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 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.
..... Respondent

APPELLANT AMY KOVACH'S PETITION WRIT OF *CERTIORARI*

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CERTIFICATE PURSUANT TO RULE 242(d)(1)

Counsel for Petitioner certifies, pursuant to Rule 242(d)(1), S.C.R.A.P., that it filed a petition for rehearing in the South Carolina Court of Appeals in this matter. The South Carolina Court of Appeals finally ruled upon and denied that petition on January 21, 2021. As a result, Petitioner has timely filed this Petition.

QUESTIONS PRESENTED

The questions presented for review in this Petition are as follows:

1. **Should this Court grant a writ of *certiorari* to address the Court of Appeals' affirmation of Rule 11 Sanctions Against Amy Kovach?**

Suggested Answer: Yes.

2. **Did the Court of Appeals err in finding the Trial Court's decision finding sanctions were supported by adequate evidence when there was no evidence presented that the civil conspiracy allegations were in any way untrue?**

Suggested Answer: Yes.

3. **Did the Court of Appeals err in finding that Appellant's Guilty Pleas to a Separate Criminal Matter precluded her ability to file an action for civil conspiracy?**

Suggested Answer: Yes.

STATEMENT OF JURISDICTION

This Court has jurisdiction over the questions raised in Petitioner's Petition for Certiorari pursuant to Article V, § 5 of the South Carolina Constitution and S.C. Code §§ 14-3-310 & -330.

STATEMENT OF THE CASE

A. Background 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. After not receiving an apology from the school district leadership for Kovach's actions, 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 and 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.

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 and direction. 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, Counterclaims and a Third-Party Complaint; a motion to Dismiss the Complaint and a Motion for Sanctions against Ms. Bloodgood only. (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 as well as contact between Joshua Whitley and the Attorney General's Office, the Attorney General moved for an order to show cause against Kovach in her criminal case. The motion for order to show cause was regarding 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 additional 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 never discussed the payment of Defendants' attorney fees with Kovach and no other party to this action has moved for sanctions.

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. 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 and the school board. 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.

B. Procedural History in the Trial Court

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 or any other evidence 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." (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 an appeal on March 13, 2018.

C. The Court of Appeals Opinion

On December 9, 2020, the Court of Appeals filed its Opinion affirming the trial judge's order sanctioning Appellant. The Court held that Appellant's claim of civil conspiracy was an attempt to re-litigate the facts that served as a predicate of her guilty plea. (December 9, 2020 App. Order, Pg. 4). The Court then agreed with the trial court's conclusion that Appellant's civil conspiracy claims were predicated on false facts and barred by her guilty plea to a separate criminal matter. (December 9. 2020 App. Order Pg. 5). Appellant timely filed a Petition for Rehearing on December , 2020 and an Amended Petition for Rehearing on January 6, 2021. The Court of Appeals denied the Petitions for Rehearing on January 21, 2021

For the reasons that follow, this Court should grant the Amy Kovach's Petition for Writ of *Certiorari* and reverse the imposition of Rule 11 Sanctions against her.

ARGUMENT

A. Standard of Review

It is well-settled that this Court has considerable discretion in determining whether to grant a Petition for Writ of *Certiorari*:

A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

(1) *Where there are novel questions of law.*

(2) Where there is a dissent in the decision of the Court of Appeals.

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

(4) Where substantial constitutional issues are directly involved.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

See S.C.R.A.P., Rule 242(b) (emphasis added). The substantive standard of review does not require that the appellate Courts give deference to the trial judge's determination:

Whether a party is entitled to free speech, equal protection, and to access the courts for redress of grievances is a matter of constitutional right. *See* Amendments I & XIV, United States Constitution. For the reasons that follow, this Court should grant the Amy Kovach's Petition for Writ of *Certiorari* and should reverse the imposition of sanctions.

1. <u>This Case Presents a Novel Question of Law</u>

The Court should exercise it discretion to grant a writ of certiorari because this case involves an open and novel question regarding a matter of first impression. Amy Kovach was sanctioned for filing an action for civil conspiracy after pleading guilty to a criminal charge sharing no common element with the civil conspiracy cause of action and containing no factual predicate upon which the civil conspiracy action was based. A review of South Carolina case law and indeed case law throughout the United States finds no precedent supporting the imposition of sanctions in such a situation.

