaint, the Defendant denies that many emails were exchanged related to a rental lease. Defendant admits that Defendant Dr. Karen Whitley may have used her computer and/or emails on very few occasions and recalls that Defendant Josh Whitley may have sent an email regarding a lease agreement. SLED took no action because there was no criminal activity. These allegations have nothing to do with Kovach's criminal actions and are meant only to harass Defendants and are further evidence that warrants sanctions for the filing of this frivolous lawsuit.

88. As to the allegations contained in Paragraph 170 of Plaintiff's Complaint, Defendant denies he violated Rule 3.6, as he was at all times acting as a citizen and/or elected official attempting to hold a criminal accountable for her crimes. Rule 3.6 does not prohibit commenting on matters of public concern in these circumstances. Whitley was never an attorney investigating this matter on behalf of SLED and was never an attorney working on behalf of the Attorney General in this matter. Plaintiff's criminal counsel, on

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the other hand, commented substantively in the news and granted video interviews during the course of this prosecution, which Plaintiff conveniently ignores herein.

89. As to the allegations contained in Paragraph 171 of the Plaintiff's Complaint, the Defendant denies he threatened to sue Jane Pulling if she continued to support Plaintiff. At a minimum, this allegation is narcissistic at best. Moreover, Pulling is not a retiree of BCSD; rather, upon information and belief, she is a former employee of the district and retired from a different district. In fact, Whitley wrote to Pulling on one occasion and had one telephone conversation with Pulling, both regarding her harassment of Defendant Karen Whitley and threats towards Karen Whitley. Upon information and belief, Plaintiff instructed or put Pulling up to harassing Karen Whitley. Pulling also continuously disseminated misinformation regarding the Referendum and was embarrassed at a highly attended public debate against Defendant Josh Whitley at which he received numerous ovations for exposing several occasions when Polling mislead the public.

90. As to the allegations in Paragraph 172 of the Plaintiff's Complaint, Defendant denies that he bragged publicly that he hoped to harm the School District. In fact, during the time Defendant Josh Whitley spoke to the School Board, he bragged about how proud he was to be a product of the school system. Whitley attended Kindergarten through 12th grade in Berkeley County Schools and is a third generation graduate of Berkeley High School. His mother has devoted nearly four decades to the school district. In short, Plaintiff fails to plead this allegation with any particularity as to when and where that statement was made because Plaintiff continuously misrepresents the reality and tries to deflect from her criminal actions.

91. Defendant denies the allegations of Paragraphs 173 and 174 of Plaintiff's Complaint.

92. As to the allegations of Paragraph 175 of Plaintiff's Complaint, Defendant admits that SLED and the Attorney General took no action against him for the simple reason that, unlike Plaintiff, he had not committed any crimes. This ridiculous allegation is further evidence of the frivolity of Plaintiff's Complaint.

93. Defendant denies the allegations of Paragraphs 176 through 179 of Plaintiff's Complaint. Further answering, it is incredible that Kovach now claims damages when on May 14, 2013, she stood before a large crowd at an orchestrated school board meeting and proclaimed that she was proud to be on the front page of the Post & Courier related to the ethics investigation. Further answering, Defendant Karen Whitley is not a member of the Republican Party. Further answering, any suffering or further exacerbation of any existing mental condition is solely from being caught for her crimes and the public humiliation and consequences for her own actions.

(FIFTH CAUSE OF ACTION)
(Civil Assault against Defendant Terry Hardesty)

94. As to the allegations contained in Paragraph 180 of the Plaintiff's Complaint, Defendant incorporates each and every response contained in Paragraphs 1 through 93 of this Answer as if repeated herein verbatim.

95. As to the allegations contained in Paragraphs 181 through 187 of Plaintiff's Complaint, the Defendant states that these allegations are against Defendant Hardesty and, therefore, no response is required. To the extent a response is required, Defendant denies the same.

AFFIRMATIVE DEFENSES

1. Plaintiff's Complaint should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim against this Defendant upon which relief may be granted.
2. Plaintiff's Complaint should be dismissed pursuant to Rule 12(b)(7) for failure to join a party (the Attorney General) under Rule 19 of the SCRPC.

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3. Plaintiff's Complaint should be dismissed under the doctrine of unclean hands.
4. Plaintiff's conspiracy claim against Defendant is barred by the doctrines of res judicata, collateral estoppel, and judicial estoppel due to her plea of guilty to the crimes of misconduct in office in violation of the common law of South Carolina and the criminal use of public funds to influence an election in violation of Section 8-13-1346 of the South Carolina Code of Laws.
5. Plaintiff's conspiracy claim against Defendant should be dismissed because Plaintiff, by pleading guilty to the crimes of misconduct in office in violation of the common law of South Carolina and the criminal use of public funds to influence an election in violation of Section 8-13-1346 of the South Carolina Code of Laws has waived any claims she might have had against Defendant.
6. Plaintiff's conspiracy claim against Defendant is barred on the basis of the statute of limitations.
7. To the extent it applies, Plaintiff's complaint is barred by laches.
8. Any and all acts of the Defendant are protected under the First Amendment of the United States Constitution and under the South Carolina Constitution. Moreover, public policy absolutely protects and extends full and absolute immunity to members of the public in reporting crimes, as was done here.
9. Defendant is immune from liability for his reports to law enforcement in the public interest of matters within the public record.
10. Plaintiff's injuries, if any, were caused in whole or in part by the acts or omissions of others for whose conduct this Defendant is not responsible and/or resulted from conditions unrelated to any conduct of this Defendant.
11. Plaintiff's alleged injuries and damages may have been the result of an independent, intervening, and superseding cause over which this Defendant had no control.

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alleged action or alleged omission on the part of this Defendant was not the proximate cause of the alleged damages.

12. Plaintiff already suffered from one or more significant medical conditions and the injuries complained of herein are the result of her pre-existing condition(s).
13. Any recovery by Plaintiff must be reduced or offset by amounts Plaintiff has received or will receive from others for the same injuries to Plaintiff claimed in this lawsuit.
14. Plaintiff's alleged injuries and damages, if any, were caused in whole or in part by Plaintiff's and/or her representatives' own acts and, therefore, the alleged injuries and claim for damages should be diminished *in toto* according to Plaintiff's culpable conduct.
15. With respect to Plaintiff's demands for punitive damages, this Defendant asserts his conduct, as alleged herein, does not rise to the level required to sustain a claim for punitive damages. Further, the award or assessment of punitive damages as prayed for by the Plaintiff would violate this Defendant's constitutional rights under the First, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Section 3 of the South Carolina Constitution and, therefore, may not be awarded to Plaintiff, in that:
 - a. The judiciary's ability to correct a punitive damage award only upon a finding of passion, prejudice, or caprice is inconsistent with due process guarantees;
 - b. Any award of punitive damages serving a compensatory functions is inconsistent with due process guarantees;
 - c. Any award of punitive damages based upon the wealth of this Defendant violates due process guarantees;
16. The jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards, is arbitrary, promotes grossly excessive awards and is inconsistent with due process guarantees;

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17. Further, this Defendant specifically incorporates by reference all standards of limitations regarding the determination and enforceability of punitive damage awards contained in the decisions of Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008); State Farm v. Campbell, 538 U.S. 408 (2003); BMW of North America v. Gore, 517 U.S. 559 (1996) and Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001), together with all such standards applicable under state law.
18. The Plaintiff has an ongoing duty to mitigate her damages and, to the extent she have failed to do so, her recovery, if any, should be reduced accordingly.
19. To the extent allowed by law, this Defendant hereby invokes the protections afforded by law regarding the limitations on joint and several liability as set forth in S.C. Code §15-38-10 et seq. and associated provisions.
20. To the extent allowed by law, this Defendant hereby invokes the protections afforded by law regarding the limitations on punitive damages as set forth in S.C. Code §15-32-530, et seq. and associated provisions.
21. This Defendant hereby gives notice that he intends to rely upon such other defenses as may become available or appear through discovery or otherwise, and hereby reserves the right to amend this Answer to assert any such defenses.

COUNTERCLAIMS AGAINST PLAINTIFF/COUNTERCLAIM DEFENDANT AMY KOVACH

Statement of Facts

1. Joshua S. Whitley is a lifelong resident of the County of Berkeley and attended Berkeley County Schools from Kindergarten through the 12th Grade, where he served as President of the Student Body of Berkeley High School ("BHS"), was a member of Beta Club and the National Honors Society, was an Honor Student, and was elected by the Faculty as

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Mr. BHS in 2001. Whitley still returns to BHS to speak at the invitation of members of the faculty, including during the Referendum and investigation of the criminal Plaintiff. Following his graduation from BHS, Whitley attended Wofford College, where he was a member of the Judicial Commission, Vice President of the Student Body, President of the Student Body, Student Representative to the Board of Trustees, a Member of all three of the Colleges' Honor Societies, including Phi Beta Kappa, and graduated summa cum laude in 2005. Whitley attended the College of William & Mary on an academic scholarship and graduated with Honors and was second in his class and was recognized nationally for his advocacy skills. Following law school, Whitley received a prestigious clerkship from the Honorable Dennis W. Shedd of the United States Court of Appeals for the Fourth Circuit. Upon completion of the clerkship, Whitley and his wife chose to return to Berkeley County to make a difference and for him to practice law and give back to the community he loves dearly. Whitley is an elected official representing District 2 (Daniel Island, Clements Ferry Road, Hanahan, and Goose Creek) on the Berkeley County Council and Chairs the Human Resources and Purchasing Committee.

2. The Plaintiff is a resident of the County of Berkeley and is a convicted criminal. She pled guilty to criminal violations of the South Carolina Ethics Act and to Misconduct in Office for acts of public dishonesty. Further, as part of her misconduct guilty plea, she admitted to the facts supporting the nolle prossed indictments of forgery (2 counts) and perjury.
3. Third Party Defendant Rodney Thompson is a resident of Berkeley County and the former Superintendent of Schools. He has been indicted for criminal violation(s) of the South Carolina Ethics Act and, upon information and belief, is still under investigation.

4. It is established criminal statutory law that "A person may not use or authorize the use of public funds, property, or time to influence the outcome of an election." S. C. Code § 8-13-1346.
5. Moreover, it is established criminal statutory law that "No person may use government personnel, equipment, materials, or an office building in an election campaign." S.C. Code § 8-13-765.
6. Indeed, training on these criminal statutes is a major part of a school board member's initial orientation. Further, employees and law firms representing school boards are aware of the prohibition regarding influencing an election or using public resources in an election or Referendum campaign.
7. At all relevant times, Kovach was aware of these criminal statutes and that she could not use district resources in an election campaign or to influence the outcome of an election.
8. Further, Kovach was aware of district policy that prohibited taking actions that transform schools into arenas of political activity and that further "no one may collect or solicit funds for political use . . . no one can use the district communication systems, including e-mail or voice mail, to promote or solicit."
9. Further, at all relevant times, Rodney Thompson was aware of district policy that prohibited taking actions that transform schools into arenas of political activity and that further "no one may collect or solicit funds for political use . . . no one can use the district communication systems, including e-mail or voice mail, to promote or solicit."
10. On or about mid-2012, Whitley observed that Rodney Thompson, Superintendent of Berkeley County Schools, and Doug Cooper, former Chairman of the Berkeley County School District were providing misleading information to the public, including regarding the cost of Cane Bay Middle School. Whitley believed that their strategy in understating the cost of the Middle School was to be able to tell the public later in the Fall that they

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could build schools cheaper and the taxpayers should trust them with a \$198 million bond issue. Whitley learned that Thompson intended to first announce a \$250 million dollar bond and then lower the amount to a more palatable amount of \$198 million based on his claim he could build schools cheaper. Whitley was disheartened that the School District he loved so dearly would play games with the public on important issues.

11. In mid 2012, the School Board voted to pursue a \$198 million bond Referendum to include the building of 5 new schools and renovations on 19 schools. As the program was developed, some of the claimed renovations were not true renovations (including mere carpet replacement or information technology updates) or were already going to be paid from other sources but were simply being included to try to appeal to the county-wide electorate. Again, Whitley was disheartened that a school district would mislead citizens and believed it was a terrible example to set for children. Upon information and belief, this misleading strategy was lead by the convicted criminal Plaintiff and indicted Third-Party Defendant Thompson.

12. As the campaign was being laid out, school leaders also began to misrepresent the cost of the Referendum to the taxpayers.

13. Whitley also attended a board meeting in the summer of 2012 where he was astounded that the convicted criminal Plaintiff gave a presentation where she was laying the groundwork for a campaign. Whitley inquired who she was and was told she was the new community relations / communications person for the District. Whitley was shocked that she would so boldly give a presentation that laid out a criminal framework / plan for passing the Referendum, as all educator professionals are aware that you cannot campaign for these Referendums with district resources. In fact, Kovach and Thompson knew they were not supposed to use district resources to campaign. In fact, Whitley had supported the last bond Referendum, which passed and transformed the district in 1999.

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building wonderful schools across the county. Unlike the 2012 Referendum, the 1999 Referendum was led with integrity, passed legally, and upheld its promises to the citizens of Berkeley County after its passage.

14. As the "Yes 4 Schools Campaign" went forward; the campaign was slick, highly funded, and highly misleading. It was misleading to residents as to location of schools, as to the amount of the tax increase that were going to be required, as to the enrollment issues, and as to the funding of projects across the County. At that point, Whitley felt compelled to speak out, and he called his mother Dr. Karen Whitley ("Dr. Whitley" or "Karen Whitley") who is the Associate Superintendent of Schools. Whitley told his Mother that he had researched and read about the Referendum and believed the District's numbers were misleading. Whitley told his Mother that he would not want to jeopardize her employment, but that he felt compelled to speak out against this Referendum. His mother responded that she had raised him "to do the right thing."
15. Thereafter, Whitley created a Committee titled "Committee for Sustainable Education" to be co-chaired with Defendant Hardesty. Whitley worked with a consultant from out-of-state to determine what the tax increase would be for the top 200 taxpayers in Berkeley County. The astounding results were then mailed to the 200 taxpayers with a letter seeking financial support for the opposition committee. Whitley's law firm's address was listed on the letter, but Whitley's name was not listed in order to protect his mother. Whitley's plan was to do a low-key opposition campaign that simply raised money to then send to voters with the real facts.
16. One of the persons who received the letter gave his copy to Rodney Thompson who shared it with Doug Cooper, the Chairman of the Board, and Amy Kovach, who was leading the campaign's illegal activities on behalf of the District. Kovach and/or Thompson asked the "volunteer chairman" Jane Pulling to call Whitley's mother. Pulling

called for two days to Dr. Whitley's office and when she reached Dr. Whitley, she was threatening in both tone and substance. Among other statements, Pulling told Dr. Whitley that she can google and found Whitley's law firm address on google. Kovach then followed up, on information and belief, by email to Pulling asking what Dr. Whitley's response was.

17. Josh Whitley then called Pulling and stated to her that if she could google Whitley's address, why could she not also google Whitley's phone number and call him instead of improperly calling Whitley's mother on her office phone to threaten her regarding her son's opposition to the bond Referendum. Pulling was flustered and at a loss of words and simply said that she and Whitley needed to have lunch and discuss matters. They proceeded to have lunch in the coming days, where Pulling stated misinformation regarding the Referendum. Pulling also lied and said she had helped start Karen Whitley's career and had Karen in an assistant principalship mentor / training program. This is wholly untrue but, upon information and belief, typical of Pulling's inability to give accurate information. For example, Pulling kept referring to herself as a former "Superintendent" to Whitley during the entire lunch when in point of fact, Pulling was never hired as a Superintendent despite applying to several districts. When confronted with the misinformation by Whitley, Pulling said she would go back to the folks at the district and inquire – presumably meaning Kovach and Thompson. Later, when Dr. Whitley complained to Thompson that Dr. Pulling had given misinformation to voters at Whitesville Elementary at a community meeting, he said there was nothing he could do about that. In point of fact, giving information was what Thompson and Kovach could do legally – instead, they chose to campaign illegally, as admitted by Kovach under oath in her guilty plea hearing. Later, at a debate between Whitley and Pulling, she continued to give misinformation.

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18. In late September, Thompson called Dr. Karen Whitley into his office regarding Whitley's opposition to the Referendum. Thompson told Dr. Whitley that since the Board passed the Referendum, she was required to support it. She replied that she only supports what is right. Thompson threatened Dr. Whitley that if her son continued to be opposed to the Referendum, Thompson could not protect her from the repercussions from the Board. She replied that she raised her son to do the right thing and was proud of him. She further told Thompson that he had already lied to her and was already after her, so she was not worried about the repercussions. When asked how he had lied, she stated to him that on the morning following his interview to be Superintendent, Dr. Whitley had asked him why he planned to move her laterally from the Chief Academic Office and what had she ever done to him but be supportive. That morning, he told her that was just people trying to pit them against each other, and he had no such plans and had made no such statement. This, in fact, was a lie and Dr. Whitley had a copy of the powerpoint Thompson gave the board in executive session stating he was going to move Dr. Whitley. When Dr. Whitley revealed to him that she had proof via a powerpoint that he lied, he became flustered. Later that afternoon, Thompson called Dr. Whitley back to his office to again threaten and attempt to get her to get her son to back down and also demanded to know which board member had turned on him and given her a copy of the powerpoint presentation. Dr. Whitley refused to tell him how she had come in possession of the powerpoint and refused to ask her son to back down.

19. Thereafter, on or about October 1, 2012, Thompson reached out to Josh Whitley asking for a meeting at Whitley's office, which Whitley agreed to. Thompson also asked Chief Financial Officer Brantley Thomas if Thomas had a good relationship with Whitley. Thomas answered yes and that Whitley had invited him to his wedding in 2008. Thompson and Thomas came to Whitley's office on October 2, 2012, following an illegal

campaign "Yes 4 Schools" rally at Stratford High School that they both attended and that Kovach later pled guilty to orchestrating with district resources.

20. In the meeting with Thompson and Thomas, Thompson revealed the opposition letter and that the committee had gotten the numbers wrong, and he thought that made Whitley look bad. Whitley stated to him that he had gotten the numbers from the District (the bond formula) and from the County (the tax assessments) but if there were any numbers wrong, he would volunteer to resend the 200 letters correcting himself and did not want incorrect information out there. As it turns out, Whitley's numbers were correct, Thompson was wrong, and Whitley confirmed that in writing / email to Thompson and Thomas. Even knowing that Whitley's numbers were correct, Thompson lied to board members that "Whitley's numbers were wrong," to which Whitley appeared at the next board meeting and chastised Thompson publicly for misleading the Board after he knew the truth. Thompson was speechless and mostly looked down at the floor / desk.
21. During the October 2, 2012, meeting and after he realized that Whitley had his information together, Thompson asked Thomas to leave. Thomas was nervous and quickly exited the conference room without saying goodbye. After Thomas left, Thompson threatened Whitley's mother and that he could not protect her job if Whitley continued in opposition. Thompson stated that he loved Whitley's mother, that being a grandmother made her so happy, that she was one of the strongest leaders in the County, and that he hated to see Whitley's actions negatively affect her. Thereafter, Whitley sent Thompson a letter the next day explaining he and the Board could not take any retaliation against Dr. Whitley based on the political activities of her adult son. Nevertheless, upon information and belief, at a later point, Doug Cooper threatened to reassign Dr. Whitley to a lesser position due to Whitley's actions.

22. Based on these threats and the utter lack of integrity of Thompson and Cooper, Whitley understood he would need to be publicly out front against the Referendum so that any action taken against Dr. Whitley would be obviously based on retaliation due to Whitley's political activities. Thereafter, Whitley participated in a debate with Pulling and gave public interviews in opposition to the Referendum in the Post & Courier and elsewhere.
23. After Whitley publicly opposed the Referendum, he began receiving calls from employees and parents stating how they had witnessed Plaintiff and others illegally campaigning using district funds. Whitley also learned that the District had used resources to make a campaign video with children in the video saying "Yes 4 Schools." At that point, Whitley told a member of the Board Donna Marino, who was also worried about the video, that she needed to be on the record that she did not sanction District employees using resources for the Referendum campaign. Marino asked Whitley for help with a statement, which Marino read on October 9, 2012, that absolutely put Thompson and Kovach and anyone else on notice to cease using district resources for the campaign. See Exhibit B. (Minutes of October 9, 2012). After Marino's statement, Kovach drafted a statement for Thompson and gave to the press stating that no district resources had been used in the making of the video. See Exhibit C (Email of Kovach to Thompson of October 10, 2012 at 3:14PM); see also Exhibit D (Email of Kovach to Rindge on October 10, 2012 at 5:04PM). Kovach knowingly lied to the media in this statement. Instead of being humble, admitting their errors, Kovach and Thompson lied to the media about the making of the video on October 10, 2012 in an article in the Post & Courier. Kovach admitted in her guilty plea hearing that she lied.
24. After Kovach knowingly lied on October 10, 2012, regarding the video, Whitley produced an email from September 20, 2012, where Kovach emailed 14 principals to tell

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them that she would be coming to their school with a videographer to make a video for the campaign and to have children available / prepared to say "Yes 4 Schools" for the Campaign video. See Exhibit E (Email of Kovach to 14 principals on September 20, 2012). The newspaper then printed an article demonstrating Kovach's lie. Because Kovach and Thompson had directly lied about their involvement in the video, Whitley then FOIA'd all emails of Kovach, her supervisor Archie Francini, and Rodney Thompson for the last two months regarding Vote Yes, Referendum, Yes 4 Schools, and other similar search terms.

25. Soon thereafter, Whitley was attending a Yes 4 Schools information meeting on Daniel Island and was sitting in the back when Kovach and Thompson came into the school. Thompson came and sat beside Whitley and asked what it would take for Whitley to withdraw his FOIA. At that point, Whitley realized he would be able to easily prove that they had illegally used resources, but Whitley did not want any unnecessary war, so he told Thompson during a call the next day that if he would apologize to Marino for indicating that she had lied and apologize to his employees for illegally using district resources to campaign and cease campaigning, Whitley would withdraw the FOIA. Thompson told him he would be back in touch. Thereafter, Kathy Mahoney, one of the District's attorneys, drafted a letter to all employees from Thompson that set forth the law and told employees to stop campaigning. Thompson's letter made it look like employees were the ones at fault. Because Thompson did not apologize, Whitley did not withdraw his FOIA.

26. Whitley began to realize that they were also lying about the location of the school on Daniel Island / Clements Ferry Road in order to have Daniel Island residents support the tax increase. Thompson and Kovach and volunteers from the campaign were representing to Daniel Island residents that the school would be on Daniel Island

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Whitley knew this would be nearly impossible and was not their intent due to land price and that they intended to place the school on Clements Ferry Road. Whitley began telling residents that the new school would not be on Daniel Island, to which, upon information and belief, the campaign or Kovach took out an ad in the newspaper promising the school would be on Daniel Island. Further, Kovach strategized that Daniel Island residents needed to be scared that there were going to be trailers on the island if the Referendum did not pass and, upon information and belief, also wanted to scare residents on Clements Ferry Road that they would have to go to school at Cainhoy, which is a majority African American School and, of course, that veiled racial scare tactic is highly inappropriate. In point of fact, the Cainhoy is a wonderful school with a wonderful supportive community that Dr. Whitley has long admired. Of course, the school is currently being built on Clements Ferry Road, as Whitley said all along and followed great community upheaval where hundreds of parents and community members showed up to express their disgust with Thompson, Cooper, and Kovach's lies. Moreover, three years after the Referendum, citizens in Hanahan were supposed to have a new school open in the coming year, but again, Thompson and others have not fulfilled their campaign promise and land has not even been purchased yet, much less construction started.

27. In addition, Whitley was also critical of the amount Kovach, Thompson and Pulling were advertising as the cost of the tax increase. These individuals were misleading residents that it would only cost \$40 per year or a tank of gas, or 4 pizzas. Of course, in reality, the increase would be \$40 per \$100,000 of assessed value for the first three years and then \$80 per \$100,000 of assessed value for the next 17 years. For a starter home on Daniel Island that starts at \$400,000, in year 4, the resident would be paying an extra \$320 per year, yet district officials were telling Daniel Island, *inter alia*, it would just be \$40 per year.

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28. The District was also greatly overstating the enrollment numbers of the District and need for new schools. Whitley pointed out their own website and enrollment numbers demonstrated their direct lies.
29. Upon information and belief, any time a person approached Kovach at a community meeting with the apparent facts not "adding up," she would lose self-control or become flustered and storm away.
30. The District withheld the response to Whitley's FOIA for months in what Whitley believed was to allow the election to occur first and hope Whitley's interest would wane. Indeed, Kovach alleges that the district's attorney told her that Whitley would lose interest.
31. On Sunday, November 4, 2012, just prior to the Tuesday November 6 Referendum election, Kovach and Thompson called Brenda Rindge with the Post & Courier to tell her they had a major story and she needed to be available at 8:00pm that night. Rindge called Whitley to ask if he knew what that could be. Whitley responded that he had given them multiple chances to apologize, so maybe they were going to take responsibility in hopes that he would not pursue their ethical wrongdoings (which had they apologized, he would not have taken further steps). Instead, Kovach and Thompson were waiting, upon information and belief, to give misinformation that would make Whitley look to be unethical instead of them and did not want him to have an opportunity to respond.
32. Specifically, Kovach and Thompson committed knowingly false statements, or statements with actual malice, and defamed Whitley by accusing Whitley of not properly filing a statement of political organization with the South Carolina Ethics Commission and violating the South Carolina Ethics Act.
33. This was a knowingly false statement, committed with actual malice (knowledge of its falsity or reckless disregard of the truth) and Whitley provided correspondence from the

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South Carolina Ethics Commission that stated "There is no filing requirement for this committee."

34. Nevertheless, Kovach and Thompsons' defamatory statements were published on Page 1A of the Post and Courier on November 5, 2012.

35. Kovach and Thompson further defamed Whitley by denying their criminal acts throughout the campaign and during the investigation, by knowingly lying about their acts, and by stating that Whitley was incorrect – all the while, they knew Whitley was telling the truth and they had indeed engaged in the activity as Whitley claimed. These defamatory acts by Thompson and Kovach have caused malicious attacks on social media and in the newspaper of Whitley and damaged Whitley's reputation. During the course of the nearly three years, the majority of the public, upon information and belief, has come to despise the criminal acts of Kovach and resented her for knowingly causing hundreds of thousands of dollars to be spent on her defense, but during those years Whitley's reputation has been damaged until the truth of Kovach's lies came to light. Further, Kovach continues to defame Whitley, upon information and belief, by stating to family members and friends and educators that Whitley has a close friend in the Attorney Generals Office, which is a knowingly false statement, or a statement made in reckless disregard of the truth, and further stating that she did nothing wrong, which is also a knowingly false statement. Indeed, Kovach's Ohio family and / or friends have posted on social media and comments on newspaper articles that Whitley was fraternity brothers of the Attorney General and that Amy had personally shown them the evidence and it would soon come out that she did nothing wrong. Thus, within a certain part of society, Whitley continues to have his reputation attacked based on the defamatory statements and complete lies of Kovach.

36. After the election, when Whitley finally received the response to his FOIA, he was completely dumbfounded by what Kovach put in writing to her superiors and others regarding her illegal misconduct. Many who have seen Kovach's emails sent on district email cannot get over the utter lack of intelligence of what she put in writing, including:

- a. In an email subject "Re: Yes for Schools – video" – Kovach writes, "Jason, I LOVE IT! It is brilliant! My only suggestion is that we take off this version at the very end the district logo and just leave the YES 4 SCHOOLS logo." See Exhibit F (Email from Kovach to Jason Bennett on September 27, 2012 at 9:00AM).
- b. In an email to the Principal of Stratford High School, she outlines an illegal Vote Yes Pep Rally to be held during the school day and on school property and writes "The press conference will be in the back yard by the trailers – we want them as background. . . From the school, we will need a podium, microphone A/V (If the school does not have, I can work with technology to get this set up) and two easels from the art room. Finally, if we can have a class or two of students to be present and behind the podium too, that would be great!" See Exhibit G (email from Kovach to Stackley and Lopes on September 17, 2012 at 12:52PM); see also Exhibit H (email from Kovach to Scott Varn on October 1, 2012 at 2:02 PM and coordinating press conference for the committee); see also Exhibit I (email from Kovach to Scott Varn demonstrating Kovach would use district resources to hang Vote Yes banner). She uses school children as part of the campaign.
- c. Kovach drafts email for Principal Newsletter that states with blatant illegal advocacy "All Principals: Between now and October 5, the most important thing you can do to support the school improvement referendum at your school is to encourage your school staff to register to vote...Berkely County School Dsitrict employs 4,200 amazing people. If each one of them and a spouse or family member votes 'YES', we can pass this referendum. That's how important this activity is." See Exhibit J (Email from Kovach to Kim Glaze on September 20, 2012 at 10:17AM).
- d. Kovach drafts an advocacy letter for the editor on behalf of the highest elected official in Berkeley County and emails to Thompson for approval. See Exhibit K (Email from Kovach to Thompson on October 10, 2012 at 4:26PM) (stating "I encourage the voters of Berkeley County to carefully consider the *Yes 4 Schools* School Improvement referendum on November 6 . . . Let's continue to invest ...by supporting the *Yes 4 Schools* campaign").
- e. Kovach drafts an email on behalf of Thompson to a Developer seeking support on for the bond Referendum campaign. See Exhibit L (Email from Kovach on August 8, 2012 at 2:49PM) (stating "Superintendent Thompson has asked me to reach out to you regarding support for the bond referendum campaign").
- f. Kovach drafts an extensive email to Jane Pulling telling her they need a public volunteer committee to do the advocacy for the Referendum because she could not do it but then stated further to Pulling that many of the advocacy items Pulling would publicly do had already been taken care of behind the scenes by Kovach. Pulling was aware of the scheme and Kovach's role. See Exhibit M (email of Kovach to Jane Pulling on August 10, 2012 at 3:07PM).

- g. Kovach blatantly and illegally organized Yes 4 Schools yard signs to be available in each school's office. See Exhibit N (Email from Kovach on September 13, 2012 at 10:53AM) (stating "yes, yard signs will be available from a school office (they will all have them) beginning Oct. 15. Please pick up one and a few more to share with neighbors and friends! Amy").
- h. Upon information and belief, Kovach drafted the volunteer campaign solicitation letter. She certainly circulated and used it, including in raising funds from the district's attorney.
- i. Kovach actively, by email and otherwise, sought endorsements for the campaign. See Exhibit O (email from Kovach to Brenda Rindge on September 19, 2012 at 5:12PM) (stating "Hi Brenda! Yes, we have secured Mayor Riley's endorsement. I think we have MCTown Council as a whole unit"); see also Exhibit P (email from Kovach seeking organization / HOA's endorsement); Exhibit Q (Email from Kovach on October 3, 2012 seeking endorsements of Mayors of St. Stephen and Bonneau); Exhibit R (email from Kovach to Pulling and Thompson and Pulling on October 3, 2012) (telling Pulling and Thompson that "I also am working on endorsements from St. Stephen and Bonneau mayors"); Exhibit S (Email from Kovach to Thompson on October 3, 2012) (telling Thompson that Congressmen "Clyburn is officially on board").
- j. Kovach asked employees to volunteer at football games in exchange for free admission and to pass out Yes 4 Schools flyers and stickers and coordinated the volunteers instead of letting the campaign do it. See Exhibit T (email from Kovach on September 18, 2012 at 1:18AM); see also Exhibit U (email from Kovach to Pulling on August 22, 2012) (stating "We will set her up with a table, tent and materials" at the football game); Exhibit V (email from Kovach to Thompson and Francini on September 18, 2012) (seeking permission to give Yes 4 Schools volunteers free admission to football games)
- k. Without shame and blatantly illegal, Kovach coordinated the football announcers to do commercials for the campaign during every quarter. As evidence she knew it was illegal, she told principals if your announcer is an employee of the district, they cannot announce the commercial and to have someone else do it. This shows Kovach understood the law because if you cannot announce it, you certainly cannot write it, coordinate it, and have it announced. See Exhibit W (email from Kovach to high school principals on September 18, 2012 at 1:10AM)
- l. Kovach used district copiers, her administrative assistant, and other district resources (including her email) to print Yes 4 Schools Propaganda material. See Exhibit X (emails and material Kovach directed to be produced with District resources).
- m. Kovach wrote dozens of advocacy scripts / speeches for community meetings to be read by the volunteer committee members and instructed them to ask people to Vote Yes and instructed the volunteers to stay on script. See Exhibit Y.
- n. Kovach put in writing in her district email admitting to campaigning on the job. See Exhibit Z (Email from Kovach to Claire Freeman on September 17, 2012) (Stating in regards to a Yes 4 Schools meeting "am working 7 days a week nearly 15 to 16 hour days. This is like the ultimate test of my ability to succeed or fail – the results on Nov. 6 will be the proof"); see also Exhibit AA (Email from Kovach to Susan Haire on September 5, 2012 at 1:46PM) (stating "I haven't even gotten to the IGP yet working on referendum stuff for Rodney that he needs asap"); Exhibit BB (Email from Kovach to Karen Whitley on September 5, 2012) (stating

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in response for work from her legal job at the district, "Karen, I am at about 97% complete. If I could just get a dedicated amount of about 4 hours to work on it without interruption, I could nail it and be done. We are so close and I just need a ½ day without work to focus on it"); Exhibit CC (Kovach email to Library Director) (stating "the referendum is an enormous task and overwhelming. I'm looking forward to a successful conclusion in November and then getting back to my real work")

- o. Kovach provided countless emails circulating information sheets for employees and others with Yes 4 Schools logo and other advocacy information contained within.
- p. Kovach emails a teacher early on in 2012 stating she would love to give the teacher's group an update on the "campaign" and that "we'll be tapping into all of our teachers and staff to support the referendum." See Exhibit DD (Email from Kovach to Angie Simmons on February 15, 2012).
- q. Finally, Kovach emails an official in another school district who was conducting a legal campaign explaining her illegal conduct and campaign plan. See Exhibit EE (email from Kovach to Duke on July 19, 2012) (explaining that they had hired a strategist and set up a volunteer committee and set up an account with the chamber of commerce. She goes on to say . . . "they are NOT 'running the campaign.' The campaign is being run internally from my desk as the BCSD point of contact for all marketing and campaign details").

37. Kovach even presented to the board regarding the Referendum and updated them on a schedule of events for the Yes 4 Schools campaign, fundraising efforts, "and the extensive plan in place to get the message out to all stakeholders so the Campaign can be successful." See Exhibit FF (Board Minutes from August 28, 2012). Kovach even told the Board that she had cleared Thompson's schedule for the month of October for him to be at the disposal of the campaign.

38. Also, during the campaign, a federal agent and school board candidate met with Thompson and when he passed Kovach's office he saw numerous Yes 4 Schools yards signs stacked up. He reported this conduct to Thompson knowing it was illegal and Thompson replied that Kovach normally had her door shut. See Exhibit GG (Affidavit of Kevin Cox dated January 14, 2013).

39. Whitley also received a copy of Kovach's district credit card under FOIA and found where she had made the campaign video and split up the transaction to cover her illegal conduct. See Exhibit HH (credit card statements). This demonstrates, among the

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mountain of other evidence, Kovach lied repeatedly regarding the making of the video with district resources.

40. Kovach and Thompson clearly understood that they could not use district resources to influence the outcome of an election. See Exhibit II (Letter of Thompson to All Staff, October 15, 2012) (citing state law and district policy prohibiting campaigning with district resources); see also Exhibit A (Referendum Do's And Don't's) (prohibiting promoting the ballot measure; collecting funds to support a vote yes; printing material, emailing material, etc. promoting a vote; sending emails supporting a yes vote; organizing a "Vote Yes" rally, etc, and stating further "Be careful – pit falls – Using School District computers, emails, phones to organize support for the Referendum. Remember that communications using official devices can be subject to Freedom of Information Act) (Kovach even circulated this Do's and Don't's Fact Sheet and then proceeded to violate almost every single prohibited example); Exhibit JJ (Email from Kovach to employee on September 13, 2012) (stating "keep in mind that we can't do any of this work from any equipment or district resource as it would violate the SC Ethics rules); Exhibit KK (Email from Kovach to a principal on September 25, 2012) (stating "we may not use the Yes 4 Schools log – that is proprietary to the campaign committee and coming from a school or the district would be viewed as advocating for our position); Exhibit LL (email from Kovach to Jerry Prosser on September 6, 2012) (stating "as you know I may not ask for a YES vote"); Exhibit MM (email from Kovach to Justin Matthews on October 8, 2012) (stating that employees are limited to only asking folks to vote and "anything else could be construed as advocacy"); Exhibit NN (Email from Kovach stating "I have checked with our attorney from McNair and she has told me that this action would need to be taken by the campaign but absolutely cannot come from the district. We may not solicit money for the purpose of advocating our position on a school

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improvement referendum"). Of course, Kovach circulates a funds solicitation letter to raise money, including to Ken Childs, the District's counsel.

41. Even with this extensive and pervasive scheme of criminal activity, Kovach and Thompson knowingly and repeatedly denied any wrongdoing. See e.g., Exhibit OO, Front page P&C Article titled "Cloud over Berkeley vote" (November 3, 2012) (stating "the district has maintained that it has done nothing wrong" and Thompson stating "I would not be surprised if we are accused of using our resources to oppose the school improvement referendum as well." And Kovach claiming she did not make the campaign video or coordinate the weekly campaign calls); see also Exhibit PP, Front page P&C Article titled "Berkeley district counters bond foes: Officials raise own ethics questions" (with Thompson stating (upon information and belief, prepared by Kovach) that "district employee activities during school time relating to the referendum 'have been intended to be within the scope of preparing informational materials, conducting public meetings, or responding to news media or citizens' inquiries concerning the referendum,' as allowed by law. 'The opposition to the effort has run out of fruitful arguments and is using items not related to how to finance solutions to overcrowded schools instead of presenting a credible alternative,' Thompson said. District officials also launched ethics accusation back at Whitley's group, accusing the group of failing to file a statement of political organization with the Ethics Commission. ... A Sept. 26 email to Whitley from the Ethics Commission states, 'There is no filing requirement for this committee)'). Thus, not only were Thompson and Kovach knowingly lying about their activities and knowingly denying their illegal conduct to make Whitley and others appear to be liars, they went further to state Whitley did not have fruitful arguments (i.e., truthful), which was a lie, and went further to falsely accuse Whitley of violating the Ethics Act, which was a knowing lie. Instead of admitting to their known acts, Thompson and Kovach

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knowingly and falsely defamed Whitley. Kovach and Thompson continued their lies for months. See Exhibit QQ, Article titled "Berkeley district under scrutiny" (March 5, 2013) (Thompson and Kovach stating, even after they knew what emails had been produced, in a release that "For months there have been rumors and threats arising out of the school improvement bond referendum. As expected, concerns have been raised about the district's efforts . . . Some of these concerns are now under review by state level authorities and the district is fully cooperating"). In fact, upon information and belief, this too was a lie, as not only did Kovach and Thompson lie to SLED investigators (which is not cooperation), but Archie Franchini, a public employee and target, refused to even be interviewed by SLED. In fact, upon information and belief, the District's, Kovach's, Thompson's, Franchini's and Board members lack of cooperation caused the investigation to take years, instead of weeks or months.

42. As further proof of Kovach's knowingly false denials in order to make Whitley look bad and to defame his character, Kovach told the Post and Courier that she was invited to participate in weekly campaign calls just to provide information. However, her emails received pursuant to FOIA revealed that she actually coordinated and conducted the telephone calls and knowingly lied to the Post and Courier reporter. See Exhibit OO, (Post and Courier article denying involvement in weekly calls). Cf. Exhibit RR, (emails demonstrating Kovach lied about weekly calls involvement).

43. Based on the overwhelming evidence, Whitley believed that the Board would take appropriate action against Kovach if he took the complaint to the ethics commission. Instead, Chairman Doug Cooper stated, upon information and belief, that it did not matter what Whitley and others did, the District would pay the fine for Kovach, Thompson, and Franchini and [intimated that there would be no disciplinary actions taken]. At that point, Whitley realized the Board under Cooper's leadership was not going to take appropriate

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action for the violations of law if only the ethics commission found civil violations. Whitley felt that this inaction to discipline wrongdoers was a horrible example for children and the public, so he decided it needed the attention of the Attorney General. Further, the evidence was overwhelming in terms of intent, so Whitley believed these individuals needed to be prosecuted criminally instead of civilly.

44. Whitley requested a meeting with the Attorney General and met with Wilson, his Chief Deputy, his Solicitor General, and another Deputy Attorney General in January of 2013. Prior to this meeting, upon information and belief, Whitley did not know any member of the Attorney General's Office.

45. At the start of the meeting, one of the members of the Attorney General's staff stated that they understood all school districts pushed the line when it came to Referendums, so he was aware of the issue. After seeing only a portion of the presentation and Kovach's emails and credit card statements, he stated, "he didn't think anyone had ever done this." The Attorney General's office immediately ordered a SLED investigation.

46. Whitley then met with SLED Special Agent Ryan Kelly and Ethics Commission investigator Jimmy Bagnall at Whitley's office the following month. Both agents seemed skeptical of the investigation. In the coming months, Whitley spoke to investigators multiple times to respond to questions and it appeared they had unearthed the illegality of what Kovach and others had done, as they seemed to be taking the investigation very seriously. Moreover, as she admitted under oath, Kovach lied to SLED investigators when interviewed, which further caused SLED to have to seek information to prove their case. As emphatically stated by the Attorney General, and admitted to by Kovach, the more they searched the more crimes they found.

47. During the course of the investigation, the Board refused to take action, continued to let Kovach and Thompson work and kept stating that there had been no indictment and that

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they did not want to know what she did and would defer to the investigation. The Board absconded their elected duties. Accordingly, interested citizens began reading emails of Kovach and others during the public comment section so the Board could not claim ignorance of Kovach's actions. Hysterically, Kovach claims in her lawsuit that the reading of her emails defamed her – that is, her own words defamed her. If true, Kovach, as with everything else, has no one to blame but herself.

48. Eventually, Kovach was indicted for five crimes: an ethics violations indictment, 2 forgery indictments, a perjury indictment, and misconduct in office for acts of public dishonesty. Contrary to Kovach's frivolous complaint, these 5 indictments were all legitimate and not bogus and indeed Kovach admitted under oath (and subject to perjury) to the crimes and facts of each of the five indictments as part of her guilty plea.

49. In fact, in the sentencing, the Attorney General set forth the case as follows:

As the indictments state, Ms. Kovach is the communications director for the Berkeley County school district, and this case arises out of a 2012 bond referendum for some two hundred million dollars roughly for the schools. But I want to start by saying very clearly that this case has nothing to do with whether or not the bond referendum was a good idea; **nor, is this a case of a school official who got overzealous and unknowingly overstepped the line. This case is about someone who intentionally and knowingly broke the law and broke the ethics act.** And that ethics act rule that Your Honor just read of course, governs the fair operation of elections and it provides that a government employee cannot use government time and resources to influence the outcome of an election. And [it is there] to insure that both sides are on a level playing field and to insure that the power of the government, that taxpayer's money is not, the thumb is not on one side of the scale or the other. And while a governmental agency to provide information all day long, they can't go from that into the realm of advocacy and that's prohibited by the statute.

This case came to us, as many cases do, from a complaint from a private citizen . . . we refer that to SLED who does their investigation. And I do want to acknowledge SLED Agent Ryan Kelly who is here today who is the lead investigator, as well as Jimmy Bagnal, investigator with the Ethics Commission who are the two investigators that worked on this case. And they do their investigation and then they provide that information to the prosecuting office and we make our decision based on that information.

... I think I told Your Honor at the last hearing that when we're looking at these

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types of cases, how do we decide where something is just purely a civil event or where it moves into the criminal. And over the years in doing these type of cases we've developed sort of a three step, and the first thing we look at is knowledge of the law. We're looking for somebody who knows the law because we're not going to charge someone criminally who overstepped a line that they didn't know was there. And secondly, we're looking for intentional violations of that law. And then finally we're looking for some evidence of criminal intent which comes as Your Honor is familiar with and a motive that can come with lies, it can come with cover-ups, misrepresentations that show that the person knew what they were doing was wrong and against the law. We don't charge people for innocent mistakes and mere inadvertence. So the two counts that Your Honor has, again, is the global misconduct conduct in office, which again encompasses all the conduct that was charged and then the underlying ethics act count as well.

And in talking about the three steps that I just referred to, the first thing, of course, is knowledge of the law. And in this particular case we have ample evidence that Ms. Kovach was aware of these ethics act rules, and we know that in part from the fact that in the months leading up to the referendum they distributed, and indeed Ms. Kovach herself distributed, a referendum do's and don't's sheet ... And they had this prepared by a law firm. They sent out to all employees to advise them of this law, which is one of the counts that Ms. Kovach is pleading to. And in that particular Do's and Don't's document it says, this law is strictly enforced, you can't influence an election. And they define that as telling people how to vote yes or no, or soliciting support or opposition for one side or the other in the bond referendum. And then on the side there's actually a little check list of things you can't do. It says you can't print things with government resources and on government time. You can't send emails on county time. You can't use county email accounts and county equipment to send emails in advocacy. You can't organize rallies. You can't promote support for or against using government resources and time; and as the facts in this case show, Ms. Kovach did all of those. And the evidence of that, the evidence comes primarily from the emails of Ms. Kovach herself. She would say things like, well, I don't want to end up in Columbia before the Ethics Commission, and on at least two occasions told vendors who had submitted for payment to the District for items that were clearly campaign items, she told them you've got to take off the invoice reference to the campaign 'cause I can't pay it if it's got that on there. So she's very well aware of the law. ... So that's the first prong which is knowledge of the law, and we had ample evidence that Ms. Kovach with aware of these rules.

So the second prong, of course, is whether there are intentional violations of that law. And initially I just want to go through a few of the miscellaneous offenses that we were able to discover in the evidence, and there are multiple emails throughout August and September 2012 where she was writing pro-referendum scripts for individuals to give at various community meetings, not just information, but blatant advocacy. There are multiple million emails where she -- and this starts in July of 2012 through September of 2012, at least five, where it relates to her having her secretary print Yes for Schools with a campaign logo

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print fliers, stickers and other paraphernalia on the government copiers and government colored copiers and that sort of thing. There are emails and witness statements that talk about using the government, the District warehouse, to store pallets and yard signs for the campaign. There are emails where she talks about putting a trailer or a portable classroom on tour to generate support because of the, in particular on Daniel Island, to create the sort of fear of the dreaded trailer as she put it in the email. And then, of course, there was organizing Yes for Schools events and indeed getting school children sort of as window dressing for some of those events. So this is not just an isolated event. This is a continued and along standing course of conduct. . . .

I kind of want to talk a little bit about prong three, about criminal intent and the motive. And what was the motive here? Well, again, her emails show a couple of things as to motive and the first thing is that she felt that her own career and Doctor Rodney Thompson's career would be advanced by, and by a success in this referendum. On 8/13/12 she wrote that Mr. Thompson, or Doctor Thompson, was very personally invested in this and knows the length of his term as superintendent very much depends on this referendum. And on 9/17/12, that's right before she started to put together this campaign video, she noted in an email that this referendum is the ultimate test of her ability to succeed or fail. And the second aspect of the motive was, is that she was very frustrated by the campaign committee itself. She initially was in control even writing in July of 2012 that the campaign is being run internally from my district desk, from my desk. But ultimately, the campaign committee individual started to assert themselves, and she would frequently criticize them by saying sarcastically finally the committee is taking a role, there's no one who will take a lead. And she would complain about -- in September 30th, 2012, she complain[ed] about poor leadership from the chamber as she called it, **and stated to Doctor Thompson that we can win this but we're gonna have to pull out every trick in the book.** And then finally on August 8th, 2012, she's complaining that the campaign committee has marginalized her and Doctor Thompson, that they told her that it's not their campaign, it's our campaign, and that there are to have no involvement and she said that their strategy is broken and we're losing momentum. So she felt that this campaign was necessary for their career, but also felt that she had lost control, and she was very frustrated with the, with the direction the campaign was taking. Additionally, she was aware that the campaign was not flushed with cash. So it is in that context that we look and under those circumstances that Amy Kovach decided to use District funds to make a Yes for Schools campaign video.

Now she claimed in her statement to the press, she claimed in her statement to SLED, that she was just making a district marketing video, that she was just giving the campaign separate and unused excess footage and that the campaign essentially had requested this and asked for this. And she claimed in her statements that the signs from Nelson Printing were wanted by the campaign, and she just paid for and then prepared a invoice for them to reimburse her. But the campaign workers deny that they had anything to do or knowledge of this particular video, and her own emails in the investigation itself confirm that.

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But in 9/12, on 9/12/2012 she sends an email to Nelson Printing asking them for foam core signs and banners that are going to be held by students; and these are Yes for Schools banners. And again, there's been some who have said that that's all this case is about; but as Your Honor has already described and we'll describe further, this case is much broader than just that invoice for 259-dollars. So she gets and pays for the Yes for Schools banners to be held by the students and the next thing she does is contact Go To Team video and particular, a videographer by the name of Jason Bennett. And her emails and Jason Bennett's emails are very interesting in as much as, in particular Mr. Bennett emails after his meeting with Ms. Kovach, and he says, I just met with Amy Kovach, she's going to need two videos, one video is a specific support for the vote video and the other using the same content will be a re-edit for general purposes. She says the cost for the project is 4800-dollars but we need to split it into two estimates of 2400 and the reason for that is, is her budgetary permissions, she's only able to write checks up to 2500-dollars without having to go to committee. **So that right there refutes exactly what Amy Kovach told the press until SLED clearly the understanding** was, we're making two videos, we're making a campaign video, and he was expressly asked to structure those transactions or we call it smurfing transactions so that would come under her 2,400-dollar limit. As we will see under the procurement code, if she's going to spend more than 2500-dollars she has to get three bids and she has to choose the lowest bid. So Jason Bennett then provides the estimate, and this is on page two of the document that I just handed up. But it has on the two estimates that are smurfed, that are structured, it has on there the first ones have support for the vote on it. And her secretary, Ms. Kovach's secretary says, I thought we couldn't pay for anything with the bond referendum. So they get that fixed, and ultimately sends two more estimates. Mr. Bennett sends two more estimates that are exactly the same except they've removed any reference that is for support for the vote. So even Mr. Bennett, when he sent the estimate it was just for support for the vote; that was the primary project. And again, the same thing happens on October 3rd with Nelson Printing when they sent their invoice it has Yes for Schools signs on it and she emails back Nelson Printing and says, you got to change Yes for Schools ... 'cause I can't pay it like the way that you've written it. So on September 19th Ms. Kovach goes ahead and pays Go To Team 2,500-dollars with her District P card, her procurement card, her District credit card, and then she arranges for the shooting, for the shooting of the video and gets some classes and some school children available. And on 9/21/2012, on September 21st the video is shot. And Your Honor, in that document I provided to you I provided stills of that particular video, and the only difference between the campaign video that was the initial one produced in the subsequent District video is that the campaign video contains an extra 44 seconds of various children and we provided those shots, various children either in groups or by themselves either holding up a Yes for Schools banner or saying Yes for Schools or say Yes for Schools. The school children, of course, were used as props in this political ad. And some of them are very, very young and one on page 11, and you can tell they can't really tell what's going on with what they're being asked to do. So the shooting is taking place on September 21st. She's already paid half the bill on September 19th, but she runs into a problem. And the problem is, as I said, she can't spend more than 2500 without going through the procurement code which requires three bids and selection of the lowest bid. And she writes the

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finance person, well, don't worry about it, I had them split it into two invoices, one for shooting and one for editing, and the finance people say you can't do that. You can't do that, you can't structure it like that, we're gonna have to do that. And they say hold off on any commitments until you get the three bids. Well, she's already paid for it, half of it, and she's already shot the video so what does she do at that point. Well, she promptly then starts to generate sham estimates. Even though she's already paid for it, the video has already been shot, she sent out emails to various vendors -- these vendors have no idea they're wasting their time -- and says, hey, I've got this project coming up, I need an estimate. And so she starts to generate those various sham estimates starting on September 26. She does that on September 26. That same day she gets the campaign video from Jason Bennett. And in that, the email where she acknowledges getting that, she says, I need you to take the District logo off of the campaign version that has Yes for Schools on it because we don't want to be accused of advocating. So she tells him that right then and there, you got to take that off of there. So, even though she was told by the financial department that you can't smurf these transactions and told to hold off, she goes ahead and generates these sham estimates and then on October 1st pays the rest of the money, or actually asks Jason Bennett, I need you to wait until after October 1st to bill the other 2500, okay. So they run the second payment of 2500 on October 8 and then they run the final payment of \$300 on October 9 to keep it underneath that 2500 limit, even though she's been told by finance what needs to happen. Soon, October 5th she receives an estimate from a vendor who, again, doesn't know they're wasting their time. "Dear Ms. Kovach, this is our estimate to you for this project," that's already happened. And then on October 9th there's a board meeting where a board member, a Donna Marino, raises questions about the video, about hearing about a video that might have been done with school funds or something to that effect. And within a couple of days Ms. Kovach is contacting these vendors saying or contacting vendors saying, hey, I really need to get that estimate in, I've got a meeting set up to make a decision on it and I need you to get that estimate in. But the reality is, is that she needed to get that estimate in because some public light was being shined on it and the paperwork needed, finance was requesting, needed to be turned in. So she's gotten the sham estimates from the other two vendors; but the problem is, is that she can't turn in the estimates from Go To Team because the ones that she got were smurfed, they were split into two. ...[so] she manufactures a false and fictitious document. And how do we know that? Your Honor, if you look at the exhibit that we've provided, or excuse me—I thought I had it in front of me. Oh, here it is. ... So she turns in that particular estimate for 5300-dollars as the estimate for the procurement code from Go To Team. And in reviewing a number of those documents and Mr. Petrano was going through those and ultimately looked at that one; and as we looked at it, we noticed that the text in the middle is kind of eschewed down to the side and it's in a different font than the rest of the document and that document is printed with an accounting software. And we realized that the accounting software couldn't print that document; there's no way for it to print it. It just could not do that. It could not change the font like that. It cannot change the numbering like that. And we also realized that the text in the middle to the 5300-dollars is in the default font for Word and Outlook that you normally would have. And so what it appears to, what appears to have been done there is that somebody took the original estimate, added up to the 5300-dollars, and scotch

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taped that on there, and then ran it through the copier. And the other thing we are able to tell as well is that the logo is washed out which also indicated that it was washed through a copier. Additionally, if you look at the text of that particular document it was as if someone was copying the text from the original two estimates and didn't get the text right. It says post production addition, whereas, the original one said post production editing. Post production addition doesn't make any sense. It says two days of shooting with a camera man and high definition camera and audio gear, and the original one said high definition camera and audio gear. High definition camera and audio gear is not a thing. So we went to the vendor, to Go To Team, and we said is this your estimate, is this your document, and they said, no, that's not ours, we couldn't make that if we wanted to, our software won't do it. So ultimately, she submitted this false and fictitious document, again, to cover up what had already been done and that was the payment of this campaign video.

And just real quick, I know in this particular case our motives have been questioned to some extent. And I think this is a valid point to show that when we look at cases like this and we realize that we have a case where it appears as someone had intentionally and knowingly violated the law; but like in other cases that we've had recently our motives get questioned, our integrity gets questioned, sand gets thrown in our face. But the problem was, was that not only do we know we had a valid case but the more we looked, the more we found. And if, because people throw sand in our face we were to just slink away, (a) we would not be doing our job. But secondly, that would become M.O, all you'd have to do is just throw sand in the face of the Attorney General's Office and SLED and they will slink away. And if that were case, then none of these cases would ever get prosecuted, and we wouldn't be doing our duty and we wouldn't be doing our job. The reality was, is that the more we looked, the more we continued to find.

So, ultimately these allegations were brought to our attention, and SLED goes to the District and said, we'd like a copy of that campaign video and they're like, what video, we don't have a video. And so the District doesn't have it. And we go to the campaign and they're saying, well, we never had any, we never had it, we never had any involvement with this. And we go to the videographer, Bennett. He says, I don't have a copy of it. And so we finally go to the owner and low and behold, finally they find a backup copy some where on a server. So we get that video, we see what's on the video, we read the emails as to how it was created, and we know at that point we've got something we're gonna have to deal with here, we've got a case of somebody intentionally violating the law.

Ms. Kovach says in her interviews that she gave this video to the campaign and it was at their request. And again, they say, we had nothing to do with this and we've never seen it and we never had it. So SLED interviews Ms. Kovach again on November 22nd, 2013, and asks her about paying Nelson Printing for those Yes For School signs that were held in the video; and the ones where she said earlier when she paid the invoice, she said, well, I can't pay this unless you take Yes for Schools out of the invoice. And Ms. Kovach says, well, I prepared an invoice dated October 2nd, 2012, for the campaign to reimburse the District and

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I'll send it to you. And of course, we receive it on about November 25th, 2013, three days after that SLED interview. But the problem is, is again, her secretary says, I don't recall ever seeing that document at the time, I don't recall ever seeing that invoice. The Campaign says, I don't recall ever seeing that invoice. And as we looked at the District servers that document does not appear until November 25th, 2013, even though it's dated October 2nd, 2012 at the appropriate time during the campaign. And indeed, we were able to find a backup of Ms. Kovach's server from February of 2013, and that document was not on that backup either, but it did show up in November of 2013 after she was being interviewed by SLED. So that is the second false and fictitious document that was alleged in the original charges that we presented.

So she ultimately at that particular, at that particular interview on November 22nd, 2013, she gives SLED a detailed timeline about the video; and she says, well, I started getting estimates before the shoot in early September. She says, I picked the lowest of the estimates as I'm required to. She says, that I made sure that the videographer knew that they, that the campaign is only to get unused excess footage. I made sure that, myself, that I looked at it, that footage in those two individual videos was completely separate and distinct and that I verified that myself. And none of that is true at all. The campaign video came first, and the only difference between the campaign video and the subsequent District video is that the District video just doesn't have all the kids yelling Yes for Schools in it. Other than that it's the same exact video, same exact footage, same music, same everything.

So ultimately, Your Honor, she knew the law. She was in control of this campaign. She knew this was good for her career but she got frustrated because it wasn't going the way that she wanted and so she knowingly broke the law. She used government resources to advocate for the Yes for Schools campaign, and then she engaged in a cover up and in lies a misrepresentation of both during and after in order to cover up what she had done. And that's the factual basis, not only for the misconduct in office, for using her government funds to advocate for the campaign and then covering up with dishonesty, as well as underlying substantive offense of using governmental resources to advocate a campaign.

50. Under oath, and subject to perjury, when asked by the court if she agreed with the

above stated facts of the Attorney General: the transcript states:

THECOURT: Ms. Kovach, you agree with the facts as stated by the attorney general?

THE DEFENDANT: Yes, sir.

51. Furthermore, the transcript of the proceedings state, with Kovach under oath and subject

to perjury that:

THECOURT: Are you, in fact, guilty of misconduct in office?

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THE DEFENDANT: Yes, sir.

THE COURT: Are you, in fact, guilty of using public funds to influence an election?

THE DEFENDANT: Yes, sir.

...

THE COURT: All right, I understand. So Ms. Kovach, you fully understand the charges you're pleading guilty to and the potential consequences of this plea?

THE DEFENDANT: Yes, sir.

...

THE COURT: Is the only reason that you're pleading guilty to the use of public funds to influence an election and misconduct in office is because you are actually guilty of those charges?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Under indictment 2014-GS-08-266 charging you with use of public funds to influence an election, how do you, Amy Kovach, plead, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Under indictment 2015-GS-08-1073 charging you, Amy Kovach, with misconduct in office, how do you plead, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Alright. I find there's sufficient factual basis for the plea. I find the defendant has entered into it freely, voluntarily, knowingly. She has had the advice of counsel who she says is well pleased, I will accept the plea. What is her criminal history?

Exhibit SS, (Transcript of Sentencing Hearing)

52. Then, in sentencing the Plaintiff, the Judge stated:

THE COURT: Alright, I've considered the presentations given by the attorney general and Mr. Theos; and even in my limited exposure to this case was 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

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she chose deceit over the truth. The public servants have the duty and the obligation to not just be good as the rest of the public, but to behave better. Thank God most public servants do that, and most of them serve very proudly. But Ms. Kovach has not upheld her position and tried to sway the will of the public who hired her in her position to try to sway an election, and I take that very seriously.

... The sentence of the Court, please stand, under indictment 2015 -- 2014-GS-08-266, under use of public funds to influence election, the sentence is that you be committed to the State Department of Corrections for a period of one year and that you pay a fine of 25,000-dollars. That is suspended upon your paying a 25,000-dollar fine and serving two years probation. On the indictment 2015-GS-08-1073, on the charge of misconduct in office, the sentence is that you be committed to the State Department of Corrections for a period of five years, and that is suspended upon two years probation. These sentences shall run concurrently. Thank you.

53. Thereafter, Ms. Kovach left the courtroom and, contrary to her under oath acceptance of her criminal acts, blamed her accusers for her situation and stated that she forgave her accusers for their trespasses. As a convicted criminal, she offered absolutely no apologies to those she had committed crimes against, in her position of trust, including her crimes against the public, against her colleagues at the district, and worst of all, against the children of Berkeley County. Instead, she blamed others.

54. Then, instead of "forgiving those that trespassed against her," she filed this frivolous and sanctionable lawsuit, wherein she alleged that Whitley and others conspired against her with the Attorney General. Most of her allegations are directly contrary to her under oath plea. She does however factually show in her lawsuit that she and Thompson worked in conspiracy together regarding their actions in this case, including those against Defendant Whitley. Based on these direct contradictions, her lawsuit is either frivolous on its face, or she has committed perjury. In actuality, it is both frivolous and demonstrates she committed perjury.

55. Moreover, she now claims damages, including emotional injury from stress, and blames Whitley and others. However, on May 14, 2013, the criminal Plaintiff stated that she was proud of being on the front page of the Post & Courier for her actions related to the bond

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Referendum campaign and the subsequent investigation after an expose piece ran on many of her illegal activities for which she eventually pled guilty. To the extent Kovach has had further mental disease and gastrointestinal disease problems, they flow directly from being caught and prosecuted for crimes she chose to commit.

CAUSES OF ACTION

I. DEFAMATION

56. Whitley incorporates the allegations of Paragraphs 1 through 55 of the above-stated facts and Paragraphs 1 through 96 of his Answer, as if stated herein verbatim.
57. On Sunday, November 4, 2012, just prior to the Tuesday November 6 Referendum election, Kovach and Thompson called Brenda Rindge with the Post & Courier to tell her they had a major story and she needed to be available at 8:00 pm that night. Kovach and Thompson were waiting, upon information and belief, to give misinformation that would make Whitley appear to be unethical instead of them and deprive him of the opportunity to respond.
58. Specifically, Kovach and Thompson committed knowingly false statements, or statements with actual malice, and defamed Whitley by accusing Whitley of not properly filing a statement of political organization with the South Carolina Ethics Commission and violating the South Carolina Ethics Act.
59. This was a knowingly false statement, committed with actual malice (knowledge of its falsity or reckless disregard of the truth) and Whitley provided correspondence from the South Carolina Ethics Commission that stated "There is no filing requirement for this committee."
60. Nevertheless, Kovach and Thompsons' defamatory statements were published on Page 1A of the Post and Courier on November 5, 2012.

61. Kovach and Thompson further defamed Whitley by denying their criminal acts throughout the campaign and during the investigation, by knowingly lying about their acts, and by stating that Whitley was incorrect – all the while, they knew Whitley was telling the truth and they had indeed done those acts Whitley claimed them to have done.
62. Kovach and Thompson intended to have Whitley look unethical with her November 4th allegations and libel and her statement was false and made with actual malice. Further, they published her defamatory statement directly to the Post & Courier reporter regarding Whitley and Whitley is entitled to presumed damages.
63. Kovach and Thompson committed defamation, per se, by implying Whitley to be unfit for his trade or profession.
64. Kovach and Thompson directly claimed Whitley was unethical and had violated the South Carolina Ethics Act, which they intended “to impeach the honesty, integrity, virtue, or reputation” Whitley in order to “expose him to public hatred, contempt, ridicule, or obloquy, or to cause him to be shunned or avoided, or to injure him in his office, business, or occupation.”
65. Kovach and Thompson committed Actual Malice, or Constitutional Malice, as they knew of the falsity of her statements or recklessly disregarded the truth.
66. Further, Kovach and Thompson acted with actual and implied malice.
67. These defamatory acts by Thompson and Kovach have caused malicious attacks on social media and in the newspaper of Whitley and damaged Whitley’s reputation. During the course of the three years, the majority of the public has come to despise the criminal acts of Kovach and resented her for knowingly causing hundreds of thousands of dollars to be spent on her defense, but during those years Whitley’s reputation has been damaged until the truth of Kovach’s lies came to light. Further, Kovach continues to defame Whitley stating to family members and friends and educators that Whitley has a close friend in the

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Attorney Generals Office, which is a knowingly false statement, and that she did nothing wrong, which are also knowingly false statements. Thus, within a certain segment of the public, Whitley continues to have his reputation attacked based on the defamatory statements of Kovach and to suffer embarrassment and humiliation due to damage to his reputation.

II. QUANTUM MERUIT

68. Whitley incorporates the allegations of Paragraphs 1 through 67 of this Counterclaim and Paragraphs 1 through 96 of his Answer, as if stated herein verbatim.

69. Whitley has standing as a taxpayer of Berkeley County.

70. Criminal Plaintiff Kovach has received a benefit the retention of which would be unjust if not paid for.

71. Further, Kovach was paid her \$75,000.00 per year salary for a year and a half while on administrative leave for her indictments. She claimed to have acted in good faith and applied for criminal attorney fees to be paid for, which totaled \$303,000.00

72. As pointed out by the sentencing judge, Kovach received her salary and attorney fees and during that entire time, she knew she had committed crimes and lies and attempted to cover-up her crimes. Accordingly, her crimes could not be in "good faith."

73. Moreover, even if her acts were in good faith, it is illegal for Kovach to receive public monies for a private purpose – her criminal defense.

74. Kovach received the benefit of her salary and attorney's fees from the general fund of Berkeley County, which is funded by the Defendant, as a taxpayer of Berkeley County. Thus, the Defendant conferred a benefit on the criminal Plaintiff.

75. The criminal Plaintiff realized the benefit of the salary and fees.

76. The retention by the criminal Plaintiff of the more than \$415,000.00 of taxpayers' money under the condition of her conviction makes it unjust for her to retain these monies.

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77. The doctrine of quantum meruit permits recovery by the taxpayers for Plaintiff's unjust enrichment.

78. Plaintiff was well aware that the Attorney General had authored opinions that these monies were illegally received by the Plaintiff and that a taxpayer could bring suit for return of the funds. See Exhibit TT, (Attorney General Opinions).

79. Accordingly, the taxpayers should have those funds returned by the convicted Plaintiff.

80. Further, the taxpayers are entitled to prejudgment interest in this claim for quantum meruit.

III. MONEY HAD AND RECEIVED

81. Whitley incorporates the allegations of Paragraphs 1 through 80 of this Counterclaim and Paragraphs 1 through 96 of his Answer, as if stated herein verbatim.

82. Whitley has standing as a taxpayer of Berkeley County.

83. The taxpayers of Berkeley County, including Whitley, had in excess of \$415,000 as a sum of money in its public coffers.

84. The Criminal Plaintiff Kovach received in excess of \$415,000 and the taxpayers, including Whitley, bring suit to get the monies back.

85. The pecuniary benefit of \$415,000 that the criminal Plaintiff Kovach received belongs back to the public coffers.

86. In equity and good conscience, the criminal Plaintiff ought to reimburse to the taxpayers the salary she received and attorney's fees received for which she has now pled guilty.

IV. CIVIL CONSPIRACY

87. Whitley incorporates the allegations of Paragraphs 1 through 86 of his Counterclaim and Paragraphs 1 through 96 of his Answer, as if stated herein verbatim.

88. Kovach and Thompson and potentially others to be determined in discovery came together for the purpose of injuring Whitley and caused special damages.

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89. Among the many acts of conspiracy, Kovach and Thompson worked together to harm Whitley's reputation by stating false information to the Post & Courier that Whitley violated ethical acts and by knowingly denying their own criminal behavior.
90. Moreover, they worked together to have, upon information and belief, a contractor for Yes 4 Schools FOIA Whitley and his mother's emails to humiliate and conspire and threaten Whitley.
91. Further, they conspired to lie and cover up their actions to not only keep their criminal activities from coming to light but to also cause harm to Whitley.
92. As a result of their conspiracy, Whitley suffered embarrassment and great stress related to his reputation. Further, Whitley spent hundreds of hours proving the validity of his complaint and refuting their conspiracy, which took away from his practice of law at a great cost to his practice.

V. DECLARATORY JUDGMENT

93. Whitley incorporates the allegations of Paragraphs 1 through 91 of his Counterclaim and Paragraphs 1 through 96 of his Answer, as if stated herein verbatim.
94. Whitley has standing as a taxpayer of Berkeley County.
95. It is illegal to use public monies for a private purpose.
96. Criminal defense is a private purpose.
97. Notwithstanding, SC Code's allowance of payment of an attorney for acts in "good faith," Kovach admitted her acts were not in good faith and, therefore, even if that statute was constitutional, it does not apply herein.
98. Criminal Plaintiff Kovach has received a benefit the retention of which would be unjust if not paid for.

99. Further, Kovach was paid her \$75,000.00 per year salary for a year and a half while on administrative leave for her indictments. She claimed to have acted in good faith and applied for criminal attorney fees to be paid for, which totaled \$303,000.00.
100. As pointed out by the sentencing judge, Kovach received her salary and attorney fees and during that entire time, she knew she had committed crimes and lies and attempted to cover-up her crimes. Accordingly, her crimes could not be in "good faith."
101. Moreover, even if her acts were in good faith, it is illegal for Kovach to receive public monies for a private purpose – her criminal defense.
102. Kovach received the benefit of her salary and attorney fees from the general fund of Berkeley County, which is funded by the Defendant, as a taxpayer of Berkeley County. Thus, the Defendant conferred a benefit on the criminal Plaintiff.
103. The criminal Plaintiff realized the benefit of the salary and fees.
104. The Court Must declare that Kovach's monies be returned to the public coffers.

THIRD PARTY COMPLAINT AGAINST RODNEY THOMPSON

DEFAMATION

1. Whitley incorporates the allegations of Paragraphs 1 through 104 of his Counterclaim against Plaintiff Amy Kovachs and Paragraphs 1 through 96 of his Answer, as if stated herein verbatim.
2. On Sunday, November 4, 2012, just prior to the Tuesday November 6 Referendum election, Kovach and Thompson called Brenda Rindge with the Post & Courier to tell her they had a major story and she needed to be available at 8:00pm that night. Kovach and Thompson were waiting, upon information and belief, to give misinformation that would make Whitley look to be unethical instead of them and did not want him to have an opportunity to respond.

3. Specifically, Kovach and Thompson committed knowingly false statements, or statements with actual malice, and defamed Whitley by accusing Whitley of not properly filing statement of political organization with the South Carolina Ethics Commission and violating the South Carolina Ethics Act.
4. This was a knowingly false statement, committed with actual malice (knowledge of its falsity or reckless disregard of the truth) and Whitley provided correspondence from the South Carolina Ethics Commission that stated "There is no filing requirement for this committee."
5. Nevertheless, Kovach and Thompsons' defamatory statements were published on Page 1A of the Post and Courier on November 5, 2012.
6. Kovach and Thompson further defamed Whitley by denying their criminal acts throughout the campaign and during the investigation, by knowingly lying about their acts, and by stating that Whitley was incorrect – all the while, they knew Whitley was telling the truth and they had indeed done those acts Whitley claimed them to have done.
7. Thompson intended to have Whitley look unethical with his November 4th allegations and libel and his statement was false and made with actual malice. Further, he published his defamatory statement directly to the Post & Courier reporter regarding Whitley and Whitley is entitled to presumed damages.
8. Thompson committed defamation per se by implying Whitley to be unfit for his trade or profession.
9. Thompson directly claimed Whitley was unethical and had violated the South Carolina Ethics Act, which he intended "to impeach the honesty, integrity, virtue, or reputation" Whitley in order to "expose him to public hatred, contempt, ridicule, or obloquy, or to cause him to be shunned or avoided, or to injure him in his office, business, or occupation."

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10. Thompson acted with Actual Malice, or Constitutional Malice, as he knew of the falsity of his statements or recklessly disregarded the truth.
11. Further, Thompson acted with actual and implied malice.
12. These defamatory acts by Thompson have caused malicious attacks on social media and in the newspaper of Whitley and damaged Whitley's reputation. During the course of the three years, the majority of the public has come to despise the criminal acts of Kovach and resented her for knowingly causing hundreds of thousands of dollars to be spent on her defense, but during those years Whitley's reputation has been damaged until the truth of Kovach's lies came to light. Whitley continues to have his reputation attacked based on the defamatory statements of Thompson and to suffer embarrassment and humiliation due to damage to his reputation.

CIVIL CONSPIRACY

13. Whitley incorporates the allegations of Paragraphs 1 through 104 of the foregoing Counterclaim against Plaintiff Amy Kovachs, Paragraphs 1 through 96 of his Answer, and Paragraphs 1 through 12 of this Third Party Complaint as if stated herein verbatim.
14. Kovach and Thompson and potentially others to be determined in discovery came together for the purpose of injuring Whitley and caused special damages.
15. Among the many acts of conspiracy, Kovach and Thompson worked together to harm Whitley's reputation by stating false information to the Post & Courier that Whitley violated ethical acts and by knowingly denying their own criminal behavior.
16. Moreover, they worked together to have, upon information and belief, a contractor for Yes 4 Schools FOIA Whitley and his mother's emails to humiliate and conspire and threaten Whitley. In fact, the conspired to threaten and use the emails against Whitley.
17. As a result of their conspiracy, Whitley suffered embarrassment and great stress related to his reputation. Further, Whitley spent hundreds of hours proving the validity of his

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complaint and refuting their conspiracy which took away from his practice of law to great cost to his practice.

WHEREFORE, having fully answered the Plaintiff's Complaint and asserted the foregoing defenses and counterclaims and third party claims, this Defendant respectfully requests:

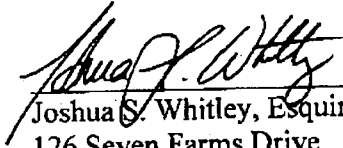
- (1) a trial by jury of twelve;
- (2) this Court to dismiss Plaintiff's claims with prejudice as to this Defendant and enter judgment in his favor and against Plaintiff and the Third-Party Defendant; and
- (3) this Court to sanction Plaintiff and her counsel for the filing of a frivolous lawsuit, and award this Defendant its costs and expenses, including attorney's fees incurred in this matter and grant whatever additional relief the Court deems appropriate.

[SIGNATURE PAGE TO FOLLOW]

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Respectfully submitted,

SMYTH WHITLEY, LLC



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(Pro hac vice pending)

November 3, 2015
Charleston, South Carolina

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STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Amy Kovach,

Plaintiff,

vs.

The Berkeley County School District,
Joshua S. Whitley, Terry Hardesty, Scott
Marino, Karen Whitley in her Individual
Capacity, and The Berkeley County
Republican Party,

Defendants.

) IN THE COURT OF COMMON PLEAS

) C.A. No.: 2015-CP-08-2380

) **DEFENDANT JOSHUA S. WHITLEY'S**
) **MOTION FOR SANCTIONS AGAINST**
) **PLAINTIFF'S COUNSEL AND BRIEF IN**
) **SUPPORT OF MOTION FOR SANCTIONS**
) **AGAINST PLAINTIFF'S COUNSEL**

FILED
15 NOV -3 AM 10:09
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

PLEASE TAKE NOTICE the Defendant Joshua S. Whitley ("Whitley" or "Defendant") hereby moves this Honorable Court, pursuant to Rule 11 of the South Carolina Rules of Civil Procedure and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10, *et seq.*, within ten (10) days or as soon thereafter as can be heard, for an Order sanctioning Plaintiff's counsel Nancy Bloodgood, Esq. ("Bloodgood") for filing a false and frivolous lawsuit meant only to harass the Defendant and which is utterly contrary to the convicted criminal Plaintiff's under oath testimony before this Court. As an Officer of the Court, Bloodgood's conduct is sanctionable because, in short, she either failed to review the August 28, 2015 criminal sentencing transcript of her client, or chose to ignore it, choosing instead to file a frivolous claim based solely on her client's patently false rendition of the facts.

BACKGROUND

Defendant moves for sanctions against Bloodgood because Plaintiff's claim against him for civil conspiracy is vexatious, devoid of factual support, and reflects an abject failure on the

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part of Bloodgood to investigate the factual basis for the claim and the controlling legal authority.

Plaintiff is the former Director of Communications and Community Relations for the Berkeley County School District ("BCSD"). Beginning in 2012, Whitley, a private citizen and taxpayer in Berkeley County, observed misrepresentations and questionable fundraising efforts by Plaintiff and other BCSD officials. It appeared to Defendant that these officials were in violation of Section 8-13-1346 of the South Carolina Code of Laws, which prohibits the use of public funds to influence an election. Defendant investigated the matter by seeking access to relevant documents from the BCSD through the South Carolina Freedom of Information Act ("FOIA"), pursuant to which "*any person* has a right to inspect or copy any public record of a public body..." S.C. Code Ann. § 30-4-30 (emphasis added).

Upon review of the documents produced under FOIA - in particular, emails from Plaintiff in which she actively engaged in campaigning in favor of a Referendum in violation of the law - Plaintiff's misconduct was manifest. Accordingly, Defendant took his concerns to the Attorney General, and the South Carolina Law Enforcement Division ("SLED") conducted a thorough investigation. SLED's investigation resulted in six indictments filed by the Attorney General, including five indictments against Plaintiff. She was charged with engaging in misconduct in office in violation of the common law of South Carolina and the criminal use of public funds to influence an election in violation of Section 8-13-1346 of the South Carolina Code of Law. She was also charged with two counts of felony forgery because of her efforts to conceal her criminal activity and one count of perjury related to fraudulently conducting procurement matters. Plaintiff entered a plea of guilty to the misconduct in office and ethics charges during a sentencing hearing on August 28, 2015, at which time she admitted that she knew when she committed her crimes that her actions were in violation of the law. As a part of her guilty plea,

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she also admitted facts supporting the two felony forgery charges and the perjury charge related to her efforts to cover up her misconduct.

Less than two months after entering her guilty pleas, Plaintiff, by and through Bloodgood, filed the Complaint in the instant action in which she alleges, *inter alia*, that Defendant, Joshua S. Whitley ("Whitley" or "Defendant") along with the Berkeley County School District, Terry Hardesty, Scott Marino, Karen Whitley in her Individual Capacity, and the Berkeley County Republican Party "conspired with each other to harm [her]." (Complaint, ¶ 159.) Her conspiracy claim lacks any factual support. As Plaintiff's Answer, Affirmative Defenses, Counterclaims, and Motion to Dismiss (all filed simultaneously herewith) demonstrate, no reasonable attorney would file this claim against this Defendant on behalf of this Plaintiff. The facts alleged in the Complaint are in direct contradiction to those to which Plaintiff agreed *under oath* during her sentencing hearing on August 28, 2015. Bloodgood either failed to review the August 28, 2015 transcript or chose to ignore it, choosing instead to file a frivolous claim based solely on her client's patently false rendition of the facts.

