

RECEIVED

NOV 15 2021

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.: 2021-000174

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.

APPENDIX – VOLUME IV
(Court of Appeals Filings)

Joshua S. Whitley, Esquire
SC Bar No.: 77824
Smyth Whitley, LLC
126 Seven Farms Drive, Suite 260
Charleston, SC 29492
843-606-5635

Jeffrey A. Breit, Esquire
VSB No. 18876
Breit Cantor Grana Buckner, PLLC
Town Pavilion Center II
600 22nd Street, Suite 402
Virginia Beach, VA 23451
757-280-2708
Attorneys for Respondent Joshua S. Whitley

Wm. Howell Morrison, Esquire
SC Bar No.: 4106
Haynsworth Sinkler Boyd, P.A.
134 Meeting Street, 3rd Floor
Charleston, SC 29401
843-722-3366
Attorney for Respondent Karen Whitley

M. Dawes Cooke, Jr., Esquire
SC Bar No.: 1376
Barnwell Whaley Patterson & Helms, LLC
211 King Street, Suite 300
Charleston, SC 29401
843-577-7700
Attorney for Petitioner Amy Kovach

INDEX

VOLUMES I-III
(Record on Appeal)

Orders

November 20, 2015 Rule to Show Cause Order signed by Judge Young 004

October 24, 2016 Order Granting Motion for Sanctions 005

February 19, 2018 Order Denying Motion for Reconsideration..... 0029

Pleadings

August 4, 2015 Affidavit of Amy Kovach..... 0033

October 15, 2015 Plaintiff's Complaint 0045

November 3, 2015 Joshua Whitley Answer, Counterclaims and Third-Party Complaint.....0076

November 3, 2015 Joshua Whitley Motion for Sanctions Against Attorney Bloodgood00146

November 9, 2015 Attorney General's Rule to Show Cause and Petition in Support00158

November 16, 2015 Karen Whitley Motion to Dismiss and for Rule 11 Sanctions against Attorney Bloodgood..... 00168

December 2, 2015 Joshua Whitley Amended Answer, Amended Counterclaims and Amended Third Party Complaint00187

December 4, 2015 Plaintiff's Answer to Counterclaims and Answer to Motion to Dismiss 00253

December 4, 2015 Notice and Motion to Strike Stipulation of Dismissal as to Defendant Karen Whitley.....00267

February 11, 2016 Bloodgood Memo in Opposition to Sanctions Motion 00270

 Ex A: Affidavit of Margaret Fabri 00279

 Ex B: Clegg v. Lambrecht, 2009 S.C. App. LEXI 353 00282

 Ex C: October 13, 2015 Email from Attorney Jerry Theos' Office to Nancy Bloodgood enclosing plea hearing transcript.....00289

 Ex D: Nancy Bloodgood time sheet records.....00290

February 12, 2016 Joshua Whitley Amended Motion for Sanctions Against Attorney Bloodgood and Plaintiff.....	00292
February 23, 2016 Karen Whitley Amended Motion for Sanctions Against Attorney Bloodgood and Plaintiff.....	00311
August 24, 2016 Bloodgood Supplemental Memo in Opposition to Motion for Sanctions	00314
Ex 1: Stipulations of Dismissal as to Karen Whitley; Terry Hardesty; Scott Marino..	00334
Ex 2: November 25, 2015 Letter from Attorney Jeffery Breit to Attorney Nancy Bloodgood refusing dismissal without payment of attorney fees.....	00347
Ex 3: Anderson County v. Preston, 2013 WL 10154806	00349
August 25, 2016 Amended Motion for Sanctions	00372
September 15, 2016 Plaintiff's Response to Amended Motion for Sanctions	00392
Ex A: December 18, 2014 Report: Federal Forensic Associates.....	00403
Ex. B: August 19, 2014: Supplemental Motion to Dismiss.....	00412
Ex C: May 2, 2014 Letter from Attorney Victor Rawl to Dr. Kent Murray, Berkeley County School Board.....	00449
Ex D: January 20, 2015 Motion to Disqualify Attorney General	00455
Ex E: Partial Transcript of Record: 14-GS-08-266; 15-GS-08-1073	00540
Ex F: Partial Transcript of Record: Show Cause Hearing February 8, 2016.....	00545
Ex G: Facebook Posts from Berkeley County Republicans group	00547
November 2, 2016 Affidavit of Howell Morrison	00583
November 3, 2016 Petition for Fees of Joshua S. Whitley	00599
November 7, 2016 Bloodgood Motion for Reconsideration	00619
November 7, 2016 Affidavit of Lucy Sanders, Esq.....	00642
November 16, 2016 Affidavit of Nancy Bloodgood, Esq. and supporting documents	00645
January 13, 2017 Supplemental Affidavit of Howell Morrison	001060
January 13, 2017 Plaintiff's Motion for Reconsideration and Memo in Support.....	001071
Exhibit: Affidavit of Christopher Kovach	001081

Transcripts

August 28, 2015 Transcript of Record from Amy Kovach’s guilty plea and sentencing hearing001084

February 8, 2016 Show Cause Hearing Transcript.....001141

September 16, 2016 Hearing Transcript.....001154

January 17, 2017 Motion for Reconsideration Hearing Transcript001233

Other Materials or Documents

April 22, 2014 Letter from Attorney John Freeman to Attorney Victor Rawl001354

August 31, 2015 Letter from Deputy Assistant Attorney General Creighton Waters to the Berkeley County School Board001358

September 16, 2015 Letter from Berkeley County School District re: denial of Amy Kovach’s employment grievance appeal.....001365

November 25, 2015 Letter to Attorney Bloodgood from Attorney Jeffrey A. Breit.....001367

February 8, 2016 Letter from Joshua S. Whitley to Nancy Bloodgood001369

January 11, 2017 Letter from Jeffrey A. Breit to Chief Justice Toal.....001371

VOLUME IV
(Court of Appeals Filings)

Appellant’s Final Brief001375

Respondents’ Joint Brief001414

Appellant’s Final Reply Brief.....001449

Petition for Writ of Certiorari001472

Joint Return to Writ of Certiorari.....001497

Petitioner’s Reply to Return.....001529

Opinion filed December 9, 2020.....001540

Amended Petition for Rehearing January 6, 2021001547
Order Denying Petition for Rehearing January 21, 2021001566
Certificate of Counsel001568

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Jean H. Toal, Circuit Court Judge

Appellate Case No.: 2018-000467

Amy S. Kovach..... Plaintiff

v.

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

And

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

v.

Amy Kovach Plaintiff/Counterclaim Defendant

And

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

v.

Rodney Thompson..... Third-Party Defendant

Of whom Amy Kovach is the Appellant

APPELLANT'S FINAL BRIEF

M. Dawes Cooke, Jr., Esq.
Barnwell Whaley Patterson & Helms, LLC
288 Meeting Street, Suite 200 (29401)
Charleston, SC 29401
(843) 577-7700
mdc@barnwell-whaley.com
Attorney for Plaintiff/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIESii

STATEMENT OF ISSUES ON APPEAL1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS3

ARGUMENT.....8

I. STANDARD OF REVIEW8

**II. THE TRIAL JUDGE SHOULD NOT HAVE IMPOSED
 SANCTIONS OF \$48,000 UPON AMY KOVACH.....8**

**A. The Lower Court Erred in Imposing Sanctions Upon a Party Under Rule
 11 and the FCPSA With No Discovery or Trial Finding The Claims
 Lacked Factual and Legal Support.....9**

**B. Appellant’s Guilty Plea to a Separate Criminal Matter Did Not In Any
 Way Preclude Her Ability to File an Action for Civil Conspiracy15**

**C. Rule 11 Sanctions Are Inappropriate as There Was No Rule 11
 Conference Prior to Respondents’ Amended Motions for Sanctions,
 Appellant Agreed to Dismiss the Case Upon Respondents’ Motion for
 Sanctions Against Her Counsel and The Amount of Sanctions
 Imposed On Amy Kovach Is Excessive and Inequitable.....24**

