THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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

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

Case No.: 2021-000174

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.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Should the Court refuse to grant a writ of *certiorari* to address the Court of Appeals' affirmation of the Rule 11 Sanctions against Amy Kovach?

2. Did the Court of Appeals properly affirm Chief Justice Toal's decision that Kovach's guilty pleas foreclosed her ability to file an action against Respondents for Civil Conspiracy?

3. Did the Court of Appeals properly affirm Chief Justice Toal's decision based on the record as developed?

4. Should the Court refuse to consider Kovach's argument concerning the amount of the sanction awarded since she failed to include the issue among her Questions Presented?

5. Did the Court of Appeals properly affirm the sanctions awarded as not excessive?

COUNTER-STATEMENT OF THE CASE

Procedural History

On October 15, 2015, Petitioner, Amy Kovach ("Kovach" or "Petitioner"), filed a Complaint against Joshua Whitley ("Mr. Whitley"), Karen Whitley ("Karen Whitley") (together the "Respondents" or "Whitleys"), the Berkeley County School District ("BCSD"), Scott Marino, Terry Hardesty, and the Berkeley County Republican Party, LLC in the Court of Common Pleas for Berkeley County. R. p 45. In her Complaint, she alleged a claim for civil conspiracy against Mr. Whitley and others, including Karen Whitley. Mr. Whitley filed responsive pleadings, including an Answer, Counter-claim and a Third-Party Claim on November 3, 2015, along with a Motion for Sanctions against Kovach's attorney, Nancy Bloodgood ("Bloodgood"). R. pp. 76, 146, 187. Karen Whitley filed a Motion to Dismiss and for Rule 11 Sanctions against Bloodgood on November 16, 2015. R. p. 168. Mr. Whitley amended his Motion for Sanctions on February

12, 2016 to include a motion for sanctions against Kovach pursuant to Rule 11 of the South Carolina Rules of Civil Procedure. R. p. 292. Karen Whitley filed an Amended Motion for Sanctions against Bloodgood and Kovach on February 23, 2016. R. p. 311. The matter came before the trial court for a hearing on September 16, 2016, with Chief Justice Toal presiding. On October 24, 2016, Chief Justice Toal granted the Whitleys' motions for sanctions against both Bloodgood and Kovach. R. p. 5. In accordance with the Order, counsel for Karen Whitley filed an Affidavit for Attorneys' Fees on November 2, 2016, and a Supplemental Affidavit on January 13, 2017. R. pp. 583, 1060. Mr. Whitley submitted his petition for fees on November 3, 2016, and amended it by letter on January 11, 2017 to segregate billing entries pursuant to the Court's request. R. pp. 599, 1371. Bloodgood and Kovach moved for reconsideration, and Chief Justice Toal heard the motions on January 17, 2017. R. pp. 619, 1071. On February 19, 2018, Chief Justice Toal entered an order denying the motions for reconsideration and assessing sanctions against Bloodgood in the amount of $17,000 ($2,000 to Karen Whitley and $15,000 to Mr. Whitley) and Kovach in the amount of $48,000 ($13,000 to Karen Whitley and $35,000 to Mr. Whitley) R. p. 29.

Bloodgood has paid the sanctions imposed against her and did not appeal the Court's Order. Kovach appealed Chief Justice Toal's decision to the Court of Appeals. On December 9, 2020, the Court of Appeals entered its Order affirming Chief Justice Toal's decision. Kovach filed a petition for rehearing, which the Court of Appeals denied on January 21, 2021.

Statement of Facts

Petitioner, Kovach, is the former Director of Communications and Community Relations for the BCSD. Kovach was fired from that position after she pled guilty to two crimes related to her leadership role in Berkeley County's 2012 School Bond Referendum ("Referendum"). The

Referendum called for a $198 million bond offering to pay for the building of five (5) new schools and renovations on nineteen (19) schools. In support of the Referendum, a campaign known as the "Vote Yes 4 Schools" was established.

During the Referendum campaign, Mr. Whitley, a private citizen, attorney, and taxpayer in Berkeley County, became concerned that Kovach and others at the BCSD were campaigning in favor of the Referendum using BCSD resources to do so, in violation of S.C. Code Ann. § 8-13-1346, which prohibits the use of public funds to influence an election. Mr. Whitley investigated the matter by gaining access to relevant documents from the BCSD through the South Carolina Freedom of Information Act ("FOIA"), pursuant to which "*any person* has a right to inspect or copy any public record of a public body...." S.C. Code Ann. § 30-4-30 (emphasis added).

After the election, the BCSD responded to Mr. Whitley's FOIA request. Upon review of the documents produced under FOIA – in particular, emails from Kovach in which she actively engaged in campaigning in favor of the Referendum in violation of the law – Kovach's misconduct was manifest. Mr. Whitley brought this information to the attention of the South Carolina Attorney General and, thereafter, the South Carolina Law Enforcement Division ("SLED") began an investigation into Kovach's activities.

SLED's investigation eventually led the Attorney General's office to indict Kovach on five charges: (1) misconduct in office in violation of the common law of South Carolina; (2) criminal use of public funds to influence an election in violation of Section 8-13-1346 of the South Carolina Code of Laws; (3) two counts of forgery based on Kovach's efforts to cover up her criminal misconduct; and (4) and one count of perjury related to fraudulently conducting procurement matters to cover up her criminal misconduct related to the campaign and use of district resources.