Plaintiff's Complaint reflects counsel's complete disregard for the obligation to refrain from filing a pleading that lacks ground to support it. It represents the very sort of conduct Rule 11 is intended to deter. The Complaint lacks any factual and legal basis, and its filing was not for a proper purpose; instead, it was unreasonable, vexatious, improperly motivated, and intended to harass. The Court should therefore order the dismissal of the case and award Defendant his costs and attorneys' fees in accordance with Rule 11. Furthermore, because no reasonable attorney would believe that Plaintiff's civil conspiracy claim is reasonably founded or warranted under existing law, the Court should award sanctions pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Action, S.C. Code Ann. § 15-36-10, *et seq.*

ARGUMENT

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I. SANCTIONS AGAINST BLOODGOOD ARE WARRANTED BY RULE 11.

Rule 11 provides that the signature of an attorney on a pleading “constitutes a certificate by him that he has read the pleading... and “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.” SCRCP 11. If the pleading is signed in violation of the Rule, the court 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...including a reasonable attorney's fee.” *Id.*

The conspiracy claim Bloodgood filed against Whitley had no “good ground to support it.” The sum total of the conspiracy allegations against Defendant in Plaintiff’s fourth cause of action is as follows:

- He 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.)
- He 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.)
- He 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.)
- State Senator Larry Grooms, who sat in the front row at Plaintiff’s criminal case hearings and “acknowledged Defendant Joshua S. Whitley’s actions towards Plaintiff when he stated publicly, ‘Josh has got the goods on her.’” (Complaint, ¶ 163.)

- He exchanged emails with his mother, Defendant Karen Whitley, regarding the lease of Karen Whitley's private property while Karen Whitley was at work. (Complaint ¶ 168.)
- He 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.)
- He "threatened to sue volunteer Campaign Coordinator Co-Chair Jane Pulling if she continued to support Plaintiff." (Complaint, ¶ 171).
- He "bragged publically that he hoped to harm the School District." (Complaint, ¶ 172).
- He "issued multiple FOIA requests for emails of other BCSD employees who publically expressed support for Plaintiff." (Complaint, ¶ 173).
- He "knew and encouraged his mother to use public resources while she was working to lease her personal property which personally benefited her." (Complaint, ¶ 174).

Thus, the only actions that Bloodgood alleges that Whitley and others "conspired with each other" to do was to (1) file a complaint with the Attorney General, and (2) ensure a Resolution was passed by the Berkeley County Republican Party, LLC encouraging the Attorney General to prosecute Plaintiff, both of which these Defendants were within their rights to do. Bloodgood alleges that false statements were made to SLED and the press, but she fails to identify any such statements. She complains that Defendant sought information through FOIA, which is a right preserved to any person under South Carolina law § 30-4-30 (emphasis added). She asserts that Defendant violated Rule 3.6 of the Professional Rules of Conduct, which is clearly inapplicable to Defendant's speech as a concerned private citizen/taxpayer and does not prevent Defendant from exercising his First Amendment rights. Moreover, the unsupported allegation appears to be meant to harass Defendant and meant for leverage in a lawsuit, as she

clearly ignored that Plaintiff's criminal counsel did indeed comment in the press during the investigation and post-indictment.

In any event, in light of Plaintiff's guilty plea, there is no doubt that Defendant's concerns - which prompted the FOIA request, the complaint to the Attorney General and the efforts to prosecute her, as well as his protected speech - were well founded. Further, Defendant is immune from liability for his good faith reporting of Plaintiff's criminal activities and, as a citizen, he enjoyed a qualified privilege in his reports of "judicial records and proceedings and other official acts, reports, and records." *White v. Wilkerson*, 328 S.C. 179, 186, 493 S.E.2d 345, 348 (1997); *Jones v. Garner*, 250 S.C. 479, 158 S.E.2d 909 (1968). A person is shielded from liability for publishing information "originally based upon government reports or actions." *Id.* *Carter v. Dozier*, 2011 U.S. Dist. LEXIS 66335, *10 (D.S.C. May 31, 2011). In addition, it is settled law in South Carolina that, "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).

The real purpose behind Plaintiff's Complaint is revenge. Plaintiff seeks to harass and intimidate those who discovered and reported her illegal activities. Bloodgood, as an officer of the Court, has a duty to refrain from filing vexatious pleadings pursued as a means of retribution. She also had an absolute obligation to file a truthful Complaint. Incredibly, although Bloodgood acknowledges in the Complaint that Plaintiff entered a plea of guilty to two of the charges

against her, she failed to review the transcript of the sentencing hearing to determine the extent of Plaintiff's admissions when Plaintiff entered her plea. Before filing her Complaint, Bloodgood had an absolute obligation to order and read the criminal sentencing transcript prior to filing a false Complaint that contradicts the Convicted Criminal Plaintiff's under oath admission to ALL of the facts of ALL five indictments charged against her. Plaintiff's counsel undermines the rule of law and our system of justice by filing a complaint against interested citizens for false acts for which Plaintiff swore under oath to exactly the oppose of what Plaintiff's counsel pleads.¹

A review of the transcript of the sentencing hearing on August 28, 2015 exposes these myriad contradictions and provides conclusive evidence that Bloodgood should be sanctioned for the filing of this Complaint. The attached chart compares the allegations of the Complaint to the facts to which Plaintiff agreed during the August 28, 2015 sentencing hearing. (Exhibit B, attached). In paragraph 38 of the Complaint, Bloodgood alleges that the video Plaintiff was working on was not prepared in anticipation of the Referendum." (Complaint, ¶ 38.) However, during the sentencing hearing, the Court read from the indictment, "Amy Kovach did use public funds to pay for the creation of a campaign video...Is what's stated in the indictment the truth?" Kovach answered, "Yes, sir." (Transcript, p. 8.) The Attorney General then provided a detailed explanation of how Plaintiff paid for the video and for campaign signs for children to hold during the video and how she made false statements to SLED and the press concerning the videos. (Transcript, pp. 13, 17 19, 21, 26-27.) When the Court asked if Kovach agreed with the facts as stated by the Attorney General, Plaintiff answered, "Yes, sir." (Transcript, p. 28.)

¹ The entire sentencing transcript is attached as Exhibit A.

In addition, Plaintiff alleges in her Complaint at Paragraph 40, that she “never personally profited from her position with the [BCSD] and no one has ever alleged that she did.” (Complaint, ¶ 40.) During the sentencing hearing, however, the Attorney General explained that Kovach’s emails show that she was motivated by the advancement of her career. (Transcript, pp. 14-15.) Kovach agreed that those facts were correct as well. (Transcript, p. 28.)

At paragraph 57 of the Complaint, Plaintiff alleges that the “[FOIA’d] emails merely indicated Plaintiff and other BCSD employees were responding to questions about the school bond referendum, providing current information to the volunteer Referendum committee, and preparing Defendant BCSD Board members of public presentations.” (Complaint, ¶ 57.) However, the Attorney General explained that Kovach used her emails on county time for advocacy, organized rallies, promoted support using government resources and time. (Transcript, p. 11.) Kovach agreed with those facts. (Transcript, p. 28.)

Plaintiff alleges at Paragraph 83 of the Complaint that “no public funds were used by Plaintiff to create or pay for any Referendum campaign video” and that “the video Plaintiff finalized for the District in September of 2012 had been started months before the beginning of the Referendum process and for an entirely different purpose.” However, during the sentencing hearing she agreed that she did use public funds to pay for the creation of a campaign video. (Transcript, p. 7.)

Plaintiff asserted at Paragraph 106 of the Complaint that her attorney moved to disqualify the Attorney General after which the Attorney General “retaliated” against her by adding three “completely bogus” additional indictments, including a perjury and forgery charge, which were dismissed. However, at the sentencing hearing, Kovach agreed that she was pleading as indicted to the global law misconduct in office offense “*which covers and incorporates all of the conduct that have been charged at issue*, as well as the original ethics indictments for use of government

funds to influence an election.” (Transcript, pp. 3, 28.) As the Attorney General explained, and Kovach agreed, Kovach submitted a false and fictitious document (an estimate from Go To Team) to cover up the payment of the campaign video. (Transcript, pp. 24, 28.) She also created another forgery, an invoice created after her interview with SLED, which she created in an attempt to cover up the fact that she did not get three estimates for the video as she had claimed. (Transcript, pp. 26-27.) Kovach agreed that she had forged that document as well. (Transcript, p. 28.) And, although Plaintiff claims at Paragraph 111 of the Complaint that the indictment was “false and unfounded,” she agreed at the hearing that she was pleading guilty to facts supporting all five charged indictments, three of which were dismissed only as part of the plea agreement. (Transcript, pp. 3, 10.) Further, despite Bloodgood’s allegation at paragraph 112 that the document was not Plaintiff’s, the Attorney General set forth in meticulous and supported detail exactly how the criminal Plaintiff committed her forgeries and her crimes. Incredibly, after setting forth the exact OPPOSITE of what the Plaintiff Counsel alleges herein, the convicted criminal Plaintiff agreed with the facts as stated by the Attorney General.

Plaintiff also claims in Paragraphs 113 through 117 of the Complaint that she did not “smurf” or split up the cost of an item over time so that the total cost appears to be less than quoted. She claims that there was no smurfing “and the Attorney General knew or should have known there was no “smurfing.” (Complaint, ¶ 114.) However, during the sentencing hearing, the Attorney General outlined precisely how Plaintiff had used “smurfing” to cover up her purchase of the video, and Plaintiff agreed to all of the facts as outlined by the Attorney General, without reservation. (Transcript, pp. 18-25, 28.)

In Paragraph 123, Plaintiff alleges that she “eventually pled guilty to this particular charge because she had to end the criminal proceedings for her own mental health.” (Complaint, ¶ 123.) In fact, she pled guilty to avoid more years from the forgery and perjury

charges and testified to the facts of all of her crimes and that she was pleading guilty knowingly and of her own will. (Transcript, pp. 4, 5-7.)

Having agreed that she is guilty of all of the crimes for which she was charged and to all the facts as laid out by the Attorney General, Plaintiff cannot now seek compensation or punitive damages for an alleged conspiracy in reporting the misconduct to law enforcement or seeking to have her prosecuted for those charges. Thus, not only should the Court dismiss the Complaint against Defendants for the reasons stated in Defendant's Motion to Dismiss, it should award sanctions against Bloodgood for filing the action first place. The Complaint is frivolous as it had no reasonable basis, and the purpose behind it was merely to harass those whose efforts to have Plaintiff prosecuted for her crimes were successful. Bloodgood was obligated to, at a minimum, read the transcript wherein her client admitted to the opposite of what Bloodgood pleads her. She either did not read it, or she blatantly (and without explanation) ignored the transcript, which violates Rule 11.

II. DEFENDANT IS ENTITLED TO SANCTIONS PURSUANT TO THE FCPSA.

In addition to sanctions under Rule 11, Defendant is entitled to sanctions pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 (FCPSA). The FCPSA authorizes an award of attorney's fees in a civil action as a sanction against a party bringing frivolous pleadings, claims, or defenses. The FCPSA allows for sanctions against an attorney, party, or *pro se* litigant for a frivolous claim or defense where the court finds that:

- (a) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
- (b) a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of the civil suit was intended merely to harass or injure the other party; or
- (c) a reasonable attorney in the same circumstances would believe that the case or defense

was frivolous as not reasonably founded in fact or was interposed merely for delay, or was merely brought for a purpose other than securing proper discovery, joinder of proposed parties, or adjudication of the claim or defense upon which the proceedings are based.

S.C. Code Ann. § 15-36-10(C). Sanctions may be awarded under Section 15-36-10 “regardless of whether or not the case has been tried to verdict so long as the trial court finds by a preponderance of the evidence that the party should be sanctioned under the terms of the FCPSA.” *Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 153, 758 S.E.2d 483, 491 (2014).

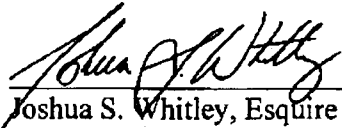
No reasonable attorney would believe that the civil conspiracy claim alleged in the Complaint was reasonably founded or warranted under existing law. Plaintiff entered a plea of guilty and admitted to a series of facts that directly contradicts the facts alleged in the Complaint and completely undermines the conspiracy claim. A reasonable attorney would have reviewed the transcript of the sentencing hearing that took place on August 28, 2015, and she would have known that the factual allegations in her Complaint were barred by her client’s admissions during the hearing. A reasonable attorney would know that the filing of a complaint by concerned citizens seeking prosecution of a person who has admitted to the crimes that the Defendants sought to be investigated could not form the basis for a civil conspiracy cause of action. She would know that these defendants would be immune from such an action and that the reports they made were privileged under South Carolina law. Accordingly, in addition to the sanctions available under the Rule 11, the Court should award sanctions against Bloodgood pursuant to the FCPSA.

CONCLUSION

For the foregoing reasons, Defendant, Joshua S. Whitley, by counsel, respectfully requests that this Court enter an Order awarding him his costs and attorneys’ fees due to the frivolous nature of this action and the vexatious purposes for which it was filed.

Respectfully submitted,

SMYTH WHITLEY, LLC



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Defendant Joshua S. Whitley appearing Pro Se

Jeffrey A. Breit, Esquire

VSb No. 18876

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jbreit@bdbmail.com

(Applied for Pro hac vice)

November 2, 2015

Charleston, South Carolina

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The Honorable W. Jeffrey Young

Dr

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STATE OF SOUTH CAROLINA	)	
COUNTY OF BERKELEY	)	IN THE COURT OF GENERAL SESSIONS
	)	NINTH JUDICIAL CIRCUIT
The State of South Carolina,	)	2014-GS-08-0266; 2015-GS-08-01073
	)	
Petitioner,	)	
v.	)	
	)	PETITION IN SUPPORT OF
Amy Kovach,	)	RULE TO SHOW CAUSE
	)	
Respondent.	)	
	)	

The State of South Carolina, through the undersigned Assistant Attorney General, hereby petitions for order commanding Amy Kovach ("Respondent") to show cause why she 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. The State would show as follows.

I. FACTS

(1) Respondent was indicted by the Berkeley County Grand Jury for five separate charges: 2014-GS-08-00266 (Ethics Act violation), 2014-GS-08-01403 (forgery), 2015-GS-08-1072 (perjury), 2015-GS-08-1073 (misconduct in office), 2015-GS-08-1074 (forgery).

(2) On August 28, 2015, Respondent pled guilty to the Ethics Act violation and misconduct in office. A transcript of that plea is attached as Exhibit A to this Petition.

(3) In return for the plea to the Ethics Act charge and misconduct in office, the State dismissed the two forgery and the one perjury charges. However, it was made clear at the plea that "defendant will be pleading as indicted to the global common law misconduct in

office offense which covers and *incorporates all of the conduct that [has] been charged at issue*" {Ex. A p. 3 ll. 13-16} (emphasis added). Additionally, during the factual basis to which Respondent Kovach agreed to under oath, the State pointed out: "So the two counts that Your Honor has, again, is the global misconduct conduct in office, which again encompasses all the conduct that was charged and then the underlying ethics act count as well." {Ex. A p. 10 ll. 12-16}.

(4) Kovach expressly admitted under oath that the allegations in the indictments were truthful after the Court read them to her, including the statement that she "continuously used public resources and time to influence the outcome of a bond referendum while covering up her actions with dishonesty". {Ex. A pp. 6-7}.

(5) In response to a question from the Court, Kovach agreed under oath with the factual basis that the State had set forth. {Ex. A p. 28 ll. 19-21}. This factual basis encompasses 20 pages in the transcript and included exhibits that were handed to the Court. {Ex. A. pp. 8-28}.

(6) On page 30, Kovach indicated under oath to questioning from this Court that she was in fact guilty of the charges. {Ex. A p. 30 ll. 1-6}.

(7) On page 31, Kovach indicated under oath her desire to plead guilty after being advised by the Court of the possible sentences. {Ex. A p. 31 ll. 1-8}.

(8) On page 33, Kovach indicated under oath to questioning from the Court that she was "pleading guilty to the use of public funds to influence an election and misconduct in office is because [she was] actually guilty of those charges". {Ex. A p. 33 ll. 18-22}.

(9) On pages 34 to 35, Kovach expressly pled guilty under oath to both indictments.

{Ex. A p. 34-35}.

(10) On page 33, Kovach indicated under oath to questioning from this Court that she had not been threatened or promised anything to plead guilty. **{Ex. A p. 33 ll. 11-18}.**

(11) On page 35, the Court found a sufficient factual basis for the plea and found that Kovach had freely, voluntarily, and knowingly entered into the plea with advice of counsel. **{Ex. A p. 35 ll. 5-10}.** The Court sentenced Kovach to one year and a fine of \$25,000 suspended with payment of the fine and two years' probation, and a concurrent five years suspended with the service of two years' probation. **{Exhibit B}.**

(12) Upon information and belief, on or about September 8, 2015, Kovach executed a sworn affidavit notarized by Nancy Bloodgood, Esquire, which she submitted as part of a grievance to the Berkeley County School District. **{Exhibit C}.**

(13) In Paragraphs 5 through 12 of Exhibit C, Kovach contends under oath that she acted in good faith and under the school board's direction in everything she did. However, at the plea she admitted under oath to knowingly spending school funds on campaign materials, and circumventing the ethics act and the school's procurement code with requests for altered estimates or invoices, misrepresentations, submission of fictitious documents, and sham requests for estimates.

(14) In Paragraph 21 of Exhibit C, Kovach states under oath: "No public funds were used to create or pay for any campaign video" (underlining in original). However, at the plea, she under oath pled guilty to and admitted the truth of the two indictments, which state in part that Kovach "did use public funds to pay for the creation of a campaign video" and that Kovach "continuously used public resources and time to influence the outcome of

a bond referendum while covering up her actions with dishonesty". She additionally agreed under oath with the State's factual recitation at the plea, which in great detail described, among other things, Kovach's use of public funds to pay for a campaign video and for a campaign sign to be used in the campaign video, as well as her lies and misrepresentations relating to this conduct. The factual basis to which Kovach agreed under oath discussed a number of emails, documents, and information that formed the case against Kovach, but it also included exhibits handed to the Court, a copy of which is attached as Exhibit D. That exhibit included: (a) an email from the videographer recounting his meeting with Kovach at which she requested two videos with "one video being a specific 'support for the vote' video and the other (using the same content) will be a re-edit used for general purposes"; (b) copies of the original estimates the videographer sent specifically referring to a "support for the vote" video; (c) an email showing Kovach's successful efforts to get "support for the vote" removed from the estimates because the school could not pay for campaign-related items under the law; (d) an email where Kovach discusses editing two versions of the video and wanting to "get kids in a large group with a Yes 4 Schools banner"; (e) eighteen screenshots from the campaign video of children used as props in this political ad, along with a screenshot of the Yes 4 Schools campaign logo displayed at the end of the video; (f) emails from Kovach ordering the sign paid for with school funds which she says will "be held by students", and an email from Kovach asking the school vendor to change the invoice because she "can't process any invoices that specifically call out 'Yes 4 Schools'"; and (g) emails between Kovach and the videographer discussing running payment for the campaign video in separate steps because of the \$2500 limit on Kovach's District-issued P-card.

(15) In Paragraph 24 of Exhibit C, Kovach contends under oath that she was falsely accused of forging a backdated invoice. However, she admitted to this conduct under oath at the plea. Not only did she admit the truthfulness of an indictment that she committed misconduct in office by "continuously [using] public resources and time to influence the outcome of a bond referendum while covering up her actions with dishonesty" {Exhibit A pp. 6-7; 31}; but she also specifically agreed under oath to a factual basis which included a discussion of this conduct. {Ex. A pp. 26-27}.

(16) In Paragraph 25 of Exhibit C, Kovach contends under oath that the perjury and forgery charges "were completely bogus". However, as detailed above, she not only agreed under oath at the plea to the truth of the indictments and a factual basis that included a discussion of the facts underlying these charges, and she agreed under oath that her plea to the misconduct in office included all the charged conduct at issue. {Ex. A p. 3 ll. 13-16; p. 10 ll. 12-16}.

(17) In Paragraph 27 of Exhibit C, Kovach contends under oath that the State falsely alleged that she snuck in the District Office after her suspension to put the second fictitious document into the procurement file, when the factual basis to which Kovach admitted under oath was that she submitted the fictitious document to the district finance office on or about sometime in October 2012 to feign compliance with the three-bid requirement of the procurement code. {Ex. A pp. 20-24}.

(18) In Paragraph 30 of Exhibit C, Kovach contends under oath that she did not structure or "smurf" transactions. However, at the plea, Kovach admitted under oath both in questioning by the Court and in agreement to the State's factual basis that she did

structure the payment for the video to avoid the requirements of the procurement code, as more fully set forth above and incorporated here, particularly paragraph 14 of this document.

(19) In paragraphs 31 through 33 of Exhibit C, Kovach contends under oath that she pled guilty simply for closure and to avoid subjecting the school district to legal fees and a trial. However, at the plea, Kovach repeatedly admitted that she was actually guilty, that the allegations were true, and that she was pleading guilty because she actually was guilty, as more fully set forth in the preceding paragraphs and in particular at page 33 line 18-22 of Exhibit A.

(20) Additional objective evidence such as emails, records, and witness interviews overwhelmingly support the factual basis as set forth by the State at the plea hearing. Additionally, upon information and belief, while Amy Kovach was on probation from this Court and close in time to her termination by the District, Facebook servers received a series of commands to trigger the deletion of at least 29 of the BCSD school Facebook pages – including the District's main Facebook page. Based on the information provided by the District, the commands were initiated by Facebook user "Amy Kovach."

II. ANALYSIS

The power to punish for contempt is inherent in all courts and is essential to preservation of order in judicial proceedings. Willful disobedience of an order of the Court may result in contempt. A willful act is defined as one "done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done". See In the Matter of Diggs, 344 S.C. 434, 544 S.E.2d 632 (2001) (internal citations omitted).

Further, the caselaw is also clear that "perjury or false swearing may constitute contempt of court". State v. Stanley, 365 S.C. 24, 615 S.E.2d 455, 460 (Ct. App. 2005) (affirming case where judge put witness in jail overnight where witness contradicted on stand sworn statement given to police); State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (1999) (juror who failed to disclose to judge relationship with defendant's family committed direct contempt of court).

Additionally, cases from outside South Carolina have found direct contempt where individuals subsequently gave sworn statements that contradicted sworn statements they made at their guilty pleas. See Whitty v. State, 5 So.3d 724 (Fla. Dist. Ct. App. 2009) (post-conviction movants should be aware that direct contempt or perjury may be used to punish false statements in post-conviction proceedings); Roberts v. State, 515 So.2d 434 (Fla. Dist. Ct. App. 1987) (affirming finding of contempt where person gave testimony at motion to vacate plea that was "diametrically opposite" of testimony given at his plea, and judges should not tolerate this perjury which interferes with and obstructs the judicial process).

Here, Kovach's statements to this Court were truthful as they were made in response to direct inquiry from the Court, where this Court assessed their credibility and found the plea voluntary. Her statements at the plea are also consistent with the overwhelming evidence in the case. However, Kovach's subsequent statements in the grievance affidavit are also under oath and are in direct contradiction to her sworn admissions to this Court, and they also directly impugn the integrity of the criminal justice system and the process. Therefore, the State respectfully submits an inquiry should be made as to whether Kovach committed direct contempt by lying in her sworn statements to

the Court at her plea, or whether she committed constructive contempt by making a mockery of the criminal justice system with her conduct and false statements after her solemn plea of guilty before this Court.

Additionally, the State respectfully submits that inquiry should be made as to whether a warrant or citation should issue for violation of probation, due to commission of perjury and other conduct by Kovach. Pursuant to S.C. Code § 24-21-450, *either* the court *or* the probation agent may issue a warrant for violating any of the conditions of probation. See also S.C. Code § 24-21-430 (probationer must not violate any state or federal penal laws and must avoid injurious or vicious habits); S.C. Code § 24-21-300 (a citation for probation violation may be issued instead of a warrant).

WHEREFORE, the State respectfully requests that this Court issue an Order compelling Respondent Amy Kovach to show cause why she should not be held in contempt of court for based on actions relating to her plea of guilty before the Court on August 28, 2015. The State further requests that if Respondent cannot show good cause, an order be issued holding her in contempt of court.

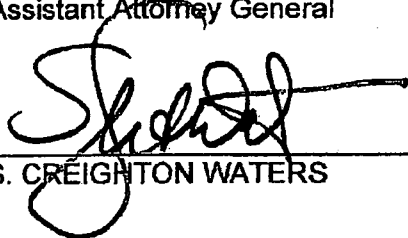
Respectfully submitted,

ALAN WILSON
Attorney General

S. CREIGHTON WATERS
Assistant Deputy Attorney General

BRIAN T. PETRANO
Assistant Attorney General

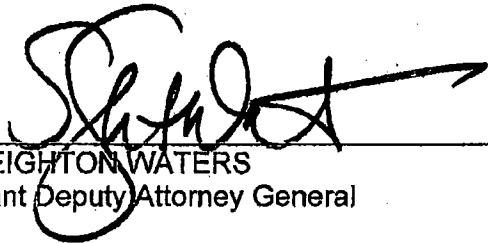
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S. CREIGHTON WATERS

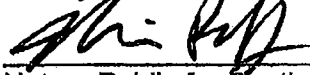
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3693

November 9, 2015

The factual allegations made in this petition are true to the best of my information and belief.


S. CREIGHTON WATERS
Assistant Deputy Attorney General

Sworn before me this
9th day of November 2015

 Michael Brooks Biediger
Notary Public for South Carolina
My commission expires: 12/28/2016

The factual allegations made in this petition are true to the best of my information and belief.


BRIAN T. PETRANO
Assistant Attorney General

Sworn before me this
9th day of November 2015

 Michael Brooks Biediger
Notary Public for South Carolina
My commission expires: 12/28/2016

00167

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Amy Kovach,

Plaintiff,

vs.

The Berkeley County School District,
Joshua S. Whitley, Terry Hardesty, Scott
Marino, Karen Whitley in her Individual
Capacity, and The Berkeley County
Republican Party,

Defendants.

) IN THE COURT OF COMMON PLEAS

) C.A. No.: 2015-CP-08-2380

**DEFENDANT KAREN WHITLEY'S
NOTICE AND MOTION FOR
RULE 11 SANCTIONS**

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

NOV 16 PM 2:24

FILED

PLEASE TAKE NOTICE THAT Defendant, Karen Whitley, through her undersigned attorneys, will move before the presiding judge of the Court of Common Pleas for Berkeley County, at the courthouse in Moncks Corner, SC, on the 10th day hereafter, or as soon as this matter can be scheduled, for an order awarding sanctions against the attorneys for Plaintiff pursuant to Rule 11(a), SCRCF, and the South Carolina Frivolous Civil Proceedings Sanctions Act, §15-36-10, in an amount that will reimburse all attorneys' fees and costs of defending this matter for Karen Whitley. This motion is filed on the grounds that the instant action was filed in bad faith, is demonstrably frivolous, vexatious and dependent on allegations of fact that are irreconcilable with the guilty pleas entered by Amy Kovach on August 28, 2015, and her sworn admissions to the Court made at her plea and sentencing resolving her criminal prosecution by the State of South Carolina.

This Motion joins and adopts by reference the *Defendant Joshua S. Whitley's Motion for Sanctions Against Plaintiff's Counsel And Brief In Support Of Motion For Sanctions Against Plaintiff's Counsel* filed in this matter on November 3, 2015. It is also supported by the pleadings

00168

in this matter, the law of South Carolina, and any affidavits and documentary evidence that the Court may ask to review in its consideration.

The undersigned affirms that he consulted in person with counsel for Plaintiff prior to filing this motion in a good faith attempt to resolve the case against Karen Whitley with a request that Plaintiff dismiss this action against Karen Whitley prior to forcing her to plead in response.

PLEASE BE PRESENT TO DEFEND IF SO MINDED.

Respectfully submitted,



Wm. Howell Morrison
Pierce T. MacLennan
Haynsworth Sinkler Boyd, P.A.
134 Meeting Street, 4th Floor
Charleston, SC 29401
(843) 722-3366

Attorneys for Defendant Karen Whitley

Charleston, South Carolina

November 9, 2015

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Amy Kovach,

Plaintiff,

vs.

The Berkeley County School District,
Joshua S. Whitley, Terry Hardesty, Scott
Marino, Karen Whitley in her Individual
Capacity, and The Berkeley County
Republican Party,

Defendants.

) IN THE COURT OF COMMON PLEAS

) C.A. No.: 2015-CP-08-2380

) **DEFENDANT KAREN WHITLEY'S**
) **NOTICE AND MOTION TO DISMISS**

FILED
2015 NOV 16 PM 2:50
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

PLEASE TAKE NOTICE THAT Defendant Karen Whitley, through her undersigned counsel, will move for dismissal of the Complaint against her at the Berkeley County Courthouse, Moncks Corner, South Carolina, on the 10th day hereafter, or at such time and place as the court shall schedule, pursuant to Rule 12(b)(6), South Carolina Rules of Civil Procedure, on the grounds that the cause of action for civil conspiracy fails to state facts sufficient to constitute a cause of action. The grounds for this motion are more fully set out in Defendant's Memorandum in Support to be filed and will be supported as well by the pleadings in the matter and documentation from the related criminal case against Plaintiff together with any written statements from her.

PLEASE BE PRESENT TO DEFEND IF SO MINDED.

00170



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134 Meeting Street, 4th Floor
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(843) 722-3366

Attorneys for Defendant Karen Whitley

Charleston, South Carolina

November 9, 2015

IN THE COURT OF COMMON PLEAS

C.A. No.: 2015-CP-08-2380

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MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SH

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Karen Whitley is a lifelong resident of Berkeley County who has served the Berkeley County school district for 39 years as teacher, assistant principal, principal, supervisor of elemental schools, Chief Academic Officer, and Associate Superintendent. She holds an educational doctorate degree in educational leadership. Dr. Whitley was recently appointed principal of the new Philip Simmons Elementary School.

In this civil case, Plaintiff Kovach seeks damages from Dr. Whitley and others for their alleged conspiratorial efforts to have her criminally prosecuted. The story of Amy Kovach's indictment and eventual guilty pleas for her crimes has been highly publicized. Kovach pled guilty to two crimes defined as misdemeanors for which she faced a possible 11 years in jail, this in exchange for dismissal of the three statutory felony charges against her. In the first three causes of action of Kovach's complaint, she seeks compensation from her former employer, BCSD, for what can loosely be defined as "employment" claims. Kovach alleges that BCSD misled her as to her job responsibilities and failed to "support" her criminal defense. In her fourth cause of action for civil conspiracy, which is the subject of this motion, Kovach seeks to hold Dr. Whitley and members of her family¹ liable for allegedly conspiring with each other and/or with others to have her prosecuted—specifically for bringing facts to the attention of the Attorney General's office that ultimately resulted in her indictments and convictions. The fifth cause of action alleges a civil assault (absent any battery), at a polling place, against Defendant Terry Hardesty, who Kovach alleges yelled at and scared her.

In a shameless effort to sensationalize her civil claims, Kovach also alleges obstruction of justice, fraud on the court, and ethical breaches against the Attorney General, his lawyers, the South Carolina Law Enforcement Division and one of its agents. (*See e.g.*, Complaint at ¶¶ 104-106: perjury and forgery indictments were "retaliatory" and "completely bogus;" ¶ 110: SLED

¹ Defendant Josh Whitley is Dr. Whitley's son. Defendant Scott Marino is her son-in-law.

agent "drafted a false interview report with witness..." ¶ 112: Attorney General attributed a doctored document to Kovach knowing that it was not Plaintiff's and SLED agent "obstructed justice"; ¶ 115: SLED knew that "smurfing" charges were "patently false;" and ¶ 117: Attorney Generals' Office "manufactured" smurfing charge to injure Kovach.) There is no known factual support for these serious allegations, and Kovach alleges no actual claims against the persons and offices that she impugns.² Indeed, if there were any truth to these allegations, such facts would potentially have required dismissal of all criminal charges against Kovach. Similarly, Kovach and her attorneys implicate and impugn a vice president of Santee Cooper, State Sen. Larry Grooms and his wife, and the law firm that represented the BCSD--all while alleging no claims against any of them. (Complaint, ¶¶ 60, 65-66, 71, 163-64.)

The record of the proceedings at Kovach's plea and sentencing, including her own sworn testimony admitting to her criminal wrongdoing, effectively bars her from re-litigating or contradicting her guilt in this subsequent civil proceeding. Kovach admitted under oath to the facts establishing the elements of the crimes to which she pled guilty. Simultaneously, Kovach admitted to the underlying facts that gave rise to her forgery and two perjury indictments, which were dismissed only as a condition of her plea deal and not because prosecutors had secured the indictments illegally, as the complaint implies. Again, Kovach admitted under oath to the facts supporting these three indictments, even though she did not plead to them. Moreover, neither Kovach nor her criminal attorney made any assertion at her plea hearing that she was not guilty

² To avoid what would otherwise be libel *per se*, Kovach's attorneys apparently rely on the protection of the judicial privilege. This does not relieve Kovach's attorneys of their Rule 11 duty, which is the subject of other motions in this action. South Carolina law requires that attorneys conduct a reasonable investigation prior to filing a lawsuit. See *Ex Parte Gregory*, 378 S.C. 430, 438, 663 S.E.2d 46, 51 (2008) (affirming sanctions against lawyer for filing frivolous suit without first conducting a reasonable investigation into the facts underlying the claim).

of the perjury and forgery charges. Yet, Kovach now alleges those charges to have been "completely bogus." (Complaint, ¶ 106.)

Kovach generally alleges that Karen Whitley conspired with others to have Kovach criminally charged and prosecuted. But Kovach has not pled *any facts* specific to Dr. Whitley which, if proven true, would entitle her to relief. Nor has she alleged the special damages required to state a viable claim for civil conspiracy. For these and the other reasons discussed below, Plaintiff's conspiracy claim against Dr. Whitley must be dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action. To the extent that the Court considers matters outside the pleadings, movant requests that her motion be considered one for summary judgment under Rule 56, pursuant to SCRPC 12(b), SCRPC.

FACTS

In her former role as Director of Communications for Berkeley County schools, Amy Kovach played a leadership role in support of Berkeley County's 2012 School Bond Referendum ("Referendum") known as "Vote Yes 4 Schools." In her efforts to secure a favorable vote--driven in part by personal ambition--Kovach illegally used district resources to run the campaign in favor of the Referendum. The facts proving her intentional criminal actions are documented in emails, videos, credit card transactions, and the like. All of it was investigated by SLED, analyzed by the Attorney General, and presented to the statewide grand jury for consideration. (See, generally, **Exhibit A**: Transcript of Record of guilty plea and sentencing--Aug. 28, 2015.)

Kovach was indicted on five criminal counts as a result of her role in the "Vote Yes 4 Schools" campaign and subsequent effort to hide and disguise her crimes: (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 §8-13-1346 of the South Carolina Code; (3) two counts of

statutory forgery (Code §16-13-10(A) & (B)(2)) based on Plaintiff's efforts to cover up her criminal misconduct; and (4) one count of statutory perjury (Code §16-9-10(A)(2)) also flowing from Kovach's efforts to hide her underlying crimes.

Kovach's defense attorney mounted an aggressive, but unavailing defense, at considerable expense to the taxpayers of Berkeley County.³ After spending eighteen months on paid leave from the school district, Plaintiff eventually pled guilty to the two counts in exchange for dismissal of the remaining three charges. At the plea and sentencing hearing, Creighton Waters, Assistant Deputy Attorney General, set forth the factual predicate for the charges and the state's proof in detail. (Exh. A: pp. 8-28.) After hearing the declaration of the incriminating facts that the state was prepared to prove, Kovach replied to the Court under oath that she "agre[ed] with the facts as stated by the attorney general." (Exh. A: p. 28, lines 19-21.)

As part of the guilty plea, Plaintiff also admitted to the facts underlying the charges against her that were dismissed in the plea deal. (Exh. A-- pp. 3 & 10: plea to misconduct covers and incorporates *all* of the charged conduct in addition to the underlying ethics act count; pp. 6-7: Kovach admits 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;" p. 28: Kovach agrees under oath with the facts that the state set forth including those supporting the forgery and perjury charges; p. 30, 33, 34 & 35: Kovach indicated under questioning from the Court that she was guilty of the charges.)

After listening to the prosecutor's factual presentation, including facts relevant to the perjury and forgery indictments, the judge stated at the time of sentencing:

THE COURT: 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

³ Approximately \$303,000 was paid to Kovach's defense counsel pursuant to S.C. Code §59-17-110.

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."

(Exh. A: pp. 55-56.)

The Court sentenced Ms. Kovach to five years' imprisonment, suspended upon the completion of two years' probation and payment of a \$25,000 fine.⁴

LAW

Rule 12(b)(6). Under SCRCP 12(b)(6), a defendant may move to dismiss a complaint due to its "failure to state facts sufficient to constitute a cause of action." In considering a motion to dismiss under Rule 12(b)(6), a court must base its ruling solely on the allegations set forth in the complaint. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would not entitle the plaintiff to relief on any theory, dismissal under Rule 12(b)(6) is warranted. *See Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 753 S.E.2d 846 (2014). Should the court consider matters outside the pleadings, it may convert the dismissal motion to one for summary judgment, provided "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." *See* SCRCP 12(b).

Civil Conspiracy. 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, 566-567, 633 S.E.2d 505, 511 (2006); *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. Carolina v. Resources Planning Corp.*, 358 S.C. 460, 470, 596

⁴ On October 29, 2015, Assistant Deputy Attorney General Creighton Waters wrote the sentencing judge, the Hon. Jeffrey Young, requesting a hearing regarding the allegations in Kovach's complaint accusing the AG's office and SLED of manufacturing evidence and the other illegalities.

S.E.2d 51, 56-57 (2004) ("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. *Lyon v. Sinclair Refining Co.*, 189 S.C. 136, 200 S.E. 78 (1938).

The "essential consideration" in civil conspiracy "is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the primary purpose or object of the combination is to injure the plaintiff." *Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986). "[I]n order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 601, 358 S.E.2d 150, 153 (Ct. App. 1987); *accord Cowburn*, 366 S.C. at 49, 619 S.E.2d at 453.

ARGUMENT

Dr. Whitley is only briefly and sporadically mentioned in the body of the 30-page Complaint outside the claim for civil conspiracy. The actual conspiracy allegations set forth in the Fourth Cause of Action boil down as follows:

- Karen Whitley 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)
- Karen Whitley 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)
- Karen Whitley 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.)
- Karen Whitley advocated and spoke publicly in favor of the Referendum. (Complaint, ¶ 166)
- Karen Whitley used her work computer to negotiate a lease of her private property. (Complaint, ¶ 167)

- Karen Whitley exchanged emails with her son Josh Whitley regarding the lease of her private property while at work. (Complaint ¶ 168)

I. The Complaint Fails To Allege Facts Sufficient To Show That Dr. Whitley Combined With Others For The Purpose Of Injuring Plaintiff.

Of the allegations made against Dr. Whitley, only those in paragraphs 160 through 162 could conceivably support a claim for civil conspiracy. Those averments reflect Plaintiff's suspicion that Dr. Whitley conspired to provide false information to SLED and the press. Kovach also alleges that Dr. Whitley (i) had a resolution passed by the Berkeley County Republican Party encouraging the Attorney General to prosecute the Plaintiff (Complaint, ¶159); (ii) spoke in support of the school bond Referendum (Complaint, ¶166); and (iii) committed acts somehow similar to those for which Plaintiff was indicted (Complaint, ¶¶167-69). Even if true these allegations cannot, as a matter of law, support a civil conspiracy claim.

The first bullet point above, taken from the Complaint at ¶159, alleges nothing more than Dr. Whitley's efforts as a private citizen to have Kovach indicted. If true, these facts cannot support a civil conspiracy charge because Kovach's admissions of criminal guilt validated the alleged activity by private citizens to have her prosecuted. A citizen's efforts to have a corrupt public employee prosecuted are not actionable in a civil case; to the contrary, such efforts are commendable. "[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). Dr. Whitley had every legal right to report Kovach's illegal acts to the authorities. Indeed, such actions are protected by the doctrine of judicial privilege. *See Crowell v. Herring*, 301 S.C. 424, 430, 392 S.E.2d 464, 467 (Ct. App. 1990) ("We hold the 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..."). As the South Carolina Court of Appeals stated in *Crowell*, "[t]he threat of a civil action and slander or libel would undoubtedly have a chilling effect on those tempted to initiate legitimate investigations or inquiries into other supposed wrongdoing." *Id.*

The last three of the bullet points, abstracted from ¶¶166-168 of the complaint, are irrelevant on their face to Kovach's conspiracy claims. The last two points relate to Kovach's belief that she was the victim of selective prosecution. Thus, she implies that the Attorney General failed to act on ostensibly comparable unethical behavior on the part of Dr. Whitley. While selective prosecution may have been a potential defense to the criminal charges against Kovach--if there were actually any facts to support such a defense--it was not asserted in the criminal proceeding. That foregone criminal defense is of no possible relevance to the allegation of civil conspiracy.

The second and third bullet points, taken from ¶¶160-162 of the complaint, are potentially of more interest to the Court's inquiry, but are equally unavailing to Plaintiff. Paragraph 160 alleges on "information and belief" that Dr. Whitley "provided false statements" to SLED and the Attorney General. Here the complaint offers no factual specificity as to the nature of the "false statements." Further diluting the allegation to the point of rendering it legally meaningless, Kovach states the allegation on "information and belief," thereby admitting that she has no personal knowledge that the event even occurred. Thus, the allegation as pled is wholly speculative on its face and cannot withstand a motion to dismiss.

As for the allegations of paragraphs 161-162 that the alleged conspirators "suggested stories and provided false information" to the press, the fatal inadequacy of the averment is

similarly obvious. If there were any press stories generated from “false information,” Kovach has failed to allege any of them. If there were any substance or truth to this allegation, it would be a simple matter to substantiate by identifying the “press stories” and/or the “false information” therein. Instead, Plaintiff persists with her wholly speculative allegations that cannot constitute a viable cause of action. Indeed, these are exactly the kind of allegations that Rule 12(b)(6) is designed to weed out. *See Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 116, 682 S.E.2d 871, 875 (Ct. App. 2009) (citing *Doe v. Erskine Coll.*, 2006 WL 1473853, at *17 (D.S.C. 2006) (finding that “specific facts” must be alleged in furtherance of the conspiracy to survive a Rule 12(b)(6) motion); *McNeil v. S.C. Dep’t of Corrections*, 404 S.C. 186, 193, 743 S.E.2d 843, 847 (Ct. App. 2013) (dismissing cause of action on 12(b)(6) because the complaint did not “set forth *specific allegations* that would enable the court to determine” whether a former employee’s discharge was in violation of public policy) (emphasis added).

Assuming the truth of the allegations against Dr. Whitley in the complaint, they are insufficient to state a cause of action for civil conspiracy. Kovach fails to allege any facts to proceed with a claim that Karen Whitley entered into a combination with others to injure anyone.

II. Plaintiff Fails to Plead Special Damages

To maintain a claim for civil conspiracy a plaintiff must allege damages that occurred as a result of the conspiracy itself, in addition to any damages alleged as a result of any other claims. *Sheek v. Lee*, 289 S.C. 327, 345 S.E.2d 496, 497 (1986); *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 278 S.E.2d 607 (1981). In her Complaint, Kovach alleges that “[d]efendants took the above stated actions solely for the purpose and with the intent of intimidating and harming Plaintiff.” (Complaint, ¶178) She further alleges that she “has suffered and continues to suffer special damages due to this conspiracy in the form of injury to her personal and professional reputation and injury to her 22-year career and the loss of future

Marketing and Communications career opportunities, and she seeks special damages, costs of this action and punitive damages from these Defendants.” (Complaint, ¶179)

To the extent Kovach has sustained any injuries to her reputation, they are the direct result of the public disclosure of her criminality and the legal consequences that flowed from her indictment, conviction, sentencing, and job termination. Kovach admits as much in paragraph 123 of her complaint where she alleges that she pled guilty “because she had to end the criminal proceedings for her own mental health.” Plaintiff acknowledged during the sentencing hearing that she was well-aware of the consequences of her guilty pleas when she entered them. Among those consequences is a criminal record of convictions of crimes involving dishonesty, which unavoidably damages her business reputation and diminishes her career opportunities. Her claim that “special damages” resulted from the actions of Defendants in bringing her public corruption to light merely reflects her obstinate refusal to take responsibility for her criminal conduct, even after she has formally and publicly admitted to it.

The court of appeals recently decided a case that illustrates this principle. In *Mason v. Mason*, 412 S.C. 28, 61-62, 770 S.E.2d 405, 422-423 (Ct. App. 2015), which arose from a shareholder dispute involving a family owned business. The son alleged that other family members engaged in a civil conspiracy to loot the company at his expense. The court of appeals affirmed the special referee’s finding that the son’s actions were the cause of any damages he had sustained and he, therefore, could not demonstrate a cause of action for civil conspiracy.

The referee found:

If the value of Son's stock has indeed been impaired, Son need not look further than his own actions in filing false and inaccurate tax returns, diverting Company funds through the casing scheme, payment of personal expenses (including attorney[']s fees) from Company funds and working on an expansion of the Company business to include (for the first time) Company ownership of land and building from which the Conway Store is operated, and diverting Company funds

for operation of a non-company owned entity (BCJ Tires).

Id. at 61-62, 770 S.E. 2d at 422-423.

Likewise, if Amy Kovach has sustained damage to her reputation or a loss of job opportunities, she need look no further than the transcript of her own guilty plea hearing and her sworn admissions to the facts underlying her criminal convictions.

III. Plaintiff's Claims Are Barred By Collateral Estoppel and Judicial Estoppel

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.E2d 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).

In *Zurcher*, the plaintiff approached defendant car salesman requesting a referral fee for recruiting a customer who had recently purchased a vehicle from the dealership where defendant worked. When defendant refused, a physical altercation ensued. The solicitor charged the plaintiff with three counts of simple assault. Subsequently, the plaintiff brought suit against defendant and his dealership alleging assault and battery, false imprisonment, abuse of process, malicious prosecution, and intentional infliction of emotional distress. Thereafter, plaintiff entered an *Alford* plea of guilty on a single count of simple assault in exchange for the dismissal of two remaining assault charges. The court in the civil action then granted defendants' motion for summary judgment on all of plaintiff's counts against them on the basis of collateral estoppel,

as all of the claims hinged on whether the plaintiff assaulted the individual defendant. The supreme court affirmed the trial court's decision on the basis that the plaintiff "had a full and fair opportunity to litigate the criminal assault and battery charge" and voluntarily determined that pleading guilty was his best alternative. Similarly, in *Johnson v. American Med. Int'l*, 36 S.W.3d 572 (Tex. App. 2000), a physician plaintiff brought suit against hospital administrators who accused him of sexual misconduct, alleging that they had conspired to do so in retaliation for his decision to do his own billing. The Court in *Johnson* held that the physician was estopped from bringing the conspiracy action because he entered a plea of guilty to sexual assault. *Id.* To allow him to maintain the suit would violate state public policy. *Id.*

In the instant case, Kovach voluntarily chose to enter a plea of guilty to the charges of misconduct in office and the criminal use of public funds to influence an election, both of which involve acts of public dishonesty. She now seeks to hold Defendants liable for conspiring against her in their efforts to have her misconduct investigated by the Attorney General and SLED. Any such claims disappeared when she pled guilty to the crimes. Obviously the situation would be different had Kovach been exonerated of the criminal charges. But her guilty plea constitutes a legal confession and prevents her from re-litigating the issue of her guilt. Kovach had a full and fair opportunity to litigate her conduct, and she admitted unequivocally to her guilt and actions. Accordingly, the Court should dismiss Kovach's claim of conspiracy against Dr. Whitley.

Plaintiff's conspiracy claim is also barred by the doctrine of judicial estoppel. The doctrine of judicial estoppel evolved to protect the truth-seeking function of the judicial process by punishing those who seek to misrepresent facts to gain advantage. *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997); see also *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 29 (4th Cir. 1995) (stating goal of judicial estoppel "is to prevent a

party from playing 'fast and loose' with the courts, and to protect the essential integrity of the process." The doctrine "precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." *Hayne*, 327 S.C. at 251, 489 S.E.2d at 477. "When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him." *Id.*

Kovach takes multiple positions in her complaint that directly contradict the version of the facts that she agreed to under oath at her sentencing hearing. Despite having agreed to the Attorney General's allegations about her conduct and entering a plea of guilty to misconduct in office and the use of public funds to influence an election in creating the video, Plaintiff now alleges that "[n]o public funds were used by Plaintiff to create or pay for any Referendum campaign video." (Complaint, ¶83.) Despite her agreement to the contrary during the sentencing hearing, she now alleges that "[t]here was no 'smurfing' and the Attorney General knew or should have known there was no 'smurfing.'" (Complaint, ¶114.) Despite her agreement at sentencing that the case against her was not "a case of a school official who got overzealous and unknowingly overstepped the line," but rather about someone who "intentionally and knowingly broke the law and broke the ethics act," (Exh. A, p. 8.) Kovach now claims that she acted in "good faith." (Complaint, ¶15.) But she is bound by her guilty plea and her agreement to the facts as outlined by the Attorney General, and she cannot now claim that she acted in good faith, deny her misconduct, deny her use public funds to influence an election, or deny that she hid and covered up her criminal activities. Because Plaintiff's sworn factual admissions bar her from taking contradictory legal positions, her claim against Karen Whitley is foreclosed.

CONCLUSION

Defendant Karen Whitley asks that the Court enter an order dismissing, with prejudice,

Plaintiff's cause of action for civil conspiracy against her and granting such additional relief as the Court deems just and proper under the circumstances.

Respectfully submitted,



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DM: 4269253 v.1

**STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY**

AMY KOVACH,

Plaintiff,

v.

CA No. 2015-CP-08-2380

**THE BERKELEY COUNTY SCHOOL DISTRICT,
JOSHUA S. WHITLEY, TERRY HARDESTY,
SCOTT MARINO, KAREN WHITLEY in her Individual
Capacity, and THE BERKELEY COUNTY REPUBLICAN
PARTY,**

Defendants.

JOSHUA S. WHITLEY,

Defendant/Counterclaimant,

v.

AMY KOVACH,

Plaintiff/Counterclaim Defendant.

FILED
2015 DEC -2 AM 9:02
MANN F. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

JOSHUA S. WHITLEY,

Defendant/Third-Party Plaintiff,

v.

RODNEY THOMPSON,

Third-Party Defendant.

**DEFENDANT JOSHUA S. WHITLEY'S ANSWER, AFFIRMATIVE DEFENSES,
AMENDED COUNTERCLAIM AND AMENDED THIRD PARTY COMPLAINT**

Subject to the Rule 12(b) motion previously filed with the filing of the
Answer, Defendant/Counterclaim Plaintiff/Third-Party Plaintiff Joshua S. Whitley, by counsel,

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JW

sets forth the following as his Answer, Affirmative Defenses, and Amended Counterclaim to Plaintiff/Counterclaim Defendant Amy Kovach's Complaint; and Amended Third-Party Complaint against Rodney Thompson:

ANSWER AND AFFIRMATIVE DEFENSES TO COMPLAINT

ANSWER

1. As to the allegations contained in Paragraph 1 of Plaintiff's Complaint, Defendant admits that Plaintiff is a citizen of Berkeley County, but denies that Plaintiff was wrongfully terminated, as she is a convicted criminal as a result of her plea of guilty to misconduct in office in violation of the common law of South Carolina for acts of public dishonesty and the criminal use of public funds to influence an election in violation of Section 8-13-1346 of the South Carolina Code of Laws. It would be unprecedented for Plaintiff's employment to continue based on her convictions. The Plaintiff was convicted of the same crime (plus more) as former Speaker of the House Harrell and Lt. Governor Ard, both of whom lost their positions, as well. These criminal convictions demonstrate the frivolous nature of Plaintiff's lawsuit, and form the basis for Defendant's motion to dismiss and motion for sanctions. Counsel for the Plaintiff had an obligation to order and review the transcript of Plaintiff's guilty plea hearing, wherein Plaintiff was under oath, and which materially contradicts this frivolous Complaint. Upon information and belief, Counsel did not order the transcript, and Counsel's failure to order and review this hearing transcript (or ignoring the same) and the filing of a civil complaint arising out of the very acts for which Plaintiff has pleaded guilty warrant the imposition of sanctions pursuant to Rule 11 of the South Carolina Rules of Civil Procedure and Frivolous Civil Proceedings Sanctions Act codified at S.C. Code Ann. § 15-36-10.

2. As to the allegations contained in Paragraph 2 of Plaintiff's Complaint, Defendant admits that the School Board is the elected body charged with operating a public school system in Berkeley County and denies any inconsistent allegation.
3. As to the allegations contained in Paragraph 3 of Plaintiff's Complaint, Defendant admits that he was elected and served as Chairman of the Berkeley County Republican Party, LLC, until he was elected to the Berkeley County Council. Defendant was not a member of the Republican Party until 2013 (the year after the Referendum) and, therefore, denies the inconsistent allegation. Defendant admits he is a current and lifelong resident of Berkeley County, excluding his college years at Wofford College, his years at William & Mary Law School, and his two year clerkship on the United States Court of Appeals for the Fourth Circuit. Following his education and post-education clerkship, Whitley chose to return to Berkeley County to make a difference for the good, which is evidenced by his holding school officials accountable by taking legitimate complaints to law enforcement and which resulted in historic convictions, including the convicted criminal Plaintiff.
4. Defendant admits the allegations contained in Paragraph 4 of Plaintiff's Complaint, but denies any insinuation that the Berkeley County Republican Party had any role whatsoever in the opposition to the Referendum.
5. Defendant admits the allegations contained in Paragraph 5 of Plaintiff's Complaint.
6. As to the allegations contained in Paragraph 6 of Plaintiff's Complaint, Defendant admits that Defendant Karen Whitley ("Dr. Whitley" or "Karen Whitley") is a resident of Berkeley County but denies the remainder of that paragraph. Dr. Whitley would have no information regarding the convicted criminal Amy Kovach and would not know the convicted criminal Amy Kovach but for her work in her official capacity at the Berkeley County School District. Further answering, Dr. Whitley does not knowingly socialize with convicted criminals or dishonest persons.

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7. Defendant denies the allegations contained in paragraph 7 of Plaintiff's Complaint.
8. As to the allegations contained in Paragraph 8 of Plaintiff's Complaint, Defendant is not aware of where the convicted criminal Plaintiff was located during all pertinent times of her criminal enterprise and, therefore, denies the same.
9. As to this Defendant, the Defendant admits the allegations contained in Paragraph 9 of Plaintiff's Complaint.
10. As to the allegations contained in Paragraphs 10 and 11 of Plaintiff's Complaint, the Defendant is unaware of the amount of success or lack thereof that the convicted criminal Plaintiff has had during her career. Further answering, and upon information and belief, Plaintiff has misstated publicly (including her attorney's argument at her criminal sentencing in this Court) that she accepted the position at BCSD to make a difference and left high paying positions. Upon information and belief, Plaintiff had been laid off or otherwise terminated or downsized from her position in the private sector and came to work at the BCSD on a part-time basis in order to have gainful employment.
11. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 12 through 18 of Plaintiff's Complaint and, therefore, denies the same.
12. Defendant admits the allegations contained in Paragraph 19 of Plaintiff's Complaint.
13. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 20 through 24 of Plaintiff's Complaint and, therefore, denies the same. As to the allegation that payment of her attorney's fees was evidence of the Board's satisfaction with the convicted criminal Plaintiff's work, Defendant further answers that the Board publicly voted to pay these fees when the Plaintiff continued to deny her illegal conduct. As the sentencing judge pointed out, the entire time Plaintiff was paid to stay at home and paid for her legal fees, she knew she

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had committed criminal acts to which she eventually pled guilty. Therefore, her actions were not in "good faith" as required to pay her legal fees and all such fees must be returned to the public coffers.

14. Defendant denies the allegations contained in Paragraph 25 of Plaintiff's Complaint.

Further, this allegation is inconsistent with Plaintiff's allegations at Paragraph 48, as former Trustee Donna Marino, on October 9, 2012, publicly called upon all illegal activities to cease and desist, including the making of campaign videos with district resources. Instead of heeding Ms. Marino's warning, the convicted criminal Plaintiff lied about her role in the making of the video and took steps to cover up her illegal conduct. She was convicted of her activities, and the judge pointed out that all he saw [with respect to Kovach's conduct] was "lies, lies, lies." Accordingly, Defendant denies the allegations of this paragraph.

15. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 26 and 27 of Plaintiff's Complaint and, therefore, denies the same. Further answering, it is obvious that providing information regarding the Referendum is legal and appropriate; however, Ms. Kovach knowingly committed illegal acts for which she ultimately pled guilty.

16. As to the allegations contained in Paragraph 28 of Plaintiff's Complaint, Defendant admits that Superintendent Rodney Thompson instructed employees to attend the pep rally. Further answering, the convicted criminal Plaintiff also coordinated the campaign's activities for the rally, even though Plaintiff was explicitly instructed that "Vote Yes" pep rallies were illegal. See Exhibit A, Do's and Don'ts. All remaining allegations in this paragraph are denied.

17. As to the allegations contained in Paragraph 29 of Plaintiff's Complaint, Defendant admits that the volunteer Referendum committee would provide inaccurate information to

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the public, including specifically Referendum co-chair Jane Pulling who knowingly provided inaccurate information even after given the correct information by Defendant Josh Whitley. Defendant confronted Pulling in a private lunch meeting about the misinformation and in a public debate. Further, on October 1, 2012, Dr. Karen Whitley addressed the fact that Jane Pulling gave misinformation to a group at Whitesville Elementary, which Rodney Thompson told Dr. Whitley there was nothing he could do. Further answering, and upon information and belief, not only did the volunteer committee give misinformation, including Jane Pulling, but so did the convicted criminal Plaintiff. Further answering, on information and belief, on September 19, 2012, Dr. Karen Whitley attended a meeting at Highland Park Baptist where both Jane Pulling and convicted criminal Plaintiff gave out misinformation.

18. Defendant is without information or knowledge sufficient to form a belief as to the allegations contained in Paragraphs 29 through 32 (including subparts (a) through (e)) of Plaintiff's Complaint and, therefore, denies the same. Further answering, Defendant Josh Whitley did witness the convicted criminal Plaintiff give a presentation at a late summer board meeting.

19. Defendant denies the allegations contained in Paragraph 33 of Plaintiff's Complaint. Further, this allegation is inconsistent with Plaintiff's allegation at Paragraph 48, as former Trustee Donna Marino publicly called upon all illegal activities to cease and desist, including the making of campaign videos with district resources. Instead of heeding Ms. Marino's warning, the convicted criminal Plaintiff lied about her role in the making of the video and took steps to cover up her illegal conduct. She was convicted of her activities, and the judge pointed out that all he saw [with respect to Kovach's conduct] was "lies, lies, lies." Accordingly, the Defendant denies the allegations of this paragraph.

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20. Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 34 of Plaintiff's Complaint and, therefore, denies the same. To the extent this allegation is true, the convicted criminal Plaintiff is alleging that she was in a criminal conspiracy with members of the board and her superiors, and although this certainly may implicate others, it cannot absolve her criminal wrongdoing.
21. Defendant admits the allegations contained in Paragraph 35 of Plaintiff's Complaint. Of course, further answering, had a school board member asked the convicted criminal Plaintiff to embezzle or commit any other illegal act, it is still the convicted criminal Plaintiff's responsibility to not knowingly violate the law. As Plaintiff admitted during her August 28, 2015 plea hearing, Plaintiff knew that her actions were in violation of the law at the time she acted, and she plead guilty to those violations. Further answering, the convicted criminal Plaintiff, as usual, completely misleads in her accusation that Phillip Obie chastised her for asking, "Why are we waiting until September 5th to start the Campaign;" but even if true, what is telling was the convicted criminal's response wherein she stated that they were waiting so as to not give any opposition time to organize against the campaign. In other words, she was blatantly strategizing illegally in support of the Referendum.
22. As to the allegations contained in Paragraphs 36 and 37 of Plaintiff's Complaint, Defendant answers that upon information and belief, the convicted criminal Plaintiff worked with a videographer on or about September 21, 2012, touring schools and shooting a video to be used for the campaign. Further answering, Dr. Karen Whitley saw the convicted criminal Plaintiff with the videographer on September 21, 2012, at the Stratford High School football game. Of course, on numerous occasions, Plaintiff denied publicly and to the Post & Courier and to SLED any knowledge whatsoever of the video.

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which ultimately was proven to be an outright lie, and she pled guilty to the making of the illegal video. In fact, her criminal fine was based on the amount of district funds she used to make the illegal video. As to the allegation of Paragraph 37, to the extent this allegation is true, the convicted criminal Plaintiff is alleging that she was in a criminal conspiracy with members of the board and her superiors, and although this certainly may implicate others, it cannot absolve her criminal wrongdoing. Accordingly, the Defendant denies any inconsistent allegation.

23. As to the allegations contained in Paragraph 38 of Plaintiff's Complaint, Defendant answers that the convicted criminal Plaintiff admitted under oath that the video was made for purposes of the campaign. This allegation, *inter alia*, renders this lawsuit frivolous and sanctionable under Rule 11. It further indicates that Plaintiff is either lying in this lawsuit or committed perjury at her sentencing or both. The fact that the campaign ultimately did not use the video because it did not like the convicted criminal Plaintiff's work, or for other reasons, did not absolve her criminal activities for which she pled guilty related to the making of the campaign video.

24. Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 39 of Plaintiff's Complaint and, therefore, denies the same. Defendant is unaware of this policy. Further denying the allegations of this paragraph, and specifically the allegation that Plaintiff developed close working relationships between the school system and the community, Defendant answers that due to Plaintiff's criminal actions, the relationship of the school district and community has never been so strained, and Plaintiff specifically caused severe mistrust in the community due to her criminal activities. It is noteworthy that Plaintiff is the first school official in state history to be convicted of these crimes, which is indicative of the severity and pervasiveness of her criminal wrongdoing.

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25. Defendant denies the allegations contained in Paragraph 40 of Plaintiff's Complaint. In fact, as part of Plaintiff's plea deal, the Attorney General read from Plaintiff's emails indicating that her career would benefit from the passage of the bond Referendum. Further answering, upon information and belief, the convicted criminal Plaintiff received a large pay increase and promotion (from part-time or contract to a Directorship) during her work on this bond Referendum. This allegation, *inter alia*, renders this lawsuit frivolous and sanctionable under Rule 11, as Plaintiff admitted to the Attorney General's factual recitation regarding the benefit of her illegal conduct on her career.
26. As to the allegations contained in Paragraph 41 of Plaintiff's Complaint, Defendant admits that he is an attorney practicing law on Daniel Island and that he opposed the bond Referendum. All remaining allegations are denied. Defendant opposed the Referendum *before* the vote, and he was not the Chairman of the Berkeley County Republican Party until a significant time after the Referendum. In fact, he was not a member or in any elected position with the Party during the Referendum. It was not until after the election that the Party, which appreciated Defendant's principled stand on this Referendum and particularly against the convicted criminal Plaintiff's activities and those of her superiors, that he was recruited to serve in leadership of the Party. This allegation is proof that the convicted criminal Plaintiff utterly failed under her objective at work to "develop and maintain [a] close working relationship[] between the school system and the community," as she was completely unfamiliar with the leadership of the predominant political party of the County. At all times pertaining to the convicted criminal Plaintiff, Defendant Whitley acted as a concerned citizen and not as an attorney, other than at any time that he offered counsel to his mother Karen Whitley
27. Defendant admits the allegations contained in Paragraph 42 of Plaintiff's Complaint.

Further answering, Defendant Whitley is the proud son of Dr. Karen Whitley who has a

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distinguished career in Berkeley County. During Whitley's entire career, he could not go in public in Moncks Corner and beyond without young and old, rich and poor, and ethnically diverse persons beaming with excitement in spotting their former teacher or principal and she replying by name to each of them, including former students or parents from decades before.

28. Defendant denies the allegations contained in Paragraph 43 of Plaintiff's Complaint.

Defendant further points out the deficiency of Plaintiff's pleading, as she does not describe in any detail the nature of how Dr. Whitley expressed publicly her dissatisfaction. Further answering, Dr. Karen Whitley never applied to be Chief Academic Officer but rather the previous Superintendent asked her to serve him as his Chief Academic Officer. A short time after Thompson was elected Superintendent, he told Dr. Whitley he needed her strengths in different areas, including supervising of all schools, supervision of athletics, transportation, Head Start, School Nurses, and other auxiliary services.

29. Defendant denies the allegations contained in Paragraphs 44 and 45 of Plaintiff's Complaint. Specifically, Gwen Scarborough asked Dr. Whitley why the "Principal for the Day" program had been given to Plaintiff. Dr. Whitley simply inquired to Dr. Thompson to be able to answer Ms. Scarborough. It is beyond silly and narcissistic to believe that is a basis for some fictitious vendetta by Dr. Whitley against the convicted criminal Plaintiff. This allegation evinces Plaintiff's inability to accept responsibility for her criminal conduct, for which she seeks to blame others. Moreover, Plaintiff had mentioned to Dr. Whitley that her husband had difficulty finding a job as a lawyer and would be interested in working for Defendant Josh Whitley. Further responding, Plaintiff's allegations regarding Dr. Whitley's objectives is beyond absurd and lacks the particularity of minimal pleading standards. In fact, Dr. Whitley has had a stellar and

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award-winning career as a teacher, assistant principal, principal, supervisor of elementary schools, Chief Academic Officer, and Associate Superintendent. When the Superintendent's position became vacant, Dr. Whitley chose to not apply for the vacant position, even after the Chairman of the Board called and asked her to do so. In other words, even though the convicted criminal plaintiff sought to commit crimes in order to rise in leadership and advance her career, Dr. Whitley was at the top of her career and had no desire to go beyond the great success that she had achieved.

30. As to the allegations contained in Paragraph 46 of Plaintiff's Complaint, Defendant admits that Scott Marino is Josh Whitley's brother in-law but denies the ridiculous proposition that Marino and Whitley were angered regarding a principalship. In fact, during the very time of the investigation of the criminal defendant Plaintiff, Dr. Lindsey Marino was named South Carolina Assistant Principal of the Year.
31. As to the allegations contained in Paragraph 47 of Plaintiff's Complaint, Defendant admits that Plaintiff showed her illegal video to Dr. Karen Whitley, even though the convicted criminal Plaintiff continuously denied the existence of the video to the Post & Courier and even to authorities, which she later pled guilty to, including acts of dishonesty (i.e., forgery) in trying to cover up her acts. Upon information and belief, the convicted criminal Plaintiff is an attention-seeker and sought praise on the making of the campaign video and, therefore, would not have been able to resist showing multiple persons the video, including Lara Varn, the Third-Party Defendant Thompson, and others. Moreover, this allegation is frivolous and sanctionable as it admits she made an illegal video and showed Dr. Whitley but then claims elsewhere in the pleading that she did not make a video for the campaign. All other inconsistent allegations are denied.
32. As to the allegations of Paragraphs 48 and 49 of Plaintiff's Complaint, Defendant admits that Donna Marino read a statement that district resources should not be used for illegal

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purposes, but denies that Defendant Dr. Karen Whitley misrepresented the video to Defendant Josh Whitley. As to the allegation of the Pulling video versus the illegal video made by the convicted criminal Plaintiff, Defendant does not recall the genesis but only that it appeared that district resources were being used for illegal purposes. This caused Defendant Josh Whitley to issue the FOIA request, which conclusively demonstrated the illegal conduct for which Plaintiff eventually pled guilty. Prior to the FOIA request, Defendant Josh Whitley was unaware of the extent of Plaintiff's illegal conduct, if any. After the FOIA documents were produced, Defendant was convinced that Plaintiff knowingly and repeatedly broke the law, and lied about her conduct, which is why he went to the Attorney General with the emails he had received pursuant to his FOIA request.

33. Defendant lacks information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraphs 50 and 51 of Plaintiff's Complaint and, therefore, denies the same.

34. Defendant denies the allegations contained in Paragraph 52 of Plaintiff's Complaint.

Plaintiff's allegation that she did not know that an opposition to the Referendum existed until mid-October is a demonstrable lie. In fact, Plaintiff was aware of the opposition, and had Jane Pulling call Dr. Karen Whitley on September 27th and 28th at the BCSD Office regarding Defendant Josh Whitley's opposition and the letter sent by the opposition committee. Upon information and belief, the convicted criminal Plaintiff followed up with an email to Jane Pulling to inquire how the conversation with Dr. Whitley went. Also, on October 1, 2012, Rodney Thompson met with Dr. Whitley regarding Josh Whitley's opposition to the Referendum. Furthermore, on October 2, 2012, Rodney Thompson came to Defendant Josh Whitley's law office regarding the opposition to the Referendum. Further answering, the Berkeley County Republican Party

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had nothing to do with the opposition to the Referendum, and indeed, Defendant Josh Whitley had not joined or attended any Berkeley County Republican meetings prior to the Referendum. In fact, Josh Whitley was invited for the first time by the party to discuss his opposition to the Referendum at the November monthly breakfast (just days before the vote), which was also attended by "Vote Yes" Co-Chairs John Matthews and Jane Pulling. This Defendant denies, on information and belief, that the Director of Communications, who in Paragraph 39 of her Complaint stated that she maintained close relationships with members of the community, did not know that the Berkeley County Republican Party had no role in the opposition to the Referendum.

35. As to the allegations contained in Paragraph 53 of Plaintiff's Complaint, Defendant Josh Whitley admits that he gave the district / Dr. Thompson several opportunities to apologize to the community and if they did so, he would withdraw his FOIA request. At first, Dr. Thompson appeared willing to apologize, but then Defendant received an email from attorney Kathy Mahoney on November 1, 2012, stating that the district declined Josh Whitley's proposal for the district to issue an apology in exchange for the withdrawal of the FOIA request. All remaining allegations are denied.

36. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 54 of Plaintiff's Complaint and, therefore, denies the same.

37. Defendant admits the allegations contained in Paragraph 55 of Plaintiff's Complaint. Further answering, requesting and receiving public documents pursuant to FOIA is a right of citizens of the State, and Plaintiff's claim against Defendant arising out of inculpatory information contained in those documents is frivolous and sanctionable. There can be no basis for a conspiracy against a citizen requesting the documents

pursuant to FOIA when those documents lead to evidence of criminality for which the public employee then enters a plea of guilty.

38. As to the allegations contained in Paragraph 56 of Plaintiff's Complaint, Defendant admits that he had to selectively choose emails for his Powerpoint presentation. This, however, was not to mislead; instead, it was due to the vast amount of evidence of the Plaintiff's criminality among the documents produced. There were simply too many incriminating emails from which to choose. Further answering, the Defendant did not alter (other than obvious highlights / annotations) the emails in any way and simply uploaded the emails into the presentation. It was Plaintiff's own words that were incriminating, not Defendant's selection of the emails.

39. As to the allegations contained in Paragraph 57 of Plaintiff's Complaint, the Defendant denies that the emails "merely indicated Plaintiff ... [was] responding to questions about the school bond Referendum, providing correct information to the volunteer Referendum committee...." In fact, the plain reading of these emails shows the frivolity and sanction-worthy nature of this allegation, including the fact that Plaintiff pled guilty under oath to advocating for the bond Referendum and not merely just providing information. Consistent with the contemporaneously filed motion for sanctions and motion to dismiss, the criminally convicted Plaintiff cannot plead guilty under oath to violating the law and then claim in this lawsuit that she did not commit the criminal acts to which she voluntarily entered her guilty plea. Moreover, the Attorney General stated that the evidence of the Plaintiff's guilt and criminal activities came mostly from her emails. This allegation is fraudulent, frivolous, and sanctionable.

40. As to the allegations contained in Paragraph 58 of Plaintiff's Complaint, the Defendant admits this allegation and affirmatively alleges that this allegation highlights the absurdity of the lawsuit in that all the Republican Party allegedly did was ask the

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Attorney General to prosecute any person who violated any ethics laws relating to the school bond Referendum. Further answering, this resolution and Party activity came the following year after the Referendum. Further answering, and upon information and belief, the Party took this action on this Defendant's request after he received word that the convicted criminal Kovach's attorney was stating that there was not much to this case. In other words, the only reason the Party passed the resolution was to request the Attorney General take this matter seriously and prosecute only persons who violated criminal law.

41. Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraphs 59 through 60 of Plaintiff's Complaint and, therefore, denies the same.
42. As to the allegations contained in Paragraphs 61 and 62 of Plaintiff's Complaint, the Defendant admits he contacted the Attorney General with evidence of criminality of employees of the school district, and that he alleged that Plaintiff and others worked on the Referendum and used District resources to promote its passage. Thereafter, the Defendant Josh Whitley was proven correct, as Plaintiff pled guilty to charges that she used district resources illegally. This was an historic and important moment for the State of South Carolina to hold public officials accountable for acts of public corruption.
43. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 63 through 67 of the Plaintiff's Complaint and, therefore, denies the same. Further answering, what is incomprehensible is not the prosecution of Plaintiff but rather how Plaintiff could plead guilty to her public acts of corruption and do so under oath and then file this frivolous lawsuit that demonstrates she is either lying here or perjured herself at her hearing.

44. As to the allegations contained in Paragraph 68 of Plaintiff's Complaint, Defendant admits he complained of the Plaintiff's (and others') criminal wrongdoings to the Attorney General. The Attorney General asked SLED to investigate and, thereafter, there were numerous indictments (six total – five against Kovach and one against Thompson) and two convictions of the criminal Plaintiff. Accordingly, not only was this Defendant within his rights to take evidence to the Attorney General of criminal wrongdoing; ultimately, he was proven correct.

45. As to the allegations contained in Paragraph 69 of Plaintiff's Complaint, the Defendant vehemently denies this frivolous allegation. To the Defendant Josh Whitley's knowledge, he had no known relationship with any person at the Attorney General's office prior to taking his complaint to the Attorney General. In fact, he directed his complaint directly to Attorney General Alan Wilson and gave his presentation to General Wilson and several other high level members of Wilson's administration. Prior to approaching General Wilson with his Complaint, Whitley had never met or spoken to the Attorney General.

46. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 70 of Plaintiff's Complaint and, therefore, denies the same. Defendant is unaware of when the convicted criminal Plaintiff learned of the investigation, and due to her inability to relate truthful information regarding timelines and other information, the Defendant must deny this allegation and not rely on Plaintiff's ability to truthfully allege information.

47. As to the allegations contained in Paragraphs 71 and 72 of Plaintiff's Complaint, Defendant admits that Childs & Halligan was district legal counsel and donated to the "Vote Yes" campaign after the convicted criminal Plaintiff illegally used district resources to solicit funds directly from Ken Childs. Defendant denies that all legal

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questions were made clear to Childs & Halligan as John Reagle of Childs & Halligan told Defendant Josh Whitley that he was unaware of the pre-election illegal activities of the Plaintiff and others and was only called after the District received Defendant's FOIA request. Further answering, Plaintiff admitted to knowingly breaking the law and knowingly committing forgeries and perjury to cover up her crimes. Therefore, reliance on counsel is no defense, as Plaintiff must have realized when she pled guilty to her crimes.

48. As to the allegations contained in Paragraph 73 of Plaintiff's Complaint, Defendant is unaware of when the convicted criminal Plaintiff met with SLED in the presence of her husband. Further answering, Defendant points out that the Plaintiff's husband is an attorney and was an attorney during the entirety of Plaintiff's criminal activities.
49. As to the allegations contained in Paragraph 74 of Plaintiff's Complaint, the Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegation that Plaintiff was acting at the wishes of the BCSD and, therefore denies the same. Further answering, the Defendant notes that Plaintiff pled guilty to knowingly violating criminal laws and, therefore, the wishes of the BCSD are immaterial. For example, if Plaintiff was told to embezzle money and was caught, she would still be guilty of embezzling money. As she admitted during the hearing on her guilty plea, she was aware of the criminal law, chose to violate it, and pled guilty to the same. Further answering, to the extent this allegation is true, it is an admission of a criminal conspiracy, but it does not absolve the Plaintiff of her criminal wrongdoing.
50. As to the allegations contained in Paragraph 75 of Plaintiff's Complaint, Defendant is without information or knowledge sufficient to form a belief as to the truth of Plaintiff's allegations concerning any phone calls received by the convicted criminal Plaintiff's attorney husband and, therefore, denies the same. Further answering, Plaintiff hired and

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was reimbursed by the taxpayers for separate counsel, even though at all times, she knew she had knowingly committed criminal acts.

51. As to the allegations of Paragraphs 76 through 80 of Plaintiff's Complaint, Defendant is without information or knowledge sufficient to form a belief as to the truth of Plaintiff's allegations relating to the actions of BCSD as alleged and, therefore, denies the same. Further answering, based on these allegations alone, it is clear the Complaint against the remaining Defendants is completely frivolous and sanctionable and only meant to harass those who held the Plaintiff responsible for her criminal activities. Plaintiff cannot allege on one hand that BCSD did wrong because they did not properly supervise her and warn her of her criminal activities and then on the other hand state that the remaining Defendants did anything wrong as to reporting those same criminal activities to the proper authorities.

52. As to the allegations contained in Paragraph 81 of Plaintiff's Complaint, the Defendant is without information or knowledge sufficient to form a belief as to the truth of Plaintiff's allegations concerning her proffer with SLED and, therefore, denies the same. Further, upon information and belief, the convicted criminal plaintiff admitted under oath to lying to SLED in that November proffer.

53. As to the allegations contained in Paragraph 82 of Plaintiff's Complaint, Defendant admits that Plaintiff was indicted for "use of public funds to influence an election" on February 11, 2014. Defendant denies the remainder of the allegations regarding what Plaintiff's employer instructed her to do and points out that the convicted criminal Plaintiff denied on many occasions that she had done anything to influence the election. Now, she admits that she did so, but claims it was done at the directive of her employer. Defendant points out that Plaintiff's numerous lies were explicitly recognized by this Court at her guilty plea hearing. Further answering, Defendant notes that the Plaintiff

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pled guilty to these charges of knowingly violating the criminal statute prohibiting the use of public resources for a campaign and of misconduct in office. To the extent her allegation implicates a conspiracy with others, it nevertheless does not absolve her criminal wrongdoing.

54. Defendant denies the allegations contained in Paragraph 83 of Plaintiff's Complaint, and further notes that Kovach pled guilty under oath that she used public funds for the making of a campaign video in excess of \$5,000.00. In fact, the Judge set her \$25,000 fine based on the cost of that video (the statute allowed for a 500% fine of the monies used). For Plaintiff to now file this lawsuit and claim no monies were used demonstrates the frivolous nature of this lawsuit and is a basis for the motions to dismiss and for sanctions.

55. As to the allegations contained in Paragraph 84 of Plaintiff's Complaint, Defendant admits the Plaintiff was placed on administrative leave after the February 11, 2014 indictment. Further answering, Defendant states that Kovach drew a \$75,000 salary during that time and even after she was indicted on felony charges, knowing she had committed crimes. This resulted in Plaintiff's unjust enrichment at the expense of taxpayers for nearly a year and a half.

56. As to the allegations contained in Paragraphs 85 through 87 of Plaintiff's Complaint, Defendant admits that the district sought review by Victor Rawl but denies he is a judge. In fact, he is an attorney that was paid to deliver his opinion and was given selective information. Moreover, Mr. Rawl admitted on the face of his letter that he was not given all information and, amazingly, that he had relied on information from Kovach's criminal attorney.. The Attorney General opined that Mr. Rawl's opinion was wrong. Likewise, Defendant also admits that John Freeman gave an opinion as to legal fees. Further answering, Mr. Rawl's and Mr. Freeman's opinions were proven emphatically wrong by

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Plaintiff's own plea under oath where she admitted to criminal acts, which can never be in "good faith." The Court appeared disgusted by Kovach's refusal to accept responsibility for her admitted crimes while taking public funds away from children. She continues deny responsibility, as evidenced by this lawsuit.

57. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 88 of Plaintiff's Complaint and, therefore, denies the same.

58. As to the allegations contained in Paragraph 89 of Plaintiff's Complaint, Defendant denies the Attorney General instructed the BCSD to refrain from reimbursing Plaintiff but did advise the district that it was in violation of the South Carolina Constitution to pay these fees and that indemnification was the proper method to handle her criminal defense, if she was found not guilty.

59. As to the allegations contained in Paragraph 90 of Plaintiff's Complaint, the Defendant admits the convicted criminal's defense lawyer filed the hasteful motion to disqualify the Attorney General, which he lost. Further answering, Plaintiff's criminal defense lawyer filed numerous motions on behalf of the convicted criminal Plaintiff, including one motion to dismiss the indictment and, upon information and belief, admitted in open court he had never filed a similar motion in 33 years. Further, he filed a motion to disqualify the Attorney General and lost. He also filed a motion to change venue and lost. These motions were extremely lengthy and likely cost the taxpayers of Berkeley County a tremendous amount of money. Indeed, criminal counsel billed approximately \$303,000.00 to defend Kovach on what began as a \$5,000 misdemeanor ethics case. Of course, Kovach was unjustly enriched by the amount of fees paid on her behalf, especially since she knew she was guilty of the crimes for which she was charged the entire time. Ultimately, even her criminal counsel stated at the hearing that he believed

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she would likely be found guilty by a jury of the charged crimes if the matter went to trial, and that it was in her best interest to plead guilty.

60. As to the allegations contained in Paragraphs 91 and 92 of Plaintiff's Complaint, upon information and belief, Defendant admits two law professors were engaged to opine on behalf of Kovach. Further answering, Defendant points out the Court rejected in whole the professors' arguments and denied Kovach's motion to disqualify the Attorney General. Unfortunately, the cost of this dubious motion was borne by the taxpayers of Berkeley County and is a basis for recovery in the counterclaims of this action.

61. As to the allegations contained in Paragraph 93 of Plaintiff's Complaint, Defendant admits the BCSD continued to pay the fees, but only as to the ethics charge – not as to the two felony forgery indictments, the perjury indictment, or the misconduct in office indictment. Or at least that is what they stated. Further answering, the school board never examined the evidence to conclude whether the acts were in "good faith," but accepted Kovach's representations that she was acting in good faith. Plaintiff ultimately admitted in Court that this was a lie and pled guilty to two of the charges, including misconduct in office for acts of public dishonesty, and admitted that she knew these actions were in violation of the law when she was committing them. Accordingly, it was Kovach's misrepresentation that led to the "good faith" conclusion and payment of her fees, which she should reimburse to the public coffers.

62. As to the allegations contained in Paragraphs 94 and 95 of Plaintiff's Complaint, Defendant is without information or knowledge sufficient to form a belief as to the truth of Plaintiff's allegations concerning BCSD's knowledge and, therefore, denies the same.

63. As to the allegations contained in Paragraph 96 of Plaintiff's Complaint, Defendant is without information or knowledge sufficient to form a belief as to the truth of Plaintiff's allegations concerning what has happened to her personally and, therefore, denies the

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same. Further answering, although it is typical of Kovach's modus operandi to blame the Attorney General for her actions and not take responsibility, Kovach can only blame herself for willfully and knowingly committing criminal acts and the consequences that arose therefrom, including the criminal mug shot taken of the convicted criminal Plaintiff that was in the Post & Courier and any and all impact her crimes have had on her career.

64. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 97-99 of Plaintiff's Complaint and, therefore, denies the same.

65. As to the allegations contained in Paragraph 100 of Plaintiff's Complaint, Defendant denies specific information regarding the Republican Party's intent to replace Phillip Obie. Further answering, the Republican Party has been interested during the investigation in holding officials accountable who waste taxpayer funds or officials who defend criminal activity and likely would be interested in replacing any board member that supported those two objectives, as has been evidenced in the last general election and likely will be evidenced in the next general election.

66. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 101-104 of Plaintiff's Complaint and, therefore, denies the same. Further answering, it is curious how Kovach would have information from privileged executive session. Further answering, regarding the forensic expert, Kovach, under oath, admitted to the underlying facts of the forgeries as part of her guilty plea for misconduct in office for acts of public dishonesty. Accordingly, this allegation proves the frivolity of the Complaint or the perjury committed by Kovach at her guilty plea hearing, or both.

67. As to the allegations contained in Paragraphs 105 and 106 of Plaintiff's Complaint, Defendant denies the Attorney General dismissed the indictments as unsupported, bogus

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and false against the Plaintiff. These allegations are ludicrous and prove the frivolous nature of the Complaint. The Attorney General announced at the guilty plea hearing that it was dismissing the three indictments as part of the plea deal and emphatically *not because they were unsupported*. In fact, the Attorney General was clear that Kovach, under oath, still had to plead to the facts that supported the three additional indictments as part of her misconduct in office charge for acts of public dishonesty. A simple request for the transcript of the hearing would have prevented the frivolous filing of this lawsuit and is the subject, *inter alia*, of Defendant's motion for sanctions against Plaintiff and her counsel.

68. Defendant denies the allegations contained in Paragraphs 107 through 117 of Plaintiff's Complaint. In fact, the Attorney General was clear that Plaintiff, under oath, still had to plead to the facts underlying the three additional indictments as part of her misconduct in office charge for acts of public dishonesty. An easy request for the transcript of the hearing would have prevented the frivolous filing of this lawsuit and is the subject, *inter alia*, of Defendant's motion for sanctions against Plaintiff and counsel. Further answering, Kovach cannot contradict in this civil action here what she has already pled guilty to under oath in August of 2015. That act in and of itself subjects Kovach to sanctions and dismissal of this suit.

69. Defendant admits the allegations of Paragraph 118 of Plaintiff's Complaint.

70. As to the allegations of Paragraphs 119 and 120 of Plaintiff's Complaint, Defendant denies that the publicity caused distress or damage to Plaintiff and her family and states rather that any stress Plaintiff experienced was caused by Plaintiff's criminal activities and being caught for the same. Again, Plaintiff continuously attempts to blame everyone else for her criminal behavior and refuses to accept responsibility. In Defendant's opinion, there could not be a worse example for her children than the one she has set

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both in committing crimes and in not taking responsibility. Further answering, it is incredible that Kovach now claims damages resulting from publicity, when on May 14, 2013, she stood before a large crowd at an orchestrated school board meeting and proclaimed that she was proud to be on the front page of the Post & Courier with Thompson related to the ethics investigation.

71. Defendant denies the allegations of Paragraph 121 of Plaintiff's Complaint.
72. Defendant denies the allegations of Paragraphs 122 and 123 of Plaintiff's Complaint, as Plaintiff pled guilty under oath to the charges against her. She cannot now file this lawsuit and perjure herself. Such an attempt is grounds for Defendant's motion for sanctions and dismissal. In fact, Plaintiff, under oath, told the judge that she was knowingly pleading guilty, admitting her guilt, and was doing so under her own free will.
73. As to the allegations of Paragraph 124 of Plaintiff's Complaint, the Defendant admits he made comments seeking accountability for the criminal activities of the Plaintiff and any other employee found to have violated the law. Defendant's comments in this regard are protected by the First Amendment to the United States Constitution. Similarly, Defendant is going to demand redress for the filing of this frivolous lawsuit.
74. As to the allegations of Paragraph 125 of Plaintiff's Complaint, Defendant admits that he successfully represented Hardesty in a First Amendment lawsuit when the school board chairman would not let members of the public read Ms. Kovach's emails. To the extent that Plaintiff was "disparage[d]" by the emails, her own words and criminal activities were to blame as speakers read Ms. Kovach's emails. Further answering, as the federal court has already addressed, Ms. Kovach was a public figure and this was a matter of grave public importance, which is protected under the First Amendment.
75. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 126-136 of Plaintiff's Complaint, and

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therefore, denies the same. It is amazing that a convicted criminal would make the allegation that the BCSD has never supported her, as the BCSD spent \$303,000 plus hundreds of thousands more to Childs & Halligan, both related to doing everything they could to protect a person who turns out is a criminal. Moreover, although the convicted criminal Plaintiff alleges that Defendant Marino conspired to harm her (without any supporting pleaded facts), she fails to mention that Marino in point of fact voted to provide her criminal counsel. Moreover, Plaintiff's pleading that the Attorney General provided false information, manufactured evidence, and indicted her on baseless evidence is sanctionable, as the convicted criminal Plaintiff pled just two months ago to the exact opposite.

(FIRST CAUSE OF ACTION)

(Breach of the Covenant of Good Faith and Fair Dealing against Defendant BCSD)

76. As to the allegations contained in Paragraph 137 of Plaintiff's Complaint, the Defendant incorporates each and every response contained in Paragraphs 1 through 75 of this Answer as if repeated herein verbatim.

77. As to the allegations contained in Paragraphs 137 through 141 of Plaintiff's Complaint, Defendant states that these allegations are against Defendant BCSD and, therefore, no response is required. To the extent a response is required, Defendant denies the same.

(SECOND CAUSE OF ACTION)

Grossly Negligent and / or Intentional Misrepresentation against Defendant BCSD)

78. As to the allegations contained in Paragraph 142 of Plaintiff's Complaint, Defendant incorporates each and every response contained in Paragraphs 1 through 77 of this Answer as if repeated herein verbatim.

79. As to the allegations contained in Paragraphs 143 through 152 of Plaintiff's Complaint, Defendant states that these allegations are against Defendant BCSD and, therefore, no response is required. To the extent a response is required, Defendant denies the same.

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(THIRD CAUSE OF ACTION)
(Breach of Fiduciary Duty against Defendant BCSD)

80. As to the allegations contained in Paragraph 153 of the Plaintiff's Complaint, Defendant incorporates each and every response contained in Paragraphs 1 through 79 of this Answer as if repeated herein verbatim.

81. As to the allegations contained in Paragraphs 154 through 157 of Plaintiff's Complaint, Defendant states that these allegations are against Defendant BCSD and, therefore, no response is required. To the extent a response is required, Defendant denies the same.

(FOURTH CAUSE OF ACTION)
(Civil Conspiracy against Defendants Joshua S. Whitley, Terry Hardesty, Scott Marino, Karen Whitley, the Berkeley County Republican Party, LLC)

82. As to the allegations contained in Paragraph 158 of the Plaintiff's Complaint, Defendant incorporates each and every response contained in Paragraphs 1 through 81 of this Answer as if repeated herein verbatim.

83. Defendant denies the allegations contained in Paragraphs 159 through 163 of Plaintiff's Complaint. Defendant did communicate with various Board Members at times. Communicating and sharing concerns with elected officials is still permissible in the United States.

84. Defendant denies the allegations contained in Paragraph 164 of Plaintiff's Complaint. Further answering, Senator Grooms' wife was never an employee of the District and, therefore, could not illegally use District Resources, as Plaintiff suggests and as Plaintiff did.

85. As to the allegations contained in Paragraph 165 of Plaintiff's Complaint, the Defendant admits the same in so much as there was no action to be taken against Senator Grooms. Even as frivolously plead, any action would have been against Senator Grooms' wife, but still, she did not violate the law, as she was not a district employee. Again, this is

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evidence of Kovach continuously attempting to blame anyone but herself for her criminal activity. Moreover, it is a frivolous allegation as there is no basis of criminality.

86. As to the allegations contained in Paragraph 166 of Plaintiff's Complaint, Defendant denies that Dr. Karen Whitley spoke publicly in favor of the Referendum as an employee of the District. Defendant admits, however, that the convicted criminal Plaintiff did write Dr. Karen Whitley's and others' speeches. Importantly, upon information and belief, Plaintiff removed any advocacy from Dr. Karen Whitley's speech but included advocacy in other district officials' speech, which demonstrates that Kovach knew Dr. Whitley would not advocate and break the law and further demonstrates that Kovach knew what the law was. Moreover, it is very indicative of the difference in character of the convicted criminal Plaintiff and Dr. Whitley.
87. As to the allegations contained in Paragraphs 167 through 169 of Plaintiff's Complaint, the Defendant denies that many emails were exchanged related to a rental lease. Defendant admits that Defendant Dr. Karen Whitley may have used her computer and/or emails on very few occasions and recalls that Defendant Josh Whitley may have sent an email regarding a lease agreement. SLED took no action because there was no criminal activity. These allegations have nothing to do with Kovach's criminal actions and are meant only to harass Defendants and are further evidence that warrants sanctions for the filing of this frivolous lawsuit.
88. As to the allegations contained in Paragraph 170 of Plaintiff's Complaint, Defendant denies he violated Rule 3.6, as he was at all times acting as a citizen and/or elected official attempting to hold a criminal accountable for her crimes. Rule 3.6 does not prohibit commenting on matters of public concern in these circumstances. Whitley was never an attorney investigating this matter on behalf of SLED and was never an attorney working on behalf of the Attorney General in this matter. Plaintiff's criminal counsel on

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the other hand, commented substantively in the news and granted video interviews during the course of this prosecution, which Plaintiff conveniently ignores herein.

89. As to the allegations contained in Paragraph 171 of the Plaintiff's Complaint, the Defendant denies he threatened to sue Jane Pulling if she continued to support Plaintiff. At a minimum, this allegation is narcissistic at best. Moreover, Pulling is not a retiree of BCSD; rather, upon information and belief, she is a former employee of the district and retired from a different district. In fact, Whitley wrote to Pulling on one occasion and had one telephone conversation with Pulling, both regarding her harassment of Defendant Karen Whitley and threats towards Karen Whitley. Upon information and belief, Plaintiff instructed or put Pulling up to harassing Karen Whitley. Pulling also continuously disseminated misinformation regarding the Referendum and was embarrassed at a highly attended public debate against Defendant Josh Whitley at which he received numerous ovations for exposing several occasions when Pulling misled the public.

90. As to the allegations in Paragraph 172 of the Plaintiff's Complaint, Defendant denies that he bragged publicly that he hoped to harm the School District. In fact, during the time Defendant Josh Whitley spoke to the School Board, he bragged about how proud he was to be a product of the school system. Whitley attended Kindergarten through 12th grade in Berkeley County Schools and is a third generation graduate of Berkeley High School. His mother has devoted nearly four decades to the school district. In short, Plaintiff fails to plead this allegation with any particularity as to when and where that statement was made because Plaintiff continuously misrepresents the reality and tries to deflect from her criminal actions.

91. Defendant denies the allegations of Paragraphs 173 and 174 of Plaintiff's Complaint.

92. As to the allegations of Paragraph 175 of Plaintiff's Complaint, Defendant admits that SLED and the Attorney General took no action against him for the simple reason that, unlike Plaintiff, he had not committed any crimes. This ridiculous allegation is further evidence of the frivolity of Plaintiff's Complaint.

93. Defendant denies the allegations of Paragraphs 176 through 179 of Plaintiff's Complaint. Further answering, it is incredible that Kovach now claims damages when on May 14, 2013, she stood before a large crowd at an orchestrated school board meeting and proclaimed that she was proud to be on the front page of the Post & Courier related to the ethics investigation. Further answering, Defendant Karen Whitley is not a member of the Republican Party. Further answering, any suffering or further exacerbation of any existing mental condition is solely from being caught for her crimes and the public humiliation and consequences for her own actions.

(FIFTH CAUSE OF ACTION)
(Civil Assault against Defendant Terry Hardesty)

94. As to the allegations contained in Paragraph 180 of the Plaintiff's Complaint, Defendant incorporates each and every response contained in Paragraphs 1 through 93 of this Answer as if repeated herein verbatim.

95. As to the allegations contained in Paragraphs 181 through 187 of Plaintiff's Complaint, the Defendant states that these allegations are against Defendant Hardesty and, therefore, no response is required. To the extent a response is required, Defendant denies the same.

AFFIRMATIVE DEFENSES

1. Plaintiff's Complaint should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim against this Defendant upon which relief may be granted.
2. Plaintiff's Complaint should be dismissed pursuant to Rule 12(b)(7) for failure to join a party (the Attorney General) under Rule 19 of the SCRCP.

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3. Plaintiff's Complaint should be dismissed under the doctrine of unclean hands.
4. Plaintiff's conspiracy claim against Defendant is barred by the doctrines of res judicata, collateral estoppel, and judicial estoppel due to her plea of guilty to the crimes of misconduct in office in violation of the common law of South Carolina and the criminal use of public funds to influence an election in violation of Section 8-13-1346 of the South Carolina Code of Laws.
5. Plaintiff's conspiracy claim against Defendant should be dismissed because Plaintiff, by pleading guilty to the crimes of misconduct in office in violation of the common law of South Carolina and the criminal use of public funds to influence an election in violation of Section 8-13-1346 of the South Carolina Code of Laws has waived any claims she might have had against Defendant.
6. Plaintiff's conspiracy claim against Defendant is barred on the basis of the statute of limitations.
7. To the extent it applies, Plaintiff's complaint is barred by laches.
8. Any and all acts of the Defendant are protected under the First Amendment of the United States Constitution and under the South Carolina Constitution. Moreover, public policy absolutely protects and extends full and absolute immunity to members of the public in reporting crimes, as was done here.
9. Defendant is immune from liability for his reports to law enforcement in the public interest of matters within the public record.
10. Plaintiff's injuries, if any, were caused in whole or in part by the acts or omissions of others for whose conduct this Defendant is not responsible and/or resulted from conditions unrelated to any conduct of this Defendant.
11. Plaintiff's alleged injuries and damages may have been the result of an independent, intervening, and superseding cause over which this Defendant had no control.

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alleged action or alleged omission on the part of this Defendant was not the proximate cause of the alleged damages.

12. Plaintiff already suffered from one or more significant medical conditions and the injuries complained of herein are the result of her pre-existing condition(s).
13. Any recovery by Plaintiff must be reduced or offset by amounts Plaintiff has received or will receive from others for the same injuries to Plaintiff claimed in this lawsuit.
14. Plaintiff's alleged injuries and damages, if any, were caused in whole or in part by Plaintiff's and/or her representatives' own acts and, therefore, the alleged injuries and claim for damages should be diminished *in toto* according to Plaintiff's culpable conduct.
15. With respect to Plaintiff's demands for punitive damages, this Defendant asserts his conduct, as alleged herein, does not rise to the level required to sustain a claim for punitive damages. Further, the award or assessment of punitive damages as prayed for by the Plaintiff would violate this Defendant's constitutional rights under the First, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Section 3 of the South Carolina Constitution and, therefore, may not be awarded to Plaintiff, in that:
 - a. The judiciary's ability to correct a punitive damage award only upon a finding of passion, prejudice, or caprice is inconsistent with due process guarantees;
 - b. Any award of punitive damages serving a compensatory functions is inconsistent with due process guarantees;
 - c. Any award of punitive damages based upon the wealth of this Defendant violates due process guarantees;
16. The jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards, is arbitrary, promotes grossly excessive awards and is inconsistent with due process guarantees;

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17. Further, this Defendant specifically incorporates by reference all standards of limitations regarding the determination and enforceability of punitive damage awards contained in the decisions of Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008); State Farm v. Campbell, 538 U.S. 408 (2003); BMW of North America v. Gore, 517 U.S. 559 (1996) and Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001), together with all such standards applicable under state law.
18. The Plaintiff has an ongoing duty to mitigate her damages and, to the extent she have failed to do so, her recovery, if any, should be reduced accordingly.
19. To the extent allowed by law, this Defendant hereby invokes the protections afforded by law regarding the limitations on joint and several liability as set forth in S.C. Code §15-38-10 et seq. and associated provisions.
20. To the extent allowed by law, this Defendant hereby invokes the protections afforded by law regarding the limitations on punitive damages as set forth in S.C. Code §15-32-530, et seq. and associated provisions.
21. This Defendant hereby gives notice that he intends to rely upon such other defenses as may become available or appear through discovery or otherwise, and hereby reserves the right to amend this Answer to assert any such defenses.

COUNTERCLAIMS AGAINST PLAINTIFF/COUNTERCLAIM DEFENDANT AMY KOVACH

Statement of Facts

1. Joshua S. Whitley is a lifelong resident of the County of Berkeley and attended Berkeley County Schools from Kindergarten through the 12th Grade, where he served as President of the Student Body of Berkeley High School ("BHS"), was a member of Beta Club and the National Honors Society, was an Honor Student, and was elected by the Faculty as

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Mr. BHS in 2001. Whitley still returns to BHS to speak at the invitation of members of the faculty, including during the Referendum and investigation of the criminal Plaintiff. Following his graduation from BHS, Whitley attended Wofford College, where he was a member of the Judicial Commission, Vice President of the Student Body, President of the Student Body, Student Representative to the Board of Trustees, a Member of all three of the Colleges' Honor Societies, including Phi Beta Kappa, and graduated summa cum laude in 2005. Whitley attended the College of William & Mary on an academic scholarship and graduated with Honors and was second in his class and was recognized nationally for his advocacy skills. Following law school, Whitley received a prestigious clerkship from the Honorable Dennis W. Shedd of the United States Court of Appeals for the Fourth Circuit. Upon completion of the clerkship, Whitley and his wife chose to return to Berkeley County to make a difference and for him to practice law and give back to the community he loves dearly. Whitley is an elected official representing District 2 (Daniel Island, Clements Ferry Road, Hanahan, and Goose Creek) on the Berkeley County Council and Chairs the Human Resources and Purchasing Committee.

2. The Plaintiff is a resident of the County of Berkeley and is a convicted criminal. She pled guilty to criminal violations of the South Carolina Ethics Act and to Misconduct in Office for acts of public dishonesty. Further, as part of her misconduct guilty plea, she admitted to the facts supporting the nolle prossed indictments of forgery (2 counts) and perjury.
3. Third Party Defendant Rodney Thompson is a resident of Berkeley County and the former Superintendent of Schools. He has been indicted for criminal violation(s) of the South Carolina Ethics Act and, upon information and belief, is still under investigation.

4. It is established criminal statutory law that "A person may not use or authorize the use of public funds, property, or time to influence the outcome of an election." S. C. Code § 8-13-1346.
5. Moreover, it is established criminal statutory law that "No person may use government personnel, equipment, materials, or an office building in an election campaign." S.C. Code § 8-13-765.
6. Indeed, training on these criminal statutes is a major part of a school board member's initial orientation. Further, employees and law firms representing school boards are aware of the prohibition regarding influencing an election or using public resources in an election or Referendum campaign.
7. At all relevant times, Kovach was aware of these criminal statutes and that she could not use district resources in an election campaign or to influence the outcome of an election.
8. Further, Kovach was aware of district policy that prohibited taking actions that transform schools into arenas of political activity and that further "no one may collect or solicit funds for political use . . . no one can use the district communication systems, including e-mail or voice mail, to promote or solicit."
9. Further, at all relevant times, Rodney Thompson was aware of district policy that prohibited taking actions that transform schools into arenas of political activity and that further "no one may collect or solicit funds for political use . . . no one can use the district communication systems, including e-mail or voice mail, to promote or solicit."
10. On or about mid-2012, Whitley observed that Rodney Thompson, Superintendent of Berkeley County Schools, and Doug Cooper, former Chairman of the Berkeley County School District were providing misleading information to the public, including regarding the cost of Cane Bay Middle School. Whitley believed that their strategy in understating the cost of the Middle School was to be able to tell the public later in the Fall that they

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could build schools cheaper and the taxpayers should trust them with a \$198 million bond issue. Whitley learned that Thompson intended to first announce a \$250 million dollar bond and then lower the amount to a more palatable amount of \$198 million based on his claim he could build schools cheaper. Whitley was disheartened that the School District he loved so dearly would play games with the public on important issues.

11. In mid 2012, the School Board voted to pursue a \$198 million bond Referendum to include the building of 5 new schools and renovations on 19 schools. As the program was developed, some of the claimed renovations were not true renovations (including mere carpet replacement or information technology updates) or were already going to be paid from other sources but were simply being included to try to appeal to the county-wide electorate. Again, Whitley was disheartened that a school district would mislead citizens and believed it was a terrible example to set for children. Upon information and belief, this misleading strategy was lead by the convicted criminal Plaintiff and indicted Third-Party Defendant Thompson.

12. As the campaign was being laid out, school leaders also began to misrepresent the cost of the Referendum to the taxpayers.

13. Whitley also attended a board meeting in the summer of 2012 where he was astounded that the convicted criminal Plaintiff gave a presentation where she was laying the groundwork for a campaign. Whitley inquired who she was and was told she was the new community relations / communications person for the District. Whitley was shocked that she would so boldly give a presentation that laid out a criminal framework / plan for passing the Referendum, as all educator professionals are aware that you cannot campaign for these Referendums with district resources. Kovach and Thompson knew they were not supposed to use district resources to campaign. In fact, Whitley had supported the last bond Referendum, which passed and transformed the district in 1999

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building wonderful schools across the county. Unlike the 2012 Referendum, the 1999 Referendum was led with integrity, passed legally, and upheld its promises to the citizens of Berkeley County after its passage.

14. As the "Yes 4 Schools Campaign" went forward, the campaign was slick, highly funded, and highly misleading. It was misleading to residents as to location of schools, as to the amount of the tax increase that were going to be required, as to the enrollment issues, and as to the funding of projects across the County. At that point, Whitley felt compelled to speak out, and he called his mother Dr. Karen Whitley ("Dr. Whitley" or "Karen Whitley") who is the Associate Superintendent of Schools. Whitley told his Mother that he had researched and read about the Referendum and believed the District's numbers were misleading. Whitley told his Mother that he would not want to jeopardize her employment, but that he felt compelled to speak out against this Referendum. His mother responded that she had raised him "to do the right thing."

15. Thereafter, Whitley created a Committee titled "Committee for Sustainable Education" to be co-chaired with Defendant Hardesty. Whitley worked with a consultant from out-of-state to determine what the tax increase would be for the top 200 taxpayers in Berkeley County. The astounding results were then mailed to the 200 taxpayers with a letter seeking financial support for the opposition committee. Whitley's law firm's address was listed on the letter, but Whitley's name was not listed in order to protect his mother. Whitley's plan was to do a low-key opposition campaign that simply raised money to then send to voters with the real facts.

16. One of the persons who received the letter gave his copy to Rodney Thompson who shared it with Doug Cooper, the Chairman of the Board, and Amy Kovach, who was leading the campaign's illegal activities on behalf of the District. Kovach and/or Thompson asked the "volunteer chairman" Jane Pulling to call Whitley's mother. Pulling

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called for two days to Dr. Whitley's office and when she reached Dr. Whitley, she was threatening in both tone and substance. Among other statements, Pulling told Dr. Whitley that she can google and found Whitley's law firm address on google. Kovach then followed up, on information and belief, by email to Pulling asking what Dr. Whitley's response was.

17. Josh Whitley then called Pulling and stated to her that if she could google Whitley's address, why could she not also google Whitley's phone number and call him instead of improperly calling Whitley's mother on her office phone to threaten her regarding her son's opposition to the bond Referendum. Pulling was flustered and at a loss of words and simply said that she and Whitley needed to have lunch and discuss matters. They proceeded to have lunch in the coming days, where Pulling stated misinformation regarding the Referendum. Pulling also lied and said she had helped start Karen Whitley's career and had Karen in an assistant principalship mentor / training program. This is wholly untrue but, upon information and belief, typical of Pulling's inability to give accurate information. For example, Pulling kept referring to herself as a former "Superintendent" to Whitley during the entire lunch when in point of fact, Pulling was never hired as a Superintendent despite applying to several districts. When confronted with the misinformation by Whitley, Pulling said she would go back to the folks at the district and inquire – presumably meaning Kovach and Thompson. Later, when Dr. Whitley complained to Thompson that Dr. Pulling had given misinformation to voters at Whitesville Elementary at a community meeting, he said there was nothing he could do about that. In point of fact, giving information was what Thompson and Kovach could do legally – instead, they chose to campaign illegally, as admitted by Kovach under oath in her guilty plea hearing. Later, at a debate between Whitley and Pulling, she continued to give misinformation.

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18. In late September, Thompson called Dr. Karen Whitley into his office regarding Whitley's opposition to the Referendum. Thompson told Dr. Whitley that since the Board passed the Referendum, she was required to support it. She replied that she only supports what is right. Thompson threatened Dr. Whitley that if her son continued to be opposed to the Referendum, Thompson could not protect her from the repercussions from the Board. She replied that she raised her son to do the right thing and was proud of him. She further told Thompson that he had already lied to her and was already after her, so she was not worried about the repercussions. When asked how he had lied, she stated to him that on the morning following his interview to be Superintendent, Dr. Whitley had asked him why he planned to move her laterally from the Chief Academic Office and what had she ever done to him but be supportive. That morning, he told her that was just people trying to pit them against each other, and he had no such plans and had made no such statement. This, in fact, was a lie and Dr. Whitley had a copy of the powerpoint Thompson gave the board in executive session stating he was going to move Dr. Whitley. When Dr. Whitley revealed to him that she had proof via a powerpoint that he lied, he became flustered. Later that afternoon, Thompson called Dr. Whitley back to his office to again threaten and attempt to get her to get her son to back down and also demanded to know which board member had turned on him and given her a copy of the powerpoint presentation. Dr. Whitley refused to tell him how she had come in possession of the powerpoint and refused to ask her son to back down.
19. Thereafter, on or about October 1, 2012, Thompson reached out to Josh Whitley asking for a meeting at Whitley's office, which Whitley agreed to. Thompson also asked Chief Financial Officer Brantley Thomas if Thomas had a good relationship with Whitley. Thomas answered yes and that Whitley had invited him to his wedding in 2008. Thompson and Thomas came to Whitley's office on October 2, 2012, following an illegal

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campaign "Yes 4 Schools" rally at Stratford High School that they both attended and that Kovach later pled guilty to orchestrating with district resources.

20. In the meeting with Thompson and Thomas, Thompson revealed the opposition letter and that the committee had gotten the numbers wrong, and he thought that made Whitley look bad. Whitley stated to him that he had gotten the numbers from the District (the bond formula) and from the County (the tax assessments) but if there were any numbers wrong, he would volunteer to resend the 200 letters correcting himself and did not want incorrect information out there. As it turns out, Whitley's numbers were correct, Thompson was wrong, and Whitley confirmed that in writing / email to Thompson and Thomas. Even knowing that Whitley's numbers were correct, Thompson mislead board member(s) that "Whitley's numbers were wrong," to which Whitley appeared at the next board meeting and chastised Thompson publicly for misleading the Board after he knew the truth. Thompson was speechless and mostly looked down at the floor / desk.
21. During the October 2, 2012, meeting and after he realized that Whitley had his information together, Thompson asked Thomas to leave. Thomas was nervous and quickly exited the conference room without saying goodbye. After Thomas left, Thompson threatened Whitley's mother and that he could not protect her job if Whitley continued in opposition. Thompson stated that he loved Whitley's mother, that being a grandmother made her so happy, that she was one of the strongest leaders in the County, and that he hated to see Whitley's actions negatively affect her. Thereafter, Whitley sent Thompson a letter explaining he and the Board could not take any retaliation against Dr. Whitley based on the political activities of her adult son. Nevertheless, upon information and belief, at a later point, Doug Cooper threatened to reassign Dr. Whitley to a lesser position due to Whitley's actions.

22. Based on these threats and the utter lack of integrity of Thompson and Cooper, Whitley understood he would need to be publicly out front against the Referendum so that any action taken against Dr. Whitley would be obviously based on retaliation due to Whitley's political activities. Thereafter, Whitley participated in a debate with Pulling and gave public interviews in opposition to the Referendum in the Post & Courier and elsewhere.
23. After Whitley publicly opposed the Referendum, he began receiving calls from employees and parents stating how they had witnessed Plaintiff and others illegally campaigning using district funds. Whitley also learned that the District had used resources to make a campaign video with children in the video saying "Yes 4 Schools." At that point, Whitley told a member of the Board Donna Marino, who was also worried about the video, that she needed to be on the record that she did not sanction District employees using resources for the Referendum campaign. Marino asked Whitley for help with a statement, which Marino read on October 9, 2012, that absolutely put Thompson and Kovach and anyone else on notice to cease using district resources for the campaign. See Exhibit B. (Minutes of October 9, 2012). After Marino's statement, Kovach drafted a statement for Thompson and gave to the press stating that no district resources had been used in the making of the video. See Exhibit C (Email of Kovach to Thompson of October 10, 2012 at 3:14PM); see also Exhibit D (Email of Kovach to Rindge on October 10, 2012 at 5:04PM). Kovach knowingly lied to the media in this statement. Instead of being humble, admitting their errors, Kovach and Thompson lied to the media about the making of the video on October 10, 2012, in an article in the Post & Courier. Kovach admitted in her guilty plea hearing that she lied.
24. After Kovach knowingly lied on October 10, 2012, regarding the video, Whitley produced an email from September 20, 2012, where Kovach emailed 14 principals to tell

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them that she would be coming to their school with a videographer to make a video for the campaign and to have children available / prepared to say "Yes 4 Schools" for the Campaign video. See Exhibit E (Email of Kovach to 14 principals on September 20, 2012). The newspaper then printed an article demonstrating Kovach's lie. Because Kovach and Thompson had directly lied about their involvement in the video, Whitley then FOIA'd all emails of Kovach, her supervisor Archie Francini, and Rodney Thompson for the last two months regarding Vote Yes, Referendum, Yes 4 Schools, and other similar search terms.

25. Soon thereafter, Whitley was attending a Yes 4 Schools information meeting on Daniel Island and was sitting in the back when Kovach and Thompson came into the school. Thompson came and sat beside Whitley and asked what it would take for Whitley to withdraw his FOIA. At that point, Whitley realized he would be able to easily prove that they had illegally used resources, but Whitley did not want any unnecessary war, so he told Thompson during a call the next day that if he would apologize to Marino for indicating that she had lied and apologize to his employees for illegally using district resources to campaign and cease campaigning, Whitley would withdraw the FOIA. Thompson told him he would be back in touch. Thereafter, Kathy Mahoney, one of the District's attorneys, drafted a letter to all employees from Thompson that set forth the law and told employees to stop campaigning. Thompson's letter made it look like employees were the ones at fault. Because Thompson did not apologize, Whitley did not withdraw his FOIA.

26. Whitley began to realize that they were also lying about the location of the school on Daniel Island / Clements Ferry Road in order to have Daniel Island residents support the tax increase. Thompson and Kovach and volunteers from the campaign were representing to Daniel Island residents that the school would be on Daniel Island.

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Whitley knew this would be nearly impossible and was not their intent due to land price and that they intended to place the school on Clements Ferry Road. Whitley began telling residents that the new school would not be on Daniel Island, to which, upon information and belief, the campaign or Kovach took out an ad in the newspaper promising the school would be on Daniel Island. Further, Kovach strategized that Daniel Island residents needed to be scared that there were going to be trailers on the island if the Referendum did not pass and, upon information and belief, also wanted to scare residents on Clements Ferry Road that they would have to go to school at Cainhoy, which is a majority African American School and, of course, that veiled racial scare tactic is highly inappropriate. In point of fact, the Cainhoy is a wonderful school with a wonderful supportive community that Dr. Whitley has long admired. Of course, the school is currently being built on Clements Ferry Road, as Whitley said all along and followed great community upheaval where hundreds of parents and community members showed up to express their disgust with Thompson, Cooper, and Kovach's lies. Moreover, three years after the Referendum, citizens in Hanahan were supposed to have a new school open in the coming year, but again, Thompson and others have not fulfilled their campaign promise and land has not even been purchased yet, much less construction started.

27. In addition, Whitley was also critical of the amount Kovach, Thompson and Pulling were advertising as the cost of the tax increase. These individuals were misleading residents that it would only cost \$40 per year or a tank of gas, or 4 pizzas. Of course, in reality, the increase would be \$40 per \$100,000 of assessed value for the first three years and then \$80 per \$100,000 of assessed value for the next 17 years. For a starter home on Daniel Island that starts at \$400,000, in year 4, the resident would be paying an extra \$320 per year, yet district officials were telling Daniel Island, *inter alia*, it would just be \$40 per year.

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28. The District was also greatly overstating the enrollment numbers of the District and need for new schools. Whitley pointed out their own website and enrollment numbers demonstrated their direct lies.
29. Upon information and belief, any time a person approached Kovach at a community meeting with the apparent facts not "adding up," she would lose self-control or become flustered and storm away.
30. The District withheld the response to Whitley's FOIA for months in what Whitley believed was to allow the election to occur first and hope Whitley's interest would wane. Indeed, Kovach alleges that the district's attorney told her that Whitley would lose interest.
31. On Sunday, November 4, 2012, just prior to the Tuesday November 6 Referendum election, Kovach and Thompson called Brenda Rindge with the Post & Courier to tell her they had a major story and she needed to be available at 8:00pm that night. Rindge called Whitley to ask if he knew what that could be. Whitley responded that he had given them multiple chances to apologize, so maybe they were going to take responsibility in hopes that he would not pursue their ethical wrongdoings (which had they apologized, he would not have taken further steps). Instead, Kovach and Thompson were waiting, upon information and belief, to give misinformation that would make Whitley look to be unethical instead of them and did not want him to have an opportunity to respond.
32. Specifically, Kovach and Thompson conspired to injure Whitley by making knowingly false statements, by accusing Whitley of not properly filing a statement of political organization with the South Carolina Ethics Commission and violating the South Carolina Ethics Act.
33. This was a knowingly false statement, committed with actual malice (knowledge of its falsity or reckless disregard of the truth) and Whitley provided correspondence from the

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South Carolina Ethics Commission that stated "There is no filing requirement for this committee."

34. Nevertheless, Kovach and Thompsons' false statements were published on Page 1A of the Post and Courier on November 5, 2012.

35. Kovach and Thompson further injured Whitley by denying their criminal acts throughout the campaign and during the investigation, by knowingly lying about their acts, and by stating that Whitley was incorrect – all the while, they knew Whitley was telling the truth and they had indeed engaged in the activities as Whitley claimed. These conspiratorial acts by Thompson and Kovach have caused malicious attacks on social media and in the newspaper of Whitley and damaged Whitley's reputation. During the course of the nearly three years, the majority of the public, upon information and belief, has come to despise the criminal acts of Kovach and resented her for knowingly causing hundreds of thousands of dollars to be spent on her defense, but during those years Whitley's reputation has been damaged until the truth of Thompson and Kovach's lies came to light. Further, Kovach continues the conspiracy by stating to family members and friends and educators that Whitley has a close friend in the Attorney General's Office, which is a knowingly false statement, or a statement made in reckless disregard of the truth, and further stating that she did nothing wrong, which is emphatically a knowingly false statement. Indeed, upon information and belief, Kovach's Ohio family and / or friends have posted on social media and comments on newspaper articles that Whitley was fraternity brothers with the Attorney General and that Kovach had personally shown them the evidence and it would soon come out that she did nothing wrong. Thus, within a certain part of society, Whitley continues to have his reputation attacked based on the conspiracy between Thompson and Kovach to injure Whitley.

36. After the election, when Whitley finally received the response to his FOIA, he was completely dumbfounded by what Kovach put in writing to her superiors and others regarding her illegal misconduct. Many who have seen Kovach's emails sent on district email cannot get over the utter lack of intelligence of what she put in writing, including:

- a. In an email subject "Re: Yes for Schools – video" – Kovach writes, "Jason, I LOVE IT! It is brilliant! My only suggestion is that we take off this version at the very end the district logo and just leave the YES 4 SCHOOLS logo." See Exhibit F (Email from Kovach to Jason Bennett on September 27, 2012 at 9:00AM).
- b. In an email to the Principal of Stratford High School, she outlines an illegal Vote Yes Pep Rally to be held during the school day and on school property and writes "The press conference will be in the back yard by the trailers – we want them as background. . . From the school, we will need a podium, microphone A/V (If the school does not have, I can work with technology to get this set up) and two easels from the art room. Finally, if we can have a class or two of students to be present and behind the podium too, that would be great!" See Exhibit G (email from Kovach to Stackley and Lopes on September 17, 2012 at 12:52PM); see also Exhibit H (email from Kovach to Scott Varn on October 1, 2012 at 2:02 PM and coordinating press conference for the committee); see also Exhibit I (email from Kovach to Scott Varn demonstrating Kovach would use district resources to hang Vote Yes banner). She uses school children as part of the campaign.
- c. Kovach drafts email for Principal Newsletter that states with blatant illegal advocacy "All Principals: Between now and October 5, the most important thing you can do to support the school improvement referendum at your school is to encourage your school staff to register to vote...Berkely County School Dsitrict employs 4,200 amazing people. If each one of them and a spouse or family member votes 'YES', we can pass this referendum. That's how important this activity is." See Exhibit J (Email from Kovach to Kim Glaze on September 20, 2012 at 10:17AM).
- d. Kovach drafts an advocacy letter for the editor on behalf of the highest elected official in Berkeley County and emails to Thompson for approval. See Exhibit K (Email from Kovach to Thompson on October 10, 2012 at 4:26PM) (stating "I encourage the voters of Berkeley County to carefully consider the *Yes 4 Schools* School Improvement referendum on November 6 . . . Let's continue to invest ...by supporting the *Yes 4 Schools* campaign").
- e. Kovach drafts an email on behalf of Thompson to a Developer seeking support on for the bond Referendum campaign. See Exhibit L (Email from Kovach on August 8, 2012 at 2:49PM) (stating "Superintendent Thompson has asked me to reach out to you regarding support for the bond referendum campaign").
- f. Kovach drafts an extensive email to Jane Pulling telling her they need a public volunteer committee to do the advocacy for the Referendum because she could not do it but then stated further to Pulling that many of the advocacy items Pulling would publicly do had already been taken care of behind the scenes by Kovach. Pulling was aware of the scheme and Kovach's role. See Exhibit M (email of Kovach to Jane Pulling on August 10, 2012 at 3:07PM).

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- g. Kovach blatantly and illegally organized Yes 4 Schools yard signs to be available in each school's office. See Exhibit N (Email from Kovach on September 13, 2012 at 10:53AM) (stating "yes, yard signs will be available from a school office (they will all have them) beginning Oct. 15. Please pick up one and a few more to share with neighbors and friends! Amy").
- h. Upon information and belief, Kovach drafted the volunteer campaign solicitation letter. She certainly circulated and used it, including in raising funds from the district's attorney.
- i. Kovach actively, by email and otherwise, sought endorsements for the campaign. See Exhibit O (email from Kovach to Brenda Rindge on September 19, 2012 at 5:12PM) (stating "Hi Brenda! Yes, we have secured Mayor Riley's endorsement. I think we have MCTown Council as a whole unit"); see also Exhibit P (email from Kovach seeking organization / HOA's endorsement); Exhibit Q (Email from Kovach on October 3, 2012 seeking endorsements of Mayors of St. Stephen and Bonneau); Exhibit R (email from Kovach to Pulling and Thompson and Pulling on October 3, 2012) (telling Pulling and Thompson that "I also am working on endorsements from St. Stephen and Bonneau mayors"); Exhibit S (Email from Kovach to Thompson on October 3, 2012) (telling Thompson that Congressmen "Clyburn is officially on board").
- j. Kovach asked employees to volunteer at football games in exchange for free admission and to pass out Yes 4 Schools flyers and stickers and coordinated the volunteers instead of letting the campaign do it. See Exhibit T (email from Kovach on September 18, 2012 at 1:18AM); see also Exhibit U (email from Kovach to Pulling on August 22, 2012) (stating "We will set her up with a table, tent and materials" at the football game); Exhibit V (email from Kovach to Thompson and Francini on September 18, 2012) (seeking permission to give Yes 4 Schools volunteers free admission to football games)
- k. Without shame and blatantly illegal, Kovach coordinated the football announcers to do commercials for the campaign during every quarter. As evidence she knew it was illegal, she told principals if your announcer is an employee of the district, they cannot announce the commercial and to have someone else do it. This shows Kovach understood the law because if you cannot announce it, you certainly cannot write it, coordinate it, and have it announced. See Exhibit W (email from Kovach to high school principals on September 18, 2012 at 1:10AM)
- l. Kovach used district copiers, her administrative assistant, and other district resources (including her email) to print Yes 4 Schools Propaganda material. See Exhibit X (emails and material Kovach directed to be produced with District resources).
- m. Kovach wrote dozens of advocacy scripts / speeches for community meetings to be read by the volunteer committee members and instructed them to ask people to Vote Yes and instructed the volunteers to stay on script. See Exhibit Y.
- n. Kovach put in writing in her district email admitting to campaigning on the job. See Exhibit Z (Email from Kovach to Claire Freeman on September 17, 2012) (Stating in regards to a Yes 4 Schools meeting "am working 7 days a week nearly 15 to 16 hour days. This is like the ultimate test of my ability to succeed or fail – the results on Nov. 6 will be the proof"); see also Exhibit AA (Email from Kovach to Susan Haire on September 5, 2012 at 1:46PM) (stating "I haven't even gotten to the IGP yet working on referendum stuff for Rodney that he needs asap"); Exhibit BB (Email from Kovach to Karen Whitley on September 5, 2012) (stating

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in response for work from her legal job at the district, "Karen, I am at about 97% complete. If I could just get a dedicated amount of about 4 hours to work on it without interruption, I could nail it and be done. We are so close and I just need a ½ day without work to focus on it"); Exhibit CC (Kovach email to Library Director) (stating "the referendum is an enormous task and overwhelming. I'm looking forward to a successful conclusion in November and then getting back to my real work")

- o. Kovach provided countless emails circulating information sheets for employees and others with Yes 4 Schools logo and other advocacy information contained within.
- p. Kovach emails a teacher early on in 2012 stating she would love to give the teacher's group an update on the "campaign" and that "we'll be tapping into all of our teachers and staff to support the referendum." See Exhibit DD (Email from Kovach to Angie Simmons on February 15, 2012).
- q. Finally, Kovach emails an official in another school district who was conducting a legal campaign explaining her illegal conduct and campaign plan. See Exhibit EE (email from Kovach to Duke on July 19, 2012) (explaining that they had hired a strategist and set up a volunteer committee and set up an account with the chamber of commerce. She goes on to say . . . "they are NOT 'running the campaign.' The campaign is being run internally from my desk as the BCSD point of contact for all marketing and campaign details").

37. Kovach even presented to the board regarding the Referendum and updated them on a schedule of events for the Yes 4 Schools campaign, fundraising efforts, "and the extensive plan in place to get the message out to all stakeholders so the Campaign can be successful." See Exhibit FF (Board Minutes from August 28, 2012). Kovach even told the Board that she had cleared Thompson's schedule for the month of October for him to be at the disposal of the campaign.

38. Also, during the campaign, a federal agent and school board candidate met with Thompson and when he passed Kovach's office he saw numerous Yes 4 Schools yards signs stacked up. He reported this conduct to Thompson knowing it was illegal and Thompson replied that Kovach normally had her door shut. See Exhibit GG (Affidavit of Kevin Cox dated January 14, 2013).

39. Whitley also received a copy of Kovach's district credit card under FOIA and found where she had made the campaign video and split up the transaction to cover her illegal conduct. See Exhibit HH (credit card statements). This demonstrates, among the

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mountain of other evidence, Kovach lied repeatedly regarding the making of the video with district resources.

40. Kovach and Thompson clearly understood that they could not use district resources to influence the outcome of an election. See Exhibit II (Letter of Thompson to All Staff, October 15, 2012) (citing state law and district policy prohibiting campaigning with district resources); see also Exhibit A (Referendum Do's And Don't's) (prohibiting promoting the ballot measure; collecting funds to support a vote yes; printing material, emailing material, etc. promoting a vote; sending emails supporting a yes vote; organizing a "Vote Yes" rally, etc, and stating further "Be careful – pit falls – Using School District computers, emails, phones to organize support for the Referendum. Remember that communications using official devices can be subject to Freedom of Information Act) (Kovach even circulated this Do's and Don't's Fact Sheet and then proceeded to violate almost every single prohibited example); Exhibit JJ (Email from Kovach to employee on September 13, 2012) (stating "keep in mind that we can't do any of this work from any equipment or district resource as it would violate the SC Ethics rules); Exhibit KK (Email from Kovach to a principal on September 25, 2012) (stating "we may not use the Yes 4 Schools log – that is proprietary to the campaign committee and coming from a school or the district would be viewed as advocating for our position); Exhibit LL (email from Kovach to Jerry Prosser on September 6, 2012) (stating "as you know I may not ask for a YES vote"); Exhibit MM (email from Kovach to Justin Matthews on October 8, 2012) (stating that employees are limited to only asking folks to vote and "anything else could be construed as advocacy"); Exhibit NN (Email from Kovach stating "I have checked with our attorney from McNair and she has told me that this action would need to be taken by the campaign but absolutely cannot come from the district. We may not solicit money for the purpose of advocating our position on a school

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improvement referendum"). Of course, Kovach circulates a funds solicitation letter to raise money, including to Ken Childs, the District's counsel.

41. Even with this extensive and pervasive scheme of criminal activity, Kovach and Thompson knowingly and repeatedly denied any wrongdoing. See e.g., Exhibit OO, Front page P&C Article titled "Cloud over Berkeley vote" (November 3, 2012) (stating "the district has maintained that it has done nothing wrong" and Thompson stating "I would not be surprised if we are accused of using our resources to oppose the school improvement referendum as well." And Kovach claiming she did not make the campaign video or coordinate the weekly campaign calls); see also Exhibit PP, Front page P&C Article titled "Berkeley district counters bond foes: Officials raise own ethics questions" (with Thompson stating (upon information and belief, prepared by Kovach) that "district employee activities during school time relating to the referendum 'have been intended to be within the scope of preparing informational materials, conducting public meetings, or responding to news media or citizens' inquiries concerning the referendum,' as allowed by law. 'The opposition to the effort has run out of fruitful arguments and is using items not related to how to finance solutions to overcrowded schools instead of presenting a credible alternative,' Thompson said. District officials also launched ethics accusation back at Whitley's group, accusing the group of failing to file a statement of political organization with the Ethics Commission. ... A Sept. 26 email to Whitley from the Ethics Commission states, 'There is no filing requirement for this committee)'). Thus, not only were Thompson and Kovach knowingly lying about their activities and knowingly denying their illegal conduct to make Whitley and others appear to be liars, they went further, and combined to injure Whitley by claiming that Whitley did not have fruitful arguments (i.e., truthful), and to falsely accuse Whitley of violating the Ethics Act, both of which Thompson and Kovach knew to be false. Instead of admitting to their

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known acts, Thompson and Kovach combined to knowingly and falsely injure Whitley. Kovach and Thompson continued their lies for months. See Exhibit QQ, Article titled "Berkeley district under scrutiny" (March 5, 2013) (Thompson and Kovach stating, even after they knew what emails had been produced, in a release that "For months there have been rumors and threats arising out of the school improvement bond referendum. As expected, concerns have been raised about the district's efforts . . . Some of these concerns are now under review by state level authorities and the district is fully cooperating"). In fact, upon information and belief, this too was a lie, as not only did Kovach and Thompson lie to SLED investigators (which is not cooperation), but Archie Franchini, a public employee and target, refused to even be interviewed by SLED. In fact, upon information and belief, the District's, Kovach's, Thompson's, Franchini's and Board members lack of cooperation caused the investigation to take years, instead of weeks or months.

42. As further proof of Kovach's knowingly false denials in order to injure Whitley, Kovach told the Post and Courier, in furtherance of the conspiracy, that she was invited to participate in weekly campaign calls just to provide information. However, her emails received pursuant to FOIA revealed that she actually coordinated and conducted the telephone calls and knowingly lied to the Post and Courier reporter. See Exhibit OO, (Post and Courier article denying involvement in weekly calls). Cf. Exhibit RR, (emails demonstrating Kovach lied about weekly calls involvement).
43. Based on the overwhelming evidence, Whitley believed that the Board would take appropriate action against Kovach if he took the complaint to the ethics commission. Instead, Chairman Doug Cooper stated, upon information and belief, that it did not matter what Whitley and others did, the District would pay the fine for Kovach, Thompson, and Franchini and [intimated that there would be no disciplinary actions taken]. At that point,

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Whitley realized the Board under Cooper's leadership was not going to take appropriate action for the violations of law if only the ethics commission found civil violations. Whitley felt that this inaction to discipline wrongdoers was a horrible example for children and the public, so he decided it needed the attention of the Attorney General. Further, the evidence was overwhelming in terms of intent, so Whitley believed these individuals needed to be prosecuted criminally instead of civilly.

44. Whitley requested a meeting with the Attorney General and met with Wilson, his Chief Deputy, his Solicitor General, and another Deputy Attorney General in January of 2013. Prior to this meeting, upon information and belief, Whitley did not know any member of the Attorney General's Office.

45. At the start of the meeting, one of the members of the Attorney General's staff stated that they understood all school districts pushed the line when it came to Referendums, so he was aware of the issue. After seeing only a portion of the presentation and Kovach's emails and credit card statements, he stated, "he didn't think anyone had ever done this."

The Attorney General's office immediately ordered a SLED investigation.

46. Whitley then met with SLED Special Agent Ryan Kelly and Ethics Commission investigator Jimmy Bagnall at Whitley's office the following month. Both agents seemed skeptical of the investigation. In the coming months, Whitley spoke to investigators multiple times to respond to questions and it appeared they had unearthed the illegality of what Kovach and others had done, as they seemed to be taking the investigation very seriously. Moreover, as she admitted under oath, Kovach lied to SLED investigators when interviewed, which further caused SLED to have to seek information to prove their case. As emphatically stated by the Attorney General, and admitted to by Kovach, the more they searched the more crimes they found.

47. During the course of the investigation, the Board refused to take action, continued to let Kovach and Thompson work and kept stating that there had been no indictment and that they did not want to know what she did and would defer to the investigation. The Board absconded their elected duties. Accordingly, interested citizens began reading emails of Kovach and others during the public comment section so the Board could not claim ignorance of Kovach's actions. Hysterically, Kovach claims in her lawsuit that the reading of her emails defamed her – that is, her own words defamed her. If true, Kovach, as with everything else, has no one to blame but herself.

48. Eventually, Kovach was indicted for five crimes: an ethics violations indictment, 2 forgery indictments, a perjury indictment, and misconduct in office for acts of public dishonesty. Contrary to Kovach's frivolous complaint, these 5 indictments were all legitimate and not bogus and indeed Kovach admitted under oath (and subject to perjury) to the crimes and facts of each of the five indictments as part of her guilty plea.

49. In fact, in the sentencing, the Attorney General set forth the case as follows:

As the indictments state, Ms. Kovach is the communications director for the Berkeley County school district, and this case arises out of a 2012 bond referendum for some two hundred million dollars roughly for the schools. But I want to start by saying very clearly that this case has nothing to do with whether or not the bond referendum was a good idea; nor, is this a case of a school official who got overzealous and unknowingly overstepped the line. This case is about someone who intentionally and knowingly broke the law and broke the ethics act. And that ethics act rule that Your Honor just read of course, governs the fair operation of elections and it provides that a government employee cannot use government time and resources to influence the outcome of an election. And [it is there] to insure that both sides are on a level playing field and to insure that the power of the government, that taxpayer's money is not, the thumb is not on one side of the scale or the other. And while a governmental agency to provide information all day long, they can't go from that into the realm of advocacy and that's prohibited by the statute.

This case came to us, as many cases do, from a complaint from a private citizen . . . we refer that to SLED who does their investigation. And I do want to acknowledge SLED Agent Ryan Kelly who is here today who is the lead investigator, as well as Jimmy Bagnal, investigator with the Ethics Commission who are the two investigators that worked on this case. And they do their

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investigation and then they provide that information to the prosecuting office and we make our decision based on that information.

... I think I told Your Honor at the last hearing that when we're looking at these types of cases, how do we decide where something is just purely a civil event or where it moves into the criminal. And over the years in doing these type of cases we've developed sort of a three step, and the first thing we look at is knowledge of the law. We're looking for somebody who knows the law because we're not going to charge someone criminally who overstepped a line that they didn't know was there. And secondly, we're looking for intentional violations of that law. And then finally we're looking for some evidence of criminal intent which comes as Your Honor is familiar with and a motive that can come with lies, it can come with cover-ups, misrepresentations that show that the person knew what they were doing was wrong and against the law. We don't charge people for innocent mistakes and mere inadvertence. So the two counts that Your Honor has, again, is the global misconduct conduct in office, which again encompasses all the conduct that was charged and then the underlying ethics act count as well.

And in talking about the three steps that I just referred to, the first thing, of course, is knowledge of the law. And in this particular case we have ample evidence that Ms. Kovach was aware of these ethics act rules, and we know that in part from the fact that in the months leading up to the referendum they distributed, and indeed Ms. Kovach herself distributed, a referendum do's and don't's sheet ... And they had this prepared by a law firm. They sent out to all employees to advise them of this law, which is one of the counts that Ms. Kovach is pleading to. And in that particular Do's and Don't's document it says, this law is strictly enforced, you can't influence an election. And they define that as telling people how to vote yes or no, or soliciting support or opposition for one side or the other in the bond referendum. And then on the side there's actually a little check list of things you can't do. It says you can't print things with government resources and on government time. You can't send emails on county time. You can't use county email accounts and county equipment to send emails in advocacy. You can't organize rallies. You can't promote support for or against using government resources and time; and as the facts in this case show, Ms. Kovach did all of those. And the evidence of that, the evidence comes primarily from the emails of Ms. Kovach herself. She would say things like, well, I don't want to end up in Columbia before the Ethics Commission, and on at least two occasions told vendors who had submitted for payment to the District for items that were clearly campaign items, she told them you've got to take off the invoice reference to the campaign 'cause I can't pay it if it's got that on there. So she's very well aware of the law. ... So that's the first prong which is knowledge of the law, and we had ample evidence that Ms. Kovach with aware of these rules.

So the second prong, of course, is whether there are intentional violations of that law. And initially I just want to go through a few of the miscellaneous offenses that we were able to discover in the evidence, and there are multiple emails throughout August and September 2012 where she was writing pro-referendum

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scripts for individuals to give at various community meetings, not just information, but blatant advocacy. There are multiple million emails where she -- and this starts in July of 2012 through September of 2012, at least five, where it relates to her having her secretary print Yes for Schools with a campaign logo print fliers, stickers and other paraphernalia on the government copiers and government colored copiers and that sort of thing. There are emails and witness statements that talk about using the government, the District warehouse, to store pallets and yard signs for the campaign. There are emails where she talks about putting a trailer or a portable classroom on tour to generate support because of the, in particular on Daniel Island, to create the sort of fear of the dreaded trailer as she put it in the email. And then, of course, there was organizing Yes for Schools events and indeed getting school children sort of as window dressing for some of those events. So this is not just an isolated event. This is a continued and along standing course of conduct. . . .

I kind of want to talk a little bit about prong three, about criminal intent and the motive. And what was the motive here? Well, again, her emails show a couple of things as to motive and the first thing is that she felt that her own career and Doctor Rodney Thompson's career would be advanced by, and by a success in this referendum. On 8/13/12 she wrote that Mr. Thompson, or Doctor Thompson, was very personally invested in this and knows the length of his term as superintendent very much depends on this referendum. And on 9/17/12, that's right before she started to put together this campaign video, she noted in an email that this referendum is the ultimate test of her ability to succeed or fail. And the second aspect of the motive was, is that she was very frustrated by the campaign committee itself. She initially was in control even writing in July of 2012 that the campaign is being run internally from my district desk, from my desk. But ultimately, the campaign committee individual started to assert themselves, and she would frequently criticize them by saying sarcastically finally the committee is taking a role, there's no one who will take a lead. And she would complain about -- in September 30th, 2012, she complain[ed] about poor leadership from the chamber as she called it, and stated to Doctor Thompson that we can win this but we're gonna have to pull out every trick in the book. And then finally on August 8th, 2012, she's complaining that the campaign committee has marginalized her and Doctor Thompson, that they told her that it's not their campaign, it's our campaign, and that there are to have no involvement and she said that their strategy is broken and we're losing momentum. So she felt that this campaign was necessary for their career, but also felt that she had lost control, and she was very frustrated with the, with the direction the campaign was taking. Additionally, she was aware that the campaign was not flushed with cash. So it is in that context that we look and under those circumstances that Amy Kovach decided to use District funds to make a Yes for Schools campaign video.

Now she claimed in her statement to the press, she claimed in her statement to SLED, that she was just making a district marketing video, that she was just giving the campaign separate and unused excess footage and that the campaign essentially had requested this and asked for this. And she claimed in her statements that the signs from Nelson Printing were wanted by the campaign, and she just paid for and then prepared a invoice for them to reimburse her. But the

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campaign workers deny that they had anything to do or knowledge of this particular video, and her own emails in the investigation itself confirm that.

...

But in 9/12, on 9/12/2012 she sends an email to Nelson Printing asking them for foam core signs and banners that are going to be held by students; and these are Yes for Schools banners. And again, there's been some who have said that that's all this case is about; but as Your Honor has already described and we'll describe further, this case is much broader than just that invoice for 259-dollars. So she gets and pays for the Yes for Schools banners to be held by the students and the next thing she does is contact Go To Team video and particular, a videographer by the name of Jason Bennett. And her emails and Jason Bennett's emails are very interesting in as much as, in particular Mr. Bennett emails after his meeting with Ms. Kovach, and he says, I just met with Amy Kovach, she's going to need two videos, one video is a specific support for the vote video and the other using the same content will be a re-edit for general purposes. She says the cost for the project is 4800-dollars but we need to split it into two estimates of 2400 and the reason for that is, is her budgetary permissions, she's only able to write checks up to 2500-dollars without having to go to committee. So that right there refutes exactly what Amy Kovach told the press until SLED clearly the understanding was, we're making two videos, we're making a campaign video, and he was expressly asked to structure those transactions or we call it smurfing transactions so that would come under her 2,400-dollar limit. As we will see under the procurement code, if she's going to spend more than 2500-dollars she has to get three bids and she has to choose the lowest bid. So Jason Bennett then provides the estimate, and this is on page two of the document that I just handed up. But it has on the two estimates that are smurfed, that are structured, it has on there the first ones have support for the vote on it. And her secretary, Ms. Kovach's secretary says, I thought we couldn't pay for anything with the bond referendum. So they get that fixed, and ultimately sends two more estimates. Mr. Bennett sends two more estimates that are exactly the same except they've removed any reference that is for support for the vote. So even Mr. Bennett, when he sent the estimate it was just for support for the vote; that was the primary project. And again, the same thing happens on October 3rd with Nelson Printing when they sent their invoice it has Yes for Schools signs on it and she emails back Nelson Printing and says, you got to change Yes for Schools ... 'cause I can't pay it like the way that you've written it. So on September 19th Ms. Kovach goes ahead and pays Go To Team 2,500-dollars with her District P card, her procurement card, her District credit card, and then she arranges for the shooting, for the shooting of the video and gets some classes and some school children available. And on 9/21/2012, on September 21st the video is shot. And Your Honor, in that document I provided to you I provided stills of that particular video, and the only difference between the campaign video that was the initial one produced in the subsequent District video is that the campaign video contains an extra 44 seconds of various children and we provided those shots, various children either in groups or by themselves either holding up a Yes for Schools banner or saying Yes for Schools or say Yes for Schools. The school children, of course, were used as props in this political ad. And some of them are very, very young and one on page

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11, and you can tell they can't really tell what's going on with what they're being asked to do. So the shooting is taking place on September 21st. She's already paid half the bill on September 19th, but she runs into a problem. And the problem is, as I said, she can't spend more than 2500 without going through the procurement code which requires three bids and selection of the lowest bid. And she writes the finance person, well, don't worry about it, I had them split it into two invoices, one for shooting and one for editing, and the finance people say you can't do that. You can't do that, you can't structure it like that, we're gonna have to do that. And they say hold off on any commitments until you get the three bids. Well, she's already paid for it, half of it, and she's already shot the video so what does she do at that point. Well, she promptly then starts to generate sham estimates. Even though she's already paid for it, the video has already been shot, she sent out emails to various vendors -- these vendors have no idea they're wasting their time -- and says, hey, I've got this project coming up, I need an estimate. And so she starts to generate those various sham estimates starting on September 26. She does that on September 26. That same day she gets the campaign video from Jason Bennett. And in that, the email where she acknowledges getting that, she says, I need you to take the District logo off of the campaign version that has Yes for Schools on it because we don't want to be accused of advocating. So she tells him that right then and there, you got to take that off of there. So, even though she was told by the financial department that you can't smurf these transactions and told to hold off, she goes ahead and generates these sham estimates and then on October 1st pays the rest of the money, or actually asks Jason Bennett, I need you to wait until after October 1st to bill the other 2500, okay. So they run the second payment of 2500 on October 8 and then they run the final payment of \$300 on October 9 to keep it underneath that 2500 limit, even though she's been told by finance what needs to happen. Soon, October 5th she receives an estimate from a vendor who, again, doesn't know they're wasting their time. "Dear Ms. Kovach, this is our estimate to you for this project," that's already happened. And then on October 9th there's a board meeting where a board member, a Donna Marino, raises questions about the video, about hearing about a video that might have been done with school funds or something to that effect. And within a couple of days Ms. Kovach is contacting these vendors saying or contacting vendors saying, hey, I really need to get that estimate in, I've got a meeting set up to make a decision on it and I need you to get that estimate in. But the reality is, is that she needed to get that estimate in because some public light was being shined on it and the paperwork needed, finance was requesting, needed to be turned in. So she's gotten the sham estimates from the other two vendors; but the problem is, is that she can't turn in the estimates from Go To Team because the ones that she got were smurfed, they were split into two. ...[so] she manufactures a false and fictitious document. And how do we know that? Your Honor, if you look at the exhibit that we've provided, or excuse me—I thought I had it in front of me. Oh, here it is. ... So she turns in that particular estimate for 5300-dollars as the estimate for the procurement code from Go To Team. And in reviewing a number of those documents and Mr. Petrano was going through those and ultimately looked at that one; and as we looked at it, we noticed that the text in the middle is kind of eschewed down to the side and it's in a different font than the rest of the document and that document is printed with an accounting software. And we realized that the accounting software couldn't print that document; there's no way for it to print

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it. It just could not do that. It could not change the font like that. It cannot change the numbering like that. And we also realized that the text in the middle to the 5300-dollars is in the default font for Word and Outlook that you normally would have. And so what it appears to, what appears to have been done there is that somebody took the original estimate, added up to the 5300-dollars, and scotch taped that on there, and then ran it through the copier. And the other thing we are able to tell as well is that the logo is washed out which also indicated that it was washed through a copier. Additionally, if you look at the text of that particular document it was as if someone was copying the text from the original two estimates and didn't get the text right. It says post production addition, whereas, the original one said post production editing. Post production addition doesn't make any sense. It says two days of shooting with a camera man and high definition camera and audio gear, and the original one said high definition camera and audio gear. High definition camera and audio gear is not a thing. So we went to the vendor, to Go To Team, and we said is this your estimate, is this your document, and they said, no, that's not ours, we couldn't make that if we wanted to, our software won't do it. So ultimately, she submitted this false and fictitious document, again, to cover up what had already been done and that was the payment of this campaign video.

And just real quick, I know in this particular case our motives have been questioned to some extent. And I think this is a valid point to show that when we look at cases like this and we realize that we have a case where it appears as someone had intentionally and knowingly violated the law; but like in other cases that we've had recently our motives get questioned, our integrity gets questioned, sand gets thrown in our face. But the problem was, was that not only do we know we had a valid case but the more we looked, the more we found. And if, because people throw sand in our face we were to just slink away, (a) we would not be doing our job. But secondly, that would become M.O., all you'd have to do is just throw sand in the face of the Attorney General's Office and SLED and they will slink away. And if that were case, then none of these cases would ever get prosecuted, and we wouldn't be doing our duty and we wouldn't be doing our job. The reality was, is that the more we looked, the more we continued to find.

So, ultimately these allegations were brought to our attention, and SLED goes to the District and said, we'd like a copy of that campaign video and they're like, what video, we don't have a video. And so the District doesn't have it. And we go to the campaign and they're saying, well, we never had any, we never had it, we never had any involvement with this. And we go to the videographer, Bennett. He says, I don't have a copy of it. And so we finally go to the owner and low and behold, finally they find a backup copy some where on a server. So we get that video, we see what's on the video, we read the emails as to how it was created, and we know at that point we've got something we're gonna have to deal with here, we've got a case of somebody intentionally violating the law.

Ms. Kovach says in her interviews that she gave this video to the campaign and it was at their request. And again, they say, we had nothing to do with this and we've never seen it and we never had it. So SLED interviews Ms. Kovach again

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on November 22nd, 2013, and asks her about paying Nelson Printing for those Yes For School signs that were held in the video; and the ones where she said earlier when she paid the invoice, she said, well, I can't pay this unless you take Yes for Schools out of the invoice. And Ms. Kovach says, well, I prepared an invoice dated October 2nd, 2012, for the campaign to reimburse the District and I'll send it to you. And of course, we receive it on about November 25th, 2013, three days after that SLED interview. But the problem is, is again, her secretary says, I don't recall ever seeing that document at the time, I don't recall ever seeing that invoice. The Campaign says, I don't recall ever seeing that invoice. And as we looked at the District servers that document does not appear until November 25th, 2013, even though it's dated October 2nd, 2012 at the appropriate time during the campaign. And indeed, we were able to find a backup of Ms. Kovach's server from February of 2013, and that document was not on that backup either, but it did show up in November of 2013 after she was being interviewed by SLED. So that is the second false and fictitious document that was alleged in the original charges that we presented.

So she ultimately at that particular, at that particular interview on November 22nd, 2013, she gives SLED a detailed timeline about the video; and she says, well, I started getting estimates before the shoot in early September. She says, I picked the lowest of the estimates as I'm required to. She says, that I made sure that the videographer knew that they, that the campaign is only to get unused excess footage. I made sure that, myself, that I looked at it, that footage in those two individual videos was completely separate and distinct and that I verified that myself. And none of that is true at all. The campaign video came first, and the only difference between the campaign video and the subsequent District video is that the District video just doesn't have all the kids yelling Yes for Schools in it. Other than that it's the same exact video, same exact footage, same music, same everything.

So ultimately, Your Honor, she knew the law. She was in control of this campaign. She knew this was good for her career but she got frustrated because it wasn't going the way that she wanted and so she knowingly broke the law. She used government resources to advocate for the Yes for Schools campaign, and then she engaged in a cover up and in lies a misrepresentation of both during and after in order to cover up what she had done. And that's the factual basis, not only for the misconduct in office, for using her government funds to advocate for the campaign and then covering up with dishonesty, as well as underlying substantive offense of using governmental resources to advocate a campaign.

50. Under oath, and subject to perjury, when asked by the court if she agreed with the above stated facts of the Attorney General: the transcript states:

THE COURT: Ms. Kovach, you agree with the facts as stated by the attorney general?

THE DEFENDANT: Yes, sir.

51. Furthermore, the transcript of the proceedings state, with Kovach under oath and subject to perjury that:

THE COURT: Are you, in fact, guilty of misconduct in office?

THE DEFENDANT: Yes, sir.

THE COURT: Are you, in fact, guilty of using public funds to influence an election?

THE DEFENDANT: Yes, sir.

...

THE COURT: All right, I understand. So Ms. Kovach, you fully understand the charges you're pleading guilty to and the potential consequences of this plea?

THE DEFENDANT: Yes, sir.

...

THE COURT: Is the only reason that you're pleading guilty to the use of public funds to influence an election and misconduct in office is because you are actually guilty of those charges?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Under indictment 2014-GS-08-266 charging you with use of public funds to influence an election, how do you, Amy Kovach, plead, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Under indictment 2015-GS-08-1073 charging you, Amy Kovach, with misconduct in office, how do you plead, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Alright. I find there's sufficient factual basis for the plea. I find the defendant has entered into it freely, voluntarily, knowingly. She has had the advice of counsel who she says is well pleased, I will accept the plea. What is her criminal history?

Exhibit SS, (Transcript of Sentencing Hearing)

52. Then, in sentencing the Plaintiff, the Judge stated:

THE COURT: Alright, I've considered the presentations given by the

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attorney general and Mr. Theos; and even in my limited exposure to this case was 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. The public servants have the duty and the obligation to not just be good as the rest of the public, but to behave better. Thank God most public servants do that, and most of them serve very proudly. But Ms. Kovach has not upheld her position and tried to sway the will of the public who hired her in her position to try to sway an election, and I take that very seriously.

... The sentence of the Court, please stand, under indictment 2015 -- 2014-GS-08-266, under use of public funds to influence election, the sentence is that you be committed to the State Department of Corrections for a period of one year and that you pay a fine of 25,000-dollars. That is suspended upon your paying a 25,000-dollar fine and serving two years probation. On the indictment 2015-GS-08-1073, on the charge of misconduct in office, the sentence is that you be committed to the State Department of Corrections for a period of five years, and that is suspended upon two years probation. These sentences shall run concurrently. Thank you.

53. Thereafter, Ms. Kovach left the courtroom and, contrary to her under oath acceptance of her criminal acts, blamed her accusers for her situation and stated that she forgave her accusers for their trespasses. As a convicted criminal, she offered absolutely no apologies to those she had committed crimes against, in her position of trust, including her crimes against the public, against her colleagues at the district, and worst of all, against the children of Berkeley County. Instead, she blamed others.

54. Then, instead of "forgiving those that trespassed against her," she filed this frivolous and sanctionable lawsuit, wherein she alleged that Whitley and others conspired against her with the Attorney General. Most of her allegations are directly contrary to her under oath plea. She does however factually show in her lawsuit that she and Thompson worked in conspiracy together regarding their actions in this case, including those against Defendant Whitley. Based on these direct contradictions, her lawsuit is either frivolous on its face, or she has committed perjury. In actuality, it is both frivolous and demonstrates she committed perjury.

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55. Moreover, she now claims damages, including emotional injury from stress, and blames Whitley and others. However, on May 14, 2013, the criminal Plaintiff stated that she was proud of being on the front page of the Post & Courier for her actions related to the bond Referendum campaign and the subsequent investigation after an expose piece ran on many of her illegal activities for which she eventually pled guilty. To the extent Kovach has had further mental disease and gastrointestinal disease problems, they flow directly from being caught and prosecuted for crimes she chose to commit.

CAUSES OF ACTION

I. QUANTUM MERUIT

56. Whitley incorporates the allegations of Paragraphs 1 through 55 of this Counterclaim and Paragraphs 1 through 96 of his Answer, as if stated herein verbatim.

57. Whitley has standing as a taxpayer of Berkeley County.

58. Criminal Plaintiff Kovach has received a benefit the retention of which would be unjust if not paid for.

59. Further, Kovach was paid her \$75,000.00 per year salary for a year and a half while on administrative leave for her indictments. She claimed to have acted in good faith and applied for criminal attorney fees to be paid for, which totaled \$303,000.00

60. As pointed out by the sentencing judge, Kovach received her salary and attorney fees and during that entire time, she knew she had committed crimes and lies and attempted to cover-up her crimes. Accordingly, her crimes could not be in "good faith."

61. Moreover, even if her acts were in good faith, it is illegal for Kovach to receive public monies for a private purpose – her criminal defense.

62. Kovach received the benefit of her salary and attorney's fees from the general fund of Berkeley County, which is funded by the Defendant, as a taxpayer of Berkeley County.

Thus, the Defendant conferred a benefit on the criminal Plaintiff.

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63. The criminal Plaintiff realized the benefit of the salary and fees.
64. The retention by the criminal Plaintiff of the more than \$415,000.00 of taxpayers' money under the condition of her conviction makes it unjust for her to retain these monies.
65. The doctrine of quantum meruit permits recovery by the taxpayers for Plaintiff's unjust enrichment.
66. Plaintiff was well aware that the Attorney General had authored opinions that these monies were illegally received by the Plaintiff and that a taxpayer could bring suit for return of the funds. See Exhibit TT, (Attorney General Opinions).
67. Accordingly, the taxpayers should have those funds returned by the convicted Plaintiff.
68. Further, the taxpayers are entitled to prejudgment interest in this claim for quantum meruit.

II. MONEY HAD AND RECEIVED

69. Whitley incorporates the allegations of Paragraphs 1 through 68 of this Counterclaim and Paragraphs 1 through 96 of his Answer, as if stated herein verbatim.
70. Whitley has standing as a taxpayer of Berkeley County.
71. The taxpayers of Berkeley County, including Whitley, had in excess of \$415,000 as a sum of money in its public coffers.
72. The Criminal Plaintiff Kovach received in excess of \$415,000 and the taxpayers, including Whitley, bring suit to get the monies back.
73. The pecuniary benefit of \$415,000 that the criminal Plaintiff Kovach received belongs back to the public coffers.
74. In equity and good conscience, the criminal Plaintiff ought to reimburse to the taxpayers the salary she received and attorney's fees received for which she has now pled guilty.

III. CIVIL CONSPIRACY

75. Whitley incorporates the allegations of Paragraphs 1 through 74 of his Counterclaim and Paragraphs 1 through 96 of his Answer, as if stated herein verbatim.
76. Kovach and Thompson and potentially others to be determined in discovery came together for the purpose of injuring Whitley and caused special damages.
77. Among the many acts of conspiracy, Kovach and Thompson worked together to harm Whitley's reputation by stating, falsely, to the Post & Courier that Whitley violated ethical acts and by knowingly denying their own criminal behavior.
78. Moreover, they worked together to have, upon information and belief, a contractor for Yes 4 Schools FOIA Whitley and his mother's emails to humiliate and conspire and threaten Whitley.
79. Further, they conspired to lie and cover up their actions to not only keep their criminal activities from coming to light but to also cause harm to Whitley.
80. As a result of their conspiracy, Whitley suffered embarrassment and great stress related to his reputation. Further, Whitley spent hundreds of hours proving the validity of his complaint and refuting their conspiracy, which took away from his practice of law at a great cost to his practice.

IV. DECLARATORY JUDGMENT

81. Whitley incorporates the allegations of Paragraphs 1 through 80 of his Counterclaim and Paragraphs 1 through 96 of his Answer, as if stated herein verbatim.
82. Whitley has standing as a taxpayer of Berkeley County.
83. It is illegal to use public monies for a private purpose.
84. Criminal defense is a private purpose.
85. Notwithstanding, SC Code's allowance of payment of an attorney for acts in "good faith," Kovach admitted her acts were not in good faith and, therefore, even if that statute was constitutional, it does not apply herein.

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86. Criminal Plaintiff Kovach has received a benefit the retention of which would be unjust if not paid for.
87. Further, Kovach was paid her \$75,000.00 per year salary for a year and a half while on administrative leave for her indictments. She claimed to have acted in good faith and applied for criminal attorney fees to be paid for, which totaled \$303,000.00.
88. As pointed out by the sentencing judge, Kovach received her salary and attorney fees and during that entire time, she knew she had committed crimes and lies and attempted to cover-up her crimes. Accordingly, her crimes could not be in "good faith."
89. Moreover, even if her acts were in good faith, it is illegal for Kovach to receive public monies for a private purpose – her criminal defense.
90. Kovach received the benefit of her salary and attorney fees from the general fund of Berkeley County, which is funded by the Defendant, as a taxpayer of Berkeley County. Thus, the Defendant conferred a benefit on the criminal Plaintiff.
91. The criminal Plaintiff realized the benefit of the salary and fees.
92. The Court Must declare that Kovach's monies be returned to the public coffers.

THIRD PARTY COMPLAINT AGAINST RODNEY THOMPSON

CIVIL CONSPIRACY

1. Whitley incorporates the allegations of Paragraphs 1 through 92 of the foregoing Counterclaim against Plaintiff Amy Kovach, Paragraphs 1 through 96 of his Answer, as if stated herein verbatim.
2. Kovach and Thompson and potentially others to be determined in discovery came together for the purpose of injuring Whitley and caused special damages.
3. Among the many acts of conspiracy, Kovach and Thompson worked together to harm Whitley's reputation by stating, falsely, to the Post & Courier that Whitley violated ethical acts and by knowingly denying their own criminal behavior.

