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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Jean Toal, Circuit Court Judge

Appellate Case No. 2021-00014

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.

PETITONER AMY KOVACH'S BRIEF

M. Dawes Cooke, Jr., Esq.
Barnwell, Whaley, Patterson & Helms, LLC
211 King Street, Suite 400 (29401)
P. O. Drawer H
Charleston, SC 29402
(843) 577-7700 Fax: (843) 577-7708
mdc@barnwell-whaley.com

Attorney for Amy Kovach

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STATEMENT OF ISSUES ON APPEAL

The questions presented for review in Amy Kovach's Petition for Writ of *Certiorari* were as follows:

1. Did the Court of Appeals err in finding the Trial Court's decision imposing sanctions was supported by adequate evidence when there is no evidence that the civil conspiracy allegations were in any way unsupportable?

Suggested Answer: Yes.

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

Suggested Answer: Yes.

STATEMENT OF THE CASE

This matter was commenced on October 15, 2015 with the Petitioner Amy Kovach's ("Ms. Kovach") filing of a Complaint against numerous Defendants (most of whom are not parties to this appeal), including a claim against the Respondents Joshua S. Whitley and Karen Whitley ("Respondents") for civil conspiracy. Respondents immediately filed Motions for Sanctions Against Ms. Kovach's counsel, Nancy Bloodgood and amended those motions to include Ms. Kovach in February, 2016. The matter came before the trial court for hearing on September 16, 2016. The trial court granted sanctions on October 24, 2016. Attorney Bloodgood and Ms. Kovach filed Motions for Reconsideration, which the trial court heard on January 17, 2017. The trial court entered its final order on February 19, 2018, denying the motions for reconsideration and assessing sanctions against Ms. Kovach in the amount of $48,000 and against Attorney Bloodgood in the amount of $15,000.

Ms. Kovach served her Notice of Appeal on March 13, 2018. She filed her final Appellant's Brief and Reply Brief in the Court of Appeals on or about August 15, 2018. The Court of Appeals decided the appeal without oral argument, issuing its opinion on December 9, 2020. Ms. Kovach filed a Petition for Rehearing and Suggestion for Rehearing *en Banc* on December 23, 2020 and Amended Petition for Rehearing and Suggestion for Rehearing *en Banc* on January 20, 2021. The Court of Appeals denied her Petitions for Rehearing on January 21, 2021. Ms. Kovach filed a Petition for Writ of Certiorari on February 22, 2021, which this Court granted on October 12, 2021. For the reasons set forth below, this Court should reverse the rulings of the trial court and Court of Appeals and vacate the imposition of sanctions on Ms. Kovach.

STATEMENT OF THE FACTS

Ms. Kovach is the former Communications Director of the Berkeley County School District ("School District"). Ms. Kovach's superiors tasked her with serving as campaign liaison between the School District and a volunteer "Yes4Schools" Campaign Committee during the 2012 Yes4Schools Improvement Bond Referendum. In this role, she provided informational support to

School District employees and leadership, and to members of the public seeking information about the referendum.

Respondent Josh Whitley led an organized group opposing the bond referendum. After not receiving an apology from School District leadership for Kovach's actions supporting the referendum, which he believed violated the law, he "took his concerns to the Attorney General, and the South Carolina Law Enforcement Division ('SLED') conducted a thorough investigation." (R. p. 00293). Ms. Kovach cooperated fully with the investigation and requested reimbursement from the School District for legal expenses under South Carolina Code § 59-17-110. Ms. Kovach was indicted on February 11, 2014 for violating South Carolina Code § 8-13-1346 by using public funds to promote an election, to wit the school bond referendum. Kovach retained criminal counsel, who provided a vigorous defense, including a motion to dismiss the indictment and motions to disqualify the Attorney General and to change venue. The trial court denied the motion to dismiss, holding that a bond referendum falls within the prohibition against "the use of public funds, property, or time to influence the outcome of an election" and that the statute could impose individual criminal liability. Ultimately, Ms. Kovach pled guilty to two charges: (a) use of government funds to influence an election; and (b) misconduct in office. The Attorney General dismissed two charges of forgery and one charge of perjury.

After her guilty plea on August 24, 2015, Kovach retained Attorney Nancy Bloodgood to represent her in an employment grievance against the School District arising from her termination for actions during the referendum campaign. Ms. Kovach alleged that she engaged in those actions in good faith and at the School District's instruction. When the school board rejected her grievance without a hearing, Kovach filed suit on October 15, 2015 against the School District and numerous other Defendants, including the Respondents herein. (R. pp. 0045-75). On November 3, 2015, approximately two weeks after Ms. Kovach filed her Complaint, Respondent Joshua Whitley filed an Answer, Affirmative Defenses, Counterclaims and a Third-Party Complaint; a motion to Dismiss the Complaint; and a Motion for Sanctions against Attorney Bloodgood. (R. pp. 00168-86). He did not move for sanctions against Kovach at that time.

Shortly thereafter, following correspondence between Attorney Bloodgood and the South Carolina Attorney General's Office, the Attorney General moved for an order to show cause against Ms. Kovach in her criminal case for contempt. That motion related to statements Ms. Kovach made in an affidavit in her grievance that were allegedly contrary to information in her guilty plea. The rule to show cause did not specifically address the allegations of civil conspiracy in the Complaint. (R. pp. 00159-67). After consulting criminal counsel, Ms. Kovach instructed Attorney 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 Respondents who demanded attorneys' fees from Attorney Bloodgood. On November 25, 2015, counsel for Respondent Joshua Whitley wrote to Attorney Bloodgood: "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). Attorney Bloodgood did not discuss the payment of attorney fees with Kovach.

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 as to Karen Whitley. On December 4, 2015, Attorney Bloodgood filed an answer to Respondent Joshua Whitley's Counterclaims, a Motion to Dismiss the Counterclaims and a Motion to Dismiss Ms. Kovach's Complaint as to Respondent Joshua Whitley. On February 11, 2016, Attorney Bloodgood filed a 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 Attorney Bloodgood and Ms. Kovach personally. (R. pp. 00292-310). On February 23, 2016 Respondent Karen Whitley did the same. (R. pp. 00311-13). More than three months prior, Kovach had instructed Attorney Bloodgood to dismiss the action as to Respondents.

