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 S. Kovach ..... Plaintiff

v.

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

And

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

v.

Amy Kovach ..... Plaintiff/Counterclaim Defendant

And

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

v.

Rodney Thompson ..... Third-Party Defendant

Of whom Amy Kovach is the ..... Appellant

APPELLANT'S FINAL BRIEF

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II. Did the trial judge err in imposing monetary sanctions in the amount of $48,000 against a party who agreed to dismiss her action at the defendants' request within one month of filing and prior to any motion for sanctions against the party?

STATEMENT OF THE CASE

This matter was commenced on October 15, 2015 with the Appellant's filing of a complaint against the Respondents for Civil Conspiracy. Respondents immediately filed Motions for Sanctions Against Appellant's Counsel, Nancy Bloodgood, and 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 and the trial court issued its order granting sanctions on October 24, 2016. 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 denying the motions for reconsideration and assessing sanctions against Attorney Bloodgood in the amount of $15,000 and Appellant in the amount of $48,000. Appellant served Respondents with its Notice of Appeal on March 13, 2018.

STATEMENT OF THE FACTS

The Appellant Amy Kovach ("Kovach") is a former Berkeley County School District communications director, who was tasked by her superiors with serving as a campaign liaison between the school district and a volunteer "Yes4Schools" Campaign Committee during the 2012 Yes4Schools Improvement Bond Referendum. In this role, she provided information support to district employees and leadership as well as members of the public seeking information regarding the referendum. Defendant Josh Whitley led an organized group opposition to the bond referendum for a variety of reasons; after not receiving an apology from the school district leadership for Kovach's actions, which he believed to be in violation of the law, he "took his concerns to the Attorney General, and the South Carolina Law Enforcement Division ("SLED") conducted a thorough investigation." (R. p. 00293). Kovach cooperated with this investigation and requested reimbursement from the school district for legal expenses under South Carolina Code §59-17-110. As a result of this investigation Kovach was indicted on February 11, 2014 for violating South Carolina Code §8-13-1346 by using public funds to promote the school bond referendum. Kovach retained criminal counsel, who provided a vigorous defense, including a motion to dismiss the initial indictment and subsequent motions to disqualify the Attorney General and to change venue. The court denied the motion to dismiss, holding that a bond referendum falls within the prohibition against "the use of public funds, property, or time to influence the outcome of an election" and that the statute imposes individual criminal liability. Ultimately, the matter ended with a guilty plea to two charges, use of government funds to influence the outcome of an election and misconduct in office. Two charges of forgery and one charge of perjury were subsequently dismissed.

Subsequent to her guilty plea on August 24, 2015, Kovach retained Attorney Nancy Bloodgood to represent her in an employment grievance against the Berkeley County School District ("BCSD") arising from her termination for actions taken during the bond referendum campaign in good faith at the school district's instruction. When the school board rejected the grievance application without a hearing, Kovach filed suit against the BCSD and other parties. (R. pp. 0045-75) Specifically, Kovach filed this suit on October 15, 2015 against the BCSD, Joshua Whitley, Karen Whitley and other parties who have subsequently been dismissed and are not involved in these motions. On November 3, 2015, approximately two weeks after the complaint was filed, Defendant Joshua Whitley filed an Answer, Affirmative Defenses, Counterclaims and a Third Party Complaint; a motion to Dismiss the Complaint and a Motion for Sanctions against Ms. Bloodgood. (R. pp. 00168-86) No motion for sanctions against Kovach was filed at that time. Shortly thereafter, following an exchange of letters between Ms. Bloodgood and the South Carolina Attorney General's Office, the Attorney General moved for an order to show cause against Kovach in her criminal case for contempt for information contained in an employment grievance affidavit that was allegedly contrary to information contained in her guilty plea. The rule to show cause did not address, the specific allegations of civil conspiracy raised in the complaint. (R. pp. 00159-67) After consultation with criminal counsel, Kovach instructed Ms. Bloodgood to dismiss the actions as to all parties based upon the threat of new criminal charges being levied against her. By November 23, 2015 all parties had consented to a stipulation of dismissal except the Respondents who demanded attorneys' fees from Ms. Bloodgood. By letter dated November 25, 2015, counsel for Respondent, Joshua Whitley, demanded payment from Ms. Bloodgood stating, "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 attorney 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." (R. pp. 001367-68). Ms. Bloodgood did not ever discuss the payment of attorney fees with Kovach and no other party to this action has moved for sanctions.

On December 2, 2015, Respondent Joshua Whitley filed an Amended Answer, Affirmative Defenses, Amended Counterclaims and an Amended Third Party Complaint. On December 1, 2015 Respondent Karen Whitley filed a general denial answer followed by a December 4, 2015 Motion to Strike Plaintiff's Stipulation of Dismissal to Karen Whitley. On December 4, 2015, Ms. Bloodgood filed an answer to Respondent Joshua Whitley's Counterclaims, a Motion to Dismiss the Counterclaims and a Motion to Dismiss Kovach's Complaint as to Respondent Joshua Whitley. Then on February 11, 2016 Ms. Bloodgood filed Memo in Opposition to the Motion for Sanctions. (R. pp. 00270-90) On February 12, 2016, Respondent Joshua Whitley filed an Amended Motion for Sanctions against Ms. Bloodgood and Kovach personally. (R. pp. 00292-310) On February 23, 2016 Respondent Karen Whitley filed an Amended Motion for Sanctions against Ms. Bloodgood and Appellant. (R. pp. 00311-13) More than three months prior, Kovach had instructed Ms. Bloodgood to dismiss the action as to both Respondents.