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4. Moreover, they worked together to have, upon information and belief, a contractor for Ycs 4 Schools FOIA Whitley and his mother's emails to humiliate and conspire and threaten Whitley. In fact, they conspired to threaten and use the emails against Whitley.
5. Kovach and Thompson worked together, upon information and belief, to harm Whitley and Whitley's mother in the execution of her job duties at the district.
6. As a result of their conspiracy, Whitley suffered embarrassment and great stress related to his reputation. Further, Whitley spent hundreds of hours proving the validity of his complaint and refuting their conspiracy, which took away from his practice of law at a great cost to his practice.

WHEREFORE, having fully answered the Plaintiff's Complaint and asserted the foregoing defenses and counterclaims and third party claims, this Defendant respectfully requests:

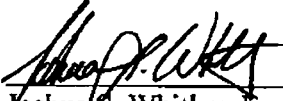
- (1) a trial by jury of twelve;
- (2) this Court to dismiss Plaintiff's claims with prejudice as to this Defendant and enter judgment in his favor and against Plaintiff and the Third-Party Defendant; and
- (3) this Court to sanction Plaintiff and her counsel for the filing of a frivolous lawsuit, and award this Defendant its costs and expenses, including attorney's fees incurred in this matter and grant whatever additional relief the Court deems appropriate.

[SIGNATURE PAGE TO FOLLOW]

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Respectfully submitted,

SMYTH WHITLEY, LLC



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December 1, 2015
Charleston, South Carolina

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STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS FOR
THE NINTH JUDICIAL CIRCUIT

Amy Kovach,

Plaintiff,

vs.

Joshua S. Whitley and Terry Hardesty,

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.

Case No.: 2015-CP-8- 2380

MADEY P. BROWN
CLERK OF COURT
NINTH JUDICIAL CIRCUIT

FILED
2015 DEC -4 AM 11:25

**PLAINTIFF'S ANSWER TO DEFENDANT
JOSHUA S. WHITLEY'S
COUNTERCLAIMS**

Plaintiff, by and through her undersigned attorneys, hereby answers Defendant Joshua S. Whitley's Counterclaims as follows, incorporating all previous allegations in her Complaint:

1. Paragraph One of Defendant Joshua S. Whitley's Counterclaims applies to a party other than Plaintiff and does not require a response.

NB

2. Plaintiff admits so much of the allegations in Paragraph Two of Defendant Joshua S. Whitley's Counterclaims all allege Plaintiff is a resident of Berkeley County. The remainder of the allegations in this Paragraph are denied.

3. Paragraph Three of Defendant Joshua S. Whitley's Counterclaims applies to a party other than Plaintiff and does not require a response.

4. Paragraph Four of Defendant Joshua S. Whitley's Counterclaims states a conclusion of law that requires no response.

5. Paragraph Five of Defendant Joshua S. Whitley's Counterclaims contains a conclusion of law that requires no response.

6. Paragraph Six of Defendant Joshua S. Whitley's Counterclaims contains no factual allegations pertaining to this Plaintiff and requires no response.

7. Paragraph Seven of Defendant Joshua S. Whitley's Counterclaims is denied.

8. Paragraph Eight of Defendant Joshua S. Whitley's Counterclaims is denied and Plaintiff affirmatively alleges that other district employees used the district's communications system to promote political and personal issues.

9. Paragraph Nine of Defendant Joshua S. Whitley's Counterclaims applies to a party other than Plaintiff and does not require a response.

10. Paragraph Ten of Defendant Joshua S. Whitley's Counterclaims applies to a party other than Plaintiff and does not require a response.

11. To the extent Paragraph Eleven of Defendant Joshua S. Whitley's Counterclaims applies to a party other than Plaintiff, it requires no response. The remainder of the allegations contained in this Paragraph is denied.

12. Paragraph Twelve of Defendant Joshua S. Whitley's Counterclaims applies to

persons other than Plaintiff and does not require a response.

13. To the extent the allegations in Paragraph Thirteen of Defendant Joshua S. Whitley's Counterclaims apply to a party other than Plaintiff, it requires no response. The remainder of the allegations contained in this Paragraph is denied.

14. Paragraph Fourteen of Defendant Joshua S. Whitley's Counterclaims applies to persons other than Plaintiff and does not require a response.

15. Paragraph Fifteen of Defendant Joshua S. Whitley's Counterclaims applies to persons other than Plaintiff and does not require a response.

16. Paragraph Sixteen of Defendant Joshua S. Whitley's Counterclaims applies to a party other than Plaintiff, it requires no response. To the extent any of the remainder of the allegations contained in this Paragraph apply to Plaintiff, they are denied.

17. Paragraph Seventeen of Defendant Joshua S. Whitley's Counterclaims applies to persons other than Plaintiff and does not require a response.

18. Paragraph Eighteen of Defendant Joshua S. Whitley's Counterclaims applies to persons other than Plaintiff and does not require a response.

19. Paragraph Nineteen of Defendant Joshua S. Whitley's Counterclaims applies to a party other than Plaintiff, it requires no response. The remainder of the allegations contained in this Paragraph is denied and reference craved to the language of the indictment for an exact rendition thereof.

20. Paragraph Twenty of Defendant Joshua S. Whitley's Counterclaims applies to persons other than Plaintiff and does not require a response.

21. Paragraph Twenty-One of Defendant Joshua S. Whitley's Counterclaims applies to persons other than Plaintiff and does not require a response.

22. Paragraph Twenty-Two of Defendant Joshua S. Whitley's Counterclaims applies to persons other than Plaintiff and does not require a response.

23. Paragraph Twenty-Three of Defendant Joshua S. Whitley's Counterclaims applies to a party other than Plaintiff, it requires no response. The remainder of the allegations contained in this Paragraph is denied and reference is craved to the plea hearing for an exact rendition of what was stated during that hearing.

24. Paragraph Twenty-Four of Defendant Joshua S. Whitley's Counterclaims applies to a party other than Plaintiff, it requires no response. To the extent any of the allegations contained in this Paragraph apply to Plaintiff, they are denied.

25. Paragraph Twenty-Five of Defendant Joshua S. Whitley's Counterclaims applies to persons other than Plaintiff and does not require a response.

26. Paragraph Twenty-Six of Defendant Joshua S. Whitley's Counterclaims applies to a party other than Plaintiff, it requires no response. To the extent any of the allegations contained in this Paragraph apply to Plaintiff, they are denied.

27. Paragraph Twenty-Seven of Defendant Joshua S. Whitley's Counterclaims applies to a party other than Plaintiff, it requires no response.

28. Paragraph Twenty-Eight of Defendant Joshua S. Whitley's Counterclaims applies to a party other than Plaintiff, it requires no response.

29. Paragraph Twenty-Nine of Defendant Joshua S. Whitley's Counterclaims applies to a party other than Plaintiff, it requires no response. To the extent any of the allegations contained in this Paragraph apply to Plaintiff, they are denied.

30. Plaintiff admits so much of Paragraph Thirty of Defendant Joshua S. Whitley's Counterclaims as alleges the district's attorney told Plaintiff Defendant Joshua Whitney would

lose interest. The remainder of the allegations in this Paragraph applies to a party other than Plaintiff and requires no response.

31. Paragraph Thirty-One of Defendant Joshua S. Whitley's Counterclaims is denied.

32. Paragraph Thirty-Two of Defendant Joshua S. Whitley's Counterclaims is denied.

33. Paragraph Thirty-Three of Defendant Joshua S. Whitley's Counterclaims applies to a party other than Plaintiff, it requires no response.

34. Paragraph Thirty-Four of Defendant Joshua S. Whitley's Counterclaims is denied.

35. Paragraph Thirty-Five of Defendant Joshua S. Whitley's Counterclaims is denied.

36. Paragraph Thirty-Six of Defendant Joshua S. Whitley's Counterclaims applies to persons other than Plaintiff, it requires no response. To the extent the allegations pertain to emails, Plaintiff craves reference to the emails themselves for an exact rendition of their content and context.

37. Plaintiff denies the allegations in Paragraph Thirty-Seven of Defendant Joshua S. Whitley's Counterclaims as stated and craves reference to the minutes of district board meetings for an exact rendition of their content and context.

38. Paragraph Thirty-Eight of Defendant Joshua S. Whitley's Counterclaims applies to persons other than Plaintiff, it requires no response.

39. Paragraph Thirty-Nine of Defendant Joshua S. Whitley's Counterclaims applies to persons other than Plaintiff, it requires no response. To the extent the allegations pertain to Plaintiff, they are denied.

40. To the extent the allegations contained in Paragraph Forty of Defendant Joshua S. Whitley's Counterclaims apply to persons other than Plaintiff, they require no response. Plaintiff craves reference to the emails and the other documents mentioned in this Paragraph for an exact

rendition of their content and context.

41. To the extent the allegations contained in Paragraph Forty One of Defendant Joshua S. Whitley's Counterclaims apply to persons other than Plaintiff, they require no response. Plaintiff craves reference to the emails and the other documents mentioned in this Paragraph for an exact rendition of their content and context. Plaintiff denies the remainder of the allegations in this Paragraph.

42. Paragraph Forty-Two of Defendant Joshua S. Whitley's Counterclaims is denied.

43. Paragraph Forty-Three of Defendant Joshua S. Whitley's Counterclaims applies to persons other than Plaintiff, it requires no response.

44. Paragraph Forty-Four of Defendant Joshua S. Whitley's Counterclaims applies to persons other than Plaintiff, it requires no response.

45. Paragraph Forty-Five of Defendant Joshua S. Whitley's Counterclaims applies to persons other than Plaintiff, it requires no response.

46. Paragraph Forty-Six of Defendant Joshua S. Whitley's Counterclaims applies to persons other than Plaintiff, it requires no response. To the extent the allegations pertain to Plaintiff, they are denied.

47. Paragraph Forty-Seven of Defendant Joshua S. Whitley's Counterclaims applies to persons other than Plaintiff, it requires no response. To the extent the allegations pertain to Plaintiff, they are denied.

48. Paragraph Forty-Eight of Defendant Joshua S. Whitley's Counterclaims is denied.

49. Paragraph Forty-Nine of Defendant Joshua S. Whitley's Counterclaims applies to persons other than Plaintiff, it requires no response.

50. Paragraph Fifty of Defendant Joshua S. Whitley's Counterclaims requires no

response. Plaintiff craves reference to the transcript itself for an exact rendition of its content and context.

51. Paragraph Fifty-One of Defendant Joshua S. Whitley's Counterclaims requires no response. Plaintiff craves reference to the transcript itself for an exact rendition of its content and context.

52. Paragraph Fifty-Two of Defendant Joshua S. Whitley's Counterclaims applies to persons other than Plaintiff and requires no response. Plaintiff craves reference to the transcript itself for an exact rendition of its content and context.

53. Paragraph Fifty-Three of Defendant Joshua S. Whitley's Counterclaims is denied.

54. Paragraph Fifty-Four of Defendant Joshua S. Whitley's Counterclaims is denied.

55. Paragraph Fifty-Five of Defendant Joshua S. Whitley's Counterclaims is denied.

AS TO THE DEFENDANT JOSHUA S. WHITLEY'S FIRST COUNTERCLAIM
(Defamation)

56. Paragraph Fifty-Six of Defendant Joshua S. Whitley's Counterclaims does not require a response. Nevertheless, Plaintiff incorporates the foregoing responses, allegations, and denials as if set forth fully herein.

57. Plaintiff denies the allegations contained in Paragraph Fifty Seven of Defendant Joshua S. Whitley's Counterclaims.

58. Plaintiff denies the allegations contained in Paragraph Fifty Eight of Defendant Joshua S. Whitley's Counterclaims.

59. Plaintiff denies the allegations contained in Paragraph Fifty Nine of Defendant Joshua S. Whitley's Counterclaims.

60. Paragraph Sixty of Defendant Joshua S. Whitley's Counterclaims requires no response.

61. Plaintiff denies the allegations contained in Paragraph Sixty One of Defendant Joshua S. Whitley's Counterclaims.

62. Plaintiff denies the allegations contained in Paragraph Sixty Two of Defendant Joshua S. Whitley's Counterclaims.

63. Plaintiff denies the allegations contained in Paragraph Sixty Three of Defendant Joshua S. Whitley's Counterclaims.

64. Plaintiff denies the allegations contained in Paragraph Sixty Four of Defendant Joshua S. Whitley's Counterclaims.

65. Plaintiff denies the allegations contained in Paragraph Sixty Five of Defendant Joshua S. Whitley's Counterclaims.

66. Plaintiff denies the allegations contained in Paragraph Sixty Six of Defendant Joshua S. Whitley's Counterclaims.

67. Plaintiff denies the allegations contained in Paragraph Sixty Seven of Defendant Joshua S. Whitley's Counterclaims.

AS TO THE DEFENDANT JOSHUA S. WHITLEY'S SECOND COUNTERCLAIM
(Quantum Meruit)

68. Paragraph Sixty Eight of Defendant Joshua S. Whitley's Counterclaims does not require a response. Nevertheless, Plaintiff incorporates the foregoing responses, allegations, and denials as if set forth fully herein.

69. Plaintiff denies the allegations contained in Paragraph Sixty Nine of Defendant Joshua S. Whitley's Counterclaims.

70. Plaintiff denies the allegations contained in Paragraph Seventy of Defendant Joshua S. Whitley's Counterclaims.

71. Plaintiff denies the allegations contained in Paragraph Seventy One of Defendant

Joshua S. Whitley's Counterclaims.

72. Plaintiff denies the allegations contained in Paragraph Seventy Two of Defendant Joshua S. Whitley's Counterclaims.

73. Plaintiff denies the allegations contained in Paragraph Seventy Three of Defendant Joshua S. Whitley's Counterclaims.

74. Plaintiff denies the allegations contained in Paragraph Seventy Four of Defendant Joshua S. Whitley's Counterclaims.

75. Plaintiff denies the allegations contained in Paragraph Seventy Five of Defendant Joshua S. Whitley's Counterclaims.

76. Plaintiff denies the allegations contained in Paragraph Seventy Six of Defendant Joshua S. Whitley's Counterclaims.

77. Plaintiff denies the allegations contained in Paragraph Seventy Seven of Defendant Joshua S. Whitley's Counterclaims.

78. Plaintiff denies the allegations contained in Paragraph Seventy Eight of Defendant Joshua S. Whitley's Counterclaims.

79. Plaintiff denies the allegations contained in Paragraph Seventy Nine of Defendant Joshua S. Whitley's Counterclaims.

80. Plaintiff denies the allegations contained in Paragraph Eighty of Defendant Joshua S. Whitley's Counterclaims.

AS TO THE DEFENDANT JOSHUA S. WHITLEY'S THIRD COUNTERCLAIM
(Money Had and Received)

81. Paragraph Eighty One of Defendant Joshua S. Whitley's Counterclaims does not require a response. Nevertheless, Plaintiff incorporates the foregoing responses, allegations, and denials as if set forth fully herein.

82. Plaintiff denies the allegations contained in Paragraph Eighty Two of Defendant Joshua S. Whitley's Counterclaims.

83. Plaintiff denies the allegations contained in Paragraph Eighty Three of Defendant Joshua S. Whitley's Counterclaims.

84. Plaintiff denies the allegations contained in Paragraph Eighty Four of Defendant Joshua S. Whitley's Counterclaims.

85. Plaintiff denies the allegations contained in Paragraph Eighty Five of Defendant Joshua S. Whitley's Counterclaims.

86. Plaintiff denies the allegations contained in Paragraph Eighty Six of Defendant Joshua S. Whitley's Counterclaims.

AS TO THE DEFENDANT JOSHUA S. WHITLEY'S FOURTH COUNTERCLAIM
(Civil Conspiracy)

87. Paragraph Eighty Seven of Defendant Joshua S. Whitley's Counterclaims does not require a response. Nevertheless, Plaintiff incorporates the foregoing responses, allegations, and denials as if set forth fully herein.

88. Plaintiff denies the allegations contained in Paragraph Eighty Eight of Defendant Joshua S. Whitley's Counterclaims.

89. Plaintiff denies the allegations contained in Paragraph Eighty Nine of Defendant Joshua S. Whitley's Counterclaims.

90. Plaintiff denies the allegations contained in Paragraph Ninety of Defendant Joshua S. Whitley's Counterclaims.

91. Plaintiff denies the allegations contained in Paragraph Ninety One of Defendant Joshua S. Whitley's Counterclaims.

92. Plaintiff denies the allegations contained in Paragraph Ninety Two of Defendant

Joshua S. Whitley's Counterclaims.

AS TO THE DEFENDANT JOSHUA S. WHITLEY'S FIFTH COUNTERCLAIM
(Declaratory Judgment)

93. Paragraph Ninety Three of Defendant Joshua S. Whitley's Counterclaims does not require a response. Nevertheless, Plaintiff incorporates the foregoing responses, allegations, and denials as if set forth fully herein.

94. Plaintiff denies the allegations contained in Paragraph Ninety Four of Defendant Joshua S. Whitley's Counterclaims.

95. Plaintiff admits the allegations contained in Paragraph Ninety Five of Defendant Joshua S. Whitley's Counterclaims.

96. Paragraph Ninety Six of Defendant Joshua S. Whitley's Counterclaims contains a conclusion of law that requires no response.

97. Paragraph Ninety Seven of Defendant Joshua S. Whitley's Counterclaims contains a conclusion of law that requires no response.

98. Plaintiff denies the allegations contained in Paragraph Ninety Eight of Defendant Joshua S. Whitley's Counterclaims.

99. Plaintiff admits the allegations contained in Paragraph Ninety Nine of Defendant Joshua S. Whitley's Counterclaims.

100. Plaintiff denies the allegations contained in Paragraph One Hundred of Defendant Joshua S. Whitley's Counterclaims.

101. Plaintiff denies the allegations contained in Paragraph One Hundred One of Defendant Joshua S. Whitley's Counterclaims.

102. Plaintiff denies the allegations contained in Paragraph One Hundred Two of Defendant Joshua S. Whitley's Counterclaims.

103. Plaintiff denies the allegations contained in Paragraph One Hundred Three of Defendant Joshua S. Whitley's Counterclaims.

104. Plaintiff denies the allegations contained in Paragraph One Hundred Four of Defendant Joshua S. Whitley's Counterclaims.

PLAINTIFF'S AFFIRMATIVE DEFENSES

For A First Defense

105. Defendant's Counterclaims fail to state a claim upon which relief can be granted by this Court.

For A Second Defense

106. To the extent Defendant's counterclaims do not fall within applicable statutes of limitations, they are barred.

For A Third Defense

107. Plaintiff has at all times acted in good faith and in a loyal manner towards her Employer.

For A Fourth Defense

108. Defendant has no standing to bring some of his causes of action.

For A Fifth Defense

109. Upon information and belief, some of or all of Defendant's counterclaims are barred by virtue of his failure to mitigate his damages.

For A Sixth Defense

110. Defendant's counterclaims in equity are barred by principals of equity including, but not limited to, the requirement of clean hands, and the doctrines of estoppel, waiver and laches.

For A Seventh Defense

111. No act or omission of this Plaintiff proximately caused any damages to this Defendant.

For An Eighth Tenth Defense

112. Any damages suffered by Defendants which are denied, were due to, caused by, and the direct and proximate result of his own willful acts, recklessness, and/or negligence.

For A Ninth Defense

113. Any damages sustained by Defendant, which are denied, were caused by his own conduct or the conduct of others over whom this Plaintiff had no control or duty to control.

For A Tenth Defense

114. Defendant's damages may be limited by certain after-acquired evidence.

For An Eleventh Defense

115. Plaintiff hereby gives notice she intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery and, thus, reserves the right to amend her answer to Defendant's counterclaims to assert such defenses.

Wherefore, having fully answered the Counterclaims and having set forth various affirmative defenses, Plaintiff respectfully requests this Court dismiss Defendant's Counterclaims and award Plaintiff attorney fees and costs incurred in defending against Defendant's Counterclaims.

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Attorneys for Plaintiff

Charleston, South Carolina

Date: 12-2-15

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Amy Kovach,

Plaintiff,

vs.

The Berkeley County School District,
Joshua S. Whitley, Terry Hardesty, Scott
Marino, Karen Whitley in her Individual
Capacity, and The Berkeley County
Republican Party,

Defendants.

) IN THE COURT OF COMMON PLEAS

) C.A. No.: 2015-CP-08-2380

) **NOTICE AND MOTION TO STRIKE**
) **STIPULATION OF DISMISSAL AS TO**
) **DEFENDANT KAREN WHITLEY**

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

2015 DEC -4 PM 3:11

FILED

PLEASE TAKE NOTICE THAT Defendant Karen Whitley, through her undersigned counsel, hereby moves pursuant to Rule 41(a), South Carolina Rules of Civil Procedure, for an Order striking, or otherwise invalidating, Plaintiff Amy Kovach's "Stipulation of Dismissal Without Prejudice For Defendant Karen Whitley" on the grounds that the filing is improper under Rule 41 as set forth below.¹

Plaintiff captions her dismissal as a "Stipulation," suggesting that Plaintiff seeks dismissal under Rule 41(a)(1)(B), which allows "filing a stipulation of dismissal signed by all parties who have appeared in the action." Plaintiff's Stipulation of Dismissal contains only the signature of Plaintiff's counsel, however. Neither Defendant Karen Whitley, nor any of the other defendants, stipulated to the filing. Therefore, the filing is not a stipulation and should be stricken for that reason.

If Plaintiff intended to file a voluntary "notice of dismissal" under Rule 41(a)(1)(A), then she failed to satisfy the requirements of that subsection. Because Plaintiff's stipulation references

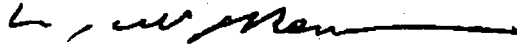
¹ A copy of Plaintiff's Stipulation of Dismissal is attached hereto as Exhibit A.

only "Rule 41(a)(1)" and neglects to reference a specific subsection the parties and Court are left to guess Plaintiff's intentions. Subsections (A) and (B) of 41(a)(1) are entirely different filings. Subsection (A) provides that an action may be dismissed by the Plaintiff "by filing *and serving* a notice of dismissal at *any time before service by the adverse party of an answer* or motion for summary judgment, whichever first occurs." (emphasis added).

Defendant filed and served her Answer to Plaintiff's Complaint on December 1, 2015. (See File-stamped cover page of Answer and Certificate of Service attached as **Exhibit B**.) Later the morning of December 1, counsel for Defendant Whitley received delivery and service of Plaintiff's "Stipulation of Dismissal" through the U.S. Mail. That transmittal letter, dated November 24, included no certificate of service. (See **Exhibit C**.) Plaintiff's "Stipulation of Dismissal" was not served on counsel for Whitley until after Whitley's counsel had filed and served her Answer. Accordingly, if it was Plaintiff's intent to dismiss under Rule 41(a)(1)(A), her attempt does not meet the requirements of that rule.

On November 9, 2015, Defendant Whitley also filed and served a Notice and Motion for Rule 11 Sanctions which was filed November 16, 2015. This Motion remains pending before the Court and was filed well prior to Plaintiff's attempt to dismiss. "Generally, a plaintiff is entitled to a voluntary non-suit without prejudice as a matter of right unless the defendant shows legal prejudice or important issues of public policy are present." *Nelson v. QHG of South Carolina, Inc.*, 354 S.C. 290, 302, 580 S.E.2d 171, 177 (Ct. App. 2003) (*rev'd* on other grounds). Granting Plaintiff's voluntary dismissal without affording Defendant Whitley a hearing on her Motion for Rule 11 Sanctions would be severely prejudicial to the Defendant based on the fact that Defendant seeks in that Motion to recovery her costs and attorney's fees necessarily incurred defending Plaintiff's bad faith filing. Plaintiff's filing of a bad faith and frivolous proceeding--in direct contradiction of sworn testimony--is at the heart of this controversy and Defendant's

sanctions motion. The motion presents a genuine and important issue of public policy. Plaintiff's Dismissal should not be granted before Defendant is heard on these issues, and her "Stipulation" should be stricken.²



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(843) 722-3366

*ATTORNEYS FOR DEFENDANT
KAREN WHITLEY*

December 2, 2015

DM: 4304262 v.1

² Although Defendant's Motion for Rule 11 Sanctions was not an answer or motion for summary judgment under Rule 41(a)(1)(A), the Notice and Motion did act as an appearance such that a voluntary dismissal of the suit as a matter of right by Plaintiff would be improper under Rule 41.

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

Amy Kovach,

Plaintiff,

vs.

Joshua S. Whitley,

Defendant.

Joshua S. Whitley,

Defendant/Counterclaimant

vs.

Amy Kovach,

Plaintiff/Counterclaim
Defendant.

Joshua S. Whitley,

Defendant/Third-Party
Plaintiff,

vs.

Rodney Thompson and Alan Wilson,
Attorney General for the State of South
Carolina,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS FOR
THE NINTH JUDICIAL CIRCUIT

Case No.: 2015-CP-8- 2380

FILED
2016 FEB 12 AM 11:12
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

**MEMORANDUM IN OPPOSITION TO
DEFENDANT JOSHUA S. WHITLEY'S
MOTION FOR SANCTIONS**

Undersigned counsel submits this Memorandum in advance of a hearing scheduled for
February 19, 2016.

N.B

Background

Due to new criminal issues being alleged against Plaintiff by the Attorney General's Office a few weeks after this civil case was filed, undersigned counsel (after consultation with Plaintiff and Plaintiff's new criminal counsel) took steps in November of 2015 to dismiss this civil action in order to better her position in criminal court.¹ At the time, the only named Defendant who could not be unilaterally dismissed by Plaintiff pursuant to Rule 41 was Defendant Joshua S. Whitley. (Defendant Karen Whitley contends she is still a party but she was dismissed without prejudice before she filed an answer.)² On November 25, 2015, Whitley indicated he would only consent to a dismissal of the case against him if Plaintiff paid his attorney fees. After a criminal hearing on February 8, 2016, Defendant Whitley indicated he would agree to a Stipulation of Dismissal of Plaintiff's claim against him but not of his counterclaims or this Motion for Sanctions. That issue is

¹ Undersigned counsel did not withdraw the complaint pursuant to S.C. Code § 15-36-10 (D); steps were taken to dismiss the complaint only to secure Plaintiff an advantage in criminal court.

² Defendant Karen Whitley's Motion for Sanctions cannot be heard as this Court has no jurisdiction of a claim once it has been dismissed. A week after Karen Whitley was dismissed as a Defendant pursuant to S.C.R.C.P., Rule 41, she filed an Answer for the first time, evidently trying to resurrect her case. An answer cannot be filed in a case that has been dismissed as the court loses jurisdiction of a case once a notice of dismissal has been filed. A dismissal under Rule 41 without prejudice is as if the case was never filed. *See, e.g., United States v. Matthews (In re Matthews)*, 395 F.3d 477, 480-481, 2005 U.S. App. LEXIS 1273, *8-9 (4th Cir. N.C. 2005) Further, the fact that Karen Whitley's attorney filed a Motion to Dismiss before Plaintiff dismissed her case is not sufficient to alter Plaintiff's unilateral right to dismiss the action. *See, e.g., Frank v. Trilegiant Corp.*, 2012 U.S. Dist. LEXIS 8246, *7; 8 James Wm. Moore et al., *Moore's Federal Practice* ¶ 41.33[5][c][viii][A] and [D] (3d ed. 2000) ("The plaintiff's right to a voluntary dismissal is not extinguished by the filing of a motion to dismiss under [Rule] 12(b) . . . Arguments that other motions or proceedings constitute the 'equivalent' of an answer or motion for summary judgment have been generally unsuccessful."). Respectfully, if the Court disagrees and believes it does have jurisdiction, as Karen Whitley's Motion for Sanctions is the same as Joshua S. Whitley's Motion, Plaintiff requests this Response apply to both Motions. (The specific allegations pertaining to Karen Whitley's participation in the conspiracy are found in Paragraphs 44, 45, 47, 48, 166, 167, and 169 of the Complaint.)

still being discussed and negotiated by the parties. When Defendant Whitley originally filed an Answer, he filed a Motion for Sanctions, which this Memorandum addresses.

Standard of Review

A request to impose sanctions under the Frivolous Civil Proceedings Sanctions Act is treated as a proceeding in equity. *Hanahan v. Simpson*, 326 S.C. 140, 156, 485 S.E.2d 903, 912 (1997). Under Rule 11, SCRCP, an attorney may be sanctioned for filing a pleading in bad faith. *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008); *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996). The Rule further provides an attorney may be sanctioned whether or not there are good grounds to support a claim if it was filed for an impermissible purpose such as harassment or unnecessary delay. *Johnson v. Dailey*, 318 S.C. 318, 323, 457 S.E.2d 613, 616 (1995). Rule 11 sanctions can be assessed by a court if a baseless complaint is filed, if there was no reasonable inquiry under the circumstances, or culpable carelessness. None of those facts are present here and there is no basis for sanctions. Specifically, for sanctions to be imposed, there must be a finding by the Court, based on a preponderance of the evidence that a reasonable attorney in the same circumstances would believe under the facts of the case a claim is warranted or that the claim was not intended merely to harass or injure the other party, and that the claim is not frivolous. *S.C. Code § 15-36-10 (A) (3)*.

Facts

Defendant Whitley filed a Motion for Sanctions pursuant to Rule S.C.R.C.P., Rule 11 and S.C. Code § 15-36-10 *et seq.* against undersigned counsel on November 3, 2015, approximately two (2) weeks after the Complaint in this matter was filed.

ARGUMENT

- A. A reasonable attorney in the same circumstances would believe under the facts of this case that a claim is warranted.

Defendant Whitley's Motion for Sanctions fails as the civil conspiracy claim against him was clearly warranted. Defendant Whitley alleges that the Complaint is "devoid of factual support." Whitley evidently is not alleging that there are insufficient facts alleged to support a civil conspiracy claim but, rather, that the facts alleged are not true. This is, of course, an argument that should be made at the summary judgment stage of litigation. Defendant Whitley may not like the conspiracy claim that was filed against him but there were ample factual allegations (supported by documents, emails, and witness statements) alleged in the Complaint to support the elements for a cause of action for civil conspiracy against him. *See, e.g., Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006); *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 SC 559, 626 SE 2d 884, 886 (2006) (the elements of a civil conspiracy claim are a combination of two or more persons who intend to injure another person and cause her special damage.) (See Affidavit of Margaret D. Fabri, Ex. A)

The following allegations reasonably support Plaintiff's allegation of civil conspiracy in her Complaint:

1. Alleged in Par. 41: Whitley led a group opposing the BCSD (Berkeley County School District) referendum – during part of the time he opposed the referendum, he was Chair of the Berkeley County Republican Party.
2. Alleged in Par. 121: The Berkeley County Republican Party made defamatory statements together about Plaintiff on its various websites such as she doesn't know whether to defecate or go blind and isn't it grand when a plan comes together.
3. Alleged in Par. 124: Some of these website comments were made by Whitley who also spoke out against Plaintiff in public.
4. Alleged in Par. 48: Whitley created a statement for a Board member (Scott Marino's mother) to read to the BCSD Board which misrepresented facts about a video.

5. Alleged in Par. 53: Whitley demanded an apology from the Superintendent in October of 2012 for the District's use of public funds to support the referendum.
6. Alleged in Par. 54-55: Whitley sent a FOIA requesting Plaintiff's emails regarding the referendum.
7. Alleged in Par. 56: Whitley chose some of the emails he received to create a power point harmful to the District and Plaintiff which he showed to the Republican Party and the Attorney General's office.
8. Alleged in Par. 58, 159: Thereafter, the Republican Party passed a resolution asking the Attorney General's office to prosecute any BCSD employees who violated the ethics laws.
9. Alleged in Par. 60: Plaintiff was assured by BCSD attorneys that Joshua Whitley was "family" and his actions were self-serving to further his career so Plaintiff did not require separate legal counsel.
10. Alleged in Par. 69: Whitley directed his complaints to a close friend of his in the Attorney General's office to receive special attention.
11. Alleged in Par. 124-125: When the BCSD refused to allow Terry Hardesty to disparage Plaintiff at Board meetings, Whitley sued the School District on behalf of Hardesty.
12. Alleged in Par. 161: Whitley suggested stories and provided false information to the press.
13. Alleged in Par. 170: Whitley repeatedly commented publically on the SLED investigation to influence it.
14. Alleged in Par. 162: Whitley communicated directly with BCSD Board members in order to turn them against Plaintiff.
15. Alleged in Par. 163: Senator Larry Grooms stated publicly regarding Plaintiff, "Josh [Whitley] has got the goods on her."
16. Alleged in Par. 171: Whitley threatened to sue a referendum campaign volunteer if the volunteer continued to support Plaintiff.
17. Alleged in Par. 173: Whitley sent FOIAs for the emails of BCSD employees who publically expressed support for Plaintiff.

18. Alleged in Par. 178: Whitley's actions were taken with the intent of intimidating and harming Plaintiff.

19. Alleged in Par. 179: Plaintiff has suffered special damages (injury to her career).

Plaintiff clearly alleged with particularity facts to support a cause of action of civil conspiracy and facts that would make a reasonable attorney believe a civil conspiracy claim was warranted.

B. A reasonable attorney in the same circumstances would believe that the claim was not intended merely to harass or injure the other party.

Defendant Whitley alleges this civil action was brought merely to harass him but undersigned counsel had never met Defendant Whitley at the time the law suit was filed and only knew of him through the emails and documents she reviewed prior to filing the suit. There is no reason to harass someone you do not know. Defendant Whitley, who has the burden of proof, has pointed to no evidence to support his belief that undersigned counsel filed this Complaint to harass him.

The facts are that Plaintiff's counsel never met or spoke to Defendant Whitley prior to filing the Complaint and knew nothing about him other than he was a young attorney from Berkeley County who was active in local politics. Undersigned counsel had no involvement in Berkeley County politics at the time the Complaint was prepared and no involvement in the criminal proceeding that preceded this civil case. Undersigned counsel knew none of the parties involved in the previous criminal proceeding, including the Plaintiff (her client), until Plaintiff was referred to her and retained undersigned counsel in September of 2015. Further, the case was referred to undersigned counsel by another attorney; she did not seek this client or case out. (See Affidavit of Margaret D. Fabri, Ex. A)

C. A reasonable attorney in the same circumstances would not believe the claim was frivolous.

A claim is not frivolous if an attorney believes in "good faith" the action was not intended to harass or to injure the other party. *S.C. Code Ann. § 15-36-20(3)*; *See, Clegg v. Lambrecht*, 2009 S.C. App. LEXIS 353, *9 (S.C. Ct. App. Feb. 5, 2009) (overruled in part on other grnds) (attached as Ex. B). The Complaint was not filed frivolously as there is absolutely no evidence to support Whitley's claim that the Complaint was filed merely to harass him.

When determining whether a lawsuit was frivolous, a court must analyze whether a party reasonably believed "under [the] facts his claim may be valid under the existing or developing law." *S.C. Code Ann. § 15-36-20(1)*. Defendant Whitley contends undersigned counsel "either failed to review the August 28, 2015 criminal sentencing transcript of her client, or chose to ignore it." Again, this allegation is without any basis in fact, although Andy Savage also made this same false statement to the Court on February 8th without ever talking to undersigned counsel to determine the accuracy of his statements.

Undersigned counsel was provided a copy of the criminal sentencing transcript by Plaintiff's former criminal counsel on October 13, 2015, read it and accordingly revised the draft complaint on October 14th. (Email, Ex. C; time records, Ex. D) The time records of undersigned counsel indicate there were numerous conversations and meetings with Plaintiff's previous criminal counsel and receipt of voluminous documents from him. In fact, there were at least seven (7) discussions with Plaintiff's criminal counsel before the Complaint was filed. (Ex. D.) The statements made by Defendant Whitley and Andy Savage are simply not true, which they would have known had they bothered to ask. In fact, the time records show the draft complaint was revised eight (8) times before it was filed: on September 18th, September 21st, September 22nd, September 23rd, September 28th, September 29th, October 10th and October 14th. (*Id.*)

Defendant Whitley also alleges in support of his Motion that undersigned counsel failed to investigate the claim. In fact, undersigned counsel filed the thirty-one (31) page Complaint only after researching the various causes of action, performing an independent analysis of the facts, talking to proposed witnesses and other attorneys, and conducting an extensive review of documents over a four (4) week period of time. Several drafts of the Complaint were prepared over the course of those four (4) weeks and these drafts were discussed and reviewed by other lawyers, as well as with Plaintiff and her lawyer husband, before being modified a last time after a review the criminal sentencing transcript. In fact, undersigned counsel spent more than thirty-seven (37) hours investigating and drafting the Complaint before it was filed. (Ex. D.) Defendant Whitley provides no evidence to support his allegation that undersigned counsel failed to investigate before drafting the Complaint. Defendant Whitley may wish that undersigned counsel failed to investigate the claim and the allegation may make for good press coverage, but it is false. (See Affidavit of Margaret D. Fabri, Ex. A)

For the above reasons, undersigned counsel respectfully requests this Court deny Whitley's Motion for Sanctions.

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Attorneys for Plaintiff

Charleston, South Carolina

Date: 2-10-16

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS FOR
THE NINTH JUDICIAL CIRCUIT

Amy Kovach,

Case No.: 2015-CP-8- 2380

Plaintiff,

vs.

Joshua S. Whitley,

Defendant.

Joshua S. Whitley,

Defendant/Counterclaimant

vs.

Amy Kovach,

Plaintiff/Counterclaim
Defendant.

**MARGARET D. FABRI'S AFFIDAVIT IN
OPPOSITION TO DEFENDANT JOSHUA
S. WHITLEY'S MOTION FOR
SANCTIONS**

Joshua S. Whitley,

Defendant/Third-Party
Plaintiff,

vs.

Rodney Thompson and Alan Wilson,
Attorney General for the State of South
Carolina,

Third-Party Defendants.

PERSONALLY appeared before me, Margaret D. Fabri, who after being duly sworn,
deposes and says as follows:

1. I am an attorney practicing in Charleston.

2. I am very familiar with civil litigation issues having tried cases in Charleston County Family Court, Charleston County Court of Commons Pleas, and in the Federal District Court, District of Charleston.

3. At Ms. Bloodgood's request, I reviewed the pleadings, her time records, and the several boxes of documents she was provided by her client and other attorneys prior to the time she filed a Complaint in this matter.

4. I know she spent over a month drafting and redrafting the Complaint and that, contrary to Joshua Whitley and Andy Savage's false and baseless statements to the Court, she reviewed her client's criminal hearing transcript and amended the Complaint after reviewing it.

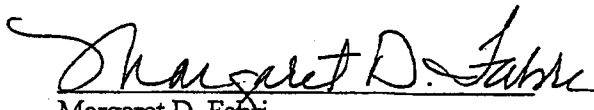
5. It is my opinion that there is voluminous, not only a preponderance, of evidence from which I, or any other reasonable attorney in the same circumstances, would believe that a claim for civil conspiracy was clearly warranted against Joshua Whitley (and his mother) based on the facts.

6. I know from personal experience that Ms. Bloodgood exhibits the utmost civility and would never bring a claim that is not warranted or merely to harass or injure the other party.

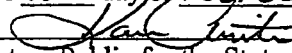
7. In this case, there was a real and substantial basis for the allegations in the 31 page Complaint, the issues were thoroughly researched and the Complaint is based on facts. Further, the Complaint was only filed after significant advice was received from other attorneys and her client.

8. In my opinion, Ms. Bloodgood took actions to prepare and file this Complaint any reasonable attorney would have, and she has complied with all of the requirements of S.C. Code § 15-36-10 (A) (3) so no sanctions are warranted.

FURTHER, YOUR DEPONENT SAYETH NAUGHT.


Margaret D. Fabi

Sworn to and subscribed before me
this 10th day of February, 2016.


Notary Public for the State of South Carolina

My Commission Expires: 07/15/2025

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Copy Citation

Court of Appeals of South Carolina

December 2, 2008, Heard; February 5, 2009, Filed

Opinion No. 4498

Reporter

2009 S.C. App. LEXIS 353

Deborah J. Clegg, as Personal Representative of the Estate of Allison Clegg, Respondent, v. Elliot M. Lambrecht, Douglas A. Lambrecht, Rhett Barker, Jan Horan, and Anna C. Lambrecht, Defendants, Of Whom Douglas A. Lambrecht is the Appellant.

Notice: THIS DECISION IS NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Subsequent History: Rehearing denied by [Clegg v. Lambrecht, 2009 S.C. App. LEXIS 429 \(S.C. Ct. App., June 29, 2009\)](#)

Opinion withdrawn by, Substituted opinion at, Remanded by [Clegg v. Lambrecht, 2009 S.C. App. Unpub. LEXIS 374 \(2009\)](#)

Prior History: [1] Appeal From Beaufort County. [Roger M. Young](#) ▾, Circuit Court Judge.

[Clegg v. Lambrecht, 678 S.E.2d 260, 2009 S.C. App. LEXIS 28 \(S.C. Ct. App., 2009\)](#)

Disposition: AFFIRMED.

Core Terms

sanctions, trial court, good faith, frivolous, negligent entrustment, reasonable attorney, conclusions of law, denial of motion, circumstances, attorney's, grounds

Case Summary

Procedural Posture

The Beaufort County Circuit Court (South Carolina) entered a judgment that denied appellant father's motion to impose sanctions under S.C. R. Civ. P. 11 or pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act. The father, a cosigner on the loan used to obtain the relevant car, had been sued for negligent entrustment after defendant son crashed the son's car into a tree, killing the passenger. The father appealed.

Overview

Respondent personal representative sued, inter alia, the father after the passenger in a vehicle being driven by the son struck a tree and killed the personal representative's decedent. Although the son owned the vehicle, the father was sued for negligent entrustment because the father might have exercised control over the son's use of the car. Eventually, however, the action against the father was dismissed. The father then moved for sanctions under S.C. R. Civ. P. 11 or the South Carolina Frivolous Civil Proceedings Sanctions Act, [S.C. Code Ann. § 15-36-10](#) (2005). The trial court denied that motion. The appellate court found that (1) since the trial court was not rendering a judgment on the merits, but was simply denying a motion for sanctions, it was not required to state findings of fact or conclusions of law pursuant to S.C. R. Civ. P. 52(a); (2) the trial court used the correct standard in evaluating whether the complaint was frivolous; (3) the personal representative did not have the burden of showing that sanctions were unwarranted; (4) an award of sanctions was not mandatory; and (5) the trial court did not have to award attorney fees.

Outcome

The appellate court affirmed the trial court's judgment.

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00282

Civil Procedure > [Preliminary Considerations](#) > [Equity](#) > [General Overview](#) >
 Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [Frivolous Lawsuits](#) >
 Civil Procedure > [Appeals](#) > [Standards of Review](#) > [Abuse of Discretion](#) >
 Evidence > [Burden of Proof](#) > [Preponderance of Evidence](#) >

HN1 A request to impose sanctions under the South Carolina Frivolous Civil Proceedings Sanctions Act is treated as a proceeding in equity. Once a reviewing court has determined the facts based upon its own view of the preponderance of the evidence, it next determines whether a trial court abused its discretion. An abuse of discretion occurs when the trial court's ruling is based upon an error of law or when based upon factual conclusions without evidentiary support. [Shepardize - Narrow by this Headnote](#)

Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [General Overview](#) >
 Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [Frivolous Lawsuits](#) >
 Legal Ethics > [Sanctions](#) > [General Overview](#) >

HN2 Under S.C. R. Civ. P. 11, an attorney may be sanctioned for filing a pleading in bad faith. The rule further provides an attorney may be sanctioned whether or not there are good grounds to support a claim if it was filed for an impermissible purpose such as harassment or unnecessary delay. [Shepardize - Narrow by this Headnote](#)

Civil Procedure > ... > [Attorney Fees & Expenses](#) > [Basis of Recovery](#) > [Bad Faith Awards](#) >
 Civil Procedure > ... > [Attorney Fees & Expenses](#) > [Basis of Recovery](#) > [Statutory Awards](#) >
 Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [Vexatious Litigants](#) >

HN3 See S.C. Code Ann. § 15-36-10(1),(2) (2005). [Shepardize - Narrow by this Headnote](#)

Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [General Overview](#) >
 Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [Vexatious Litigants](#) >
 Legal Ethics > [Sanctions](#) > [General Overview](#) >

HN4 Under the former South Carolina Frivolous Civil Proceedings Sanctions Act, an action is proper if the party reasonably believed in the existence of the facts upon which his claim was based and: (1) reasonably believes that under those facts his claim may be valid under the existing or developing law; or (3) believes, as an attorney of record, in good faith that his procurement, initiation, continuation, or defense of a civil cause is not intended to merely harass or injure the other party. S.C. Code Ann. § 15-36-20(1),(3) (2005). [Shepardize - Narrow by this Headnote](#)

Civil Procedure > [Trials](#) > [Bench Trials](#) >
 Civil Procedure > [Appeals](#) > [Standards of Review](#) > [General Overview](#) >
 Governments > [Courts](#) > [Rule Application & Interpretation](#) >

HN5 S.C. R. Civ. P. 52(a) procedure governs all actions tried upon the facts without a jury. The rule indicates a trial court acting without a jury is required to find facts and separately state conclusions of law which constitute the grounds for the court's action. The rule is directorial in nature and if a trial court substantially complies with S.C. R. Civ. P. 52(a) and adequately states the basis for the result it reaches, the appellate court should not vacate the trial court's judgment for lack of an explicit or specific factual finding. The findings must be sufficient enough for an appellate court to ensure the law has been faithfully executed. However, S.C. R. Civ. P. 52(a) further indicates that findings of fact and conclusions of law are unnecessary on decisions of motions under S.C. R. Civ. P. 12 or 56, or any other motion except as provided in S.C. R. Civ. P. 41(b). S.C. R. Civ. P. 52(a). Under S.C. R. Civ. P. 41(b), if a court renders a judgment on the merits against the plaintiff, the court shall make findings as provided in S.C. R. Civ. P. 52(a). [Shepardize - Narrow by this Headnote](#)

Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [General Overview](#) >
 Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [Frivolous Lawsuits](#) >
 Legal Ethics > [Sanctions](#) > [General Overview](#) >

HN6 Consistent with a finding of good faith, S.C. R. Civ. P. 11 provides an attorney may be sanctioned for filing a claim in bad faith. Moreover, a claim was not frivolous under the former South Carolina Frivolous Civil Proceedings Sanctions Act if an attorney believed in "good faith" the action was not intended to harass or to injure the other party. S.C. Code Ann. § 15-36-20(3) (2005). [Shepardize - Narrow by this Headnote](#)

Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [General Overview](#) >
 Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [Frivolous Lawsuits](#) >

HN7 The former South Carolina Frivolous Civil Proceedings Sanctions Act did not require a trial court to state explicitly its grounds for denying sanctions. However, it did instruct a trial court, when determining whether a lawsuit was frivolous, to analyze whether a party reasonably believed under the facts his claim may be valid under the existing or developing law. S.C. Code Ann. § 15-36-20(1) (2005). [Shepardize - Narrow by this Headnote](#)

Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [Frivolous Lawsuits](#) >
 Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [Signature Requirements](#) >
 Legal Ethics > [Sanctions](#) > [General Overview](#) >

00283

HNS: Under S.C. R. Civ. P. 11 and the former South Carolina Frivolous Civil Proceedings Sanctions Act, a good faith analysis is appropriate. The rule indicates the 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. S.C. R. Civ. P. 11(a). By requiring an attorney to attest to the best of his or her knowledge and belief that there is good ground to support the matter, the rule effectively requires attorneys to file claims in good faith. Moreover, the former South Carolina Frivolous Civil Proceedings Sanctions Act, before being amended, provided, in part, that a claim was not frivolous if the attorney believed in "good faith" the cause of action was not intended merely for an impermissible purpose. S.C. Code Ann. § 15-36-20(3) (2005). *Shepardize - Narrow by this Headnote*

Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [General Overview](#)

Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [Frivolous Lawsuits](#)

Evidence > [Burden of Proof](#) > [Preponderance of Evidence](#)

Legal Ethics > [Sanctions](#) > [General Overview](#)

HNS: A party opposing sanctions does not have the burden to demonstrate sanctions are not warranted; instead, the party moving for the imposition of sanctions has the burden to establish grounds for sanctions by a preponderance of the evidence. *Shepardize - Narrow by this Headnote*

Civil Procedure > ... > [Costs & Attorney Fees](#) > [Attorney Fees & Expenses](#) > [General Overview](#)

Civil Procedure > ... > [Attorney Fees & Expenses](#) > [Basis of Recovery](#) > [Statutory Awards](#)

Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [General Overview](#)

Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [Frivolous Lawsuits](#)

HNI: Under the former South Carolina Frivolous Civil Proceedings Sanctions Act, upon a finding that a person has violated the provisions of "this chapter," a court had to determine the appropriate fees and costs and enter judgment accordingly. S.C. Code Ann. § 15-36-50 (2005). *Shepardize - Narrow by this Headnote*

Counsel: [John E. North, Jr.](#) and [Pamela K. Black](#), both of Beaufort, for Appellant.

[H. Fred Kuhn, Jr.](#), of Beaufort and [Richardson Wieters](#), of Hilton Head, for Respondent.

Judges: [PIEPER](#), J.

Opinion by: [PIEPER](#)

Opinion

PIEPER, J.: The appellant, Douglas Lambrecht (Lambrecht), appeals the denial of a motion to impose sanctions under Rule 11, SCRPC, or pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act (FPSA). **[1]** We affirm.

FACTS

On July 27, 2002, Deborah Clegg (Clegg) filed a complaint as personal representative of her deceased daughter, Allison Clegg, against Lambrecht. **[2]** Clegg alleged her daughter was killed when Lambrecht's son, Elliot Lambrecht (Elliot), crashed a vehicle into a tree. Clegg argued Lambrecht, as the father of Elliot, was liable based on a negligent entrustment cause of action.

At the time of the accident, Elliot was nineteen years old, living in his own residence. Elliot owned the vehicle involved in the accident, though Lambrecht co-signed on the car loan.

Before the accident, the state suspended Elliot's driver's license. Consequently, Elliot parked his vehicle at Lambrecht's house. A few weeks thereafter, Elliot asked Lambrecht to give Elliot's sister, Anna, the keys to Elliot's car because her vehicle had broken down. Lambrecht agreed and Anna picked the car up from Lambrecht's house, taking it to her home in Beaufort, South Carolina. Several weeks later, Elliot traveled with a friend to Beaufort to retrieve the vehicle. Although Elliot's driver's license was still suspended, he nonetheless drove the vehicle, picked up Allison Clegg, and crashed into a tree resulting in Allison's death.

Prior to trial, Lambrecht moved for summary judgment. The trial court granted the motion, concluding Lambrecht had no duty to control Elliot's conduct because it was uncontested that Elliot was an emancipated adult. Further, the court concluded Clegg presented no evidence Lambrecht owned or controlled the vehicle. **[3]** Involved in the accident. Subsequently, Lambrecht filed a motion to impose sanctions pursuant to the FPSA and pursuant to Rule 11 of the South Carolina Rules of Civil Procedure. The trial court first denied the motion; subsequently, in its denial of the motion to alter or amend, the court specified Clegg's claims were filed in good faith and were reasonable. This appeal followed.

STANDARD OF REVIEW

HNI: A request to impose sanctions under the FPSA is treated as a proceeding in equity. *Hanahan v. Simpson*, 326 S.C. 140, 156, 485 S.E.2d 903, 912 (1997). Once we have determined the facts based upon our own view of the preponderance of the evidence, we next determine whether the trial court abused its discretion. *Father v. South Carolina Dep't of Soc. Servs.*, 353 S.C. 254, 261, 578 S.E.2d 11, 14-15 (2003). An abuse of discretion occurs when the trial court's ruling is based upon an error of law or when based upon factual conclusions without evidentiary support. *Fontaine v. Peltz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

DISCUSSION

00284

Lambrecht contends the trial court erred in refusing to impose sanctions by: (1) failing to set forth findings of fact and conclusions of law in its order denying [4] sanctions; (2) using the competence of counsel and the good faith of counsel as the standard for evaluating frivolity; (3) ruling Clegg acted in good faith without an evidentiary basis; (4) failing to find sanctions were mandatory; and (5) failing to award attorney's fees.

HN2 Under Rule 11, SCRCP, an attorney may be sanctioned for filing a pleading in bad faith. *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008); *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996). The rule further provides an attorney may be sanctioned whether or not there are good grounds to support a claim if it was filed for an impermissible purpose such as harassment or unnecessary delay. *Johnson v. Dalley*, 318 S.C. 318, 323, 457 S.E.2d 613, 616 (1995).

Prior to being amended, the FPSA stated:

HN3 Any person who takes part in the procurement, initiation, continuation, or defense of any civil proceeding is subject to being assessed for payment of all or a portion of the attorney's fees and court costs of the other party if:

(1) he does so primarily for a purpose other than that of securing the proper discovery, joinder of parties, or adjudication of the claim upon which the proceedings are based; and

(2) [5] the proceedings have terminated in the favor of the person seeking an assessment of the fees and costs.

S.C. Code Ann. § 15-36-10(1), (2) (2005). [3]

HN4 Under the former FPSA, an action was proper if the party reasonably believed in the existence of the facts upon which his claim was based and:

(1) reasonably believes that under those facts his claim may be valid under the existing or developing law; or

(3) believes, as an attorney of record, in good faith that his procurement, initiation, continuation, or defense of a civil cause is not intended to merely harass or [7] injure the other party.

S.C. Code Ann. § 15-36-20(1), (3) (2005). [4]

Lambrecht first argues the trial court erred in refusing to award sanctions by failing to set forth findings of fact and conclusions of law in its order denying sanctions. We disagree.

HN5 Rule 52(a) of the South Carolina Rules of Civil Procedure governs all actions tried upon the facts without a jury. *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 131, 568 S.E.2d 338, 342 (2002). The rule indicates a trial court acting without a jury is required to find facts and separately state conclusions of law which constitute the grounds for the court's action. *Id.*; Rule 52(a), SCRCP. The rule is directorial in nature and if "a trial court substantially complies with Rule 52(a) and adequately states the basis for the result it reaches, the appellate court should not vacate the trial court's judgment for lack of an explicit or specific factual finding." *Luckabaugh*, 351 S.C. at 131, 568 S.E.2d at 342 (quoting *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 123 (1991)). The findings must be sufficient [8] enough for an appellate court to ensure the law has been faithfully executed. *Id.* However, Rule 52(a) further indicates that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b)." Rule 52(a), SCRCP (emphasis added). Under Rule 41(b), SCRCP, if a court renders a judgment on the merits against the plaintiff, the court "shall make findings as provided in Rule 52(a)." Here, the trial court simply denied a motion for sanctions; therefore, the trial court was not required to state its findings of fact or conclusions of law to support its denial of sanctions.

Notwithstanding, the trial court actually made findings to address the Rule 11, SCRCP, and the FPSA grounds raised by Lambrecht as his basis for sanctions; therefore, even if required, the trial court adequately stated its basis for denying sanctions. Specifically, in its order, the trial court first indicated it denied sanctions because Clegg's claims against Lambrecht were filed in good faith. **HN6** Consistent with this type of finding, Rule 11, SCRCP, provides an attorney may be sanctioned for filing a claim in bad faith. [5] *Gregory*, 378 S.C. 430 at 437, 663 S.E.2d at 50. [9] Moreover, a claim was not frivolous under the former FPSA if an attorney believed in "good faith" the action was not intended to harass or to injure the other party. S.C. Code Ann. § 15-36-20(3) (2005). Consequently, the trial court appropriately considered whether Clegg filed her claim in good faith.

The trial court also denied sanctions because it found Clegg's claim was reasonable. **HN7** The former FPSA did not require the trial court to state explicitly its grounds for denying sanctions. [6] However, it did instruct a trial court, when determining whether a lawsuit was frivolous, to analyze whether a party reasonably believed "under [the] facts his claim may be valid under the existing or developing law." S.C. Code Ann. § 15-36-20(1) (2005). [7] Accordingly, the trial court appropriately considered whether Clegg's claim was reasonable. Therefore, the trial court did not err on this asserted ground.

Lambrecht further contends [11] the trial court erred in using the competence of counsel and the good faith of counsel as its criteria for evaluating frivolity. We disagree.

HN8 Under Rule 11, SCRCP, and the former FPSA, a good faith analysis was appropriate. [8] The rule indicates "[t]he 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." Rule 11(a), SCRCP (emphasis added); see *Gregory*, 378 S.C. at 437, 663 S.E.2d at 50 (stating under Rule 11, SCRCP, "[t]he party and/or attorney may . . . be sanctioned for filing a pleading, motion, or other paper in bad faith whether or not there is good ground to support it."). By requiring an attorney to attest to the best of his or her knowledge and belief that there is good ground to support the matter, the rule effectively requires attorneys to file claims in good faith. Moreover, the FPSA, before being amended, provided, in part, that a claim was not frivolous if the attorney believed in "good faith" the cause of action was not intended merely for an impermissible purpose. S.C. Code Ann. § 15-36-20(3) [12] (2005). Consequently, the trial court did not abuse its discretion in denying sanctions on the basis it referenced the competence and good faith of counsel. We read the court's amended order only as its written attempt to demonstrate that both Rule 11 and the FPSA were at issue; thus, both standards considered by the court were cited in its order reflecting the court's understanding of the different sanction mechanisms before it. Accordingly, the trial court did not abuse its discretion in denying sanctions on the basis it referenced the competence and good faith of counsel.

Lambrecht argues, in the alternative, the trial court had no evidentiary basis for ruling Clegg acted in good faith. In essence, Lambrecht argues Clegg's failure to file a brief opposing sanctions demonstrated an absence of evidence [13] Clegg acted in good faith. This argument has no merit because it incorrectly suggests **HN9** the party opposing sanctions has the burden to demonstrate sanctions are not warranted; instead, the party moving for the imposition of sanctions has the burden to establish grounds for sanctions by a preponderance of the evidence. *Rutland v. Holler, Dennis, Corbett, Ormond, & Garner (Law Firm)*, 371 S.C. 91, 97, 637 S.E.2d 316, 319 (Ct. App. 2006). [9] Moreover, the trial judge who denied the motion for sanctions was also the trial judge who granted summary judgment in Lambrecht's favor; therefore, he was particularly familiar with the substance of the underlying case. See *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 531 S.E.2d 287 (2000) (stating in an equity case, an appellate court is not required to disregard the findings of the trial judge who was in a better position to judge credibility). Accordingly, the trial court did not err based on Clegg's failure to put forth evidence demonstrating her claims were not frivolous.

Lambrecht also contends the trial court erred in refusing to award sanctions because sanctions were mandatory under the FPSA. We disagree. **HN10** Under the former FPSA, "[u]pon a finding that a person has violated the provisions of this chapter, the court shall determine the appropriate fees and costs and enter judgment accordingly." S.C. Code Ann. § 15-36-50 (2005). [10] Here, the trial court found no violation warranting sanctions. Therefore, an award of sanctions was not mandatory. As such, the trial court did not abuse its discretion in denying sanctions.

00285

Lambrecht's final argument is the trial court erred by failing to award attorney's fees he incurred in defense of Clegg's claims against him as sanctions. Because we conclude the trial court did not abuse its discretion in denying sanctions, we need not address whether attorney's fees should have been awarded. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

Footnotes

[1*] The legislature amended the FPSA in 2005. The amended law became effective July 1, 2005, and is applicable to causes of action arising on or after that date. The instant cause of action arose before July 1, 2005; therefore, the FPSA, prior to the 2005 amendment, is applicable in this case.

[2*] The [2] complaint also listed Elliot Lambrecht as a defendant.

[3*] Under the amended § 15-36-10 of the South Carolina Code (Supp. 2008), an attorney may be sanctioned for:

(a) filing a frivolous pleading, motion, or document if:

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

S.C. Code Ann. § 15-36-10(A)(4)(a)(ii)-(iv) (Supp. 2008).

The current statute [6] also directs a court to take into account the following factors when determining whether an attorney has violated the FPSA:

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

S.C. Code Ann. § 15-36-10(E)(1)-(7) (Supp. 2008).

[4*] Though applicable to the case herein, § 15-36-20 of the South Carolina Code (2005) was repealed in the 2005 amendments to the FPSA.

[5*] Our state supreme court has previously indicated the standard for Rule 11, SCRCP, sanctions is essentially the same as for sanctions under the former FPSA. See Father, 353 S.C. at 261, 578 S.E.2d at 15 (stating evaluation of sanctions under the former FPSA and Rule 11, SCRCP, essentially the same); In re Beard, 359 S.C. 351, 360, 597 S.E.2d 835, 839 (Ct. App. 2004). However, this language is not controlling precedent as to the application of the amended FPSA. Father and In re Beard, for instance, were issued prior to the legislature amending the FPSA and consequently, do not reflect the "reasonable attorney" paradigm implemented by the amendments to the FPSA. Compare S.C. Code Ann. § 15-36-10 (Supp. 2008), with S.C. Code Ann. §§ 15-36-10, 15-36-20 (2005). Absent the legislature amending Rule 11, SCRCP, to reflect changes made to the FPSA, the analysis for sanctions under the rule will [10] not necessarily be the same as the analysis under the amended FPSA due to the subjective versus objective components.

[6*] The amended FPSA also does not require courts to make explicit findings.

[7*] Under the pertinent section of the amended FPSA, the analysis, in part, is whether a reasonable attorney, would believe, under the same facts, a claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law. S.C. Code Ann. § 15-36-10(A)(4)(a)(ii) (Supp. 2008).

[8*] The amended FPSA permits a court to take into account "other factors the court considers just, equitable, or appropriate under the circumstances." S.C. Code Ann. § 15-36-10(E)(7) (Supp. 2008). Arguably, even under the amended FPSA, it would not be inappropriate for a court to consider good faith; however, since the amended FPSA is not applicable herein, we need not make this determination.

[9*] The evidence also supports the trial court's finding that Clegg filed her claim in good faith. While Lambrecht argues the claim became frivolous when Clegg discovered Lambrecht did [14] not own the vehicle involved in the accident, ownership alone is not dispositive of a negligent entrustment claim. See USAA Prop. & Cas. Ins. v. Clegg, 377 S.C. 643, 657, n.7, 661 S.E.2d 791, 798, n.7 (2008) (stating a negligent entrustment claim may lie against "the owner or one in control of the vehicle" involved in an accident) (quoting Am. Mut. Fire Ins. Co. v. Passmore, 275 S.C. 618, 621, 274 S.E.2d 416, 418 (1981)) (emphasis added); see also Corbett v. Weaver, 380 S.C. 288, 669 S.E.2d 615 (Ct. App. 2008). Additionally, although Lambrecht contends Elliot's emancipation destroyed the negligent entrustment claim, emancipation merely suggests a lack of control over the subject person, which while potentially relevant, does not necessarily address whether the defendant had ownership or control over the vehicle involved in the accident. See Passmore, 275 S.C. at 621, 274 S.E.2d at 418. Nevertheless, despite Lambrecht's possession of the vehicle's keys and the vehicle being parked at his residence for a period of time, the trial court apparently concluded Lambrecht did not have control of the vehicle at or near the time of the accident and that the negligent entrustment claim therefore [15] should be dismissed. Thus, notwithstanding its ultimate disposition, factual support does appear in the record for the trial court to have concluded Clegg filed the claim in good faith. See Johnson, 318 S.C. at 323, 457 S.E.2d at 616 (holding the trial court did not abuse its discretion in denying sanctions, asserted under Rule 11, SCRCP, where sufficient facts in the record supported a conclusion counsel did not act in bad faith).

[10*] Under the amended FPSA, if a sanction is imposed the court "shall report its findings to the South Carolina Commission of Lawyer Conduct" and to our state's supreme court. S.C. Code Ann. §§ 15-36-10(H), (M) (Supp. [16] 2008).

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A Clegg v. Lambrecht, 2009 S.C. App. LEXIS 429**Copy Citation**

Court of Appeals of South Carolina

June 29, 2009, Decided

4498

Reporter**2009 S.C. App. LEXIS 429**

Clegg v. Lambrecht

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: Clegg v. Lambrecht, 2009 S.C. App. LEXIS 353 (S.C. Ct. App., Feb. 5, 2009)**Opinion****[1]**

Petition for Rehearing Denied.



Document: Clegg v. Lambrecht, 2009 S.C. App. Unpub. LEXIS 374 Actions ▼

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A Clegg v. Lambrecht, 2009 S.C. App. Unpub. LEXIS 374**Copy Citation**

Court of Appeals of South Carolina

December 2, 2008, Heard; June 30, 2009, Filed

Unpublished Opinion No. 2009-UP-376

Reporter**2009 S.C. App. Unpub. LEXIS 374** | 2009 WL 9529151

Deborah J. Clegg, as Personal Representative of the Estate of Allison Clegg, Respondent, v. Elliot M. Lambrecht, Douglas A. Lambrecht, Rhett Barker, Jan Horan, and Anna C. Lambrecht, Defendants, Of Whom Douglas A. Lambrecht is the Appellant.

Notice: THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239 (d)(2), SCACR.

Subsequent History: [1] Withdrawn, Substituted and Refiled June 30, 2009. Formerly Opinion No. 4498. Withdrawn, Substituted, and Refiled May 13, 2009. Writ of certiorari denied Clegg v. Lambrecht, 2014 S.C. LEXIS 244 (S.C., June 25, 2014).

Prior History: Appeal From Beaufort County. Roger M. Young, Circuit Court Judge.
Clegg v. Lambrecht, 2009 S.C. App. LEXIS 353 (S.C. Ct. App., Feb. 5, 2009).

Disposition: VACATED AND REMANDED.

Core Terms

trial court, conclusions, frivolous, sanctions, vacate, appellate review, withdraw

Counsel: John E. North, Jr. ▼, and Pamela K. Black ▼, both of Beaufort, for Appellant.

H. Fred Kuhn, Jr. ▼, of Beaufort and Richardson Wieters ▼, of Hilton Head, for Respondent.

Judges: WILLIAMS, PIEPER ▼, and GEATHERS ▼, JJ., concur.

Opinion

PER CURIAM: Douglas Lambrecht appeals the denial of a motion to impose sanctions under Rule 11, SCRCP, or pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act (FCPSA) under Sections 15-36-10, et seq. of the South Carolina Code (Supp. 2008). We now withdraw our previous opinion from publication and substitute this revised opinion. We vacate and remand.

Under the peculiar facts of this case, more specific findings and conclusions by the trial court are necessary because a duty to dismiss or withdraw frivolous litigation may arise at a subsequent point in the litigation based on whether an attorney knew or should have known a claim is frivolous. This type of review requires an intensive factual consideration of the record, including discovery. We are unable to [2] determine which facts the trial court relied upon in its decision. We therefore vacate the denial of sanctions and remand the matter to the trial judge for an order "identifying the facts and accompanying legal analysis on which [he] relied" to enable meaningful appellate review of this issue. Doe v. Howe, 367 S.C. 432, 449, 626 S.E.2d 25, 34 (Ct. App. 2005); Bowen v. Lee Process Sys. Co., 342 S.C. 232, 234, 536 S.E.2d 86, 88 (Ct. App. 2000); see also Ackra Direct Mktg. Corp. v. Fingerhut Corp., 86 F.3d 852, 857 (8th Cir. 1996) (explaining that although courts are not normally required to make findings of fact or conclusions of law in ruling on motions, the court "may remand when the lack of findings by the district court would substantially hinder" appellate review). Upon remand, the trial court shall conduct a separate evaluation under Rule 11, SCRCP, and under FCPSA, and make findings and conclusions as to each sanction mechanism asserted.

VACATED AND REMANDED.

WILLIAMS, PIEPER, and GEATHERS, JJ., concur.

00288

Nancy Bloodgood

From: Janet Smith <janet@uricchio.com>
Sent: Tuesday, October 13, 2015 10:50 AM
To: Nancy Bloodgood
Cc: Janet Smith
Subject: Kovach
Attachments: Transcript of Sentencing Hearing 08 28 15.pdf

Ms. Bloodgood:

Pursuant to Mr. Theos' instructions, attached please find a copy of the transcript from the August 28, 2015 plea/sentencing hearing.

Thank you,

Janet S. Smith
Legal Assistant to Jerry N. Theos
and Margaret E. Theos

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Attorneys and Counselors at Law

PAUL J. FOSTER, JR., 1928-1999

Amy Kovach
212 Clouter Creek Drive
Charleston SC 29492

Page: 1
February 10, 2016
Our File No. 12586-0000P
Statement No: 7

DRAFT STATEMENT-IN HOUSE USE!!!!

Code

			Hours
09/03/2015	NB	Meeting with client; Review documents	1.80
	NB	Telephone conference with Kathy; Email to Amy and Jerry Theos; Review documents	0.70
09/04/2015	NB	Receive and review voluminous documents from Jerry Theos and documents from Amy; Receive and review emails from Kathy Mahoney	1.20
09/07/2015	NB	Review documents; Revise and supplement affidavit; Prepare memo; Assemble exhibits; Meet with Amy re revisions	6.60
09/08/2015	NB	Edit and finalize grievance affidavit and memo and scan to opposing counsel	1.80
09/09/2015	NB	Receive email from opposing counsel re decision by Board; Telephone conference with Amy; Lengthy Telephone conference with John Reagle	0.40
09/17/2015	LCS	Review, edit, and supplement draft complaint	0.70
	NB	Telephone conference with Amy; Telephone conferences with John Reagle; Research causes of action and start draft complaint	4.70
09/18/2015	NB	Revise and supplement complaint; Emails to Amy; Prepare informed consent	0.80
09/21/2015	NB	Supplement complaint with additional causes of action	1.40
	LCS	Review, edit and supplement draft complaint	0.60
09/22/2015	NB	Revise complaint; Meet with Amy	1.70
	NB	Receive and review emails and edit and supplement complaint	1.60
09/23/2015	NB	Supplement complaint; Meet with client; Lengthy telephone conference with Jerry Theos; Revise complaint	3.40
09/25/2015	NB	Supplement complaint; Receive and review emails from [REDACTED] and media file from Jerry	1.30

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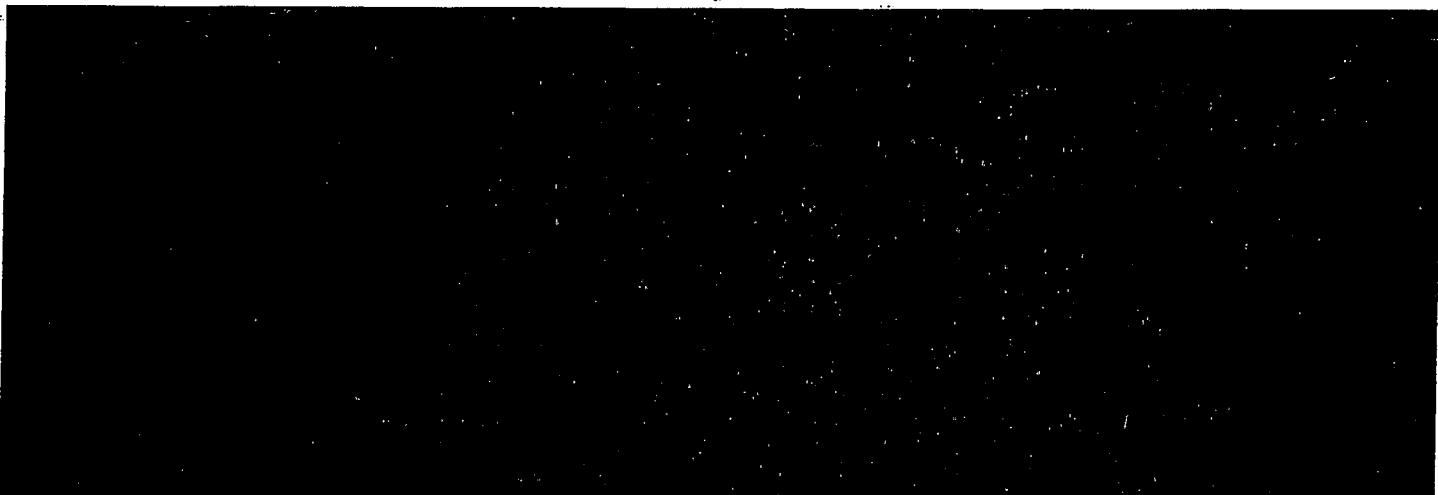
Attorneys and Counselors at Law

PAUL J. FOSTER, JR., 1928-1999

Amy Kovach

Page: 2
February 10, 2016
Our File No. 12586-0000P
Statement No: 7

			Hours
09/28/2015	NB	Receive and review emails re facts from [REDACTED]; Amend Complaint; Telephone conference with Amy	3.80
09/29/2015	NB	Telephone conference with [REDACTED]; Receive and review voluminous emails; Revise complaint	3.80
09/30/2015	NB	Receive and review emails from Amy and revise complaint	0.30
10/01/2015	NB	Edit and supplement complaint	1.10
	LCS	Edit and supplement draft complaint	1.40
10/02/2015	NB	Receive and review emails and supplement complaint	0.60
10/06/2015	NB	Telephone conference with Jerry; Receive and review FOIAs letter and forward to Jerry and Amy	0.30
10/07/2015	NB	Receive and reviews from Amy and reply re AG's letter	0.20
10/09/2015	NB	Supplement complaint; Voicemail to Jerry Theos; Telephone conference with Jerry	0.40
10/13/2015	NB	Receive and review email and documents from Jerry	1.10
10/14/2015	NB	Finalize complaint; Prepare transmittal documents	0.60



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00291

) IN THE COURT OF COMMON PLEAS

) C.A. No.: 2015-CP-08-2380

)

)

1)

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1

) **DEFENDANT JOSHUA S. WHITLEY'S**
) **AMENDED MOTION FOR SANCTIONS**
) **AGAINST PLAINTIFF AND PLAINTIFF'S**
) **COUNSEL AND BRIEF IN SUPPORT OF**
) **AMENDED MOTION FOR SANCTIONS**
) **AGAINST PLAINTIFF AND**
) **PLAINTIFF'S COUNSEL.**

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

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client's patently false rendition of the facts. Plaintiff is also subject to sanctions under Rule 11 due to the false information included in the Complaint, her involvement in the filing of the frivolous Complaint, and her agreement to the vexatious and baseless allegations in the Complaint.

BACKGROUND

Defendant moves for sanctions against Plaintiff and Bloodgood because Plaintiff's claim against him for civil conspiracy is vexatious, devoid of factual support, and reflects an abject failure on the part of Bloodgood to investigate the factual basis for the claim and the controlling legal authority. Plaintiff is subject to sanctions pursuant to Rule 11 for filing a frivolous Complaint.

Plaintiff is the former Director of Communications and Community Relations for the Berkeley County School District ("BCSD"). Beginning in 2012, Whitley, a private citizen and taxpayer in Berkeley County, observed misrepresentations and questionable fundraising efforts by Plaintiff and other BCSD officials. It appeared to Defendant that these officials were in violation of Section 8-13-1346 of the South Carolina Code of Laws, which prohibits the use of public funds to influence an election. Defendant investigated the matter by seeking access to relevant documents from the BCSD through the South Carolina Freedom of Information Act ("FOIA"), pursuant to which "*any person* has a right to inspect or copy any public record of a public body..." S.C. Code Ann. § 30-4-30 (emphasis added).

Upon review of the documents produced under FOIA - in particular, emails from Plaintiff in which she actively engaged in campaigning in favor of a Referendum in violation of the law - Plaintiff's misconduct was manifest. Accordingly, Defendant took his concerns to the Attorney General, and the South Carolina Law Enforcement Division ("SLED") conducted a thorough investigation. SLED's investigation resulted in six indictments filed by the Attorney General,

including five indictments against Plaintiff. She was charged with engaging in misconduct in office in violation of the common law of South Carolina and the criminal use of public funds to influence an election in violation of Section 8-13-1346 of the South Carolina Code of Law. She was also charged with two counts of felony forgery because of her efforts to conceal her criminal activity and one count of perjury related to fraudulently conducting procurement matters. Plaintiff entered a plea of guilty to the misconduct in office and ethics charges during a sentencing hearing on August 28, 2015, at which time she admitted that she knew when she committed her crimes that her actions were in violation of the law. As a part of her guilty plea, she also admitted facts supporting the two felony forgery charges and the perjury charge related to her efforts to cover up her misconduct.

Less than two months after entering her guilty pleas, Plaintiff, by and through Bloodgood, filed the Complaint in the instant action in which she alleges, *inter alia*, that Defendant, Joshua S. Whitley ("Whitley" or "Defendant") along with the Berkeley County School District, Terry Hardesty, Scott Marino, Karen Whitley in her Individual Capacity, and the Berkeley County Republican Party "conspired with each other to harm [her]." (Complaint, ¶ 159.) Her conspiracy claim lacked any factual support. As Plaintiff's Answer, Affirmative Defenses, Counterclaims, and Motion to Dismiss demonstrate, no reasonable attorney would file this claim against this Defendant on behalf of this Plaintiff. The facts alleged in the Complaint are in direct contradiction to those to which Plaintiff agreed *under oath* during her guilty plea hearing on August 28, 2015. Bloodgood either failed to review the August 28, 2015 transcript or chose to ignore it, choosing instead to file a frivolous claim based solely on her client's patently false rendition of the facts.

Because the allegations in the Complaint directly contradict the facts to which Plaintiff agreed under oath on August 28, 2015, the Attorney General filed a notice on November 9, 2015

against Plaintiff to show cause why she should not be held in contempt. (Rule to Show Cause and Petition in Support, attached as Exhibit A). Only after the Attorney General filed its Rule to Show Cause did Plaintiff and Bloodgood seek voluntary dismissal of the Complaint. The show cause hearing took place on February 8, 2016, before the Honorable W. Jeffrey Young in the Court of General Sessions. During the February 8, 2016 hearing, Plaintiff testified that Bloodgood failed to perform due diligence before filing the Complaint, and that the advice Bloodgood gave her was provided without a clear understanding of what the Attorney General had alleged or what occurred at Plaintiff's guilty plea hearing held on August 28, 2015. (Show Cause Transcript, attached as Exhibit B, pp. 8, 10.) She also agreed with her attorney's statement that Bloodgood did not review the transcript of the guilty plea hearing before the Complaint was filed, and that the instant civil case against Whitley and others had been "withdrawn with prejudice." (Exhibit B, pp. 8-9.) Ms. Kovach testified that she filed the Complaint on the advice of her counsel, Bloodgood. (Exhibit B, p. 10.) Thus, Plaintiff placed the blame for filing the frivolous Complaint squarely on Bloodgood.

On February 10, 2016, Bloodgood filed her opposition to Mr. Whitley's original motion for sanctions against her. In it, she claims that she received the guilty plea transcript on October 13, 2015, and revised the draft Complaint on October 14, 2015 based on her review of the transcript, before filing it on October 15, 2015. (Opposition Brief, p. 8.) She also asserts that she reviewed versions of the Complaint with Plaintiff. *Id.*

Because both versions of events leading up to the filing of the Complaint cannot be true, Whitley amends his Motion for Sanctions to include Plaintiff so that she can be before the Court and the Court can determine whether her conduct is sanctionable under Rule 11.