CONCLUSION30

TABLE OF AUTHORITIES

CASES

Anderson County v. Preston, 2013 WL 1015480626

Armel v. Com., 28 Va.App. 407, 505 S.E.2d 378 (1998).....20

In re Beard, 359 S.C. 351, 597 S.E.2d 835 (Ct. App. 2004).....8

Bilbo v Thigpen, 647 So.2d 678 (Miss. 1994).....12

Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663, 667, 54 L.Ed.2d 604 (1978).....21

Borough of Duryea, Pa., v. Guanieri, 564 U.S. 379, 387 (2011).....21

Brady v. United States, 397 U.S. 742 (1970).....22

Brubaker v. City of Richmond, 943 F.2d 1363, 1373 (4th Cir. 1991).....11

Burfoot v. Com., 23 Va. App. 38, 473 S.E.2d 724 (1996)20

Carolina Renewal, Inc. v. S.C. Dept of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009)21

City of Hartsville v. S.C. Mun. Ins & Risk Fund, 382 S.C. 535, 677 S.E.2d 574 (2009)17

Clark Equipment Co., Inc. v. Bowman, 762 S.W.2d 417 (Ky. App., 1988)13, 17

Coleman v. Stevens, 124 S.C. 8, 117 S.E. 305 (1923)17

Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 326, 701 S.E.2d 39, 46
(Ct. App. 2010)16, 17

DuBose v. Bultman, 215 S.C. 468 (1949)26

Fox v. Vice, 563 U.S. 826, 836 (2011).....26

Giganti v. Gen-X Strategies, Inc., 222 F.R.D. 299 (E.D. Va., 2004)11

Goodyear Tire & Rubber Co. v. Haeger, No. 15-1406, 2017 WL 1377379, at *5
(U.S. April 18, 2017)26, 27

Ex Parte Gregory, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008)8

Hackworth v. Greywood, 385 S.C. 110, 682 S.E.2d 871 (Ct. App. 2009).....16

<u>Hanahan v. Simpson</u> , 326 S.C. 140, 156, 485 S.E.2d 903, 912 (1997)	8, 13
<u>Haring v. Prorise</u> , 462 U.S. 306, 103 S.Ct. 2368 (1983)	21,22,23
<u>Hodges v. Rainey</u> , 341 S.C. 79, 83, 533 S.E.2d 578, 581 (2000).....	11
<u>Hogan v. Wellstar Health Network, Inc.</u> , Civil Action No. 1:12-CV-1418-RWS, 2013 WL 1136980 (N.D. Ga. March 14, 2013).....	29
<u>Holmes v. East Cooper Comm. Hosp., Inc.</u> , 408 S.C. 138, 160, 758 S.E.2d 483, 495 (2014).....	11
<u>Hoover Universal, Inc. v. Brockway Imco, Inc.</u> , 809 F.2d 1039, 1044 (4 th Cir. 1987).....	11
<u>Huggins v. Winn-Dixie Greenville, Inc.</u> , 249 S.C. 206, 153 S.E.2d 693 (1967).....	17
<u>Hunter v. Earthgrains Co. Bakery</u> , 281 F.3d 144, 151 (4 th Cir. 2002).....	25
<u>In re Kunstler</u> , 914 F.2d 505 (C.A. 4 (N.C.) 1990).....	25,26,27,29
<u>LaMotte v. Punchline of Columbia, Inc.</u> , 296 S.C. 66, 70, 370 S.E.2d 711 (1988)	16
<u>Leaf River Forest Products, Inc. v. Deakle</u> , 661 So.2d 188, 197 (Miss. 1995)	12
<u>Lee v. Chesterfield General Hosp., Inc.</u> , 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986)	16
<u>McMillan v. Oconee County Mem’l Hospital, Inc.</u> , 367 S.C. 559, 626 S.E.2d 884 (2006)..	16, 17
<u>Milwaukee Concrete Studios, Ltd., v. Field Mfg. Co., Inc.</u> , 8 F.3d 441 (7 th Cir. 1993).....	29
<u>Murdock v. Stout</u> , 54 F.3d 1437 (9 th Cir. 1985)	29
<u>Nietzke v. Williams</u> , 490 U.S. 319, 325, 109 S. Ct. 1827, 1831 – 32 (1989).....	11
<u>Parker v. Spartanburg Sanitary Sewer Dist.</u> , 362 S.C. 276, 607 S.E.2d 711 (S.C. App. 2005)	12
<u>Paroline v. United States</u> , 572 U.S. ___, ___, 134 S.Ct. 1710, 1722, 188 L.Ed.2d 714 (2014).....	26
<u>Pee Dee Health Care v. Thompson</u> , 418 S.C. 557, 795 S.E.2d 40 (Ct. App. 2016).....	25
<u>Pye v. Estate of Fox</u> , 369 S.C. 555, 633 S.E.2d 505 (2006).....	16

<u>Sierra v. Skelton</u> , 307 S.C. 217, 414 S.E.2d 169 (Ct. App. 1992).....	17
<u>Southeastern Site Prep., LLC v. Atlantic Coast Builders & Contractors, LLC</u> , 394 S.C. 97, 104, 713 S.E.2d 650, 653-54 (Ct. App. 2011)	8, 25
<u>State v. Charles</u> , 183 S.C. 188, 190 S.E. 466 (1937)	20
<u>State v. Fletcher</u> , 322 S.C. 256, 259, 471 S.E.2d 702, 704 (1996)	21
<u>State v. Gaskins</u> , 263 S.C. 343, 210 S.E.2d 590 (1974)	20
<u>Stern v. Thompson & Coates, Ltd.</u> , 185 Wis. 2d 220, 517 N.W.2d 658 (1994).....	29
<u>United States v. Broce</u> , 488 U.S. 563, 569, 109 S.Ct. 757, 762 (1989).....	20
<u>United States v. Cazares</u> , 121 F.3d 1241 (9 th Cir., Ct. App. 1997).....	20
<u>United States v. Goodwin</u> , 457 U.S. 368, 372, 102 S.Ct. 2485, 2488, 73 L.Ed.2d 74 (1982).....	21

STATUTES

South Carolina Code §8-13-1346	3, 20
South Carolina Code §15-36-10	6, 8, 9, 10, 12, 24
South Carolina Code§ 15-36-20(1).....	13
South Carolina Code §59-17-110	3, 18
U.S. Const. amend I	9, 19

OTHER

DR 7 105 of the Model Code of Professional Responsibility	15
EC 7-20 of the Model Code of Professional Responsibility	15
Rule 3.1 of the South Carolina Rules of Professional Responsibility	12
Rule 4.5 South Carolina Rule of Professional Conduct.....	15
Fed. R. Civ. P. 11, 1993 Advisory Committee Notes.....	13, 14
Fed. R. Civ. P. 11	Passim

South Carolina R. Civ. P. 11	Passim
21 Am.Jur.2d, Criminal Law §721	20
22A C.J.S., Criminal Law, § 456.....	20
Hubbard and Felix, <i>The South Carolina Law of Torts</i> , 342 (1990).....	18
Michael G. Sullivan, ELEMENTS OF CIVIL CAUSES OF ACTION (FIFTH EDITION 2015), p. 83.....	16

STATEMENT OF ISSUES ON APPEAL

- I. Did the trial judge err in imposing sanctions under Rule 11 and under the South Carolina Frivolous Proceedings Sanctions Act ("FCPSA") S.C. §§ 15-36-10, *et seq.*, where plaintiff followed her attorney's suggested legal theory, there was never a determination of the merits of her civil conspiracy claims and her civil conspiracy claims were not foreclosed as a matter of law by her prior criminal guilty plea?