Kovach was provided with a defense attorney by her employer, BCSD, pursuant to S.C. Code Ann. § 59-17-110, based on her claim that she had done nothing illegal and had always acted in good faith. The BCSD incurred more than $300,000.00 on Kovach's behalf in paying her defense attorney. After spending eighteen months on paid leave from the school district, Kovach ultimately pled guilty in a negotiated plea to the misconduct in office and criminal use of public funds charges in exchange for dismissal of the remaining three charges. In exchange for dismissing the three remaining charges, Kovach admitted to the underlying facts of those indictments as part of her global misconduct charge.

At Kovach's guilty plea and sentencing hearing on August 28, 2015, she admitted under oath to the material facts supporting all five charges against her, including the two felony forgery charges and the perjury charge related to her efforts to cover up her misconduct. During the hearing, Assistant Deputy Attorney General Creighton Waters set forth the factual predicate for the charges and the state's proof in detail. R. pp. 1091-1111. After hearing the declaration of the incriminating facts that the state was prepared to prove, Kovach replied to the Court under oath that she "agree[d] with the facts as stated by the attorney general." R. pp. 1102-1104. As part of the guilty plea, Kovach also admitted to the facts underlying the charges against her that were dismissed in the plea deal. (R. pp. 1086, 1093 (plea to misconduct covers and incorporates all of the charged conduct in addition to the underlying ethics act count); R. pp. 1089-1090 (Kovach admits that the allegations in the indictment were truthful after the Court read them to her, including the statement that she engaged in "covering up her actions with dishonesty"); R. p. 1111 (Kovach agrees under oath with the facts that the state set forth including those supporting forgery and perjury charges); R. pp. 1113, 1116-1118 (Kovach agreed under questioning from the Court that she was guilty of the charges).) After hearing the prosecutor's factual presentation, including

facts underlying the perjury and forgery indictments, the presiding judge, the Hon. Jeffrey Young, stated at the time of sentencing:

> THE COURT: All right, I've considered the presentations given by the attorney general and Mr. Theos; and even in my limited exposure to this case was (*sic*) started a month ago, what I see here is lies, lies, and lies. Ms. Kovach from what I see ignored every warning sign that was available to her. Again, she lied to every opportunity reading one's emails somebody warned her that this was not the right thing to do. The email says all fixed. Well, it's not all fixed. Her actions included, again, lies, **fabrication of documents**, and at every opportunity she chose deceit over the truth."

R. pp. 1138-1139 (emphasis added).

Judge Young sentenced Kovach to five years' imprisonment, suspended upon the completion of two years' probation and payment of a $25,000 fine. In light of the guilty plea and admissions to her illegal role in the Referendum, the BCSD recommended her termination to the Berkeley County School Board ("Board"). The Board received input from the Attorney General's office regarding the evidence in the criminal case against Kovach. On August 31, 2015, Deputy Assistant Attorney General Waters wrote a lengthy letter to the Board explaining in detail the facts supporting the charges that Kovach admitted to just days earlier. R. pp. 1358-1364) Kovach was then terminated from her employment.

On or about September 3, 2015, Kovach met with Bloodgood to discuss filing a grievance with the BCSD and civil claims in circuit court. Consulting with Bloodgood, Kovach prepared an Affidavit dated August 4, 2015, to accompany the grievance package sent to the Board. R. pp. 33-44. The essence of the Kovach Affidavit is that she was falsely accused, that SLED and the Attorney General's Office had improper motives, and that the perjury and forgery charges "were completely bogus," among other things. The Affidavit contains material contradictions of her sworn admissions made during the guilty plea hearing. By way of example, Kovach stated under oath that "[n]o public funds were used to create or pay for any campaign video." R. p. 38.

However, at her plea and sentencing on August 28, 2015, she admitted under oath that she "did use public funds to pay for the creation of a campaign video," which admission was material to her indictments and guilty plea. R. p. 1090, lines 10-12.

On or about September 16, 2015, the Board denied the Kovach employment grievance appeal, which finalized her termination. Kovach then turned to the pursuit of this litigation. On October 15, 2015, within two months of the sentencing hearing, Kovach, through Bloodgood, filed the instant civil action against the BCSD, Mr. Whitley, Scott Marino, Karen Whitley, Terry Hardesty, and the Berkeley County Republican Party, LLC. R. p. 45. The Complaint is thirty pages in length and continues with the central theme contained in the Kovach Affidavit–that she was not in fact guilty of the crimes to which she admitted only weeks prior, and others were to blame for her conduct.

The fourth cause of action in Kovach's Complaint asserts a claim of civil conspiracy against Mr. Whitley, Karen Whitley, and others in which Kovach alleged that they conspired to have Kovach prosecuted for her criminal activities. Specifically, Kovach alleged that Mr. Whitley conspired with others to bring Kovach's criminal conduct to the attention of the Attorney General's Office–conduct that ultimately resulted in her indictment and admission to her criminal conduct. On November 3, 2015, Mr. Whitley filed his Answer, Counterclaims, and Third Party Complaint, as well as a Motion for Sanctions against Bloodgood for having filed a frivolous pleading against him. Karen Whitley filed a Motion for Sanctions on November 16, 2015. R. pp. 76-157.