ARGUMENT

The Complaint reflects complete disregard by Plaintiff and Bloodgood for the obligation to refrain from filing a pleading that lacks ground to support it. It represents the very sort of conduct Rule 11 is intended to deter. The Complaint lacks any factual and legal basis, and its filing was not for a proper purpose; instead, it was unreasonable, vexatious, improperly motivated, and intended to harass. The Court should therefore order the dismissal of the case and award Defendant his costs and attorneys' fees in accordance with Rule 11. Furthermore, because no reasonable attorney would believe that Plaintiff's civil conspiracy claim is reasonably founded or warranted under existing law, the Court should award sanctions against Bloodgood pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Action, S.C. Code Ann. § 15-36-10, *et seq.* Bloodgood's actions also violate multiple Rules of Professional Conduct, as addressed below.

I. SANCTIONS AGAINST BLOODGOOD ARE WARRANTED BY RULE 11.

Rule 11 provides that the signature of an attorney on a pleading "constitutes a certificate by him that he has read the pleading... and "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." SCRCP 11. If the pleading is signed in violation of the Rule, the court 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...including a reasonable attorney's fee." *Id.* Under Rule 11 of the South Carolina Rules of Civil Procedure, a trial court may impose sanctions on a party, a party's attorney, or both "for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments." *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162, (1996); *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 645, 760 S.E.2d 399, 412 (2014) (upholding

sanctions under Rule 11, SCRCP, when a party "engaged in 'dilatory litigation tactics,' lodged 'frivolous and dilatory appeals,' filed affidavits and memoranda 'without reasonable basis,' and moved for reconsideration after nearly every ruling made by the circuit court").

The conspiracy claim Plaintiff and Bloodgood filed against Whitley had no "good ground to support it." The sum total of the conspiracy allegations against Defendant in Plaintiff's fourth cause of action is as follows:

- He 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.)
- He 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.)
- He 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.)
- State Senator Larry Grooms, who sat in the front row at Plaintiff's criminal case hearings and "acknowledged Defendant Joshua S. Whitley's actions towards Plaintiff when he stated publicly, 'Josh has got the goods on her.'" (Complaint, ¶ 163.)
- He exchanged emails with his mother, Defendant Karen Whitley, regarding the lease of Karen Whitley's private property while Karen Whitley was at work. (Complaint ¶ 168.)
- He 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.)

- He “threatened to sue volunteer Campaign Coordinator Co-Chair Jane Pulling if she continued to support Plaintiff.” (Complaint, ¶ 171).
- He “bragged publically that he hoped to harm the School District.” (Complaint, ¶ 172).
- He “issued multiple FOIA requests for emails of other BCSD employees who publically expressed support for Plaintiff.” (Complaint, ¶ 173).
- He “knew and encouraged his mother to use public resources while she was working to lease her personal property which personally benefited her.” (Complaint, ¶ 174).

Thus, the only actions that Bloodgood alleges that Whitley and others “conspired with each other” to do was to (1) file a complaint with the Attorney General, and (2) ensure a Resolution was passed by the Berkeley County Republican Party, LLC encouraging the Attorney General to prosecute Plaintiff, both of which these Defendants were within their rights to do. Plaintiff and Bloodgood allege that false statements were made to SLED and the press, but they fail to identify any such statements. They complain that Defendant sought information through FOIA, which is a right preserved to any person under South Carolina law § 30-4-30 (emphasis added). They assert that Defendant violated Rule 3.6 of the Professional Rules of Conduct, which is clearly inapplicable to Defendant’s speech as a concerned private citizen/taxpayer and does not prevent Defendant from exercising his First Amendment rights. Moreover, the unsupported allegation appears to be meant to harass Defendant and meant for leverage in a lawsuit, as they clearly ignored that Plaintiff’s criminal counsel did indeed comment in the press during the investigation and post-indictment.

In any event, in light of Plaintiff’s guilty plea, there is no doubt that Defendant’s concerns - which prompted the FOIA request, the complaint to the Attorney General and the efforts to prosecute her, as well as his protected speech - were well founded. Further, Defendant is immune from liability for his good faith reporting of Plaintiff’s criminal activities and, as a

citizen, he enjoyed a qualified privilege in his reports of "judicial records and proceedings and other official acts, reports, and records." *White v. Wilkerson*, 328 S.C. 179, 186, 493 S.E.2d 345, 348 (1997); *Jones v. Garner*, 250 S.C. 479, 158 S.E.2d 909 (1968). A person is shielded from liability for publishing information "originally based upon government reports or actions." *Id.* *Carter v. Dozier*, 2011 U.S. Dist. LEXIS 66335, *10 (D.S.C. May 31, 2011). In addition, it is settled law in South Carolina that, "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. Leake*, 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).

The real purpose behind Plaintiff's Complaint is revenge. Plaintiff sought to harass and intimidate those who discovered and reported her illegal activities, and she is therefore subject to sanctions under Rule 11. Bloodgood, as an officer of the Court, had a duty to refrain from filing vexatious pleadings pursued as a means of retribution. Bloodgood's assertion that she did not "know" Whitley and had no personal reason to harass him does not protect her from this duty. Bloodgood also had an absolute obligation to file a truthful Complaint. Incredibly, although Plaintiff and Bloodgood acknowledge in the Complaint that Plaintiff entered a plea of guilty to two of the charges against her, Bloodgood failed to review the transcript of the sentencing hearing to determine the extent of Plaintiff's admissions when Plaintiff entered her plea. In her opposition to Defendant's original Motion for Sanctions, Bloodgood claims that she did review the guilty plea transcript. This, however, is an incredible assertion. No reasonable attorney, after

having reviewed her client's admissions during the guilty plea hearing, would have believed that the instant case was warranted. Bloodgood had an absolute obligation to order and read the criminal sentencing transcript prior to filing a false Complaint that contradicts the Convicted Criminal Plaintiff's under oath admission to ALL of the facts of ALL five indictments charged against her. Plaintiff and Bloodgood undermine the rule of law and our system of justice by filing a complaint that directly contradicts the facts to which Plaintiff admitted under oath during her guilty plea hearing.¹

A review of the transcript of the guilty plea hearing on August 28, 2015 exposes these myriad contradictions and provides conclusive evidence that Plaintiff and Bloodgood should be sanctioned for the filing of this Complaint. The attached chart compares the allegations of the Complaint to the facts to which Plaintiff agreed during the August 28, 2015 sentencing hearing. (Exhibit D, attached). In paragraph 38 of the Complaint, Plaintiff and Bloodgood allege that the video Plaintiff was working on was not prepared in anticipation of the Referendum." (Complaint, ¶ 38.) However, during the sentencing hearing, the Court read from the indictment, "Amy Kovach did use public funds to pay for the creation of a campaign video...Is what's stated in the indictment the truth?" Kovach answered, "Yes, sir." (Exhibit C, p. 8.) The Attorney General then provided a detailed explanation of how Plaintiff paid for the video and for campaign signs for children to hold during the video and how she made false statements to SLED and the press concerning the videos. (Exhibit C, pp. 13, 17 19, 21, 26-27.) When the Court asked if Kovach agreed with the facts as stated by the Attorney General, Plaintiff answered, "Yes, sir." (Exhibit C, p. 28.)

¹ The entire sentencing transcript is attached as Exhibit C.

In addition, Plaintiff and Bloodgood allege at Paragraph 40 of the Complaint, that Plaintiff "never personally profited from her position with the [BCSD] and no one has ever alleged that she did." (Complaint, ¶ 40.) During the sentencing hearing, however, the Attorney General explained that Kovach's emails show that she was motivated by the advancement of her career. (Exhibit C, pp. 14-15.) Plaintiff agreed that those facts were correct as well. (Exhibit C, p. 28.)

At paragraph 57 of the Complaint, Plaintiff and Bloodgood allege that the "[FOIA'd] emails merely indicated Plaintiff and other BCSD employees were responding to questions about the school bond referendum, providing current information to the volunteer Referendum committee, and preparing Defendant BCSD Board members of public presentations." (Complaint, ¶ 57.) However, the Attorney General explained that Kovach used her emails on county time for advocacy, organized rallies, promoted support using government resources and time. (Exhibit C, p. 11.) Kovach agreed with those facts. (Exhibit C, p. 28.)

Plaintiff and Bloodgood allege at Paragraph 83 of the Complaint that "no public funds were used by Plaintiff to create or pay for any Referendum campaign video" and that "the video Plaintiff finalized for the District in September of 2012 had been started months before the beginning of the Referendum process and for an entirely different purpose." However, during the sentencing hearing she agreed that she did use public funds to pay for the creation of a campaign video. (Exhibit C, p. 7.)

Plaintiff and Bloodgood asserted at Paragraph 106 of the Complaint that Plaintiff's attorney moved to disqualify the Attorney General after which the Attorney General "retaliated" against her by adding three "completely bogus" additional indictments, including a perjury and forgery charge, which were dismissed. However, at the sentencing hearing, Kovach agreed that she was pleading as indicted to the global law misconduct in office offense "*which covers and*

incorporates all of the conduct that have been charged at issue, as well as the original ethics indictments for use of government funds to influence an election." (Exhibit C, pp. 3, 28.) As the Attorney General explained, and Kovach agreed, Kovach submitted a false and fictitious document (an estimate from Go To Team) to cover up the payment of the campaign video. (Exhibit C, pp. 24, 28.) She also created another forgery, an invoice created after her interview with SLED, which she created in an attempt to cover up the fact that she did not get three estimates for the video as she had claimed. (Exhibit C, pp. 26-27.) Kovach agreed that she had forged that document as well. (Exhibit C, p. 28.) And, although Plaintiff and Bloodgood claim at Paragraph 111 of the Complaint that the indictment was "false and unfounded," she agreed at the hearing that she was pleading guilty to facts supporting all five charged indictments, three of which were dismissed only as part of the plea agreement. (Exhibit C, pp. 3, 10.) Further, despite the allegation at paragraph 112 that the document was not Plaintiff's, the Attorney General set forth in meticulous and supported detail exactly how the criminal Plaintiff committed her forgeries and her crimes. Incredibly, after setting forth the exact OPPOSITE of what the Plaintiff and Bloodgood allege herein, the convicted criminal Plaintiff agreed with the facts as stated by the Attorney General.

Plaintiff and Bloodgood also claims in Paragraphs 113 through 117 of the Complaint that Plaintiff did not "smurf" or split up the cost of an item over time so that the total cost appears to be less than quoted. They claim that there was no smurfing "and the Attorney General knew or should have known there was no "smurfing." (Complaint, ¶ 114.) However, during the sentencing hearing, the Attorney General outlined precisely how Plaintiff had used "smurfing" to cover up her purchase of the video, and Plaintiff agreed to all of the facts as outlined by the Attorney General, without reservation. (Exhibit C, pp. 18-25, 28.)

In Paragraph 123, Plaintiff and Bloodgood allege that Plaintiff "eventually pled guilty to this particular charge because she had to end the criminal proceedings for her own mental health." (Complaint, ¶ 123.) In fact, she pled guilty to avoid more years from the forgery and perjury charges and testified to the facts of all of her crimes and that she was pleading guilty knowingly and of her own will. (Exhibit C, pp. 4, 5-7.)

As Plaintiff and Bloodgood have conceded by dismissal of this Complaint, Plaintiff is guilty of all of the crimes for which she was charged and to all the facts as laid out by the Attorney General. There is no question that Plaintiff cannot now seek compensation or punitive damages for an alleged conspiracy in reporting the misconduct to law enforcement or seeking to have her prosecuted for those charges, and her dismissal of the case against Whitley demonstrates that. The Complaint is therefore frivolous as it had no reasonable basis, and the purpose behind it was merely to harass those whose efforts to have Plaintiff prosecuted for her crimes were successful. Bloodgood was obligated to, at a minimum, read the transcript wherein her client admitted to the opposite of what Bloodgood pleads here. She either did not read it, or she blatantly (and without explanation) ignored the transcript, which violates Rule 11.

In her opposition to Plaintiff's original Motion for Sanctions, Bloodgood asserts that she did read the guilty plea transcript, and that she still determined that there was a sufficient basis for filing the suit against Whitley for civil conspiracy. Of course, this is an incredible assertion, as no reasonable attorney would believe that a complaint would be warranted after reading that transcript. To make this assertion, Bloodgood apparently seeks to draw a distinction between the facts that were admitted during the guilty plea hearing and the specific allegations of conspiracy against Whitley. However, if the allegations that directly contradict Plaintiff's guilty plea admissions are removed from the Complaint, there can be no complaint against Whitley. In the Complaint, Plaintiff professes her innocence to the charges against her; the fact that she pleaded

guilty and admitted the factual basis for the charges validates Whitley's efforts to bring them to light. Any reasonable attorney would know that her client would be estopped from asserting a civil conspiracy claim under those circumstances, or worse, haled before a court to show cause as to why she should not be held in contempt.

II. DEFENDANT IS ENTITLED TO SANCTIONS PURSUANT TO THE FCPSA.

In addition to sanctions under Rule 11, Defendant is entitled to sanctions pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 (FCPSA) against Bloodgood. The FCPSA authorizes an award of attorney's fees in a civil action as a sanction against an attorney bringing frivolous pleadings, claims, or defenses. Pursuant to the FCPSA, an attorney participating in civil litigation may be sanctioned for:

(a) filing a frivolous pleading, motion, or document if:

(i) the person has not read the frivolous pleading, motion, or document;

(ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;

(iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or

(iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based;

(b) making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts; or

(c) making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law or if there is no good faith argument that exists for the extension, modification, or reversal of existing law.

S.C. Code Ann. § 15-36-10(A)(4).

No reasonable attorney would believe that the civil conspiracy claim alleged in the Complaint was reasonably founded or warranted under existing law. Plaintiff entered a plea of guilty and admitted to a series of facts that directly contradicts the facts alleged in the Complaint and completely undermines the civil conspiracy claim against Whitley. A reasonable attorney presented with the same circumstances would believe that the claim was frivolous or intended merely to harass or injure Whitley. A reasonable attorney would have reviewed the transcript of the sentencing hearing that took place on August 28, 2015, and she would have known that the factual allegations in her Complaint were barred by her client's admissions during the hearing. A reasonable attorney would know that the filing of a complaint by concerned citizens seeking prosecution of a person who has admitted to the crimes that the Defendants sought to be investigated could not form the basis for a civil conspiracy cause of action. She would know that these defendants would be immune from such an action and that the reports they made were privileged under South Carolina law. Accordingly, in addition to the sanctions available under the Rule 11, the Court should award sanctions against Bloodgood pursuant to the FCPSA.

III. BLOODGOOD'S CONDUCT VIOLATES SOUTH CAROLINA'S RULES OF PROFESSIONAL CONDUCT.

Sanctions against Bloodgood are further warranted under the foregoing statutes based on her violation of multiple Rules of South Carolina's Rules of Professional Conduct. Bloodgood was subject to these Rules as an officer of the Court and counsel for Kovach. They are as follows:

1. RULE 3.1. MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law....

The comments to this rule state, in part, that lawyers are required to "inform themselves

about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions." RPC 3.1 (Comment 2). An attorney's actions are frivolous "if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by good faith argument for an extension, modification or reversal of existing laws." *Id.* Here, Plaintiff agreed on February 8, 2016, that the allegations of her Complaint directly contradict her sworn testimony during the guilty plea hearing. She also stated that she filed the suit on the advice of her attorney, and that her attorney failed to review the transcript of the guilty plea hearing. Thus, according to Plaintiff, Bloodgood failed to inform herself of the facts of her client's case and the applicable law to determine if she could make a good faith argument in support of Kovach's position. Bloodgood, of course, claims to have reviewed the transcript before filing the suit. This assertion is incredible; but even if it were true, filing the suit with full knowledge that the allegations contained in it contradicted his client's sworn testimony would be a direct violation of Rule 3.1 of the Rules of Professional Conduct.

2. RULE 3.3. CANDOR TOWARD THE TRIBUNAL

A lawyer shall not knowingly:

make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer....

(RCP 3.3(a)). The comments to this Rule provide that, a "lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false." (RPC 3.3, Comment 2). The Complaint that Bloodgood filed on Plaintiff's behalf was riddled with false statements of fact that she either knew to be false or which she alleged without having conducted even minimal investigation. Obviously, she knew that Kovach had entered a plea of guilty to the charges against her and that a hearing had been conducted during which Kovach

would have been required to admit to the factual bases for those charges. This knowledge alone should have prevented her from filing the Complaint on Kovach's behalf. By filing a Complaint in direct contradiction to her client's prior admissions, she failed in her duty of candor owed to this Court.

3. RULE 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

.....

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

Bloodgood violated the prohibition in Rule 3.4 against falsifying evidence by filing a Complaint which she knew to contain false allegations against Whitley and others. As the Complaint indicates, she was aware that her client entered a guilty plea, yet she used the Complaint to make false allegations which contradicted the admissions during the guilty plea hearing. By doing so, she violated her duty of fairness to Whitley and other defendants and their counsel.

4. RULE 4.1. TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

The comments to this Rule provide that a "misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements." (RCP 4.1 (Comment 1)). Here, Bloodgood knew that Kovach had entered a guilty plea, yet she incorporated false allegations through which Kovach claimed her innocence into the Complaint. Bloodgood's false factual statements as alleged in the Complaint

amount to misrepresentations in violation of her duty of truthfulness under RCP 4.1.

5. RULE 4.4. RESPECT FOR RIGHTS OF THIRD PERSONS

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.*

This Rule prohibits lawyers from disregarding the rights of third persons in carrying out their responsibility to their clients. The allegations of the Complaint that Bloodgood filed not only contradicted myriad facts to which her client had admitted under oath, but also slandered Whitley for no purpose other than embarrassing him and causing him public humiliation and the financial burden of defending himself against false allegations. She thereby violated her duty to respect the rights of third persons imposed by RCP 4.4.

6. RULE 8.4. MISCONDUCT

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;*

.....

- (d) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;*

- (e) engage in conduct that is prejudicial to the administration of justice;*

(RCP 8.4). The comments to this Rule provide that "lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf." RCP 8.4 (Comment 1). In filing a frivolous Complaint against Whitley and others, Bloodgood engaged in misconduct which violated multiple rules of professional conduct that were designed to enhance the quality of justice in South Carolina. She willfully misrepresented facts, made allegations that had no basis in law and fact, and violated

her duties of candor, truthfulness and fairness. She has thus violated her duty under Rule 8.4 to refrain from engaging in acts of misconduct.

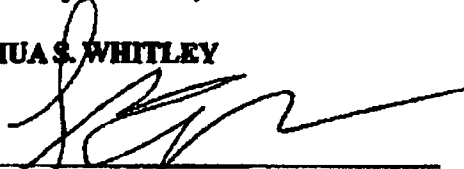
Bloodgood may seek to blame Kovach *in camera* for the allegations in the Complaint. She may assert that Kovach misrepresented facts to her, and she simply made factual allegations in the Complaint based on what she was told by her client. This argument provides her with no refuge. The Rules of Professional Conduct require lawyers to use the law's procedures "only for legitimate purposes and not to harass or intimidate others." (RCP Preamble, Section 5). Lawyers are also required to demonstrate respect for the legal system and uphold the legal process. *Id.* Further, "Rule 11 imposes a duty on attorneys to investigate beyond the mere allegations of their clients." *Blue v. United States Dep't of the Army*, 914 F.2d 525, 542 (4th Cir. 1990); *Defoe v. Peed (In re Beeton)*, 1996 U.S. App. LEXIS 13461 (4th Cir. June 6, 1996). More importantly, Bloodgood *knew* – even without an investigation beyond what she was told by her client – that Kovach had entered a plea of guilty to the State's charges against her. She had to *know* that a part of entering a guilty plea was an admission to the factual bases underlying those charges, and that any allegations professing innocence would contradict her client's sworn testimony and place her in jeopardy. Bloodgood cannot, therefore, hide behind any misrepresentations of her client in an effort to avoid sanctions.

CONCLUSION

For the foregoing reasons, Defendant, Joshua S. Whitley, by counsel, respectfully requests that this Court enter an Order awarding him his costs and attorneys' fees due to the frivolous nature of this action and the vexatious purposes for which it was filed.

Respectfully submitted,

JOSHUA S. WHITLEY



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February 17, 2015

Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Amy Kovach,

Plaintiff,

vs.

The Berkeley County School District,
Joshua S. Whitley, Terry Hardesty, Scott
Marino, Karen Whitley in her Individual
Capacity, and The Berkeley County
Republican Party,

Defendants.

) IN THE COURT OF COMMON PLEAS

) C.A. No.: 2015-CP-08-2380

)
)
) **DEFENDANT KAREN WHITLEY'S**
) **NOTICE AND AMENDED MOTION FOR**
) **SANCTIONS AGAINST PLAINTIFF AND**
) **PLAINTIFF'S COUNSEL**

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

2015 FEB 23 AM 11:15

FILED

PLEASE TAKE NOTICE THAT Defendant Karen Whitley will move the Probate Court in Charleston, pursuant to Rule 11 of the South Carolina Rules of Civil Procedure and the South Carolina Frivolous Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10, *et seq.*, within ten (10) days or as soon thereafter as can be heard, for an Order sanctioning Plaintiff Amy Kovach ("Kovach" or "Plaintiff") and/or Plaintiff's counsel Nancy Bloodgood, Esq. ("Bloodgood") for filing a false and frivolous lawsuit meant only to harass Karen Whitley, a filing that Plaintiff has recently conceded in open court was inappropriate and irreconcilably contrary to her sworn testimony before the court at her sentencing hearing.

Karen Whitley originally filed this Motion on November 16, 2015, against Bloodgood only; however, because Plaintiff and Bloodgood now disagree as to critical facts giving rise to the filing of the frivolous Complaint that is the subject of this motion, the addition of Plaintiff is also necessary to any complete consideration of the Rule 11 sanctions. Bloodgood's conduct is sanctionable because, as an officer of the court, she either failed to review the criminal sentencing transcript of her client of August 28, 2015, or she inexplicably chose to ignore it,

Tom

choosing instead to file a frivolous claim apparently based on her client's patently false rendition of the facts. Plaintiff Kovach, likewise, is subject to sanctions due to the false information included in the Complaint, her direct involvement in the preparation and filing of the frivolous Complaint, and her agreement to the vexatious and baseless allegations in the Complaint.

Contrary to Bloodgood's assertions, Karen Whitley has not been dismissed from this lawsuit. Plaintiff filed a purported "Stipulation of Dismissal" as to Karen Whitley on November 23, 2015. On December 1, undersigned counsel for Defendant received delivery and service of Plaintiff's "Stipulation of Dismissal" in the afternoon U.S. Mail delivery. The transmittal letter, dated November 24, included no certificate of service. (Exhibit A) Plaintiff's filing contained only the signature of Plaintiff's counsel, and not any of the other parties to the action, which does not qualify the filing as a "stipulation" of dismissal under SCRCP 41(a)(1)(B). Plaintiff's filing was also objectionable to Karen Whitley for being *without* prejudice. In response to Plaintiff's filing, Karen Whitley's attorneys filed and served a *Notice and Motion to Strike Stipulation of Dismissal as to Defendant Karen Whitley* on December 4, 2015.

If Plaintiff intended to file a voluntary "notice of dismissal" under Rule 41(a)(1)(A), then she failed to satisfy the requirements of that subsection as well. Subsection (A) provides that an action may be dismissed by the Plaintiff "by filing and serving a notice of dismissal at any time before service by the adverse party of an answer or motion for summary judgment, whichever first occurs." Defendant Karen Whitley filed and served her Answer on December 1, 2015. (See file-stamped cover page of Answer and Certificate of Service attached as Exhibit B.) It was later that day that counsel for Defendant was served with Plaintiff's "Stipulation of Dismissal" in the U.S. Mail. The transmittal letter for that filing, dated November 24, included no certificate of service. (Exhibit C) Thus, Plaintiff's "Stipulation of Dismissal," even if it had been proper, was

not served on counsel for Whitley until after Whitley's counsel had filed and served her Answer. Accordingly, if Plaintiff's intent was to dismiss under Rule 41(a)(1)(A), her attempt did not meet the plain requirements of that rule. Here again, because Plaintiff's stipulation references only "Rule 41(a)(1)" and neglects to reference a specific subsection, the parties and the Court are left to guess Plaintiff's intentions.

This Motion joins and adopts by reference *Defendant Joshua S. Whitley's Amended Motion For Sanctions Against Plaintiff And Plaintiff's Counsel And Brief In Support of Amended Motion For Sanctions Against Plaintiff and Plaintiff's Counsel* filed on February 12, 2016. It is also supported by the pleadings in this matter, the law of South Carolina, any affidavits and documentary evidence that the Court may take into consideration, and live testimony that will be presented at the hearing on this motion.

The undersigned reaffirms that he consulted in person with counsel for Plaintiff prior to filing the original motion in a good faith attempt to resolve the case against Karen Whitley with a request that Plaintiff dismiss this action against Karen Whitley prior to forcing her to plead in response.

PLEASE BE PRESENT TO DEFEND IF SO MINDED.


Wm. Howell Morrison
Pierce T. MacLennan
Haynsworth Sinkler Boyd, P.A.
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(843) 722-3366

**ATTORNEYS FOR DEFENDANT
KAREN WHITLEY**

February 23, 2016

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Amy Kovach,

Plaintiff,

vs.

Joshua S. Whitley,

Defendant.

Joshua S. Whitley,

Defendant/Counterclaimant

vs.

Amy Kovach,

Plaintiff/Counterclaim
Defendant.

Joshua S. Whitley,

Defendant/Third-Party
Plaintiff,

vs.

Rodney Thompson and Alan Wilson,
Attorney General for the State of South
Carolina,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS FOR

THE NINTH JUDICIAL CIRCUIT

Case No.: 2015-CP-8- 2380

FILED
2016 AUG 29 PM 1:32
HATTY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

**Supplemental Memorandum in Opposition
to the Whitley Defendants' Motions for
Sanctions**

Attorney Nancy Bloodgood, formerly of the Foster Law Firm and currently of Bloodgood and Sanders, LLC, and the undersigned counsel respond to the Whitley Defendants' Motions for Sanctions as follows.

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STATEMENT OF FACTS AND PROCEDURAL DEFECTS

This matter (hereinafter referred to as "Civil Action") was filed by Plaintiff on October 15, 2015. On November 3, 2015, approximately two (2) weeks after the Complaint was filed, Defendant attorney Josh Whitley had filed an Answer, Affirmative Defenses, Counterclaims and Third Party Complaint; a Motion to Dismiss the Complaint; and a Motion for Sanctions against Ms. Bloodgood. Defendant Karen Whitley's counsel, Howell Morrison, filed an Acceptance of Service on October 30, 2015; a Notice of Appearance on November 2, 2015; and a Motion to Dismiss and a Motion for Sanctions on November 16, 2015.

New criminal issues were alleged against Ms. Kovach by the Attorney General's Office in November of 2015, and Ms. Bloodgood, after consulting with Plaintiff, and Plaintiff's then-criminal counsel, determined it was in Plaintiff's best interest to dismiss the Civil Action to better posture Plaintiff for complete and final resolution in the criminal matter and for closure for all matters. The Plaintiff, through her counsel, Ms. Bloodgood, immediately attempted to dismiss all Defendants, including Attorney Whitley, who was the only defendant who had filed an Answer at that time. Ms. Whitley¹ – along with the other Defendants except for Attorney Whitley – was dismissed pursuant to Rule 41(a) of the South Carolina Rules of Civil Procedure. (Ex. 1.) On November 25, 2015, Attorney Whitley, though an attorney from Virginia, indicated he would not agree to a stipulation of dismissal of the Complaint against Josh Whitley without payment of attorney fees. (Ex. 2.)

¹ Prior to serving an Answer in this Civil Action, Ms. Whitley was voluntarily dismissed on November 23, 2015. The Clerk's records demonstrate that her Answer was filed on December 1, 2015.

On December 2, 2015, attorney Whitley filed an Amended Answer, Affirmative Defenses, Amended Counterclaims and Amended Third Party Complaint, which did not include the time-barred claim for defamation he previously pled. On December 4, 2015, Ms. Bloodgood, on behalf of Ms. Kovach, filed an Answer to Attorney Whitley's Counterclaims, a Motion to Dismiss attorney Whitley's Counterclaims, and a Motion to Dismiss the Complaint as to attorney Whitley.

On February 12, 2016, Ms. Bloodgood filed a Memorandum in Opposition to attorney Whitley's Motions for Sanctions and in Support of Ms. Kovach's Motion to Dismiss attorney Whitley's Counterclaims.²

On February 12, 2016, Attorney Whitley filed an Amended Motion for Sanctions against Ms. Bloodgood and against Plaintiff individually. On February 23, 2016, Ms. Whitley filed an Amended Motion for Sanctions against Ms. Bloodgood and against Plaintiff individually.

At the outset, the present motion is procedurally and facially defective and should be denied for the following reasons:

- (1) The present Motions should be deemed stricken for non-compliance with Rule 11(a), S.C. R. Civ. P.**

The Whitley Defendants failed to comply with Rule 11(a) of the South Carolina Rules of Civil Procedure regarding the Motions for Sanctions and Amended Motions for Sanctions, and the present Motions are therefore not properly before the Court. Rule 11(a), S.C. R. Civ. P. ("All motions filed shall contain an affirmation that the movant's counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion,

² As more fully set forth below, Rule 41(A)(1)(a) removed Ms. Whitley's standing.

unless the movant's counsel certifies that consultation would serve no useful purpose or could not be timely held. . . . If a motion . . . does not comply with this Rule, it shall be stricken If a . . . motion . . . is signed in violation of this Rule, the court, upon motion or 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 . . . motion. . . . including a reasonable attorney's fee."'); *Anderson County v. Preston*, 2013 WL 10154806 (S.C.Com.Pl.) (recognizing that failure to comply with Rule 11(a) strikes the motion such that the motion is not properly before the court where the party neither consulted opposing counsel before filing nor attached a certification confirming consultation would serve no useful purpose) (Ex. 3.)

Attorney Josh Whitley's Motion, filed on his own behalf, must be stricken and dismissed because there was no consultation by either Attorney Whitley or his counsel, and neither the Motion nor the Amended Motion contain the Rule 11 certification. (J. Whitley Motion for Sanctions; J. Whitley Am. Motion for Sanctions.)

Had Attorney Whitley consulted with Ms. Bloodgood as the Rule requires, they would have had the opportunity to civilly discuss the aspects of the Complaint he took issue with and the relative merits of his position. (Bloodgood Aff.³ at ¶ 25.) Additionally, Ms. Bloodgood would have had the chance to communicate to him her due diligence and reasonable investigation behind Ms. Kovach's allegations. *Id.* These consultations, required by the Rule, could have served a useful purpose.

³ The Bloodgood Affidavit contains privileged and protected information subject to the attorney-client privilege and work-product privilege. A Motion to Seal is currently pending before this Court. As such, this Memorandum references the Bloodgood Affidavit generally, and does not waive any of the privileges claimed in the Motion to Seal.

Ms. Karen Whitley's Motion, filed by her attorney Mr. Howell Morrison, contains the certification; however, as set forth in Ms. Bloodgood's affidavit, no consultation regarding the Motion for Sanctions or the Amended Motion for Sanctions in fact occurred. (Bloodgood Aff. at ¶ 26.) Rather, Mr. Morrison came by Ms. Bloodgood's office and indicated Ms. Whitley was a very nice person and related to an attorney in his firm. (Bloodgood Aff. at ¶ 26.) Mr. Morrison asked Ms. Bloodgood to dismiss the Complaint, and she told him she would talk to her client again, which she did. (Bloodgood Aff. at ¶ 26.) Ms. Bloodgood told Mr. Morrison that she may reconsider the dismissal after a few depositions had been taken but that based on the information before her, it was apparent Ms. Whitley was properly named a Defendant. There was no discussion of the present Motion or of any substance contained in the present Motion. (Bloodgood Aff. at ¶ 26.)

In addition, the Whitley Defendants could have raised their concerns about the specific allegations which they believe are contradictory with Ms. Kovach's guilty plea without the necessity of this Motion or, more appropriately (given the procedural posture), conferred with Ms. Bloodgood about their concerns (for example, those set forth in detail in Exhibit B to Attorney Whitley's Motion and Exhibit D to Attorney Whitley's Amended Motion) to request that her client agree to remove them in advance of a motion to strike those allegations.

(2) Karen Whitley was Voluntarily Dismissed and Lacks Standing to File the Present Motion.

Even though both Whitley Defendants' Motions are not properly before the Court as fully set forth above, Ms. Whitley's Motion is further inappropriately before this Court because she was voluntarily dismissed from the case as a matter of law and lacks

standing to bring the present Motion. "A Court of law can know no other persons as parties, than those whose rights are made to appear by the record, made up according to the established rules of pleading." *McElwee v. House*, 17 S.C.L. 108, 109 (S.C. App. L. & Eq. 1828). "A person without interest in the subject matter of the lawsuit has no legal standing to be heard." *Nelson v. QHG of S. Carolina Inc.*, 354 S.C. 290, 303, 580 S.E.2d 171, 178 (Ct. App. 2003), *aff'd in part, rev'd in part*, 362 S.C. 421, 608 S.E.2d 855 (2005)(recognizing that a party voluntarily dismissed in accordance with Rule 41(a)(1) lacks standing) (quoting *Duke Power Co. v. S.C. Pub. Serv. Comm'n*, 284 S.C. 81, 326 S.E.2d 395 (1985); *Furman Univ. v. Livingston*, 244 S.C. 200, 136 S.E.2d 254 (1964)).

Prior to serving an Answer in this Civil Action, Ms. Whitley was voluntarily dismissed on November 23, 2015.⁴ Attorney Morrison never filed an Answer until December 1, 2015, after his client Defendant Karen Whitley was dismissed without prejudice as a party by Plaintiff on November 23, 2015.⁵ He had actual authority to

⁴ When new criminal issues were alleged against Ms. Kovach by the Attorney General's Office a few weeks after the Civil Action was filed in November of 2015, and after consulting with Ms. Kovach and her new criminal counsel that Ms. Bloodgood had secured for her (Michael O'Connell), Ms. Bloodgood took steps to dismiss the Civil Action in order to improve Ms. Kovach's position in criminal court such that Ms. Kovach's legal matters would be universally resolved. It should be noted that this dismissal was not prompted by the merits of the case or by some factual basis to dismiss the Complaint. The dismissal was a strategic move to further Ms. Kovach's best interest.

At the time, Defendant Karen Whitley's counsel, Howell Morrison, had filed an Acceptance of Service on October 30, 2015; a Notice of Appearance on November 2, 2015; and a Motion to Dismiss and a Motion for Sanctions on November 16, 2015.

⁵ On November 23, 2015, the Dismissal was filed by hand at the Berkeley County Clerk of Court's office. A copy of the same was placed in the United States Mail the next day, addressed to Howell Morrison. Contrary to Mr. Morrison's contention that he was not properly served with the Rule 41(a)(1) Notice of Dismissal, service was complete at the time of mailing per S.C.R.C.P., Rule 5(b)(1) as Mr. Morrison was the attorney of record and the filed Notice was placed in the US mail to his office. Even if there was no certificate of service, the cover letter had a date of November 24, 2015 and it was mailed on

accept pleadings on behalf of his client, and per Rule 5 of the South Carolina Rules of Civil Procedure, service is made by mailing a copy of the pleading to the attorney at his last known address. Therefore, as of November 24, 2015 (and as outlined in note 5), Plaintiff's Dismissal was filed and served on Defendant Karen Whitley and she was no longer a party to this action.

It should be noted, however, that notwithstanding, on December 1, 2015, a week after Karen Whitley was dismissed as a Defendant pursuant to Rule 41(a)(1)(A) of the South Carolina Rules of Civil Procedure, she filed an Answer for the first time, in an apparent attempt to resurrect her case. However, an answer cannot be filed in a case that has been dismissed as the court loses jurisdiction of a case once a notice of dismissal has been filed. See, e.g., *Commercial Space Mgmt. Co. v. Boeing Co.*, 193 F.3d 1074, 1076, 1999 U.S. App. LEXIS 23474, *3-4, ("once a notice of voluntary dismissal is filed, the district court in which the action is pending loses jurisdiction and cannot exercise discretion with respect to the terms and conditions of the dismissal.") Ms. Whitley also filed a Motion to Strike the Stipulation of Dismissal on December 4, 2015, which is another Motion over which this Court has no jurisdiction for these same reasons.

A dismissal under Rule 41 without prejudice is as if the case was never filed.⁶ See, e.g., *United States v. Matthews (In re Matthews)*, 395 F.3d 477, 480-481, 2005 U.S. App. LEXIS 1273, *8-9 (4th Cir. 2005) (citing *Van-S-Aviation Corp. v. Piper Aircraft Corp. (In re Piper Aircraft Distrib. Sys. Antitrust Litig.)*, 551 F.2d 213, 219 (8th Cir.

November 24, 2015, so it was clearly mailed before December 1, 2015 and under the Rules, Plaintiff's Dismissal was clearly served before an Answer was filed and served on December 1, 2015.

⁶ Notwithstanding, and subsequently, the IRF appointed an attorney (Elloree Ganes) to represent Karen Whitley.

1977)) (A voluntary dismissal carries down with it previous proceedings and orders in the action, and all pleadings, both of plaintiff and defendant, and all issues, with respect to plaintiff's claim.) (internal quotation marks omitted). After an action is voluntarily dismissed, the court lacks authority to conduct further proceedings on the merits. See, e.g., *Jones, Blechman, Woltz & Kelly, PC v. Babakaeva*, 375 Fed. Appx. 349, 350, 2010 U.S. App. LEXIS 8240, *1-2 (4th Cir. 2010) ("Therefore, the voluntary dismissal became effective upon filing of the notice with the clerk of the district court. At that point, the action terminated, and the district court was divested of jurisdiction." See *In re Matthews*, 395 F.3d 477, 480 (4th Cir. 2005); *Marex Titanic, Inc. v. The Wrecked & Abandoned Vessel*, 2 F.3d 544, 546 (4th Cir. 1993)). Given that the law treats Ms. Whitley as having never been a part of the case, it follows that she does not have standing to file this Motion or to be heard on other motions.

Notwithstanding these procedural defects, the Motions for Sanctions and Amended Motions for Sanctions should further be DENIED based on the merits, as discussed more fully below.

STANDARD OF REVIEW

"The determination of whether attorney's fees should be awarded under Rule 11 or under the [South Carolina Frivolous Civil Proceedings Sanction Act] is treated as one in equity." *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 641, 760 S.E.2d 399, 410 (S.C. 2014).

LEGAL ARGUMENT

- I. **Attorney Bloodgood had a good faith basis to proceed with the lawsuit, and a preponderance of the evidence will show that the South Carolina Frivolous Civil Proceedings Sanction Act does not apply in this case.**

The South Carolina Frivolous Civil Proceedings Sanction Act⁷ (hereinafter the "Act") provides that "[u]nless the court finds by a preponderance of the evidence that an attorney, party, or pro se litigant engaged in advancing a frivolous claim or defense, the attorney, party, or pro se litigant shall not be sanctioned." S.C. Code Ann. § 15-36-10(C)(2). The Act shall not apply where an attorney establishes a basis to proceed with litigation, or to assert to controvert an issue therein, that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of the existing law. S.C. Code Ann. § 15-36-10(J). "Criteria for Rule 11 sanctions are essentially the same as those for sanctions under the Frivolous Civil Proceedings Sanctions Act (FCPSA)." *In re Beard*, 359 S.C. 351, 597 S.E.2d 835 (S.C. Ct. App. 2004), certiorari denied.

On the other hand, sanctions are appropriate where an attorney, party, or pro se litigant has filed a pleading but failed to comply with one of the following conditions: (i) the person has not read the frivolous pleading; (ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law; (iii) a reasonable attorney in

⁷ Under the former version of the FCPSA, a party seeking sanctions had to prove the other party acted frivolously. *Father v. S.C. Dep't of Soc. Servs.*, 353 S.C. 254, 259, 578 S.E.2d 11, 13 (2003). The revisions to the FCPSA created a "reasonable attorney" standard to determine whether sanctions are warranted. *Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (S.C. Ct. App. 2011).

the same circumstances would believe that his procurement, initiation, continuation, or defense of the civil suit was intended merely to harass or injure the other party; or (iv) a reasonable attorney in the same circumstances would believe that the case or defense was frivolous as not reasonably founded in fact or was interposed merely for delay, or was merely brought for a purpose other than securing proper discovery, joinder of proposed parties, or adjudication of the claim or defense upon which the proceedings are based. S.C. Code Ann. § 15-36-10(C)(1).

Further, and as outlined in Bloodgood's initial Memorandum in Opposition to Sanctions⁸ and supported by the Affidavits of Fabri and Bloodgood, the Whitley Defendants' Motions should be denied because attorney Bloodgood had a basis for proceeding and did not engage in the above-described sanctionable conduct.

A reasonable attorney in the same circumstances as Ms. Bloodgood would believe that under the facts, Ms. Kovach's claim may be warranted under the existing law. There were ample factual allegations (supported by documents, emails, and witness statements) alleged in the Complaint to support the elements for a cause of action for civil conspiracy against the Whitley Defendants. See, e.g., *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006); *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 SC 559, 626 SE 2d 884, 886 (2006) (the elements of a civil conspiracy claim are a combination of two or more persons who intend to injure another person and cause her special damage.) (Bloodgood Aff. ¶ 15.) The type of conduct alleged by Ms. Kovach to support her civil conspiracy claims is similar to conduct alleged in other reported civil conspiracy cases. In *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 326, 701 S.E.2d 39, 46, (Ct. App.

⁸ Bloodgood's initial Memorandum in Opposition to Sanctions was filed with the Court on February 12, 2016 and its arguments and exhibits are incorporated herein by reference.

2010), a civil conspiracy claim was stated when "[i]t may be reasonably inferred from the complaint as a whole that Cricket Cove is alleging Respondents had a personal stake in preventing Cricket Cove from moving forward with its development plans." In *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. at 545, 677 S.E.2d at 579, the allegation of conspiracy concerned an agreement between two entities to sell property at an inflated price. In *Coleman v. Stevens*, 124 S.C. 8, 117 S.E. 305 (1923), the Court found that documents did constitute evidence of a conspiracy to breach the confidential relations of persons which resulted in the conversion of money. In *Gynecology Clinic, Inc. v. Cloer*, 334 S.C. 555, 556, 514 S.E.2d 592, 592, (1999), a civil conspiracy was alleged against appellants after appellants picketed respondent, an abortion services provider. (Bloodgood Aff. ¶ 16.)

As supported by the Affidavit of Fabri, there was a real and substantial basis for the allegations in the Complaint and the issues were thoroughly researched. (See Fabri Aff. ¶¶ 4, 5, 6, 7.) Ms. Bloodgood "took actions to prepare and file this Complaint any reasonable attorney would have, and she complied with all of the requirements of S.C. Code § 15-36-10(A)(3)." (Fabri Aff. ¶ 8.)

The suit was not filed merely to harass and/or injure the Whitley Defendants. Based on the above-discussed case law (and supported by the Affidavit of Fabri), a reasonable attorney in the same circumstances would believe that there was as valid and well supported claim for conspiracy, and that the allegation was not intended merely to harass or injure the Whitley Defendants. (Bloodgood Aff. ¶ 17.) In fact, Ms. Bloodgood had never met either of the Whitley Defendants at the time the Civil Action was filed. (Bloodgood Aff. ¶ 20.) She only knew of Mr. Whitley and his actions through

his internet posts, emails, and the documents she reviewed prior to filing the suit. (Bloodgood Aff. ¶ 20.) Ms. Bloodgood never met or spoke to Mr. Whitley prior to filing the Complaint and knew nothing about him other than he was a young attorney from Berkeley County who was active in local politics. (Bloodgood Aff. ¶ 20.) Mr. Whitley does not offer any reason why Ms. Bloodgood would harass him. (Bloodgood Aff. ¶ 20.) In fact, Ms. Bloodgood was not involved in Berkeley County politics at the time the Complaint was prepared and had no involvement in the criminal proceeding that preceded this Civil Action. (Bloodgood Aff. ¶ 20.) Ms. Bloodgood knew none of the parties involved in the previous criminal proceeding, including Ms. Kovach. (Bloodgood Aff. ¶ 20.) As previously stated, Ms. Bloodgood was retained in September of 2015. (Bloodgood Aff. ¶ 20.) Further, the case was referred to her by another attorney – she did not seek out Ms. Kovach or this case. (Bloodgood Aff. ¶ 20.) In short, Mr. Whitley, who has the burden of proof, has pointed to no evidence at all to support his allegation that Ms. Bloodgood filed this Complaint for the purpose of harassing him. Nor did Ms. Whitley point to any evidence as to why Ms. Bloodgood would harass her.

The Civil Action was filed for the primary purpose of adjudicating the merits of the civil matter. (Bloodgood Aff. ¶ 15.)

Pursuant to the statute, the Court should consider the following factors when determining whether S.C. Code Ann. § 15-36-10 has been violated: (1) the number of parties; (2) the complexity of the claims and defenses; (3) the length of time available to the attorney, party, or pro se litigant to investigate and conduct discovery for alleged violations of the provisions of subsection (A)(4); (4) information disclosed or undisclosed to the attorney, party, or pro se litigant through discovery and adequate investigation;

(5) previous violations of the provisions of this section; (6) the response, if any, of the attorney, party, or pro se litigant to the allegation that he violated the provisions of this section; and (7) other factors the court considers just, equitable, or appropriate under the circumstances. S.C. Code Ann. § 15-36-10 (E).

In this case, Ms. Bloodgood spent over a month meeting with the client and her husband, an attorney at a well-respected law firm, reaching out to criminal counsel to obtain documents and other information, researching the lawsuit, and drafting and revising the pleading. (See Bloodgood Aff. at ¶ 22 and Ex. 6 to Bloodgood Aff.)

The South Carolina Supreme Court has held that prior to filing a lawsuit, an attorney does not have a duty to consult potential defendants. *Ex parte Gregory*, 378 S.C. 430, 439, 663 S.E.2d 46, 51 (S.C. 2008) ("We find that while an attorney or a pro se litigant does not have a duty to consult with a potential defendant prior to filing suit, before alleging conversion against an attorney for misappropriation of client funds or legal malpractice, a reasonable investigation is necessary."). In most circumstances (and in this circumstance) an attorney need not conduct an investigation beyond what is relayed to the attorney by his client. *Id.* at n. 3.⁹ Ms. Bloodgood spent more than 37 hours researching, reviewing documents (including the criminal hearing transcript), speaking to other lawyers about the underlying criminal action, and preparing drafts over the course of four (4) weeks before filing the 31 page Complaint. (See Bloodgood

⁹ Note 3 of the South Carolina Supreme Court Opinion states in full: "The concurrence indicates that we have imposed an additional duty upon an attorney by creating a blanket rule that an attorney is precluded from obtaining a reasonable belief in the merits of a case based solely on information related to him by a client. However, we have not created such a blanket rule. Our conclusion that an attorney must conduct a reasonable investigation beyond what is related to the attorney by his client is limited to the situation where a client is alleging conversion against his or her former attorney for misappropriation of client funds or legal malpractice."

Aff. at ¶ 22 and Ex. 6 to Bloodgood Aff.) In addition, Ms. Bloodgood held off filing the Complaint until she had received and reviewed the criminal transcript and had allowed other attorneys to review the proposed Complaint. (See Bloodgood Aff. at ¶ 22 and Ex. 6 to Bloodgood Aff.)

It should be noted that Ms. Bloodgood has never been subject to a sanctions motion. As set forth in the Affidavit of Fabri, Ms. Bloodgood exhibits the utmost civility and would never bring a claim that is not warranted or merely to harass or injure the other party. (Fabri Aff. ¶ 6.) The present Motions for Sanctions¹⁰ are the first Motions for Sanctions that have ever been filed against Ms. Bloodgood in her 33 years of practice. (Bloodgood Aff. at ¶ 27.)

¹⁰ To the extent the Whitley Defendants may seek relief in accordance with South Carolina Code Section 15-36-10 (C)(1), the subsection which outlines the distinct opportunities for a motion under the Act to be filed, none of those triggering events have occurred. See *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.") (internal citations omitted). As expressly set forth in the statute, a motion for sanctions based on the Act is ripe at the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict. See also *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 643, 760 S.E.2d 399, 411 and n. 16 (2014), *reh'g denied* (Aug. 5, 2014) *abrogated by Stokes-Craven Holding Corp. v. Robinson*, 787 S.E.2d 485 (S.C. 2016) (recognizing that the party seeking sanctions has the burden of proving (1) the other party has procured, initiated, continued, or defended the civil proceedings against him; (2) the proceedings were terminated in his favor; (3) the primary purpose for which the proceedings were procured, initiated, continued, or defended was not that of securing the proper discovery, joinder of parties, or adjudication of the civil proceedings; (4) the aggrieved person has incurred attorney's fees and court costs; and (5) the amount of the fees and costs set forth in item (4)) (further recognizing that the 2005 act specifies that "[a]t the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict, upon motion of the prevailing party, the court shall proceed to determine if the claim or defense was frivolous.")

II. Attorney Bloodgood acted reasonably, in good faith, and had good grounds for filing this lawsuit such that Rule 11 of the South Carolina Rules of Civil Procedure is not implicated in this case.

A trial court may impose sanctions on a party, a party's attorney, or both for filing a pleading, motion, or other paper to cause delay or when no good grounds exist to support the filing. *Ex parte Bon Secours-St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 597, 713 S.E.2d 624, 627–28 (2011); Rule 11, SCRPC (requiring an attorney to sign every pleading, motion, or other court paper to certify that he has read the court 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). *See also* Rule 3.1, RPC ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."); S.C. Code Ann. § 15-36-10 (A) (3)(b), 4(c)(same language as Rule 3.1). Rule 11 is evaluated by a subjective standard and may be violated when a filing 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.* at 598, 713 S.E.2d at 628.

Black's Law Dictionary defines acting in good faith as "behaving honestly and frankly, without any intent to defraud or to seek an unconscionable advantage." ACTING IN GOOD FAITH, Black's Law Dictionary (10th ed. 2014).

Hence, in its usual sense, "good faith" indicates a state of mind, an honesty in the belief that there is a basis for pursuing the claim or argument, lacking intent to defraud or take undue advantage. The lack of "good faith," on the other hand, indicates some motive beyond pursuing a remedy on behalf of a client. The lawyer would have to act with the actual knowledge that there is no hope of prevailing, or without conducting sufficient due diligence to ensure there is some factual and legal basis to assert the position being challenged as frivolous or "not in good faith."

Trial Handbook for South Carolina Lawyers § 10:5.

By contrast, bad faith has been defined by the Court as "[t]he opposite of good faith, generally implying or involving actual or constructive fraud, or a design to deceive or mislead another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." *State v. Griffin*, 100 S.C. 331, 84 S.E. 876, 877 (S.C. 1915) (quoting Black's Law Dictionary, 112).

As demonstrated by her affidavit, Ms. Bloodgood acted in good faith and fulfilled her duties owed to her client and to the profession.

III. Additional Arguments Proffered by the Movants Do Not Change the Result

First, Attorney Whitley's ethical allegations with respect to Ms. Bloodgood are not properly before the Court. "The Commission on Lawyer Conduct and the South Carolina Supreme Court have jurisdiction over all allegations that a lawyer has committed misconduct." *In re Jardine*, 410 S.C. 369, 375, 764 S.E.2d 924, 927 (2014).

In addition, Attorney Whitley argues in his Amended Motion for Sanctions an incorrect allegation that the Attorney General stated in a Rule to Show Cause that Ms. Kovach's Complaint contradicted her testimony at her criminal plea hearing. (J. Whitley Am. Motion, pp. 3-4 "Because the allegations in the Complaint directly contradict the facts to which Plaintiff agreed under oath on August 28, 2015, the Attorney General filed a notice on November 9, 2015 against Plaintiff to show cause why she should not be held in contempt."). In fact, the Attorney General only contended that the Affidavit Ms. Kovach filed in support of a non-public administrative grievance hearing with the

Berkeley County School District (BCSD) (hereafter referred to as the "Grievance Affidavit") contradicted her plea testimony. (Ex. A to J. Whitley Am. Motion.) Notably, the Grievance Affidavit was filed a few days after her criminal plea hearing and before any criminal transcript had been prepared. The Attorney General did not contend in its filed Rule to Show Cause that the Complaint contradicted her plea testimony. *Id.* Specifically, at the February 8, 2015 Rule to Show Cause hearing, the Associate Attorney General stated, "Since that time, since her plea, [Kovach] subsequently signed an affidavit as part of a grievance procedure which materially contradicted the matters to which she admitted in the guilty plea... and she filed a lawsuit that called into question the integrity of the process and called into question the integrity of the actors in this particular process." (Feb 8, 2015 Rule to Show Cause Hearing Transcript, p. 5-6, Ex. D.B. to J. Whitley Am. Motion for Sanctions) (emphasis added.) This statement was merely argument by counsel at a hearing, however, this Civil Action did not call into question the integrity of the legal process; it called into question the Berkeley County School District's integrity. Therefore, contrary to what Attorney Whitley contends in his Memorandum, it was the Grievance Affidavit, not the Complaint in this Civil Action that was at issue at the February 8, 2015 hearing. Attorney Whitley's Motion for Sanctions is based entirely on statements in the civil Complaint, however the Attorney General did not allege that the Complaint contradicted Plaintiff's guilty plea; only Mr. Whitley has alleged this.

Finally, nothing said by Mr. Savage in the February 8, 2015 hearing makes Attorney Whitley's Motion any more viable. It is true that, for whatever reason, at the February 8, 2015 Rule To Show Cause hearing, Plaintiff's criminal counsel, Mr. Andy

Savage, made statements to the Court about the Complaint and Ms. Bloodgood's actions. In fact, Ms. Bloodgood had met with and talked to Mr. Savage's law associate several times before the February 8th hearing and they discussed in very general terms the events leading up to the Rule to Show Cause being filed. She offered to let him review her files. However, Mr. Savage's law associate did not "investigate" or ask any specific questions about the precise actions taken by Ms. Bloodgood and her firm such as what documents were reviewed, what legal research performed, which attorneys were consulted, or how much time was spent preparing and revising the Complaint before it was filed. If he had, he would have been provided the information in this Memorandum and Affidavit, but he did not.

Further, Mr. Savage did not have a single conversation with Ms. Bloodgood about this case. Mr. Savage erred when he stated to the Court on February 8, 2015, "It was clear from our analysis that the time that a civil suit was filed, no due diligence, none, was performed." (Feb. 8, 2015 Rule to Show Cause Transcript, p. 8, Ex. D.B. to J. Whitley Am. Motion for Sanctions.) Had Mr. Savage or his legal associate made any investigation at all to determine the facts, they would have known the following facts: (1) Ms. Bloodgood's time records indicate that she spent more than 37 hours researching, reviewing documents (including the criminal hearing transcript), speaking to other lawyers about the underlying criminal action, and preparing drafts over the course of four weeks before filing the 31 page Complaint; and (2) multiple emails indicate Ms. Bloodgood held off filing the Complaint until she had received and reviewed the criminal transcript and had allowed other attorneys to review the proposed Complaint. In short,

nothing said by Mr. Savage in the February 8, 2015 hearing makes Attorney Whitley's Motion any more viable.

Finally, it should be noted that, as evidenced by the voluminous filings in this case and motions brought outside of the plain language of the Act – without any consultation or certification (on the part of attorney Josh Whitley) or real compliance with Rule 11 (on the part of attorney Howell Morrison) – the Whitley Defendants have failed to mitigate such expenses and costs.

CONCLUSION

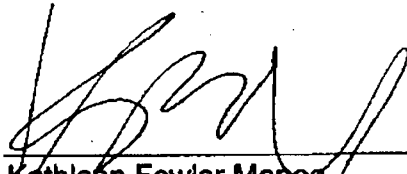
Procedurally, Rule 11 required a consultation or at least a certification. Neither attorney Josh Whitley nor attorney Howell Morrison actually consulted attorney Bloodgood about the Motion for Sanctions and their specific issues with various allegations in the Complaint prior to filing their respective Motions for Sanctions. Attorney Josh Whitley also did not provide a certification that a consultation would be useless. To the contrary, Ms. Bloodgood believes that a civil discussion between the two of them up front could have been useful. The remedy for failure to comply with Rule 11 is striking a motion.

To the extent the movants seek sanctions under the Act, they fail to meet their burden to prove that sanctions are warranted. Attorney Bloodgood reasonably investigated the matter beyond discussions with the client and had a basis for filing the suit on her client's behalf.

For these reasons, the reasons set forth in Ms. Bloodgood's initial memorandum, and others to be argued, the Whitley Defendants' Motions should be DENIED and Ms. Bloodgood respectfully requests that the Court award costs and attorneys' fees for

having to respond to the Whitley Defendants' procedurally and facially defective motions.

Respectfully submitted,



Kathleen Fowler Monoc
SMITH MOORE LEATHERWOOD LLP
25 Calhoun Street, Suite 250 (29401)
PO Box 21509
Charleston, South Carolina 29413
Ph. 843.300.6673
Fax 843.300.6773
katie.monoc@smithmoorelaw.com

August 24, 2016
Charleston, South Carolina

Attorneys for Nancy Bloodgood

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Amy Kovach,

Plaintiff,

vs.

The Berkeley County School District;
Joshua S. Whitley; Terry Hardesty; Scott
Marino; Karen Whitley in her individual
capacity; and The Berkeley County
Republican Party, LLC,

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 FOR

THE NINTH JUDICIAL CIRCUIT

Case No.: 2015-CP-8- 2380

FILED
15 NOV 28 PM 4:43
CLERK OF COURT
BERKELEY COUNTY, S.C.

STIPULATION OF
DISMISSAL
WITHOUT PREJUDICE
FOR DEFENDANT
KAREN WHITLEY



Pursuant to Rule 41(a)(1) of the South Carolina Rules of Civil Procedure, Plaintiff Amy Kovach hereby voluntarily dismisses all claims asserted or that might have been asserted in this action without prejudice.

Dated this 23rd day of November, 2015.

Nancy Bloodgood

FOSTER LAW FIRM, L.L.C.
Nancy Bloodgood, SC Bar No.: 6459
Lucy C. Sanders, SC Bar No.: 78169
895 Island Park Drive, Suite 202
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Attorneys for Plaintiff

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Amy Kovach,

Plaintiff,

vs.

The Berkeley County School District;
Joshua S. Whitley; Terry Hardesty; Scott
Marino; Karen Whitley in her individual
capacity; and The Berkeley County
Republican Party, LLC,

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 FOR

THE NINTH JUDICIAL CIRCUIT

Case No.: 2015-CP-8- 2380

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MARY P. BROWN
CLERK OF COURT
NINTH JUDICIAL CIRCUIT

STIPULATION OF
DISMISSAL WITHOUT
PREJUDICE FOR
DEFENDANTS BERKELEY
COUNTY SCHOOL
DISTRICT, TERRY
HARDESTY, SCOTT
MARINO AND BERKELEY
COUNTY REPUBLICAN
PARTY, LLC

NB

No answer or responsive pleading has yet been filed by Defendants Berkeley County School District, Terry Hardesty, Scott Marino, or the Berkeley County Republican Party, LLC in this matter. Pursuant to Rule 41(a)(1) of the South Carolina Rules of Civil Procedure, Plaintiff Amy Kovach, through her undersigned attorneys of record, hereby voluntarily dismisses all claims asserted or that might have been asserted in this action without prejudice against Defendants Berkeley County School District, Terry Hardesty, Scott Marino, and Berkeley County Republican Party.

FOSTER LAW FIRM, L.L.C.



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Attorneys for Plaintiff

Charleston, South Carolina

Date: 11-23-15

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Amy Kovach,

Plaintiff,

vs.

The Berkeley County School District;
Joshua S. Whitley; Terry Hardesty; Scott
Marino; Karen Whitley in her individual
capacity, and The Berkeley County
Republican Party,

Defendants.

Joshua S. Whitley,

Defendant/Counterclaimant,

v.

Amy Kovach,

Plaintiff/Counterclaim Defendant.

Joshua S. Whitley,

Defendant/Third-Party Plaintiff,

v.

Rodney Thompson,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2015-CP-8-2380

STIPULATION OF DISMISSAL WITH
PREJUDICE PURSUANT TO RULE 41
AS TO DEFENDANT TERRY
HARDESTY

MARY P. BROWN
CLERK OF COURT

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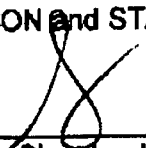
WHEREAS, that the Plaintiff and Defendant Terry Hardesty have resolved their differences pursuant to Rule 41(a). The Plaintiff hereby dismisses and ends this action with prejudice as to all claims filed or which could have been filed arising out of the

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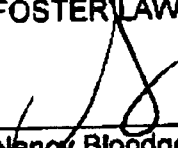
subject matter of the within lawsuit against Defendant Terry Hardesty. This is with the consent of both parties, with each side to bear its own costs and attorneys fees.

CLAWSON and STAUBES, LLC



David C. Cleveland
Attorney for Defendant Terry Hardesty

FOSTER LAW FIRM, LLC



Nancy Bloodgood
Attorney for Plaintiff

*for Nancy Bloodgood
with her consent*

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Amy Kovach,

Plaintiff,

vs.

Joshua S. Whitley,

Defendant.

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 FOR

THE NINTH JUDICIAL CIRCUIT

Case No.: 2015-CP-8- 2380

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STIPULATION OF
DISMISSAL
WITH PREJUDICE
FOR DEFENDANT
SCOTT MARINO

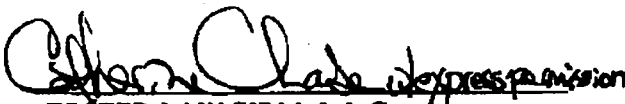
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CHC

Pursuant to Rule 41(a)(2) of the South Carolina Rules of Civil Procedure, Plaintiff Amy Kovach and Defendant Scott Marino stipulate to the dismissal of all claims asserted or that might have been asserted in this action with prejudice and request the Court issue an Order dismissing this action against Scott Marino with prejudice.

Dated this 30th day of December, 2015.

 *Nancy Bloodgood*

FOSTER LAW FIRM, L.L.C.

for Nancy Bloodgood, SC Bar No.: 6459

Lucy C. Sanders, SC Bar No.: 78169

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Attorneys for Defendant Scott Marino

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

Amy Kovach,

Plaintiff,

vs.

The Berkeley County School District,
Joshua S. Whitley, Terry Hardesty, Scott
Marino, Karen Whitley in her individual
capacity and The Berkeley County
Republican Party, LLC,

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
IN THE NINTH JUDICIAL CIRCUIT

Civil Action No. 2015-CP-08-02380

**AMENDED STIPULATION OF
DISMISSAL**

FILED
CLERK OF COURT
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NB

On November 25, 2015, the Plaintiff filed a Stipulation of Dismissal without Prejudice for Defendant Berkeley County School District.¹ Attached as Exhibit 1. The Plaintiff hereby now seeks to amend its dismissal against the Berkeley County School District and file an Amended Stipulation of Dismissal with prejudice. Pursuant to Rule 41(a)(1), SCRCP, this Amended Stipulation of Dismissal is proper since no responsive pleading has been filed by the Berkeley County School District.

NOW, THEREFORE, based upon the foregoing, it is the desire of the Plaintiff that the above-captioned action against the Berkeley County School District is hereby dismissed, with prejudice.

FOSTER LAW FIRM, LLC

By: Nancy Bloodgood
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Lucy C. Sanders, Esquire, SC Bar No. 78169
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Attorneys for Amy Kovach

Charleston, South Carolina

2-10, 2016

¹ The Stipulation of Dismissal also dismissed Defendants Terry Hardesty, Scott Marino, and Berkeley County Republican Party, LLC.

EXHIBIT 1

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Amy Kovach,

Plaintiff

vs.

The Berkeley County School District;
Joshua S. Whitley; Terry Hardesty; Scott
Marino; Karen Whitley in her individual
capacity; and The Berkeley County
Republican Party, LLC,

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 FOR

THE NINTH JUDICIAL CIRCUIT

Case No.: 2015-CP-8- 2380

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NINTH JUDICIAL CIRCUIT
MAY 9 2016

**STIPULATION OF
DISMISSAL WITHOUT
PREJUDICE FOR
DEFENDANTS BERKELEY
COUNTY SCHOOL
DISTRICT, TERRY
HARDESTY, SCOTT
MARINO AND BERKELEY
COUNTY REPUBLICAN
PARTY, LLC**

NB

00345

No answer or responsive pleading has yet been filed by Defendants Berkeley County School District, Terry Hardesty, Scott Marino, or the Berkeley County Republican Party, LLC in this matter. Pursuant to Rule 41(a)(1) of the South Carolina Rules of Civil Procedure, Plaintiff Amy Kovach, through her undersigned attorneys of record, hereby voluntarily dismisses all claims asserted or that might have been asserted in this action without prejudice against Defendants Berkeley County School District, Terry Hardesty, Scott Marino, and Berkeley County Republican Party.

FOSTER LAW FIRM, L.L.C.



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Attorneys for Plaintiff

Charleston, South Carolina

Date: 11-23-15

**BREIT DRESCHER
IMPREVENTO**

November 25, 2015

Nancy Bloodgood, Esq.
Foster Law Firm, LLC
895 Island Park Drive, Suite 202
Charleston, SC 29492

Re: Amy Kovach v. The Berkeley County School District, et al
Case No. 2015-CP-8-2380
Your File No. 12586

Dear Ms. Bloodgood:

I am in receipt of your assistant's email correspondence to my client, Josh Whitley, to which she attached a proposed Stipulated Order of Dismissal for my signature. In your draft order, you propose that the dismissal be without prejudice and each party bear their own expenses. For obvious reasons, I cannot recommend that my client sign your proposed order.

At the outset, I am surprised that after filing a clearly frivolous lawsuit mirroring an untrue affidavit filed with the Board of Education that has now placed your client in criminal jeopardy (I understand Judge Young has signed a Rule to Show Cause Order to be heard on January 4, 2016), that you would have your assistant send this correspondence without any explanation or even so much as a phone call from you, especially considering the patently false allegations you make in the Complaint. The ethics allegation is particularly bothersome, as (a) it was a misapplication of the ethics rules, (b) it was obviously improperly used as leverage in a civil complaint, and (c) you immediately violated the same rule you complain of in the first post-filing newspaper article by asserting that you had read the criminal sentencing transcript. In other words, the least you could have done was to call me or my client, admit your error, and explain why you, as an officer of the court, filed this lawsuit. Had that occurred, I believe we would have made quick strides to dismiss this case.

As you know, our motion for sanctions arising out of the filing of this suit remains pending. My firm and my client's firm have spent significant hours and resources defending against the spurious factual allegations and claims in your complaint. We believe you had a minimum obligation, before filing this action, to read the sentencing hearing transcript. Further, we understand that neither attorney Joe Griffith nor Jerry Theos approved of your filing of this action and, indeed, advised against it. My client has an outstanding reputation as an attorney and elected official that you tarnished by



Nancy Bloodgood
November 25, 2015
Page 2

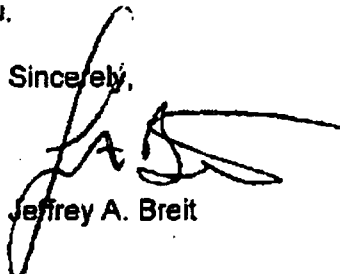
making false allegations in a complaint that you knew would generate significant press coverage. As an officer of the court, you cannot simply file a complaint containing inflammatory allegations that have no evidentiary support and then expect the Defendants to stipulate to a dismissal without the imposition of sanctions. You are responsible for the consequences of filing this frivolous action, which includes the payment of our attorneys' fees.

The dismissal of this action is clearly in your client's best interest, and we are willing to stipulate, with prejudice, to the same, **accompanied by the payment of attorneys' fees.** It is apparent that there is a significant potential conflict of interest between you and your client which you will need to discuss with her. Your firm cannot make a decision to reject our demand for attorneys' fees without explaining in full to your client that your firm is choosing its best interests over hers.

We request a personal conference with your firm's decision makers to discuss these issues immediately. Please advise within 24 hours whether a representative from your firm will meet with me to discuss this. Please also advise as to whether you have placed your law firm's carrier on notice of our motion for sanctions or whether you or your firm plans to pay the fees.

I look forward to hearing from you.

Sincerely,



Jeffrey A. Breit

JAB/elp

2013 WL 10154806 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina
Anderson County

ANDERSON COUNTY, Plaintiff,

v.

Joey PRESTON and the South Carolina Retirement System, Defendants.

No. 2009-CP-04-4482.

November 8, 2013.

Order

Roger L. Couch, Judge.

*1 This matter comes before the Court on three motions. They include: a post-judgment motion to amend ("Motion to Amend") filed by Anderson County ("Plaintiff" or "the County"); a motion to intervene filed by putative intervenor, Richard Freemantle ("Intervention Motion"); and a motion to reconsider ("Reconsideration Motion") filed by the County. For the reasons stated herein, the Court denies all three (3) motions.

The County's Motion to Amend

The Motion to Amend seeks to add a new claim for relief bottomed on a theory that the severance agreement ("Severance Agreement"), executed by the County and Preston in November of 2008, arose from a vote where Plaintiff now contends no quorum ("Quorum Claim") of County Council existed. The County filed its Motion to Amend on July 15, 2013: nine (9) months after trial, two (2) months after the Court issued its judgment in this case, and two (2) months after the County, filed its Reconsideration Motion.

The County failed to preserve the proposed Quorum Claim, as the issue was never presented to the Court. At trial, Plaintiff actually argued the exact opposite position concerning the votes of Waldrep and C. Wilson instead contending such votes were properly cast. Allowing Plaintiff to amend its pleading, at this stage, would impermissibly allow the County to try the instant case twice using discrepant legal and factual theories of relief, the latter of which the County only raised after the Court issued judgment on May 3, 2013.

Even if the Quorum Claim had merit, which the Court rejects *infra*, the County unduly delayed in seeking the Quorum Claim amendment. The County had more than adequate opportunity to pursue the amendment: from the case's inception; during the three (3) years leading up to trial; following Waldrep's and C. Wilson's depositions; in connection with the previous amendment of Plaintiff's Complaint (which was by consent on March 29, 2012). The County could also have pursued the amendment: on or before the first day of trial; during the trial; contemporaneous with the submittal of its November 16, 2012 written summation following trial; or during the six (6) month window between trial and issuance of judgment. The County failed to identify any legitimate basis, legally or factually, for its delay in pursuing the Quorum Claim.

Permitting the County's proposed amendment—following a lengthy trial and after judgment issued—would require the Court to re-open proof in this case. Such result would highly prejudice Preston. Absent re-opening proof, Preston would lose:



- The opportunity to develop facts and introduce evidence of prior usage and to assert the same as an affirmative defense (Third Davis Aff., ¶¶12-14);
- The opportunity to develop facts and introduce evidence regarding other affirmative defenses such as (*inter alia*) the rule of necessity doctrine, ratification, waiver, and estoppel (*Id.* at ¶¶30-31);
- The opportunity to develop facts and introduce evidence refuting the non-existence of a quorum (*Id.* at ¶¶14-19);
- *2 • The opportunity to introduce expert testimony concerning the Quorum Claim (*Id.* at ¶¶20-21);
- The opportunity to pursue different litigation and trial strategies, based upon claims actually asserted (*Id.* at ¶¶22-24);
- The opportunity to develop and introduce evidence pertaining to counter-theories that the entirety of the lawsuit constituted an unauthorized act. (*Id.* at ¶¶33-39.)

By contrast, if the Court allowed the County to re-litigate the case by re-opening proof, Preston would:

- Re-incur duplicative discovery and trial expense after trial (*Id.* at ¶¶17-19);
- Incur an unfair disadvantage inasmuch as it would allow the County to try the case under one theory, absent certain risks, and upon losing, re-open the record to re-try the case under a new theory (*Id.* at ¶¶17-19, 33-36);
- Incur an unfair disadvantage as to litigation decisions, trial strategies, and the presentation of evidence which Preston showed were made based upon the framing of the issues (as then framed), which cannot now be undone (*Id.* at ¶¶23-28);
- The loss of the procedural right under Rule 15(b), SCRCP, which would have permitted Preston to seek a continuance during trial, had the County timely pursued the instant amendment (*Id.* at ¶¶37-38).

Accordingly, due to the County's undue delay and the resulting prejudice to Preston, the Court denies Plaintiff's Motion to Amend.¹

The Court also finds the County's proposed amendment proves futile.² First, the Court finds the County's position errs as Anderson County's Code itself establishes what constitutes a quorum based upon presence at the meeting site and not on voting ability.³ Second, as to Preston's Severance Agreement, the County's Code did not require a majority of Council to vote on an issue for the vote to be a valid vote, but rather a majority of those present and voting to carry the question.⁴

*3 Third, the County's prior interpretation and usage under its own Code (which the Code, in turn, obligates the County to follow) allowed votes to be taken despite the disqualification of certain members, so long as present at the meeting site.⁵ Fourth, the County Code expressly incorporated FOIA and the State Ethics Act—both of which define quorum without reference to voting disqualification—into County meeting procedures.⁶ Accordingly, the Court denies the County's Motion to Amend, as the proposed amendment is futile.⁷

The County alternatively seeks to amend pursuant to Rule 15(b), SCRCP contending the Parties tried the Quorum Claim by consent during trial. As noted above, the Court rejects the County's contention that the Quorum Claim was raised during trial or even before judgment issued. The County's argument improperly conflates the issue concerning the

disqualification of C. Wilson's and Waldrep's votes under ethics provisions with the issue of whether a quorum existed. The issues are legally and factually distinct, as they involve different provisions of the Anderson County Code and concern different factual inquiries.⁸ While the former issue was raised at trial and before,⁹ the Quorum Claim was not.

*4 The County's arguments fail under Rule 15(b), SCRCP for two additional reasons. First, as noted *supra* and incorporated by reference, amendment of Plaintiffs Complaint to add the Quorum Claim would highly prejudice Preston if allowed. See *Nat'l Time Shares, Inc. v. Maritime Ltd. P'ship*, 297 S.C. 43, 47, 374 S.E.2d 678, 680 (1988) (Rule 15(b) allows "amendment of the pleadings to conform to the proof where the opposing party is not prejudiced.") Second, even if amendment under Rule 15(b) otherwise proved proper, such amendment was clearly not express and "implied consent will not be found if all the parties did not recognize [the issue] as an issue at trial, even if evidence in the record exists to support the amendment." *Armstrong v. Collins*, 366 S.C. 204, 227-228, 621 S.E.2d 368, 380 (Ct. App. 2005); see also *Davis Aff.*, ¶¶41-42 (County never raised any argument causing Preston to conclude it was asserting quorum issues as basis for relief). Accordingly, the Court denies the County's Motion to Amend under Rule 15, SCRCP.

FREEMANTLE'S MOTION TO INTERVENE

As an initial matter, Freemantle's Intervention Motion proves facially defective for four (4) reasons. They include: (1) the Intervention Motion violated Rule 11(a), SCRCP; (2) the Intervention Motion violated Rule 7(b), SCRCP; (3) the Intervention Motion violated Rule 24(c), SCRCP; and (4) granting the Intervention Motion would violate Rule 12(b)(8), SCRCP. The Court addresses each in turn.

First, Freemantle failed to comply with Rule 11(a), SCRCP, as Freemantle neither consulted with Preston's counsel before filing nor did he attach to the Intervention Motion a certification confirming consultation would serve no useful purpose. See Rule 11(a), SCRCP (Non-compliant motion "shall be stricken unless it is signed promptly after the omission is called to the attention of the ... movant") (emphasis added); Second Davis Aff., ¶44.¹⁰ Accordingly, the Court must deem the Intervention Motion, as stricken, and not properly before the Court. *Jackson v. Speed*, 326 S.C. 289, 310, 486 S.E.2d 750, 761 (1997) ("The penalty for noncompliance [with Rule 11(a), SCRCP] is to strike the motion....").

Second, pursuant to Rule 24(c), SCRCP, Freemantle was required, but did not, attach a proposed "pleading setting forth the claim or defense for which intervention is sought." Rule 24(c), SCRCP.¹¹ Without a proposed pleading, Freemantle procedurally failed to interpose a proper motion under which intervention could be granted. Thus, even if the Court were so inclined, it could not grant Freemantle's Motion.

Third, Freemantle's Intervention Motion violates Rule 7(b)(1), SCRCP, as it fails to state the grounds supporting the same. Rule 7(b)(1), SCRCP (Motion "shall state with particularity the grounds therefor ..."); see also *Summer Place of Myrtle Beach Homeowners Ass'n, Inc. v. Knight*, 298 S.C. 241, 243, 379 S.E.2d 724, 725 (Ct. App. 1989).¹² In this regard, the Court finds the Intervention Motion's vagueness substantially prejudices Preston.¹³ The resulting prejudice is further compounded due to Freemantle's decision to delay filing the Motion for nearly forty (40) months after learning of the County's lawsuit. See *infra*. Accordingly, the Court denies the Intervention Motion, as violative of Rule 7(b)(1), SCRCP.

*5 Fourth, Rule 12(b)(8), SCRCP similarly bars Freemantle from intervening in this case. Rule 12(b)(8) disallows litigants from pursuing more than one action, for the same claim, between the same parties. Freemantle previously asserted a claim under the South Carolina Freedom of Information Act in another, pending lawsuit. See *Freemantle v. Preston, et al*, No. 2009-CP-04-4528 ("Freemantle Lawsuit").¹⁴ The South Carolina Supreme Court has previously determined Freemantle lacked standing to assert claims relating to Preston's Severance Agreement, other than those arising under FOIA's declaratory and injunctive relief provisions. *Freemantle v. Preston*, 398 S.C. 186, 193, 728 S.E.2d

40, 44 (2012). Freemantle cannot intervene in this lawsuit to allege the identical claim he has already asserted in the Freemantle Lawsuit—the only claim for which he has standing to bring—without violating Rule 12(b)(8), SCRCP.

Freemantle's Intervention Motion also suffers from a series of substantive defects. As an initial matter, Freemantle's Motion proves untimely. Regardless of whether of right or permissively, under "Rule 24, SCRCP, a party may intervene only upon timely application." *State v. ex rel. Wilson*, 391 S.G. 565, 580, 707 S.E.2d 402, 410 (2011). South Carolina Courts utilize a "four-part test for determining timeliness: (1) the time that has passed since the applicant knew or should have known of his interest in the suit; (2) the reason for the delay; (3) the stage to which the litigation has progressed; and (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial."¹⁵

Freemantle's Intervention Motion fails all four (4) criteria. The evidence of record confirms (and Freemantle does not contest) that he knew of the County's Lawsuit for over forty (40) months before pressing the instant Motion.¹⁶ Freemantle also waited approximately eight (8) months after trial and sixty days after judgment before filing his Motion.¹⁷ No legal or factual bases justify Freemantle's delay in seeking intervention nor has Freemantle offered any. Accordingly, the Court finds Freemantle's Motion fails the first three (3) timeliness criteria. *Id.*

As to the last criterion, the Court finds Preston would incur substantial prejudice if Freemantle's untimely intervention were permitted.¹⁸ The County did not assert FOIA-based claims in the case *sub judice* and, as such, Preston did not allege defenses to FOIA claims. None of the discovery, which Preston and the County conducted for over three (3) years before trial commenced, related to un-alleged FOIA claims. (Davis Aff., ¶¶23-45.) For Freemantle to interject such claims into the instant lawsuit—after judgment—would unfairly and improperly deprive Preston of the right to defend himself regarding claims never alleged by the County, including the right to assert additional affirmative defenses, to assert counterclaims, to pursue different discovery, to pursue different trial strategies, to cross-examine witnesses, and to present different trial evidence. (*Id.* at ¶40.) Granting Freemantle's Motion would also result in undue delay and needless expense. (*Id.* at ¶¶40-41.)