Ms. Bloodgood filed a Supplemental Memo in Opposition to the Motion for Sanctions on August 24, 2016. (R. pp. 00314-49) Kovach filed a response to the Amended Motion for Sanctions on September 14, 2016. (R. pp. 00392-547)

On September 16, 2016, the matters came for hearing before The Honorable Jean Toal who stated that, "what we are dealing with is whether or not a complaint was filed that was known to be without factual foundation and therefore violated Rule 11." (R. p. 001181, lines 3-

5). No testimony was taken from any party, as Judge Toal instead focused only on Kovach's criminal guilty plea and the attorney general's defense of its investigation stating, "I think the parties pretty well got the drift from me I was not going to take any testimony today but, rather, try to deal with these things as motions on the law and on the record as it's been submitted, and, of course, that record includes for you [Assistant Attorney General Creighton Waters] a very fulsome defense of the office [South Carolina Attorney General] and yourself in connection with the submissions that we have received so far." (R. p. 001218, lines 14-20). Judge Toal further stated, "I don't feel discontented that we're not having a factual hearing. I think these matters can very directly be addressed by the very fulsome record we do have on all sides." (R. p. 001219, lines 8-11).

The court issued an order granting sanctions against Ms. Bloodgood and Appellant making extensive findings of fact regarding Kovach's guilty plea and finding, "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." (R. p. 0017).

Both Ms. Bloodgood and Appellant moved for Reconsideration of the Court's October 24, 2016 Order granting Sanctions which was heard on January 17, 2017. (R. pp. 00619-45 and 001071-81) At that time the trial court heard arguments and took the matter under advisement. The trial court issued an order on February 19, 2018 denying the motions for reconsideration and ordering monetary sanctions under Rule 11, SCRCP and South Carolina Code §15-36-10G(I) against Ms. Bloodgood in the amount of $15,000 and Kovach in the amount of $48,000. (R. pp. 0029-32) Kovach timely filed the instant appeal on March 13, 2018.

Kovach believed, and contended, that her criminal prosecution was politically motivated. Respondents opposed the Berkeley County School District 2012 Bond Referendum while simultaneously seeking to remove former Superintendent Rodney Thompson and take control of the school board.[1] Kovach, a recently-hired employee, was specifically tasked by her employer with referendum-related tasks and performed those tasks in good faith. (R. pp. 00449-54, and pp. 0047-49 ¶¶24, 25, 26, 27, 28, 30, 31, 32). She was subsequently caught in the crossfire of warring parties and long simmering feuds within the school district. The premise of Kovach's lawsuit was that the Respondents had made her political fodder in their battle with her superiors in the school district. She contended that, notwithstanding her guilty plea to using public funds to promote the school bond referendum, Respondents and others conspired to procure her prosecution for improper political reasons. Soon after filing suit, Kovach agreed to dismiss her suit. No discovery was conducted and the merits of the civil conspiracy claims were never adjudicated. The lower court nevertheless found that her claims were incompatible with her guilty plea and her suit therefore violated Rule 11 and the FCPSA. The Court then ordered her to pay the Respondents' attorneys' fees – the vast majority of which were incurred in pursuing sanctions. Kovach files the instant appeal because she acted in good faith in bringing her suit in reliance on the advice of counsel and her claims could be reconciled with her guilty plea. Kovach's civil conspiracy claims were never adjudicated, and were certainly never properly found to be frivolous.

[1] Indeed, while not appearing in the record, the Court may take judicial notice of the fact that Respondents have succeeded in their goals as Rodney Thompson, who was Appellant's direct supervisor and who directed Appellant's actions during the referendum was also indicted and subsequently resigned and the majority of the school board members in place in 2012 no longer serve on the board and have been replaced by members of the Berkeley County Republican party who promptly fired long-time district counsel Childs and Halligan which provided legal advice to Kovach during and after the referendum.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review of the trial judge's imposition of sanctions on Appellant, Amy Kovach is well settled. The determination of whether sanctions under Rule 11 or under the FCPSA is treated as one in equity. *See In re Beard*, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004)(applying equitable standard of review of factual findings in action for sanctions); *accord Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997). In an action in equity tried by the trial judge alone, the this Court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Id.* "However, the abuse of discretion standard plays a role in the appellate review of a sanctions award." *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008). Where the appellate court agrees with the lower court's findings of fact, it reviews the decision to award sanctions under an abuse of discretion standard under which the imposition of sanctions will not be disturbed unless its decision is controlled by an error of law or is based on unsupported factual conclusions. *Id. accord Southeastern Site Prep, LLC v. Atlantic Coast Builders & Contractors, LLC,* 394 S.C. 97, 104, 713 S.E.2d 650, 653-54 (Ct. App. 2011). For the reasons discussed below, the lower court's imposition of sanctions on Appellant, Amy Kovach was in error and this Court should reverse and vacate that determination.

II. THE TRIAL JUDGE SHOULD NOT HAVE IMPOSED SANCTIONS OF $48,000 UPON AMY KOVACH

The lower court imposed sanctions under Rule 11 of the SCRCP and the FCPSA, S.C. Code §15-36-10 for her filing of an action for civil conspiracy. The trial court incorrectly applied both Rule 11 and the FCPSA by imposing sanctions upon a party who acted upon the

advice of counsel, without the benefit of any discovery or a trial on the merits, and by making factual findings that the record did not support. In addition, the trial court violated Plaintiff's right to petition the government as guaranteed by the First Amendment of the United States Constitution. In this case, the Respondents failed in their burden as they provided no evidence that any of the allegations pertaining to civil conspiracy were untrue. Furthermore, both Rule 11 and the FCPSA do not impose liability upon a represented party for the legal theories recommended by her counsel and neither impose any form of liability upon a party until after the conclusion of trial.