The Complaint also contains various allegations of wrongdoing against non-parties. Specifically, Kovach alleged obstruction of justice, fraud on the court, and ethical breaches against the Attorney General, his lawyers, SLED, and one if its agents. (R. p. 60 (perjury and forgery indictments were "retaliatory" and "completely bogus"); R. p. 61 (SLED agent "drafted a false

interview report with witness…"); R. pp. 61-62 (Attorney General attributed a doctored document to Kovach knowing that it was not Kovach's and SLED agent "obstructed justice"); R. p. 62 (SLED knew that "smurfing" charges were "patently false"); and R. pp. 62-63 (Attorney Generals' Office "manufactured" smurfing charge to injure Kovach).) Kovach alleged no actual claims against these parties, but she questioned the credibility of the investigation and indictment and implied throughout that she was not actually guilty of the crimes to which she pled guilty or the indicted charges dismissed in her plea deal.[1]

Much like the Affidavit filed in conjunction with her employment grievance, Kovach's Complaint contains numerous material contradictions of her sworn testimony at the guilty plea hearing. In response to the sworn contradictions in the Affidavit and the allegations of misconduct in the Complaint on the part of SLED and the Attorney General's Office, the Assistant Attorney General filed, on November 9, 2015, a Rule to Show Cause "why Amy Kovach should not be held in contempt of court for her statements to this Court and her subsequent actions relating to her plea of guilty before this Court on August 28, 2015." R. pp. 158-167. The basis of the Attorney General's show cause petition was that Kovach committed perjury when she submitted her affidavit directly contradicting her previous sworn testimony, and committed constructive contempt "by making a mockery of the criminal justice system and false statements after her solemn plea of guilty before this Court." R. pp. 158-167. The Hon. W. Jeffrey Young, who presided at Kovach's guilty plea and sentencing, signed the Rule to Show Cause on November 20, 2015. R. p. 4.

[1] The Complaint also implicates and impugns a Vice President of Santee Cooper, State Senator Larry Grooms and his wife, and the law firm that represented the BCSD–all while alleging no actual claims against any of them or giving them the opportunity to refute the allegations. R. pp. 54-55, 70-71.

On November 25, 2015, counsel for Mr. Whitley wrote to Bloodgood, acknowledging receipt of her assistant's email correspondence, to which she attached a proposed Stipulated Order of Dismissal for signature by Mr. Whitley's attorney. R. p. 1367. However, the draft order provided for dismissal without prejudice and for each party to bear its own expenses. Counsel for Mr. Whitley responded in the November 25, 2015 letter that Mr. Whitley would be willing to stipulate to dismissal only if it were with prejudice, and accompanied by the payment of attorneys' fees. R. p. 1367. Bloodgood did not respond.

At the Show Cause hearing on February 8, 2016, the Complaint in this action, which largely contains the same material contradictions as the Affidavit, was addressed by the Court. Kovach testified during the Show Cause hearing that her attorney, Bloodgood, failed to perform due diligence before filing the Complaint, and that the advice her attorney gave her was provided without a clear understanding of what the Attorney General had alleged or what had occurred at Kovach's guilty plea hearing held on August 28, 2015. R. pp. 1148-1150. She also agreed with her criminal attorney's statement that Bloodgood did not review the transcript of the guilty plea hearing before the Complaint was filed, and that the instant civil case against Mr. Whitley and others had been "withdrawn with prejudice." R. pp. 1148-1149. Kovach testified that she filed the Complaint on the advice of her counsel, Bloodgood. R. p. 1150. Kovach thus placed the blame for the filing of the frivolous Complaint on Bloodgood.

Ultimately, Judge Young agreed with the Deputy Assistant Attorney General not to hold Kovach in contempt based on her sworn reaffirmation that her admissions under oath at her guilty plea were in fact true, and her express representation that she would dismiss the ill-advised civil Complaint against all parties, immediately and with prejudice and never file another suit arising out of the same facts. Kovach also admitted under oath at the Show Cause hearing that her

Complaint contained information that was inconsistent with her sworn testimony at the guilty plea hearing. Kovach and her criminal attorney shifted blame for the filing of the Complaint by claiming a failure to perform due diligence on the part of her civil attorney Bloodgood. R. pp. 1141-1153. Immediately after the Show Cause hearing, Mr. Whitley wrote to Bloodgood to tell her that her client misrepresented to the court that the case against him had been dismissed with prejudice. R. pp. 1369-1370. Thereafter, Bloodgood agreed to dismiss the case with prejudice, but refused to agree to compensate Mr. Whitley for his legal fees.

On February 12, 2016, Bloodgood filed her opposition to the Whitleys' original motions for sanctions against her. In it, she claimed that she received the guilty plea transcript on October 13, 2015, and revised the draft Complaint on October 14, 2015 based on her review of the transcript, before filing it on October 15, 2015. R. p. 276. She also asserted that she reviewed versions of the Complaint with Kovach. R. p. 277. On February 12, 2016, Mr. Whitley filed an Amended Motion for Sanctions to include a Rule 11 motion for sanctions against Kovach. R. pp. 292-310. On February 23, 2016, Karen Whitley also filed an Amended Motion for Sanctions to include a motion for sanctions against Kovach under Rule 11.

On September 16, 2016, the trial court, the Honorable Chief Justice Jean H. Toal (ret.) presiding, heard the arguments of counsel on the motions for sanctions. Kovach was represented at the hearing by her current counsel, who never expressed a need to present evidence. At the close of the hearing, the Court asked counsel to submit memoranda providing authorities addressing the issue of the imposition of sanctions for filing a complaint in a civil case arising out of a criminal proceeding in which Kovach entered a guilty plea and proposed Orders. The parties then submitted reply briefs in accordance with the Court's request. On October 24, 2016, the Court entered its Order Granting Motion for Sanctions. R. pp. 5-28. In accordance with the Order,

counsel for Karen Whitley filed an Affidavit for Attorneys' Fees on November 2, 2016, and a Supplemental Affidavit on January 13, 2017. R. p. 583. Mr. Whitley submitted his Petition for Fees on November 3, 2016, and amended it by letter on January 11, 2017 to segregate billing entries pursuant to the Court's request. R. pp. 599, 1371.