*6 Similarly, no basis exists for Freemantle to intervene as a matter of right pursuant to Rule 24(a), SCRCP. No statute confers upon Freemantle "an unconditional right to intervene," see Rule 24(a)(1), SCRCP, and Freemantle cannot demonstrate any particularized interest arising out of Preston's Severance Agreement. See *Freemantle v. Preston*, 398 S.C. 186, 193, 728 S.E.2d 40, 44 (2012) (rejecting Freemantle's claims, other than under FOIA, due to a lack of particularized interest and therefore no standing).¹⁹ Under South Carolina law, only a party with standing *and* who constitutes the real party in interest can properly intervene in a lawsuit. *Bailey v. Bailey*, 312 S.C. 454, 458 (1994) ("Therefore, we hold that respondents lack standing to intervene in appellants' lawsuit.");²⁰ see also Rule 17(a), SCRCP (requiring: "Every action shall be prosecuted in the name of the real party in interest.")²¹ Accordingly, Freemantle cannot intervene as a matter of right in this case.²²

*7 Freemantle's Intervention Motion likewise fails to show, as required, that the County has failed to protect the legal interests relating to the Severance Agreement. Rule 24(a), SCRCP (providing intervention of right is disallowed if "applicant's interest is adequately represented by existing parties.") To the contrary, the County, to date, has expended well over double the amount of severance monies paid to Preston in seeking the Severance Agreement's rescission. (See Order, at 22 (May 3, 2013).) Merely because Freemantle may have a "difference of opinion concerning the tactics with which litigation should be handled does not [render] inadequate the representation" of the County as to the interests embraced by the instant lawsuit. 7C Wright and Miller, Fed. Practice and Procedure: Civil § 1909. And, even a decision not to take an appeal falls within the County's discretion and would not render the representation inadequate.²³

Freemantle similarly fails to satisfy permissive intervention requirements. No statute affords Freemantle the "conditional right to intervene," see Rule 24(b)(1), SCRCP,²⁴ nor does any "claim or defense" of Freemantle involve a "common" "question of law or fact" with the instant action. Rule 24(b)(2), SCRCP. As noted *supra*, the County has alleged no claims arising under FOIA in this case. No issues, then, overlap with the sole remaining claims (*i.e.*, the FOIA claims) in the Freemantle Lawsuit.

Rule 24(b), SCRCP requires the Court to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Rule 24(b)(2), SCRCP. Here, for the reasons cited above, the Court finds Freemantle's intervention will both unduly delay the adjudication of the instant case and prejudice Preston. Accordingly, the Court denies Freemantle's Intervention Motion under Rule 24(b), SCRCP.

Finally, during the September 9th, 2013 hearing, Freemantle's counsel articulated certain motivations prompting the filing of the Intervention Motion. Freemantle's counsel indicated the Motion was intended, in part, to obstruct or prevent a potential settlement of the case by the County and Preston. Counsel also expressed Freemantle's desire to appeal the case if County Council, in its discretion as a governing body, elected not to do so. The Court finds such motivations are improper reasons to seek intervention and the Court will not allow intervention for those reasons. Accordingly, for the reasons set forth above, the Court denies Freemantle's Intervention Motion.

The County's Motion to Reconsider

Plaintiffs Reconsideration Motion raises fifteen (15) grounds asking the Court to reconsider its Order dated May 3, 2013 (hereinafter as "Order").²⁵ Both the County and Preston filed lengthy submittals in connection with the Motion. After careful review, the Court denies the County's Motion.

Issue 1:

*8 As to the Court's finding of unclean hands, the County first questions whether the Court properly distinguished Plaintiff from Council members. (Pl.'s Mot. at 2, ¶.)²⁶ In raising the issue, Plaintiff cites page 4 of the Order and pages 32 through 34. Addressing the cited passages in turn, page 4 only relates to the factors supporting the Court's finding that a toxic political environment existed in Anderson County in the months leading up to the November 18, 2008 vote, a fact which Plaintiff conceded both before and at trial. (See Order, at 3-5 (discussing political environment in Anderson County).)²⁷

Pages 32-34 contain eight bullet points supporting the Court's finding of unclean hands in this case. Each bullet point outlines conduct involving either sitting County Council members acting alone or acting in concert with Council-elect in an effort to interfere with Preston's role as County Administrator in violation of the Home Rule Act.²⁸ Moreover, in a ninth bullet point, the Court referenced a series of actions (appearing in Exhibit A to the Order), which the Court found did not constitute conduct properly attributable to the Plaintiff. (Order, at 34.) The County's Motion overlooks that the Court, in fact, made such distinctions, which were the exact distinctions Plaintiff asserts as unmade. In so doing, the County's Motion fails to explain why the distinctions made by the Court were improperly drawn. After careful review, the Court finds the distinctions were properly made.

Issue 2:

The County's second ground urging reconsideration relates to the Quorum Claim addressed *supra* at pp. 1-6.²⁹ As noted *supra*, before filing its Reconsideration Motion, the County failed to preserve the quorum issue as the issue was

not presented to the Court.³⁰ Indeed, the County argued the exact opposite position of what it now posits in both its Reconsideration Motion and Motion to Amend.³¹ Accordingly, the County has waived this issue and cannot purport to change the complexion of this case, after judgment, by interjecting a new claim for relief requiring additional discovery and proof.³²

*9 As to the substantive merits of the County's quorum analysis, the Court rejects the same. The Court analyzed such issues above and expressly incorporates its previous findings herein. (See *supra* at 3-5.) Accordingly, the Court rejects the second ground raised by the County as substantively incorrect.

The County also incorrectly urges the disqualification issue of Waldrep's and C. Wilson's votes were not properly raised and preserved. (Pl.'s Mot. to Recons., at 4, n.4.) The Court disagrees for the following reasons:

- The County's own pleading first put the voting disqualification of the 2008 Council's members at issue. (See Am. Compl., ¶35; see also Order, at 6.)³³

- Preston's Ninth Affirmative Defense specifically pleads the decision of *Baird v. Charleston Cnty.*, 333 S.C. 519, 535, 511 S.E.2d 69, 79 (1999) (treated as "Baird"). (See Order, at 6 n.4.)³⁴

- The disqualification of Waldrep's and C. Wilson's votes do not even implicate a true affirmative defense, but rather form part of Plaintiff's *prima facie* proof of the claims the County alleged in seeking to invalidate Council action.

- The Parties otherwise tried the issue of disqualifying Waldrep's and C. Wilson's votes pursuant to Rule. 15(b), SCRPC. (See PL's Mot. to Am., at 5.) The Court allowed the evidence at trial and addressed the same on page 6 of its Order.³⁵

*10 Accordingly, the Court rejects the County's contention that the disqualification of Waldrep's and C. Wilson's votes were not properly raised and preserved.

Issue 3;

Under its third issue, the County asserts the Court failed to "address the county's showing of a business connection between McAbee and Amy Plummer, and of the travel and commission 1 benefits she received and operated to disqualify him." (Pl.'s Mot. to Recons., at 6.) The Court rejects the County's third contention as unfounded. The County neglects the following findings in the Order:

- "After considering all evidence of record... McAbee did not possess a financial interest in Preston's Severance Agreement or the vote approving the same." (Order, at 7.)

- "[N]either the allegations nor the record evidence concerning McAbee's vote gave rise to a substantial appearance of impropriety." (Order, at 7.)

- "No evidence linked McAbee's travel to Preston's Severance Agreement or the surrounding issues" (Order, at 8.)

- "The evidence established McAbee's economic development travel occurred over an extended period of time and did not relate to Preston's Severance Agreement." (Order, at 8.)

The Court notes that by finding no evidence linked McAbee's travel to the Severance Agreement, any allegations concerning Plummer are necessarily subsumed by the Order's finding, since only McAbee, not Plummer, served on

Council. Throughout the trial, the County broadly referenced a "business connection" between McAbee and Plummer but failed to introduce any evidence establishing a connection between such a relationship and Preston's Severance Agreement. The lack of evidence introduced by the County, in this regard, warranted no further discussion beyond what is found in the Order.³⁶ Indeed, the Court cannot discuss evidence the County did not present.

Issue 4:

According to the County, the Court failed to address the fact "that Preston was aware—at the very moment [County Council voted] for his Severance Package—that Thompson and Ron Wilson should have been disqualified." (PL's Mot., at 6, ¶4.) Yet, even though the County shouldered the burden to prove the same by clear and convincing evidence, the County introduced no such evidence.³⁷

*11 In raising this issue, the County's Motion improperly attempts to convert factual knowledge into knowledge of a "legal conclusion." According to the County, Preston had knowledge that the alleged interests of Thompson and Wilson disqualified their votes by operation of law (*i.e.*, the Anderson County Code of Ordinances and the State Ethics Act). The County's analysis errs for three (3) reasons:

- First, the County presented no evidence showing Preston knew Thompson's and Wilson's votes warranted disqualification due to legal constraints. In fact, the only testimony at trial about the same (that of Preston) showed the exact opposite.

- Second, as stated in the Order, "impacted elected officials possessed positive legal duties to disclose any issues implicating ethical matters." (Order, at 25.) The Anderson County Code expressly confers such duty, first on the individual Council member, and then if doubts persist, on the County Attorney.³⁸ Neither at trial nor in its Reconsideration Motion does the County explain or present evidence why Preston, a lay person, possessed a duty as County Administrator to furnish legal opinions concerning ethics laws during County Council meetings.³⁹

- Simultaneously, the County seeks to transfer a duty conferred to the County Attorney on Preston under factual circumstances where Preston was represented by counsel and openly adverse to the County. (*See* Order, at 25.)

For these reasons, the Court rejects the fourth ground raised by the County's Motion.⁴⁰

Issue 5:

As a fifth ground, the County contends two passages in the Order concerning R. Wilson are inconsistent. (PL's Mot. to Recons., at 6-7.) The two passages appear on page 9 of the Order and on pages 26 and 27 respectively. The passage on page 9 relates to R. Wilson's knowledge of the Services Contract's extension when he voted, while the passage on pages 26 and 27 discusses the fact that it was well known Schaum had a Services Contract before any contract extension and well before Preston asserted any claims against the County. The Court finds the passages do not conflict.⁴¹

*12 As to the passage from page 9, the County did fail to prove Wilson had knowledge of the "Services Contract's extension when he voted." The only evidence introduced about the issue came from Allison Schaum, who testified she never told her father of the Services Contract's extension. No evidence of record demonstrated otherwise and the Court rejects the County's contention that a reasonable inference could otherwise be drawn.

As to the passage from pages 26 to 27, the Services Contract was a public file, *see* S.C. Code § 30-4-40(a)(5)(A), which the County nowhere disputes Preston had a duty to disclose.⁴² Moreover, the evidence of record established it had "been

widely known that Schaum had a Services Contract with the County long before Preston asserted any claims against the County.”⁴³ (Order, at 26-27.) The trial evidence similarly confirmed it was widely known that Schaum was R. Wilson's daughter. Accordingly, the Court finds both passages are accurate, supported by the evidence at trial, and consistent.

Issue 6:

As to the sixth ground, the County contends the Court failed to address “the available inference of knowing impropriety” arising out of Preston's subsequent investment of severance proceeds. The Order does not address the issue because no such available inference exists. No trial evidence demonstrated R. Wilson contemplated soliciting an investment from Preston at the time of the Severance Agreement vote.⁴⁴

Preston's testimony was the only evidence introduced at trial regarding the issue. Preston testified he did not consider investing with R. Wilson until months after he left his post as County Administrator. Moreover, Preston testified that he had been duped, just like countless other investors. The County introduced no evidence to suggest otherwise and its Motion cites none.

Issue 7:

The County next contends the Court failed to address the factors the County argues as distinguishing this case from the holding in *Baird v. Charleston Cnty.*, 333 S.C. 519, 511 S.E.2d 69 (1999). (Pl.'s Mot. to Recons. at 7.) The Court analyzed the *Baird* decision at length in its Order and finds no error in *Baird's* application to the instant case. (See Order, at 12-16.) Moreover, the County overlooks the numerous decisions cited by the Order, which also support its findings. (See Order, at 13 n.10.) The County also overlooks the Court's analysis discussing the superiority of the approach adopted by *Baird*. (Order, at 14 n.12 (noting the County's urged approach would up-end the finality of legislative action and injure the public interest.)) By contrast, the distinctions the County attempts to draw have no foundation in South Carolina law, prove unpersuasive, and simply ignore South Carolina law as stated in *Baird's* holding.

Nonetheless, contrary to the County's assertions, the Order did address and rejected the distinctions the County misreports as overlooked:

- “No South Carolina authority supports the County's premise wherein it argues that South Carolina courts should weigh the potential sway of participating individuals when reviewing the validity of governmental votes. To the contrary, here, all elected officials owed the same legal duties to their constituents. The Court treats each public official equally and finds their respective votes warrant equal weight and independence.” (Order, at 14.)

- *13 • “The County characterizes County Council's approval of the Severance Agreement as judicial in nature. The Court rejects the County's distinction in this regard. The ‘appointment and removal of a public officer is a governmental function’ *Piedmont Pub. Serv. Dist. v. Cowart*, 324 S.C. 239, 241, 478 S.E.2d 836, 837 (1996). Indeed, it is a statutory power conferred upon County bodies to exercise within their legislative discretion. S.C. Code Ann. § 4-9-620.” (Order, at 14 n. 13.)

- “In addition, the County also characterizes the Severance Agreement as conferring solely an ‘individual benefit.’ The Court likewise rejects this characterization. The evidence at trial confirmed those Council members who appropriately voted in favor of the Severance Agreement did so in hopes of promoting the public good. Some of the rationales included *inter alia*: a desire to avoid a significant downside risk to the County, to avoid further political infighting that had proved deleterious to the County, to help the County move forward with County business, which had been stymied, and to help ensure the County could hire competent County Administrators later.” (Order, at 15.)

• “The Court, therefore, rejects Plaintiff’s premise that because Thompson (as Chairman of Council) and R. Wilson (as Chairman of the Personnel Committee) supported the Severance Agreement, their influence overwhelmed the independent judgment of the County Council’s remaining elected officials. Indeed, even if such inquiry proved appropriate, the evidence of record establishes otherwise.” (Order, at 15.)

• As discussed at length above and below, Preston testified he believed no conflicts existed. None could be kept hidden because no conflicts were believed to exist. Moreover, the Court specifically found the County failed to prove the existence of such conflicts was material: “Plaintiff has not shown such disclosures, even, if made, would have changed the votes of McAbee, Greer, and Floyd. Indeed, the evidence of record supports an opposite conclusion.” (Order, at 25.) The Court discounted those votes for which it found an appearance of impropriety existed. And, the measure still passed.

• “See also *Griggs v. Hodge*, 229 S.C. 245, 251, 92 S.E.2d 654, 657 (1956) (“As a general rule, the courts will not attempt to interfere with the exercise of discretionary powers by a public board or subordinate governmental agency.”); *Schroeder v. O’Neill*, 179 S.C. 310, 184 S.E.2d 679, 684 (1936) (“The court will not interfere with discretionary powers of a municipal body, except in cases of fraud or clear abuse of power, or where unreasonable or capricious”); *Plunkett v. City of Aiken*, 159 S.C. 97, 108-09, 156 S.E. 245, 249 (1931) (“The exercise of that discretion, so long as it is not unreasonable or capricious, is a matter of policy with which the courts are not concerned. There was not sufficient evidence to show any exercise of arbitrary power or caprice upon the part of the city council, and we cannot sustain the decree of the circuit judge on this additional ground, as urged by the respondents.”).” (Order, at 16 n.14.)

• “Consistent with their votes throughout, the trial testimony from voting Council members reflected that additional debate on the Motion to Reconsider would not have changed their ultimate vote. (See, e.g., McAbee Tr. Test.; Greer Tr. Test.; Floyd Tr. Test.) The County has not introduced any evidence to the contrary. Second, had such members felt that additional debate could materially change their ultimate vote, they could have voted against the final vote adopting the Severance Agreement. As noted above, this did not occur, as the Second Vote on the Severance Agreement passed with a vote of 5-1-1. Third, adverse parliamentary rulings can be appealed under the Anderson County Code. See ACC § 2-37(g) (1). Here, no appeal occurred. (See Pl.’s Ex. 5.) Finally, South Carolina Courts do not review the parliamentary processes of legislative bodies. See *State v. Lewis*, 181 S.C. 10, 186 S.E. 625, 631 (1936) (“That is merely a matter of parliamentary procedure, which each body, by special rule, may, and usually does, regulate for itself.”); *Smith v. Jennings*, 67 S.C. 324, 328, 45 S.E. 821, 822-23 (1903) (“That is merely a matter of parliamentary procedure, which each body, by special rule, may, and usually does, regulate for itself.”); see also MASON’S MANUAL OF LEGISLATIVE PROCEDURES § 71, at 72 (1975) (“[C]ourts will not disturb a ruling on a parliamentary question made by a legislative ... body having authority necessary to make rules for its government....”).” (Order, at 17 n.15.)

*14 Thus, the Order did address the distinctions drawn by the County, despite their lack of footing under South Carolina law. Accordingly, the Court rejects the County’s seventh ground seeking reconsideration.

Issue 8:

As to the eighth ground, the County contends the Court did not address Plaintiff’s argument that the Severance Agreement was arbitrary and capricious and violated public policy. (Pl.’s Mot. to Recons., at 8.) However, the Order discusses in detail both the County’s arbitrary and capricious and public policy arguments for five (5) pages. (See Order, at 18-22.) The Order analyzed the trial evidence through the correct legal standards for evaluating whether the 2008 County Council’s decision-making was arbitrary and capricious, which the County does not contest or cite any authority to the contrary. (Order, at 18-22.)

The County’s eighth ground is misplaced as it overlooks the actual findings of fact made by the Court in concluding the 2008 Council amply satisfied the “fairly debatable” standard.⁴⁵ The County instead complains the Court failed to

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address Plaintiffs arguments concerning the arbitrary and capricious nature of the Severance Agreement because it was "based on an asserted claim for 'anticipatory breach' that could not exist as a matter of law."⁴⁶ (Pl.'s Mot., at 8.) The Court rejects the County's contention for three reasons.

*15 First, the Order did address the issue. After hearing all of the trial testimony and weighing the credibility of the same, the Court found, "[T]he issue of whether to suspend and dismiss Preston had already been made by Council-elect without giving Preston the right to present evidence at a fair and impartial hearing before the entire 2009 Council. It is clear to this Court that the matter had been prejudged by the majority of Council-elect." (Order, at 21.) The 2008 Council took reasonable actions to safeguard against imminent litigation, for which they had received notice and for which their employment attorney opined would expose the County to "estimated potential exposure, including attorney's fees and costs, of up to two million dollars (\$2,000,000.00)." ⁴⁷ (Order, at 21.)

No authority exists to support the notion that elected officials must standby and idly watch as the County becomes entrenched in litigation. Legislative bodies routinely address issues in prospective fashion. Indeed, such is the very nature of the obligation to constituents.

Second, the County's argument misstates the reasoning expressed by the 2008 Council members for voting in favor of the Severance Agreement. Contrary to the trial evidence, the County attempts to reduce the basis for the 2008 Council's vote in favor of the Severance Agreement to a solitary issue—the "anticipatory breach" claimed by Preston. Yet, as discussed in the Order, the 2008 Council members expressed a host of interrelated reasons explaining their votes.⁴⁸ The Order correctly examined the evidence introduced at trial in its totality. (Order, at 18-22.)

Third, as the Order points out, Preston's demand letter also referenced tort claims against two members. (Order, at 20 n.16.) While the County now argues, "there was no evidence any such other claim was ever identified or could be valid," both Waldrep and C. Wilson confirmed Preston's demand letter referenced the assertion of tort claims against them personally. (See Waldrep, Tr. Test. (Day 1); Tr. Test. C. Wilson (Depo.), 59: 14-18; 75:1-8; Pl. Ex. 22.) Moreover, Preston introduced an unappealed Order from *Preston v. Waldrep & C. Wilson*, No. 2008-CP-04-2776, wherein the Court found, among thirty-one (31) findings in all, that: "The County Administrator's duty to supervise his employees is being intentionally and purposefully thwarted by [Waldrep and C. Wilson]," and "[t]he actions of Defendants have interfered with the County Administrator's ability to do his job." (Def. Ex., ¶¶27 & 29.)⁴⁹ Despite such evidence, the County asks the Court to reconsider its Order contending "no evidence" exists showing the tort claims referenced by Preston were "ever identified" or "could be valid." (Pl.'s Mot., at ¶8.)⁵⁰ Accordingly, the Court rejects the County's position as unfounded.⁵¹

*16 The County next complains the Court Order does not address its allegations the Severance Agreement "violated public policy." (Pl.'s Mot., at 8.) However, the Order specifically finds: "As to the second cause of action, the Court finds that public policy renders neither the Severance Agreement nor the vote adopting the same as void as against public policy." (Order, at 18.) The Court also noted, "[P]aragraphs 37 through 39 of the Amended Complaint never specify how the Severance Agreement's approval violated public policy..." (Order, at 18.) Accordingly, the County's eighth exception to the Order has no merit.

The Order rejected the County's unspecified public policy claims, finding the exact opposite proved true. "The Court [found] greater harm would exist by virtue of South Carolina's courts disturbing the decision of a legislative body." (Order, at 18.) As the Court correctly found, "South Carolina courts accord deference to the discretionary decision-making conferred upon legislative bodies by statute." (Order, at 18.) South Carolina law mandates such deference so as to preserve the integrity of duly elected legislative bodies and proper observance of Separation of Powers constraints. (See Order, at 15,18-19.)

Issues 9 & 10:

As to grounds nine and ten, the County contends the Order misapprehended its breach of fiduciary duty claim and the duty Preston owed to the County. The Court rejects the County's contentions in this regard. Whether and to what extent a party owes a fiduciary duty to another constitutes "an equitable issue for the judge to decide," *see Moore v. Moore*, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004), and requires the Court to "look to the particulars of the relationship between the parties." *Armstrong v. Collins*, 366 S.C. 204, 222, 621 S.E.2d 368, 377 (Ct. App. 2005); *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 330, 574 S.E.2d 502, 507 (Ct. App. 2002).

To impose a fiduciary obligation to the matter under consideration, "the facts and circumstances must indicate the party reposing trust in another has some foundation for believing the one so entrusted will act not in his own behalf but in the party so reposing." *Moore*, 360 S.C. at 251, 599 S.E.2d at 472. Applying such principles to the case *sub judice*, the Order correctly found the facts and circumstances, as they related to the Severance Agreement, failed to support the imposition of a fiduciary duty. (See Order, at 23) ("[N]o evidence [exists] supporting Plaintiffs contention that Preston breached a fiduciary duty...")⁵²

The Court correctly found and the County does not dispute, "It is clear to this Court that by October and November of 2008, Preston and County Council had assumed positions adverse to each other." (Order, at 25.)⁵³ Under these particular facts, the Order correctly concluded, Preston did not owe County Council a duty to furnish information adverse to his position. (Order, at 26; *see also supra*.) Plaintiff failed to introduce any plausible evidence entitling it to contend Preston should have acted on behalf of the County and not "his own behalf as related to his employment claims." *Moore*, 360 S.C. at 251, 599 S.E.2d at 472.⁵⁴ Accordingly, the Order correctly found, as an adverse party, Preston owed no duty to the County.

*17 Moreover, as discussed above and incorporated herein by reference, what the County contends Preston should have disclosed constitutes a legal opinion under State and local ethics laws. *See supra* at 19-20. Yet, under Anderson County Ordinance, such duties are expressly conferred to Council members and, if necessary, to the County Attorney, not the County Administrator. (See ACC §§ 2-352 & 2-289; Order, at 25.)

Finally, as discussed *supra* and incorporated herein, the Order correctly found no evidence supported Plaintiffs contention that Preston had knowledge of potential violations of ethics provisions. (Order, at 23; *see also supra* at 19-20.) The only testimony at trial concerning the issue came from Preston, who testified he did not realize Thompson, R. Wilson, or McAbee had a conflict of interest. No evidence demonstrated he believed otherwise. Accordingly, the Court rejects the County's ninth and tenth grounds for reconsideration.

Issue 11:

As to the eleventh ground, the County contends the Order fails to address the argument that Preston "continued to act" with respect to "the Heather Jones memoranda after he left office." (Pl.'s Mot., at 10.) The County is incorrect: The last sentence on page 27 of the Order (continuing on page 28) states: "Moreover, the County failed to prove that Preston executed any memoranda on or after December 1, 2008, as alleged." (*Compare* Order, at 27-28 with Am. Compl., at ¶¶ 11(a), (b), & (c).) Preston's Severance Agreement provided that Preston would serve as County Administrator through November 30, 2008. (PL's Ex. 1.)

The County's eleventh ground also mischaracterizes certain evidence of record. For example, the County cites the Jones' memoranda as "Preston's forgery" completed "for the obvious purpose of deceiving his employer." (PL's Mot., at 10.)

The actual evidence at trial showed the memoranda simply replaced employment memoranda that previously existed in Jones' employment file but could not be found.⁵⁵

Issue 12:

*18 As to the twelfth ground, the County seeks reconsideration of the Order because the Court did not address its contention that Retirement System funds could be used in fashioning a remedy for constructive trust. (Pl.'s Mot. to Recons., at 10.) The County's argument overlooks page 29 of the Order where the Court specifically rejected Plaintiff's claim for a constructive trust. The Order states: "Given the remaining findings of the Court, as set forth in this decision, Plaintiffs cause of action for constructive trust no longer remains viable." (Order, at 29.) No reason existed for the Court to analyze a remedy under a claim the County failed to prove.

Notably, the County was required, but did not, prove fraud, as an "essential element" to establish a constructive trust, *Lollis v. Lollis*, 291 S.C. 525, 529, 354 S.E.2d 559 (1987). The County failed to introduce any evidence establishing fraud let alone by "clear, definite, unequivocal, and satisfactory evidence." See *Singleton v. Mullins Lumber Co.*, 234 S.C. 330, 350-351, 108 S.E.2d 414, 424 (1959); see also *Whitmire v. Adams*, 273 S.C. 453, 458, 257 S.E.2d 160, 163 (1979) (Evidence must leave "no reasonable doubt as to the existence of the trust."); *McNair v. Rainsford*, 330 S.C. 332, 357, 499 S.E.2d 488, 501 (Ct. App. 1998).⁵⁶ Accordingly, the Court rejects the County's twelfth ground.

Issue 13:

As to the thirteenth ground, the County complains the Order fails to address the availability of rescission due to "Preston's own culpability." (PL's Mot., at 11.) The County thus concludes: "the changed circumstances" defense to rescission is not available where the one invoking the defense is at fault." (PL's Mot., at 11.) However, the Court rejects the County's premise, as it failed to prove any of its claims and, thus, failed to prove the "culpability" it directs at Preston. The Court, therefore, rejects the County's twelfth ground as it again errantly assumes a conclusion it failed to prove.

Moreover, the Order cited ample South Carolina law to support the unavailability of rescission in this case. (Order, at 30-31.) Under South Carolina law, "In the absence of fraud which would justify shifting the loss to party who opposes rescission, rescission is appropriate only if both parties can be returned to the status quo prior to the contract." (Order, at 30 (citing *King v. Oxford*, 282 S.C. 307, 313, 318 S.E.2d 125, 129 (Ct. App. 1984)). In turn, the Court specifically found the County failed to prove both its claims for fraud and constructive fraud. (Order, at 24-27.)

*19 Citing *Griggs v. E.I. DuPont de Nemours & Co.*, 385 F.3d 440, 452 (4th Cir. 2004), the County argues rescission can occur even if restoration to the status quo *ante* proves impossible. The Court rejects this contention. First, *Griggs* does not apply South Carolina law and has no bearing on this case. Second, *Griggs* actually supports the Court's Order as it confirms the general rule disallows rescission unless the parties can be restored to their prior positions. *Id.* (citing Dan B. Dobbs, *Handbook on Remedies* § 9.4 at 622 (West 1973) ("The general rule ... is that the adult plaintiff must make restoration of what he got under the contract in order to get rescission, and his inability to do so will not excuse such restoration. In such a case, he may be permitted to recover damages, but rescission will be barred by his inability to make restoration to the defendant.")).

Third, the *Griggs* decision does state: "rescission may be granted if the court can balance the equities and fashion an appropriate remedy that would do equity to both parties and afford complete relief." *Id.* Yet, precisely for the reasons stated in the Order on pages 30 and 31, rescission (even if Plaintiff had proved its non-fraud based claims) cannot be granted in this case in a manner that does equity to both parties. Nor has the County ever explained how rescission could occur and do equity to both parties. The County seeks to retain all the benefit conferred by the Severance Agreement

(i.e., [termination of employment, release, etc.] but Preston alone would return all benefits he received.) This would not be equitable to both Parties. Accordingly, the Order amply addresses the rescission issues raised by the County.

Finally, the County repeats rescission as appropriate due to the public nature of the contract. The County cites no South Carolina authority to support its contention that a Court in equity should elevate a public body to a higher status than a private citizen. In its written summation, the County cited the decision of *Thompson v. City of Atlantic City*, 921 A.2d 427 (N.J. 2007) for the proposition that rescission is the proper remedy when "a public act has been taken improperly." As noted *supra* and incorporated herein, however, the Order found the holding of *Baird* controlling. (See Order, at 12-14; see also *supra* at 22-24.)⁵⁷ As a result, the Court rejects the County's thirteenth ground seeking reconsideration.

Issue 14:

As to issue 14, the County contends the Order misstates that a declaratory judgment action provides "an adequate remedy at law." (Pl.'s Mot. to Recons., at 12.) The Court rejects the County's contention. Not only does the declaratory judgment statute furnish litigants with a useful statutory vehicle to resolve disputes arising under contracts, it also enables South Carolina Courts to fashion further relief after a declaration of the parties' respective rights has been reached. South Carolina Code § 15-53-120 states:

Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why further relief should not be granted forthwith.

S.C. Code Ann. § 15-53-120. Moreover, a declaratory judgment action proves inherently neither legal nor equitable in nature, but instead assumes the nature of the underlying issue. See, e.g., *Travelers Indent. Co. v. Auto World of Orangeburg, Inc.*, 334 S.C. 137, 140, 511 S.E.2d 692, 693 (Cl. App. 1999); *Ettas v. Firemen's Ins. Co. of Newark, N.J.*, 309 S.C. 129, 132, 420 S.E.2d 504, 505 (1992). As the Order states, simply nothing prevented the County from pursuing a declaratory action and then, if appropriate, petitioning the Court for proper equitable relief consistent with the rights adjudicated by the declaratory judgment. (Order, at 36.)

Issue 15:

*20 As to ground 15, the County takes exception that the Order did not note the 2009 County Council subsequently voted to dismiss the lawsuit Preston initiated against Waldrep and C. Wilson. What occurred after line 2009 County Council took office in January of 2009 has no bearing on whether Waldrep and C. Wilson had a special interest at stake when voting in November of 2008. Accordingly, the Court rejects the County's fifteenth ground.

The County again argues Waldrep and C. Wilson had no special interest in the Severance Agreement vote. (Pl.'s Mot. to Recons., at 12.) The Order addressed this issue for several pages, which the Court incorporates by reference. (Order, at 10-13) (finding Waldrep and C. Wilson had both direct financial interests and a substantial appearance of impropriety.) The Court also addressed the special interests of Waldrep and C. Wilson *supra* at 27-28, which the Court also incorporates by reference. The Court declines to restate its holding for a third time as the same analysis, incorporated herein, applies.⁵⁸

CONCLUSION

For the reasons stated above, the Court denies the County's Motion to Amend, Freemantle's Motion to Intervene, and the County's Motion to Reconsider.

IT IS SO ORDERED.

<<signature>>

The Honorable Roger L. Couch

Circuit Court Judge

November 7, 2013

Footnotes

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See Rule 15(a), SCRCP (disallowing amendment resulting in "prejudice [to] any other party"); 6 WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE, § 1488 (2011) ("[I]n keeping with the purpose of Rule 15(a), which is to facilitate a determination of the action on the merits, a motion to amend should be made as soon as the necessity for altering the pleading becomes apparent."); see also *McCann v. Hall & Co., Inc.*, 109 F.R.D. 363, 364-65 (N.D. Ill. 1986); *United States ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1167 (10th Cir. 2009) (denying motion to amend because delay in asserting new allegations would re-open discovery and render prior filings of the defendant as "worthless"); *Royal Indent. Co. v. King*, 532 F. Supp. 2d 404, 417 (D. Conn. 2008) ("[A]n amendment clearly will not be allowed when the moving party has been guilty of delay in requesting leave to amend and, as a result of the delay, the proposed amendment, if permitted, would have the effect of prejudicing another party.")

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The County's quorum argument heavily relies upon the decision of *Garris v. Governing Bd. of South Carolina Reinsurance Facility*, 333 S.C. 432, 511 S.E.2d 48 (1998). However, the County's Motion omitted the following operative language from *Garris*: "In the absence of any statutory or other controlling provision . . ."

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Id. at 453, 511 S.E.2d at 59. As explained below, the Court finds positive law, controlling provisions (i.e., the Anderson County Code, FOIA, and the State Ethics Act) exist with respect to defining a quorum of Anderson County Council. See ACC § 2-37(d) ("Should sufficient members leave during a meeting, the chairperson shall immediately declare a recess and attempt to obtain a quorum.") Thus, consistent with other provisions cited herein, the only instances wherein the Anderson County Code contemplates the loss of a quorum relate to the physical absence of members, not their voting qualification or recusal issues. See also *Rainey v. Haley*, 404 S.C. 320, 325, 745 S.E.2d 81, 84 (2013) (Noting the canon of construction *expressio unius est exclusio alterius* or *inclusio unius est exclusio alterius*; the express inclusion of one thing implies the exclusion of another).

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See ACC § 2-37(g)(3) ("[A] majority vote of those members present and voting shall decide all questions, motions, and other votes.") Inclusion of this less onerous voting formula evidences an intent to permit governmental action on a vote less than a majority of a quorum, which the County Code uses elsewhere. See, e.g., ACC § 2-36.

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Compare ACC § 2-37(g)(12) (Interpretation of County Code "shall be guided by the previous usage of county council....") with *First Davis Aff.*, Ex. F (Anderson

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County Meeting Minutes August 19, 2009), 13:33-40) (County Attorney: "Under the County Code it...requires a majority of the council to be present for there to be a quorum"; disqualified voters could "still be present...and we would have a quorum of council at that point..."; "then it would require a majority of those present and voting to carry the motion."); *see also* ACC § 1-2 (Defining the term shall: "The word 'shall' is mandatory.")

Compare ACC § 2-37(d) ("A quorum shall consist of a majority of the council"), ACC § 2-37(a) ("County council will conduct] its meetings in accordance with the South Carolina Freedom of Information Act, as amended, and the state ethics laws, as amended, and the requirements of those acts and laws, as amended, shall apply to all notices, agenda, minutes, and other aspects of such meetings."); ACC § 2-676 (Mandating compliance with FOIA); ACC § 2-352 ("[S]hall comply with the provisions of the South Carolina Freedom of Information Act") with S.C. Code § 30-4-20(e) ("Quorum" unless otherwise defined by applicable law means a simple majority of the constituent membership of a public body."); South Carolina Ethics Opinion, SEC AO98-002 (Nov. 19, 1997) (Analyzing substantially similar facts and concluding: "[D]isqualification under the Ethics Reform Act does not affect the existence of a quorum."); *see also Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 500, 585 S.E.2d 600 (2009) (South Carolina courts accord substantial deference to the State Ethics Commission's interpretation of its own enabling legislation.); South Carolina Municipal Association, Frequently Asked Questions, <http://www.masc.sc/newsroom/uptown/June2#012/Pages/Frequently-asked-questions-Quorums.aspx> (last visited on Oct. 30, 2013) ("How would a recusal or abstention affect the quorum? The quorum is unaffected. Once established, the recusal or abstention of one or more council members in attendance at the meeting does not break the quorum. In such a case, a simple majority of the voting members governs the vote's outcome.")

See Higgins v. Medical University of South Carolina, 326 S.C. 592, 604, 486 S.E.2d 269, 275 (Ct. App. 1997) (disallowing amendment due to futility); *see also Coral Gables v. Palmetto Brick Co.*, 183 S.C. 478, 191 S.E. 337, 339 (1937) ("The court will not do a useless and futile thing, by allowing an opportunity for setting up a new cause of action by amendment, which is barred by the statute of limitations.")

If, as the County contends but the Court otherwise rejects, the disqualification of Waldrep's and C. Wilson's votes standing alone implicated quorum requirements, the County's position, in this regard, confirms Plaintiff had an opportunity to raise the issue during trial but did not. As noted above, the County instead elected to pursue a different theory altogether.

See Order, 6, n. 4 (May 3, 2013).

Preston raised Freemantle's non-compliance with Rule 11(a), SCRCP in his July 25, 2013 response. Freemantle thereafter failed to take any action to cure the deficiency during the ensuing forty-five (45) day period leading up to the September 9, 2013 hearing on his motion. Accordingly, Freemantle failed to promptly cure the deficiency.

See H. Lightsey & J. Flanagan, *South Carolina Civil Procedure*, (2d ed. 1985) ("Since [South Carolina's] Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure."); *Dillard v. City of Foley*, 166 F.R.D. 503, 506 (M.D. Ala. 1996) (denying intervention motion for purposes of pursuing an appeal of Court Order due to ninety (90) day delay and failure to attach proposed pleading and noting, "The purpose of requiring an intervenor to file a pleading is to place the other parties on notice of the claimant's position, the nature and

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basis of the claim asserted, and the relief sought by the intervenor.”) (citing *WJA Realty Ltd. P’ship v. Nelson*, 708 F. Supp. 1268, 1272 (S.D. Ha. 1989).)

Among other things, Freemantle’s Intervention Motion fails: to specify whether Freemantle sought to intervene as a matter of right or permissively; to specify what claims Freemantle sought to assert against Preston; to specify what relief Freemantle seeks against Preston; to specify what personal interests Freemantle possessed as to the County’s claims; to specify how the County’s lawsuit impaired or impeded his personal interests; to specify what questions of law and fact are in common with the County’s claims; to specify whether Freemantle sought to intervene as a Plaintiff or Defendant; to attach a proposed pleading delineating the particulars of his putative claims; and to identify why the County’s efforts to do not already protect the public interest. (See Freemantle Mot. to Intervene.)

Such prejudice includes: preventing Preston from discerning the claims Freemantle seeks to assert (Second Davis Aff., ¶¶42-44); preventing Preston from discerning whether Freemantle seeks to intervene of right or permissively (*Id.*); preventing Preston from discerning what relief Freemantle seeks in this case (*Id.*); preventing Preston from discerning whether Freemantle seeks to join as a Plaintiff or Defendant (*Id.*); preventing Preston from discerning why Freemantle contends the County cannot protect its interests (*Id.*); preventing Preston from discerning what interests Freemantle claims in the County’s lawsuit (*Id.*); preventing Preston from discerning what common legal questions and factual issues Freemantle contends exist (*Id.*); causing Preston to defend against a “moving target” and creating an unfair disadvantage (*Id.*); causing Preston to incur undue expense and delay in final adjudication (*Id.*).

Freemantle also cannot now assert new FOIA claims arising from allegations occurring in 2008, as such claims would prove untimely under FOIA’s one year time limit. See S.C. Code Ann. § 30-4-100(a) (requiring action to commence “no later than one year following the date on which the alleged violation occurs.”). See also *Davis v. Jennings*, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991).

See Second Davis Aff., Attach. Ex. A (Motion to Dismiss (January 19, 2010) (seeking its dismissal from Freemantle Lawsuit, in part, due to the County’s Lawsuit)).

Freemantle thereafter refrained from serving the Intervention Motion on either Preston or the County until July 22, 2013. (Second Davis Aff., ¶10.)

“The most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case.” 7C Wright & Miller, § 1916.

The doctrine of collateral estoppel bars Freemantle from re-litigating the standing and real party in interest issues. See *Crosby v. Prysmian Comm’n’s Cables & Sys. USA, LLC*, 397 S.C. 101, 109, 723 S.E.2d 813, 817 (Ct. App. 2012). See also *Beaufort Realty Co., Inc. v. Beaufort Cnty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589-90 (Ct. App. 2001) (“A party cannot appeal from a decision which does not affect his or her interest, however erroneous and prejudicial it may be to some other person’s rights and interests.”)

Ample authority supports such analysis. See, e.g., *Envtl. Def. v. Leavitt*, 329 F.Supp.2d 55, 66 (D.D.C. 2004) (“[A]pplicant for intervention as of right must demonstrate that it has standing by showing injury-in-fact.”); *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 316-17 (6th Cir. 2005) (Party could not intervene to appeal negotiated settlement because it had no cognizable legal interest in the subject matter of the zoning litigation.); *Purcell v. Bank Atlantic Fin. Corp.*, 85 F.3d 1508, 1513 (11th Cir. 1996) (cert. denied) (An interest in the collateral estoppel effect of an action, in which a party is not a party in interest to the transactions underlying the action, is not a sufficient interest

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in the action to support intervention as of right); *Hawaii-Pacific Venture Capital Corp. v. Rothbard*, 564 F.2d 1343 (9th Cir. 1977) (A person with a potential claim against a party in a class action has no right to intervene simply because the outcome of the suit may increase or decrease the collectability of his claim.); *In re Franklin Nat'l Bank Sees. Litig.*, 92 F.R.D. 468, 470-71 (D.C.N.Y. 1981) (The nonprofit group was not entitled to intervene as of right in an action brought by FDIC to challenge order of confidentiality relating to settlement, as it had "no 'significantly protectable interest' in the [] litigation."); *Liberty Mut. Ins. Co. v. Pac. Indent. Co.*, 76 F.R.D. 656, 660 (D. Pa. 1977) (Plaintiff could not intervene in declaratory action relating to insurance coverage as plaintiff had not yet obtained a judgment.)

Freemantle, in part, contends he should be allowed to intervene in the instant case so as to preserve his remedies in the Freemantle Lawsuit. However, South Carolina precedent expressly disallows intervention bids for purposes of preserving a possible, future remedy. See *Ex parte Reichlyn v. Columbia Organic Chem. Co., Inc.*, 310 S.C. 495, 498, 427 S.E.2d 661, 663 (1993) (Merely claiming a general interest in a lawsuit so as to preserve remedy in another lawsuit is not a "direct or legally protectable interest" in the subject of the lawsuit in which intervention is sought) (citing *Gould v. Alleco, Inc.*, 883 F.2d 281, 285 (4th Cir. 1989) (merely claiming an interest in a lawsuit to preserve potential indemnification rights fails to support intervention)). See also *Washington Elec. Coop. Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990) ("An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable will not satisfy the rule" (internal citations omitted)).

See, e.g., *Little Rock School Dist. v. North Little Rock School Dist.*, 378 F.3d 774, 780-81 (8th Cir. 2004) ("We presume that the government entity adequately represents the public ... It is not sufficient that the party seeking intervention merely disagrees with the litigation strategy or objectives of the party representing its interests [T]hat the Bollen Group has asserted its interest with arguably greater fervor than has the state and would have made different procedural choices, including a decision to appeal, does not" change the analysis.); *Dekalb Cnty. v. Post Props., Inc.*, 245 Ga. 214, 219, 263 S.E.2d 905, 909 (1980) ("[W]here the interest of the intervenor is identical to that of a governmental body or officer who is a named party, it will be assumed that the intervenor's interests are adequately represented, absent a 'concrete showing of circumstances in the particular case that make the representation inadequate' ... Even a decision not to take an appeal" falls "within the discretion of the representative" body, (quoting 7A Wright & Miller, Fed. Practice and Procedure: Civil 519,529-32, § 1909)).

Freemantle has not cited any statute for purposes of intervention under Rule 24(b), SCRCP.

In ruling upon the Reconsideration Motion, the Court incorporates by reference its factual and legal findings from its Order dated May 3, 2013, which further militate in favor of denying the Motion. In addition, the Order notes: "To the extent an argument has not been deemed worthy of discussion by the Court, it should be deemed as having been fully reviewed and rejected by the Court as without legal basis under the facts *sub judice*." (Order, at 4 n. 2.)

In its first argument, the County also references issues relating to its contentious Preston's Severance Agreement was arbitrary and capricious. The Court addresses such issues below.

No exception to the doctrine of *respondeat superior* exists merely because the entity constitutes a public entity. Moreover, in the tort context, the Tort Claims

Act mandates the substitution of the public entity as the named defendant when individual public officials and employees are named as a defendant. *See* S.C. Code Ann. § 15-78-70(c).

28 Notably, Bullet Point 5 discusses improper conduct expressly ratified by Anderson County in ACC Resolution 2009-63. (*See* First Davis Aff., Ex. F, at 17.)

29 The Court incorporates its prior discussion of the quorum issue (above) herein by reference.

30 The County's Motion appears to suggest it raised the quorum issue in its written summation. (*See* Pl.'s Mot., at 5.) The Court has reviewed the passage cited by the County and it does not relate to the quorum issue. The actual argument, which the Court rejected (*see* Order, at 11 n.6) contended that all Council members received the same release conferring the same benefit and, as a result, if Preston's argument was accepted "no one should have voted." (Pl.'s Post-Trial Memo., at 17.) After searching the County's written summation, the Court notes the word "quorum" appears nowhere in the submittal, nor was the issue otherwise raised.

31 Notably, the County's Reconsideration Motion suggests, "The prospect of destruction of a quorum was not present in this case until the Order invalidated four votes." (Pl.'s Mot. to Recons., at 5.) By contrast, the County's Motion to Amend simultaneously suggests the Court tried the issue by consent. (Pl.'s Mot. to Am., at 5.) The Court rejects both contentions. As noted above, the issue of the disqualification of Waldrep's and C. Wilson's votes is factually and legally distinct from the issue of whether a quorum existed. However, to the extent the County predicates its quorum analysis on the disqualification of Waldrep's and C. Wilson's votes, the Court heard such issues at trial but the County failed to raise the Quorum Claim when they arose.

32 *See MailSource, LLC v. M.A. Bailey & Assocs., Inc.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003) ("A party cannot raise an issue for the first time in a Rule 59(c), SCRPC motion which could have been raised at trial."); *Anderson Men'l Hosp., Inc. v. Hagen*, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994) ("A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not."); *Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App. 1999) (issue not preserved where party raised argument for the first time in motion for reconsideration); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76 497 S.E.2d 731, 733 (1998); *see also* Jean Hoefer Toal *et al.*, *Appellate Practice in South Carolina* 57 (2d ed. 2002) (outlining requirements for preserving issues at trial: the issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised with sufficient specificity.)

33 Having placed the issue in contention, the County cannot complain when the Court's decision embraces and decides what it has raised by contention at its own hand. *See State v. Brown*, 344 S.C. 70, 76, 543 S.E.2d; 552,555 (2001) (petitioner cannot complain of prejudice from evidence he has brought before the jury); *State v. Robinson*, 305 S.C. 469, 474, 409 S.E.2d. 404, 408 (1991) (a party will be unsuccessful in opposing the admission of evidence if that party was the one who opened the door).

34 The *Baird* holding specifically requires an analysis of whether disqualified votes would cause a vote to fail. Analyzing how many votes were cast and analyzing what votes warrant disqualification when tallying whether a disputed measure passed by majority vote fails squarely beneath the *Baird* holding and squarely beneath Preston's Ninth Affirmative Defense.

35 The Court notes that if the County believed the issues were not raised by the pleadings, it could have moved for a continuance pursuant to Rule 15(b).

SCRCF. No such motion was made. Moreover, the evidence of record reflects the issue had arisen and was factually developed during the discovery phase. During her deposition, C. Wilson was examined about: the tort claims asserted by Preston, which she confirmed referred to her and Waldrep (C. Wilson Tr. Test. (Depo.) 59:14-18; 60:13-18); the scope of the release in the Severance Agreement (*Id.* at 65:20-25; 66:1-11); the lawsuit brought by Preston and the injunction granted against C. Wilson (*Id.* at 70:1-25); C. Wilson's understanding that she could not vote on an item where her personal interest exceeds that of the general public, which she confirmed (*Id.* at 74:24-25; 1-24); whether C. Wilson voted on the Severance Agreement containing a release when she previously was put on notice of tort claims personally, against her, which she admitted (*Id.* at 75:1-14); and C. Wilson's provision of a confidential settlement agreement to Rick Freemantle in violation of ACC § 2-288, which she confirmed. (*Id.* at 75:23-25; 76:1-77:8; 81:1-15.) The County also called Waldrep and C. Wilson in their case-in-chief and elected not to question either about potential disqualification issues.

Notably, the only commission McAbee ever received occurred in April of 2008, over five (5) months before Preston's employment dispute arose in September of 2008 and over seven months before the Severance Agreement vote in November of 2008. (Order, at 8.) The trial testimony and exhibits further revealed McAbee recused himself from every vote relating to the transaction, which arose out of a real estate contract originating years before. (Order, at 8; Def. Ex. 58; Def. Ex. 59; Def. Ex. 60.) No evidence of record reflected Preston had anything to do with the commission received by McAbee. (Order, at 8.) And, the trial testimony failed to establish McAbee received any part of any commission from the properties listed by Plummer or involving the County.

See Kahn Constr. Co. v. S.C. Nat'l Bank of Charleston, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (1980); *Baptist Found. for Christian Educ. v. Baptist College*, 282 S.C. 53, 59-60, 317 S.E.2d 453, 458 (Ct. App. 1984); *Smothers v. Richland Mem'l Hosp.*, 328 S.C. 566, 570, 493 S.E.2d 107, 109 (Ct. App. 1997).

Anderson County Code § 2-352(b) states: "It shall be the responsibility of members, individually and collectively, to become familiar with the provisions of [the Ethics Act] and conduct themselves accordingly." (ACC § 2-352(b).) In turn, ACC § 2-289 states in material part: "When an official ... has doubt as to the applicability of a provision of this division to a specific situation or definition of terms used in the Code, he shall apply to the county attorney for an advisory opinion and be guided by that opinion when given." ACC § 2-289.

Moreover, misrepresentations as to matters of law cannot support claims for constructive fraud or fraud. *See Barber v. Barber*, 291 S.C. 399, 400, 353 S.E.2d 882, 883 (Ct. App. 1987); *First Nat'l Bank of Greenville v. U.S. Fid. & Guar. Co.*, 207 S.C. 15, 30, 35 S.E.2d 47, 59 (1945).

The County's argument is also misplaced since it overlooks a number of findings in the Court's Order, including: "As to Thompson and R. Wilson, the County failed to introduce any evidence linking the alleged improprieties to Preston's Severance Agreement." (Order, at 25.); "Plaintiff failed to prove such disclosures were material to the outcome ... even if made." (Order, at 25.); "[T]his Court has invalidated any tainted votes and the result of the voting remains unchanged." (Order, at 25.); "No evidence proved the [Schaum] Contract's renewal was in any way material or related to the County Council's decision to approve Preston's Severance Agreement." (Order, at 27.); "The evidence further failed to prove County Council would not have approved the Severance Agreement, regardless. Indeed, the Court finds the evidence of record proves otherwise." (Order, at 27.)

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Compare Order, at 9 ("No evidence establishes R. Wilson knew of the Services Contract's extension when he voted.") with Order, at 26-27 ("[T]he Court finds the Services Contract was a public file and Preston had no duty to inform Council of public information. *See, e.g.*, S.C. Code Ann. § 30-4-40(a)(5)(A). It had been widely known that Schaum had a Services Contract with the County long before Preston asserted any claims against the County. Schaum's relationship with R. Wilson was likewise known.")

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The fact that the file was public does not prove R. Wilson knew about the Services Contract's extension when he voted.

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The sentence does not relate to the Services Contract's extension but rather to the fact that Schaum had a contract with the County, which had existed since September 4, 2007. (*See Am. Compl.*, ¶26.)

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Moreover, the Order discounted R. Wilson's vote on other grounds. (Order, at 9.)

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The County's Motion simply overlooks the numerous factual findings made by the Court in the Order. The Court incorporates such factual findings herein by reference. (*See, e.g.*, Order, at 18-22: ("[T]he Court finds Anderson County Council's approval of the Severance Package fell within the advice of counsel and has proven a reasonable choice." (Order, at 20)); ("The reasonability of County Council's decision-making proves especially true in light of the steps the Council-elect had leaked to the public as their intended course of action upon taking office." (Order, at 20)); ("[I]t is worth noting that Preston's claims, as articulated in correspondence from his attorney dated October 23, 2008, included potential tort claims and exceeded severance claims arising strictly from the four corners of his Master Employment Agreement." (Order, at 20 n.16)); ("Thus, contrary to Plaintiff's suggestions, County Council's mere approval of a Severance Agreement providing for severance amounts exceeding the strict operation of Preston's Master Employment Agreement does not render the Severance Agreement arbitrary and capricious." (Order, at 20 n.16)); ("By November of 2008, the evidence at trial demonstrated that the issue of whether to suspend and dismiss Preston had already been made by Council-elect without giving Preston the right to present evidence at a fair and impartial hearing before the entire 2009 Council." (Order, at 21)); ("To follow such course could very well have resulted in the costly litigation feared by the County's employment lawyer. The County's employment lawyer estimated potential exposure, including attorney's fees and costs, of up to two million (\$2,000,000.00) dollars." (Order, at 21)) ("Each of the Council members who the Court has found properly voted for the Severance Agreement provided independent and lucid reasons supporting their votes." (Order, at 21 n.18)); ("Also, it is noted that the *Cunningham* case has been allowed to go forward toward trial on issues relating to his wrongful discharge. These are some of the same issues that may have been asserted by Preston had the plan developed by the councilmen and councilmen-elect in the time leading up to this vote been allowed to proceed as had been planned." (Order, at 21)) ("It is noteworthy that, upon that upon taking office, Council-elect did take actions to initiate this litigation on similar issues facing the 2008 Council in the litigation averted by the Severance Agreement. The resulting costs to Anderson County for this litigation and the underlying investigation have exceeded the County employment attorney's 2008 estimate of two million dollars (\$2,000,000.00)." (Order, at 22)) ("The Court finds the witnesses supporting the Severance Agreement, specifically Gracie Floyd, Larry Greer and Bill McAbee, to be the more credible witnesses in the trial. Other testimony at trial was evasive and not credible concerning the emails between those parties that did not support the approval of the severance package untrustworthy." (Order, at 40)).)

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The only authority the County has cited to support its argument is that of *Collins Holding Corp. v. Wasau Underwriters Ins. Co.*, 204 Fed. Appx. 208 (4th Cir. 2006). *Collins* was an unpublished opinion having no precedential value in this Court. *Council v. Catoe*, 359 S.C. 120, 127, 597 S.E.2d 782, 785 (2004) ("Further, as an unpublished opinion, *Locklair* has no precedential value." (citing Rule 220(a), SCACR)); *Lanham v. Blue Cross & Blue Shield of South Carolina, Inc.*, 338 S.G. 343, 349, 526 S.E.2d 253, 256 (Ct. App. 2000) ("However, it should be noted unpublished opinions have no precedential value.") Moreover, *Collins* bears no resemblance to facts *sub judice*. *Collins* involved a dispute under an insurance contract between two private entities. The insurer paid Collins the sum of two hundred and ninety-six thousand dollars (\$296,000.00) and informed Collins no additional replacement cost amounts would be paid unless Collins completed repairs by a slated date. Collins did not make the repairs by the date specified by the insurer. Under such facts, the Court found no anticipatory breach of contract existed.

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If potential liability proved as speculative as the County's Motion suggests, the "County's employment attorney would not have identified a potential downside risk of up to two million dollars (\$2,000,000.00)." (Order, at 22 n.19.) Moreover, "the County's employment lawyer alluded to subsequent events before County Council acted upon the Severance Agreement." (Order, at 17 n.17.) And, the County's employment lawyer also conceded during trial testimony that public officials had to take into consideration additional factors relating to the public, which fell beyond his scope of knowledge and expertise.

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(Order, at 21, n.18) (hoping political infighting would end that had impaired the County's ability to do business for years; sought to avoid the potential downside risk of two million (\$2,000,000.00) dollars; sought to avoid risk to economic development; deemed it important to treat the County Administrator fairly so as not to impair County's ability to find another Administrator; believed the Severance Agreement was the honest and fair thing to do; believed it was important for the County to treat Preston honestly and fairly; sought to avoid deleterious situation to County; sought to remove impediment to County Council's ability to move forward.))

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At the time of the November 18, 2008 meeting, the Parties had already submitted filings and had participated in a hearing on the issues prompting the Court's Order.

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The Court rejects the County's arguments, in this regard, as without basis. As County Administrator, Preston did file a lawsuit against Waldrep and Wilson in their individual capacities seeking an injunction, attorney's fees and costs for interfering with his job. And, in his individual capacity, Preston gave notice of tort claims against Waldrep and C. Wilson in their individual capacities for interfering with his job. In both instances, the claims against Waldrep and C. Wilson were against them in their individual capacities, which is why the release operated to confer an economic benefit on them personally but not the other Council members.

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The County also disregards the Court's finding that: "County Council's mere approval of a Severance Agreement providing for severance amounts exceeding the strict operation of Preston's Master Employment Agreement does not render the Severance Agreement arbitrary and capricious." (Order, at 20 n.16.) The Court cited three reasons for the same: Preston's demand asserted tort claims exceeding the four corners of the Master Employment Agreement; the release contained in the Severance Agreement exceeded the scope of the release contemplated by the Master Employment Agreement; and the Master Employment Agreement contained an indemnity provision, which survived the

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Agreement, but was terminated under the Severance Agreement. (Order, at 20 n.16.) The County's Motion does not refute any of the Court's findings in this regard.

The Court specifically incorporated such analysis into its discussion of the County's breach of fiduciary duty claim. (Order, at 23 n.20.)

As the Order reflects, Preston had: sued C. Wilson and Waldrep individually; retained personal counsel; furnished notice of his claim against the County; and furnished notice of tort claims he intended to bring against individual Council members. (Order, at 25.) Like Preston, the County, C. Wilson, and Waldrep had retained their own attorneys to protect their interests. (Order, at 25.) Thus, at the time of the Severance Agreement vote and earlier, "Preston was a claimant against certain Council members and Council itself and the parties' "adversarial positions" were both "open and known" to both parties, as the parties had actively engaged in negotiations adverse to each other. (Order, at 25.)

Moreover, while South Carolina courts have not yet addressed the issue, those courts from other jurisdictions addressing the issue have reached the same conclusion as this Court. *See e.g., Boaz v. Boaz*, 221 S.W.3d 126, 133 (Tex. Ct. App. 2006) ("[A]dverse parties who have retained professional counsel ... do not owe fiduciary duties to one another."); *Gray v. Caldwell*, 904 So.2d 212, 215 (Miss. Ct. App. 2005) ("[I]n transactions of sale of their interests, cotenants do not stand in a relationship of mutual trust and confidence toward each other, but deal as adverse parties."); *Bender v. Wise*, Ca. No. 04-0521, 695 N.W.2d 335, at *3 (Iowa Ct. App. Dec. 22, 2004) (Unpublished Opinion) ("Nothing in the relationship between adverse parties suggests the existence of a fiduciary duty."); *Smalley v. Smalley*, No. 09-11-00261, 2012 WL 1448433, at 5-6 (Tex. Ct. App. Apr. 26, 2012); ("[A]dverse parties who have retained professional counsel... do not owe fiduciary duties to one another") The County has supplied no legal authority to the contrary.

The eleventh ground of the County's Motion is also misplaced since it ignores the Order's factual findings regarding Jones. (Order, at 27) ("No evidence of record demonstrates that any document executed by Preston changed the County's existing contractual obligations to Jones."); (Order, at 27) (citing Jones Tr. Test. (Depo.) (relating to SUV allegations: 125: 9-19; 127: 20-25; 128: 1-13; 128: 24-25; 129: 1-5; 129: 18-25; 130: 1-4 Def. Ex. 66; Def. Ex. 138); (relating to Educational Reimbursements: 122: 5-20; 123: 10-12; 123: 17-25; 124: 14-25) ("The documents in question simply memorialized agreements that had been previously made and acted upon by all parties."); (Order, at 28) ("[T]he County failed to prove that Preston executed any memoranda on or after December 1, 2008, as alleged.") (Order, at 28.) ("[T]he Court finds none of the allegations relating to Jones breached the Severance Agreement, nor did the execution of Jones' employment memoranda harm the County in any way."); (Order, at 28) ("Even if Preston somehow breached the Severance Agreement, which is rejected as unsupported, the Court finds that any such breaches would not rise to the level of justifying a rescission of the contract."); (Order, at 28 n.23) ("The Court notes that the evidence demonstrated Jones had use of a County vehicle from December of 2006 until her departure in 2009, which was standard and necessary for her job."); (Order, at 28 n.23) ("Jones never submitted any educational reimbursements."); (Order, at 28 n.23 (citing Jones Tr. Test. (Depo.), 117:22-23) ("As to the travel memorandum, Preston never executed the memorandum and Jones never took the contemplated trip."); (Order, at 28 n.23) ("None of the Jones' allegations impacted the County whatsoever.")

The Order's finding regarding the unavailability of rescission proves entirely consistent with the law concerning constructive trust. As the Order correctly

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notes: "In the absence of fraud which would justify shifting the loss to the party who opposes rescission, rescission is appropriate only if both parties can be returned to the status quo prior to the contract." *King v. Oxford*, 282 S.C. 307, 313, 318 S.E.2d 125, 129 (Ct. App. 1984). Moreover, the County appears to suggest that it can simultaneously abrogate the Severance Agreement, a fully integrated contract acknowledging the Parties' respective obligations are conditioned upon performance of the covenants stated therein in (see PL Ex. 7, at 4, ¶¶ 14 & 17), while simultaneously preserving monies paid to the state retirement system but re-directing such payments to Plaintiff. But, the County neither pled partial rescission and "[i]t is a generally applied rule that an integrated or indivisible contract cannot be rescinded in part." See *BHP Petroleum Co., Inc. v. Okie*, 836 P.2d 873, 883 (Wyo. 1992); 17A AmJur. 2d *Contracts* § 548 (1991)). Of course, the Court's Order did not need to pursue such in depth analysis, as the Court found the County failed to prove its claim for constructive trust. Moreover, the *Thompson* decision involved unique issues under New Jersey's Faulkner Act, which have no application to the case at bar or under South Carolina law.

The County's Reconsideration Motion does misstate two items worthy of correction. First, the County suggests Preston's lawsuit "was premised on actions that took place years before..." (PL's Mot., at 12.) The evidence of record at trial demonstrated Waldrep's and C. Wilson's interference with Preston's duties had begun several years prior but had continued to increase and peaked on or about the time of the Severance Agreement vote. Second, the County argues "the injunction awarded in that case gave Preston a remedy that undermines his claims in negotiating for a Severance Agreement of other 'unspecified torts.'" (PL's Mot. to Recons., at 12.) This is inaccurate. At the time of the Severance Agreement vote the injunction had not even issued. So, the County's argument in this regard is misplaced. Moreover, while the subsequent injunction may have abated Waldrep's and C. Wilson's continued interference with Preston's contract, it would not have afforded Preston relief for harms he had already sustained and would not foreclose potential tort liability for the same.

**STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY**

AMY KOVACH,

Plaintiff,

v.

Civil Action No. 2015-CP-08-2380

**JOSHUA S. WHITLEY and
KAREN WHITLEY in her
Individual Capacity,**

Defendants.

JOSHUA S. WHITLEY,

Defendant/Counterclaimant,

v.

AMY KOVACH,

Plaintiff/Counterclaim Defendant.

JOSHUA S. WHITLEY,

Defendant/Third-Party Plaintiff,

v.

**RODNEY THOMPSON and ALAN WILSON,
Attorney General for the State of South Carolina,**

Third-Party Defendants.

**DEFENDANT JOSHUA S. WHITLEY'S AMENDED MOTION FOR
SANCTIONS AGAINST PLAINTIFF AND PLAINTIFF'S COUNSEL
AND BRIEF IN SUPPORT OF AMENDED MOTION FOR SANCTIONS
AGAINST PLAINTIFF AND PLAINTIFF'S COUNSEL**

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PLEASE TAKE NOTICE the Defendant Joshua S. Whitley ("Whitley" or "Defendant") hereby moves this Honorable Court, pursuant to Rule 11 of the South Carolina Rules of Civil Procedure and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10, *et seq.*, within ten (10) days or as soon thereafter as can be heard, for an Order sanctioning Plaintiff, Amy Kovach ("Kovach" or "Plaintiff") and Plaintiff's counsel, Nancy Bloodgood, Esq. ("Bloodgood"), for filing a false and frivolous lawsuit meant only to harass the Defendant and which is utterly contrary to the convicted criminal Plaintiff's under oath testimony before this Court. Plaintiff originally filed his motion against Bloodgood only; however, because Plaintiff and Bloodgood disagree as to critical facts leading up to the filing of the frivolous Complaint that is the subject of this motion, Plaintiff may also be subject to sanctions under Rule 11. As an officer of the Court, Bloodgood's conduct is sanctionable because, in short, she either failed to review the August 28, 2015 criminal sentencing transcript of her client, or chose to ignore it, choosing instead to file a frivolous claim based solely on her client's patently false rendition of the facts. Plaintiff is also subject to sanctions under Rule 11 due to the false information included in the Complaint, her involvement in the filing of the frivolous Complaint, and her agreement to the vexatious and baseless allegations in the Complaint.

BACKGROUND

Defendant moves for sanctions against Plaintiff and Bloodgood because Plaintiff's claim against him for civil conspiracy is vexatious, devoid of factual support, and reflects an abject failure on the part of Bloodgood to investigate the factual basis for the claim and the controlling legal authority. Plaintiff is subject to sanctions pursuant to Rule 11 for filing a frivolous Complaint.

Plaintiff is the former Director of Communications and Community Relations for the Berkeley County School District ("BCSD"). Beginning in 2012, Whitley, a private citizen and taxpayer in Berkeley County, observed misrepresentations and questionable fundraising efforts by Plaintiff and other BCSD officials. It appeared to Defendant that these officials were in violation of Section 8-13-1346 of the South Carolina Code of Laws, which prohibits the use of public funds to influence an election. Defendant investigated the matter by seeking access to relevant documents from the BCSD through the South Carolina Freedom of Information Act ("FOIA"), pursuant to which "*any person* has a right to inspect or copy any public record of a public body..." S.C. Code Ann. § 30-4-30 (emphasis added).

Upon review of the documents produced under FOIA - in particular, emails from Plaintiff in which she actively engaged in campaigning in favor of a Referendum in violation of the law - Plaintiff's misconduct was manifest. Accordingly, Defendant took his concerns to the Attorney General, and the South Carolina Law Enforcement Division ("SLED") conducted a thorough investigation. SLED's investigation resulted in six indictments filed by the Attorney General, including five indictments against Plaintiff. She was charged with engaging in misconduct in office in violation of the common law of South Carolina and the criminal use of public funds to influence an election in violation of Section 8-13-1346 of the South Carolina Code of Law. She was also charged with two counts of felony forgery because of her efforts to conceal her criminal activity and one count of perjury related to fraudulently conducting procurement matters. Plaintiff entered a plea of guilty to the misconduct in office and ethics charges during a sentencing hearing on August 28, 2015, at which time she admitted that she knew when she committed her crimes that her actions were in violation of the law. As a part of her guilty plea, she also admitted facts supporting the two felony forgery charges and the perjury charge related to her efforts to cover up her misconduct.

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Less than two months after entering her guilty pleas, Plaintiff, by and through Bloodgood, filed the Complaint in the instant action in which she alleges, *inter alia*, that Defendant, Joshua S. Whitley (“Whitley” or “Defendant”) along with the Berkeley County School District, Terry Hardesty, Scott Marino, Karen Whitley in her Individual Capacity, and the Berkeley County Republican Party “conspired with each other to harm [her].” (Complaint, ¶ 159.) Her conspiracy claim lacked any factual support. As Plaintiff’s Answer, Affirmative Defenses, Counterclaims, and Motion to Dismiss demonstrate, no reasonable attorney would file this claim against this Defendant on behalf of this Plaintiff. The facts alleged in the Complaint are in direct contradiction to those to which Plaintiff agreed *under oath* during her guilty plea hearing on August 28, 2015. Bloodgood either failed to review the August 28, 2015 transcript or chose to ignore it, choosing instead to file a frivolous claim based solely on her client’s patently false rendition of the facts.

Because the allegations in the Complaint directly contradict the facts to which Plaintiff agreed under oath on August 28, 2015, the Attorney General filed a notice on November 9, 2015 against Plaintiff to show cause why she should not be held in contempt. (Rule to Show Cause and Petition in Support, attached as Exhibit A). Only after the Attorney General filed its Rule to Show Cause did Plaintiff and Bloodgood seek voluntary dismissal of the Complaint. The show cause hearing took place on February 8, 2016, before the Honorable W. Jeffrey Young in the Court of General Sessions. During the February 8, 2016 hearing, Plaintiff testified that Bloodgood failed to perform due diligence before filing the Complaint, and that the advice Bloodgood gave her was provided without a clear understanding of what the Attorney General had alleged or what occurred at Plaintiff’s guilty plea hearing held on August 28, 2015. (Show Cause Transcript, attached as Exhibit B, pp. 8, 10.) She also agreed with her attorney’s statement that Bloodgood did not review the transcript of the guilty plea hearing before the

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Complaint was filed, and that the instant civil case against Whitley and others had been “withdrawn with prejudice.” (Exhibit B, pp. 8-9.) Ms. Kovach testified that she filed the Complaint on the advice of her counsel, Bloodgood. (Exhibit B, p. 10.) Thus, Plaintiff placed the blame for filing the frivolous Complaint squarely on Bloodgood.

On February 10, 2016, Bloodgood filed her opposition to Mr. Whitley’s original motion for sanctions against her. In it, she claims that she received the guilty plea transcript on October 13, 2015, and revised the draft Complaint on October 14, 2015 based on her review of the transcript, before filing it on October 15, 2015. (Opposition Brief, p. 8.) She also asserts that she reviewed versions of the Complaint with Plaintiff. *Id.*

Because both versions of events leading up to the filing of the Complaint cannot be true, Whitley amends his Motion for Sanctions to include Plaintiff so that she can be before the Court and the Court can determine whether her conduct is sanctionable under Rule 11.

ARGUMENT

The Complaint reflects complete disregard by Plaintiff and Bloodgood for the obligation to refrain from filing a pleading that lacks ground to support it. It represents the very sort of conduct Rule 11 is intended to deter. The Complaint lacks any factual and legal basis, and its filing was not for a proper purpose; instead, it was unreasonable, vexatious, improperly motivated, and intended to harass. The Court should therefore order the dismissal of the case and award Defendant his costs and attorneys’ fees in accordance with Rule 11. Furthermore, because no reasonable attorney would believe that Plaintiff’s civil conspiracy claim is reasonably founded or warranted under existing law, the Court should award sanctions against Bloodgood pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Action, S.C. Code Ann. §

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15-36-10, *et seq.* Bloodgood's actions also violate multiple Rules of Professional Conduct, as addressed below.

I. SANCTIONS AGAINST BLOODGOOD ARE WARRANTED BY RULE 11.

Rule 11 provides that the signature of an attorney on a pleading "constitutes a certificate by him that he has read the pleading... and "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." SCRPC 11. If the pleading is signed in violation of the Rule, the court 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...including a reasonable attorney's fee." *Id.* Under Rule 11 of the South Carolina Rules of Civil Procedure, a trial court may impose sanctions on a party, a party's attorney, or both "for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments." *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162, (1996); *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 645, 760 S.E.2d 399, 412 (2014) (upholding sanctions under Rule 11, SCRPC, when a party "engaged in 'dilatory litigation tactics,' lodged 'frivolous and dilatory appeals,' filed affidavits and memoranda 'without reasonable basis,' and moved for reconsideration after nearly every ruling made by the circuit court").

The conspiracy claim Plaintiff and Bloodgood filed against Whitley had no "good ground to support it." The sum total of the conspiracy allegations against Defendant in Plaintiff's fourth cause of action is as follows:

- He 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.)

- He 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.)
- He 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.)
- State Senator Larry Grooms, who sat in the front row at Plaintiff’s criminal case hearings and “acknowledged Defendant Joshua S. Whitley’s actions towards Plaintiff when he stated publicly, ‘Josh has got the goods on her.’” (Complaint, ¶ 163.)
- He exchanged emails with his mother, Defendant Karen Whitley, regarding the lease of Karen Whitley’s private property while Karen Whitley was at work. (Complaint ¶ 168.)
- He 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.)
- He “threatened to sue volunteer Campaign Coordinator Co-Chair Jane Pulling if she continued to support Plaintiff.” (Complaint, ¶ 171).
- He “bragged publically that he hoped to harm the School District.” (Complaint, ¶ 172).
- He “issued multiple FOIA requests for emails of other BCSD employees who publically expressed support for Plaintiff.” (Complaint, ¶ 173).
- He “knew and encouraged his mother to use public resources while she was working to lease her personal property which personally benefited her.” (Complaint, ¶ 174).

Thus, the only actions that Bloodgood alleges that Whitley and others “conspired with each other” to do was to (1) file a complaint with the Attorney General, and (2) ensure a Resolution was passed by the Berkeley County Republican Party, LLC encouraging the Attorney

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General to prosecute Plaintiff, both of which these Defendants were within their rights to do. Plaintiff and Bloodgood allege that false statements were made to SLED and the press, but they fail to identify any such statements. They complain that Defendant sought information through FOIA, which is a right preserved to any person under South Carolina law § 30-4-30 (emphasis added). They assert that Defendant violated Rule 3.6 of the Professional Rules of Conduct, which is clearly inapplicable to Defendant's speech as a concerned private citizen/taxpayer and does not prevent Defendant from exercising his First Amendment rights. Moreover, the unsupported allegation appears to be meant to harass Defendant and meant for leverage in a lawsuit, as they clearly ignored that Plaintiff's criminal counsel did indeed comment in the press during the investigation and post-indictment.

In any event, in light of Plaintiff's guilty plea, there is no doubt that Defendant's concerns - which prompted the FOIA request, the complaint to the Attorney General and the efforts to prosecute her, as well as his protected speech - were well founded. Further, Defendant is immune from liability for his good faith reporting of Plaintiff's criminal activities and, as a citizen, he enjoyed a qualified privilege in his reports of "judicial records and proceedings and other official acts, reports, and records." *White v. Wilkerson*, 328 S.C. 179, 186, 493 S.E.2d 345, 348 (1997); *Jones v. Garner*, 250 S.C. 479, 158 S.E.2d 909 (1968). A person is shielded from liability for publishing information "originally based upon government reports or actions." *Id.* *Carter v. Dozier*, 2011 U.S. Dist. LEXIS 66335, *10 (D.S.C. May 31, 2011). In addition, it is settled law in South Carolina that, "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

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(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).

The real purpose behind Plaintiff’s Complaint is revenge. Plaintiff sought to harass and intimidate those who discovered and reported her illegal activities, and she is therefore subject to sanctions under Rule 11. Bloodgood, as an officer of the Court, had a duty to refrain from filing vexatious pleadings pursued as a means of retribution. Bloodgood’s assertion that she did not “know” Whitley and had no personal reason to harass him does not protect her from this duty. Bloodgood also had an absolute obligation to file a truthful Complaint. Incredibly, although Plaintiff and Bloodgood acknowledge in the Complaint that Plaintiff entered a plea of guilty to two of the charges against her, Bloodgood failed to review the transcript of the sentencing hearing to determine the extent of Plaintiff’s admissions when Plaintiff entered her plea. In her opposition to Defendant’s original Motion for Sanctions, Bloodgood claims that she did review the guilty plea transcript. This, however, is an incredible assertion. No reasonable attorney, after having reviewed her client’s admissions during the guilty plea hearing, would have believed that the instant case was warranted. Bloodgood had an absolute obligation to order and read the criminal sentencing transcript prior to filing a false Complaint that contradicts the Convicted Criminal Plaintiff’s under oath admission to ALL of the facts of ALL five indictments charged against her. Plaintiff and Bloodgood undermine the rule of law and our system of justice by filing a complaint that directly contradicts the facts to which Plaintiff admitted under oath during her guilty plea hearing.¹

¹ The entire sentencing transcript is attached as Exhibit C.

A review of the transcript of the guilty plea hearing on August 28, 2015 exposes these myriad contradictions and provides conclusive evidence that Plaintiff and Bloodgood should be sanctioned for the filing of this Complaint. The attached chart compares the allegations of the Complaint to the facts to which Plaintiff agreed during the August 28, 2015 sentencing hearing. (Exhibit D, attached). In paragraph 38 of the Complaint, Plaintiff and Bloodgood allege that the video Plaintiff was working on was not prepared in anticipation of the Referendum.” (Complaint, ¶ 38.) However, during the sentencing hearing, the Court read from the indictment, “Amy Kovach did use public funds to pay for the creation of a campaign video...Is what’s stated in the indictment the truth?” Kovach answered, “Yes, sir.” (Exhibit C, p. 8.) The Attorney General then provided a detailed explanation of how Plaintiff paid for the video and for campaign signs for children to hold during the video and how she made false statements to SLED and the press concerning the videos. (Exhibit C, pp. 13, 17 19, 21, 26-27.) When the Court asked if Kovach agreed with the facts as stated by the Attorney General, Plaintiff answered, “Yes, sir.” (Exhibit C, p. 28.)

In addition, Plaintiff and Bloodgood allege at Paragraph 40 of the Complaint, that Plaintiff “never personally profited from her position with the [BCSD] and no one has ever alleged that she did.” (Complaint, ¶ 40.) During the sentencing hearing, however, the Attorney General explained that Kovach’s emails show that she was motivated by the advancement of her career. (Exhibit C, pp. 14-15.) Plaintiff agreed that those facts were correct as well. (Exhibit C, p. 28.)

At paragraph 57 of the Complaint, Plaintiff and Bloodgood allege that the “[FOIA’d] emails merely indicated Plaintiff and other BCSD employees were responding to questions about the school bond referendum, providing current information to the volunteer Referendum committee, and preparing Defendant BCSD Board members of public presentations.”

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(Complaint, ¶ 57.) However, the Attorney General explained that Kovach used her emails on county time for advocacy, organized rallies, promoted support using government resources and time. (Exhibit C, p. 11.) Kovach agreed with those facts. (Exhibit C, p. 28.)

Plaintiff and Bloodgood allege at Paragraph 83 of the Complaint that “no public funds were used by Plaintiff to create or pay for any Referendum campaign video” and that “the video Plaintiff finalized for the District in September of 2012 had been started months before the beginning of the Referendum process and for an entirely different purpose.” However, during the sentencing hearing she agreed that she did use public funds to pay for the creation of a campaign video. (Exhibit C, p. 7.)

Plaintiff and Bloodgood asserted at Paragraph 106 of the Complaint that Plaintiff’s attorney moved to disqualify the Attorney General after which the Attorney General “retaliated” against her by adding three “completely bogus” additional indictments, including a perjury and forgery charge, which were dismissed. However, at the sentencing hearing, Kovach agreed that she was pleading as indicted to the global law misconduct in office offense “*which covers and incorporates all of the conduct that have been charged at issue*, as well as the original ethics indictments for use of government funds to influence an election.” (Exhibit C, pp. 3, 28.) As the Attorney General explained, and Kovach agreed, Kovach submitted a false and fictitious document (an estimate from Go To Team) to cover up the payment of the campaign video. (Exhibit C, pp. 24, 28.) She also created another forgery, an invoice created after her interview with SLED, which she created in an attempt to cover up the fact that she did not get three estimates for the video as she had claimed. (Exhibit C, pp. 26-27.) Kovach agreed that she had forged that document as well. (Exhibit C, p. 28.) And, although Plaintiff and Bloodgood claim at Paragraph 111 of the Complaint that the indictment was “false and unfounded,” she agreed at the hearing that she was pleading guilty to facts supporting all five charged indictments, three of

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which were dismissed only as part of the plea agreement. (Exhibit C, pp. 3, 10.) Further, despite the allegation at paragraph 112 that the document was not Plaintiff's, the Attorney General set forth in meticulous and supported detail exactly how the criminal Plaintiff committed her forgeries and her crimes. Incredibly, after setting forth the exact OPPOSITE of what the Plaintiff and Bloodgood allege herein, the convicted criminal Plaintiff agreed with the facts as stated by the Attorney General.