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

STATEMENT OF THE CASE

This matter was commenced on October 15, 2015 with the Appellant's filing of a complaint against the Respondents for Civil Conspiracy. Respondents immediately filed Motions for Sanctions Against Appellant's Counsel, Nancy Bloodgood, and subsequently amended their motions for sanctions to include Appellant in February 2016. The matter came before the trial court for hearing on September 16, 2016 and the trial court issued its order granting sanctions on October 24, 2016. Following Motions for Reconsideration filed by Attorney Bloodgood and Appellant, the trial court held a hearing on January 17, 2017, and entered its final order on February 19, 2018 denying the motions for reconsideration and assessing sanctions against Attorney Bloodgood in the amount of \$15,000 and Appellant in the amount of \$48,000. Appellant served Respondents with its Notice of Appeal on March 13, 2018.

STATEMENT OF THE FACTS

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

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

accompanied by the payment of attorney fees. It is apparent that there is a significant potential conflict of interest between you and your client which you will need to discuss with her.” (R. pp. 001367-68). Ms. Bloodgood did not ever discuss the payment of attorney fees with Kovach and no other party to this action has moved for sanctions.

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

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

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

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

The court issued an order granting sanctions against Ms. Bloodgood and Appellant making extensive findings of fact regarding Kovach's guilty plea and finding, "the facts admitted under oath at the guilty plea, and the plea itself, foreclosed the claim against Defendants for civil conspiracy, because the allegations against them directly contradict Ms. Kovach's material admissions under oath." (R. p. 0017).

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

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

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

ARGUMENT

I. STANDARD OF REVIEW

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

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

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

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

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

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

Under the South Carolina Code §15-36-10(A)(4) , "An attorney or pro se litigant participating in a civil or administrative action or defense may be sanctioned for:

(a) Filing a frivolous pleading, motion or document if:

(ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;

(iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or

(iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based.).

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

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

- (1) the number of parties;
- (2) the complexity of the claims or defenses;
- (3) the length of time available to the attorney, party, or pro se litigant to investigate and conduct discovery for alleged violations of subsection (A)(4);
- (4) information disclosed or undisclosed to the attorney, party, or pro se litigant through discovery and adequate investigation;
- (5) previous violations of the provisions of this section;
- (6) the response, if any, of the attorney, party, or pro se litigant to the allegation that he violated the provisions of this section; and
- (7) other factors the court considers just, equitable, or appropriate under the circumstances.

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

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

“At the conclusion of a trial and after a verdict for or a directed verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict, upon motion of the prevailing party, the court shall proceed to determine if the claim or defense was frivolous. An attorney, party, or pro se litigant shall be sanctioned for a frivolous claim or defense if the court finds the attorney, party or pro se litigant failed to comply with one of the following conditions:

- (a) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification or reversal of existing law;
- (b) a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of the civil suit was intended merely to harass or injure the other party; or,
- (c) a reasonable attorney in the same circumstances would believe that the case or defense was frivolous as not properly founded in fact or was interposed merely for delay, or was merely brought for a purpose other than securing proper discovery, joinder of proposed parties, or adjudication of the claim or defense upon which the proceedings are based.”

The FCPSA makes clear that the trial judge could only consider sanctions against Kovach *after the conclusion of the case by dispositive motion or trial in favor of the moving party.*

“Under the plain meaning rule, it is not the court’s place to change the meaning of a clear and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

statements made by Kovach precluded her from filing an action for civil conspiracy since the gravamen of a civil conspiracy claim is *not* the legality or illegality of the alleged conspiratorial actions, but the intent to harm the plaintiff.⁴ The elements of a civil conspiracy are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages. The “essential consideration” in civil conspiracy “is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the primary purpose or object of the combination is to injure the plaintiff.” *Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986). A civil conspiracy is a combination of two or more persons for the purpose of injuring another. Michael G. Sullivan, ELEMENTS OF CIVIL CAUSES OF ACTION (FIFTH EDITION 2015), p. 83; *McMillan v. Oconee County Mem’l Hospital, Inc.*, 367 S.C. 559, 626 S.E.2d 884 (2006). While the combination must have been for the purpose of injuring the plaintiff, “the means of accomplishing the injury need not be unlawful.” Sullivan, *supra* at 86-87; *LaMotte v. Punchline of Columbia, Ind.*, 296 S.C. 66, 370 S.E.2d 711 (1988); *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006). “The difference between a civil and criminal conspiracy is in criminal conspiracy, the gravamen of the offense is the agreement itself, whereas in civil conspiracy, the gravamen of the tort is the damage resulting from an overt act done pursuant to a common design.” *Hackworth v. Greywood*, 385 S.C. 110, 682 S.E.2d 871 (2009). The type of conduct Kovach alleged to support her civil conspiracy claims is similar to conduct alleged in other reported civil conspiracy cases. In *Cricket Cove*

⁴ The October 24, 2016 Order Granting Defendants Motion for Sanctions (R. p. 005) incorrectly concludes, “the gravamen of Ms. Kovach’s conspiracy claim against Defendants is that they and others conspired to report to the Attorney General as to Ms. Kovach’s criminal activity and to encourage the Berkeley County Republican Party to pass a resolution encouraging her prosecution. This the only specific actions alleged by Ms. Kovach and Ms. Bloodgood to support a claim for civil conspiracy between the Defendants and others were that they (1) filed a complaint with the Attorney General, and (2) ensured a Resolution was passed by the Berkeley County Republican Party LLC encouraging the Attorney General to prosecute Ms. Kovach.” As stated in the complaint there are no fewer than 17 specific allegations concerning the existence of a civil conspiracy and none of which have been specifically disproven.

Ventures, LLC v. Gilland, 390 S.C. 312, 326, 701 S.E.2d 39, 46 (Ct. App. 2010), a civil conspiracy claim was stated when “[i]t may be reasonably inferred from the complaint as a whole that Cricket Cove is alleging Respondents had a personal stake in preventing Cricket Cove from moving forward with development plans.” See also *City of Hartsville v. S.C. Mun. Ins & Risk Fund*, 382 S.C. 535, 677 S.E.2d 574 (2009) (allegation concerned an agreement between two entities to sell property at an inflated price); *Coleman v. Stevens*, 124 S.C. 8, 117 S.E. 305 (1923) (finding that documents did constitute evidence of conspiracy to breach confidential relations of persons which resulted in conversion of money.). A civil conspiracy “involves acts that are by their very nature covert and clandestine and usually not susceptible of proof by direct evidence.” *McMillan v. Oconee Memorial Hospital, Inc.*, 367 S.C. 559, 626 S.E.2d 884 (2005). By their nature, conspiracy claims are difficult to fully uncover through a pre-suit investigation and generally require discovery in order to fully develop. The court must avoid the wisdom of hindsight and must test the wisdom of the attorney by inquiring as to what was reasonable to believe at the time of the filing. *Clark Equipment Co., Inc. v. Bowman*, 762 S.W.2d 417 (Ky. App., 1988).

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

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

In this case, Kovach made the following conspiracy allegations:

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

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

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

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

With respect to Karen Whitley, Joshua Whitley's mother and a school district employee who worked directly with Kovach during the 2012 bond referendum, the complaint alleges that the then-associate superintendent was laterally transferred into a position with less authority upon the hiring of Dr. Rodney Thompson (R. p. 0051 ¶¶43-44).

That Karen Whitley expressed dissatisfaction with the situation publicly and further that Karen Whitley held a personal vendetta against Kovach because she wanted one of her direct reports to have Kovach's job responsibilities. (R. p. 0051 ¶¶ 43-44).

That, upon information and belief, Karen Whitley had an objective to cause harm and embarrassment to her supervisors so that she would rise in leadership within the school district. (R. p. 0051 ¶ 45).

That Whitley created a statement for a Board Member to read at a school board meeting which misrepresented facts about a video created by the independent campaign committee and about which Kovach had no involvement whatsoever. (R. p. 0051 ¶48)

⁵ Under South Carolina Code §59-17-110, "in the event that any employee of any school district in South Carolina is prosecuted in any action, civil or criminal, or special proceeding in the courts of this State, or of the United States, by reason of any act done or omitted in good faith in the course of his employment, it is made the duty of the school district, when requested in writing by any such public school employee, to appear and defend the action or proceeding in his behalf."