Bloodgood moved for reconsideration of the Court's October 24, 2016 Order on November 7, 2016, and Mr. Whitley filed a brief in opposition. Kovach moved for reconsideration on January 13, 2017. On January 17, 2017, Justice Toal held a hearing on the motions for reconsideration. R. p. 1233. On February 19, 2018, Justice Toal entered an Order denying the motions for reconsideration and imposing sanctions against Bloodgood in the amount of $15,000 and Kovach in the amount of $48,000. R. pp. 29-32.

In her Statement of Facts, Kovach states that she "believed, and contended, that her criminal prosecution was politically motivated." (Petition, p. 4.) She thus continues in her refusal to take responsibility for her actions, claiming that she acted in good faith, and that she is not guilty of the crimes for which she entered pleas of guilty. She is attempting here, as she did in the trial court and in the Court of Appeals, to absolve herself of her criminal conviction, despite her admission to the underlying facts in support of that conviction in her guilty plea. The Court should deny the Petition.

ARGUMENT

I. Kovach Has Failed To Identify Any Special And Important Reason For This Court To Grant Her Petitions for Writ of Certiorari. (Kovach Question Presented No. 1.)

Rule 242(b) of the South Carolina Appellate Court Rules provides that "[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." Rule 242(b), SCACR. The Rule lists various reasons,

the character of which will be considered on a petition for writ of certiorari. Kovach relies on two of those reasons in her Petition: "[w]here there are novel questions of law," and "[w]here substantial constitutional issues are directly involved." *Id.* (Petition, pp. 7-8; Question Presented No. 1.) Neither of these reasons for granting certiorari apply here.

A. This Case Does Not Present A Novel Question of Law.

Kovach first claims that her Petition involves an "open and novel question regarding a matter of first impression." (Petition, p. 7.) She is mistaken. This Court resolved the issue of whether a civil complaint may be precluded by a plaintiff's prior guilty plea in *Zurcher v. Bilton*, 379 S.C. 132, 136, 666 S.E.2d 224, 226 (2008). Kovach's argument is based on the faulty premise that she 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." *Id.* But the factual predicate of her complaint, including the civil conspiracy cause of action, was that the charges against her were "completely bogus" and she was innocent, which directly contradicted her previous guilty pleas. *Zurcher* controls the issue, and it is not a novel question of law.

As for the sanctions imposed by Chief Justice Toal, this case is governed by Rule 11(a), SCRCP and this Court's decision in *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008) ("Under Rule 11(a), SCRCP, a party and/or the party's attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments."); *id.* ("The party and/or attorney may also be sanctioned for filing a pleading, motion, or other paper in bad faith whether or not there is good ground to support it."); *id.* at 437-38, 663 S.E.2d at 50 ("The sanction may include an order to pay the reasonable costs and attorney fees incurred by the party or parties defending against the frivolous action or action brought in bad faith . . . ."). In the October 24,

2016 Order Granting Motion for Sanctions, Chief Justice Toal found that Kovach admitted to material facts that supported all of the charges against her - including the two felony forgery and perjury charges related to her efforts to cover up her criminal conduct. Chief Justice Toal sanctioned Kovach for alleging facts in her lawsuit that contradicted the factual predicate of her sworn guilty pleas. As such, her complaint "lack[ed] the factual foundation that is required by Rule 11 and must be deemed frivolous....[Kovach's] attempt to re-litigate her criminal conviction through the civil justice system amounts to bad faith, and also requires the Court to sanction her." R. p. 27. The Court of Appeals, applying the abuse of discretion standard, affirmed that decision, holding that "the circuit court's conclusion that Kovach's civil conspiracy claim was predicated on false facts is supported by the record and is not controlled by an error of law." (Ct. App. Opinion, p. 5.)

Thus, the courts below merely applied Rule 11(a) to a case in which the plaintiff, like the plaintiff in *Ex parte Gregory*, filed a groundless claim. This is not a novel question of law.

B. This Case Does Not Present "Important Issues Involving the Fundamental Right to Access to the Courts."

Kovach next claims that "[t]he Court of Appeals' decision deprived [her] 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." (Petition, p. 8.) Kovach fails to grasp that her access to the court system was not foreclosed by Chief Justice Toal or the Court of Appeals; it was foreclosed by her voluntary sworn guilty plea. And this is not an "entirely separate civil matter," as she claims; the factual predicate for her conspiracy claim arises out of the same set of facts underlying her guilty pleas. She was not punished for exercising rights guaranteed by the Petition Clause of the First Amendment; she was sanctioned for filing a frivolous claim in violation of Rule 11(a), SCRCP.

None of the authorities Kovach cites support the grant of a writ here. In *State v. Fletcher,* 322 S.C. 256, 259, 471 S.E.2d 702, 704 (1996), the Court recognized the truism that "[i]t is a due process violation to punish a person for exercising a protected statutory or constitutional right." *Id.* at 259, 471 S.E.2d at 704. In that case, a criminal defendant challenged a direct indictment as prosecutorial vindictiveness, and the Court ultimately rejected the argument. Kovach has merely cherry-picked a quotation from the opinion and cited it here out of context.

Kovach's reliance on the United States Supreme Court's decision in *Borough of Duryea, Pa. v. Guanieri*, 564 U.S. 379, 387 (2011) is equally infirm. She quotes the *Guanieri* Court's statement that "the right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government," but fails to note the *Guanieri* Court's recognition that the Petition Clause of the First Amendment does not protect "objectively baseless" litigation, and that sanctions are available under Fed. R. Civ. P. 11 "for claims that are 'presented for [an] improper purpose,' frivolous, or lacking evidentiary support." *Guarnieri*, 564 U.S. at 390 (quoting Fed. R. Civ. P. 11).