Plaintiff and Bloodgood also claims in Paragraphs 113 through 117 of the Complaint that Plaintiff did not "smurf" or split up the cost of an item over time so that the total cost appears to be less than quoted. They claim that there was no smurfing "and the Attorney General knew or should have known there was no "smurfing." (Complaint, ¶ 114.) However, during the sentencing hearing, the Attorney General outlined precisely how Plaintiff had used "smurfing" to cover up her purchase of the video, and Plaintiff agreed to all of the facts as outlined by the Attorney General, without reservation. (Exhibit C, pp. 18-25, 28.)

In Paragraph 123, Plaintiff and Bloodgood allege that Plaintiff "eventually pled guilty to this particular charge because she had to end the criminal proceedings for her own mental health." (Complaint, ¶ 123.) In fact, she pled guilty to avoid more years from the forgery and perjury charges and testified to the facts of all of her crimes and that she was pleading guilty knowingly and of her own will. (Exhibit C, pp. 4, 5-7.)

As Plaintiff and Bloodgood have conceded by dismissal of this Complaint, Plaintiff is guilty of all of the crimes for which she was charged and to all the facts as laid out by the Attorney General. There is no question that Plaintiff cannot now seek compensation or punitive damages for an alleged conspiracy in reporting the misconduct to law enforcement or seeking to have her prosecuted for those charges, and her dismissal of the case against Whitley demonstrates that. The Complaint is therefore frivolous as it had no reasonable basis, and the

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purpose behind it was merely to harass those whose efforts to have Plaintiff prosecuted for her crimes were successful. Bloodgood was obligated to, at a minimum, read the transcript wherein her client admitted to the opposite of what Bloodgood pleads here. She either did not read it, or she blatantly (and without explanation) ignored the transcript, which violates Rule 11.

In her opposition to Plaintiff's original Motion for Sanctions, Bloodgood asserts that she did read the guilty plea transcript, and that she still determined that there was a sufficient basis for filing the suit against Whitley for civil conspiracy. Of course, this is an incredible assertion, as no reasonable attorney would believe that a complaint would be warranted after reading that transcript. To make this assertion, Bloodgood apparently seeks to draw a distinction between the facts that were admitted during the guilty plea hearing and the specific allegations of conspiracy against Whitley. However, if the allegations that directly contradict Plaintiff's guilty plea admissions are removed from the Complaint, there can be no complaint against Whitley. In the Complaint, Plaintiff professes her innocence to the charges against her; the fact that she pleaded guilty and admitted the factual basis for the charges validates Whitley's efforts to bring them to light. Any reasonable attorney would know that her client would be estopped from asserting a civil conspiracy claim under those circumstances, or worse, haled before a court to show cause as to why she should not be held in contempt.

II. DEFENDANT IS ENTITLED TO SANCTIONS PURSUANT TO THE FCPSA.

In addition to sanctions under Rule 11, Defendant is entitled to sanctions pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 (FCPSA) against Bloodgood. The FCPSA authorizes an award of attorney's fees in a civil action as a sanction against an attorney bringing frivolous pleadings, claims, or defenses. Pursuant to the FCPSA, an attorney participating in civil litigation may be sanctioned for:

(a) filing a frivolous pleading, motion, or document if:

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- (i) the person has not read the frivolous pleading, motion, or document;
 - (ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
 - (iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or
 - (iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based;
- (b) making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts; or
- (c) making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law or if there is no good faith argument that exists for the extension, modification, or reversal of existing law.

S.C. Code Ann. § 15-36-10(A)(4):

No reasonable attorney would believe that the civil conspiracy claim alleged in the Complaint was reasonably founded or warranted under existing law. Plaintiff entered a plea of guilty and admitted to a series of facts that directly contradicts the facts alleged in the Complaint and completely undermines the civil conspiracy claim against Whitley. A reasonable attorney presented with the same circumstances would believe that the claim was frivolous or intended merely to harass or injure Whitley. A reasonable attorney would have reviewed the transcript of the sentencing hearing that took place on August 28, 2015, and she would have known that the factual allegations in her Complaint were barred by her client's admissions during the hearing. A reasonable attorney would know that the filing of a complaint by concerned citizens seeking prosecution of a person who has admitted to the crimes that the Defendants sought to be investigated could not form the basis for a civil conspiracy cause of action. She would know that these defendants would be immune from such an action and that the reports they made were

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privileged under South Carolina law. Accordingly, in addition to the sanctions available under the Rule 11, the Court should award sanctions against Bloodgood pursuant to the FCPSA.

III. BLOODGOOD'S CONDUCT VIOLATES SOUTH CAROLINA'S RULES OF PROFESSIONAL CONDUCT.

Sanctions against Bloodgood are further warranted under the foregoing statutes based on her violation of multiple Rules of South Carolina's Rules of Professional Conduct. Bloodgood was subject to these Rules as an officer of the Court and counsel for Kovach. They are as follows:

1. RULE 3.1. MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law....

The comments to this rule state, in part, that lawyers are required to "inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions." RPC 3.1 (Comment 2). An attorney's actions are frivolous "if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by good faith argument for an extension, modification or reversal of existing laws." *Id.* Here, Plaintiff agreed on February 8, 2016, that the allegations of her Complaint directly contradict her sworn testimony during the guilty plea hearing. She also stated that she filed the suit on the advice of her attorney, and that her attorney failed to review the transcript of the guilty plea hearing. Thus, according to Plaintiff, Bloodgood failed to inform herself of the facts of her client's case and the applicable law to determine if she could make a good faith argument in support of Kovach's position. Bloodgood, of course, claims to have reviewed the transcript before filing the suit. This assertion is incredible; but even if it were true, filing the suit with full knowledge that the

allegations contained in it contradicted his client's sworn testimony would be a direct violation of Rule 3.1 of the Rules of Professional Conduct.

2. RULE 3.3. CANDOR TOWARD THE TRIBUNAL

A lawyer shall not knowingly:

make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer....

(RCP 3.3(a)). The comments to this Rule provide that, a "lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false." (RPC 3.3, Comment 2). The Complaint that Bloodgood filed on Plaintiff's behalf was riddled with false statements of fact that she either knew to be false or which she alleged without having conducted even minimal investigation. Obviously, she knew that Kovach had entered a plea of guilty to the charges against her and that a hearing had been conducted during which Kovach would have been required to admit to the factual bases for those charges. This knowledge alone should have prevented her from filing the Complaint on Kovach's behalf. By filing a Complaint in direct contradiction to her client's prior admissions, she failed in her duty of candor owed to this Court.

3. RULE 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

.....

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

Bloodgood violated the prohibition in Rule 3.4 against falsifying evidence by filing a Complaint which she knew to contain false allegations against Whitley and others. As the Complaint indicates, she was aware that her client entered a guilty plea, yet she used the Complaint to make

false allegations which contradicted the admissions during the guilty plea hearing. By doing so, she violated her duty of fairness to Whitley and other defendants and their counsel.

4. RULE 4.1. TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or*
- (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.*

The comments to this Rule provide that a “misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.” (RCP 4.1 (Comment 1)). Here, Bloodgood knew that Kovach had entered a guilty plea, yet she incorporated false allegations through which Kovach claimed her innocence into the Complaint. Bloodgood’s false factual statements as alleged in the Complaint amount to misrepresentations in violation of her duty of truthfulness under RCP 4.1.

5. RULE 4.4. RESPECT FOR RIGHTS OF THIRD PERSONS

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.*

This Rule prohibits lawyers from disregarding the rights of third persons in carrying out their responsibility to their clients. The allegations of the Complaint that Bloodgood filed not only contradicted myriad facts to which her client had admitted under oath, but also slandered Whitley for no purpose other than embarrassing him and causing him public humiliation and the financial burden of defending himself against false allegations. She thereby violated her duty to respect the rights of third persons imposed by RCP 4.4.

6. RULE 8.4. MISCONDUCT

It is professional misconduct for a lawyer to:

(a) *violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;*

.....

(d) *engage in conduct involving dishonesty, fraud, deceit or misrepresentation;*

(e) *engage in conduct that is prejudicial to the administration of justice;....*

(RCP 8.4). The comments to this Rule provide that “lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer’s behalf.” RCP 8.4 (Comment 1). In filing a frivolous Complaint against Whitley and others, Bloodgood engaged in misconduct which violated multiple rules of professional conduct that were designed to enhance the quality of justice in South Carolina. She willfully misrepresented facts, made allegations that had no basis in law and fact, and violated her duties of candor, truthfulness and fairness. She has thus violated her duty under Rule 8.4 to refrain from engaging in acts of misconduct.

Bloodgood may seek to blame Kovach *in camera* for the allegations in the Complaint. She may assert that Kovach misrepresented facts to her, and she simply made factual allegations in the Complaint based on what she was told by her client. This argument provides her with no refuge. The Rules of Professional Conduct require lawyers to use the law’s procedures “only for legitimate purposes and not to harass or intimidate others.” (RCP Preamble, Section 5). Lawyers are also required to demonstrate respect for the legal system and uphold the legal process. *Id.* Further, “Rule 11 imposes a duty on attorneys to investigate beyond the mere allegations of their clients.” *Blue v. United States Dep’t of the Army*, 914 F.2d 525, 542 (4th Cir. 1990); *Defoe v. Peed (In re Beeton)*, 1996 U.S. App. LEXIS 13461 (4th Cir. June 6, 1996). More importantly, Bloodgood *knew* – even without an investigation beyond what she was told by her

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client - that Kovach had entered a plea of guilty to the State's charges against her. She had to *know* that a part of entering a guilty plea was an admission to the factual bases underlying those charges, and that any allegations professing innocence would contradict her client's sworn testimony and place her in jeopardy. Bloodgood cannot, therefore, hide behind any misrepresentations of her client in an effort to avoid sanctions.

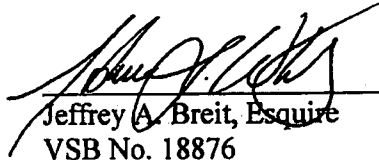
CONCLUSION

For the foregoing reasons, Defendant, Joshua S. Whitley, by counsel, respectfully requests that this Court enter an Order awarding him his costs and attorneys' fees due to the frivolous nature of this action and the vexatious purposes for which it was filed.

Pursuant to Rule 11, I hereby certify that any pre-filing consultation with opposing counsel would have served no useful purpose. Co-Defendant Karen Whitley's counsel had met with Nancy Bloodgood prior to the service of the lawsuit, and the undersigned believed any consultation by him or on his behalf would have served no useful purpose. Finally, pursuant to Rule 11, this certification cures the omission promptly after the omission was called to the undersigned movant's attention (within 24 hours).

Respectfully submitted,

JOSHUA S. WHITLEY



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August 25, 2016
Charleston, South Carolina

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STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Amy Kovach,

Plaintiff,

vs.

Joshua S. Whitley and
Karen Whitley

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

C.A. NO: 2015-CP-08-2380

PLAINTIFF'S REPLY TO MOTION
AND AMENDED MOTION OF
JOSHUA S. WHITLEY AND KAREN WHITLEY
FOR SANCTIONS

2016 SEP 15 AM 9:15
FILED
MERRY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

INTRODUCTION

The Plaintiff Amy Kovach respectfully opposes the Defendants' (or former Defendants') Motions for sanctions. Ms. Kovach, who was trying only to do her job in helping to improve the Berkeley County schools, was unwittingly drawn into a political battle that has resulted in her being indicted and ultimately pleading guilty to a crime. Her crime was that, as Director of Community Relations for the Berkeley County School District, she helped promote a school bond referendum. At all times she was doing what her superiors expected and told her to do, and what she thought she was supposed to do. Yet, when she learned that it was a crime to use public resources to promote a bond referendum, she pleaded guilty to that crime because she had done that. Later, when the School District fired her, she retained an experienced and reputable employment lawyer to represent her. She filed suit against the people who she believed were responsible for her criminal indictment and firing, which have devastated her life. The Attorney General then threatened her with contempt of court, asserting that the allegations of her grievance contradicted her guilty plea. She decided to drop this lawsuit rather than face more potential criminal liability.

She opposes the Defendants' motions for sanctions because she did not make false allegations in her complaint and her lawsuit was not frivolous. She wishes for her litigation to end and that

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whatever political or legal battles still need to be waged in Berkeley County be waged without her participation.

STATEMENT OF FACTS

In May, 2011, The Berkeley County School District recruited Amy Kovach to a one-year contract position in its public information office. Prior to taking this position, Ms. Kovach had worked exclusively in the private sector and had never worked for a school district or any other government entity. She did, however, have extensive experience volunteering in the non-profit sector, included work promoting education in the tri-county area. It was her successful history of community engagement and public relations that led the Berkeley County School District to seek her out for employment in 2011 as it prepared to implement plans for a school supply drive at the start of the 2011 school year. In that drive, Ms. Kovach created a community-wide school supply donation drive that included numerous private vendors and community businesses with the goal of supplying school supplies to economically disadvantaged students throughout the district.

As her one year contract was coming to an end in 2012, she was again approached by the District for the purpose of applying for the newly-created permanent position of Director of Community Relations. This position specifically entailed coordination of all internal and external district communications. Ms. Kovach interviewed for the position and was hired in June, 2012 as a permanent district employee. It was also at this time that Ms. Kovach was tasked by her superiors and the Berkeley County School Board with serving as the community relations liaison for the upcoming District Bond Referendum being contemplated for the November, 2012 election. Ms. Kovach was tasked with gathering any information requested by her superiors or the Volunteer "Yes4Schools" Campaign Committee formed at the start of August, 2012. Prior to this date, Ms. Kovach was gathering information necessary for communicating to the public regarding the specifics of the referendum, with

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the approval of her superiors and the board of education. Ms. Kovach presented her progress at no fewer than five school board meetings. At one meeting a board member even chastised her for failing to move the referendum effort along fast enough. Ms. Kovach reasonably believed that it was part of her job to promote the school bond referendum.

On or about August 6, 2012, the school board formally put the school improvement question on the ballot and, at this time, the volunteer Yes4Schools campaign committee began its work in reaching out to the community in order to inform and build support for passage of the referendum. As the district liaison to the committee, Ms. Kovach provided factual support to both the volunteer referendum committee as well as members of the public regarding district needs and plans for new school buildings and renovations of existing buildings. Her instructions from the district were that she could not directly ask the public to vote yes or no on the referendum but should work to provide information that did not specifically request a vote for or against the referendum. Relying upon this instruction, Ms. Kovach provided factual information to the campaign committee and responded to campaign members' numerous requests for informational support and guidance. She also attended public information meetings arranged by the volunteer campaign committee for the purpose of providing factual information regarding the district's needs. At these meetings, a school board member or district employee would appear along with a member of the public.

In November and December, 2012, Ms. Kovach was summoned to meet with district counsel to review emails that were subject to a FOIA request that had been made by defendant Joshua Whitley. At that time, Ms. Kovach asked if she had done something wrong during the campaign and was advised that she had not. It was not until March, 2013 that she was advised by Superintendent Rodney Thompson to seek out criminal counsel in connection with an investigation initiated by SLED pertaining to her activities during the referendum. She then hired counsel and requested indemnification from the district pursuant to SC Code Ann. Sec 59-17-110, which provides, "In the event that any employee of

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any school district in South Carolina is prosecuted in any action, civil or criminal, or special proceeding in the courts of this State, or of the United States, by reason of any act done or omitted in good faith in the course of his employment, it is made the duty of the school district, when requested in writing by any such public school employee, to appear and defend the action or proceeding in his behalf". In April, 2013, the school district voted to pay Ms. Kovach's legal fees in connection with the investigation.

Throughout 2013, Ms. Kovach cooperated with any request made of her by her counsel or SLED. Specifically, in May, 2013 she was asked to obtain video invoicing and estimates from a video produced during the campaign by a company called GoToTeam Video. As requested, she contacted the video production company and obtained the requested invoices which were provided to SLED through her counsel. Again during the summer of 2013, she was asked to provide an invoice from Nelson Printing Company for \$259.00 issued for 6 foam core signs featuring the Yes4Schools logo. Ms. Kovach contacted Nelson printing, obtained the October, 2012 invoice and provided it to SLED through her attorney.

On Friday, November 22, 2013, Ms. Kovach met with SLED agents under a proffer agreement for questioning regarding the referendum. At this meeting, she was asked about the \$259.00 Nelson Printing invoice and she informed the agents that the district had sought reimbursement for the \$259.00 sign printing cost from the Yes4Schools committee during the campaign. At SLED's request, Ms. Kovach reviewed her files on Monday morning, November 25, 2013 and found the original reimbursement invoice, dated October 3, 2012 for the signs in her files, which evidently by mistake had never been sent to the volunteer campaign committee. As requested, she scanned this document and emailed it to her attorney. Ms. Kovach heard nothing further regarding this document until September, 2014 when she was accused of creating the document between Friday, November 22, 2013 and Monday, November 25, 2013 and "back-dating" the document to October, 2012 in order to verify her proffer statement that the campaign had been invoiced for the signs. After being indicted for forgery based upon her alleged back-dating of this invoice, Ms. Kovach retained a forensic document examiner

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to analyze original document. Using advanced spectrographic analysis of the printer toner, the expert determined that the document was not created in November, 2013 as alleged in the indictment but was instead created at least a year prior to that date. A copy of this report is attached hereto and labelled as Exhibit "A". A copy of this report was given to the Attorney General in January, 2015.

On February 9, 2014 Ms. Kovach was informed that she had been indicted for one count of violating SC Code Ann. Sec 8-13-1346 for using government resources to influence the outcome of an election. No mention of any forgery or any other misconduct in office was made at that time. Ms. Kovach's counsel then made a motion to dismiss the indictment focusing on the statutory language of SC Code Section and the fact that the language specifically excludes a "Bond Referendum" from an election and that only a "Government Entity" and not an individual can be liable under the express language of the statute. A copy of this motion is attached hereto and labelled as Exhibit "B". A hearing on this motion was subsequently set for October 28, 2014, and the motion was denied.

After receiving continuing pressure and criticism from political figures and opponents of the referendum regarding the continuing payment of Ms. Kovach's legal fees, the school district retained retired Judge Victor Rawl to review the case and issue an opinion regarding whether the "conduct of Ms. Kovach as outlined in the indictment constitutes an act done or omitted in good faith in the course of her employment as provided for in SC Code Ann Sec 59-17-110. (See attached Exhibit "C"). On May 2, 2014, Judge Rawl answered the question in the affirmative and noted in his response an opinion from Professor John Freeman that Ms. Kovach's indictment did not preclude the school board from appearing or defending her in the indictment for using government resources in an election.

In August, 2014, SLED issued a warrant to obtain Ms. Kovach's work computer. Her counsel, realizing that privileged communications, including the November 25, 2013 scan of the reimbursement invoice, might be contained in the computer, filed a motion for protective order seeking an independent

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forensic examiner for the contents of the computer. The issue was not resolved until just prior to the October 28, 2014 hearing on the Motion to Dismiss. However, prior to that date, on September 9, 2014, Ms. Kovach was indicted for forgery for allegedly creating and backdating the October 3, 2012 printing reimbursement invoice. The indictment was based upon a review of the contents of Ms. Kovach's work computer conducted on or about August 25, 2014 while a motion for protective order was pending and without any resolution of this order. Neither Ms. Kovach nor her counsel had any idea that that computer had been searched until provided with a disk containing the search results at the October 28, 2014 hearing.

After the first forgery indictment, in October, 2014, Assistant Attorney General John McIntosh sent a letter to all school board members individually threatening legal action against the board and threatening to take civil action against the board if it continuing to pay Ms. Kovach's legal fees. In response, on January 20, 2015 Ms. Kovach's criminal counsel filed a motion to disqualify the Attorney General. (See attached Exhibit "D"). While this motion was ultimately unsuccessful, it highlights the extent to which the issue of payment of attorney fees dominated the background discussions between the school board and the attorney general's office.

In July, 2015 Ms. Kovach was indicted a second time for forgery involving invoices for the making of the aforementioned video. The charge came as a surprise to the Plaintiff as she had no knowledge of such a document. This charge alleged dishonesty and would thwart her statutory right to indemnification under SC Code Ann Sec 59-17-110 for acts done in good faith. Considering her mounting criminal exposure and the court's ruling that Section 8-13-1346 makes individuals criminally liable for using public resources to influence a bond referendum, Ms. Kovach chose to plead guilty to the original charges in order to avoid any further trauma to her and her family and avoid any further legal expenses to the district. Ms. Kovach respectfully directs the Court's attention to pages 28 - 29 of the transcript of

her guilty plea (Exhibit "E") to see exactly what she admitted to doing. She did not admit to any acts of dishonesty or forgery; only to expending public resources to support the bond referendum.

ARGUMENT

Plaintiff Kovach sought legal advice and representation from Attorney Bloodgood in response to an unusual and unprecedented employment situation, in which she believed that she had violated an election statute at the express direction of her superiors. While Ms. Kovach has taken responsibility for her actions, she can only provide such information to her counsel as she knows it to be. She did so to the best of her ability both during the criminal investigation and afterwards to her counsel, Nancy Bloodgood, prior to the filing of the instant complaint.

Plaintiff did not plead guilty to forgery or perjury

In their motions for sanctions, both Joshua Whitley and Karen Whitley incorrectly state that Plaintiff plead guilty to all of the facts of all five indictments in which she was charged and that this shows that all of the allegations contained in the Complaint are unsupported and improper. This is simply not the case. At her plea hearing on August 28, 2015, Plaintiff pled guilty to two misdemeanor indictments of Misconduct in Office and Using Government Resources to Influence the Outcome of an Election. (See Exhibit "E", Page 3). In exchange for the guilty plea to these two indictments, the state issued a nolle prosequi of the two forgery indictments as well as a perjury indictment. A nolle prosequi is a formal entry on the record that the prosecutor declares that he will not prosecute the matter any further. *State v. Gaskins*, 263 S.C. 343, 210 S.E.2d 590 (1974). Under the nolle prosequi agreement with the Attorney General, Plaintiff did not plead guilty to either forgery indictment or the perjury indictment. Her specific guilty plea, in her own words, is as follows:

The Court: "How did you violate the law? Did you lie? Did you use resources that you shouldn't have? What did you do?"

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The Defendant: "By using resources to promote school district and its agenda for passing the referendum." (Exhibit E Page 29: 20-25). The setting of the guilty plea was very stressful, with many interested observers present. Nevertheless, Ms. Kovach was clear and precise in what she admitted to having done. She stated that she acted to promote the agenda *of the district* to pass the referendum. It was not her agenda to pass the referendum, it was the *school district's*. She did not endorse every accusation that the assistant attorney general made in his lengthy presentation in support of the plea. In fact, when asked by the court to "Tell me in your own words what you did that broke the law", Ms. Kovach first responded, "I did my job at the discretion of the leadership of the school district with the leading counsel and the leadership of district as expected of me and filled my, fulfilled all of my obligations to those purposes at their discretion." (Exhibit E, Page 28:22 – 29:4). She did not state, then or ever, that she forged any document or perjured herself in any way. She cooperated in the investigation and provided all information and documentation requested of her by SLED investigators and her counsel to the best of her ability.

After being brought back before the court on February 8, 2016 on a Motion for Contempt filed by the Attorney General's Office in response to her employment grievance filed against the school district, Ms. Kovach again acknowledged that she had pled guilty to the two charges from August 28, 2015. Specifically, the exchange with the court was as follows:

The Court: What you told me on the day of your plea to the criminal charges was the truth; is that correct?

Ms. Kovach: That's correct.

The Court: you are guilty of those charges; is that correct?

Ms. Kovach: Yes sir. (See Exhibit "F", Page 11:9 – 14)

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Ms. Kovach acknowledged her guilt to the two charges from her plea agreement, namely, using government resources to influence an election and misconduct in office. She did not state that she had forged any documents or perjured herself in any way.

I. Sanctions against Plaintiff are not warranted under Rule 11 of the South Carolina Rules of Civil Procedure or the South Carolina Frivolous Civil Proceedings Act, S.C. Code Ann. Sec. 15-36-10 (FCPSA)

a. Plaintiff's actions in seeking counsel and filing her complaint did not violate Rule 11 of the South Carolina Rules of Civil Procedure.

Rule 11 (a), SCRCP provides that, "the signature of an attorney or party [on a pleading, motion or other paper] 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 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 the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other paper, including reasonable attorney's fees." *Ruyon v. Wright*, 471 S.E.2d 160, 322 S.C. 15 (1996).

In the instant case, Plaintiff retained employment counsel on or about September 2, 2015 in order to resolve an employment matter between herself and the Berkeley County School District. Plaintiff had just been advised by the school district that due to her guilty plea for conduct during the 2012 Berkeley County School Referendum campaign, she had 24 hours in order to resign or she would be terminated. Plaintiff quickly sought employment counsel regarding the district's ultimatum. In doing so, Plaintiff provided her counsel with all available information known to her regarding her employment agreement with the school district, her instructions from her superiors during the

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referendum campaign, the actions of her co-workers and volunteer campaign committee members during and after the campaign and the actions of referendum opponents during and after the campaign. Furthermore, Plaintiff provided to her counsel a record of numerous Facebook posts from members of the Berkeley County Republican Party attacking and maligning Plaintiff and making statements expressing a desire to injure her. (See attached Exhibit "G"). In addition, she provided to her counsel various newspaper articles on the subject, including quotes from other individuals as the matter was extensively covered in the press. Ms. Kovach did not invent these Facebook posts, newspaper articles, or the correspondence between others regarding the referendum. She simply provided the information that was available to her. At no time did Ms. Kovach deny that she had ultimately pled guilty to two of the charges leveled against her as a direct result of her work for the school district.

Based upon this information, Attorney Bloodgood drafted a complaint combining together the causes of action which she found to be appropriate and supportable. Plaintiff's sole purposes in retaining Nancy Bloodgood were to wind up her employment contract with the school district and to clear her name from various accusations leveled against her pertaining to her job performance. While Ms. Kovach did indeed plead guilty to using state resources in promotion of a bond referendum, she genuinely believed that her criminal prosecution was part of a political battle over control of the school district, and she gave Attorney Bloodgood the facts relevant to that belief. Attorney Bloodgood assimilated these facts and joined the necessary parties into one complaint intended to determine and vindicate her legal rights.

b. The Plaintiff's actions in filing her complaint did not violate the South Carolina Frivolous Civil Proceedings Act and the matter is not the subject to final order or decision.

The South Carolina Frivolous Civil Proceedings Act reads, in pertinent part: "At the conclusion of trial and after a verdict for or against damages has been rendered or a case has been dismissed by a

directed verdict, summary judgment or judgment notwithstanding the verdict, upon motion of the prevailing party, the court shall proceed to determine if the claim or defense was frivolous.” S.C. Code Ann Sec. 15-36-10(C)(1). This subsection C of the statute is the only portion that applies to a party as well as an attorney, by stating, “An attorney, party, or pro se litigant shall be sanctioned for a frivolous claim if the court finds that the attorney, party or pro se litigant failed to comply with one of the following conditions... .” Such motions are considered at the close of a trial in the matter or at the time of a disposition by dispositive motion. *Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 758 S.E.2d 483 (S.C., 2014).

In the instant case, Ms. Kovach has voluntarily dismissed her complaints and does not intend to proceed forward with any trial on the matter. Therefore, any ruling on sanctions pursuant to this Code Section would be unwarranted as her causes of action no longer exist. Nevertheless, even if the Court considers the motion on its merits, Ms. Kovach respectfully submits that she did not violate the Frivolous Civil Proceedings Act. While she chose to abandon her complaint and allow the matter to rest when it became apparent that the effort had the potential to cause more harm to her, the allegations were decidedly not made lightly or with frivolous intent. Most importantly, her Complaint does not contain any factual allegations that she would not have been prepared to support in a trial on the merits.

CONCLUSION

For the foregoing reasons, Defendant, Joshua Whitley and Karen Whitley’s Amended Motions for Rule 11 Sanctions and Sanctions under the S.C. Code Ann. Sec. 15-36-10 against the Plaintiff should be denied.

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FEDERAL FORENSIC ASSOCIATES, INC.

Post Office Box 31567 • Raleigh, North Carolina 27612
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December 18, 2014

Jerry N. Theos
Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith
17 1/2 Broad Street
Charleston, SC 29401

RE: State of South Carolina v. Amy Kovach
Our File No. 1114-2210

PURPOSE OF EXAMINATION

I was engaged as an expert in the area of Questioned Document Examination, particularly the analysis of document materials, in the above referenced matter. I was provided materials related to the existence of a single page document, Berkeley County School District Invoice. I was tasked with performing the appropriate physical and chemical testing upon the above referenced document for the purpose of detecting any inconsistencies related to either the method and manner of preparation or the timeliness of the preparation of the document. I was particularly requested to determine if the examination of the referenced document yielded results consistent with preparation of the document in the time frame September-October 2013.

QUALIFICATIONS

As an indication of my expertise in dealing with the above referenced task, I include the following brief description of my qualifications. I have been a Forensic Chemist specializing in the examination of questioned documents and particularly the examination of document materials and the determination of the date of preparation of documents for over 38 years. A copy of my curriculum vitae is attached as Exhibit A. During that time I have used my training and education in chemistry (B.S. and Ph.D.) and forensic science (M.S.F.S.) to address many different problems within the field of questioned document examination, including the determination of the sequence of preparation of different writings, the effect of environmental conditions on the materials used to prepare documents and the characterization of the various materials used to prepare documents, i.e. paper, writing ink, printing ink, toner and opaque materials. I have provided expert testimony in over 35 states and abroad in excess of 200 times. Additionally, I have presented research before scientific organizations including the American Academy of Forensic Sciences, the International Association of Forensic Sciences, the



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Southwestern Association of Forensic Document Examiners and the American Society of Questioned Document Examiners. A list of my publications is also contained within Exhibit A.

Attached to this report as Exhibit B is a list of the matters in which I have given sworn testimony in either deposition or trial for the last 4 years.

I am being compensated for time spent at the hourly rate of \$400.00. Receipt of compensation is in no way contingent upon our examination results or opinions espoused.

DOCUMENT TESTING METHODOLOGY

The document referenced earlier, "Invoice", was presented for examination in my offices on November 18, 2014.

PHYSICAL EXAMINATION

VISUAL AND MICROSCOPIC

The document was viewed with the unaided eye and was also examined with magnification ranging from 4X to 140X by means of handheld magnifiers and a digital microscope. The handheld magnifiers used room illumination and did not contain internal illumination. A digital microscope (MiScope) was also used that provided examination at either 40x or 140x with capabilities for digital image capture.

CHEMICAL EXAMINATION

This phase of examination is designed to analyze the components of the various materials found within the examined documents. These materials usually consist of paper, writing ink and printed text (which can be either toner based or ink based). The role of this examination phase is to characterize the materials for comparison with each other for purposes of the determination of common source or to determine the date or time period during which the materials were commercially available. Procedures also exist to allow for the determination of the date or time period of preparation of the document.

EXAMINATION OF XEROGRAPHIC TONER

1. It is often the case that documents that have been produced by the xerographic process are suspected of being recent productions, as opposed to documents that were prepared years in the past. As is the case with writing inks, xerographic toner has been found to change chemically with time. The methodology proposed is one that measures quantitatively the change in the chemical nature of toner.
2. The basis of this methodology has its foundation in previous studies related to the examination of writing inks. These studies date from the 1930's (Witte) through the

1950's (Kukuchi) and into the present day. (Cantu and Prough¹, Aginsky²). All of these studies indicated that writing inks when first applied to paper were different chemically and reacted differently to various stimuli than "aged" inks. By application of artificial aging conditions (heat or ultraviolet light), it was observed that the chemical measurements of "aged" or old writings yielded similar results to the measurements of artificially aged writings. A comparative examination of writings of known preparation date with writing whose date of preparation is unknown, resulted in a conclusion regarding the date of preparation of the unknown writing. Some of the more recent studies also proposed the application of threshold values for measurements as an indication of a more specific preparation time.³ All of these methodologies required the measurement of a parameter that could be quantified and treated by statistical measures.

3. In the early 1990's this author investigated the ability of an instrumental technique, X-ray Photoelectron Spectroscopy (XPS), to measure the chemical nature of xerographic toner. The XPS technique is a well researched and published analytical technique that measures the atomic and molecular structure and make up of both organic and inorganic materials. It has been in use for more than 50 years and has resulted in thousands of scientific articles. It is used routinely in the medical device field, particularly for the examination of polymers, and the semi-conductor field for both quality control and research regarding performance. Xerographic toner is a blend of polymer components and colorant, usually carbon black. In its raw form the measurement of toner will result in experimental data consistent with the chemical make-up of the toner and the specific polymer species. However, the electrostatic process used in the preparation of copies or laser print documents involves the use of a high voltage corona and the production of ozone (O₃), which becomes incorporated into the toner. This was evidenced by the change in XPS data from neat, or unprocessed toner, to the toner found on a document. It was also found that with time the toner reverted back to the chemical state of the toner before the xerographic process. By applying artificial aging methodologies to toner samples from documents of varying ages it was found that documents of less than 2 years of age resulted in significant and reproducible changes in several measured parameters. While documents that were greater than 2 years in age showed statistically insignificant variations in these parameters.
4. This work was introduced to the Forensic community at the International Association of Forensic Science meeting in Dusseldorf Germany in August of 1993 and published in the proceedings *Advances in Forensic Sciences*, B. Jacob, W. Bonte, Forensic Criminalistics 1, Volume 3, page 272. Additionally, work related to the specific analysis technique and the interpretation of the data was published in the authors dissertation entitled *Surface Characterization of Polymeric Materials by X-ray Photoelectron Spectroscopy and Time-of-Flight Secondary Ion Mass Spectrometry: Biomedical Materials and Forensic Applications*, University of North Carolina - Chapel Hill, 1999. Presentations were made at the annual meeting of the American Academy of Forensic Sciences (San

¹ Cantu, AA and Prough, RS, "On the Relative Aging of Ink-The Solvent Extraction Technique", *JFSCA*, Vol. 32, No. 5, Sept. 1987, pp 1151-1174

² Aginsky, VN. "Dating and Characterizing Writing, Stamp Pad and Jet Printer Inks by Gas Chromatography/Mass Spectrometry", *International Journal of Questioned Document Examiners*, Vol. 2, No. 2, April/June 1996, pp 103-115.

³ Gaudreau, M. & Aginsky, V., "Essentials of the Solvent Loss Ratio Method", Annual Conference of the American Society of Questioned Document Examiners, Victoria, BC, August 28-Sept. 2, 2010

Francisco, CA, February 1998), the American Society of Questioned Document Examiners (San Diego, CA, August 2002) and the International Association of Forensic Sciences (Hong Kong, 2005) that further outlined the experimental methodology and the measured parameters.

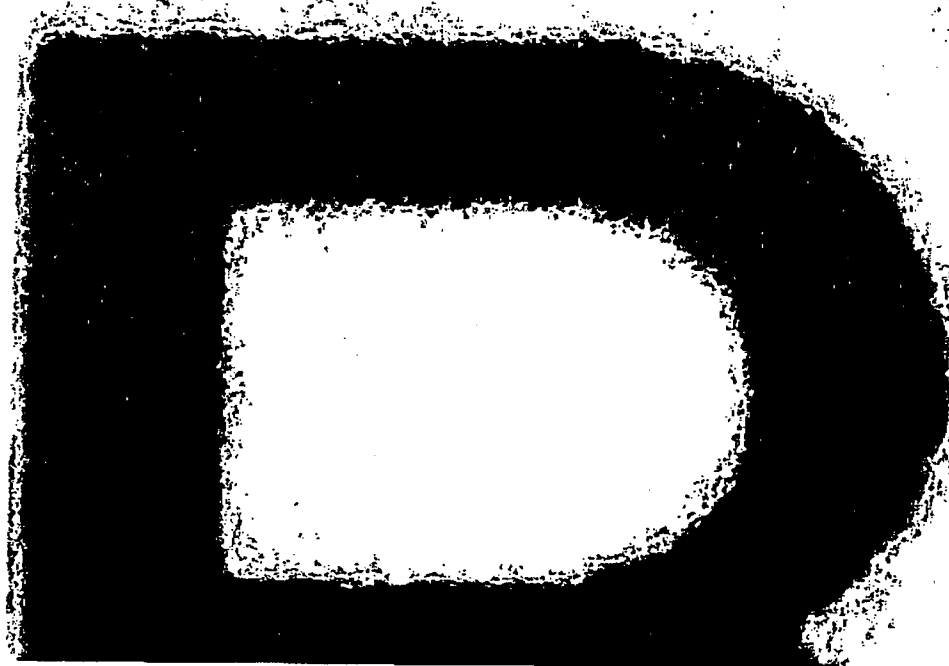
5. During this time period, 1993 to the present, this author has examined the toner of hundreds of documents for the purpose of measuring the various parameters identified as indicative of the age or relative age of the toner. Several instances of examination have resulted in the preparation of expert reports and proffering of expert testimony. One of these trial appearances was Anderson v. Mardirossian, which occurred in state court in Rockville, MD in January of 2002. At the time of our testimony there was a legal challenge to the admissibility of our opinion, which was denied by the trial judge.

EXAMINATION RESULTS

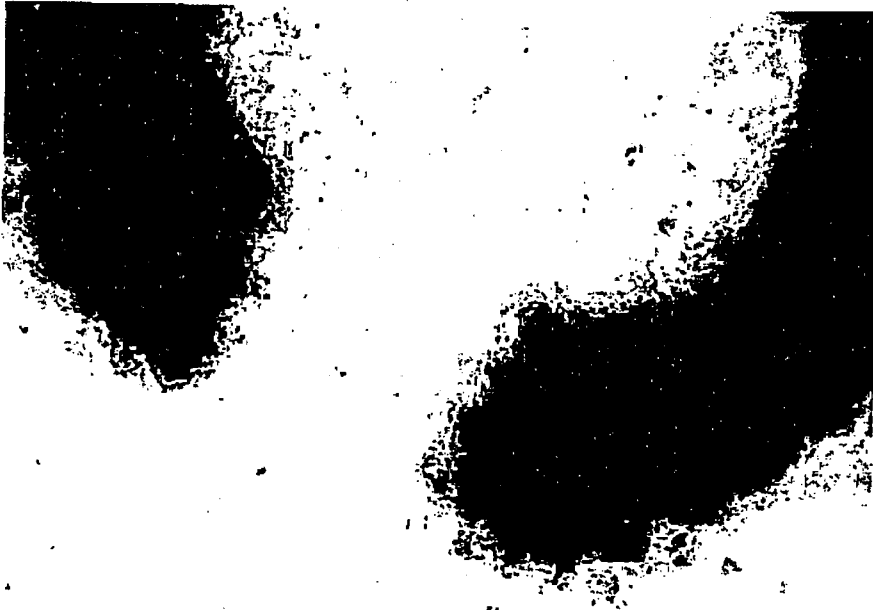
PHYSICAL EXAMINATION

Our visual examination of the referenced document, "Invoice", yielded a single page document of 8 1/2 by 11 inch paper void of any watermark or individualistic markings. The document appeared to be a "letterhead" of the Berkeley County School District with a logo in the upper middle of the page and the address, phone and website along the lower edge. The document contained printed material that appeared to be both green and black in color, and the document contained no handwritten material.

Our microscopic examination of the referenced document, "Invoice", yielded characteristics indicative of the presence of toner material. Toner is the material that is used to impart an image to paper via the xerographic process that is found in both laser printers and copiers. In this examination it was noted that the black text characters were consistent in their make-up, while the colored text and logo was composed of multiple components in the form of multi-colored "dots". Additionally, there was an underlining pattern of yellow colored "dots". The following 3 images illustrate these findings and were taken from the referenced document via the digital microscope.



140X image of black text on the document, note yellow "dot"



140X image of green text in the logo of the document

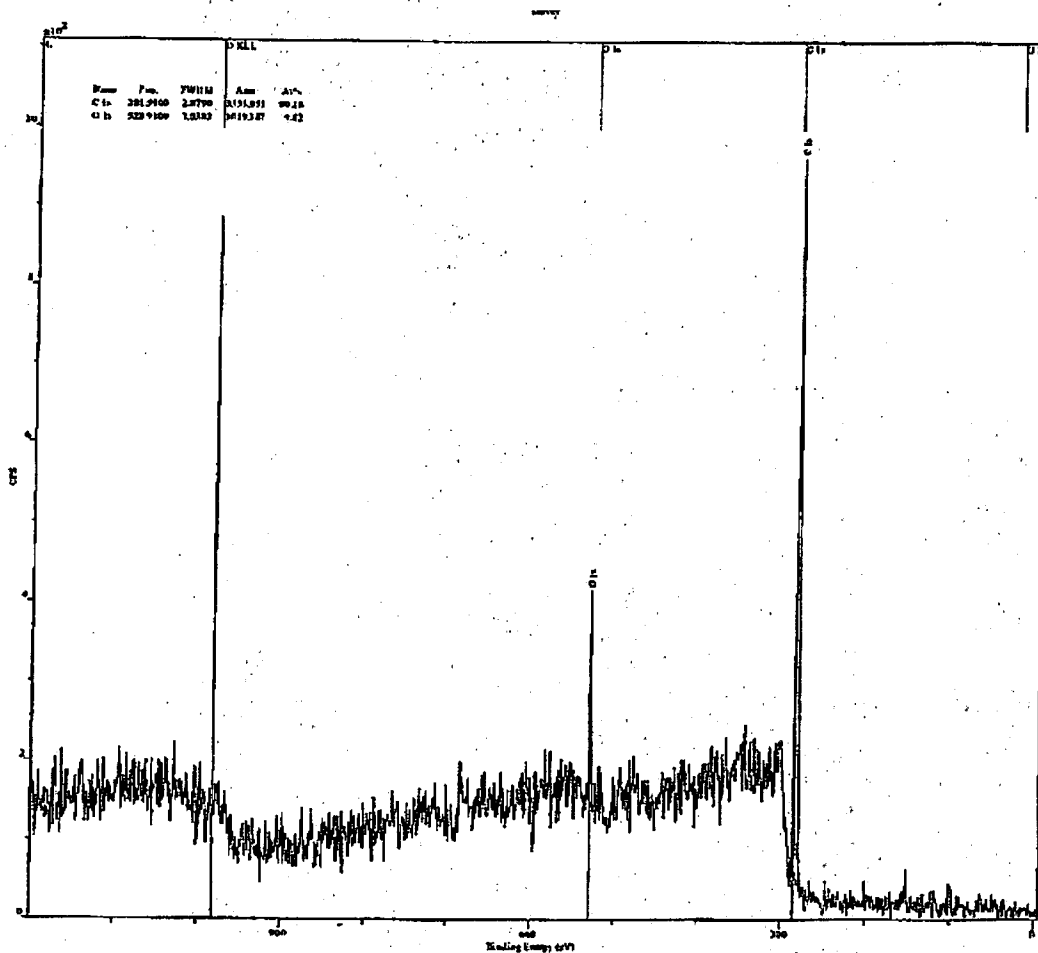


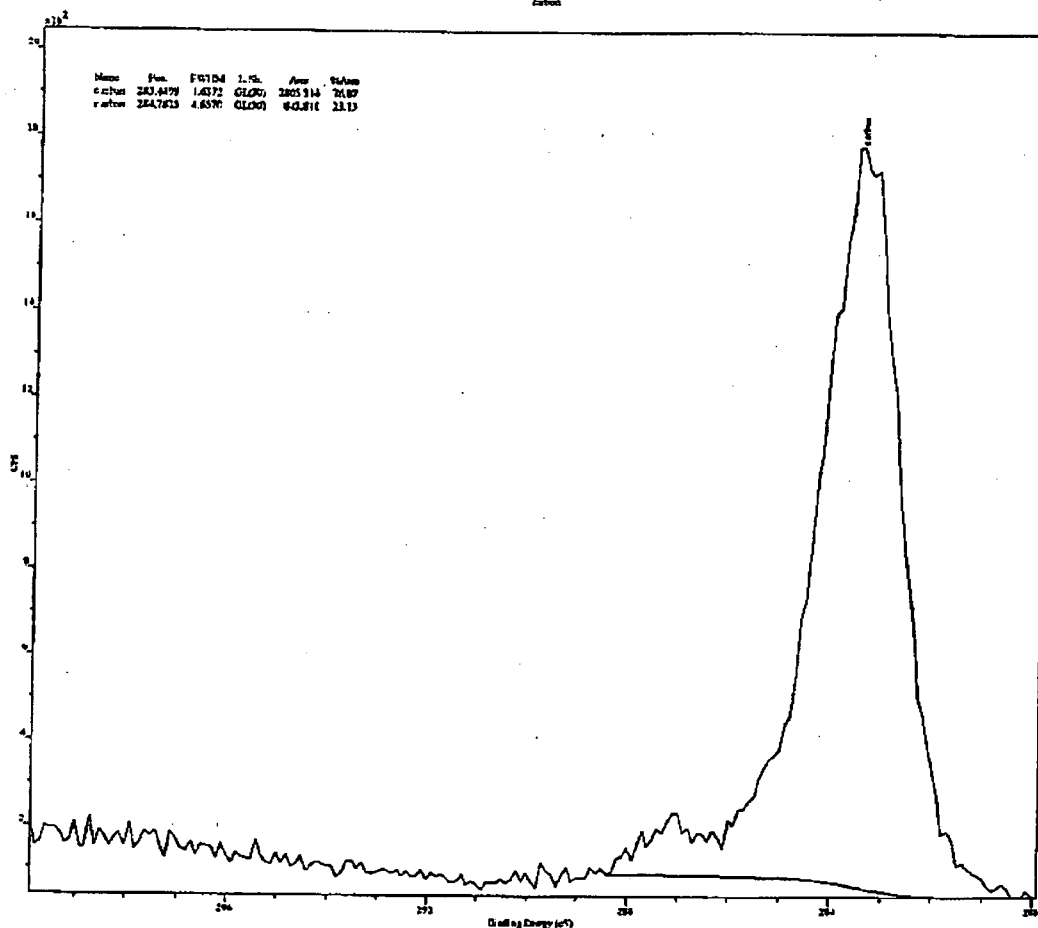
140X image of black text on the document, note yellow "dots".

CHEMICAL EXAMINATION

Examination of Xerographic Toner

Examination of toner samples removed from the referenced document by X-ray Photoelectron Spectroscopy (XPS) yielded data regarding both the elemental and molecular make-up of the samples. The following images illustrate the elemental composition, survey spectra, and the molecular composition, C1s spectra, of a toner sample from the referenced document.





The samples of toner were examined in triplicate and included not only samples of untreated toner, but also samples of toner that were exposed to either heat (70° C) or ultraviolet light (254nm and 365nm) for 12 hours. The parameters that were measured included the atomic percent of the various elements present and the number and quantity of carbon species present as a percent of the total. These measurements were evaluated in light of the reported association between the effect of artificial aging treatments on the Carbon/Oxygen Ratio and the percent of various Carbon species as they relate to the age of the toner material.

CONCLUSIONS

The consistency of materials and physical appearance of the referenced document did not indicate any alteration or substitution. The physical appearance of the document was unremarkable and the use of color laser technology to reproduce "letterhead" is quite common.

All of the measured parameters regarding the toner found on the examined page indicates that the toner was not applied to the paper within the most recent time period. Since the methodology detects differences in the measured parameters within the most recent 2 years since production of the document, the examination results indicate that the referenced document was produced (printed) at least 2 years prior to the date of the examination, i.e. before December 2012. Given the limitations of the examination methodology, it is not possible to provide a specific date or time period of production of the document.

Albert H. Lyter III, Ph.D., D-ABC
Forensic Chemist

Kwm

STATE OF SOUTH CAROLINA **FILED** IN THE COURT OF GENERAL SESSIONS
COUNTY OF BERKELEY 14-13-13 NINTH JUDICIAL CIRCUIT
INDICTMENT NUMBER: 14-GS-08-0266

STATE OF SOUTH CAROLINA
BERKELEY COUNTY, S.C.

versus

) SUPPLEMENTAL
) MOTION TO DISMISS
)
)
)
)

AMY KOVACH,

Defendant.

The Defendant, Amy Kovach (hereinafter "Mrs. Kovach"), by and through her undersigned counsel, submits the following to supplement her Motion to Dismiss filed May 22, 2014. For the reasons stated below and in her initial Motion, the Court should dismiss this case.

Defendant refers the Court to the statement of facts set forth in her initial Motion, which are adopted herein. She also refers the Court to the grounds for dismissal stated in her initial Motion: (1) the Ethics Act provisions at S.C. Code § 8-13-1346 that prohibit the use of public funds, property or time to influence a ballot measure are not applicable to individual persons like Mrs. Kovach but only to governmental entities. and (2) her conduct was permissible under S.C. Code § 8-13-1346 because she was merely providing information and reporting activities about the ballot measure, which is explicitly permitted under the statute. In addition to these grounds, this case should be dismissed for the following reasons.

1. The Indictment charges conduct that is not criminal.

Section 8-13-1346 of the South Carolina Code states:

(A) A person may not use or authorize the use of public funds, property, or time to influence the outcome of an election.



(B) This section does not prohibit the incidental use of time and materials for preparation of a newsletter reporting activities of the body of which a public official is a member.

(C) This section does not prohibit the expenditure of public resources by a governmental entity to prepare informational materials, conduct public meetings, or respond to news media or citizens' inquiries concerning a ballot measure affecting that governmental entity; however, a governmental entity may not use public funds, property, or time in an attempt to influence the outcome of a ballot measure.

The Indictment alleges first, copying the language of § 8-13-1346(A), that Mrs. Kovach did "use and authorize the use of public funds, property, or time to influence the outcome of an election" "Election" as used in this statute is defined as:

- (a) a general, special, primary, or runoff election;
- (b) a convention or caucus of a political party held to nominate a candidate; or
- (c) the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States or the Constitution of this State.

S.C. Code Ann. § 8-13-1300(9).

The Indictment then goes on to allege that the conduct constituting a violation of § 8-13-1346(A) was, "to wit," improper involvement in a "school bond referendum." There is no indication in § 8-13-1300(9) that a school bond referendum is a type of election. Indeed, a "referendum" is defined elsewhere in the Ethics Act as a type of "ballot measure," not as an "election." See S.C. Code Ann. § 8-13-1300(2) ("'Ballot measure' means a referendum, proposition, or measure submitted to voters for their approval."). Indeed, the definition of "election" was amended in 1995 to include a "ballot measure" as a type of "election," but was amended again in 2003 to remove it. Compare 1995 S.C. H.B. 4070, § 36 with 2003 S.C. H.B. 3206, § 21. This legislative history specifically shows that a "ballot measure" is not a type of

"election." Section 8-13-1346(A) does not prohibit a "person" from doing anything in support of a ballot measure. Nor does any other provision of the statute.

In effect, the Indictment charges that Mrs. Kovach was improperly involved in an election when she acted in support of a ballot measure, but an election and a ballot measure are separate and distinct under the Ethics Act, and her alleged conduct as to the latter is not prohibited of any person.¹ Quite simply, the Indictment charges conduct that is not criminal. It therefore is defective and this case must be dismissed. See Hooks v. State, 353 S.C. 48, 51, 577 S.E.2d 211, 213 (2003) (holding that the omission of an element necessary to make conduct criminal renders an indictment defective; "We judge the sufficiency of an indictment against whether it contains the necessary elements of the offense to be charged and whether it sufficiently appraises the defendant of what he must be prepared to meet."); State v. Marshall, 273 S.C. 552, 554, 257 S.E.2d 740, 742 (1979) (stating that the absence of a material allegation in an indictment renders the indictment "fatally defective"); see also State v. Patterson, 261 S.C. 362, 366, 200 S.E.2d 68, 70 (1973) (holding that an indictment was defective where the statute failed to give a person of ordinary intelligence fair notice that his conduct is prohibited). Only a "governmental entity" is prohibited from conduct intended to influence a ballot measure. See S.C. Code Ann. § 8-13-1346(C). Mrs. Kovach is not a governmental entity.

Nor can the "Penalties" provisions of the Ethics Act amend S.C. Code Ann. § 8-13-1346(C) to make it apply to persons and not just governmental entities. These provisions state that a "person" who violates the Ethics Code is guilty of a misdemeanor. However, a "person"

¹ That the Indictment charges Mrs. Kovach—indisputably a "person"—with conduct only prohibited of a governmental entity was a point made in her initial Motion.

cannot violate § 8-13-1346(C) because that statute specifically and only prohibits a "governmental entity" from using public funds to influence the outcome of a ballot measure, and does not reference a "person".

In sum, only a forced construction of the Ethics Code that cobbles together bits and pieces from distinct provisions can permit this case to proceed. The Court must dismiss this case, or it must conclude either that: (1) Mrs. Kovach is a governmental entity; (2) a bond referendum is a type of election even though the statutory definition clearly states it is not; or, (3) the Penalties provisions amend the substantive statute, expanding § 8-13-1346(C) to make it apply not just to governmental entities, but also to persons. The Court may not entertain such forced constructions of any statute, much less a criminal one. As the Supreme Court of South Carolina has stated time and time again:

When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning. Furthermore, in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.

State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (internal citations omitted) (citing Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988); State v. Cutler, 274 S.C. 376, 264 S.E.2d 420 (1980); First South Savings Bank, Inc. v. Gold Coast Assoc., 301 S.C. 158, 390 S.E.2d 486 (Cl.App.1990)).

To the extent there is any ambiguity (Mrs. Kovach contends there is not), the rule of lenity requires that such ambiguity be interpreted in her favor. In Berry v. State, the Supreme Court of South Carolina addressed a challenge to a statute enhancing a criminal sentence. The enhancement applied to a defendant with a prior conviction "relating to" specified drugs. The

defendant in Berry had a prior conviction for possession of drug paraphernalia. The Court held that the enhancement was inapplicable, because “[t]o construe a paraphernalia conviction as ‘relating to’ drugs would be contrary to unambiguously expressed legislative intent and additionally violate the rule of lenity long established in our jurisprudence.” Berry v. State, 381 S.C. 630, 634, 675 S.E.2d 425, 426 (2009); see also, e.g., Liparota v. United States, 471 U.S. 419, 427, 105 S.Ct. 2084, 2089 (1985) (“Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.”).

Berry is applicable here: interpreting the Ethics Code to make Mrs. Kovach’s conduct criminal violates the legislature’s clear intent in enacting the Code, and to the extent there is any ambiguity, for example by reading the penalty provision as amending the substantive statute, it would violate the rule of lenity to interpret the ambiguity against Mrs. Kovach.

2. Mrs. Kovach’s conduct was either the permitted reporting of information related to a ballot measure, or S.C. Code Ann. § 8-13-1346 is unconstitutionally vague.

In her initial Motion to Dismiss, Mrs. Kovach argued that the conduct the State alleges was criminal—using public funds to pay for a video and other materials concerning the bond referendum, drafting speeches about the referendum, and performing “various other acts” in support of the bond referendum—is not criminal under the statute. The statute at subsection (B) permits “the incidental use of time and materials” for preparation of a “newsletter” reporting activities of a governmental body, and “newsletter” is undefined. The statute also, at subsection (C), permits the expenditure of public resources “to prepare informational materials, conduct public meetings, or respond to news media or citizens’ inquiries concerning a ballot measure affecting that governmental entity.” Apparently, the State contends that Mrs. Kovach’s conduct

crossed the line from the permitted acts of communication, to prohibited acts of communication. To the extent her actions may be considered criminal under these provisions of the statute (Mrs. Kovach contends first that they cannot), the line drawn by the statute is too vague to be enforceable—these “informational exceptions” to what would otherwise be criminal conduct are unconstitutionally vague in violation of the Due Process Clause of the 14th Amendment to the United States Constitution.

A criminal statute is unconstitutionally vague on its face if it (1) fails to provide a person of ordinary intelligence fair notice of what is prohibited, or (2) is so standardless that it authorizes or encourages arbitrary or discriminatory enforcement. City of Chi. v. Morales, 527 U.S. 41, 56 (1999). A criminal statute is unconstitutionally vague as applied if it does not give the defendant sufficient notice that her actions were prohibited. See Chapman v. United States, 500 U.S. 453, 467-68 (1991). Although a defendant whose conduct was clearly proscribed by a statute generally cannot complain the statute is vague as applied to others, a facial challenge is more readily available to such a defendant when, as is the case here, the statute infringes expressive conduct. See Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 499 (1982). Section 8-13-1346 is unconstitutionally vague as applied to Mrs. Kovach’s conduct, and also on its face.

As explained in her initial Motion, Mrs. Kovach did nothing more than report information to the BCSD board and the public, which is expressly permitted by the statute. She cannot fairly be charged with notice that these acts were criminal, and certainly not with constitutionally sufficient notice. The statute therefore is unconstitutionally vague as applied to her actions.

It is unconstitutionally vague on its face because it allows reporting, and even the expenditure of public resources in support of the reporting, but fails to draw any intelligible line between what types of reporting are permitted and what types are prohibited. As explained above and in her initial Motion, subsection (A), despite being quoted by the State in the Indictment, is not pertinent because there is no "election" at issue. Subsection (B) permits the preparation of a "newsletter reporting" activities of a public body, but does not define "newsletter." The term itself is antiquated and therefore confusing, harkening to the days when a secretary would distribute mimeographed copies of memoranda. Subsection (C) is even less clear about what is excepted from criminal conduct (by a "governmental entity" no less), stating that it is permissible to expend public resources to prepare "informational materials" and do other acts concerning a ballot measure that affects that governmental entity. "Informational materials," like "newsletters," are not defined. Quite simply, the statute fails to provide a person of ordinary intelligence fair notice of what is prohibited and what is permitted, and therefore it is unconstitutionally vague on its face. See Morales, 527 U.S. at 56.

It also is so standardless that it authorizes or encourages arbitrary or discriminatory enforcement, id., and this can be seen from the way it has been enforced in this case compared to elsewhere. First, there is precedent in which activities similar to Mrs. Kovach's were not criminally prosecuted and instead were referred to the State Ethics Commission. In 2008, a Consent Order was executed and filed by the State Ethics Commission and the Florence County School District (hereinafter the "FCSD") regarding 2007 conduct by the FCSD to distribute flyers in support of the "VOTE YES November 6th" ballot measure, a bond referendum to fund school improvements. See Exhibit 1 (Consent Order). FCSD Superintendent Larry Jackson

personally approved a request to distribute the pro-Vote flyers among the district's schools. The Association of Parents and Teachers distributed the flyers to students in eighteen (18) FCSD elementary and middle schools. The flyers clearly stated "VOTE YES November 6th". The FCSD also sent emails and "telephone blasts" from the district offices to its staff. See Exhibit 2 (Post and Courier Article Excerpts).

There were no criminal prosecutions in the Florence County matter. Rather, the State Ethics Commission issued a public reprimand against the FCSD governmental agency. It was agreed that FCSD was a "governmental entity" as defined by S.C. Code § 8-13-100(17). The Consent Order noted that S.C. Code § 8-13-1346(C) provided as follows:

(C) This section does not prohibit the expenditure of public resources by a governmental entity to prepare informational materials, conduct public meetings, or respond to news media or citizens' inquiries concerning a ballot measure affecting that governmental entity; however, a governmental entity may not use public funds, property, or time in an attempt to influence the outcome of a ballot measure.

Thus, the State Ethics Commission deemed it appropriate to only find that a "governmental entity," to wit, the FCSD, had violated Section 8-13-1346(C), and not any individuals. The State Ethics Commission's sanction was exceedingly mild: It simply ordered that FCSD "be more diligent in complying with the Campaign Practices of the Ethics Reform Act" and further ordered that the FCSD pay the Commission an administrative fee of \$50.00. Clearly, the State Ethics Commission felt this result was appropriate for the FCSD and its officials and employees for activities similar to the conduct of Mrs. Kovach and that of the BCSD school officials and other employees. The FCSD Consent Order clearly demonstrates that

any criminal prosecution of BCSD officials and employees and, in particular, Mrs. Kovach would be excessive and unwarranted. It is arbitrary enforcement of a standardless statute.

Second, the Dorchester County School District Two (the "DCSD2") also held a bond referendum in 2012. DCSD officials engaged in activities similar to the conduct of Mrs. Kovach and other BCSD officials and employees, and BCSD employees helped DCSD2 employees draft pro-referendum materials. In fact, there was at least one joint pro-referendum presentation by both BCSD and DCSD2 school participants. See Exhibit 3. Appropriately, there has been no investigation or prosecution of the DCSD2's activities by SLED or the Attorney General's office. Like in the DCSD2 matter, no criminal charges should be pursued against Mrs. Kovach in this BCSD matter.

In at least one strikingly similar case in Alabama, there was no criminal prosecution. In Alabama Libertarian Party v. City of Birmingham, Alabama, 694 F.Supp. 814 (N.D. Ala. 1988), the plaintiffs were seeking redress due to the city's alleged unconstitutional use of tax funds for advertising to influence elections regarding, among other things, a bond issue. The Alabama statute in question, Alabama Code Section 17-1-7, provided in part as follows:

(c) No person in the employment of the state of Alabama, whether classified or unclassified, shall use any state funds, property or time, for any political activities. Any person who is in the employment of the state of Alabama must be on approved leave to engage in such political action or such person must be on personal time before or after work and on holidays. It shall be unlawful for any officer or employee to solicit any type of political campaign contributions from other employees who work for said officer or employee to coerce or attempt to coerce any subordinate employee to work in any capacity in any political campaign or cause. Any person who violates the provisions of this section shall be guilty of the crime of trading in public office and upon conviction thereof, shall be fined or sentenced or both, as provided by section 13A-10-63.

The court in the case noted as follows:

Defendants contend that § 17-1-7 is a penal statute and that it therefore fails to provide a remedy to plaintiffs. Plaintiffs allege that they approached both the District Attorney and the State Attorney General concerning enforcement of this statute. Both declined. Plaintiffs also complained to the State of Alabama Ethics Commission about the alleged violations and it too declined to prosecute.

Id. at 822 (emphasis added).

As noted above, the Attorney General's office and SLED have not conducted criminal investigations and prosecutions involving similar conduct by actors similarly situated to Mrs. Kovach. This is so in spite of the fact that the Attorney General's office was provided with and asked to consider a CD containing hundreds of emails that other BCSD staff and employees disseminated using District resources. The Attorney General's office refused.

3. Mrs. Kovach lacked the *mens rea* necessary to violate Section § 8-13-1346.

Although the legislature may declare an act criminal regardless of the actor's mental state, "[c]riminal liability is normally based upon the concurrence of two factors, an evil meaning mind [and] an evil doing hand." State v. Jefferies, 316 S.C. 13, 17, 446 S.E.2d 427, 430 (1994).

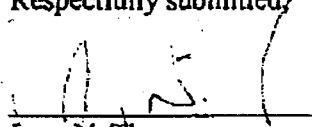
Here, the statute states no specific criminal intent, and therefore the State must prove an "evil meaning mind" and "an evil doing hand." There is no evidence of this here. There is no evidence that Mrs. Kovach received any personal gain or benefit as a result of her conduct or activities. Indeed, the BCSD passed a resolution on March 12, 2013, stating that Mrs. Kovach acted in good faith. See Exhibit 4. Furthermore, the BCSD engaged retired state circuit court Judge A. Victor Rawl, Sr. to conduct an independent investigation and render an impartial and objective opinion regarding whether Mrs. Kovach at all times pertinent to this matter (1) acted in good faith, and (2) acted within the scope of her employment. Judge Rawl concluded as follows: "I clearly conclude as a matter of fact that Ms. Kovach's activities were clearly within the course

and scope of her employment and clearly performed in good faith with her only concern being the benefit of and in the best interest of the Berkeley County School District". See Exhibit 5. The evidence is overwhelming that all acts by Mrs. Kovach regarding the Bond Referendum were performed in good faith and solely for the purpose of benefitting the students of the Berkeley County School District and for no other reason. There was thus no *mens rea* that would support the prosecution of Mrs. Kovach.

CONCLUSION

For the reasons stated above and in her initial Motion to Dismiss, Mrs. Kovach respectfully moves and urges this Court to dismiss this case.

Respectfully submitted,



Jerry N. Theos
URICCHIO, HOWE, KRELL, JACOBSON,
TOROREK, THEOS & KEITH, P.A.
17 ½ Broad Street
Charleston, South Carolina 29401

Charleston, South Carolina
August 10, 2014

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
IN THE MATTER OF:)
COMPLAINT C2008-063)
Florence School District One,)
Respondent,)
State Ethics Commission.)
Complainant;)

BEFORE THE STATE ETHICS COMMISSION

CONSENT ORDER

2008 AUG -5 PM 2:42

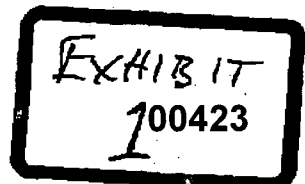
FILED

This matter comes before the State Ethics Commission by virtue of a complaint filed by the State Ethics Commission on November 14, 2007. The complaint against the Respondent, Florence School District One, was considered by the Commission on January 16, 2008 and probable cause found to warrant an evidentiary hearing.

Prior to the call of the case Respondent Florence School District One agreed to entry of the following statement of facts, conclusions of law, admission, and disposition in this matter as follows.

STATEMENT OF FACTS

- SPM
ps 1
1. The Respondent, Florence School District One (hereinafter the District), is a governmental entity located in Florence County.
 2. Florence School District One Superintendent Larry Jackson advised that prior to the November 2007 election, representatives from Florence Citizens for Education met with him and requested that a flyer in support of a ballot referendum be distributed to students at the 18 elementary and middle schools within the District. Mr. Jackson reviewed this request with D. Lawrence McIntosh, attorney for the District and received Mr. McIntosh's approval of the request. Mr. Jackson then personally approved the request. As a result, boxes of the flyers were



distributed to 18 schools by the Association of Parents and Teachers.

3. The flyer distributed in the schools clearly stated "VOTE YES November 6th".

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Commission concludes, as a matter of law:

1. During all times relevant, the Respondent, Florence School District One, was a governmental entity as defined by S.C. Code Ann. § 8-13-100(17)(Supp. 1997).
2. The State Ethics Commission has personal and subject matter jurisdiction.
3. Section 8-13-1346(C) provides as follows:

This section does not prohibit the expenditure of public resources by a governmental entity to prepare informational materials, conduct public meetings, or respond to news media or citizens' inquiries concerning a ballot measure affecting that governmental entity; however, a governmental entity may not use public funds, property, or time in an attempt to influence the outcome of a ballot measure.

ADMISSIONS

6pm
pg. 2 The Respondent, Florence School District One, admits it violated Section 8-13-1346 of the Ethics Reform Act.

DISPOSITION

The State Ethics Commission hereby finds Florence School District One in violation of Section 8-13-1346 of the Ethics Reform Act, and hereby adopts the Statement of Facts, Conclusions of Law, Admissions, and Disposition as agreed upon by Florence School District One.

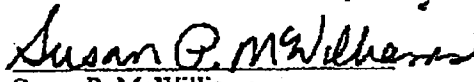
THEREFORE, the State Ethics Commission hereby publicly reprimands Florence School District One for violation of Section 8-13-1346 of the Ethics Reform Act,

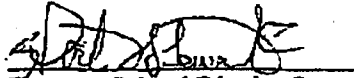
AND, orders that Florence School District One be more diligent in complying with the Campaign Practices of the Ethics Reform Act.

AND, orders Respondent to pay an administrative fee of \$50.00 within 30 days of receipt of the signed order,

AND IT IS SO ORDERED THIS 13th DAY OF August, 2008.

STATE ETHICS COMMISSION


Susan P. McWilliams
Chair


Florence School District One
Respondent

The Post and Courier

3/6/2013 Article Excerpts

"More often than not, this comes up with schools because they have the most bond referendums," said Cathy Hazelwood, general counsel and deputy director of the Ethics Commission. Hazelwood would not speak specifically about the Berkeley County investigation.

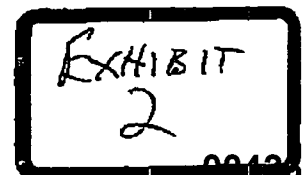
She said it has been four or five years since complaints were filed against a district in Florence County for sending emails or "telephone blasts" from the district office to the staff and distributing pro-referendum correspondence via students.

"I thought that the word had gone out because of the Florence cases," said Hazelwood, who addressed referendum and election ethics at a S.C. School Boards Association meeting last month.

In those cases, the district admitted the violation and was publicly reprimanded, she said.

Last year, three school districts in South Carolina put school improvement referendums to voters: Marlboro County School District sought \$20 million to build a new K-8 school; Dorchester District 2 wanted \$186.4 million for an aquatic center, four new schools and upgrades to 10 others; and Berkeley County School District asked for \$198 million for five new schools and improvements to more than 20 others.

All three referendums passed...



From: KovachA@bcscschools.net
To: Christopher Swetckie <SwetckieC@bcscschools.net> Susan Haire <haire@bcscschools.net>
Date: Tue 18 Sep 2012 11:21:44 AM -0400
Cc:
Subject: RE: School Improvement Referendum Follow Up

Chris, you are the best! Susan will set you up with a letter to the editor draft and suggest how we may leverage the opportunity in Goose Creek.

How about Wed., Sept. 26 at 6 p.m. at Berkeley Electric Co Op in Goose Creek (across the street from Westview Elem)

Amy

-----Original Message-----

From: Christopher Swetckie
Sent: Tuesday, September 18, 2012 9:19 AM
To: Amy Kovach; Susan Haire
Subject: RE: School Improvement Referendum Follow Up

Please send me a template or draft of a letter to the editor and I will be happy to send in a letter to the Goose Creek Gazette wearing both my educator and BCSD parent hat. I would also be happy to speak on behalf of BCSD at one of the meetings to pinch hit for Rodney. I would prefer to do it in the Goose Creek area since it would be close to work and home.

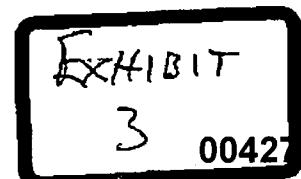
See you soon!

Chris

From: Amy Kovach
Sent: Monday, September 17, 2012 11:52 PM
To: Archie Franchini; Melissa LaBerge; Karen Whitley; Marcy Gasperson; Katie Taie; Michael Petry; Kevin Ogorman; Christopher Swetckie; Chris Buchholz; Kelli Farless; Lee Westberry; Susan Haire; Amy Kovach; ejkeeter@bellsouth.net; tom sparkman; angela adams; alicia jowers; james gaskins
Cc: lrapulling@homesc.com
Subject: School Improvement Referendum Follow Up

Thank you for taking time this evening to attend a School Improvement Referendum meeting. Your commitment to the children of Berkeley County is an amazing gift and will yield great return in the weeks, months and years to come.

Key Messages for District Staff, aka Elevator Speech: More families are choosing Berkeley County Schools which leads to overcrowding. Overcrowded



schools means it is harder to keep kids safe at arrival and dismissal, it is harder to provide small class sizes, it is harder to provide high tech learning opportunities to prepare children for career and college. And, it is really hard to provide teachers with facilities that they deserve to work in as we expect more of them in the classroom.

Things you can do to help us organize our employees around the referendum are:

1) Make sure all of your colleagues, friends and family are registered to vote by Oct. 6. Here is the link to the voter registration form:

http://www.berkeleycountysc.gov/forms/elections/VR_Blank_Form.pdf

2) Share and share some more! Tell your colleagues, friends and family to join us for one of the grass roots meetings planned between now and Nov 5. Meeting schedule is posted on the website at www.berkeley.k12.sc.us/community <<http://www.berkeley.k12.sc.us/community>>.

3) Write a letter to the editor or collaborate with colleagues to cowrite a letter. Want to, but aren't sure where to begin? No problem, call Susan Haire and we will help you out with the writing and the placement.

4) Sport a yard sign! Beginning about Oct. 8, yard signs will be available from all school offices. We will deliver a supply to you that you can let any staff or parent take with them. Here is the trick to keep this logistics and not advocacy.....you may not ask anyone to take a sign or suggest that they take a sign. You may have them in your front office and easy to pick up and take at their own will. And, you may NOT have signs on school property yards as tempting as it is. You can take them home and pass them out to neighbors, friends and family.

5) Spot Dr. Thompson a night off! :) Would you be willing to lead one community meeting to share the referendum message? Would you be willing to speak at a community event on behalf of the district? It is really easy and we will give you a script.

6) Join us at a Football Game beginning this Friday. We need someone to work at the gate and hand out information and stickers. We need people just to sit in the stands and talk it up. We need people to put flyers on cars parked in the parking lot. Easy, minimal effort. Let me know what game you can attend and we will arm you with supplies.

7) VOTE! As we near November 6, please remind everyone at your school to exercise their democratic right to vote.

Again, many thanks for your commitment and enthusiasm for this effort.

Amy Kovach

843.899.8553 Office
843.737.3396 Mobile

YES  SCHOOLS

School Improvement Referendum: Berkeley and Dorchester District 2

www.Yes4Schools2012.com

Presentation for Berkeley County School Improvement Referendum

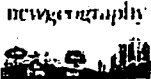
Thank you for letting me speak with you today. Introduce yourself and Joe Pye. Talk about why you are doing this together. Talk about how critically important this is to our region for all children. And, why this collaboration is unique and completely different than any other approach taken in South Carolina. Never before have two districts joined together to rally around common goals.

YES4SCHOOLS

The Lowcountry: A Great Place to Live



World's Best City
Charleston ranked #3 in the world
CNNiGo October 2011



Best Cities for Job Growth
Charleston region ranked 8th, up 17 spots from last year.
New Geography May 2011



Brain Gainest Metros
Charleston Metro listed as #1 brain gainer for highest growth in adults with college degrees
Wired September 2011



Cooler Small Cities in America
Charleston's lifestyle and culinary attributes highlighted
GQ November 2010



Best Towns of 2011
Charleston ranked 5th
Outside Magazine September 2011



2010 Best Performing Cities
Charleston ranked among nation's top 20 "Target cities"
Milken Institute October 2010



Best Places for Business & Careers
Charleston MSA ranked in top 50
Forbes July 2011



2010 Small Business Vitality Scores
Charleston ranked 4th in the nation
Portfolio January 2010

2

www.Yes4Schools2012.com

Like you, I am proud to live in the Lowcountry. I am proud of our schools – our wonderful teachers, principals, and – most importantly – students.

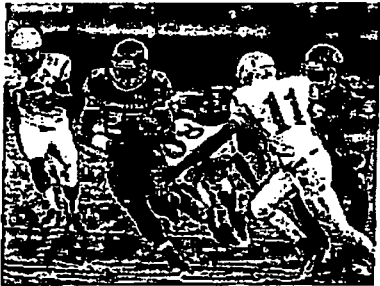
But, we are changing fast. The economy is challenging. Jobs are harder to get. More than ever, good jobs require high tech skills. We all want our kids to be ready for today's world.

And our schools are doing their best to get them ready. But they are severely handicapped by the state of our school buildings.

YES4SCHOOLS

District Priorities

1. Student and Staff Safety
2. High Academic Achievement
3. Community Engagement & Communications
4. Financial Responsibility
5. Highly Qualified Staff



www.Yes4Schools2012.com

We are committed key priorities that drive everything we do and all decisions:

Student and staff safety is our number one priority. Kids can't learn and teachers can't teach if they are not safe.

Expecting more out of our students' academic abilities is a must. Students own their work; teachers are being developed to not just pour on content, but to develop critical thinkers who can make decisions, rationalize, communicate and work in teams.

We are engaging our community with accountability, collaboration and trust. We want to produce a product our businesses want and need; and, we need business support to identify changes in work culture and technology.

We are leveraging every dollar we have.

We want to retain our current teacher leaders and we are working to identify our next generation of teacher and principal leaders. We are thinking differently about some roles and increasing our skill and talent pool.

Finally, we are taking communications to a whole new platform. More web, more video, more interviews with media....we want the world to know that our kids are bright, our teachers are capable, and we can compete with any region in the US and abroad.

YES4SCHOOLS

Our Results

- Both districts earned an "A"
- Graduation rates are up
- Reading Scores have Improved
- Budget stewardship and accountability
- Highly qualified staff



www.Yes4Schools2013.com

Our results are terrific and Mr. Pye and I are so proud of the work we are doing:

- Both districts earned an A – 2 of 26 statewide.
- Graduation rates continue to climb. More children are finding more reasons to stay in school. And, children who graduate are less likely to become dependent on social services or end up in the criminal justice system.
- We are saving money and finding ways to gain rebate opportunities; we are cutting our utility bills with new heating and cooling systems that can endure our hot, humid climate; and, we both districts have consistently received outstanding bond ratings for fiscal management and that keeps our interest rates low.
- And, we are retaining the most qualified teachers, developing our leaders, implementing new models for processes and procedures.

Our Growth

- Local, regional and national school recognition
- A "best place to live and raise kids" designation
- New jobs + New families + 2007 Baby Boomlet = We're Overcrowded!
- 1,600 more children in 2012 than in 2011



YES4SCHOOLS

www.Yes4Schools2012.com

Summerville and Moncks Corner are not the tiny little towns they used to be. They are the "go to" place to live and raise kids.

Our chambers of commerce are working hard to bring more jobs to our county; that means more families. And, in 2007, more babies were born than in any year of the official babyboom from 1948 to 1958. That boomlet of children is now starting Kindergarten.

Between the two school districts, we've got more than 1600 new children this year a year ago. Can you imagine what would happen if 1600+ new people showed up at one time on your doorstep? You'd be thrilled; and then you'd scramble to try to serve them, seat them, give them books and handouts. Now, imagine serving them without any additional revenue. No additional busses. No additional food allowance. And, serve them at the same or better ability as before they arrived in the existing buildings and space. It's an impossible task.

YES4SCHOOLS

Overcrowded classrooms

Students crammed into trailers

SAFETY ISSUES

Lack of high-tech learning

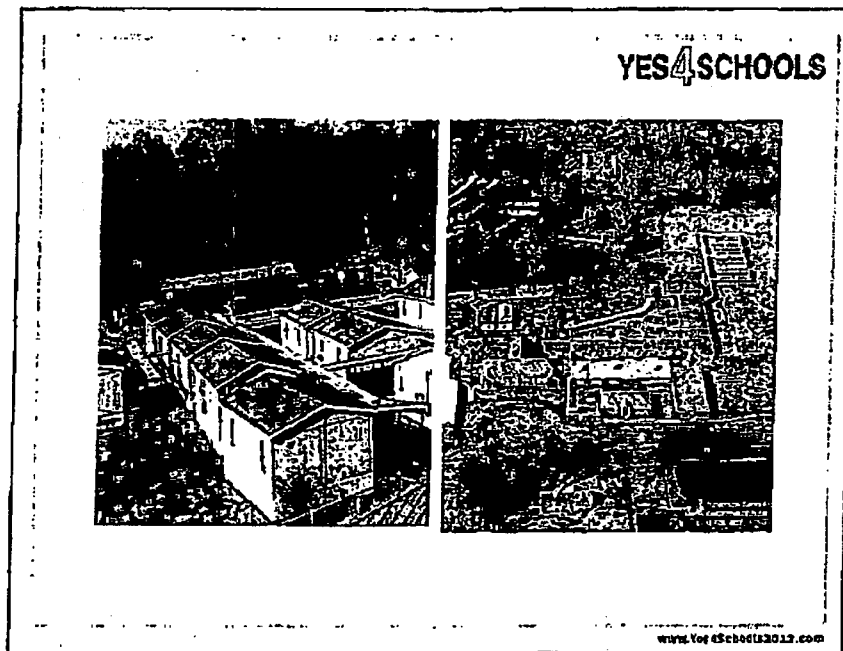
No neighborhood schools (in certain areas)

The need for better teaching facilities



Overcrowded and out of date classrooms mean:

- Students crammed into trailers
- Kids eating lunch on the floor
- Safety issues
- Lack of high-tech learning
- No neighborhood schools (in certain areas)
- The need for better teaching facilities



Many of our students are crowding into trailers like this. In Dorchester District Two, 177 trailers are in use; in Berkeley County, over 60 are in use. They're trying to learn...and teachers are trying to teach. But, when you're stuffed into a trailer, it's hard.