Attorney 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. 001181:3-5). Justice Toal did not receive any testimony from any party; instead, she focused exclusively on Ms. Kovach's guilty plea and the Attorney General's defense of its investigation:

> I think the parties pretty well got the drift from me I was not going to take any testimony today but, rather, try to deal with these things as motions on the law and on the record as it's been submitted, and, of course, that record includes for you [Assistant Attorney General Creighton Waters] a very fulsome defense of the office [South Carolina Attorney General] and yourself in connection with the submissions that we have received so far.

(R. p. 001218:14-20). Justice Toal stated that she did not "feel discontented that we're not having a factual hearing" and that "these matters can very directly be addressed by the very fulsome record we do have on all sides." (R. p. 001219:8-11). Ms. Kovach was never afforded the opportunity to conduct discovery regarding her civil conspiracy claims.

On or about October 24, 2016, the trial court issued an order granting sanctions against Attorney Bloodgood and Ms. Kovach and making extensive findings of fact about Ms. Kovach's guilty plea: "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 Attorney Bloodgood and Ms. Kovach moved for Reconsideration of the Court's Order granting sanctions, which the trial court heard on January 17, 2017. (R. pp. 00619-45 and 001071-81). On February 19, 2018, the trial court denied Ms. Kovach's motion for reconsideration and imposed monetary sanctions upon Ms. Kovach under Rule 11, SCRCP, and South Carolina Code §15-36-10(G)(1) in the amount of $48,000; the trial court also imposed sanctions of $15,000 on Attorney Bloodgood (less

than 1/3 of the sanction imposed on her client). (R. pp. 0029-32). Ms. Kovach timely filed the instant appeal on March 13, 2018.

Kovach believed and contended that her criminal prosecution was politically motivated. Respondents opposed the Berkeley County School District 2012 Bond Referendum, while simultaneously seeking to remove former Superintendent Rodney Thompson and take control of the school board. Ms. Kovach has alleged that the School District tasked her, a recently-hired employee, with referendum-related tasks and that she performed those tasks in good faith. (R. pp. 00449-54, and pp. 0047-49 ¶¶24, 25, 26, 27, 28, 30, 31, 32). The crux of her Complaint is that she was caught in the crossfire of warring parties and long simmering feuds. The premise of Ms. Kovach's lawsuit was that she was collateral damage in Respondents' political battles with others the School District. She contended that, despite her guilty plea to using public resources to promote the referendum (a technical violation of the law, at most), Respondents and others conspired to secure her prosecution for improper political reasons and actively worked to undermine her statutory right to legal defense funding from the School District.

When faced with the threat of possible further prosecution, soon after filing suit Ms. Kovach agreed to dismiss her Complaint as to all Defendants. At that time, the parties had conducted no discovery. Moreover, the trial court never adjudicated (or even considered) the substantive merits of her civil conspiracy claims. The trial court nevertheless found that her claims were facially incompatible with her guilty plea and concluded that her Complaint violated Rule 11 and the Frivolous Civil Proceedings Sanctions Act. As a sanction, the trial court ordered Ms. Kovach to pay Respondents' attorneys' fees – the vast majority of which Respondents incurred in pursuing sanctions. Ms. Kovach contends that she acted in good faith in filing her Complaint, relying on the advice of competent counsel. She also contends that her claims were consistent with her guilty plea. The trial court never adjudicated the actual merits of Ms. Kovach's civil conspiracy claims and never found those claims to be frivolous. The trial court and the Court of Appeals misunderstood the import of Ms. Kovach's guilty plea and its impact on her civil claims. From a public policy standpoint, their decision to impose sanctions was unwarrantedly

heavy-handed, essentially adopting a "loser pays" rule. If allowed to stand as precedent, this decision will not only chill prospective litigants' access to the courts, but it will force litigants to pursue cases to the bitter end, whether or not they wish to do so, just to avoid the risk of sanctions.

For the reasons set forth below, this Court should reverse the trial court and vacate the imposition of sanctions on Ms. Kovach.

ARGUMENTS

A. Standard of Review

The standard of review of the trial judge's imposition of sanctions on Ms. Kovach is well-settled:

> The determination of whether attorney's fees should be awarded under Rule 11 or under the [Frivolous Proceedings Sanctions] Act is treated as one in equity. *In re Beard*, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004) (applying an equitable standard of review of factual findings in action for sanctions under Rule 11 and the Act). In an action in equity tried by the judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Id.* "However, the abuse of discretion standard plays a role in the appellate review of a sanctions award." *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008). Where the appellate court agrees with the trial court's findings of fact, it reviews the decision to award sanctions under an abuse of discretion standard. *Id.* Under the abuse of discretion standard, the imposition of sanctions will not be disturbed on appeal unless the decision is controlled by an error of law or is based on unsupported factual conclusions. *Id.*

See Southeastern Site Prep, LLC v. Atlantic Coast Builders & Contractors, LLC, 394 S.C. 97, 104, 713 S.E.2d 650, 653–54 (Ct. App. 2011). For the reasons discussed below, the trial judge erred in imposing sanctions on Ms. Kovach; this Court should reverse and vacate those sanctions.

B. Ms. Kovach's Guilty Plea Did Not Preclude Her Civil Conspiracy Claims.

In its Opinion, the Court of Appeals held that "after our review of the records, 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 plea." (Opin., at 5). As a result, the Court of Appeals accepted the trial court's holding that "[Ms.] Kovach's civil conspiracy claim was predicated on false facts" (*See id.*). The trial judge similarly focused almost entirely on Ms. Kovach's guilty plea in imposing sanctions:

> The Court finds that Defendants are entitled to sanctions and sanctions are appropriate against both Ms. Kovach and Ms. Bloodgood on the basis that both directly participated in and contributed to the filing of a frivolous claim. The Complaint itself contradicts Ms. Kovach's admissions under oath during her guilty plea, which was known by Ms. Kovach and Ms. Bloodgood at the time of the filing of the Complaint. 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.