Kovach goes on to assert that the "right of redress includes the right of a convicted person to pursue a collateral civil action based upon facts related to the conviction." (Petition, p. 8.) This argument originates from Kovach's mistaken reliance on the United States Supreme Court's decision in *Haring v. Prosise*, 462 U.S. 306 (1983). Kovach relies heavily on *Haring* throughout her Petition, but as discussed in more detail below, the Court's decision in *Haring* was an interpretation of Virginia law on the issue of collateral estoppel, and it is therefore inapposite. Under South Carolina law, by contrast, Kovach's guilty plea operated as an estoppel to her subsequent civil complaint. *Doe v. Doe*, 346 S.C. 145, 146, 551 S.E.2d 257 (2001) (holding that "once a person has been criminally convicted, the person is bound by that adjudication in a

subsequent civil proceeding based on the same facts underlying the criminal conviction"); *Saunders v. Leeke,* 254 S.C. 444, 447, 175 S.E.2d 796, 797 (1970 (holding that a guilty plea is a "confession of guilt, made in a formal manner and has the same effect in law as a verdict of guilty"); *Zurcher v. Bilton*, 379 S.C. 132, 136, 666 S.E.2d 224, 226 (2008) (holding that a defendant who enters a guilty plea "may be collaterally estopped from litigating the same issue in a subsequent civil suit"). Her argument therefore fails under South Carolina law, which applies here.

In sum, Kovach has failed to identify any constitutional deprivation that would warrant the award of a writ of *certiorari* in this case. Her Petition should be denied.

II. The Court of Appeals Correctly Affirmed Chief Justice Toal's Decision That Kovach's Guilty Plea Foreclosed Her Claims Against the Whitleys. (Kovach Question Presented No. 3.)

Relying, again, on *Haring*, Kovach wrongly asserts that, "as a matter of law," her criminal convictions did not foreclose her subsequent civil action. (Petition, p. 9; Question Presented No. 3.) In *Haring*, the plaintiff claimed that Virginia police officers had searched his apartment without probable cause and had seized materials used to manufacture a controlled substance. In disposing of the officers' contention that the accused's (plaintiff's) guilty plea to one count of manufacturing a controlled substance foreclosed his Section 1983 claim, the Court stated,

> We begin by reviewing the principles governing our determination whether a Section 1983 claimant will be collaterally estopped from litigating an issue on the basis of a prior state-court judgment. Section 28 U.S.C. § 1738 generally requires 'federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.' In federal actions including § 1983 actions, a state-court judgment will not be given collateral estoppel effect, however, where 'the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court.' Moreover, additional exceptions to collateral estoppel may be warranted in § 1983 actions in light of the 'understanding of § 1983' that 'the federal courts could step in where the state courts were unable or unwilling to protect federal rights.'

> The threshold question is whether *under the rules of collateral estoppel applied by the Virginia courts*, the judgment of conviction based upon Prosise's guilty plea would foreclose him in a later civil action from challenging the legality of a search which had produced inculpatory evidence.

Id. at 2373 (citations and footnotes omitted) (emphasis added). Thus, contrary to Kovach's argument, the *Haring* Court did not hold that guilty pleas do not have preclusive effect in subsequent civil litigation in all cases. Applying Section 1738, the Court looked to the law of the state from where the guilty plea originated to determine its collateral estoppel effect. In that case, the guilty plea originated in Virginia, which did not give guilty pleas preclusive effect. *Grochowski v. Dewitt-Rickards*, No. 90-2159, 1991 U.S. App. LEXIS 4017, *4 (4th Cir. 1991) (noting that in *Haring*, "the Supreme Court interpreted *Virginia law* as giving preclusive effect to a state court conviction only if the constitutional issue was actually litigated and necessarily determined in the state proceeding.") (emphasis added).

Under South Carolina law, by contrast, guilty pleas are preclusive in subsequent civil litigation. *Doe v. Doe*, 346 S.C. 145, 146, 551 S.E.2d 257, 258 (2001); *Sanders v. Leeke,* 254 S.C. 444, 447, 175 S.E.2d 796, 797 (1970); *Zurcher v. Bilton*, 379 S.C. 132, 136, 666 S.E.2d 224, 226 (2008). Instead of attempting to distinguish any of these controlling South Carolina authorities - or even cite them in her Petition - Kovach takes the peculiar position that the Court of Appeals somehow erred by not addressing *Haring* in its opinion. The Court of Appeals did not address *Haring* simply because it is inapplicable here.

No actionable claim for civil conspiracy could exist against the Whitleys because of Kovach's guilty plea and her admissions under oath at the sentencing hearing. There is no question that, under South Carolina law, Kovach is *bound by her guilty plea* and cannot take a position

contrary to her previous admissions under oath at the guilty plea hearing. Accordingly, the Court should refuse to grant Kovach a writ of *certiorari* on this issue.

III. The Court of Appeals Properly Affirmed The Imposition Of Sanctions Against Kovach For Bringing a Frivolous Civil Conspiracy Claim Against the Whitleys Based on The Record Before It. (Kovach Question Presented No. 2.)

