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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

The Honorable Jean Hoefer Toal

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.

AMENDED PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC* OF APPELLANT AMY KOVACH

M. Dawes Cooke, Jr., Esq.
Barnwell, Whaley, Patterson & Helms, LLC
211 King Street, Suite 300
Charleston, SC 29401
(843) 577-7700 Fax: (843) 577-7708
mdc@barnwell-whaley.com
Attorneys for Appellant

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PETITION FOR REHEARING AND SUGGESTION OF REHEARING *EN BANC*

AND NOW COMES Appellant Amy S. Kovach, by and through her undersigned counsel, and files the following Petition for Rehearing and Suggestion for Rehearing *en Banc* with respect to the Court's affirmance of the imposition of sanctions upon Amy S. Kovach (Court's Unpublished Opinion ("Opinion")).

INTRODUCTION

This matter began as an action styled: *Amy S. Kovach v. Joshua S. Whitley and Karen Whitley, in her individual capacity, 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* No. 2015-ES-21-00778 (In the Common Pleas Court of Berkeley County, South Carolina) This appeal concerns sanctions imposed on Amy S. Kovach regarding a claim she asserted for civil conspiracy against Defendants Joshua S. Whitley and Karen Whitley.

On October 15, 2015, Appellant filed an action against Respondents for Civil Conspiracy arising from Respondent's actions before, during, and after the 2012 Berkeley County School Improvement Bond Referendum. During this referendum, Appellant was tasked by her superiors with providing information to support district employees and leadership as well as member of the public seeking information regarding the referendum. Joshua Whitley led a group actively opposing the referendum and who sought criminal prosecution of Appellant as well as the School District Superintendent and Deputy Superintendent for their efforts during the referendum.

Following receipt of Appellant's complaint, Respondents immediately filed a motion for sanctions against Appellant's counsel, Nancy Bloodgood. Counsel for Respondents then made demands upon Bloodgood for payment of attorney's fees. Appellant was not a party to any communications between Bloodgood and Respondents on the issue of sanctions against

Bloodgood or any payment of attorney fees by Bloodgood. Respondents subsequently amended their motions for sanctions to include Appellant in February 2016. The matter came before the trial court for hearing on September 16, 2016. The trial court issued its order granting sanctions on October 24, 2016 and following Motions for Reconsideration filed by Attorney Bloodgood and Appellant, the trial court held a hearing on January 17, 2017 and entered its final order on February 19, 2018. This final order assessed sanctions against Attorney Bloodgood in the amount of $15,000.00 and Appellant in the amount of $48,000.00.

Amy S. Kovach appealed from the imposition of sanctions upon her. On December 9, 2020, this Court filed its Opinion ("Opinion") that affirmed the imposition of sanctions on Amy S. Kovach. Specifically, this Court found that the trial court did not err in imposing sanctions because the trial court's factual findings were well supported by the record. Additionally, this Court held that the trial court did not abuse its discretion by imposing excessive sanctions. For the reasons that follow, Appellant respectfully asserts that this Court's Opinion is in error. This Court should grant rehearing as to its affirmance of the sanctions imposed on Amy S. Kovach and reverse the trial judge's imposition of those sanctions.

ARGUMENT

A. The Court Should Grant This Petition for Rehearing and Reverse the Imposition of Sanctions on Amy S. Kovach

In its Opinion, this Court affirmed the imposition of sanctions upon Amy S. Kovach pursuant to Rule 11 of the South Carolina Rules of Civil Procedure. Rule 11(a) requires every pleading to be signed with the signature constituting a certificate by the signor that he has read the pleading and "that to best of his knowledge, information and belief there is good ground to support it." "[T]he 'criteria for Rule 11 sanctions are essentially the same as those for sanctions under the [Frivolous Proceedings Act].'" *See In re Beard*, 359 S.C. 351, 360, 597 S.E.2d 835, 839 (Ct. App. 2004) (*quoting Father v. South Carolina Dep't of Soc. Servs.*, 345 S.C. 57, 72, 545 S.E.2d 523, 531 (Ct. App. 2001)). Under the Frivolous Proceedings Act, "[a]n attorney or pro se litigant participating in a civil or administrative action or defense may be sanctioned for . . . filing a frivolous pleading, motion, or document." *See* S.C. Code § 15-36-10(A)(4)(a).