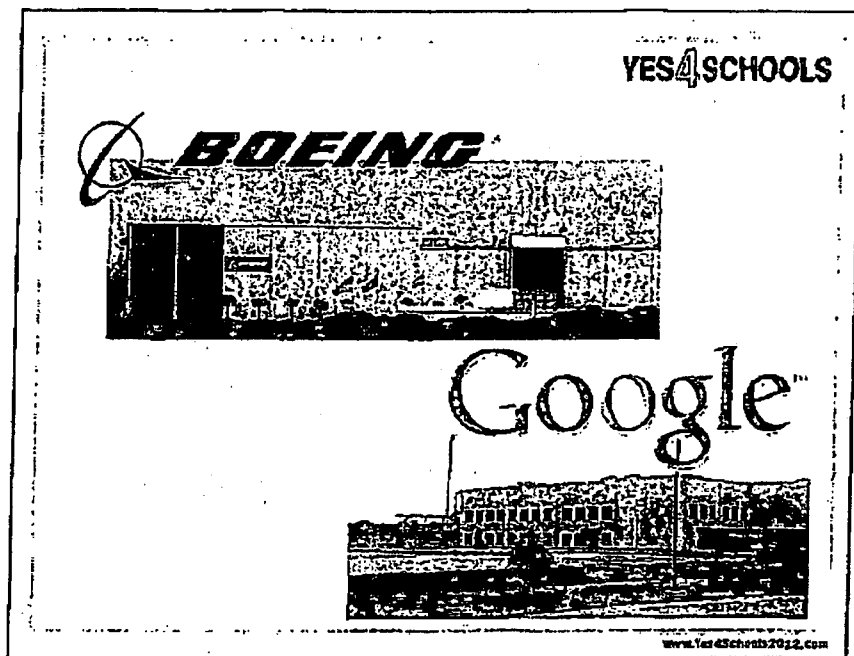
Trailers are not safe. Being outside of the building and separate, means it is harder to provide security for children on campus and it is harder to keep them protected from wet weather.

And, these units cost our tax payers more money. They are harder to heat and cool and are easily broken into.



A typical high school class change. Overcrowded conditions make it hard to monitor and move children efficiently.

And, many of our buildings were not designed or built with high tech learning in mind – learning that is needed for today's jobs at Boeing or Google.

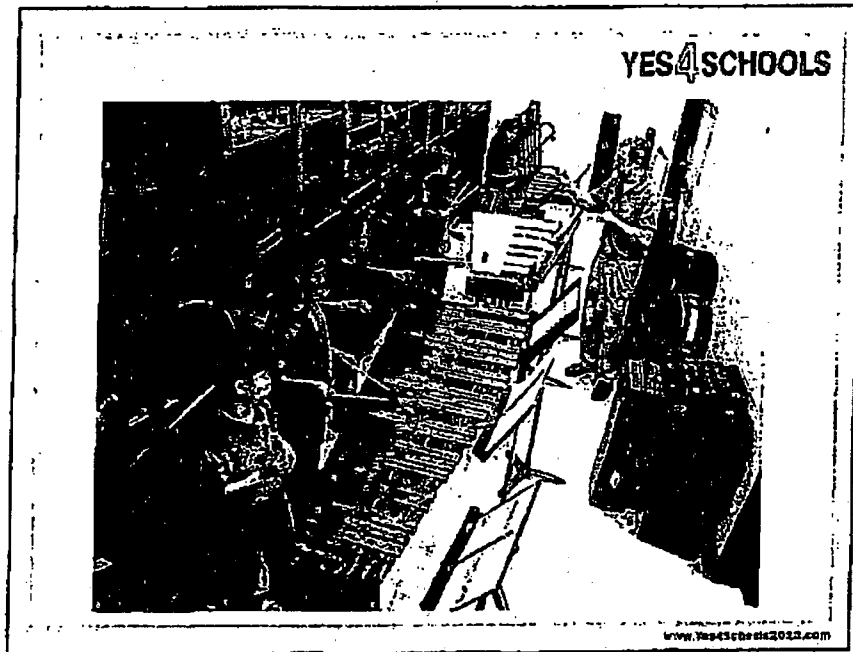


Here's a picture of Boeing and Google....two of the great new companies in our area. We'd all like our kids to be learning the skills to qualify for jobs at places like this.

To work at Google or Boeing, you need high tech skills..That's not happening at the rate it could be at our schools.

It's not happening because many of our buildings are too old to support the technology needed for this 21st century learning.

So our kids are being held back.



Finally, there are teachers. The key to great learning is a great teacher. We have so many great, hard-working teachers in Berkeley County School District. Good teachers make do, in spite of teaching in what is literally a closet. Imagine what they can do in buildings that are modern, up to date, and support high tech learning.

YES4SCHOOLS

Berkeley County

- Five new schools
- Renovations and additions to 4 high schools and 25 other schools including technology and capital improvements.

Dorchester District Two

- Four new schools
- Renovations and additions at the high schools, repairs and renovations to existing facilities including technology and other capital improvements

www.Yes4Schools2012.com

Each superintendent talks about their district

YES  SCHOOLS

Smaller Class Sizes

Reduced use of trailers

SAFER SCHOOLS

More high-tech learning

Stronger Workforce

Better Teaching Facilities

www.Yes4Schools2012.com

[Series of type slides]
Smaller class sizes
No trailers
Safer schools
More high tech learning
Stronger Neighborhoods
Better teaching facilities

What Can You Do?

- Advocate for children in our region
- Become educated & aware of school district needs
- Know how this impacts your community and you personally
- Spread the word
- Register to vote by October 6
- Vote on November 6

www.Yes4Schools2012.com

We get it all, if we get the School Improvement Referendum.

And that's why we need your help. Our children need your organization's endorsement.

Here are five things you can do:

Register to vote – the deadline is OCTOBER 6!

Spread the word. Encourage friends, family, co-workers, etc. to support the School Improvement Referendum. Let them know about it through Facebook and Twitter.

Volunteer! There are lots of volunteer opportunities. Just contact us through the website, and we'll help you find just the right opportunity for you.

VOTE! At the end of the day, voting is the key to winning! If you vote, and you get your friends and family to vote, we'll win....and – most importantly – our kids will win.

This is a once-in-a-lifetime opportunity to help our kids and our community succeed. With your help, we can do it!

STATE OF SOUTH CAROLINA)

) BERKELEY COUNTY BOARD OF EDUCATION

COUNTY OF BERKELEY)

A regular meeting of the Berkeley County Board of Education was held on Tuesday, March 12, 2013, 6:30 p.m., in the Boardroom of the Berkeley County Board of Education Building. The following members were present: Doug Cooper, Chair; Dr. Kent Murray; Phillip Obie, II; Shannon Lee; Kathy Schwalbe; Dr. Sheldon Etheridge; Wilhelmina Moore; Frank Wright; and Scott Marino.

Call to Order, Declaration of Quorum, Media Notice

Chair Doug Cooper called the meeting to order, a quorum was declared, and the media had been notified.

Approval of Agenda

On motion by Kathy Schwalbe, seconded by Sheldon Etheridge, the agenda was unanimously approved.

Opening Prayer and Pledge of Allegiance

Chair Doug Cooper led those present in the Lord's Prayer and Pledge of Allegiance.

Approval of Minutes

On motion by Sheldon Etheridge, seconded by Kent Murray, the minutes of the February 26, 2013 Regular Meeting were unanimously approved.

Special Recognition

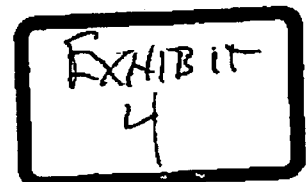
Amy Kovach, Director of Communications and Community Relations, introduced the following students who have recently achieved success as student athletes in wrestling. The district has three 2012-13 state champion wrestlers. They are Nicholas Young, the AAAA State Wrestling Champion, 132 pound weight class, Stratford High School, coached by Willie Nearhood; Bernard "VA" Harmon, Jr., the AA State Wrestling Champion, 170 pound weight class, Timberland High School, coached by Terry Keller; and Dennis Flores, the AAA State Wrestling Champion, 170 pound weight class, Hanahan High School, coached by Ray Adkins. Mr. Flores was unable to attend the meeting.

Two Berkeley County schools, Hanahan Middle School and Marrington Middle School of the Arts, are the first schools in the district in the 35 year history of the award to receive recognition as Palmetto's Finest Schools from the South Carolina Association of School Administrators.

Principal Robin Rogers of Hanahan Middle School and Principal Jim Spencer of Marrington Middle School of the Arts, joined by staff and parents, were celebrated and recognized by the Board and Superintendent Dr. Rodney Thompson for this outstanding achievement.

Citizen Comments

There were none.



00443

Administration and Facilities

Letter of Intent: Charleston Water System Property

Archie Franchini, Deputy Superintendent, requested approval of a Letter of Intent with Charleston Water System for the purpose of purchasing approximately 28 acres adjacent to Tanner Plantation, and the Goose Creek Reservoir, Berkeley County TMS# 265-02-00-015, and for the school district to pay \$25,000.00 in earnest money to be held in an escrow account with Nexsen Pruet, LLC. On motion by Kent Murray, seconded by Kathy Schwalbe, the board gave unanimous approval to the Letter of Intent with Charleston Water System.

Financial Services

Resolution to Refund the 2003 SAFE Bonds

Brantley Thomas, Chief Financial Officer, presented a Resolution for approval that would authorize the execution and delivery of documents relating to and approving the issuance and sale of not exceeding \$205,000,000 installment purchase refunding Revenue Bonds Series 2013 by Securing Assets for Education. On a motion by Phillip Obie, seconded by Scott Marino, the board gave unanimous approval to the Resolution.

Proposal for Continuing Audit Services

Mr. Thomas presented a proposal from the accounting firm of Greene, Finney & Horton, to provide audit services to the district. He requested approval of a five-year contract. On motion by Sheldon Etheridge, seconded by Shannon Lee, the proposal was approved as presented. Phillip Obie and Scott Marino voted no.

Procurements Reports for the Period July 1, 2012 – December 31, 2012

Mr. Thomas presented for information Procurements Reports for the period July 1, 2012 – December 31, 2012 that included Sole Source Procurement, Minority Business Procurements, Emergency Procurement and Purchases over \$100,000.

Instruction and Accountability

Elementary and Middle Mathematics Textbook Adoption for 2012-13

Dr. Kevin O'Gorman, Chief Academic Officer, presented a request for 1st reading approval of elementary and middle Mathematics Textbooks for adoption for 2012-13. Textbooks are available for viewing in the boardroom and on line. On motion by Kathy Schwalbe, seconded by Shannon Lee, the board unanimously approved first reading of textbooks as presented.

Portable Advanced Science Exploration (PASE)

Dr. O'Gorman provided a power point presentation to review Portable Advanced Science Exploration (PASE). PASE promotes advanced science exploration through the use of technology. It targets middle

school science teachers in South Carolina and their students. Eighth grade science teachers will attend a week-long summer professional development seminar offering in-depth training for integrating learning technologies and science equipment into the curriculum with engaging, challenging and hands-on activities. Seventh grade teachers will receive training in year 2 and sixth grade teachers in year 3.

Superintendent's Report

Superintendent Dr. Rodney Thompson expressed congratulations to Hanahan Middle School and Marrington Middle School of the Arts for winning Palmetto's Finest in their respective categories. This achievement shows great leadership, exceptional school management and a desire by teachers, staff and parents to support students in an innovative learning environment.

Human Resources will host the annual Teacher Recruitment Fair on March 23, 2013, 9 – 11:30 a.m., at Cane Bay High School. We look forward to meeting potential new teachers who may be interested in working in Berkeley County.

Our "Report to the Community" will go on the road next week as we will present to the Berkeley County Chamber members. The presentation that you saw at our last board meeting was more of a year in review. During our presentation with the Chamber, we will focus on engaging local business and industry into our goal of achieving high academic growth for all students.

Executive Session

On motion by Kathy Schwalbe, seconded by Phillip Obie, the Board voted unanimously to enter Executive Session to discuss Personnel Considerations, Contractual Matters and Legal Briefing regarding SC Code 59-17-110.

Return to Regular Session

On motion by Phillip Obie, seconded by Kathy Schwalbe, the Board voted to return to regular session. No action was taken in Executive Session.

Action as Required from Executive Session

Action

The following motion was made by Kent Murray, seconded by Shannon Lee and was unanimously approved:

After reviewing the requests of District employees during executive session that the District provide for independent legal counsel to appear and represent them as provided for in S.C. Code Ann. § 59-17-110 and Board policy GAEA (Staff Protection), and based on the advice of the Board's legal counsel, I move that we approve the requests to provide reasonable and customary legal fees and expenses under the circumstances, and subject to the approval of the Board Chair in consultation with the Board's legal counsel. I further move that the Board issue the following statement in connection with this matter.

"Last November, the citizens of Berkeley County overwhelmingly approved the school improvement bond referendum. Thereafter, as made public last week, opponents of the referendum sought an investigation into the efforts of the Berkeley County School District in connection with the school improvement referendum and the District is cooperating with the investigation. Nevertheless, we understand that being involved in such an investigation, especially one instigated at the request of out-spoken and persistent political opponents of the District's proposed referendum, is unsettling to the employees involved. Because the District understands that it has been asked not to discuss the investigation, we will continue to honor that request so as not to interfere with the investigation.

Section 59-17-110 of the South Carolina Code of Laws requires that if any employee of the District is prosecuted in any action, civil or criminal, "by reason of any act done or committed in good faith in the scope of his employment," it is the duty of the District, when requested, to appear and defend the action. Even though no civil or criminal action has been initiated against any of our employees at this time, based on the advice of the Board's attorneys, we believe as a Board it is our legal obligation to provide those employees involved in this investigation with legal representation at this juncture as they have requested. The Board has reason to believe that its employees' acts or omissions in connection with the school improvement referendum were in good faith and in the scope of their employment. Under these circumstances, it is the District's statutory obligation to provide legal representation for its employees. The District will continue to cooperate with the investigation, will make future public statements concerning this matter as is appropriate to do so, and appreciates the public's patience and understanding of the need for confidentiality while the investigation takes its course."

Adjournment

On a motion by Kathy Schwalbe and seconded by Wilhelmina Moore the board without objection voted to adjourn.

Doug Cooper, Chair

Shannon Lee, Secretary

A. Victor Rawl, Sr.
2835 Preakness Stakes, Charleston, SC 29414

(843) 766-7334
avrawl@aol.com

May 2, 2014

Dr. Kent Murray, Chairman
Berkeley County School District Board of Education
P.O. Box 608
Moncks Corner, SC 29461

Dear Dr. Murray:

I am writing you to comply with your request dated February 26, 2014. Please understand, my methodology is terse; therefore, I am attaching documents that I may refer to in this memorandum. You asked me the following:

- (1) Whether, based on the information available to the board at this time, the conduct of Ms. Kovach as outlined in the indictment constitutes an "act done or omitted in good faith in the course of [her] employment" as provided for in S.C. Code Ann. § 59-17-110; and
- (2) If you conclude that Ms. Kovach was acting "in good faith in the course of [her] employment" as provided for in S.C. Code Ann. § 59-17-110, in regard to the issues referenced in the indictment, whether the board is precluded from appearing and defending Ms. Kovach under the statute simply by virtue of the fact that she has now been indicted?

In answering question one, which I feel comfortable in so doing, I have reviewed some forty pounds of e-mails and documents submitted to me by Childs & Halligan, your attorneys. I have conducted lengthy conversations with Jerry Theos, attorney for Amy Kovach, and reviewed some of his materials. I have spoken with Jane Pulling. I have also tried to talk with Laura Varn, and was only able to speak to her attorney, Ben Hagood. I have intentionally not spoken to anyone else, as it would have entailed a very lengthy and continuous process. I note for the edification of yourself and the board that SLED and the Attorney General's office have purportedly reduced their investigation to a report that is unavailable to the school district or Ms. Kovach's defense attorney, Mr. Theos, at this time.

The standard for review to determine "acting within the course and scope of employment" is most clearly defined in the body of law surrounding the area of workers' compensation. The course and scope of employment is obviously controlled by the employment agreement the

EXHIBIT
500447

Board of Education entered into with Ms. Kovach. It is very clear to me in reviewing the material that her job description, a copy of which is attached, covers a very broad area of public information, coordination, outreach, education, and, of course, community involvement. You will see from the timeline attached that Ms. Kovach was very active in complying with her job description. It is clear to me that she has an outgoing, effervescent personality that compelled her to over-perform her responsibilities as outlined in her job description. It is also clear that she was extremely communicative, especially by e-mail, to everyone. The material clearly supports my decision that all of her actions were within the course and scope of her employment.

The next question, of course, is "good faith." In determining whether someone is acting in good faith, the standard is whether she was acting for her own benefit or for the benefit of her employer or someone else. In reviewing and discussing that standard, it is necessary to determine what, if any, personal benefit she derived from the activities outlined in the documentation. I can find absolutely no personal or financial benefit to her in the documentation. Questions have been raised concerning a video and payment for some banners and signs. These questions focus narrowly on a small number of selected documents without regard to the records or issues as a whole. The alleged video is clearly for the benefit of the school district, and not for her personal benefit. The alleged signs and banners may raise an issue of personnel matters or expenditure authority, but certainly in no way, shape, or form, are they an indication of personal benefit to her. Remember, it is her job to coordinate everything. She did her job.

The second question you asked me to provide a response to deals with a legal interpretation of South Carolina Code § 59-17-110. I did not feel comfortable for a myriad of reasons in responding to that question, and have taken the liberty of requesting that John Freeman, Esq., an expert in the field of statutory construction, as well as corporate governance, provide me with an opinion to give to you. I attach that opinion for the benefit of yourself and the board.

As you can see from the above-discussion, I clearly conclude as a matter of fact that Ms. Kovach's activities were clearly within the course and scope of her employment and clearly performed in good faith with her only concern being the benefit of and in the best interest of the Berkeley County School District. I will be more than happy to discuss, in person, my decisions, as well as give you and the board the ability to question me on the basis therefore.

Sincerely,

A. Victor Rawl
South Carolina Circuit Judge, Retired

Attachments (Kovach Job Description, Timeline, Letter from Freeman)

A. Victor Rawl, Sr.
2835 Preakness Stakes, Charleston, SC 29414

(843) 766-7334
avrawl@aol.com

May 2, 2014

Dr. Kent Murray, Chairman
Berkeley County School District Board of Education
P.O. Box 608
Moncks Corner, SC 29461

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00449

Board of Education entered into with Ms. Kovach. It is very clear to me in reviewing the material that her job description, a copy of which is attached, covers a very broad area of public information, coordination, outreach, education, and, of course, community involvement. You will see from the timeline attached that Ms. Kovach was very active in complying with her job description. It is clear to me that she has an outgoing, effervescent personality that compelled her to over-perform her responsibilities as outlined in her job description. It is also clear that she was extremely communicative, especially by e-mail, to everyone. The material clearly supports my decision that all of her actions were within the course and scope of her employment.

The next question, of course, is "good faith." In determining whether someone is acting in good faith, the standard is whether she was acting for her own benefit or for the benefit of her employer or someone else. In reviewing and discussing that standard, it is necessary to determine what, if any, personal benefit she derived from the activities outlined in the documentation. I can find absolutely no personal or financial benefit to her in the documentation. Questions have been raised concerning a video and payment for some banners and signs. These questions focus narrowly on a small number of selected documents without regard to the records or issues as a whole. The alleged video is clearly for the benefit of the school district, and not for her personal benefit. The alleged signs and banners may raise an issue of personnel matters or expenditure authority, but certainly in no way, shape, or form, are they an indication of personal benefit to her. Remember, it is her job to coordinate everything. She did her job.

The second question you asked me to provide a response to deals with a legal interpretation of South Carolina Code § 59-17-110. I did not feel comfortable for a myriad of reasons in responding to that question, and have taken the liberty of requesting that John Freeman, Esq., an expert in the field of statutory construction, as well as corporate governance, provide me with an opinion to give to you. I attach that opinion for the benefit of yourself and the board.

As you can see from the above-discussion, I clearly conclude as a matter of fact that Ms. Kovach's activities were clearly within the course and scope of her employment and clearly performed in good faith with her only concern being the benefit of and in the best interest of the Berkeley County School District. I will be more than happy to discuss, in person, my decisions, as well as give you and the board the ability to question me on the basis therefore.

Sincerely,

A. Victor Rawl
South Carolina Circuit Judge, Retired

Attachments (Kovach Job Description, Timeline, Letter from Freeman)

JOHN P. FREEMAN
2329 Wilmot Avenue
Columbia, South Carolina 29205-3164

803-254-4667 t
733-9870 f
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April 22, 2014

The Honorable A. Victor Rawl, Sr.
2835 Preakness Stakes
Charleston, SC 29414

Re: Berkeley County School District

Dear Judge Rawl:

Thank you for calling on me to assist in analyzing a legal issue that needs to be determined by the Berkeley County Board of Education. The issue concerns the Board's obligation to indemnify an employee, Mrs. Amy Kovach, who has been indicted for an alleged violation of S.C. Code § 8-13-1346. In this regard, S.C. Code § 59-17-110 requires that:

In the event that any employee of any school district in South Carolina is prosecuted in any action, civil or criminal, or special proceeding in courts of this State, or of the United States, by reason of any act done or omitted in good faith in the course of his employment, it is made the duty of the school district, when requested in writing by any such public school employee, to appear and defend the action or proceeding in his behalf.

You have advised me that you have diligently investigated the conduct of Mrs. Kovach as outlined in the indictment and have concluded based on your investigation that her conduct constitutes an "act done or omitted in good faith in the course of [her] employment" as provided for in S.C. Code Ann. § 59-17-110. Based on that factual predicate, you have asked me to give you my legal opinion whether the Board is precluded from appearing and defending Mrs. Kovach under the statute simply by virtue of the fact that she has now been indicted.

As you know, I am a recognized expert in the field of entity governance, having taught Business Associations, Corporations, Agency and a host of related courses over a span of the 35 years during which I was a Professor of Law at USC Law School. I have lectured and testified as an expert many times about the duties, rights, and powers of entities and of their board members, officers, and agents. Among other professional activities, I served the South Carolina General Assembly as a reporter on the most recent South Carolina Corporate Code revision project. The

areas for which I was reporter included indemnification of corporate officers and directors. I have in the past advised entities and their board members about indemnification matters.

PROFESSIONAL OPINION

Based on my research and in light of your factual findings, it is my professional opinion that Mrs. Kovach's indictment does not preclude the board from appearing or defending the action in her behalf.

REASONS IN SUPPORT OF OPINION

A prosecutor's attempt to interfere with an indicted employee's indemnity rights smacks of impropriety. A case in point is the Second Circuit's ruling in United States v. Stein, 541 F.3d 130, 157 (2d Cir. 2008). The government there sought to bar accounting firm KPMG from providing legal fees to former employees indicted for tax fraud. That action was held unconstitutional as a deprivation of Sixth Amendment rights. The court explained:

The government conceded at oral argument that it is in the government's interest that every defendant receive the best possible representation he or she can obtain. A company that advances legal fees to employees may stymie prosecutors by affording culpable employees with high-quality representation. But if it is in the government's interest that every defendant receives the best possible representation, it cannot also be in the government's interest to leave defendants naked to their enemies.¹

Furthermore, South Carolina's public policy strongly favors indemnity being extended to employees who have acted within the scope of their employment and in good faith. Thus, under South Carolina corporate law, S.C. Code Ann. § 33-31-851(a), indemnification is allowed in

¹ Here is additional background concerning Stein from Charles D. Weisselberg & Su Li, *Big Law's Sixth Amendment: the Rise of Corporate White-collar Practices in Large U.S. Law Firms*, 53 Ariz. L. Rev. 1221, 1223 (2011):

On July 16, 2007, U.S. District Court Judge Lewis A. Kaplan entered a remarkable order. Federal prosecutors had investigated the giant accounting firm KPMG LLP ("KPMG") for allegedly marketing fraudulent tax shelters. The firm managed to avoid criminal charges, but 16 former partners and employees did not. In United States v. Stein, Judge Kaplan dismissed the indictment against 13 of the 16 individuals, finding that federal prosecutors had unconstitutionally induced KPMG to stop funding their individual defenses. As a result, although these defendants generally had substantial personal assets, they either lost their counsel of first choice (including lawyers from major law firms) or were financially unable to defend their cases as they would have had their legal expenses been entirely advanced or underwritten by KPMG. The court was incensed, calling this "intolerable in a society that holds itself out to the world as a paragon of justice." The Department of Justice . . . challenged the ruling. The defendants and their amici were represented in a closely watched appeal by some of the finest lawyers of the day, including counsel from the nation's largest law firms. On August 28, 2008, the U.S. Court of Appeals for the Second Circuit affirmed, finding that the government had violated the defendants' Sixth Amendment right to counsel.

some cases in favor even of criminally-convicted officers, trustees, employees, or agents. Indemnification is flatly prohibited only where there is an adjudication that the officer, trustee, employee, or agent is liable to the company or where an improper personal benefit was received by the person seeking indemnification. S.C. Code Ann. § 33-31-851(d). See S.C. Code § 33-31-851(c) ("The termination of a proceeding by . . . conviction . . . is not, of itself, determinative that the director did not meet the standard of conduct described in this section."). The corporate law "standard of conduct" set forth in Section 33-31-851(a) requires that the entity be able to conclude the officer, trustee, employee, or agent acted in good faith and reasonably believed his or her conduct was in the entity's best interest. That factual predicate for indemnification in the corporate setting is very similar to the one established by S.C. Code § 59-17-110.

I have reviewed the Attorney General's Opinion dated May 13, 1997, 1997 WL 323769 (S.C.A.G.). That Opinion holds:

[O]ur courts would conclude that a school district may not expend public funds to pay a school board member's or an employee's expenses of representation in criminal proceedings.

As you well know, an Attorney General's Opinion has no force of law. In this case it is wrong. Opinions rendered by the Attorney General do not trump statutory enactments. The 1997 Opinion relies on and reiterates the holding from a 1995 Opinion, that purported to find that "a political subdivision, such as a school district, is without authority to pay an employee's expenses of representation in a criminal proceeding." This opinion is obviously and egregiously wrong because it contradicts the plain language of, S.C. Code § 59-17-110. Again, the statute requires that:

In the event that any employee of any school district in South Carolina is prosecuted in any action, civil or criminal, or special proceeding in courts of this State, or of the United States, by reason of any act done or omitted in good faith in the course of his employment, it is made the duty of the school district, when requested in writing by any such public school employee, to appear and defend the action or proceeding in his behalf.

In this case, an employee is being prosecuted in a criminal proceeding. You have determined, after making a reasonable investigation, that the employee acted in good faith and in the course of her employment. Under these circumstances, it is "the duty" of the school district to provide a defense to the proceeding on her behalf.

I hold the foregoing opinion concerning the Berkeley County Board of Education's duty to provide a defense on behalf of Mrs. Amy Kovach to a reasonable degree of professional certainty as an expert in the field of entity governance and employee indemnification rights.

I am rendering this legal opinion as a public service. No compensation, direct or indirect, in any form or fashion, has been or will be furnished to me in connection with this work.

Sincerely yours,

A handwritten signature in cursive script that reads "John P. Freeman". The signature is written in dark ink and is positioned above the printed name.

John P. Freeman

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF GENERAL SESSIONS
NINTH JUDICIAL CIRCUIT
INDICTMENT #s: 2014-GS-08-0266
2014-GS-08-01403

STATE OF SOUTH CAROLINA,)

vs.)

AMY KOVACH,)

Defendant.)

MOTION TO DISQUALIFY
ATTORNEY GENERAL

HARRY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

15 JAN 20 PM 4:20

FILED

KJW

Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.¹

The Defendant, Amy Kovach (hereinafter "Mrs. Kovach"), by and through her undersigned counsel, submits the following as and for her Motion to Disqualify the Attorney General Alan M. Wilson and his office (collectively, the "Attorney General") from prosecuting the above-listed indictments arising from the 2012 Berkeley County School District bond referendum. The Attorney General should be disqualified because he (1) is engaged in a campaign to both prosecute Mrs. Kovach and undermine her statutory right to have the Berkeley County School Board (the "BCSD") indemnify her for attorney fees and costs arising from the prosecution, thereby violating the Rules of Professional Responsibility that govern the legal profession and Mrs. Kovach's constitutional rights; (2) is on the advisory board of Santee Cooper, a governmental entity that supported the Bond Referendum, and therefore he has a conflict of interest in this matter; and (3) had SLED conduct an examination of Mrs. Kovach's

¹ Young v. United States ex rel. Vuitton Et Fils S.A., 481 U.S. 787, 814 (1987).



computer in the face of a filed motion for protective order claiming attorney-client privilege, and then misstated to the Court that SLED had not done so. Mrs. Kovach submits that a local solicitor should take over the prosecution from the Attorney General.

BACKGROUND

This case arises from a complaint made by the leadership of the Berkeley County Republican Party to the Attorney General, himself a Republican. See SLED Investigative Report dated July 25, 2013 (excerpted and without attachments at **Exhibit 1**²), at page 1 (“Attorney Josh Whitley contacted the SCAGO and provided documents, newspaper articles, and emails detailing the alleged violations.”). “Whitley alleged BCSD employees, specifically Superintendent Doctor (Dr.) Rodney Thompson, Deputy Superintendent Archie Franchini, and Director of Communications Amy Kovach, worked on the [2012 Yes4Schools bond referendum] campaign during business hours and used district resources.” Id. at 1-2. The purpose of the referendum was to raise funds to renovate and build public school facilities in Berkeley County. Voters approved the ballot measure in November 2012.

Santee Cooper was a strong supporter of the referendum campaign, contributing \$15,000 on October 9, 2012 (**Exhibit 2**), as well as an employee, Laura Varn, to serve as Co-Chair of the campaign, see Memorandum of Interview with Laura Varn on May 9, 2013 (excerpted at **Exhibit 3**). Santee Cooper staff member Phil Sails also worked as a photographer for the Campaign. See Memorandum of Interview with Kris Mathews on May 29, 2013 (**Exhibit 4**). Santee Cooper is a publicly owned entity established by statute. See S.C. Code Ann. §§ 58-31-

² The Exhibits are contained in the Appendix of Exhibits to Motion to Disqualify Attorney General, filed along with this Motion.

10 et seq. The Attorney General is a member of the advisory board of Santee Cooper. See S.C. Code Ann. § 58-31-20(D).

Upon receiving Whitley's complaint, the Attorney General immediately directed SLED to investigate his allegations. See Letter from John W. McIntosh dated January 17, 2013 (Exhibit 5). Thereafter SLED began interviewing people involved in the Yes4Schools Campaign, including Mrs. Kovach and Ms. Varn. Of course, elected officials and school district employees support school bond referendums all the time in South Carolina. See Appendix of Media Reports of Bond Referenda Support, filed January 20, 2015. It is unknown whether the Attorney General has investigated any of these other individuals, but there is no indication that he has.

On March 7, 2013, Mrs. Kovach wrote to the BCSD asking it to pay her attorney fees and costs related to the investigation, as it is required to do by statute (S.C. Code Ann. § 59-17-110) and the BCSD policy manual. See Letter from Amy Kovach dated March 7, 2013 (Exhibit 6). The BCSD began paying Mrs. Kovach's fees.

On February 11, 2014, the Attorney General presented a Berkeley County Grand Jury with an indictment charging Mrs. Kovach with violating S.C. Code Ann. § 8-13-1346 through her involvement in the Yes4Schools campaign (the "Election Indictment"). The Election Indictment states:

That Amy Kovach did, in Berkeley County, on or about the period between August 1, 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 the production of other campaign material, did 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 board referendum

held on November 6, 2012, and all of which was in violation of 8-13-1346 of the S.C. Code of Laws as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Exhibit 7. The Grand Jury true billed the Election Indictment. Mrs. Kovach immediately was put on administrative leave with pay from her position with BCSD. Laura Varn, herself an employee of a public entity, was not indicted, despite having been paid by Santee Cooper to serve as co-chair of the Yes4Schools Campaign.

The BCSD asked A. Victor Rawl, Sr., a retired South Carolina Circuit Judge, to investigate and provide a legal opinion as to:

- (1) Whether, based on the information available to the board at this time, the conduct of Ms. Kovach as outlined in the indictment constitutes an "act done or omitted in good faith in the course of [her] employment" as provided for in S.C. Code Ann. § 59-17-110; and
- (2) If you conclude that Ms. Kovach was acting "in good faith in the course of [her] employment" as provided for in S.C. Code Ann. § 59-17-110, in regard to the issues referenced in the indictment, whether the board is precluded from appearing and defending Ms. Kovach under the statute simply by virtue of the fact that she has now been indicted?

Letter from A. Victor Rawl, Sr., dated May 2, 2014 (without attachments at Exhibit 8). As to the first question, Judge Rawl responded that Mrs. Kovach was acting in good faith and within the scope and course of her employment. Specifically, he found "absolutely no personal or financial benefit" to Mrs. Kovach in the "some forty pounds of emails and documents" he had reviewed. Id. at 2.

Judge Rawl referred the second question to Professor John Freeman, Esquire, a recognized expert in the field of statutory construction and corporate governance. Professor Freeman began explaining his opinion by noting that "A prosecutor's attempt to interfere with an indicted employee's indemnity rights smacks of impropriety," citing United States v. Stein, 541

F.3d 130, (2d Cir. 2008), wherein the Second Circuit held that the government's attempts to bar KPMG from paying the legal fees of former employees indicted for tax fraud violated their Sixth Amendment rights. Letter from John Freeman dated April 22, 2014, at 2 (Exhibit 9). Professor Freeman also noted that

South Carolina's public policy strongly favors indemnity being extended to employees who have acted within the scope of their employment and in good faith. Thus, under South Carolina corporate law, S.C. Code Ann. § 33-31-851 (a), indemnification is allowed in some cases in favor even of criminally-convicted officers, trustees, employees, or agents. Indemnification is flatly prohibited only where there is an adjudication that the officer, trustee, employee, or agent is liable to the company or where an improper personal benefit was received by the person seeking indemnification. S.C. Code Ann. § 33-31-851(d). See S.C. Code § 33-31-851(c) ("The termination of a proceeding by ... conviction . . . is not, of itself, determinative that the director did not meet the standard of conduct described in this section."). The corporate law "standard of conduct" set forth in Section 33-31-851(a) requires that the entity be able to conclude the officer, trustee, employee, or agent acted in good faith and reasonably believed his or her conduct was in the entity's best interest. That factual predicate for indemnification in the corporate setting is very similar to the one established by S.C. Code § 59-17-110.

Id. at 2-3 (emphasis in original).

Professor Freeman concluded that the BCSD is not precluded from providing a defense for Mrs. Kovach because she was indicted, and that the BCSD has a duty to provide a defense for her under Section 59-17-110. Id. at 2. Professor Freeman addressed two Attorney General's Opinions, one from 1995 and one from 1997, which state that a school board may not pay for the defense of an employee in a criminal proceeding. Professor Freeman stated first that an Attorney General's Opinion "has no force of law." Id. at 3. Professor Freeman also stated that the Attorney General's Opinions are "obviously and egregiously wrong because [they] contradict[] the plain language" of Section 59-17-110. Id.

The BCSD made Judge Rawl's and Professor Freeman's opinions public at a board meeting, and has paid legal bills it has received from counsel for Mrs. Kovach and Mr. Franchini.

On or about August 4, 2014, SLED seized various materials from the offices of the BCSD, including Mrs. Kovach's computer. Mrs. Kovach's counsel immediately objected to any review of the computer, and moved for a protective order "prohibiting the State from reviewing the seized materials unless and until there is an appropriate order setting forth an extraction-and-review procedure that protects privileged and work product materials." Motion for Protective Order filed August 6, 2014 (Exhibit 10). While the Motion was pending, in total disregard of Mrs. Kovach's privilege claim, SLED conducted an examination of her computer. See Case Management History (Exhibit 11) (showing that the computer was searched beginning August 29, 2014). At a hearing on October 28, 2014, Assistant Deputy Attorney General Allen Myrick stated "While this motion is -- has been waiting to be ruled on, SLED has not moved forward on conducting this examination." October 28 Transcript pp. 5-6 (Exhibit 12). Of course, SLED had begun its examination two months earlier.

On September 9, 2014, the Attorney General obtained a second indictment of Mrs. Kovach, this time based on allegations of forgery:

That Amy Kovach did, in Berkeley County, on or about November 2013, commit the crime of Forgery, in that she did falsely make, forge, or counterfeit, cause or procure to be falsely made, forged or counterfeited of a writing or instrument, and did utter or publish as true a false, forged, or counterfeited writing or instrument of writing. To Wit: During November 2013, Amy Kovach created a false, backdated invoice, purporting to be from the Berkeley County School District to the "Yes for Schools" campaign, in an attempt to establish that she had intended to have public funds repaid to the County which had been spent on materials in support of a bond referendum election campaign, this in an amount less than \$10,000 (\$259.20), and in violation of §16-13-10(A) and (B)(2) of the Code of Laws of South Carolina (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Exhibit 13 (the "Forgery Indictment"). In obtaining the Forgery Indictment, the Attorney General generated new ammunition for its attack on Mrs. Kovach's statutory right to indemnification.

On October 14, 2014, the Attorney General wrote to BCSD's counsel, copying the board members directly, urging the BCSD to stop paying legal fees based on the Attorney General Opinions Professor Freeman had already addressed and discredited, and threatening to sue to recover the fees already paid. See Letter from John W. McIntosh dated October 14, 2014 (Exhibit 14). BCSD counsel immediately responded, correcting factual errors in the Attorney General's letter, and providing Judge Rawl's and Professor Freeman's written opinions. See Letter from Kathryn Long Mahoney dated October 14, 2014 (Exhibit 15).

Mrs. Kovach consulted legal experts to provide opinions about the Attorney General's conduct with regard to her statutory right to fees. Professor Nathan Crystal, a recognized expert in the field of Attorney Professional Responsibility, agrees with Professor Freeman that the Attorney General's interpretation of § 59-17-110 is wrong. See Affidavit of Nathan M. Crystal dated December 15, 2014, ¶¶ 13-18. With regard to the Attorney General's letter to BCSD board members and its counsel, Professor Crystal concludes:

In my opinion the Attorney General of South Carolina is interfering with Ms. Kovach's Right to Counsel under the Sixth and Fourteenth Amendments and with her statutory right to indemnification under S.C. Code §59-17-110. In my opinion such conduct violates Carolina Rule of Professional Conduct (SCRPC) 3.8 and its comments and amounts to conduct prejudicial to the administration of justice under SCRPC 8.4(e). In addition, the Attorney General has engaged in other improper conduct in this proceeding, including representation that involves a conflict of interest. In my opinion such conduct warrants disqualification of the Attorney General's office from prosecution of Ms. Kovach.

Id. at ¶ 4. Professor Crystal notes also that the October 14 letter from John McIntosh, in which he copied BCSD board members on a letter to BCSD counsel, "raises a question of possible violation of SCRCF 4.2." Id. ¶ 21.

Dr. Gregory B. Adams, another recognized expert in the field of Attorney Professional Responsibility, opines "that the persistent, ongoing professional misconduct by [the Attorney General] in connection with the prosecution of these criminal charges, violates the constitutional rights of the defendant, Amy Kovach, especially her rights to counsel and due process, and warrants the disqualification of the Attorney General as prosecutor." Affidavit of Expert Opinion of Dr. Gregory B. Adams, dated January 19, 2015, ¶ I.

The Attorney General continues to undermine Mrs. Kovach's statutory right to indemnification. On December 9, 2014, the BCSD bowed to pressure from the Attorney General and voted to suspend payment of Mrs. Kovach's attorney fees related to the Forgery Indictment. See Post & Courier, Berkeley schools halt payment of Amy Kovach's legal fees on felony charge, Dec. 10, 2014 (Exhibit 16).

DISCUSSION

1. **The Attorney General Should be Disqualified Because he Violated the Rules of Professional Responsibility and Mrs. Kovach's Sixth Amendment Right to Counsel.**

In Berger v. United States, the United States Supreme Court explained the duties of a prosecutor, in that case the United States Attorney:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he

may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

295 U.S. 78, 88 (1935). The same principals apply to a state attorney general serving as a prosecutor: he also "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Id. "Prosecutors who overreach undermine 'confidence, not only in [their] profession, but in government and the very ideal of justice itself.'" Fred C. Zacharias, Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?, 44 Vand. L. Rev. 45, 59-60 (1991).

Comment [1] to Rule 3.8 of the South Carolina Rules of Procedural Conduct ("SCRPC") makes the same point: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice" SCRPC 8.4(e) states: "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice." Citing Comment [1] to SCRPC 3.8, the South Carolina Supreme Court stated in State v. Quattlebaum: "Prosecutors are ministers of justice and not merely advocates. . . . A prosecutor has special responsibilities to do justice and is held to the highest standards of professional ethics." 338 S.C. 441, 449, 527 S.E.2d 105, 109 (2000).

Here, the Attorney General has committed professional misconduct and violated the Sixth Amendment by prosecuting Mrs. Kovach while at the same time undermining her statutory right to have the BCSD provide her a defense.

In United States v. Stein, Assistant United States Attorneys investigating fraudulent tax shelters pressured the accounting firm KPMG to condition the payment of legal fees for its employees on whether the employee cooperated with the government. 541 F.3d 130, 137-39 (2d Cir. 2008). KPMG bowed to this pressure in order to avoid indictment itself. Id. at 138-39. KPMG fired at least one employee for exercising her Fifth Amendment rights. Id. at 139. When employees were indicted, KPMG stopped paying their legal fees. Id. at 139-40.

The indicted KPMG employees moved to dismiss the indictments based on the government's interference with KPMG's advancement of legal fees. Id. at 140. The district court granted the motion, finding that the prosecutors' conduct "shock[s] the conscience." Id. at 142. The Second Circuit affirmed, holding that "the Sixth Amendment prohibits the government from impeding the supply of defense resources (even if voluntary or gratis), absent justification."³ Id. at 156.

The Attorney General is doing to Mrs. Kovach what the Government did to the defendants in Stein: impede her supply of defense resources. The facts here are even more compelling than those in Stein in that Mrs. Kovach has a statutory right to have the BCSD provide a defense. As in Stein, the Attorney General's conduct shocks the conscience.

Nor is this the first time South Carolina courts have addressed a prosecutor's interference with a defendant's Sixth Amendment rights. In State v. Quattlebaum, the Supreme Court of South Carolina reversed a conviction and disqualified the Eleventh Circuit Solicitor's Office from re-prosecuting where a deputy solicitor in that office violated the defendant's Sixth Amendment right to counsel. 338 S.C. 441, 449, 527 S.E.2d 105, 109 (2000). In that case, the

³ "Justification" was described as situations where payments to counsel demonstrate the existence of a criminal conspiracy, or possibly where the payments demonstrate a scheme to "circle the wagons" against a criminal prosecution. Stein, 541 F.3d at 156-57. No such justification exists here.

deputy solicitor had eavesdropped on a privileged conversation between the defendant and his attorney. After concluding that this conduct violated the Sixth Amendment and required reversal and disqualification, the Court addressed the issue whether the solicitor's office should also have been disqualified "to protect the integrity of the judicial system." *Id.* at 449, 527 S.E.2d at 109.

Concluding that it should, the Court wrote:

Although we have disqualified the Eleventh Circuit Solicitor's Office from prosecuting appellant, we address appellant's second assertion because of its importance to judges, attorneys, criminal defendants, and indeed all citizens of this state. Every South Carolinian has a vital interest in the fair administration of justice. This Court bears the ultimate responsibility for maintaining judicial integrity and high standards of professional conduct among the members of the bar, and for protecting and defending the constitutional rights of the accused.

The integrity of the entire judicial system is called into question by conduct such as that engaged in by the deputy solicitor and investigating officers in this case. Prosecutors are ministers of justice and not merely advocates. See Rule 3.8, cmt., Rules of Professional Conduct. A prosecutor has special responsibilities to do justice and is held to the highest standards of professional ethics. The participation at trial of a prosecutor who has eavesdropped on the accused and his attorney tarnishes us all. We will not tolerate deliberate prosecutorial misconduct which threatens rights fundamental to liberty and justice.

Id., 527 S.E.2d at 109.

A prosecutor should be disqualified if his misconduct creates even the appearance of impropriety.

The Court's ultimate consideration must be public confidence in the administration of justice, that "justice must satisfy the appearance of justice." United States v. Johnston, 690 F.2d 638 (7th Cir. 1982); General Motors Corp. v. City of New York, 501 F.2d 639, 649 (2d Cir. 1974). As the Supreme Court stated, federal courts have an obligation to ensure "that legal proceedings appear fair to all who observe them." Wheat v. United States, 486 U.S. 153, 108 S. Ct. 1692, 1697, 100 L. Ed. 2d 140 (1988).

United States v. Dyess, 231 F. Supp. 2d 493, 498 (S.D. W. Va. 2002) (disqualifying entire prosecutor's office); see also City & Cnty. of Denver v. Cnty. Ct., 37 P.3d 453 (Colo. Ct. App. 2001) (disqualifying entire city attorney's office solely because of the appearance of impropriety,

even though the Colorado Rules of Professional Conduct make no specific mention of "the appearance of impropriety"). The Attorney General's violations of the Rules of Professional Responsibility and his violation of Mrs. Kovach's Sixth Amendment rights more than satisfy the "appearance of impropriety" standard here. See State v. Gonzales, 2005-NMSC-025, ¶ 28, 138 N.M. 271, 278-79, 119 P.3d 151, 158-59 (2005) (stating that when considering whether to disqualify a prosecutor, a court should first "determine whether prosecution by a member of the district attorney's office is inconsistent with a particular standard of professional conduct, justifying disqualification of that person"). Cf. Ingle v. State, 746 N.E.2d 927, 935 (Ind. 2001) (declining to disqualify a prosecutor where there was no indication he violated any ethical duties).

Although the Rules of Professional Responsibility state that a prosecutor must "see that the defendant is accorded procedural justice," and the ABA Standards for Criminal Justice make clear that "[t]he duty of the prosecutor is to seek justice, not merely to convict" (Standard 3-1.2(c), The Function of the Prosecutor), the Attorney General is intent on convicting Mrs. Kovach at any cost, without regard to whether he is doing justice. By undermining Mrs. Kovach's statutory right to have the BCSD provide her a defense in the face of two (now three) opinions of respected legal experts, the Attorney General has shown that this is no mere prosecution subject to the measured application of prosecutorial discretion. The Attorney General will use any means necessary to obtain a conviction. The public should be terrified by this abuse of prosecutorial power. It shows that the Attorney General has little respect for the Rules of Professional Responsibility and citizens' statutory and constitutional rights. As Professor Freeman wrote, in an opinion he provided without compensation as a public service, "A prosecutor's attempt to interfere with an indicted employee's indemnity rights smacks of

impropriety." Exhibit 9 at 2. The appearance of impropriety standard is easily met by the Attorney General's misconduct.

2. The Attorney General Should be Disqualified Because he is Serving Both as Prosecutor and as a Civil Attorney as to the Same Set of Facts.

Section 17-1-20 of the South Carolina Code, "Prosecuting officer shall not accept fees or rewards, nor act in a civil case as counsel for either party," states:

No prosecuting officer shall receive any fee or reward from or in behalf of a prosecutor for services in any prosecution or business to which it is his official business to attend, nor be concerned as counsel or attorney for either party in a civil action depending upon the same state of facts.

(Emphasis added). The Supreme Court of South Carolina has described this statute as "essential for the protection of the public interest." In re Jolly, 269 S.C. 668, 670, 239 S.E.2d 490, 491 (1977).

In Jolly, the prosecutor represented a mother and her children in a civil suit against a person who was also the defendant in a reckless homicide case prosecuted at his direction. Id. at 669, 239 S.E.2d at 491. The Court rejected the prosecutor's argument that he did not violate the statute because an assistant solicitor actually prosecuted the case, noting that this "does not absolve [the prosecutor] in view of the authority possessed by [him] to control the official acts of the Assistant Solicitor." Id. at 670, 239 S.E.2d at 491.

Here, the Attorney General has threatened a civil action to stop indemnification and recover fees paid toward Mrs. Kovach's defense. See Exhibit 14. He has successfully pressured the BCSD to stop paying fees as to the Forgery Indictment. He is acting in two incongruous roles: that of criminal prosecutor taking action on behalf of the State, and that of a civil attorney for the State seeking reimbursement of public funds expended in the defense of the prosecution. The Attorney General is violating Section 17-1-20 of the South Carolina Code because he is

serving as a "prosecuting officer . . . concerned as counsel [for the State] in a civil action depending upon the same state of facts."

3. The Attorney General Should be Disqualified Because he Sits on the Board of Santee Cooper.

The Model Rules of Professional Conduct state that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest," and a concurrent conflict exists if "there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer." Rule 1.7(a)(2); see also Rule 1.11(d)(1) (stating that a lawyer currently serving as a public officer or employee . . . is subject to Rule[] 1.7"). Thus, disqualification is appropriate where (i) a co-defendant has a personal relationship with the prosecutor's office, Fregoso v. Kramer, Case No. CV 08-01115-GW (CT), 2008 U.S. Dist. LEXIS 109225, at *9 (C.D. Cal. Nov. 26, 2008), adopted in 2009 U.S. Dist. LEXIS 31479 (C.D. Cal. Apr. 10, 2009); (ii) the prosecutor's brother is a complaining witness, People v. Doyle, 159 Mich. App. 632, 648, 406 N.W.2d 893, 900, rev'd on other grounds in 161 Mich. App. 743, 411 N.W.2d 730 (1987), and (iii) a witness to the crime is a prosecutor in the District Attorney's office that is prosecuting the case, People v. Conner, 34 Cal. 3d 141, 148, 193 Cal. Rptr. 148, 151, 666 P.2d 5, 8 (1983). In Conner, the court stated that a prosecutor has a conflict "whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner." Conner, 34 Cal. 3d at 148, 193 Cal. Rptr. at 151, 666 P.2d at 8. The South Carolina Supreme Court has also recognized that a conflict in the prosecutor's duties may warrant disqualification. See State v. Hunter, 313 S.C. 53, 55, 437 S.E.2d 41, 42 (1993) (rejecting a due process challenge to denial of a motion to disqualify a prosecutor because "[t]he fact that the prosecutor advises the police department in

matters which may ultimately be prosecuted does not create any type of conflict in the duties of the prosecutor's office").

Here, there is a conflict in that the Attorney General is on the advisory board of Santee Cooper, a public entity that itself is much more culpable than Mrs. Kovach because it provided \$15,000 in public funds and the time of public employees, Laura Varn and Phil Sails, to support the Yes4Schools Campaign. The criminal statute on which the Election Indictment is based, S.C. Code Ann. § 8-13-1346 states: "a governmental entity may not use public funds, property, or time in an attempt to influence the outcome of a ballot measure." A "referendum" is defined in the Ethics Act as a type of "ballot measure." See S.C. Code Ann. § 8-13-1300(2). Thus, Santee Cooper has violated the statute under which Mrs. Kovach is charged. And under the Attorney General's interpretation of the statute,⁴ Yes4Schools co-chair Laura Varn and Phil Sails are equally or more culpable than Mrs. Kovach as they have utilized public time (their time, for which they were paid by Santee Cooper) "to influence the outcome of an election." S.C. Code Ann. § 8-13-1346(a). Even if the Attorney General's conflict is not a traditional conflict on its own compelling disqualification, it is another unseemly fact creating an appearance of impropriety. He is on the board of a public entity that supported the bond referendum for which he is prosecuting Mrs. Kovach. He has specifically targeted her and ignored Santee Cooper and its' employees conduct. Nor is there any indication he has investigated any of the elected officials or school board employees that publically have supported school bond referenda

⁴ Mrs. Kovach disagrees with the Attorney General that a school bond referendum is an "election" because the Ethics Act definitions state that it is not an election. Compare S.C. Code Ann. § 8-13-1300(9) (defining an election without including a referendum or ballot measure) with id. § 8-13-1300(2) (defining a ballot measure as including a referendum or "measure submitted to voters for their approval"). However, the Court recently agreed with the Attorney General's interpretation. See Order Denying Defendant's Motion to Dismiss or Quash the Indictment, Nov. 3, 2014. The Attorney General cannot now argue that its interpretation applies only to Mrs. Kovach and not to Ms. Varn or Mr. Sails.

throughout the state. See Appendix of Media Reports of Bond Referenda Support, filed January 20, 2015. While Mrs. Kovach has absolutely no desire to see any other individual go through the debilitating humiliation of a criminal prosecution for actions taken solely for the benefit of schoolchildren, the glaring fact remains that many others similarly situated have been ignored.

4. The Attorney General Should be Disqualified for Disregarding Mrs. Kovach's Privilege Claim.

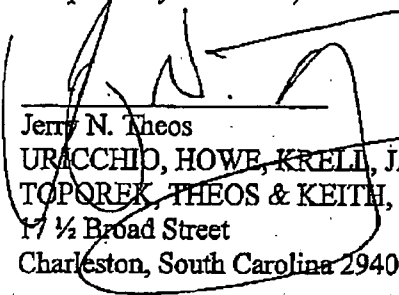
As discussed above, the Attorney General has "the responsibility of a minister of justice and not simply that of an advocate," which includes "specific obligations to see that the defendant is accorded procedural justice." Comment [1] to Rule 3.8, SCRPC. The Court should disqualify the Attorney General if his conduct creates the appearance of impropriety or undermines the integrity of the judicial system. See, e.g., Dyess, 231 F. Supp. 2d at 498; Quattlebaum, 338 S.C. at 449, 527 S.E.2d at 109.

Here, the examination of Mrs. Kovach's computer in total disregard of her privilege claim is another example of the Attorney General's abuse of power in this case. While her motion for a protective order was pending—a motion in which Mrs. Kovach asserted that the computer contained attorney-client communications and work product—the Attorney General had SLED examine her computer. See Exhibit 11. Later, the Attorney General misstated to the Court that no review had been done. See Exhibit 12. "Procedural justice" would have required, first, that the examination not be conducted, and second, that the examination that was conducted be truthfully disclosed to the Court.

CONCLUSION

For the reasons stated above, the Court should disqualify the Attorney General from prosecuting this case, and assign the prosecution to a local solicitor.

Respectfully submitted,



Jerry N. Theos
URACCHIO, HOWE, KRELI, JACOBSON,
TOPOREK, THEOS & KEITH, P.A.
17 1/2 Broad Street
Charleston, South Carolina 29401

Chris Paton
CHRIS PATON LLC
40 Calhoun Street, Suite 411
Charleston, South Carolina 29401

Charleston, South Carolina
January 19, 2015

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
) NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY) INDICTMENT #s: 2014-GS-08-0266
2014-GS-08-01403

STATE OF SOUTH CAROLINA,)
)
vs.) APPENDIX OF EXHIBITS TO
) MOTION TO DISQUALIFY
AMY KOVACH,) ATTORNEY GENERAL
)
Defendant.)

Exhibit 1 – Excerpt of SLED Investigative Report, July 25, 2013

Exhibit 2 – Santee Cooper Check for \$15,000

Exhibit 3 – Excerpt of Memorandum of Interview with Laura Varn, May 9, 2013

Exhibit 4 – Memorandum of Interview with Kris Mathews, May 29, 2013

Exhibit 5 – Letter from John W. McIntosh, January 17, 2013

Exhibit 6 – Letter from Amy Kovach to BCSD, March 7, 2013

Exhibit 7 – Indictment dated February 11, 2014

Exhibit 8 – Letter from A. Victor Rawl, Sr., May 2, 2014

Exhibit 9 – Letter from John Freeman, April 22, 2014

Exhibit 10 – Motion for Protective Order filed August 6, 2014

Exhibit 11 – Case Management History

Exhibit 12 – Excerpt of Motion Hearing Transcript, October 28, 2014

Exhibit 13 – Indictment dated September 9, 2014

Exhibit 14 – Letter from John W. McIntosh, October 14, 2014

Exhibit 15 – Letter from Kathryn Long Mahoney, October 14, 2014

Exhibit 16 – Post & Courier, "Berkeley schools halt payment of Amy Kovach's legal fees on felony charge," December 10, 2014

15 JAN 20 PM 4:20
FILED
Kym
CLERK OF COURT
BERKELEY COUNTY, S.C.

EXHIBIT 1

00473

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

NIKKI R. HALEY
Governor



MARK A. KEEL
Chief

July 25, 2013

INVESTIGATIVE REPORT

TO: File : 31130011

FROM: Special Agent Ryan Kelly

RE: Violation of South Carolina Ethics Act
Misconduct in Office

Thompson, Rodney (Subject)
Kovach, Amy (Subject)
Franchini, Archie (Subject)

COUNTY: Berkeley

Introduction

On January 18, 2013, the South Carolina Law Enforcement Division (SLED) received a written request (Attachment 1) from Chief Deputy Attorney General John McIntosh to investigate alleged incidents of Misconduct in Office and Violation of the South Carolina Ethics Act by employees of the Berkeley County School District (BCSD) during the 2012 Yes4Schools bond referendum. According to documents (Attachment 2) provided by the South Carolina Attorney General's Office (SCAGO), Attorney Josh Whitley contacted the SCAGO and provided documents, newspaper articles, and emails detailing the alleged violations. Whitley alleged BCSD employees, specifically Superintendent Doctor (Dr.) Rodney Thompson, Deputy



An Accredited Law Enforcement Agency



P.O. Box 21398 / Columbia, South Carolina 29221-1398 / (803) 737-9000 / Fax (803) 896-7588

00474

Superintendent Archie Franchini, and Director of Communications Amy Kovach, worked on the campaign during business hours and used district resources. SLED Captain (Capt.) Ryan Neill assigned Special Agent (S/A) Ryan Kelly to conduct an investigation. State Ethics Commission Investigator (Inv.) Jim Bagnall was also assigned to conduct an investigation on behalf of the State Ethics Commission in concert with S/A Kelly.

Summary

On February 13, 2013, S/A Kelly and Inv. Jim Bagnall interviewed Josh Whitley and obtained a voluntary prepared statement (Attachment 3). Whitley provided the following information: He received complaints from teacher's aides, teachers and administrators regarding improper and illegal activities by Dr. Thompson, Dr. Franchini, Ms. Kovach and several Berkeley County School Board (BCSB) members. A public records request was made related to their campaign activities. He reviewed the records provided by the BCSD and was of the opinion that BCSD and BCSB members violated state laws.

On May 21, 2013, S/A Kelly and Inv. Bagnall again interviewed Josh Whitley and obtained a voluntary written statement (Attachment 4). Whitley provided the following information: He was the Chairman of the Berkeley County Citizens for Sustainable Education Committee. The committee's purpose was to oppose the 2012 BCSD bond referendum. He was never afforded equal opportunity to speak or present at rallies, meetings or open houses held on school property. He met with Dr. Thompson on October 2, 2012. Dr. Thompson was aware that he opposed the campaign.

On February 19, 2013, S/A Kelly and Inv. Bagnall interviewed BCSD Director of Communications Amy Kovach. Based on the interview, S/A Kelly prepared a Memorandum of Interview (Attachment 5) documenting the following information as provided by Kovach: She reported directly to Dr. Franchini. She was asked by the BCSB and Dr. Thompson to facilitate communication between the BCSD and the community. She provided data and public

EXHIBIT 2

00476



santee cooper
 PO Box 2945101
 Moncks Corner, SC 29451-2501
 (843) 761-8000

OPERATING

DATE 10-09-2012

58-155
531

CHECK NO 618792

VENDOR NUMBER
502724

Fifteen Thousand Dollars And Zero Cents

PAY TO THE ORDER OF
 BERKELEY CHAMBER OF COMMERCE
 PO BOX 968
 MONCKS CORNER, SC 29461

PAY THIS AMOUNT

\$ 15,000.00

VOID AFTER SIX MONTHS

Suzanne H. Ritter
Lannie A. Carter

THE FACE OF THIS DOCUMENT HAS A MULTI COLORED BACKGROUND ON WHITE PAPER WITH A VOID FEATURE & AN ENDORSEMENT BACKER

 santee cooper		VENDOR NUMBER	VENDOR TIN	CHECK DATE	CHECK NUMBER
		502724	57-0650070	10-09-2012	618792
INVOICE DATE	INVOICE/REF NUMBER	INVOICE DESCRIPTION	INVOICE AMOUNT	DISCOUNT AMOUNT	NET AMOUNT
09-17-2012	2012 Berkeley Chambe	2012 Economic Development Sponsorship -	15,000.00	0.00	15,000.00
					15,000.00
Modica, Hazel L - M603		***** NOTICE TO VENDORS/CUSTOMERS ***** If You Have Any Questions Concerning This Check Please Call (843) 761-8055			00477

EXHIBIT 3

00478

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

NIKKI R. HALEY
Governor



MARK A. KEEL
Chief

MEMORANDUM OF INTERVIEW

TO: File # 31130011
FROM: Special Agent Ryan Kelly
RE: Interview with Laura Varn on May 9, 2013
COUNTY: Berkeley

Name: Laura Varn

Address: [REDACTED]

Phone: [REDACTED]

DOB: [REDACTED]

SSN: [REDACTED]

Employer: Santee Cooper

On May 09, 2013, Special Agent (S/A) Ryan Kelly and S/A Albayalde, SLED, interviewed Laura Varn beginning at approximately 8:45 am at the Honeycomb Café located at 162 Seven Farms Dr., Daniel Island, SC. She provided the following information: She was a Co-Chair of the Yes4Schools campaign. She spoke with Berkeley County School District (BCSD) Superintendent Doctor (Dr.) Rodney Thompson over the telephone approximately two to three times during the campaign. The purpose of the phone calls was to discuss BCSD Chief



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00479

EXHIBIT 4

00480

STATE ETHICS COMMISSION

MEMORANDUM OF INTERVIEW

NAME: MR. Kris Mathews, Yes4Schools Committee Videographer

REPORT BY: JAMES T. BAGNALL

ADDRESS:

PHONE: [REDACTED]

DATE OF INTERVIEW: 5/29/2013

IN ATTENDANCE: S/A RYAN KELLY

EDWARD LOVE ESQ.

On May 29, 2013 Special Agent Ryan Kelly and I conducted a telephone interview with Mr. Kris Mathews in regard to videos for the 2012 Berkeley County, Yes4School campaign.

During the telephone interview, Mr. Mathews provided the following information:

- Mr. Mathews said that he filmed and edited the videos for the Yes4schools campaign. He stated that he filmed a campaign co-chair, Mrs. Pulling in the studio. Mr. Mathews said that he did not record any videos at the schools or take any still photographs.
- Mr. Mathews stated that videographer, Mr. Les Stringer also provided footage for the campaign video.
- Mr. Mathews said that Santee Cooper staff, Mr. Phil Sails provided still photographs for the campaign video.

EXHIBIT 5

00482

ALAN WILSON
ATTORNEY GENERAL



January 17, 2013

RECEIVED
2013 JAN 18 PM 2:48
STATE ETHICS
COMMISSION

Chief Mark Keel
South Carolina Law Enforcement Division
Post Office Box 21398
Columbia, SC 29221

Mr. Herbert R. Hayden, Jr.
Executive Director
State Ethics Commission
5000 Thurmond Mall, Suite 250
Columbia, SC 29210

RE: Berkeley County School District

Dear Chief Keel and Director Hayden:

We have received information that indicates potential numerous violations of the South Carolina Ethics Act, and other potential misconduct in office, regarding a \$350 million bond referendum in Berkeley County. We have been provided with a notebook, two CDs, and other information outlining these potential violations.

This is to request that each of you assign an agent to investigate the potential violations in your respective jurisdiction. Your assigned agent can contact Senior Assistant Deputy Attorney General Allen Myrick, and he will provide you with a copy of the notebook, the CDs and the other information that was provided to this office.

If you have any questions or concerns, please contact me.

Yours very truly,

John W. McIntosh
Chief Deputy Attorney General

CC: Allen Myrick, SADAG

JWM/ds

EXHIBIT 6

00484

March 7, 2013

Dr. Rodney Thompson
229 E. Main Street
Moncks Corner, SC 29461

Dear Dr. Thompson:

Pursuant to South Carolina Code of Law, Title 59, Chapter 17, Section 110, titled *Duty of school districts to defend actions or proceedings against their employees*; and, pursuant to Berkeley County School District Policy GAEA, August 2005, titled *Staff Protection*, I hereby submit in writing on this, the seventh day of March, 2013, my request for legal protection and indemnification in the matter of inquiries and investigation referencing the school improvement referendum.

By state law and district policy, the district is obligated to defend its employees in legal actions resulting from acts done or omitted in good faith in the course of employment.

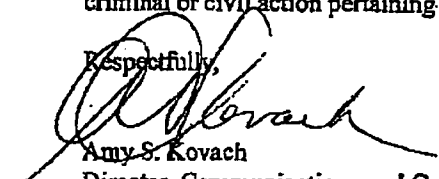
As a good faith employee, I have served to the best of my ability at the direction of the district administration and the Board of Education in the matter of the school improvement referendum, November 6, 2012. With full transparency, I presented to the Board and to the administration in public session on five (5) separate occasions detailed planning documents, information and updates regarding the activities of the volunteer campaign committee as the liaison of that committee back to the school district.

At no time was I informed, publicly or privately, not to continue to pursue working on behalf of the district in this matter, nor was I given direction indicating that my efforts were not supported by the Board of Education or the administration. The dates of public session presentation are as follows and available online for public viewing at www.berkeley.k12.sc.us.

1. Board of Education Meeting, April 24, 2012, Campaign Update and Overview;
2. Board of Education Meeting, June 29, 2012, Campaign Update and Review of Polling Data;
3. Board of Education Meeting, July 24, 2012, Campaign Review of Committee Status;
4. Board of Education Meeting, August 28, 2012, Campaign Update and Review of Committee Plans and Timing; and,
5. Board of Education Meeting, September 25, 2012, Introduction of Campaign Committee Presentation given by a representative of the Campaign Committee.

Thus, given that the Board of Education and the district administration was fully appraised and aware of all activity related to the school improvement referendum in a timely manner; and, that I provided all information publicly and in good faith with complete transparency; and, that at no time was I instructed or directed to cease or change the work as presented, I seek full protection and indemnification in any criminal or civil action pertaining to this issue.

Respectfully,



Amy S. Kovach

Director, Communications and Community Relations

00485

EXHIBIT 7

00486

WITNESSES

Charles Gheht, SLED

ARREST WARRANT NUMBER

Direct Presentment

ACTION OF GRAND JURY

True Bill

Thomas Mark J.

Foreperson of Grand Jury

Date: 2-11-14

VERDICT

Foreperson of Petit Jury

Date:

00487

Docket Number 2014-GS-08-00246

The State of South Carolina
County of Berkeley

COURT OF GENERAL SESSIONS

Term: February 2014

THE STATE

vs.

Amy Kovach,
DEFENDANT

Indictment for
Violation of Ethics Act:
Use of Public Funds to Influence
Election

SC Code: § 8-13-1346
CDR Code: 2985

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I, _____
hereby appear in my own proper person
and plead guilty to the within indictment or
to _____

Defendant

Witness:

C.C.C. Pls. And G.S.

MARY P. BISHOP
CLERK OF COURT
BERKELEY COUNTY, S.C.

14 FEB 11 PM 1:00

FILED

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

INDICTMENT

At a Court of General Sessions, convened on February 2014, the Grand Jurors
of Berkeley County present upon their Oath:

USE OF PUBLIC FUNDS TO INFLUENCE ELECTION

That Amy Kovach did, in Berkeley County, on or about the period
between August 1, 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 the production of other campaign material, did 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 8-13-1346 of the S.C. Code of Laws as amended.

Against the peace and dignity of the State, and contrary to the statute
in such case made and provided.

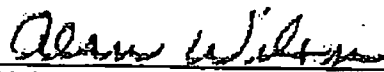

ALAN WILSON (WAM)
ATTORNEY GENERAL

EXHIBIT 8

00489

A. Victor Rawl, Sr.
2835 Preakness Stakes, Charleston, SC 29414

(843) 766-7334
avrawl@aol.com

May 2, 2014

Dr. Kent Murray, Chairman
Berkeley County School District Board of Education
P.O. Box 608
Moncks Corner, SC 29461

Dear Dr. Murray:

I am writing you to comply with your request dated February 26, 2014. Please understand, my methodology is terse; therefore, I am attaching documents that I may refer to in this memorandum. You asked me the following:

- (1) Whether, based on the information available to the board at this time, the conduct of Ms. Kovach as outlined in the indictment constitutes an "act done or omitted in good faith in the course of [her] employment" as provided for in S.C. Code Ann. § 59-17-110; and
- (2) If you conclude that Ms. Kovach was acting "in good faith in the course of [her] employment" as provided for in S.C. Code Ann. § 59-17-110, in regard to the issues referenced in the indictment, whether the board is precluded from appearing and defending Ms. Kovach under the statute simply by virtue of the fact that she has now been indicted?

In answering question one, which I feel comfortable in so doing, I have reviewed some forty pounds of e-mails and documents submitted to me by Childs & Halligan, your attorneys. I have conducted lengthy conversations with Jerry Theos, attorney for Amy Kovach, and reviewed some of his materials. I have spoken with Jane Pulling. I have also tried to talk with Laura Varn, and was only able to speak to her attorney, Ben Hagood. I have intentionally not spoken to anyone else, as it would have entailed a very lengthy and continuous process. I note for the edification of yourself and the board that SLED and the Attorney General's office have purportedly reduced their investigation to a report that is unavailable to the school district or Ms. Kovach's defense attorney, Mr. Theos, at this time.

The standard for review to determine "acting within the course and scope of employment" is most clearly defined in the body of law surrounding the area of workers' compensation. The course and scope of employment is obviously controlled by the employment agreement the

Board of Education entered into with Ms. Kovach. It is very clear to me in reviewing the material that her job description, a copy of which is attached, covers a very broad area of public information, coordination, outreach, education, and, of course, community involvement. You will see from the timeline attached that Ms. Kovach was very active in complying with her job description. It is clear to me that she has an outgoing, effervescent personality that compelled her to over-perform her responsibilities as outlined in her job description. It is also clear that she was extremely communicative, especially by e-mail, to everyone. The material clearly supports my decision that all of her actions were within the course and scope of her employment.

The next question, of course, is "good faith." In determining whether someone is acting in good faith, the standard is whether she was acting for her own benefit or for the benefit of her employer or someone else. In reviewing and discussing that standard, it is necessary to determine what, if any, personal benefit she derived from the activities outlined in the documentation. I can find absolutely no personal or financial benefit to her in the documentation. Questions have been raised concerning a video and payment for some banners and signs. These questions focus narrowly on a small number of selected documents without regard to the records or issues as a whole. The alleged video is clearly for the benefit of the school district, and not for her personal benefit. The alleged signs and banners may raise an issue of personnel matters or expenditure authority, but certainly in no way, shape, or form, are they an indication of personal benefit to her. Remember, it is her job to coordinate everything. She did her job.

The second question you asked me to provide a response to deals with a legal interpretation of South Carolina Code § 59-17-110. I did not feel comfortable for a myriad of reasons in responding to that question, and have taken the liberty of requesting that John Freeman, Esq., an expert in the field of statutory construction, as well as corporate governance, provide me with an opinion to give to you. I attach that opinion for the benefit of yourself and the board.

As you can see from the above-discussion, I clearly conclude as a matter of fact that Ms. Kovach's activities were clearly within the course and scope of her employment and clearly performed in good faith with her only concern being the benefit of and in the best interest of the Berkeley County School District. I will be more than happy to discuss, in person, my decisions, as well as give you and the board the ability to question me on the basis therefore.

Sincerely,

A. Victor Rawl
South Carolina Circuit Judge, Retired

Attachments (Kovach Job Description, Timeline, Letter from Freeman)

EXHIBIT 9

00492

JOHN P. FREEMAN
2329 Wilmot Avenue
Columbia, South Carolina 29205-3164

803-254-4667
753-9870 F
jfreemanuse@gmail.com

April 22, 2014

The Honorable A. Victor Rawl, Sr.
2835 Preakness Stakes
Charleston, SC 29414

Re: Berkeley County School District

Dear Judge Rawl:

Thank you for calling on me to assist in analyzing a legal issue that needs to be determined by the Berkeley County Board of Education. The issue concerns the Board's obligation to indemnify an employee, Mrs. Amy Kovach, who has been indicted for an alleged violation of S.C. Code § 8-13-1346. In this regard, S.C. Code § 59-17-110 requires that:

In the event that any employee of any school district in South Carolina is prosecuted in any action, civil or criminal, or special proceeding in courts of this State, or of the United States, by reason of any act done or omitted in good faith in the course of his employment, it is made the duty of the school district, when requested in writing by any such public school employee, to appear and defend the action or proceeding in his behalf.

You have advised me that you have diligently investigated the conduct of Mrs. Kovach as outlined in the indictment and have concluded based on your investigation that her conduct constitutes an "act done or omitted in good faith in the course of [her] employment" as provided for in S.C. Code Ann. § 59-17-110. Based on that factual predicate, you have asked me to give you my legal opinion whether the Board is precluded from appearing and defending Mrs. Kovach under the statute simply by virtue of the fact that she has now been indicted.

As you know, I am a recognized expert in the field of entity governance, having taught Business Associations, Corporations, Agency and a host of related courses over a span of the 35 years during which I was a Professor of Law at USC Law School. I have lectured and testified as an expert many times about the duties, rights, and powers of entities and of their board members, officers, and agents. Among other professional activities, I served the South Carolina General Assembly as a reporter on the most recent South Carolina Corporate Code revision project. The

areas for which I was reporter included indemnification of corporate officers and directors. I have in the past advised entities and their board members about indemnification matters.

PROFESSIONAL OPINION

Based on my research and in light of your factual findings, it is my professional opinion that Mrs. Kovach's indictment does not preclude the board from appearing or defending the action in her behalf.

REASONS IN SUPPORT OF OPINION

A prosecutor's attempt to interfere with an indicted employee's indemnity rights smacks of impropriety. A case in point is the Second Circuit's ruling in United States v. Stein, 541 F.3d 130, 137 (2d Cir. 2008). The government there sought to bar accounting firm KPMG from providing legal fees to former employees indicted for tax fraud. That action was held unconstitutional as a deprivation of Sixth Amendment rights. The court explained:

The government conceded at oral argument that it is in the government's interest that every defendant receive the best possible representation he or she can obtain. A company that advances legal fees to employees may stymie prosecutors by affording culpable employees with high-quality representation. But if it is in the government's interest that every defendant receives the best possible representation, it cannot also be in the government's interest to leave defendants naked to their enemies.¹

Furthermore, South Carolina's public policy strongly favors indemnity being extended to employees who have acted within the scope of their employment and in good faith. Thus, under South Carolina corporate law, S.C. Code Ann. § 33-31-851(a), indemnification is allowed in

¹ Here is additional background concerning Stein from Charles D. Weisselberg & Su Li, *Big Law's Sixth Amendment: the Rise of Corporate White-collar Practices in Large U.S. Law Firms*, 53 Ariz. L. Rev. 1221, 1223 (2011):

On July 16, 2007, U.S. District Court Judge Lewis A. Kaplan entered a remarkable order. Federal prosecutors had investigated the giant accounting firm KPMG LLP ("KPMG") for allegedly marketing fraudulent tax shelters. The firm managed to avoid criminal charges, but 16 former partners and employees did not. In United States v. Stein, Judge Kaplan dismissed the indictment against 13 of the 16 individuals, finding that federal prosecutors had unconstitutionally induced KPMG to stop funding their individual defenses. As a result, although these defendants generally had substantial personal assets, they either lost their counsel of first choice (including lawyers from major law firms) or were financially unable to defend their cases as they would have had their legal expenses been entirely advanced or underwritten by KPMG. The court was incensed, calling this "intolerable in a society that holds itself out to the world as a paragon of justice." The Department of Justice . . . challenged the ruling. The defendants and their amici were represented in a closely watched appeal by some of the finest lawyers of the day, including counsel from the nation's largest law firms. On August 28, 2008, the U.S. Court of Appeals for the Second Circuit affirmed, finding that the government had violated the defendants' Sixth Amendment right to counsel.

some cases in favor even of criminally-convicted officers, trustees, employees, or agents. Indemnification is flatly prohibited only where there is an adjudication that the officer, trustee, employee, or agent is liable to the company or where an improper personal benefit was received by the person seeking indemnification. S.C. Code Ann. § 33-31-851(d). See S.C. Code § 33-31-851(c) ("The termination of a proceeding by . . . conviction . . . is not, of itself, determinative that the director did not meet the standard of conduct described in this section."). The corporate law "standard of conduct" set forth in Section 33-31-851(a) requires that the entity be able to conclude the officer, trustee, employee, or agent acted in good faith and reasonably believed his or her conduct was in the entity's best interest. That factual predicate for indemnification in the corporate setting is very similar to the one established by S.C. Code § 59-17-110.

I have reviewed the Attorney General's Opinion dated May 13, 1997, 1997 WL 323769 (S.C.A.G.). That Opinion holds:

[O]ur courts would conclude that a school district may not expend public funds to pay a school board member's or an employee's expenses of representation in criminal proceedings.

As you well know, an Attorney General's Opinion has no force of law. In this case it is wrong. Opinions rendered by the Attorney General do not trump statutory enactments. The 1997 Opinion relies on and reiterates the holding from a 1995 Opinion, that purported to find that "a political subdivision, such as a school district, is without authority to pay an employee's expenses of representation in a criminal proceeding." This opinion is obviously and egregiously wrong because it contradicts the plain language of, S.C. Code § 59-17-110. Again, the statute requires that:

In the event that any employee of any school district in South Carolina is prosecuted in any action, civil or criminal, or special proceeding in courts of this State, or of the United States, by reason of any act done or omitted in good faith in the course of his employment, it is made the duty of the school district, when requested in writing by any such public school employee, to appear and defend the action or proceeding in his behalf.

In this case, an employee is being prosecuted in a criminal proceeding. You have determined, after making a reasonable investigation, that the employee acted in good faith and in the course of her employment. Under these circumstances, it is "the duty" of the school district to provide a defense to the proceeding on her behalf.

I hold the foregoing opinion concerning the Berkeley County Board of Education's duty to provide a defense on behalf of Mrs. Amy Kovach to a reasonable degree of professional certainty as an expert in the field of entity governance and employee indemnification rights.

I am rendering this legal opinion as a public service. No compensation, direct or indirect, in any form or fashion, has been or will be furnished to me in connection with this work.

Sincerely yours,

A handwritten signature in cursive script that reads "John P. Freeman". The signature is written in dark ink and is positioned directly below the typed name.

John P. Freeman