Under Rule 11, SCRCP, a party and/or the party's attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments. *See Runyon v. Wright*, 322 S.C. 15, 18-19, 471 S.E.2d 160, 161-162 (1996); *see also Link v. School District of Pickens County*. 302 S.C. 1, 393 S.E.2d 176 (1990); *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008). The party and/or attorney may also be sanctioned for filing a pleading, motion, or other paper in bad faith (i.e., to cause unnecessary delay) whether or not there is good ground to support it. *See Johnson v. Dailey,* 318 S.C. 318, 457 S.E.2d 613 (1995). "The sanction may include an order to pay the reasonable costs and attorney's fees incurred by the party or parties defending against the frivolous action or action brought in bad faith, a reasonable fine to be paid to the court, or a directive of a nonmonetary nature designed to deter the party or the party's attorney from bringing any future frivolous action or action in bad faith." *Runyon, supra*; Rule 11, SCRCP. "Further, if appropriate under the facts of the case, the court may order a party and/or the party's attorney to pay a reasonable monetary penalty to the party or parties defending against the frivolous action or action brought in bad faith." *Id.* The trial court was vested with inherent authority to award sanctions for the filing of frivolous pleadings. *See Holmes v. Haynsworth Sinkler Boyd, P.A.*, 408 S.C. 620, 641, 760 S.E.2d 399, 410 (2014) (abrogated on other grounds); *Runyon v. Wright*, 322 S.C. 15, 18-19, 471 S.E.2d 160, 161-62 (1996) (holding that under Rule 11, a party may be sanctioned for filing a frivolous pleading); *Ex parte Bon Secours St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 597-598, 713 S.E.2d 624, 628 (2011) (affirming an award of sanctions

in the form of attorneys' fees and costs against a hospital defendant for removing a case, on the day of trial, to federal court for a second time).

Kovach argues that there is "no evidence in the record that the civil conspiracy claims were untrue" and that Chief Justice Toal erred in imposing sanctions on her "because Respondents did not present a scintilla of evidence that the Civil Conspiracy Complaint was, in fact, frivolous or without merit." (Petition, p. 11.) She claims that an adjudication on the merits of her conspiracy claim was required, and she takes issue with the Court of Appeals' statement in its Opinion that "[t]his is a unique case where further development on the record would not illuminate the relevant issues" because the use of the word "further" reflects a "misapprehension of the record." *Id.* It is Kovach who is under a misapprehension. First, Kovach seems to forget that *she voluntarily sought dismissal of her case* against Respondents, ultimately agreeing to dismiss Dr. Whitley *with prejudice*. It borders on the absurd for a litigant to complain that she was deprived of a fully developed record on a claim that she sought to dismiss. Furthermore, her counsel - the same counsel representing her now - never expressed the need to present evidence during the hearing before Chief Justice Toal.

In any event, the Court of Appeals correctly determined that there was no need to develop the record further because it speaks for itself. The elements of a civil conspiracy in South Carolina are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages. *See Pye v. Estate of Fox*, 369 S.C. 555, 566-567, 633 S.E.2d 505, 511 (2006); *see also LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988); *Peoples Federal Savings & Loan Ass'n of S. Carolina v. Resources Planning Corp.*, 358 S.C. 460, 470, 596 S.E.2d 51, 56-57 (2004) (holding "[a] civil conspiracy is a combination of two or more parties joined for the purpose of injuring the plaintiff and thereby causing special damage"). It is

essential that the plaintiff prove all of these elements in order to recover. *See Lyon v. Sinclair Refining Co.*, 189 S.C. 136, 200 S.E. 78 (1938).

The Court of Appeals correctly affirmed Justice Toal's opinion that the conspiracy claims Kovach filed against the Whitleys had no "good ground to support" them. The sum total of the conspiracy allegations against Mr. Whitley in Kovach's fourth cause of action is as follows:

- He and others (including Karen Whitley) "conspired with each other" to file a complaint with the Attorney General, and took actions to ensure a Resolution was passed by the Berkeley County Republican Party, LLC encouraging the Attorney General to prosecute Kovach. (R. p. 70.)
- He and others "played an active and inappropriate role in SLED's investigation and upon information and belief provided false statements to SLED and the Attorney General." (*Id.*)
- He and others "suggested stories and provided false information to the press...." and "communicated directly with Defendant BCSD Board members to turn them against Plaintiff." (*Id.*)
- State Senator Larry Grooms, who sat in the front row at Kovach's criminal case hearings and "acknowledged Defendant Joshua S. Whitley's actions towards Kovach when he stated publicly, 'Josh has got the goods on her.'" (*Id.*)
- He exchanged emails with his mother, Defendant Karen Whitley, regarding the lease of Karen Whitley's private property while Karen Whitley was at work. (R. p. 71.)
- He violated Rule 3.6 of the Professional Rules of Conduct for Lawyers by repeatedly commenting on a pending matter that SLED was investigation in order to influence the outcome of the SLED investigation. (*Id.*)

- He "threatened to sue volunteer Campaign Coordinator Co-Chair Jane Pulling if she continued to support Plaintiff." (R. p. 72.)
- He "bragged publically [sic] that he hoped to harm the School District." (*Id.*)
- He "issued multiple FOIA requests for emails of other BCSD employees who publically [sic] expressed support for Plaintiff." (*Id.*)
- He "knew and encouraged his mother to use public resources while she was working to lease her personal property which personally benefited her." (*Id.*)

Thus, the only actions that Kovach alleges that Mr. Whitley and others "conspired with each other" to do was to (1) file a complaint with the Attorney General, and (2) ensure a Resolution was passed by the Berkeley County Republican Party, LLC encouraging the Attorney General to prosecute Kovach, both of which were within his rights to do. Kovach alleged that false statements were made to SLED and the press, but she failed to identify any such statements. She complained that Mr. Whitley sought information through FOIA, which is a right preserved to any person under Section 30-4-30 of the Code of South Carolina. She asserted that Mr. Whitley violated Rule 3.6 of the Professional Rules of Conduct, which is clearly inapplicable to his speech as a concerned private citizen/taxpayer and does not prevent him from exercising his First Amendment rights. Against Karen Whitley alone, she claimed only that Karen Whitley "advocated and spoke publicly in favor of the Referendum as an employee of the District, knowing that the speeches she gave had been written by Plaintiff, and used public resources to conduct personal business. R. p. 55.