Though the Opinion is unpublished, the Court's holding runs counter to sound public policy in several important respects. First, it permits imposition of Rule 11 sanctions without any development or determination of the merits of the underlying claim, thus incentivizing parties and attorneys to continue to prosecute cases to conclusion rather than risk creating an inference that the case was frivolous. Parties should be encouraged to reconsider their decisions to pursue litigation, as Amy Kovach did here, rather than feel obliged to build a record to stave off sanctions. Second, the holding effectively requires a represented party take on the role of her counsel in evaluating various legal theories or whether a claim is legally viable. Members of the public rely upon assistance from legal counsel at confusing, critical, and oftentimes traumatic moments. Lawyers in turn provide advice to their clients as fiduciaries and represent them zealously through suits or legal positions that they "believe[s] to be honestly debatable under the law of the land." As will be shown below, Appellant had reason to believe that she had a viable claim for civil conspiracy against Respondents because such a claim did not appear to be incompatible with her guilty plea.

Third, the holding fails to address case law holding that a criminal conviction does not foreclose a subsequent civil suit. A person convicted of two misdemeanors does not, as a matter of law, forfeit all rights to pursue subsequent legal actions.

For the reasons that follow, this Court should grant a partial rehearing in this matter because the trial court erred in imposing sanctions on Amy S. Kovach.

1. As a Matter of Law and Fact, the Civil Conspiracy Claim Was Not Frivolous

a. There Is No Evidence That the Civil Conspiracy Claims Were Untrue

The trial judge erred in imposing sanctions because Respondents did not present a scintilla of evidence that the Civil Conspiracy Complaint was, in fact, frivolous or without any merit. Respondents, as the parties moving for sanctions, bore the burden of showing that the claims against them were frivolous. In ordinary circumstance, motion for sanctions is made following an adjudication of the merits of the underlying claim or at least where the Movants bring forth evidence that the claims against them lack factual basis. There were no such adjudications here. In its Opinion, this Court held that "This is a unique case where further development of the record would not illuminate the relevant issues." (*See* Opin., at 5). Appellant respectfully states that this is precisely the type of case that requires the development of a factual record regarding the civil conspiracy complaint against Respondents in order to illuminate relevant issues.

Civil Rule 8 (a)(2) requires a plaintiff to set for a short and plain statement of the facts showing that the pleader is entitled to relief. This requires plaintiffs to plead "enough facts to state a claim for relief that is plausible on its face." *Bell Atl., Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A party seeking sanctions under Rule 11 must prove an attorney signed a pleading or motion "to cause delay or when no good grounds exist to support the filing." *See Ex parte Bon Secours–St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 597, 713 S.E.2d 624, 628 (2011). "A court imposing sanctions under Rule 11 should, in its order, describe the conduct determined to constitute a violation of the Rule and explain the basis for the sanction imposed." *Ex parte Gregory,* 378 S.C. 430, 438, 663 S.E.2d 46, 50 (2008).

In this case, there is nothing in either the trial court's order or this Court's opinion which specifies how the allegations supporting the civil conspiracy claim are untrue. The elements of a civil conspiracy are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages. Therefore, 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 of 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). The gravamen of a civil conspiracy action is the damage created and not whether the actions taken to create those damages were lawful or unlawful. The trial court focused its attention entirely on Appellant's guilty plea without ever considering the factual considerations necessary to support a claim for civil conspiracy. Indeed, there is nothing in the record refuting the allegations contained in the complaint regarding the existence of a civil conspiracy against Appellant.

Appellant's guilty plea was limited to two discrete elements. First whether she made a video regarding the bond referendum campaign and, and second, whether she purchased campaign signs with a value of $259.20. (R. p 1097, lines 2-8). The gravamen of Appellant's civil conspiracy complaint was not that she was attempting to disavow those two admissions. It was instead to assert a cause of action addressing Respondents' attempts to use these relatively minor items done by Appellant at the behest of her employer to carry out a personal or political vendetta against Appellant. These civil conspiracy allegations were specific, did not disavow Appellant's guilty plea, and *have been disproven.* The allegations regarding the existence of a civil conspiracy include:

> Organizing and leading a bond referendum opposition group which engaged in vitriolic commentary regarding Respondent and actively engaging in efforts to undermine Appellant's statutory right to reimbursement of Appellant's attorney's fees as a district employee. (R. p. 0045 ¶3, p. 0050 ¶41, p. 0052 ¶52, ¶, p. 0064 ¶124, p. 0070 ¶¶161, 162).
>
> Making defamatory statements directly addressing Appellant and inciting fear and gathering to injure her including "she does not know whether to deficate or go blind", and "isn't it grand when a plan comes together." (R. p. 0063 ¶121).