A. The Lower Court Erred in Imposing Sanctions Upon a Party Under Rule 11 and the FCPSA With No Discovery or Trial Finding The Claims Lacked Factual and Legal Support

1. Sanctions Under Rule 11 or the FCPSA are Impermissible Against a Represented Party Prior to the Conclusion of Trial.

Under the South Carolina Code §15-36-10(A)(4) , "An attorney or pro se litigant participating in a civil or administrative action or defense 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 with the proceedings are based.).

S.C. Code Ann. §15-36-10(A)(4)(a)(ii)-(iv)

The FCPSA takes into account the following factors in determining whether an attorney, party or pro se litigant has violated the FCPSA:

(1) the number of parties;
(2) the complexity of the claims or defenses;
(3) the length of time available to the attorney, party, or pro se litigant to investigate and conduct discovery for alleged violations 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.

See S.C. Code Ann. §15-36-10(E)(1)-(7)

Under South Carolina Code Ann. §15-36-10(C),

> "At the conclusion of a trial and after a verdict for or a directed 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. An attorney, party, or pro se litigant shall be sanctioned for a frivolous claim or defense if the court finds the attorney, party or pro se litigant failed to comply with one of the following conditions:
>
> (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 properly 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."

The FCPSA makes clear that the trial judge could only consider sanctions against Kovach *after the conclusion of the case by dispositive motion or trial in favor of the moving party.* "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and

unambiguous statute." *Hodges v. Rainey*, 341 S.C. 79, 83, 533 S.E.2d 578, 581 (2000). As expressly set forth in the statute, a motion for sanctions under the FCPSA is only ripe upon the resolution of a case on the merits by ruling on a dispositive motion or trial verdict. *Holmes v. East Cooper Comm. Hosp., Inc.*, 408 S.C. 138, 160, 758 S.E.2d 483, 495 (2014) (finding "Motions made pursuant to the FCPSA are post-trial motions."). Furthermore, the statute does not require a represented party to determine whether a claim is warranted under existing law or a good faith argument for the extension, modification or reversal of existing law.

Similarly, Rule 11 provides that the signature of an attorney certifies 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." SCRCP Rule 11. South Carolina's Rule 11 requirements are substantially the same as its federal counterpart which "require[s] *an attorney* conduct a reasonable investigation of the factual and legal basis for his claim before filing." *Brubaker v. City of Richmond*, 943 F.2d 1363, 1373 (4th Cir. 1991). (emphasis added). Rule 11 requires an attorney, and not her client, to verify the legal sufficiency of a filing. Such an investigation must be objectively reasonable and uncover some evidence to support the allegations contained in the complaint. *See Giganti v. Gen-X Strategies, Inc.* 222 F.R.D. 299 (E.D. Va., 2004). It is not necessary that an attorney prove every aspect of his case at the time of filing, and "in this regard, a pre-filing factual investigation is objectively reasonable provided it 'uncover[s] some information to support the allegations in the complaint and a pre-filing legal investigation passes muster under Rule 11 provided the claim has some 'chance of success under existing precedent', even if that chance amounts to a mere 'glimmer.'" *Giganti* at 310, citing *Hoover Universal, Inc. v. Brockway Imco, Inc.*, 809 F.2d 1039, 1044 (4th Cir. 1987).[2]

[2] Other jurisdictions provide guidance similar guidance in defining "frivolous" in its ordinary legal sense. See e.g. *Nietzke v. Williams*, 490 U.S. 319, 325, 109 S. Ct. 1827, 1831 – 32 (1989)(United States Supreme Court defined a

2. Sanctions Under Rule 11 or the FCPSA Against a Party Represented by Counsel are Inappropriate When Levied for Legal Theories Recommended by Counsel

In keeping with the standards of Rule 11, Section 15-36-10(J) of the FCPSA further provides that it "shall not apply where an *attorney* establishes a basis to proceed with litigation, which includes a good faith argument for the extension, modification, or reversal of the existing law." This obligation is not placed upon the represented client. Like the objectively reasonable factual investigation standard of Rule 11, Rule 3.1 of the South Carolina Rules of Professional Responsibility allows an *attorney* latitude to seek modification or extension of the law in good faith by stating, "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." To hold otherwise would to stifle a lawyer's creativity in challenging or arguing for change in the law which represents the lifeblood of the common law system. Neither Rule 11 nor the FCPSA are intended to convert a statutory and procedural shield into a sword designed to undermine the ability of a litigant to pursue good faith legal claims or even to amend her pleadings to conform to evidence as it is discovered. *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 607 S.E.2d 711 (S.C. App. 2005). Indeed, Section 15-36-10 of the FCPSA recognizes this explicitly stating that "this Act shall not alter the South Carolina Rules of Civil Procedure." Nor is the FCPSA a device designed to shift the Rule 11 burden for legal research and determination of viable legal claims from an attorney to her client. Rule 11, "does not provide substantive rights

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"frivolous" complaint as "a complaint containing as it does both factual allegations and legal conclusions is frivolous where it lacks an arguable basis either in law or fact."); *Leaf River Forest Products, Inc. v. Deakle*, 661 So.2d 188, 197 (Miss. 1995)(Mississippi Supreme Court note the term "frivolous" which is not expressly defined in Mississippi's Litigation Accountability Act, is the same as frivolity for Rule 11 purposes; a claim is frivolous "only when, objectively speaking, the pleader or movant has no hope of success."); *Bilbo v Thigpen*, 647 So.2d 678 (Miss. 1994)(if a complaint lacks an arguable basis either in law or in fact, it is properly characterized as frivolous.) These definitions all find that for a claim to be frivolous there must be no conceivable way to persuade the court or the positions lack an arguable basis in law or fact or good faith argument for modifying the law.

to litigants but is a procedural rule designed to curb abusive conduct in the litigation process." *Clark Equipment Co., Inc. v. Bowman*, 762 S.W.2d 417 (Ky. App., 1988). A court cannot find a violation of the FCPSA for potential new legal theories as, "Section 15-36-20 creates a presumption that a person taking part in the initiation of continuation of proceedings acted with a proper purpose 'if he reasonably believes in the existence of facts upon which his claim is based' and ... reasonably believes under the facts that his claim may be valid under existing law or developing law." *Hanahan v. Simpson,* 326 S.C. 140, 156, 485 S.E.2d 903, 912 (1997 (*quoting* S.C. Code Ann. §15-36-20(1)(Supp. 1995)).