(*See* R. p. 0017).

Although it does not use the phrase expressly, the crux of the Court of Appeals' Opinion is that Ms. Kovach's guilty plea collaterally estopped her civil conspiracy claim against Respondents. The trial judge based her conclusions explicitly on that doctrine. (*See* R. p. 0023 ("The civil conspiracy claim was also foreclosed by the related doctrines of collateral and judicial estoppel. In essence, Ms. Kovach's Complaint represents an attempt to re-litigate the factual basis for her indictment and re-litigate the question of her guilt or innocence.")). The elements of collateral estoppel are well-settled:

> Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. *Judy v. Judy,* 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009). The party asserting collateral estoppel 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. *Beall v. Doe*, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189-90 n. 1 (Ct. App. 1984). . . . The doctrine of collateral estoppel should not be rigidly or mechanically applied. *Carrigg v. Cannon*, 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct. App. 2001). Thus, even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it. *State v. Bacote*, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998).

See Carolina Renewal, Inc. v. South Carolina Dep't of Transp., 385 S.C. 550, 554–55, 684 S.E.2d 779, 782 (Ct. App. 2009). For the reasons set forth in the following sections, the trial court and Court of Appeals erroneously sanctioned Ms. Kovach based on the perceived preclusive effect of her guilty plea.

1. Ms. Kovach's Guilty Plea

Although Ms. Kovach was charged with five crimes, she did not plead guilty to all of them. Specifically, she did *not* plead guilty to two counts of forgery based on her alleged efforts to "cover up" her actions and one count of perjury related to her allegedly conducting fraudulent procurement procedures to cover up her actions; those charges were dismissed as part of her

guilty plea. (*See* R. p. 007 ¶¶ 4, 6). In her guilty plea, Ms. Kovach only admitted two indictments, as follows:

> The first one is 2015-GS-08-1073, and the charge is misconduct in office. And the indictment reads that: "Amy Kovach did in Berkeley County from on or about January 1st, 2012, to on about November 30th, 2013, while serving as director of communications and community relations for the Berkeley County school district did willfully and unlawfully commit misconduct in her public office by acts or issues of malfeasance, malfeasance and misfeasance and nonfeasance in breach of her duties to the public including her duty of good faith, honesty, and accountability, to wit, Amy Kovach, continuously used public resources and time to influence the outcome of a bond referendum while covering up her actions with dishonesty. This was done in violation of the common law of the State of South Carolina. "
>
> Is what's stated in this indictment the truth?
>
> THE DEFENDANT: Yes, sir. Yes, sir.
>
> THE COURT: The earlier indictment 2014-GS-08-266, it charges use of public funds to influence election reads as follows: "That Amy Kovach did in Berkeley County on or about the period between August 1st, 2012 and November 6, 2012, use and authorize the use of public funds, property, or time to influence the outcome of an election, to wit, while employed as communications director by the Berkeley County school district. Amy Kovach did use public funds to pay for the creation of a campaign video and production of other campaign material to draft and disseminate speeches during her public employment intended to persuade the voting public and did perform various other acts using public resources and time, all of which promoted and supported a yes vote as to the school bond referendum held on November 6, 2012 and all of which was in violation of Section 8-13-1346 of .the South Carolina Code of Laws as amended against the peace and dignity of the State and contrary to the statute in such case made and provided." Is what's stated in this indictment the truth?
>
> THE DEFENDANT: Yes, sir.

(R. pp. 1089:9-1090). As discussed below, Mr. Kovach's guilty plea to these two offenses did not estop her from alleging a civil conspiracy claim against Respondents (and others).

While a guilty plea may have preclusive effect, it estops the relitigation of facts that are necessarily admitted as elements of the crime:

> As to the fifth element, McFaddin's conduct is not germane to Brown's guilty plea. The plea judge was not required to consider McFaddin's negligence, if any, in any regard with Brown's guilty plea. Brown is bound by his factual admissions

> at his guilty plea. By virtue of that plea, Brown admitted he is criminally responsible for McFaddin's death. He cannot, thereafter, deny liability in a civil proceeding. *See Doe v. Doe*, 346 S.C. 145, 148, 551 S.E.2d 257, 258 (2001) (holding that once a person is criminally convicted he is collaterally estopped from *relitigating his guilt* in a subsequent civil proceeding if the civil proceeding is based on the same facts underlying the criminal conviction). However, because McFaddin's relative fault, if any, was *not at issue in the guilty plea, Brown is entitled to contest it in a subsequent civil proceeding. Brown's guilty plea is not totally inconsistent with his comparative negligence defense in the civil proceeding because McFaddin's negligence, if any, was not an issue for consideration by the judge at the plea hearing.* McFaddin's negligence, if any, under a theory of comparative negligence is a question for the jury.

See Cothran v. Brown, 357 S.C. 210, 217, 592 S.E.2d 629, 632 (2004) (emphasis added) (guilty plea to reckless homicide did not estop defendant from raising comparative fault); *accord South Carolina Dep't of Soc. Servs. v. C.H. (In the Interest of Two Minor Children)*, 386 S.C. 58, 63, 685 S.E.2d 835, 837 (Ct. App. 2009) ("Appellant is not estopped from denying liability for child abuse. As set forth above, Appellant pled guilty to assault and battery, not child abuse, and the guilty plea does not establish Appellant was a person responsible for the Child's welfare."); *Doe v. Doe*, 346 S.C. 145, 149-50, 551 S.E.2d 257, 259 (2001) ("[T]o allow a party to offensively invoke the collateral estoppel doctrine in this situation, it must be shown the identical issue must have *necessarily been decided* in the prior criminal action and *be decisive* in the present civil action.") (emphasis added).