The Court should further exercise its discretion to grant certiorari as this case presents a novel question regarding of law regarding the application of Rule 11 sanctions against a represented party who voluntarily dismissed her suit with no development of any factual record as

a predicate for those sanctions. It runs counter to sound public policy to permit the imposition of Rule 11 sanctions with no 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. Members of the public rely upon assistance from legal counsel to provide advice and evaluate various legal theories to evaluate whether a claim or position is legally viable. Lawyers in turn, provide advice to their clients as fiduciaries and represent them zealously through suits or legal positions that they believe to be honestly debatable under the law of the land. The decision in this case effectively sanctions a represented party for seeking redress within the contours of existing law.

2. This Case Presents Important Issues Involving the Fundamental Right to Access to the Courts

The Court should further exercise its discretion to grant a writ of *certiorari* because this case involves an open and novel constitutional question impacting the fundamental right of any person to exercise her right to freedom of speech through access to the court system. "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).

The Court of Appeals' decision in this matter deprived Amy Kovach of her right to seek redress through the court system for an entirely separate civil matter, by virtue of her conviction in a criminal matter. This runs counter to United States Supreme Court precedent and puts the

fundamental right to free speech into doubt by suppressing speech and penalizing an individual for asserting that right.

Appellant respectfully submits that this Court should grant a writ of *certiorari,* reverse the Court of Appeals and reverse the imposition of sanctions as being unsupported by the applicable law or the record below.

B. The Court of Appeals Erred in Its Opinion

This Court should grant the Appellant's Petition for Writ of *Certiorari* because the Court of Appeals erred in its Opinion as a matter of law and found factual support for sanctions without the development of any factual record. For the reasons that follow, the Court of Appeals' reasoning and interpretation of the law and factual record are fundamentally flawed.

1. As a Matter of Law, a Criminal Conviction Does Not Foreclose a Subsequent Civil Action

In its Opinion, the Court of Appeals held that "after our review of the record, we agree with the circuit court that Kovach's claim of civil conspiracy was an attempt to re-litigate the facts that served as a predicate to her guilty pleas". (Opp. Pg. 5). For the reasons that follow, the Court of Appeals erred in finding that Appellant's guilty plea in any way addressed the elements of her civil conspiracy claim and further erred in finding that, as a matter of law, guilty pleas have a preclusive effect on subsequent civil litigation.

As a matter of law, "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. *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 the law which prohibits this from occurring. 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.*

Appellant'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 guilty 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.

The rationale of *Haring* is directly applicable to the instant case. 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 others 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.

Nowhere in the trial court's order or this Court of Appeals 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. Nor is it explained how the court arrived at a conclusion that sanctions are appropriate for actions permitted under United States Supreme Court precedent and in an apparent case of first impression.

2. There is No Evidence In the Record 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, Court of Appeals held that "This is a unique case where *further* [emphasis added] development of the record would not illuminate the relevant issues." (*See* Opin., at 5). This represents a misapprehension of the record as there been no factual record development of any kind regarding the civil conspiracy allegations.

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 never been disproven.* The allegations regarding the existence of a civil conspiracy included:

> 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 untrue and 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.

3. **Even if Appellant's Complaint Was Sanctionable, The Court of Appeals 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. The Court of Appeals 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.

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 their attorney fees and was never consulted on the subject. 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, argued that Appellant could not pursue an action against them as a matter of law by virtue of her alleged status as a public official. The facts of the allegations against them were never refuted by affidavit, testimony, or otherwise. But it is important to note that substantially all of these expenses occurred after Appellant had already instructed her attorney to dismiss the action and there has been no ruling either way from the trial court of the Court of Appeals on the legal merits of the civil conspiracy complaint.

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 the Court of Appeals 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 the Court of Appeals 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.

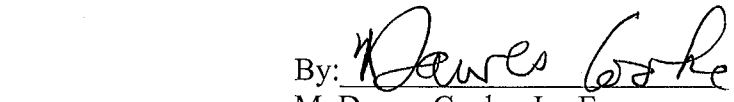
Therefore, even if sanctions were appropriate in this case, the trial judge erred in imposing such sanctions in the excessive amount of $48,000.00.

CONCLUSION

For the reasons set forth above, this Court should grant Amy Kovach's Petition for Writ of *Certiorari* in this matter.

February 22, 2021

BARNWELL WHALEY PATTERSON & HELMS, LLC

By: 

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

PROOF OF SERVICE

I certify that I have served the Appellant Charleston County School District's Petition for Writ of *Certiorari* on the above-referenced Respondents by email and by depositing a copy of it in the United States Mail, postage prepaid, on February 22, 2021, addressed to their attorneys of record:

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