With these fundamental standards in mind, "[Rule 11 motions] should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes. Nor should Rule 11 motions be prepared to emphasize the merits of a party's position, to exact an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney-client privilege of the work product doctrine." 1993 Advisory Committee Notes, Fed. R. Civ. P. 11.

In this case, Respondents' request for sanctions immediately upon receipt of the complaint and prior to discovery or final disposition of the civil conspiracy claims drove an economic and representational wedge between Kovach and her counsel. Respondent Joshua Whitley's counsel admitted to the existence of this wedge in a November 25, 2015 letter to Ms. Bloodgood, stating, "Your firm cannot make a decision to reject our demand for attorney's fees without explaining in full to your client that your firm is choosing its best interest over hers." (R. pp. 001368-69) . Respondents immediately sought sanctions against Appellant's counsel alone

and then shifted position three months later to also pursue Kovach even after she had already agreed to dismiss her case at the Respondents' request and without any discovery in the case. These actions show how each of the warnings from the 1993 Federal Rules Advisory Committee regarding why such premature Rule 11 filings are impermissible have come to fruition in this case.

Kovach retained an experienced employment attorney to explore legal options in an extremely complex legal and factual scenario; she made no secret of her criminal guilty plea, the facts surrounding her employment or the 2012 Bond Referendum. Once those legal options were presented, Kovach provided whatever factual information was available to her to support those claims and encouraged her attorney to contact her criminal legal counsel and any other parties who might have information germane to the case. (R. p. 1200, lines 10-19). Her counsel's subsequent investigation revealed information not previously known to Kovach surrounding her hiring, Respondents' dissatisfaction with the leadership of former Superintendent Rodney Thompson and internal school board discussions regarding actions of various board members both during and after the 2012 Bond Referendum. (R. pp. 0051 ¶¶43, 44, 45, 46; p. 0055 ¶69; p. 0059 ¶¶97, 99, 100, 101; p. 0060 ¶102; p. 0070 ¶162, p. 0072 ¶172). Kovach did not create any of this information as she did not previously know any of it. It was impermissible for Respondents to use a sanctions motion to test veracity of information Kovach's counsel obtained and the merits of the civil conspiracy claim when both properly belong at the dispositive motion stage after full discovery or a trial on the merits. The sanctions motions and concurrent motion for order to show cause in her criminal case intimidated Kovach into withdrawing claims for which she legitimately feared retaliatory criminal prosecution and for which she did not wish for

her counsel to suffer sanctions.[3] Both of these items created an insurmountable conflict of interest between a client and her counsel at the onset of the case. All of this was done with absolutely no evidence disproving any of Kovach's allegations of a civil conspiracy. The Respondents used the sanctions process for purposes for which it is not designed and the trial judge has effectively suppressed fact-finding and curtailed creative lawyering and threatened to foreclose Kovach's right to seek redress through the courts and argue for the extension, modification or reversal of existing law.

B. Appellant's Guilty Plea to a Separate Criminal Matter did not in any way Preclude Her Ability to File an Action for Civil Conspiracy

1. The Gravamen of a Civil Conspiracy Action is Special Damages and Not the Legality of the Underlying Conspiracy Conduct

The essence of the lower court's imposition of sanctions on Kovach is that her claim of civil conspiracy was fundamentally inconsistent with her guilty plea to the charges of using public funds to influence an election and misconduct in public office, the order specifically finds that, "[t]he 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." (R. p. 0017). This is factually incorrect, because none of the statements that Ms. Kovach made at her guilty plea in any way relate to the factual allegations made against Respondents for civil conspiracy. As a matter of law, none of these

[3] The threat of criminal prosecution is addressed in South Carolina Rule of Professional Conduct 4.5 which states that, "A lawyer shall not present, participate in presenting, or threaten to present criminal or professional disciplinary charges solely to obtain an advantage in a civil matter." This rule is based on DR 7 105 of the Model Code of Professional responsibility and its Ethical Consideration 7-20 is illustrative of the factual scenario which has led to an improper and unsupported decision in this matter. "The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system."

statements made by Kovach precluded her from filing an action for civil conspiracy since the gravamen of a civil conspiracy claim is *not* the legality or illegality of the alleged conspiratorial actions, but the intent to harm the plaintiff.[4] 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. 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). A civil conspiracy is a combination of two or more persons for the purpose of injuring another. Michael G. Sullivan, ELEMENTS OF CIVIL CAUSES OF ACTION (FIFTH EDITION 2015), p. 83; *McMillan v. Oconee County Mem'l Hospital, Inc.*, 367 S.C. 559, 626 S.E.2d 884 (2006). While the combination must have been for the purpose of injuring the plaintiff, "the means of accomplishing the injury need not be unlawful." Sullivan, *supra* at 86-87; *LaMotte v. Punchline of Columbia, Ind.*, 296 S.C. 66, 370 S.E.2d 711 (1988); *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006). "The difference between a civil and criminal conspiracy is in criminal conspiracy, the gravamen of the offense is the agreement itself, whereas in civil conspiracy, the gravamen of the tort is the damage resulting from an overt act done pursuant to a common design." *Hackworth v. Greywood*, 385 S.C. 110, 682 S.E.2d 871 (2009). The type of conduct Kovach alleged to support her civil conspiracy claims is similar to conduct alleged in other reported civil conspiracy cases. In *Cricket Cove*

[4] The October 24, 2016 Order Granting Defendants Motion for Sanctions (R. p. 005) incorrectly concludes, "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. This the only specific actions alleged by Ms. Kovach and Ms. Bloodgood to support a claim for civil conspiracy between the 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." As stated in the complaint there are no fewer than 17 specific allegations concerning the existence of a civil conspiracy and none of which have been specifically disproven.