Ms. Kovach first pled guilty to the common law offense of misconduct in office. "Misconduct in office occurs when persons in public office fail to properly and faithfully discharge a duty imposed by law." *State v. Lyles-Gray*, 328 S.C. 458, 465-66, 492 S.E.2d 802, 806 (Ct. App. 1997). "The offense may consist of one act or a series of acts." *State v. Hess*, 279 S.C. 525, 528, 309 S.E.2d 741, 743 (Ct. App. 1983). "The existence of a duty owed to the public is essential, for otherwise the offending behavior becomes merely the private misconduct of one who happens to be an official." *Id.* Misconduct in office "includes any act, any omission, in breach of duty of public concern by persons in public office provided it is done willfully and dishonestly." *Id.* Ms. Kovach also pled guilty to a violation of S.C. Code § 8-13-1346(a), which

provides that "[a] person may not use or authorize the use of public funds, property, or time to influence the outcome of an election."

Ms. Kovach's guilty plea could only have a preclusive effect with regard to the specific facts that were *necessary* to the charged offenses: *i.e.,* that Ms. Kovach used public resources to influence an election by buying the video and signs. The solicitor made clear that "[t]he main points that really crystalize this case are payment for a campaign video, as well as payment for campaign signs for kids to hold." (See R. p. 1096:20-24 (confirming that other actions allegedly taken in furtherance of referendum campaign "are not really the main points.")). The total amount of those payments was less than $6,000:

> The campaign video ultimately was 5300 dollars, and I'll get to the details of how that was paid for in a moment but that was the ultimate amount that was paid. Additionally, there was roughly 300-dollars. I think it was 294-dollars, excuse~, $259.20 that was used to pay for campaign signs . . . .

(R. p 1097:2-8). More to the point, Ms. Kovach focused her guilty plea on these specific expenditures of public funds in connection with the referendum. Ms. Kovach informed the criminal court that she was pleading guilty to conduct relating to the use of public funds to in connection with the referendum:

> THE COURT: How did you violate the law? Did you lie? Did you use resources that you shouldn't have? What did you do?
>
> THE DEFENDANT: By using resources to promote school district and its agenda of passing the referendum.

(*See* R. p. 1112:20-25). The *only* preclusive effect that Ms. Kovach's guilty plea could possibly have would be as to the factual question of whether she, in fact, used public resources in the referendum campaign.

The trial court (and the Court of Appeals) gave a much broader preclusive effect to Ms. Kovach's guilty plea. In particular, the trial judge concluded that "[a]s part of the guilty plea, [Ms. Kovach] also admitted to the facts underlying the charges against her that were dismissed as part of the negotiated plea deal." (*See* R. p. 008 ¶ 7; *accord* R. p. 1093:12-16

("[T]he two counts that Your Honor has, again, is the global misconduct conduct in office, which again encompasses all the conduct that was charged and then the underlying ethics act count as well.")). The trial court particularly relied on Ms. Kovach's statement, after the Attorney General's office made a nearly 20-page speech, that she "agree[d] with the facts as stated by the attorney general." (*See* R. pp. 1091-11). Aside from this general statement, there is no evidence that Ms. Kovach intended to admit guilt as to *anything* beyond the expenditure of public resources in the referendum. That is the only conduct she expressly admitted and is the only "necessary" fact for her guilty plea. The Attorney General agreed to dismiss the forgery and perjury charges against Ms. Kovach, so any facts relating to forgery, perjury or dishonesty were necessary to her guilty plea. The trial judge erred in concluding that Ms. Kovach had admitted to each and every statement in the 20-pages of the Attorney General's speech, almost all of which were unnecessary for her plea. To the contrary, the appropriate application of collateral estoppel would extend only to Ms. Kovach's express admissions about the video and signs.

In any event, under any construction, as set forth in the following section, Ms. Kovach's guilty plea did not estop her from asserting a civil conspiracy claim against Respondents.

2. Ms. Kovach's Civil Conspiracy Claim Is Consistent With Her Guilty Plea and Does Not Seek to Impermissibly Relitigate Her Guilty Plea.

The trial court and Court of Appeals imposed sanctions on Ms. Kovach in connection with her civil conspiracy claim against Respondents, which Ms. Kovach agreed to dismiss very early in the process. "[A] plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff." *Paradis v. Charleston Cty. Sch. Dist.*, 861 S.E.2d 774, 780 (S.C. 2021); *accord Charles v. Texas Co.*, 192 S.C. 82, 101, 5 S.E.2d 464, 472 (1939) ("[A] definition of conspiracy has been given as the conspiring together to do an unlawful act to the detriment of another or the doing of a lawful act in an unlawful way to the detriment of another.").

The tort may be proven even if the defendants' actions are lawful, so long as the purpose of the conduct is to harm the plaintiff:

> "An action for civil conspiracy may exist even though respondents committed no unlawful act and no unlawful means were used." *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 70, 370 S.E.2d 711, 713 (1988). "Specifically, it is not necessary for a plaintiff asserting a civil conspiracy cause of action to allege an unlawful act in order to state a cause of action, although a civil conspiracy may be furthered by an unlawful act." *Id.* "Thus, lawful acts may become actionable as a civil conspiracy when the object is to ruin or damage the business of another." *Id.* (citations omitted) (emphasis added).
>
> "The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se." [Citation omitted.]

City of Hartsville v. South Carolina Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 546, 677 S.E.2d 574, 579-80 (2009); *accord LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 70, 370 S.E.2d 711, 713 (1988) ("[L]awful acts may become actionable as a civil conspiracy when the 'object is to ruin or damage the business of another.'") (*quoting Charles v. Texas*, 199 S.C. 156, 170, 18 S.E.2d 719, 724 (1942)). The "essential consideration" in a civil conspiracy claim "is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the primary purpose or object of the combination is to injure the plaintiff." *See Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986).

In *Paradis*, this Court explained the broad scope and wide range of lawful acts taken with unlawful intention that might support a civil conspiracy claim:

> In a case discussing criminal conspiracy, this Court has observed that "unlawful" merely means "contrary to law" and is not limited to criminal conduct. *State v. Davis*, 88 S.C. 229, 233, 70 S.E. 811, 813 (1911) ("It is enough if the acts agreed to be done, although not criminal, are wrongful; that is amount to a civil wrong." (citations omitted)). As for civil conspiracy, early English law has noted that, "[i]n view of the infinite variations of oppressive conduct[,] no definition [of "unlawful means"] can be given which is at once satisfactory and exhaustive." *Pratt v. Brit. Med. Ass'n*, [1919] 1 K.B. 244, 260 (1918). However, *Pratt* stated precedent recognized that violence or threats of physical violence, threats not involving physical harm, nuisance, and fraud are readily encompassed, although they are not the only examples." See id at 260-61.