> With respect to Karen Whitely, Joshua Whitley's mother and a school district employee who worked directly with Kovach during the 2012 bond referendum, the complaint alleges that the then-associate superintendent was laterally transferred into a position with less authority upon the hiring of Dr. Thompson (the Berkeley County School District Superintendent). (R. p. 0051 ¶¶ 43-44).
>
> That, upon information and belief, Karen Whitley had an objective to cause harm and embarrassment to her supervisors so that she would rise in leadership within the school district. (R. p. 0051 ¶45)
>
> That Respondents (and others) communicated directly with the then school district board members in order to turn them against Appellant. (R. p. 0070 ¶162).
>
> That Respondent Joshua Whitley threatened to sue volunteer Campaign Coordinator Co-Chair Jane Pulling if she continued to support Kovach (R. p. 0072 ¶171)
>
> That the Respondents took the actions stated in the Complaint solely for the purpose and intent of intimidating and harming the Appellant. (R. p. 0073 ¶178)

In this case, Appellant's complaint complied with the requirements of the civil rules and stated a plausible action for civil conspiracy. Nothing in the civil conspiracy complaint allegations seek to undue or refute the statements made during Appellant's guilty plea as none of these allegations were every addressed during the guilty plea. (R. p. 00159-67). Indeed, even after removing all reference to the criminal case, the complaint still states a plausible claim for civil conspiracy because none of the allegations are in any way predicated upon Appellant's innocence of the charges contained in that matter.

The trial judge never analyzed the substance of the civil conspiracy claims and did not permit a hearing or discovery on the issue. Instead, the trial court ruled that, "the facts admitted under oath at the guilty plea, and the plea itself, foreclose the claim against Defendants for civil conspiracy, because the allegations against *them (i.e. Respondents)* directly contradict Mrs. Kovach's material admissions under oath." (R. p. 0017). This statement is without any factual support in the record. There is absolutely nothing in the record in this motion for sanctions or at

the guilty plea hearing where any factual allegation regarding the existence of a civil conspiracy involving Respondents was ever discussed let alone refuted or disproven.

b. A Criminal Conviction Does Not, As a Matter of Law Foreclose a Civil Suit

In its opinion, this Court agrees with the circuit court that Appellant's claim of civil conspiracy "was an attempt to re-litigate the facts that served as the predicate for her guilty plea." (*See* Opin., at 6). As stated above, the allegations regarding civil conspiracy were not an attempt to relitigate facts from Appellant's guilty plea as none of the facts supporting the civil conspiracy allegations were ever addressed in the guilty plea. Moreover, as a matter of law, "criminal judgments whether by guilty plea or adjudicated guilt, have no preclusive effect on subsequent civil litigation." *Haring v. Prosise*, 462 U.S. 306, 310 (1983). Therefore, even if the subsequent civil litigation touches upon information contained in the prior criminal complaint, there is no basis under law to prohibit this from occurring.

Appellant properly sought redress from the court for actions taken against her involving a political fight between Respondents and a school district for which she believed she was made a scapegoat. "The right of access to court for redress of wrongs is an aspect of the First Amendment right to petition the government." *Borough v. Duryea, Pa., v. Guanieri*, 564 U.S. 379, 387 (2011). This right to access should not be restrained utilized as a basis for punishment as, "It is a due process violation to punish a person for exercising a protected statutory or constitutional right. *State v. Fletcher*, 322 S.C. 256, 259, 471 S.E.2d 702, 704 (1996).

In this case, Appellant was not collaterally estopped from asserting her action for civil conspiracy regardless of her guilty plea. Under South Carolina law, in order to assert a collateral estoppel claim, a party, "must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determine in the prior action; and (3) necessary to support

the prior judgment." *Carolina Renewal v. S.C. Dept. of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). Nowhere in the trial court's order or this Court's opinion affirming it is the holding of *Haring v. Prosise* addressed. Nor it is explained how the prior criminal matter in any way actually litigated the specific allegations against Respondents contained in the civil conspiracy complaint.

