

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

S.C. SUPREME COURT

Jean Toal, Circuit Court Judge

Appellate Case No. 2021-000174

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 Petitioner

PETITIONER AMY KOVACH'S REPLY TO RETURN ON
PETITION WRIT OF *CERTIORARI*

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ARGUMENT

Respondents' Return to Petitioner's Writ focuses almost entirely upon Petitioner's criminal conviction, but this is not the basis of Petitioner's argument. Petitioner's civil conspiracy claim against Respondents was not predicated upon her guilt or innocence of the criminal charges brought against her. Rather, she contended that she, a public employee of a school district who followed her employer's instructions, was subjected to injury to her personal and professional reputation by that school district's political opponents during and after a politically charged school bond referendum. She contended that her role was thrust upon her by the Berkeley County School District, school board, and senior leadership which made her an employee referendum committee coordinator and thereby cast her into the maelstrom of local politics. In pursuing her civil conspiracy claim, Petitioner was not attempting to absolve herself of her criminal conviction and she has not refused to take responsibility for her actions. She was arguing for the right of any employee to be free from politically motivated prosecution.

As a preliminary matter, Petition notes that Respondent's statement of facts contains numerous factual statements which are not contained in the record and to the extent that any statement is without a citation to the record, it should be stricken from the document.

I. This Case Presents a Novel Question of Law

Respondents claim that Petitioner has not presented an open and novel question regarding a matter of first impression. The novel question of law presented is whether Petitioner should have been sanctioned for filing an action for civil conspiracy after pleading guilty to a criminal charge sharing no common element with the civil conspiracy allegations. It was not necessary or required that Petitioner prove her innocence to the criminal charges against her in order to prove her allegations of civil conspiracy. In fact, the civil conspiracy charges could exist by a separate action entirely omitting any discussion of the criminal matter. Respondent maintains that the court resolved this matter in *Zurcher v. Bilton*, 379 S.C. 132, 666 S.E.2d 224 (2008). However, this is not the case as *Zurcher* held that a defendant who enters a guilty plea may be collaterally estopped

from litigating *the same issue* in a subsequent civil suit. In this case, none of Petitioner's legal claims against respondents were predicated upon her innocence of the charges against her.

This novel question of law carries over into Petitioner's argument under the United States Supreme Court's opinion in *Haring v. Prosise*, 462 U.S. 306 (1983) which held as a matter of law that a conviction in state court does not preclude a subsequent action for an alleged Fourth Amendment violation that was not considered in the state court proceedings. In *Haring*, the Supreme Court applied Virginia Collateral Estoppel law to reach the conclusion that the plaintiff was not estopped from bringing his action because Defendant's Fourth Amendment rights were not waived when he pled guilty. Similarly, there was nothing in Petitioner's guilty plea which in any way addressed any of the elements of the civil conspiracy allegations or waived her right to file an action for civil conspiracy. Under South Carolina law, guilty pleas are not preclusive in any subsequent civil litigation, but rather only civil litigation in which the predicate elements were previously decided in the criminal matter. *Zurcher v. Bilton*, 379 S.C. 132, 666 S.E.2d 224 (2008). Kovach has been sanctioned for bringing a civil conspiracy action after a criminal conviction despite the lack of any South Carolina case law prohibiting her from doing so and in direct contradiction to the United States Supreme Court holding in *Haring v. Prosise*. Petitioner's situation is distinguishable from *Angus v. Burroughs & Chapin Co. (Angus I)*, 358 S.C. 498, 596 S.E.2d 67 (S.C. Ct. App. 2005) because she was not a public official such as the Horry County administrator in *Angus* but instead an employee taking her orders and direction from public officials within the Berkeley County School District.

With no case law to guide Petitioner, imposing sanctions upon this matter of first impression is inequitable. 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 the 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 photocopy expenses where the 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/her client's interest's 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).

II. This Case Does Present Important Issues Involving the Fundamental Right of Access to the Courts.

In their response, Respondents maintain that Petitioner's access to the courts was foreclosed solely by her guilty plea. This is precisely the point of the Petition. Petitioner could conceivably have prevailed in a civil conspiracy action even though all of the elements of her criminal guilty plea were conclusively determined. The offense to which she pleaded guilty shared no factual predicates with the civil conspiracy claim. Petitioner's civil conspiracy claims against Respondents are not objectively baseless and are permissible under her First Amendment rights to petition the government. *Borough of Duryea, Pa. v. Guanieri*, 564 U.S. 379 (2011).

III. The Record in this Case Contains No Evidence that the Civil Conspiracy Claims are Untrue

The Court of Appeals Opinion states that "[t]his is a unique case where further development of the record would not illuminate the relevant issues." (Petition, p. 11). This is a profound statement to make since there has been absolutely no development of a factual record regarding the civil conspiracy allegations at all. Respondents maintain that Petitioner's decision to dismiss her case somehow foreclosed the need for a factual record as to the civil conspiracy claims. This is untrue as Petitioner instructed her counsel to dismiss the case months before Respondents brought their claims for sanctions. It was the Respondents who sought to keep the

case alive through their sanctions motion and who bear the burden to prove that the civil conspiracy allegations are false. Whether the Petitioner's dismissal was with or without prejudice is irrelevant.

The lower court never required Respondents to present any proof in support of their motion for sanctions and never permitted Petition to provide any evidence in defense. Instead, the lower court focused solely on Petitioner's criminal matter, stating at hearing, "I think the parties are 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 of the law and record as its been submitted and, of course, that records includes you [Assistant Attorney General] 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). The lower court further stated, "I don't feel discontented that we're not have a factual hearing. I think these matters can very directly be addressed by the very fulsome record we have on all sides." (R. p. 001219, lines 8-11). To this day, there has never been any factual or evidentiary determination that any of the allegations contained in the civil conspiracy action are in any way untrue. This is hardly a fulsome factual record on the matter, and the Court of Appeals' conclusion that this a unique case where factual development is unnecessary begs the very question that was before the court.

CONCLUSION

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

April 22, 2021

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PROOF OF SERVICE

I certify that I have served the Petitioner Amy Kovach's Reply to Petition for Writ of *Certiorari* Return on the above-referenced Respondents by depositing a copy of it in the United States Mail, postage prepaid, on April 22, 2021, addressed to their attorneys of record:

Jeffrey A. Breit, Esquire
Breit Drescher Imprevento, P.C.