See Paradis, 861 S.E.2d at 778 n.6. For the reason set forth below, contrary to the conclusions of the trial judge and the Court of Appeals, Ms. Kovach's guilty plea did not preclude her assertion of the civil conspiracy claim, where her Complaint alleged that Respondents engaged in a lawful activity for an unlawful purpose. Ms. Kovach's key civil conspiracy allegations include the following (*see* R. pp. 0045-75):

- Respondent Karen Whitley held a personal vendetta because she believed Gwen Scarborough should have been assigned Ms. Kovach's job responsibilities. (¶ 44).

- Respondent Joshua Whitley's held a personal vendetta because his sister did not receive a principal position from Superintendent Rodney Thompson. (¶ 46).

- Respondent Joshua Whitley selectively used emails he received from the School District to create a power point for the Attorney General and the Berkeley County Republican Party, LLC. (¶ 56). As a result, the Berkeley County Republican Party, LLC passed a Resolution requesting the Attorney General prosecute to the fullest extent of the law any person in the School District who may have violated ethics laws relating to the referendum. (¶ 58).

- Respondent Joshua Whitley used his influence with a close friend in the Attorney General's office to ensure that the investigation and prosecution of Ms. Kovach received special attention. (¶ 69).

- The Berkeley County Republican Party Facebook page, Berkeley County Republican Party SC Facebook page, and Berkeley County Republican Party Public Group Facebook Page posted defamatory statements about Plaintiff. (¶ 121). Respondent Joshua Whitley was a Chairman of the Berkeley County Republican Party and often posted comments about Plaintiff or spoke out against her in public. (¶ 124).

- Respondent Josh Whitley represented Defendant Hardesty in a lawsuit when the School District would not allow him to disparage Ms. Kovach at public school board meetings. (¶ 125).

- Respondents and the other Defendants conspired with each other to harm Ms. Kovach. "Specifically, after they worked with each other to file a complaint with the Attorney General, they took actions to ensure a Resolution was passed by The Berkeley County Republican Party, LLC encouraging the Attorney General to prosecute Plaintiff." (¶ 159).

- Respondents also "played an active and inappropriate role in SLED's investigation and upon information and belief these Defendants provided false statements to SLED and the Attorney General." (¶ 160).

- Respondents suggested stories and provided false information to the press disparaging Plaintiff with inaccurate information. (¶ 161).

- Respondents communicated directly with Defendant BCSD Board members in order to turn them against Plaintiff. (¶ 162).

- State Senator Larry Grooms, at Ms. Kovach's criminal motion hearing, acknowledged that Respondent Joshua Whitley acted with a vendetta toward her, when he stated publicly that "Josh has got the goods on her." (¶ 163).

- Respondent Joshua Whitley "violated Rule 3.6 of the Professional Rules of Conduct for Lawyers by repeatedly commenting on a pending matter that SLED was investigating in order to influence the outcome of the SLED investigation." (¶ 170).

- Respondent Joshua Whitley threatened to sue volunteer Campaign Coordinator Co-Chair Jane Pulling if she continued to support Plaintiff. (¶ 171)

Ms. Kovach alleges that Respondents "took the above stated actions solely for the purpose and with the intent of intimidating and harming" her. (*See* R. p. 0073 ¶ 178). As a result, Ms. Kovach claimed that she sustained harm "in the form of injury to her personal and professional reputation and injury to her 22 year career and the loss of future Marketing and Communication career opportunities." (*See* R. p. 0073 ¶ 179)

Ms. Kovach's civil conspiracy claim does not seek to relitigate her guilty plea. To the contrary, she freely admits in her Complaint that "she could no longer emotionally handle the abuse she was receiving so she had no choice but to plead guilty to two minor charges." (*See* R. p. 0067 ¶ 140(d)). Even assuming that she admitted to everything the Attorney General said at the guilty plea, her guilty plea did not preclude her conspiracy claim. Ms. Kovach does not allege that she did not violate any laws and does not dispute that she pled guilty to certain offenses. Her claims do not require that she be innocent of the offenses to which she pled guilty. Instead, she claims that — irrespective of whether she violated the law in connection with the referendum — Respondents engaged in conspiratorial conduct for the purpose of undermining her career and selectively targeting her for prosecution for personal and political motivations.

She claims that Respondents used political sway to gin up ill will against her and to pressure and influence authorities to aggressively investigate and prosecute her. In other words, she claims that Respondents engaged in potentially lawful conduct for the unlawful purpose of sabotaging her career and exacting personal revenge.

Prosecuting attorneys and Attorney General have wide discretion in selecting cases to charge and prosecute. "'The Attorney General as the State's chief prosecutor may decide when and where to present an indictment, and may even decide whether an indictment should be sought.'" *See Harrell v. Attorney Gen. of the State (In re State Grand Jury Investigation)*, 409 S.C. 60, 69, 760 S.E.2d 808, 812 (2014) (*quoting State v. Thrift*, 312 S.C. 282, 292, 440 S.E.2d 341 (1993). "Choosing which crime to charge a defendant with is the essence of prosecutorial discretion . . . ." *State v. Standard*, 351 S.C. 199, 202, 569 S.E.2d 325, 327 (2002). "The South Carolina Constitution and case law place the unfettered discretion to prosecute solely in the prosecutor's hands." *Ex parte Littlefield,* 343 S.C. 212, 218, 540 S.E.2d 81, 84 (2000). "Although the solicitor no longer has exclusive authority to determine the order in which cases are called, the solicitor retains 'discretion in choosing how to proceed with a case.'" *State v. Page*, 406 S.C. 272, 284, 750 S.E.2d 623, 629 (Ct. App. 2013) (citation omitted).