Ventures, LLC v. Gilland, 390 S.C. 312, 326, 701 S.E.2d 39, 46 (Ct. App. 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 development plans." *See also City of Hartsville v. S.C. Mun. Ins & Risk Fund*, 382 S.C. 535, 677 S.E.2d 574 (2009) (allegation concerned an agreement between two entities to sell property at an inflated price); *Coleman v. Stevens*, 124 S.C. 8, 117 S.E. 305 (1923) (finding that documents did constitute evidence of conspiracy to breach confidential relations of persons which resulted in conversion of money.). A civil conspiracy "involves acts that are by their very nature covert and clandestine and usually not susceptible of proof by direct evidence." *McMillan v. Oconee Memorial Hospital, Inc.*, 367 S.C. 559, 626 S.E.2d 884 (2005). By their nature, conspiracy claims are difficult to fully uncover through a pre-suit investigation and generally require discovery in order to fully develop. The court must avoid the wisdom of hindsight and must test the wisdom of the attorney by inquiring as to what was reasonable to believe at the time of the filing. *Clark Equipment Co., Inc. v. Bowman*, 762 S.W.2d 417 (Ky. App., 1988).

Kovach's conspiracy claim is also akin to one for abuse of process, which does not require proof of innocence. "To cause process to issue without justification is an essential element of malicious prosecution, but not of abuse of process. In the latter, the issuance of the process may be justified in itself; it is the malicious misuse or perversion of the process for an end not lawfully warranted by it that constitutes the tort known as abuse of process. *Huggins v. Winn-Dixie Greenville, Inc.,* 249 S.C. 206, 153 S.E.2d 693 (1967), *Sierra v. Skelton*, 307 S.C. 217, 414 S.E.2d 169 (Ct. App. 1992). Stated another way abuse of process claims are founded on

perversion of process rather than illegality. Hubbard and Felix, *The South Carolina Law of Torts*, 342 (1990).

In this case, Kovach made the following conspiracy allegations:

That Joshua Whitley led an organized bond referendum group and let the Berkeley County Republican Party, which was allegedly was critically involved in opposing the bond referendum and whose public Facebook page provided a forum for vitriolic commentary about Plaintiff personally and actively publicized efforts related to both the bond referendum opposition and undermining Appellant's statutory right to reimbursement of attorney's fees as a school district employee.[5] (R. p. 0045 ¶3, p. 0050 ¶41, p. 0052 ¶52, p. 0064 ¶124, p. 0070 ¶¶161, 162)

Joshua Whitley demanded an apology from the Superintendent in October 2012 for the District's use of public funds to support the referendum. (R. p. 0052-53 ¶53)

The Berkeley County Republican Party, of which Joshua Whitley was a leader, made defamatory statements about Kovach about inciting fear and gathering to injure including that "she does not know whether to defecate or go blind" and, *"isn't it grand when a plan comes together."* (R. p. 0063 ¶121)

That Joshua Whitley posted comments about Plaintiff or spoke out against her in public. (R. p. 0064 ¶124)

With respect to Karen Whitley, 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. Rodney Thompson (R. p. 0051 ¶¶43-44).

That Karen Whitley expressed dissatisfaction with the situation publicly and further that Karen Whitley held a personal vendetta against Kovach because she wanted one of her direct reports to have Kovach's job responsibilities. (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 Whitley created a statement for a Board Member to read at a school board meeting which misrepresented facts about a video created by the independent campaign committee and about which Kovach had no involvement whatsoever. (R. p. 0051 ¶48)

[5] Under South Carolina Code §59-17-110, "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 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."

That the Respondents (and others) communicated directly with the then school district board members in order to turn them against Kovach. (R. p. 0070 ¶162).[6]

That Respondent Joshua Whitley threatened to sue volunteer Campaign Coordinator Co-Chair Jane Pulling if she continued to support Kovach. (R. p. 0072 ¶171)[7]

That Respondent Joshua Whitley bragged publicly that he hoped to harm the school district. (R. p. 0072 ¶172).

That the Respondents took the actions stated in the Complaint solely for the purpose and intent of intimidating and harming the Plaintiff. (R. p. 0073 ¶178).

At the time she filed her complaint, Kovach had a viable claim against the Respondents for civil conspiracy arising out of a political fight between Respondents and the former Berkeley County School Board even in light of her guilty plea and sworn testimony. There is no element of Kovach's guilty plea that was also an element of her civil conspiracy claim. Kovach's civil conspiracy claim against Respondents was that they used the criminal process to pursue improper goals against a newly-hired school district employee tasked by her superiors with work on a bond referendum. This resulted in special damages including injury to her personal and professional reputation, intimidating her, and discrediting her before BCSD board leadership. By conflating the facts of Kovach's guilty plea with the entirely separate civil conspiracy matter the court impermissibly sanctioned Kovach based upon a misapplication of civil conspiracy law and suppressed her right to free speech and to petition her government for redress as guaranteed by the First Amendment of the United States Constitution.

[6] The import of these actions was to pressure to the board to stop paying Appellant's legal expenses during the investigation and thwart Kovach's statutory rights.