Kovach contends that her guilty plea was limited to two discrete elements - whether she made the video regarding the bond referendum and whether she purchased campaign signs. (Petition, p. 12.) But she ignores that she admitted under oath to the material facts supporting *all five charges against her*, including the two felony forgery charges and the perjury charge related

to her efforts to cover up her misconduct. All of the allegations in her Complaint relate to the same issue, i.e., Kovach's corrupt campaign activities in favor of the Referendum in violation of South Carolina law. Having entered a plea of guilty to corruption, Kovach was estopped from litigating the same issues in a subsequent civil suit. *Zurcher, supra.*[2]

Furthermore, in her Complaint, Kovach specifically contradicts the facts to which she agreed during the sentencing hearing and which established the factual predicate for the crimes she committed. (R. p. 50 ("The video plaintiff was working on was not prepared in anticipation of the Referendum"); R. p. 50 ("Plaintiff never personally profited from her position with the Berkeley County School District ("BCSD") and no one has ever alleged that she did"); R. p. 53 ("The [FOIA'd] emails merely indicated Plaintiff and other BCSD employees were responding to questions about the school bond referendum, providing correct information to the volunteer Referendum committee, and preparing Defendant BCSD Board members for public presentations."); R. p. 57 ("No public funds were used by Plaintiff to create or pay for any Referendum campaign video. The video Plaintiff finalized for the District in September of 2012 had been started months before the beginning of the Referendum process and for an entirely different purpose."); R. p. 61 ("The indictment was false and unfounded, as was the first indictment, and was ultimately dismissed); R. p. 60 ("Then, after Plaintiff's Attorney moved to disqualify the Attorney General from the case and change venue, Plaintiff was further retaliated against by the Attorney General's office with three (3) additional indictments, including a perjury and forgery charge, both of which were completely bogus and were later dismissed by the Attorney

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[2] In addition, Mr. Whitley's actions were protected by the doctrine of judicial privilege. *See Crowell v. Herring*, 301 S.C. 424, 430, 392 S.E.2d 464, 467 (Ct. App. 1990) ("We hold the absolute privilege exists as to any utterance arising out of the judicial proceeding and having any reasonable relation to it, including preliminary steps leading to judicial action of any official nature...").

General."); R. pp. 63-64 ("After receiving no support from Defendant BCSD, Plaintiff eventually pled guilty to this particular charge because she had to end the criminal proceedings for her own mental health").) Kovach's litany of false allegations, as also similarly alleged in her grievance Affidavit, prompted the Attorney General to issue a show cause. At the show cause hearing, where she admitted that the allegations of the Complaint conflicted with her admissions during the sentencing hearing, she was admonished for having filed this lawsuit, and she represented, falsely, that it had been dismissed with prejudice. As the Chief Justice Toal and the Court of Appeals properly recognized, she was attempting, through the instant action, to re-litigate her criminal case and blame the damages she sustained on others. Kovach cannot evade or qualify her guilt and avoid the consequences of the filing of this frivolous lawsuit that directly contradicts her own sworn admissions.

Furthermore, a citizen's efforts to have a corrupt public employee prosecuted are not actionable in a civil case; to the contrary, such efforts are commendable. This Court has held that "a public official is answerable to the public; members of the public are not third-party interlopers." *Angus v. Burroughs & Chapin Co. (Angus II)*, 368 S.C. 167, 628 S.E.2d 261, 262 (2006). In *Angus II*, the Horry County Council terminated the employment of Linda Angus, the county administrator. *Id.; see Angus v. Burroughs & Chapin Co. (Angus I)*, 358 S.C. 498, 596 S.E.2d 67, 69 (S.C. Ct. App. 2005). She brought a civil conspiracy action against four members of the Horry County Council in their individual capacities; the Myrtle Beach Herald and its publisher; Burroughs & Chapin Co.; and certain individuals. The plaintiff alleged that these parties conspired to have her employment terminated. This Court held, in no uncertain terms, that the plaintiff could not maintain a conspiracy action against the private individual defendants, explaining as follows:

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

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

Angus II, 368 S.C. at 170-171, 628 S.E.2d at 262. Likewise, here, Mr. Whitley, as a private citizen and member of the public, had every legal right as a citizen to report Kovach's illegal acts to the authorities, and cannot be held liable for conspiracy in doing so under South Carolina law.

Kovach completely ignores the *Angus II* decision in her Petition. The Respondents in this action, who suspected criminal activity, had the right to make a complaint to the Attorney General. Indeed, as Justice Toal recognized, they had the right to be wrong – that is, had the Attorney General not found criminal activity, a civil conspiracy claim would still not exist against the persons that reported suspected criminal activity to authorities. Nevertheless, Mr. Whitley got it right – Kovach had indeed committed the very criminal acts he complained of to the Attorney General.

Because the record was sufficient for Chief Justice Toal and the Court of Appeals to determine that sanctions were warranted against Kovach, the Court should refuse to grant Kovach a writ of certiorari on Kovach's Question Presented No. 2.