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

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

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

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

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

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

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

A school district employee is not an elected or appointed government official and should not be subject to organized abuse resulting from a political feud for actions taken in good faith and within the scope of her employment. She additionally does not lose all rights to seek redress in a civil action merely by virtue of a criminal plea. "A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding final judgment of guilt and a lawful sentence." *United States v. Broce*, 488 U.S. 563, 569, 109 S.Ct. 757, 762 (1989). Conversely, a guilty plea does not admit any facts not necessary to be proved for conviction. *United States v. Cazares*, 121 F.3d 1241 (9th Cir., Ct. App. 1997). Kovach pled guilty to using government funds to attempt to influence the outcome of an election in violation of S.C. Code Ann. §8-13-1346 and for common law misconduct in office for failing to obtain three bids for a teacher recruitment video. Two charges of forgery and one charge of perjury were subsequently dismissed under a *nolle prosequi* which is a formal entry on the record that the prosecutor declares that he will not prosecute the matter any further. *State v. Gaskins*, 263 S.C. 343, 210 S.E.2d 590 (1974). The effect of a *nolle prosequi* is that the matter is laid to rest without disposition as if had never existed. 22A C.J.S., Criminal Law, §456, 21 Am.Jur.2d, Criminal Law §721, *Burfoot v. Com.* 23 Va. App. 38, 473 S.E.2d 724 (1996) (holding that after the *nolle prosequi* of an indictment, the slate is wiped clean, and the situation is the same as if the Commonwealth had chosen to make no charge.) *See also, Armel v. Com.*, 28 Va.App. 407, 505 S.E.2d 378 (1998). *State v. Charles*, 183 S.C. 188, 190 S.E. 466 (1937) (finding all of the proceeding in the trial which followed the entry of a *nolle prosequi* were nugatory). Regardless of the posture of Kovach's separate criminal plea, nowhere in either her plea or subsequent hearing on a rule to show cause motion regarding her employment grievance did she make any

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

“It is a due process violation to punish a person for exercising a protected statutory or constitutional right.” *State v. Fletcher*, 322 S.C. 256, 259, 471 S.E.2d 702, 704 (1996) citing *United States v. Goodwin*, 457 U.S. 368, 372, 102 S.Ct. 2485, 2488, 73 L.Ed.2d 74 (1982) and *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 667, 54 L.Ed.2d 604 (1978). Furthermore, “the right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government.” *Borough of Duryea, Pa., v. Guanieri*, 564 U.S. 379, 387 (2011). This right of redress includes the right of a convicted person to pursue a collateral civil action based upon on facts related to the conviction. Kovach’s Constitutional right to petition was addressed by her counsel in the lower court through *Haring v. Prosise*, 462 U.S. 306 (1983). In *Haring*, the United States Supreme Court found that, “criminal judgments, whether by guilty plea or adjudicated guilt, have no preclusive effect on subsequent civil litigation” and do not amount to collateral estoppel barring a subsequent civil suit. *Id.* at 310. Under South Carolina law, in order to successfully assert a collateral estoppel claim, a party “must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.” *Carolina Renewal, Inc. v. S.C. Dept of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). But where collateral estoppel results in injustice or unfairness, the courts may refuse to apply it. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The primary purpose of sanctions under Rule 11 is not to compensate the prevailing party, but to deter future litigation abuse. *See Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 151 (4th Cir. 2002). In keeping with rule’s purpose, a court should impose the least severe sanction adequate to serve the deterrence function of the rule. *In re Kunstler*, 914 F.2d 505 (4th Cir., 1990). Assessment of sanctions should be based on four factors: 1) the reasonableness of the opposing party’s attorney fees; 2) the minimum to deter; 3) the ability to pay; and 4) factors related to the severity of the Rule 11 violation. *Id.*

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

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

In examining the reasonableness of attorney fees, “the injured party has a duty to mitigate costs by not overstaffing, overresearching or overdiscovering clearly meritless claims.” *Kunstler*, 914 F.2d at 523. An injured party is required to do that which an ordinary prudent person would do under similar circumstances to mitigate his damages. *DuBose v. Bultman*, 215 S.C. 468 (1949). The Supreme Court of the United States recently held in *Goodyear Tire & Rubber Co. v. Haeger*, No. 15-1406, 2017 WL 1377379, at *5 (U.S. April 18, 2017), “as we have previously noted, a sanction counts as compensatory only if it is ‘calibrate[d] to [the] damages caused by’ the bad-faith acts on which it is based... A fee award is so calibrated if it covers the legal bills that the litigation abuse occasioned... That kind of causal connection, as this Court explained in another attorney’s fee case, is appropriately framed as a but-for test: The complaining party (here, the Haegers) may recover ‘only the portion of his fees that he would not have paid but for the misconduct. *Fox v. Vice*, 563 U.S. 826, 836 (2011); see *Paroline v. United States*, 572 U.S. ___, ___, 134 S.Ct. 1710, 1722, 188 L.Ed2d 714 (2014) No. 15-1406, 2017 WL 1377379, at *5 (U.S. April 18, 2017). In order to facilitate such damage mitigation, Rule 11 requires that “all motions filed shall contain an affirmation that the movant’s counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion, unless movant’s counsel certifies that consultation would serve no useful purpose or could not be timely held... If a motion ... does not comply with this Rule, it shall be stricken.” *Anderson County v. Preston*, 2013 WL 10154806. To date, neither Respondent has ever conferred before filing their motions for sanctions against her. Respondent Karen Whitley’s counsel did confer orally with Ms. Bloodgood in November 2015 about the complaint; however, Respondents never notified

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

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

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

2. The minimum amount necessary to deter

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

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

3. Ability to pay

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

4. Other factors

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

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

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

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

CONCLUSION

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

August 10, 2018

BARNWELL WHALEY
PATTERSON & HELMS, LLC

By: M. Dawes Cooke, Jr.

M. Dawes Cooke, Jr., Esq.
288 Meeting Street, Suite 200
Charleston, SC 29401
(843) 577-7700
mdc@barnwell-whaley.com
Attorney for Plaintiff/Appellant Amy Kovach

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Jean H. Toal, Circuit Court Judge

Appellate Case No.: 2018-000467

Amy Kovach Plaintiff

v.

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

And

Joshua S. Whitley Defendant/Counterclaimant,

v.

Amy Kovach Plaintiff/Counterclaim Defendant,

And

Joshua S. Whitley Defendant/Third-Party Plaintiff,

v.

Rodney Thompson Third-Party Defendant,

Of Whom Amy Kovach is the Appellant.

CERTIFICATE OF COUNSEL

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

BARNWELL WHALEY
PATTERSON & HELMS, LLC

By: M. Dawes Cooke, Jr.

M. Dawes Cooke, Jr., Esq.

288 Meeting Street, Suite 200

Charleston, SC 29401

(843) 577-7700

Attorney for Plaintiff/Appellant Amy Kovach

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

Appellate Case No.: 2018-000467

Amy S. Kovach, Plaintiff,

v.

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

And

Joshua S. Whitley, Defendant/Counterclaimant,

v.

Amy Kovach, Plaintiff/Counterclaim Defendant,

And

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

v.

Rodney Thompson, Third-Party Defendant,

Of whom Amy Kovach is the Appellant.