B. Even if Appellant's Complaint Was Sanctionable, This Court Should Have Concluded That the Trial Court Imposed Sanctions That Were Excessive and Disproportionate to the Actual Expense Incurred

The trial judge sanctioned Appellant and awarded Respondents $48,000.00 in legal fees related to a civil action addressing matters of first impression which she directed her attorney to dismiss within one month of filing. This Court affirmed the amount of sanctions, stating:

> The circuit court's award was well below the amount the Whitleys claimed they accrued in legal fees for the time period before Kovach attempted to dismiss the case. Further the record indicates the Whitleys attempted to negotiate a dismissal of the civil conspiracy claim and sanctions motions, but they could not reach an agreement with Kovach about the payment of attorneys' fees.

(*See* Opin., at 6). For the reasons that follow, this Court should have reversed the trial judge's amount of sanctions as being excessive and disproportionate.

First and foremost, Contrary to this Court's holding, the record does not include any evidence that Respondents ever attempted to negotiate with *Appellant* regarding payment of fees. Respondent instead pursued *Appellant's counsel*, Nancy Bloodgood for payment of fees. In doing so, Respondents even chastised Bloodgood for putting her own interest ahead of her client's by failing to acquiesce to their demand for fees. (R. pp. 001368-69) Appellant agreed to dismiss her complaint against all parties (including those who did not pursue sanctions against Bloodgood) within one month of filing the complaint. Appellant has no knowledge of any negotiations between Respondents and Attorney Bloodgood regarding Bloodgood's payment of attorney fees and was certainly never consulted regarding paying Bloodgood's fees. Furthermore, Respondents never

notified Appellant of any intent to pursue sanctions against her or negotiate for payment of attorney fees prior to filing their motion for sanctions against her in February 2016.

The United States Supreme Court has held a sanctions award is only compensatory where it compensates the moving party for fees that would not have been incurred but for the sanctioned conduct:

> [A]s we have previously noted, a sanction count is compensatory only if it is 'calibrate[d] to [the] damages caused by' the bad-faith acts on which it is based. . . . A fee award is so calibrated if it covers the legal bills that the litigation abuse occasioned. . . . That kind of causal connection, as this Court explained in another attorney's fees case, is appropriately framed as a but-for test: The complaining party (here, the Haegers) may recover 'only the portion of his fees that he would not have paid but for' the misconduct. *Fox v. Vice*, 563 U. S. 826, 836 (2011); see *Paroline v. United States*, 572 U. S. ___, ___, 134 S.Ct. 1710, 1722, 188 L.Ed.2d 714 (2014).

Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178, 1186 (2017). .

Furthermore, Rule 11 requires that, "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, unless 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." *Anderson County v. Preston*, 2013 WL 10154806.

In this case, there was never any consultation between Appellant and Respondents regarding a sanctions motion against Appellant. Instead, Respondents resisted Appellant's efforts to dismiss her case only to the extent that they wished to seek attorney fees from Attorney Bloodgood. Substantially all of Respondent's counsel's efforts, as evidenced by their Motion arguments, were spent arguing against the legal ability of Appellant to pursue her action against them. But it is important to note that substantially all of these expenses occurred after Appellant had already instructed her attorney to dismiss the action. A party should not be penalized for reassessing its position or seeking to dismiss a matter because doing so effectively forces a party to continue litigating and developing a factual record in order to stave off a motion for sanctions.

In this case, the circuit court has done exactly that by sanctioning Appellant without giving her the opportunity to develop a factual record supporting the allegations of civil conspiracy in the complaint.

In examining the reasonableness of attorney fees, "the injured party has a duty to mitigate costs by not overstaffing, overresearching of overdiscovering clearly meritless claims." *In re Kunstler*, 914 F.2d 505, 523 (4th Cir. 1990). While Appellant's claims were not clearly meritless, as evidenced by the trial court's request for briefing on the issues, spending undue time researching a matter of first impression after the threat of litigation had ended is completely contrary to mitigating costs. If such extensive legal research was indeed necessary, then this alone is evidence that the legal claim clearly not meritless and it is inequitable to require Appellant to pay for it.