IV. The Court of Appeals Properly Concluded That The Sanctions Were Reasonable And Not Excessive. (Kovach Question Presented No. 4)

The issue of the reasonableness of the sanctions awarded against Kovach was not included among Kovach's Questions Presented and is therefore waived. But even if the issue were not waived, it does not warrant the grant of a writ of *certiorari* here. In his letter to the trial court segregating fees, counsel for Mr. Whitley expressed his opinion to the trial court that February 10, 2016 was likely the most appropriate demarcation date, as it was the date of final communication with Bloodgood concerning the dismissal of Mr. Whitley with prejudice following the February 8, 2016 hearing wherein Kovach advised the criminal court that the case had been dismissed with

prejudice. R. pp. 1371-1372. The reduced fees sought based on the segregation were for the period from October 26, 2015 through February 9, 2016. They included 204.10 hours for three attorneys, at $300 per hour, for a total of $61,230.00. Counsel for Karen Whitley submitted his Affidavit in support of attorneys' fees on November 1, 2016, wherein he requested fees in the amount of $89,511.57. R. pp. 583-598. In his Supplemental Affidavit, counsel for Karen Whitley reduced his fees to $15,000.00 because the BCSD had agreed to pay part of Karen Whitley's attorneys' fees in connection with Kovach's lawsuit. R. pp. 1060-1070. In her February 29, 2018 Order Denying Motions for Reconsideration, the Court found Karen Whitley was entitled to a total of $15,000 in attorneys' fees, with Kovach responsible for $13,000 and Bloodgood responsible for $2,000; and that Mr. Whitley was entitled to a total of $50,000 in attorneys' fees, with Kovach responsible for $35,000 and Bloodgood responsible for $15,000.00. R. pp. 29-32.

Despite Kovach's representation to Judge Jeffrey Young during the Show Cause hearing on February 8, 2016 that all defendants had been dismissed, with prejudice, with no further conditions, was false. Kovach, through her attorney, wholly ignored a reasonable settlement in November of 2015 regarding dismissal that was offered by counsel for Mr. Whitley. R. pp. 1367-1368. Kovach's argument that there was no negotiation with her separate from her counsel is incorrect. If Kovach disagreed with her attorney's refusal to engage in negotiations, that is an issue between her and her counsel. Moreover, after Justice Toal entered her October 24, 2016 Order Granting Motion for Sanctions (R. p. 5), Mr. Whitley's submitted a Petition for Attorneys' Fees dated November 1, 2016, in which he stated that he and his counsel did not pursue the motion for sanctions "for personal profit but rather in the defense of the profession, which they regard as the strength of the fabric of our nation and rule of law," and added that "[e]ach of the undersigned counsel are willing to forfeit their total fees, in exchange for a personal check to be written by both

Ms. Kovach and Ms. Bloodgood in the amount of $1." R. pp. 601-602. He also requested that, in lieu of awarding total attorneys' fees, Bloodgood and Kovach remit $10,000 each to two designated charities. R. p. 602. Kovach did not respond to Mr. Whitley's Petition, thereby rebuffing the offer. Instead, on January 13, 2017, represented by separate counsel, she filed a Motion for Reconsideration. R. p. 1071. She thus had an opportunity to negotiate and reduce the ultimate sanction, but she refused to take it.

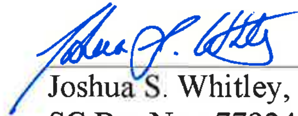
In her argument that the sanctions were excessive, Kovach relies on *Jackson v. Speed,* 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997), where the Court held that the following six factors are generally considered when determining a reasonable attorney's fee: "(1) the nature, extent, and difficulty of 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." *Id.* at 308, 486 S.E.2d at 760. The *Jackson* Court held that "on appeal, an award for attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor. *Id.* Kovach claims that these factors were not considered below, but she neglects to inform the Court that in counsel's fee petitions (R. pp. 583, 599, 1060, 137) and during the January 17, 2017 hearing Justice Toal, all of these issues were addressed in detail, and Kovach's counsel had the opportunity to argue her positions. R. pp. 1288-1351. In her February 13, 2018 Order Awarding Sanctions, Justice Toal stated that "in accordance with the foregoing findings, and upon consideration of the sanctions available under Rule 11....the Court awards the following attorneys' fees and costs, which account for the legal fees occurring at various stages of the filing of the frivolous lawsuit, efforts on the part of Ms. Bloodgood and Ms. Kovach to dismiss the matter, and the efforts of counsel to pursue sanctions." R. p. 32. Chief Justice Toal *reduced* the total fees as set out in counsel's petitions and assessed the sanctions based on the facts of the case. Counsel's

fee petitions, the January 17, 2017 hearing, and the award thus demonstrate that Justice Toal gave thoughtful consideration to the amount of the award.[3] The Court should therefore deny Kovach's petition on this issue.

CONCLUSION

For the foregoing reasons, Respondents, Joshua S. Whitley and Karen Whitley, respectfully request that this Court DENY the Petition for Writ of Certiorari filed herein by Petitioner, Amy Kovach.

Respectfully submitted,



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[3] Kovach also relies on *Goodyear Tire & Rubber Co. v Haeger*, 137 S. Ct. 1178, 1186 (2017), wherein the Court held that "a sanction count is compensatory only if it is calibrated to the damages caused by the bad faith acts on which it is based." *Id.* at 1186. Kovach's bad faith began with the filing of the Complaint and thereafter with her misrepresentation during the Show Cause Motion. The sanctions awarded are calibrated to the damages caused by her bad faith acts.