RESPONDENTS' JOINT BRIEF

Joshua S. Whitley, Esquire
SC Bar No.: 77824
Smyth Whitley, LLC
126 Seven Farms Drive, Suite 150
Charleston, South Carolina 29492

Jeffrey A. Breit, Esquire
Bar No.: 18876
Breit Drescher Imprevento, P.C.
600 22nd Street, Suite 402
Virginia Beach, Virginia 23451

Attorneys for Respondent Joshua S. Whitley

Wm. Howell Morrison, Esquire
SC Bar No.: 4106
Haynsworth Sinkler Boyd, P.A.
134 Meeting Street, 3rd Floor
Charleston, South Carolina 29401

Attorney for Respondent Karen Whitley

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iv

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS.....2

ARGUMENT 10

 I. Sanctions Are Available Against Kovach Under Rule 11. 11

 II. Kovach’s Civil Conspiracy Claim Against the Whitleys Has No Good Grounds To Support It..... 14

 III. Kovach’s Civil Conspiracy Claims Were Foreclosed By The Doctrines Of Collateral Estoppel and Judicial Estoppel..... 19

 IV. The Trial Judge Properly Awarded Sanctions Against Kovach..... 21

 V. The Sanctions Levied Against Kovach Were Reasonable.24

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

<i>Alexander v. Our Lady of Mercy Med. Ctr.</i> , 99 Civ. 1076 (HB), 2000 U.S. Dist. LEXIS 2510 (S.D.N.Y. Mar. 7, 2000)	23
<i>Angus v. Burroughs & Chapin Co. (Angus I)</i> , 358 S.C. 498, 596 S.E.2d 67 (Ct. App. 2005)	17, 22
<i>Angus v. Burroughs & Chapin Co. (Angus II)</i> , 368 S.C. 167, 628 S.E.2d 261 (2006)	17, 18
<i>Crowell v. Herring</i> , 301 S.C. 424, 392 S.E.2d 464 (Ct. App. 1990)	19, 22
<i>Doe v. Doe</i> , 346 S.C. 145, 551 S.E.2d 257 (2001)	19
<i>Ex parte Bon Secours St. Francis Xavier Hosp., Inc.</i> , 393 S.C. 590, 713 S.E.2d 624 (2011)	12, 13, 21
<i>Ex parte Gregory</i> , 3 78 S.C. 430, 663 S.E.2d 46 (2008)	10
<i>Feister v. Miller</i> , 2002-Ohio-7396, P1, 2002 Ohio App. LEXIS 7244, *1 (Ohio Ct. App., Tuscarawas County Dec. 31, 2002)	23
<i>Hayne Fed. Credit Union v. Bailey</i> , 327 S.C. 242, 489 S.E.2d 472 (1997)	22
<i>Heck v. Humphrey</i> , 512 U.S. 477 (1994)	23
<i>Holmes v. Haynsworth Sinkler Boyd, P.A.</i> , 408 S.C. 620, 760 S.E.2d 399 (2014)	12
<i>In re Beard</i> , 359 S.C. 351, 597 S.E.2d 835 (Ct. App. 2004)	10
<i>Johnson v. Dailey</i> , 318 S.C. 318, 457 S.E.2d 613 (1995)	11
<i>Johnson v. Sonoco Products Co.</i> , 381 S.C. 172, 672 S.E.2d 567 (2009)	24
<i>LaMotte v. Punch Line of Columbia, Inc.</i> , 296 S.C. 66, 370 S.E.2d 711 (1988)	14
<i>Lawson v. South Carolina Dept. of Corrections</i> , 340 S.C. 346, 532 S.E.2d 259 (2000)	18
<i>Levine v FDIC</i> , 2 F.3d 476, 479 (2d Cir. 1993)	23
<i>Link v. School District of Pickens County</i> , 302 S.C. 1, 393 S.E.2d 176 (1990)	11
<i>Lyon v. Sinclair Refining Co.</i> , 189 S.C. 136, 200 S.E. 78 (1938)	14
<i>Ojegba v. Murphy</i> ,	

178 F. App'x 888 (11 th Cir. 2006).....	24
<i>Peoples Federal Savings & Loan Ass'n of S. Carolina v. Resources Planning Corp.</i> , 358 S.C. 460, 596 S.E.2d 51 (2004).....	14
<i>Pye v. Estate of Fox</i> , 369 S.C. 555, 633 S.E.2d 505 (2006).....	14
<i>Sanders v. Leeke</i> , 254 S.C. 444, 175 S.E.2d 796 (1970).....	19
<i>Southeastern Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC</i> , 394 S.C. 97, 713 S.E.2d 650 (2011).....	10, 11
<i>Tozier v. City of Temple Terrace</i> , No. 8:10-cv-2750, 2011 U.S. Dist. LEXIS 101618 (M.D. Fla. 2011).....	23, 24
<i>Zurcher v. Bilton</i> , 379 S.C. 132, 666 S.E.2d 224 (2008).....	18, 19, 21, 22

STATUTES

S.C. Code Ann. § 30-4-30.....	3, 16
-------------------------------	-------

OTHER AUTHORITIES

Rule 11, SCRCP.....	11, 12, 13, 21
---------------------	----------------

STATEMENT OF ISSUES ON APPEAL

I. The trial judge was correct in imposing sanctions under Rule 11 of the South Carolina Rules of Civil Procedure against Appellant for filing a Complaint against Respondents Joshua Whitley and Karen Whitley alleging civil conspiracy because there were no good grounds to support the claims and Appellant's own pleading was in direct contradiction to her sworn guilty plea regarding the same facts and circumstances.

II. The trial judge was correct in her assessment of attorneys' fees against Appellant.

STATEMENT OF THE CASE

On October 15, 2015, Appellant, Amy Kovach ("Kovach" or "Appellant"), filed a Complaint against the Berkeley County School District ("BCSD"), Joshua Whitley ("Mr. Whitley"), Scott Marino, Karen Whitley ("Karen Whitley"), Terry Hardesty, and the Berkeley County Republican Party, LLC in the Court of Common Pleas for Berkeley County. In it, she included, *inter alia*, a claim for civil conspiracy against Mr. Whitley and others, including Karen Whitley. Mr. Whitley filed responsive pleadings, including an Answer, Counter-claim (against Appellant) and a Third-Party Claim on November 3, 2015, along with a Motion for Sanctions against Kovach's attorney, Nancy Bloodgood ("Bloodgood"). Karen Whitley filed a Motion to Dismiss and for Rule 11 Sanctions against Bloodgood on November 16, 2015. 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. Karen Whitley filed an Amended Motion for Sanctions against Bloodgood and Kovach on February 23, 2016. 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. 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. 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. Bloodgood and Kovach moved for reconsideration, and Chief Justice Toal heard the motions on January 17, 2017. On February 19, 2018, the trial court 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).

Bloodgood has paid the sanctions imposed against her and does not appeal the Court's Order. Kovach appeals Chief Justice Toal's award of sanctions against her.

STATEMENT OF FACTS

In this case, a public official alleged civil conspiracy against a private citizen for his efforts to expose the public official's corrupt activities, after the public official pled guilty to, and was convicted of, the corruption exposed. 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 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. In other words, Kovach pled guilty to two counts while admitting that she was guilty of all five counts against her.

Specifically, 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. 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. The essence of the conspiracy allegation was that the Whitleys conspired with others to have Kovach prosecuted. 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.

The Complaint also contains various allegations of wrongdoing against non-parties. Specifically, Kovach through her attorney alleges obstruction of justice, fraud on the court, and ethical breaches against the Attorney General, his lawyers, SLED, and one of 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 General's Office “manufactured” smurfing charge to injure Kovach).) In

her Complaint, Kovach alleged no actual claims against these parties, but 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 Indeed, Kovach alleged that the dismissed charges were “completely bogus.” (R. p. 60.)

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.)

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. 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

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 ability to refute the same. (R. pp. 54-55, 70-71.)

stipulate to dismissal only if it were with prejudice, and accompanied by the payment of attorneys' fees. 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. 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.

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. 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." She 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 below, to absolve herself of her criminal conviction, despite her admission to the underlying facts in support of that conviction in her guilty plea. For the reasons set forth below, the Court should affirm Chief Justice Toal's decision.