2. The Doctrine of Collateral Estoppel was Inapplicable to Kovach's Civil Conspiracy Claims

A school district employee is not an elected or appointed government official and should not be subject to organized abuse resulting from a political feud for actions taken in good faith and within the scope of her employment. She additionally does not lose all rights to seek redress in a civil action merely by virtue of a criminal plea. "A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding final judgment of guilt and a lawful sentence." *United States v. Broce*, 488 U.S. 563, 569, 109 S.Ct. 757, 762 (1989). Conversely, a guilty plea does not admit any facts not necessary to be proved for conviction. *United States v. Cazares*, 121 F.3d 1241 (9th Cir., Ct. App. 1997). Kovach pled guilty to using government funds to attempt to influence the outcome of an election in violation of S.C. Code Ann. §8-13-1346 and for common law misconduct in office for failing to obtain three bids for a teacher recruitment video. Two charges of forgery and one charge of perjury were subsequently dismissed under a *nolle prosequi* which 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). The effect of a *nolle prosequi* is that the matter is laid to rest without disposition as if had never existed. 22A C.J.S., Criminal Law, §456, 21 Am.Jur.2d, Criminal Law §721, *Burfoot v. Com.* 23 Va. App. 38, 473 S.E.2d 724 (1996) (holding that after the *nolle prosequi* of an indictment, the slate is wiped clean, and the situation is the same as if the Commonwealth had chosen to make no charge.) *See also*, *Armel v. Com.*, 28 Va.App. 407, 505 S.E.2d 378 (1998). *State v. Charles*, 183 S.C. 188, 190 S.E. 466 (1937) (finding all of the proceeding in the trial which followed the entry of a *nolle prosequi* were nugatory). Regardless of the posture of Kovach's separate criminal plea, nowhere in either her plea or subsequent hearing on a rule to show cause motion regarding her employment grievance did she make any

statements or admissions regarding the specific civil conspiracy allegations against the Respondents made in her complaint and upon which the trial court sanctioned her.

"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) citing *United States v. Goodwin*, 457 U.S. 368, 372, 102 S.Ct. 2485, 2488, 73 L.Ed.2d 74 (1982) and *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 667, 54 L.Ed.2d 604 (1978). Furthermore, "the right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government." *Borough of Duryea, Pa., v. Guanieri,* 564 U.S. 379, 387 (2011). This right of redress includes the right of a convicted person to pursue a collateral civil action based upon on facts related to the conviction. Kovach's Constitutional right to petition was addressed by her counsel in the lower court through *Haring v. Prosise,* 462 U.S. 306 (1983). In *Haring*, the United States Supreme Court found that, "criminal judgments, whether by guilty plea or adjudicated guilt, have no preclusive effect on subsequent civil litigation" and do not amount to collateral estoppel barring a subsequent civil suit. *Id.* at 310. Under South Carolina law, in order to successfully 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 determined in the prior action; and (3) necessary to support the prior judgment." *Carolina Renewal, Inc. v. S.C. Dept of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). But where collateral estoppel results in injustice or unfairness, the courts may refuse to apply it. *Id.*

In *Haring*, the collateral estoppel doctrine did not prevent access to the courts for a person who had pled guilty to manufacturing a controlled substance to file a subsequent §1983 action for a Fourth Amendment claim against the very police officers whose allegedly illegal

search had led to the procured the charges and his guilty plea. The Supreme Court determined that the issues that would determine the validity of the civil suit were not decided in the guilty plea.[8] Furthermore, as *Haring* correctly concluded, a guilty plea is not concession of other potential claims because,

> "a defendant's decision to plead guilty may have any number of other motivations: 'for some people, their breach of a State's law is alone sufficient for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not with the agony and expense to the defendant and his family'"

462 U.S. 306 (1983) citing *Brady v. United States*, 397 U.S. 742, 750 (1970). Kovach's guilty plea was to distinct charges that share no common elements with her claims of civil conspiracy. The government argued in *Haring* that the convicted person had no right to contest how evidence was obtained through a civil action as he had waived his Fourth Amendment rights by virtue of his plea. 462 U.S. 306 (1983). The United States Supreme Court disagreed since a waiver of his Fourth Amendment rights was never decided by the plea; therefore, collateral estoppel did not prohibit his subsequent civil suit. Under the trial court's rationale, had the United States in *Haring* wished to suppress the §1983 action, it could have simply filed a motion for sanctions or threatened additional charges. The United States took no such course at it would be impermissible under the civil rules to do so.

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[8] "It is clear from the foregoing that the doctrine of collateral estoppel would not be invoked in this case by the Virginia courts for at least three reasons. First, the legality of the search of Prosise's apartment was not actually litigated in the criminal proceedings. Indeed, no issue was 'actually litigated' in the state proceeding since Prosise declined to contest his guilt in any way. Second, the criminal proceedings did not actually decide against Prosise any issue on which he must prevail in order to establish his § 1983 claim. The only question raised by the criminal indictment and determined by Prosise's guilty plea in Arlington Circuit Court was whether Prosise unlawfully engaged in the manufacture of a controlled substance. This question is simply irrelevant to the legality of the search under the Fourth Amendment or to Prosise's right to compensation from state officials under § 1983.