The Complaint alleges that Respondents (and others) conspired to ensure — for the improper purpose of harming Ms. Kovach — that the State's prosecutorial discretion would be exercised in favor of full prosecution. They did so even though the amount at issue was relatively small, less than $6,000.00. They did so even though Ms. Kovach did not directly and personally benefit from her actions. They did so even though there existed a difficult legal question of whether the referendum was even an election under the statute. They did so even though others, including possibly Respondents themselves, had also engaged in conduct in connection with the referendum that might have violated the law. (*See* R. pp. 0071 ¶¶ 164-69, 0072 ¶¶ 174-77). They did so even though Ms. Kovach consistently contended that she was only acting as part of the School District's bond referendum campaign and that the superintendent and

school board instructed her to supply informational support to the public concerning the referendum. (*See e.g.*, R. p. 0047 ¶¶ 17, 21-23).

Perhaps most shockingly, the Attorney General — allegedly egged on by Respondents — sought to deprive Ms. Kovach of her statutory right to reimbursement of criminal attorneys' fees. There was evidence that they did this (and continued to vigorously pursue Ms. Kovach), in spite of an opinion letter concluding that Ms. Kovach had acted in "good faith":

> In determining whether someone is acting in good faith, the standard is whether she was acting for her own benefit or for the benefit of her employer or someone else. In reviewing and discussing that standard, it is necessary to determine what, if any, personal benefit she derived from the activities outlined in the documentation. *I can find absolutely no personal or financial benefit to her* in the documentation. Questions have been raised concerning a video and payment for some banners and signs. These questions focus narrowly on a small number of selected documents without regard to the records or issues as a whole. The alleged video is clearly for the benefit of the school district, and not for her personal benefit. The alleged signs and banners may raise an issue of personnel matters or expenditure authority, but certainly *in no way, shape, or form*, are they an indication of personal benefit to her. Remember, it is her job to coordinate everything. *She did her job.*

(*See* R. p. 00448 (emphasis added)). They did so even though three respected South Carolina legal experts concluded that, because she *acted in good faith*, it was improper for the Attorney General to deny her statutory right to attorneys' fees:

> 87. Thereafter, in April of 2014, Charleston School of Law Professor John P. Freeman, an expert in Ethics, opined to Defendant BCSD in response to the Attorney General's attempt to stop the payment of Plaintiffs attorney fees by Defendant BCSD, "it is my professional opinion that Mrs. Kovach's indictment does not preclude the board from appearing or defending the action on her behalf." . . .
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> 91. Charleston School of Law Professor Nathan M. Crystal agreed with Professor Freeman that the Attorney General's prosecution of Plaintiff was "obviously and egregiously wrong" and he further opined "the Attorney General has not only interfered with Mrs. Kovach's statutory and constitutional right to counsel, but has also engaged in a number of other actions that affect the integrity of this prosecution."
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> 92. Dr. Gregory Adams, a law professor at USC School of Law, issued an expert opinion in January 2015 opining "the Attorney General's conduct in

> prosecuting Ms. Kovach has been unethical and unconstitutional, warranting his disqualification from further prosecuting her."

(*See* R. p. 0057-58 ¶¶ 87, 91-92). This is at least *prima facie* support for Ms. Kovach's claim that Respondents and others conspired to harm her by, *inter alia*, pressuring the Attorney General to "throw the book" at her.

Ms. Kovach claims that Respondents publicly attacked and threatened her. One of those Respondents, Karen Whitley, was a School District administrator and Ms. Kovach's superior who allegedly worked in concert with her son to guarantee Ms. Kovach's criminal prosecution and to interfere with her ability to receive statutory reimbursement for attorneys' fees. Ms. Kovach's Complaint avers that, thanks to the influence of Respondents and others, she and the District Superintendent who instructed her were the *only* persons charged with any crime in connection with the referendum campaign. Even if Ms. Kovach did everything that the Attorney General accused her of doing, she could assert a civil conspiracy claim based Respondents' targeting of her for selective prosecution. Ms. Kovach's conspiracy claim might have failed if taken to trial. It might even be a difficult or challenging claim. However, her guilty plea does not automatically bar that claim as a matter of law; the crux of her claim is that she was charged and forced to plead guilty *because of the conspiracy*. The trial court and Court of Appeals erred in concluding that — because of her guilty plea — Ms. Kovach's civil conspiracy claims against Respondents were so meritless as to call for the imposition of sanctions directly upon her, even though qualified counsel was representing her interests.

There is no necessary fact admitted in Ms. Kovach's guilty plea that would preclude her civil conspiracy claim. Her guilty plea does not share any common elements with the civil conspiracy allegations she has made against Respondents. The trial court and Court of Appeals erroneously concluded that Ms. Kovach's guilty plea conclusively addressed the elements of her civil conspiracy claim. However, in doing so, they did not consider the specific conduct comprising her civil conspiracy claim.

The Court of Appeals' holding creates a blanket rule that a guilty plea automatically precludes a later civil claim relating in any way to the subject matter of the plea. However, it cites no authority mandating that result. To the contrary, the United States Supreme Court has said that "criminal judgments, whether by guilty plea or adjudicated guilt, have no preclusive effect on subsequent civil litigation" and do not automatically collaterally estop a later civil suit. *See Haring v. Prosise*, 462 U.S. 306, 310 (1983) (finding that guilty plea did not preclude Section 1983 civil action alleging Fourth Amendment violation). While a conviction *may* preclude later litigation with respect to issues *necessarily determined in the conviction*, the party asserting preclusive effect has the burden to precisely identify the facts from the plea that support estoppel. *See Goodridge v. Harvey Group, Inc.*, 728 F. Supp. 275 (S.D.N.Y 1990); *Scheiner v. Wallace*, 832 F. Supp 687 (S.D.N.Y 1993). Respondents never made any such showing.

"[T]he right to access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government." *Borough of Duryea v. Guanieri*, 564 U.S. 379, 387 (2011). The Court of Appeals' decision undermines access to the courts by those who plead guilty to crimes, using their guilty plea as a hammer to impose sanctions if they seek relief. This is inconsistent with South Carolina's public policy of access to the court system. As this Court has said, "[c]itizens must be afforded access to the judicial process to address alleged injustices." *See ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008). The Court of Appeals' decision threatens to deprive litigants of that access.