ARGUMENT

STANDARD OF REVIEW

The decision of whether to award attorney's fees pursuant to Rule 11 or the FCPSA is treated as one in equity. *Southeastern Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 104, 713 S.E.2d 650, 653 (2011). "In an action in equity tried by a judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence." *In re Beard*, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004). "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). When the appellate court agrees with the circuit court's factual findings, it reviews the award of

sanctions under an abuse of discretion standard. *Atl. Coast Builders*, 394 S.C. at 104, 713 S.E.2d at 654. "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 contentions." *Id.*

I. Sanctions Are Available Against Kovach Under Rule 11.

In their amended motions for sanctions, the Whitleys sought sanctions against Kovach pursuant to Rule 11 of the South Carolina Rules of Civil Procedure. (R. pp. 292-310, 372-391.)

Rule 11(a), SCRPC, provides in part as follows:

The written or electronic signature of an attorney or party [on a pleading, motion, or other paper] constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.

.....

If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

Rule 11, SCRPC. Under this Rule, 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).

The fundamental question before the trial court was whether "good grounds" existed to support the filing of a civil conspiracy claim against Mr. Whitley. If not, the trial court had discretion under Rule 11 to award sanctions not only against Bloodgood, but also against Kovach. Rule 11, SCRCP; *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 claims that sanctions under Rule 11 or the South Carolina Frivolous Civil Proceedings Sanctions Act ("FCPSA") are impermissible against a represented party prior to the conclusion of trial. Section 15-36-10(A)(4) of the FCPSA provides for sanctions against an "attorney or pro se litigant" for filing a pre-trial frivolous pleading. She argues that because she was not an "attorney or pro se litigant," she could not be sanctioned, pretrial, under the FCPSA. However, her attorney could be, and was, sanctioned under the FCPSA for filing a frivolous

pleading. In their amended motions for sanctions, the Whitleys moved for sanctions against Kovach under Rule 11, which is permitted under South Carolina law. Rule 11, SCRPC; *Runyon, supra*; *Ex parte Bon Secours St. Francis Xavier Hosp., Inc., supra*.

Kovach also asserts that “Rule 11 requires an attorney, and not her client, to verify the legal sufficiency of a filing.” (Initial Brief, p. 11.) This argument misses the mark. Under the plain language of Rule 11, Bloodgood’s signature on the Complaint, which was in violation of the Rule 11’s “good grounds” requirement, permitted the Court, “upon motion or upon its own initiative” to “impose upon the person who signed it, *a represented party, or both*, an appropriate sanction. Rule 11(a) SCRPC (emphasis added). Hence, the Rule does not permit Kovach to place all of the blame for the frivolous filing in this case on her attorney. Kovach was the person who engaged in criminal conduct, entered a guilty plea, and then sought to hold others responsible for bringing that conduct to the attention of authorities, by asserting a frivolous claim for civil conspiracy.² Justice Toal properly held her responsible for that conduct. Kovach’s argument that Rule 11 was not designed to undermine the ability of a litigant to pursue good faith legal claims is equally unavailing. Kovach’s intent in filing her frivolous Complaint was not to pursue a good faith legal claim. Her motive was to exact revenge upon those who discovered and reported her illegal activities.

Kovach also asks the Court to find fault in the speed with which Mr. Whitley filed his motions for sanctions. She claims that it was “impermissible for Respondents to use a sanctions motion to test the veracity of information Kovach’s counsel obtained and the merits of the

² Importantly, the factual allegations within the Complaint are the same as those Kovach signed under oath in her affidavit preceding the Complaint. Accordingly, blaming her attorney for filing the frivolous Complaint based on mistruths signed under oath is Kovach’s continued attempt to blame someone else for her bad acts. This case is exactly why Rule 11 allows sanctions against both attorney and the represented party.

conspiracy claim when both properly belong at the dispositive motion stage after full discovery or a trial on the merits.” (Initial Brief, p. 14.) In the Complaint, Kovach maligned Mr. Whitley’s character, sought to damage his reputation, and questioned his ethics as an attorney based on his filing of a FOIA request and providing information to the Attorney General concerning what he believed to be illegal activities on the part of Kovach and others during the Referendum campaign. Discovery was not necessary to show that the claim was frivolous, and Mr. Whitley cannot be faulted for acting quickly to defend himself from Kovach’s bad faith attack on his character and reputation.³

II. Kovach’s Civil Conspiracy Claim Against the Whitleys Has No Good Grounds To Support It.

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).

³ As to Kovach’s assertion that Mr. Whitley failed to comply with the consultation requirement of SCRCP 11, Mr. Whitley re-filed the Amended Motion with the affirmation that consultation would have served no useful purpose promptly (within 24 hours) after the omission was called to his attention, in accordance with Rule 11(a). Prior to filing his initial motion for sanctions, Whitley knew, based on the meeting between Karen Whitley’s counsel and Bloodgood after she filed the Complaint, that she was steadfast in her position that the Complaint would be served and the claims therein pursued. The futility of consultation is evidenced, even now on appeal, by Kovach’s continuing efforts to justify the claim against Whitley as meritorious.

The conspiracy claims Kovach filed against the Whitleys had no “good ground to support” them. Indeed, 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 that he hoped to harm the School District.” (*Id.*)
- He “issued multiple FOIA requests for emails of other BCSD employees who publically 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 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 asserts that, at the time she filed her Complaint, she had a “viable claim against the Respondents for civil conspiracy arising out of a political fight between Respondents and the former Berkeley County School Board even in light of her guilty plea and sworn testimony.” (Initial Brief, p. 19.) She did not. 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. Our

Supreme 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. The Supreme 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 Initial Brief. 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. In fact, Kovach admitted to committing these criminal acts, pled guilty, and was sentenced.

Kovach also ignores the requirement that she demonstrate a causal relationship between the combination element of a conspiracy claim and the damage sustained. Here, any damage she sustained was the result of her criminal conduct, for which she entered a plea of guilty, including an admission to the entire factual predicate for the crimes charged. Moreover, the actual claim asserted in the Complaint was a conspiracy to have her prosecuted for her criminal activity – despite her having entered a plea of guilty for that misconduct. (R. p. 70.)

Kovach also failed to allege special damages flowing from the conspiracy. Kovach's purported damages flowing from the conspiracy—public humiliation, reputational damage, loss of career opportunities, etc.—proximately flow not from the alleged conspiracy but from the SLED investigation, the criminal indictments, Kovach's guilty plea, sentencing, resulting termination from her employment, and the public notoriety surrounding all of those proceedings that were brought upon her by her own choices and criminal acts. These damages cannot qualify as special damages required to support a claim for civil conspiracy. *See, e.g., Lawson v. South Carolina Dept. of Corrections*, 340 S.C. 346, 352, 532 S.E.2d 259, 261 (2000) (finding summary judgment proper where no special damages alleged).

Finally, Kovach asserts, wrongly, that her claims against the Whitleys are akin to a claim for abuse of process, which “does not require proof of innocence.” (Initial Brief, p. 17.) In *Zurcher v. Bilton*, 379 S.C. 132, 136, 666 S.E.2d 224, 226 (2008), the plaintiff brought an abuse of process claim based on facts to which he had entered a plea of guilty. The Court held that his claim was precluded by his guilty plea. Likewise, here, Kovach's claims against the Whitleys hinge upon her innocence. They cannot be held liable for conspiracy for bringing her claims to

light, pursuant to *Angus II*.

III. Kovach's Civil Conspiracy Claims Were Foreclosed By The Doctrines Of Collateral Estoppel and Judicial Estoppel.

No actionable claim for civil conspiracy could exist against the Whitleys because of Kovach's admissions under oath at the sentencing hearing. There is no question that Kovach is *bound by her guilty plea* and cannot take a position contrary to her previous admissions under oath at the guilty plea hearing. In South Carolina, "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." *Doe v. Doe*, 346 S.C. 145, 146, 551 S.E.2d 257, 258 (2001). In this context, a plea of guilty is a "confession of guilt, made in a formal manner and has the same effect in law as a verdict of guilty." *Sanders v. Leeke*, 254 S.C. 444, 447, 175 S.E.2d 796, 797 (1970). Thus, a defendant who enters a guilty plea "may be collaterally estopped from litigating the same issue in a subsequent civil suit." *Zurcher, supra*.