Finally, none of the issues in the § 1983 action could have been 'necessarily' determined in the criminal proceeding. Specifically, a determination that the county police officers engaged in no illegal police conduct would not have been essential to the trial court's acceptance of Prosise's guilty plea. Indeed, a determination that the search of Prosise's apartment was illegal would have been entirely irrelevant in the context of the guilty plea proceeding." *Haring v. Prosise,* 462 U.S. 306, 316, 103 S.Ct. 2368, 76 L.Ed.2d 595 (1983)

The elements of Kovach's criminal plea have no bearing on her complaint against Respondents because none of the elements necessary to prove civil conspiracy were: (1) actually litigated in the prior criminal case; (2) directly determined in the prior criminal case; and (3) necessary to support the prior conviction. The essence of Kovach's civil conspiracy allegation was that they conspired to initiate, facilitate and encourage an investigation and public humiliation through media outlets and thereby cause special damages through the injury to her personal and professional reputation, loss of employment and that they did so for improper political purposes. As in *Haring*, there was no collateral estoppel as the posture of Kovach's separate criminal plea did not actually litigate or take into account any of the specific civil conspiracy allegations against the Respondents made in her complaint for which she has been sanctioned in this case.

In this case, Kovach retained competent legal counsel to investigate and evaluate her claims and to pursue them if they were viable. The claims are not facially meritless, even in light of Kovach's guilty plea and her sworn testimony in support of the plea and in opposition to the Attorney General's Rule to Show Cause. Furthermore, Respondents have not carried their burden as they have failed to present any proof whatsoever that the allegations of civil conspiracy against them are in any way untrue and instead rely exclusively on references to Kovach's irrelevant guilty plea transcript for their factual evidence. It is telling that neither Respondent has submitted any affidavit refuting the allegations against them and have in some instances admitted these allegations. The lower court's sole focus was on Kovach's criminal case and statements made during the guilty plea hearing as the trial judge stated on the record that she did not intend to take any testimony in the matter or conduct a "trial within a trial" to determine what actually took place concerning the averments of civil conspiracy. (R. p. 001214, lines 9-20) and instead

examined the guilty plea transcript which was irrelevant to the civil conspiracy causes of action. (R. p. 001205 lines 9-21). The lower court further focused on Kovach's statements made at the subsequent contempt hearing made under duress and at the instruction of her criminal defense attorney and concluded that these statements somehow repudiated her civil conspiracy case. (R. p. 001215 lines 4-11) This is untrue as Kovach had simply relayed to the court at the sanctions hearing her criminal attorney's advice that Ms. Bloodgood had failed to apprehend the danger which her civil filing had created given her probationary status from the criminal guilty plea. Again, none of this had anything to do with the allegations of civil conspiracy raised in the complaint.

While the lower court may not agree with the content of Kovach's complaint in civil conspiracy, it cannot punish Kovach for exercising her rights to free speech and to petition the court without any evidence that the allegations themselves are untrue. By doing so, the lower court incorrectly made its judgment without a trial on the merits based solely on attention to only a sub-set of irrelevant and prejudicial information from a separate criminal proceeding. This was done without the benefit of any independent witness testimony or discovery to refute or support the veracity of the civil conspiracy allegations alleged as to the Respondents. For these reasons, the lower court could not reasonably find by a preponderance of the evidence that Kovach's civil conspiracy allegations were untrue or filed in violation of the South Carolina Frivolous Civil Proceedings Sanctions Act or Rule 11 of the South Carolina Rules of Civil Procedure.

C. Rule 11 Sanctions Are Inappropriate as There Was No Rule 11 Conference Prior to Respondents' Amended Motions for Sanctions, Appellant Agreed to Dismiss the Case Upon Respondents' Motion for Sanctions Against Her Counsel and The Amount of Sanctions Imposed On Amy Kovach Is Excessive and Inequitable

On February 19, 2018, the lower court issued its order under Rule 11, SCRCP and Section 15-36-10G(I) of the FCPSA, finding Respondent Karen Whitley is entitled to a total of

$15,000 in attorneys' fees with Appellant responsible for $13,000 and Ms. Bloodgood responsible for $2,000; and that Respondent Joshua Whitley is entitled to a total of $50,000 in attorneys' fees with Appellant responsible for $35,000 and Ms. Bloodgood responsible for $15,000. (R. pp. 0029-32)

"The decision of whether to award attorney's fees pursuant to Rule 11 or the FCPSA is treated as one in equity." *S.E. Site Prep., LLC v. Atl. Coast Builders & Contractors LLC,* 394 S.C. 97, 713 S.E.2d 650 (Ct. App. 2011). The Federal and State versions of Rule 11 are substantially similar; in fact, the State rule is based upon the pre-1983 version of the Federal rule. When a state court analyzes the purposes behind Rule 11, interpretations from the U.S. Court of Appeals for the Fourth Circuit are instructive. *See Pee Dee Health Care v. Thompson* 418 S.C. 557, 795 S.E.2d 40 (Ct. App. 2016).

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 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 of sanctions should be based on four factors: 1) the reasonableness of the 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.*

The lower court's sanctions order did not explain how it determined the amount of sanctions or whether any factors, other than the amount Respondents requested, were considered at all in calculating the amount of sanctions. For the reasons stated below, the award represents an abuse of discretion and must be set aside.

1. The Fees Awarded are Unreasonable and Disproportionate to the Amount Reasonably Necessary to Oppose the Complaint.

In examining the reasonableness of attorney fees, "the injured party has a duty to mitigate costs by not overstaffing, overresearching or overdiscovering clearly meritless claims." *Kunstler*, 914 F.2d at 523. An injured party is required to do that which an ordinary prudent person would do under similar circumstances to mitigate his damages. *DuBose v. Bultman*, 215 S.C. 468 (1949). The Supreme Court of the United States recently held in *Goodyear Tire & Rubber Co. v. Haeger*, No. 15-1406, 2017 WL 1377379, at *5 (U.S. April 18, 2017), "as we have previously noted, a sanction counts as 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 fee 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.Ed2d 714 (2014) No. 15-1406, 2017 WL 1377379, at *5 (U.S. April 18, 2017). In order to facilitate such damage mitigation, 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. To date, neither Respondent has ever conferred before filing their motions for sanctions against her. Respondent Karen Whitley's counsel did confer orally with Ms. Bloodgood in November 2015 about the complaint; however, Respondents never notified

Kovach that they intended to seek sanctions against her. In fact, they only did so *long after* Kovach had already agreed to dismiss the case.