Additionally, Ms. Kovach notes that South Carolina law allows a finding of tortious conduct, even in connection with a legitimate prosecution or litigation. For example, the tort of abuse of process can be proven, *even when the underlying process is substantively meritorious.* "There are two essential elements required for an abuse of process action: (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the regular conduct of the proceedings." *Broadmoor Apartments of Charleston v. Horwitz,* 306 S.C. 482, 486, 413 S.E.2d 9, 11 (1991). "An ulterior purpose exists if the process is used to gain an objective not legitimate in the use of the process." *Food Lion, Inc. v. United Food & Commer. Workers Int'l Union*, 351

S.C. 65, 71, 567 S.E.2d 251, 253 (Ct. App. 2002). "[T]he issuance of the process may be justified in itself; it is the malicious misuse or perversion of the process for an end not lawfully warranted by it that constitutes the tort known as abuse of process." *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 209, 153 S.E.2d 693, 695 (1967). Likewise, Ms. Kovach has asserted a similar type of claim. Even if she engaged in the conduct of which she was accused, she has legitimately claimed that Respondents and other conspired to use criminal process to exact personal or political revenge.

For the foregoing reasons, the trial court and the Court of Appeals erred in concluding as a matter of law that Ms. Kovach's guilty plea collaterally estopped her from asserting the civil conspiracy claim.

C. The Trial Court and Court of Appeals Improperly Imposed Statutory and/or Rule 11[1] Sanctions on Ms. Kovach Because There Was Never a Determination That the Allegations of Her Civil Conspiracy Claims Were Untrue or Frivolous.

Additionally, the courts below erred in imposing and affirming sanctions on Ms. Kovach without a substantive resolution of her civil conspiracy claims. When faced with more threats from the criminal court, she took steps to withdraw her Complaint against Respondents, before an adjudication on the merits was necessary. Instead of sanctioning litigants such as Ms. Kovach for ending litigation in light of a threat under Rule 11, the Court should encourage parties to consider the early dismissal of litigation. Otherwise, it will only encourage parties to dig in their

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[1] Respondents sought sanctions from Ms. Kovach under both Rule 11 of the South Carolina Rules of Civil Procedure and the Frivolous Proceedings Sanctions Act ("Act"), S.C. Code §§ 15-36-10, *et seq.* Ms. Kovach has argued that sanctions were premature under the Act, because the Act only authorizes sanctions "[a]t the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict." *See* S.C. Code § 15-36-10(C)(1). The Court of Appeals only analyzed the propriety of sanctions under Rule 11 and did not reach the question of whether it was premature to seek sanctions under the Act. "[T]he 'criteria for Rule 11 sanctions are essentially the same as those for sanctions under the [Act].'" *See In re Beard*, 359 S.C. 351, 360, 597 S.E.2d 835, 839 (Ct. App. 2004) (*quoting Father v. South Carolina Dep't of Soc. Servs.*, 345 S.C. 57, 72, 545 S.E.2d 523, 531 (Ct. App. 2001)). As a result, because (as argued herein) sanctions are not proper under Rule 11, they are also not appropriate under the Act.

heels and litigate through trial to avoid sanctions. The lower courts should have denied Respondents' requests for sanctions when Ms. Kovach agreed to dismiss her claims against Respondents or allowed Ms. Kovach to engage in discovery and have a full and fair opportunity to present evidence supporting her claims.

Rule 11(a) of the South Carolina Rules of Civil Procedure requires every pleading to be signed with the signature constituting a certificate by the signor that he has read the pleading and "that to best of his knowledge, information and belief there is good ground to support it." The criteria for Rule 11 sanctions are the same as those for sanctions under the Frivolous Civil Proceedings Sanctions Act. *See Father v. South Carolina Dep't of Soc. Servs.*, 345 S.C. 57, 72, 545 S.E.2d 523, 531 (Ct. App. 2001).

Pursuant to Rule 11, " 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, 19, 471 S.E.2d 160, 162 (1996); *accord Burns v. Universal Health Servs., Inc.*, 340 S.C. 509, 513, 532 S.E.2d 6, 9 (Ct. App. 2000). "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." *Id.* "[T]he primary . . . purpose of Rule 11 is to deter future litigation abuse. . . . However, there are additional purposes, including compensating the victims of the Rule 11 violation, . . . punishing present litigation abuse, streamlining court dockets and facilitating court management." *See Pee Dee Health Care, P.A. v. Estate of Thompson*, 424 S.C. 520, 533, 818 S.E.2d 758, 765 (2018).

A filing is sanctionable and frivolous "when it is clearly insufficient on its face . . . and is presumably interposed for mere purposes of delay or to embarrass the plaintiff." (*See* https://thelawdictionary.org/frivolous/ (visited Dec. 22, 2020)). The South Carolina Supreme Court has stated that:

> Pleas, which may be rejected as frivolous, must be such as are impertinent, or nonsensical-trifling with the dignity of the court, and the majesty of the law; such pleas, on which no serious question of fact or law can properly arise. If it appear to be, at first blush, a material plea, and has form, it cannot be rejected as frivolous.

> The plaintiff, if he chose to question the legal effect, or propriety, of the replication, might have demurred to it, and thus have brought the question of law before the court, upon the record.

See Etiwan Fertilizer Co. v. Johns, 202 S.C. 29, 24 S.E.2d 74, 76–77 (1943) (citation omitted).

Judge Easterbrook has defined "frivolous" as follows:

> Something is frivolous only when (a) we've decided the very point, and recently, against the person reasserting it, or (b) 99 of 100 practicing lawyers would be 99% sure that the position is untenable, and the other 1% would be 60% sure it's untenable. Either one is a pretty stiff test.

See American Bar Association, Rule 11 Sanctions § 5.03 (2004).