Kovach argues that the doctrine of collateral estoppel was not applicable to her civil claims because she did not make statements or admissions during her guilty plea hearing or in the subsequent show cause hearing regarding the specific civil conspiracy allegations she made against the Respondents in her Complaint. (Initial Brief, pp. 20-21.) She is mistaken. 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*.⁴

⁴ 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

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 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 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

reasonable relation to it, including preliminary steps leading to judicial action of any official nature...”).

represented, falsely, that it had been dismissed with prejudice. As the trial court properly recognized, she was attempting, through the instant action, to re-litigate her criminal case here and blame the damages she has sustained on others.

Kovach's reliance on *Haring v. Prosser*, 462 U.S. 306, 308 (1983) is misplaced. That decision was based on Virginia law, which, according to the Court, did not give criminal judgments, whether by guilty plea or verdict, preclusive effect in subsequent civil litigation. By contrast, South Carolina *does* give preclusive effect to guilty pleas. *Zurcher, supra* (holding that "so long as a defendant has entered a guilty plea freely and voluntarily, an admission of guilt fully and fairly litigates the matter in the same manner as a contested trial in which a defendant is adjudicated guilty"). The issue of whether Kovach is guilty of the crimes charged has thus been fully and completely litigated. Under South Carolina law, she cannot revisit those issues by suing those who brought her to justice.

IV. The Trial Judge Properly Awarded Sanctions Against Kovach.

Kovach is equally, if not more, responsible with Bloodgood, for the consequences of the frivolous filing. Rule 11, SCRPC; *Runyon, supra*; *Ex parte Bon Secours St. Francis Xavier Hosp., Inc., supra*. Both Kovach's Affidavit and Complaint contain factual allegations that are irreconcilable with material aspects of her sworn testimony at the sentencing hearing and with conduct she has admitted under oath to committing. Kovach pled guilty to a detailed and clear factual predicate to her crimes as set forth by the Attorney General. Thereafter, she perjured herself in an affidavit to the School Board in which she attempted to deny her guilt. When that was unsuccessful, she filed a lawsuit with similar false accusations. The Attorney General then moved for contempt, wherein Kovach reaffirmed her guilt. Despite Kovach's multiple attempts to qualify her guilt, she is responsible for her criminal misconduct and her past actions. 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.

Kovach's argument that she had a "viable claim" under South Carolina law simply begs credulity. First, in South Carolina, a public official cannot maintain such a claim. In *Angus v. Burroughs & Chapin Co.*, 368 S.C. 167, 170, 628 S.E.2d 261, 262 (2006), the Supreme Court instructed that an action for civil conspiracy may not be maintained against a public official because citizens are "not third-party interlopers" and public officials are "answerable to the public." *Id.* Second, having entered a plea of guilty to the corruption, Kovach was estopped from litigating the same issues in a subsequent civil suit. *Zurcher v. Bilton*, 379 S.C. 132, 666 S.E.2d 224 (2008). Third, Whitley's actions are 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..."). Finally, Kovach was judicially estopped from taking a position contrary to that taken during the sentencing hearing. *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997) (holding that the judicial estoppel doctrine "precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation.").

In Mr. Whitley's Amended Motion for Sanctions, he listed Kovach's myriad admissions during her sentencing hearing that were in direct conflict to the allegations made in her Complaint. The allegations in Kovach's grievance Affidavit were *materially the same* - including the allegations of criminal wrongdoing on the part of SLED and the Attorney General's office - as those alleged in the Complaint. Kovach's dismissal of the Complaint, which Kovach admitted to contain allegations that were contrary to the statements made during

the plea, was of primary concern to the Court during the Show Cause hearing. The Show Cause was only dismissed because Kovach represented to the Court that all claims alleged in the Complaint had been dismissed with prejudice (which was false) and Kovach agreed never to file another claim arising out of the same facts. (R. pp. 1150-1151.) The Court's concern was that the Complaint was rife with false allegations, a fact that Kovach still refuses to acknowledge.

Rule 11 is violated where the allegations of the complaint are contradicted by the plaintiff's testimony. *Alexander v. Our Lady of Mercy Med. Ctr.*, 99 Civ. 1076 (HB), 2000 U.S. Dist. LEXIS 2510 (S.D.N.Y. Mar. 7, 2000). And where a plaintiff's attorney knows of testimony and documents that directly contradict information contained in the Complaint, yet fails to verify and explore that evidence, sanctions are appropriate due to the attorney's failure to conduct a reasonable investigation. *Houtakker v. Houtakker (In re Estate of Houtakker)*, 226 Wisc. 2d 562, 596 N.W.2d 501 (Wis. Ct. App. 1999). The Second Circuit Court of Appeals affirmed the imposition of Rule 11 sanctions against a plaintiff's attorney for filing a baseless complaint where the allegations the complaint were contradicted by defendant's admissions during testimony given in a prior deposition. *Levine v FDIC*, 2 F.3d 476, 479 (2d Cir. 1993). See *Feister v. Miller*, 2002-Ohio-7396, P1, 2002 Ohio App. LEXIS 7244, *1 (Ohio Ct. App., Tuscarawas County Dec. 31, 2002) (sanctioning an attorney for filing suit and maintaining a will contest action on behalf of a decedent's caregiver, despite his knowledge that the decedent had removed the caregiver as attorney-in-fact prior to his death due to theft and despite the attorney's knowledge that plaintiff had been indicted and entered a plea of guilty to theft from the decedent).

Sanctions were also properly awarded based on the reasoning in *Heck v. Humphrey*, 512 U.S. 477 (1994). In *Heck*, the Supreme Court held that a plaintiff who had been convicted of a crime could not bring a civil rights claim against those whose alleged unlawfulness would

undermine the validity of the conviction. The United States District Court for the Middle District of Florida applied *Heck* in *Tozier v. City of Temple Terrace*, No. 8:10-cv-2750, 2011 U.S. Dist. LEXIS 101618 (M.D. Fla. 2011) as a basis for an award of sanctions against a plaintiff's attorney. In *Tozier*, the plaintiff was arrested and charged with aggravated battery on a law enforcement officer. He entered a plea of guilty to the lesser charge of assault on a law enforcement officer. He then filed a civil rights suit against the officers involved in his arrest. The court in *Tozier* held that the plaintiff could not maintain such claims because if he prevailed, it would necessarily implicate the validity of the charges for which he had already admitted guilt. The Court noted that allegations in a civil suit that contradict plaintiff's plea of guilty to criminal charges should be rejected. *Id.* at *17 (citing *Ojegba v. Murphy*, 178 F. App'x 888 (11th Cir. 2006)). The Court held that plaintiff's attorney, who had been present when the plea was taken, should have known that the pleading was frivolous and sanctions against the attorney, therefore, were warranted. *Id.* at *18.

Here, Kovach alleges that the Whitleys and others "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.) She alleges further that the Whitleys 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.*) These allegations, if permitted to proceed, would necessarily undermine the validity of Kovach's guilty plea and conviction. She was properly sanctioned for these specious allegations under Rule 11.

V. The Sanctions Levied Against Kovach Were Reasonable.

As an initial matter, Kovach has failed to preserve her argument concerning the amount of the sanctions imposed against her, as it was first raised in her January 13, 2017 Motion for Reconsideration. See *Johnson v. Sonoco Products Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider."). Ahead of the Court's October 16, 2016 Order, Kovach made no argument concerning the amount of sanctions that should be awarded in the event the Court granted the Whitleys motions, or the method by which such sanctions should be calculated. She has thus waived the issue, and it should not be considered on appeal.

In any event, the sanctions Chief Justice Toal imposed on Kovach were reasonable. 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 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, this case is still pending without a final dismissal order. 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.) Importantly, although Kovach claims in her Initial Brief to have instructed her attorney to dismiss the case in November 2015, she never agreed to a dismissal, with prejudice, before the February 8, 2016 hearing, along with a payment of Whitley's attorneys' fees.