Neither the trial court nor this Court engaged in a sufficient detailed evidentiary analysis to determine whether the attorneys' fees awarded in the sanctions were reasonable. The primary purpose of sanctions under Rule 11 is not to compensate the prevailing party, but to deter future litigation abuse, *See Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 151 (4th Cir. 2002). In keeping with the rule's purpose, a court should impose the least severe sanction adequate to serve the deterrence function of the rule. *In re Kunstler*, 914 F.2d 505 (4th Cir., 1990). Assessment should be based on four factors: 1) the reasonableness of opposing party's attorney fees; 2) the minimum to deter; 3) the ability to pay; and 4) factors related to the severity of the Rule 11 violation. *Id.* In determining the reasonableness of legal fees, South Carolina courts typically focus on six factors from the case of *Jackson v. Speed,* 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997): (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. The factors for determining the reasonableness of fees set forth in Rule 1.5 of the Rules of Professional Conduct, Rule 407, SCACR, include the same factors as those in *Jackson.* Neither the trial judge nor this Court analyzed any of these factors contained *In re Kunstler* or *Jackson v. Speed*, which would have supported a $48,000.00 sanction award.

Further, even if supported by any evidence, the amount of $48,000.00 allegedly spent to defend a lawsuit with a total duration of one month is facially excessive and grossly disproportionate and runs contrary to the efficient administration of civil matters to construe the civil rules to "secure the just, speedy, and inexpensive determination of every action". Civ. R. 1.

Therefore, even if sanctions were appropriate in this case, the trial judge erred in imposing such sanctions in the excessive amount of $48,000.00.

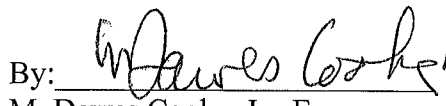
C. Appellant Suggests That This Case Would Be Appropriate for Rehearing *en Banc*

South Carolina Rule of Appellate Procedure 219(a) provides that a rehearing *en banc* may be appropriate where "(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." As discussed above, the issues in Mrs. Kovach's appeal implicate matters of exceptional importance to the South Carolina legal profession and to those who seek legal representation from it. The Court has affirmed the award of sanctions under circumstances that threaten to discourage attorneys from taking on unpopular causes or difficult cases out of fear of sanctions and countenanced separating a represented party from her chosen counsel through the threat of sanctions upon that counsel. Encouraging this tactic will obstruct the ability of laypersons to obtain legal representation in cases of first impression. Furthermore, the injection of threatened criminal sanctions against a civil litigant suppresses that litigant's constitutional right to free speech to seek redress of civil wrongs in the court system and runs contrary to United States Supreme Court precedent. It is therefore appropriate for the Court of Appeals *en banc* to consider these difficult and important legal questions.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Rehearing and Suggestion for Rehearing *en Banc* of Appellant Amy Kovach and should reverse the trial judge's imposition of sanctions of $48,000.00 upon Appellant.

January 6, 2021

By: 

M. Dawes Cooke, Jr., Esq.
Barnwell, Whaley, Patterson & Helms, LLC
211 King Street, Suite 300
Charleston, SC 29401
(843) 577-7700 Fax: (843) 577-7708
mdc@barnwell-whaley.com
Attorneys for Appellant Amy S. Kovach

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PROOF OF SERVICE

I certify that I have served the Appellant's Amended Petition for Rehearing and Suggestion for Rehearing *en Banc* on the above-referenced Respondents by depositing a copy of it in the United States Mail, postage prepaid, on January 6, 2021, addressed to the following parties and their attorneys of record:

Jeffrey A. Breit, Esquire
Breit Drescher Imprevento, P.C.
Town Pavilion Center II
600 22nd Street, Suite 402
Virginia Beach, VA 23451
Attorney for Respondent Joshua Whitley

Joshua S. Whitley, Esquire
Smyth Whitley, LLC
126 Seven Farms Drive, Suite 150
Charleston, SC 29492
Attorney for Respondent Joshua Whitley

Wm. Howell Morrison, Esquire
Haynsworth Sinkler Boyd, P.A.
134 Meeting Street, 3rd Floor
Charleston, SC 29401
Attorney for Respondent Karen Whitley

BARNWELL WHALEY
PATTERSON & HELMS, LLC

By: _____
M. Dawes Cooke, Jr., Esq.
211 King Street, Suite 300
Charleston, SC 29401
(843) 577-7700
Attorney for Plaintiff/Appellant Amy Kovach