The trial court concluded that Ms. Kovach had made "frivolous filings" (R. p. 006), without allowing testimony. It did not allow Ms. Kovach to conduct discovery in support of her civil conspiracy claims. It did not make any ruling on a substantive motion on the merits of those claims. Prior to the hearing, Ms. Kovach had undertaken efforts to dismiss her claims. As a result, the trial court did not decide a substantive motion for summary judgment or motion to dismiss. Instead, it prematurely imposed sanctions without any decision on the merits of the civil conspiracy claim. This is inconsistent with the purpose and spirit of Rule 11 and the Rules of Civil Procedure as a whole.

Instead of fully analyzing Ms. Kovach's civil conspiracy claims after a discovery and a trial, the trial court ruled in a blanket fashion 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). The trial judge and the Court of Appeals erred in imposing and upholding sanctions because Respondents did not present a scintilla of evidence to show that Ms. Kovach's civil conspiracy claims were actually untrue or without merit. As the parties seeking sanctions, Respondents carried the heavy burden of showing that the claims against them were frivolous or without merit. Normally, motions for sanctions are only made *after* an adjudication on the merits or a proffer of evidence that the claim lacks any factual basis. The courts below made no such adjudication, as Respondents pursued their sanctions motions shortly after

Ms. Kovach filed her Complaint. In its Opinion, Court of Appeals held that "[t]his is a unique case where *further* [emphasis added] development of the record would not illuminate the relevant issues." (*See* Opin., at 5). However, there has been *no development of the record* on the conspiracy claim. Aside from relying on the guilty plea, neither Respondents, nor the trial court, nor the Court of Appeals specified how Ms. Kovach's civil conspiracy allegations are untrue or do not state a claim. The trial court focused exclusively on the guilty plea, without reference to the factual considerations necessary to support a claim for civil conspiracy. There is no record evidence refuting any of Ms. Kovach's allegations of a civil conspiracy. She asserted a cause of action arising out of Respondents' attempts to use her technical violation of South Carolina law to conduct a vendetta against her. These allegations did not disavow Ms. Kovach's guilty plea and Respondents *have never disproven them.*

The practical effect of the Court of Appeals' decision will be to require every litigant to pursue their case to the bitter end to avoid sanctions, even if they have a legitimate reason to dismiss their case. Therefore, for the foregoing reasons, the lower courts erred in imposing sanctions on Ms. Kovach without a prior determination on the merits of her claims.

D. Even if Ms. Kovach's Actions Were Sanctionable, the Trial Court Imposed Excessive Sanctions That Were Disproportionate to the Actual Expense Incurred

The trial judge sanctioned Ms. Kovach in the amount of $48,000, representing Respondents' alleged legal fees incurred in a civil action involving matters of first impression, which she instructed her attorney — upon whose advice she relied — to dismiss after it was pending for only one month. The Court of Appeals affirmed the amount of sanctions, saying:

> 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 reverse the Court of Appeals' and trial judge's sanctions award as excessive and disproportionate.

The record has no evidence that Respondents ever tried to negotiate with *Ms. Kovach* concerning their attorneys' fees. Respondent instead initially pursued *Ms. Kovach's counsel*, Nancy Bloodgood for payment of fees. In doing so, Respondents accused Attorney Bloodgood of placing her own interest ahead of her client's by not acquiescing to their demand for fees. (R. pp. 001368-69). Shortly after filing this case, Ms. Kovach agreed to dismiss her Complaint against all parties (including those who did not pursue sanctions). Ms. Kovach has no knowledge of any negotiations between Respondents and Attorney Bloodgood regarding Attorney Bloodgood's payment of Respondents' attorney fees. Furthermore, Respondents never let Ms. Kovach know of their intent to pursue sanctions against her and never tried to negotiate with her concerning their attorneys' fees prior to filing moving for sanctions from 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). 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.

Respondents never consulted with Ms. Kovach about the relief they might seek in a sanctions motion against her. They made no effort to work out that issue amicably. Instead,

Respondents resisted Ms. Kovach'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 their arguments confirm, centered around the claim that Ms. Kovach could not pursue sue them as a matter of law by virtue of her alleged status as a public official. Respondents never refuted the allegations against them.

Moreover, substantially all of Respondent's expenses occurred after Ms. Kovach had instructed her attorney to dismiss the action. The court should not sanction a party for reassessing its position and agreeing to dismiss a matter when confronted with a Rule 11 motion. Doing so effectively forces a party to continue litigating to the bitter end and to develop a factual record to refute a motion for sanctions. The trial court sanctioned Ms. Kovach 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 Ms. Kovach's claims were not clearly meritless, as shown by the trial court's request for briefing on the issues, Respondents' expenditure of undue time researching and litigating this matter after the threat of substantive litigation ended shows that they were not properly mitigating costs. If such extensive legal research was necessary, then this supports Ms. Kovach's argument that her civil conspiracy claim was not meritless; it is inequitable to require Ms. Kovach to pay for such extensive work done in connection with Respondents' motions here.

Neither the trial court nor the Court of Appeals analyzed or decided whether the attorneys' fees awarded were reasonable. The primary purpose of sanctions 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 deciding 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 deciding the reasonableness of fees are set forth in Rule 1.5 of the Rules of Professional Conduct, Rule 407, SCACR, include the *Jackson* factors. Neither the trial judge nor the Court of Appeals analyzed the factors from *Kunstler* or *Jackson*, to determine if those factors supported such a large award of $48,000 against a wife and mother.

The amount of $48,000.00 allegedly spent defending a lawsuit pending for only 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". *See* Rule 1, SCRCP.

For the foregoing reasons, even assuming *arguendo* that sanctions were proper, the trial judge erred in imposing such sanctions in the excessive amount of $48,000, and the Court of Appeals erred in affirming those sanctions.

CONCLUSION

For the foregoing reasons, the Court should reverse the Court of Appeals decision in this matter affirming the Trial Court's imposition of sanctions.

BARNWELL WHALEY PATTERSON & HELMS, LLC

By: _____

M. Dawes Cooke, Jr., Esq.
211 King Street, Suite 300 (29401)
P. O. Drawer H
Charleston, SC 29402
(843) 577-7700 Fax: (843) 577-7708
mdc@barnwell-whaley.com

Attorneys for Petitioner Amy Kovach

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