Kovach filed suit on October 15, 2015 and Respondent Joshua Whitley immediately filed his answer, counterclaims and Motion for Sanctions against only Kovach's counsel. Respondent Karen Whitley followed by filing her Motion for Sanctions against Kovach's counsel on November 16, 2015. At this point in November 2015, Kovach instructed her attorney to do exactly what Respondents had requested and months before Respondents amended their Motion to seek sanctions against Kovach in February 2016. Respondents in November 2015 refused to sign a stipulation of dismissal without payment of attorney's fees from Kovach's counsel only. In doing so, Respondents drove an economic wedge between Kovach and her counsel and manufactured a conflict of interest between them.

It defies the purposes underlying Rule 11 and the FCPSA and the "but for" causation standard of *Goodyear Tire & Rubber Co., v. Haeger* to impose sanctions beyond the minimal cost the Respondents necessarily incurred before Kovach agreed to dismiss her lawsuit, particularly when Kovach had agreed relatively early on to dismiss the case. To do so would send the message to litigants that, once they commence litigation, they must see it through to the bitter end. The Court should encourage litigants to openly re-evaluate their position in litigation and to dismiss their claims when they see reason to do so.

2. The minimum amount necessary to deter

The minimum amount necessary to deter is the amount necessary to prevent further misconduct and not to compensate the opposing party for the filing of the suit. *Kunstler* at 524. "It is particularly inappropriate to use sanctions as a means of driving certain attorneys out of practice." *Id.* This principle is equally applicable to litigation parties. Kovach has been subject

to constant ridicule in the media as well as a contempt motion in her criminal case based upon the filing of this action. (R. pp. 1081-83). She requires no further deterrence as she will not and cannot take any further action in this matter and has stated her intention not to do so. To sanction Kovach through further monetary sanctions serves no other purpose than to bankrupt her and her family as she earnestly seeks to move forward with her life. Kovach has already paid dearly in criminal fines and court costs for actions taken in the scope of her employment.

3. Ability to pay

"It is hornbook law that the financial condition of the offender is an appropriate consideration in the determination of punitive damages." *Id.* at 524. Kovach and her family have suffered tremendously, both financially and emotionally from the criminal proceeding and have sought to end the civil proceeding as soon as possible. (R. pp. 1081-83). Kovach is currently working as a yoga instructor and health and wellness instructor in senior care facilities. While these positions have provided Kovach with emotionally satisfying employment and allowed her to continue working to help others like she did when working for the school district, neither pursuit is financially enriching. Kovach's income from both pursuits amounts to less than $1,000 per month. (R. pp. 1081-83) Kovach has three children with all the accompanying expenses necessary to provide for them. Kovach has borrowed heavily in order to pay her court fines, legal fees and court costs arising out of her criminal case and the subsequent contempt proceeding. While working to repay these debts, Kovach's pursuit of other employment positions has been unsuccessful due to her criminal matter and the unrelenting media attention. (R. pp. 1081-83).

4. Other factors

"In addition, the court may consider factors such as the offending party's history, experience, and ability, the severity of the violation, the degree to which malice or bad faith contributed to the violation, the risk of chilling the type of litigation involved, and other factors as deemed appropriate in individual circumstances." *Kunstler* at 524-5. It is clear that the question of whether a person criminally convicted may maintain an action in civil conspiracy is one of first impression. Indeed, the lower court expressly stated on the record that it could find no precedent on the matter. As such, it is inequitable to impose sanctions upon a client in a situation in which the law is so unsettled. *See e.g., Hogan v. Wellstar Health Network, Inc.*, Civil Action No. 1:12-CV-1418-RWS, 2013 WL 1136980 (N.D. Ga. March 14, 2013) (refusing to impose sanctions where Eleventh Circuit had not yet addressed issue of requiring expert affidavits at pleading stage in medical malpractice case); *Murdock v. Stout*, 54 F.3d 1437 (9th Cir. 1985) (refusing to impose sanctions for seeking reimbursement of photo copy expenses where issue had not previously been litigated); *Milwaukee Concrete Studios, Ltd., v. Field Mfg. Co., Inc.* 8 F.3d 441 (7th Cir. 1993) (vacating sanctions because case presented issue of first impression). As the Wisconsin Supreme Court has noted:

> Frivolous action claims are an especially delicate area since it is here that ingenuity, foresightedness and competency of the bar must be encouraged and not stifled. Many areas of the present law would not have been developed without creative and innovative positions taken by attorneys for good faith development of the law. We note that an attorney has an obligation to represent his or her client's interests zealously, and that may include making some claims that are not entirely clear in the law or in the facts, at least when commenced. Thus, when a frivolous action claim is made, all doubts are resolved in favor of finding the claim non-frivolous.

Stern v. Thompson & Coates, Ltd., 185 Wis. 2d 220, 235, 517 N.W.2d 658, 663 (1994).

Kovach has no prior history of filing civil lawsuits. She had never before experienced a situation requiring the retention of employment counsel. She reasonably followed the explicit legal advice of her attorney concerning the appropriate actions to be taken following the extraordinary employment experience she had experienced. This unique factual scenario presented a situation that was within an unsettled area of civil conspiracy law.

CONCLUSION

For the foregoing reasons, Appellant, Amy Kovach, respectfully requests that this Court reverse and vacate the lower court's order granting sanctions against her.

August 10, 2018

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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.

CERTIFICATE OF COUNSEL

I hereby certify that Appellant's Final Brief complies with Rule 211(b).

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