Kovach complains that Respondents' refusal in November of 2015 to sign a stipulation of dismissal without payment of attorney's fees from Kovach's counsel "drove an economic wedge between Kovach and her counsel and manufactured a conflict of interest between them." (Initial Brief, p. 27.) Again, Kovach fails to take responsibility for her actions. Any conflict between Kovach and her attorney was created by Kovach's filing of a frivolous Complaint and refusing to dismiss it with prejudice and pay the Whitleys' attorneys' fees.

In her argument that the fees were excessive, Kovach relies on the Fourth Circuit's opinion in *In re Kunstler*, 914 F.2d 505 (4th Cir. 1990) relating to various factors to be considered by the Court in the assessment of sanctions; however, she fails to cite a South Carolina case that requires such considerations in a Rule 11 award of sanctions. In any event, the application of those factors demonstrates that the sanctions imposed were reasonable. Kovach never agreed to dismissal of her claim against the Whitleys with prejudice and the

payment of their attorneys' fees, and Mr. Whitley properly refused to agree to the dismissal under the circumstances presented here. The amount of the sanctions was in keeping with the minimum amount necessary to deter future similar actions by Kovach and other individuals seeking to file frivolous lawsuits. Kovach's argument relating to her "ability to pay" fails to inform the Court that her financial resources are not limited to her working as a yoga instructor. Finally, Kovach's argument that she has no prior history of filing lawsuits does not militate against the amount of the sanctions awarded. In this case, she sought to malign the character and reputation of a young attorney and his mother through the filing of what she knew would be a very public Complaint. Hence, this factor does nothing to further her argument. Accordingly, even following the factors applied in *Kuntsler*, the sanctions awarded were reasonable.

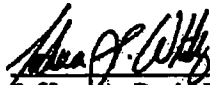
CONCLUSION

For the foregoing reasons, Respondents, Joshua S. Whitley and Karen Whitley, respectfully request that this Court affirm Chief Justice Toal's February 19, 2018 Order Denying Motions for Reconsideration and Ordering Sanctions.

August 9, 2018
Charleston, South Carolina

Respectfully submitted,

BREIT DRESCHER IMPREVENTO, P.C.



Jeffrey A. Breit, Esquire
VSB No. 18876
Breit Drescher Imprevento, P.C.
Town Pavilion Center II
600 22nd Street, Suite 402
Virginia Beach, Virginia 23451
(757) 670-3884
(757) 299-8035 fax

Jeffrey@breit.law

*Counsel for Respondent Joshua S. Whitley
Pro Hac Vice*

Joshua S. Whitley, Esquire

SC Bar No.: 77824

126 Seven Farms Drive

First Citizens Plaza, Suite 150

Charleston, SC 29492

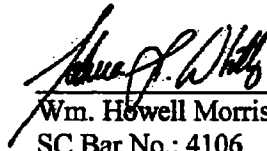
(843) 606-5635

(843) 654-4095 fax

jwhitley@smythwhitley.com

Counsel for Respondent Joshua S. Whitley

*For and with
Consent:*



Wm. Howell Morrison, Esquire

SC Bar No.: 4106

Haynsworth Sinkler Boyd P.A.

134 Meeting Street, 3rd Floor

Charleston, South Carolina 29401

(843) 722-3366

(843) 722-2266 fax

hmorrison@hsblawfirm.com

Counsel for Respondent Karen Whitley

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

Appellate Case No.: 2018-000467

Amy S. Kovach, Plaintiff,

v.

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

And

Joshua S. Whitley, Defendant/Counterclaimant,

v.

Amy Kovach, Plaintiff/Counterclaim Defendant,

And

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

v.

Rodney Thompson, Third-Party Defendant,

Of whom Amy Kovach is the Appellant.

PROOF OF SERVICE

I certify that I have served Respondents' Joint Brief on the above-referenced Appellant by depositing a copy of it in the United States Mail, postage prepaid, on August 9, 2018, addressed to the following parties and their attorneys of record:

M. Dawes Cooke, Jr., Esquire
Christopher Mark Kovach, Esquire
Barnwell Whaley Patterson & Helms, LLC
288 Meeting Street, Suite 200
Charleston, South Carolina 29401

Attorneys for Plaintiff/Appellant Amy Kovach



Tara Markham, Paralegal

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Jean H. Toal, Circuit Court Judge

Appellate Case No.: 2018-000467

Amy Kovach Plaintiff

v.

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

And

Joshua S. Whitley Defendant/Counterclaimant,

v.

Amy Kovach Plaintiff/Counterclaim Defendant,

And

Joshua S. Whitley Defendant/Third-Party Plaintiff,

v.

Rodney Thompson Third-Party Defendant,

Of Whom Amy Kovach is the Appellant.

APPELLANT'S FINAL REPLY BRIEF

M. Dawes Cooke, Jr., Esq.
Barnwell, Whaley, Patterson and Helms, LLC
288 Meeting Street, Suite 200 (29401)
Post Office Drawer H
Charleston, SC 29402
(843) 577-7700
mdc@barnwell-whaley.com
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

 A. The Trial Court Erred in Imposing Sanctions on Appellant
 Amy Kovach, Because There Is No Evidence in the Record of
 Any Culpable Conduct on Her Part and She Relied Upon
 Counsel in Filing The Complaint..... 1

 B. Respondents Are Incorrect in Their Suggestion That Appellant
 Amy Kovach Could Not Assert a Conspiracy Claim Because
 She Was a "Public Official" 5

 C. Respondents Are Incorrect in Their Suggestion That Appellant
 Amy Kovach Could Not Assert a Claim Because of Judicial
 Privilege 8

 D. Respondents Are Incorrect in Their Suggestion That Appellant
 Amy Kovach's Guilty Plea Estopped Her From Asserting
 Claims 10

 1. Collateral Estoppel..... 10

 2. Judicial Estoppel 13

CONCLUSION..... 15

TABLE OF AUTHORITIES

CASES

Allegro, Inc. v. Scully, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016),
reh'g denied (Oct. 26, 2016).....9

Angus v. Burroughs & Chapin Co., 368 S.C. 167, 628 S.E.2d 261 (2006).....5,6,7

Beall v. Doe, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189-90 n. 1
(Ct. App. 1984)10

Broadmoor Apartments of Charleston v. Horwitz, 306 S.C. 482, 486,
413 S.E.2d 9, 11 (1991)9

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)10

Carrigg v. Cannon, 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct. App. 2001)10

Cothran v. Brown, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004).....13

Crowell v. Herring, 301 S.C. 424, 430, 392 S.E.2d 464, 467 (Ct. App. 1990)8, 9

Equivest Fin., LLC v. Ravenel, 422 S.C. 499, 507,
812 S.E.2d 438, 442 (Ct. App. 2018), *reh'g denied* (Apr. 26, 2018).....14

Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 469,
629 S.E.2d 653, 666 (2006)7

Gordon v. Busbee, 397 S.C. 119, 136, 723 S.E.2d 822, 831-32 (Ct. App. 2011).....8

Ex parte Gregory, 378 S.C. 430, 438, 663 S.E.2d 46, 50 (2008)2

Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 115,
682 S.E.2d 871, 874 (Ct. App. 2009)8

Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 209,
153 S.E.2d 693, 695 (1967)9

Hunter v. Earthgrains Co. Bakery, 281 F.3d 144, 151 (4th Cir. 2002)2

Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009).....10

In re Kilgore, 253 B.R. 179, 187 (Bankr. D.S.C. 2000).....2

<i>Kirk Capital Corp. v. Bailey</i> , 16 F.3d 1485, 1492 (8th Cir. 1994).....	3
<i>In re Kunstler</i> , 914 F.2d 505, 522 (4th Cir. 1990).....	2
<i>Lawson v. Citizens & S. Nat. Bank of S.C.</i> , 255 S.C. 517, 520, 180 S.E.2d 206, 208 (1971).....	10
<i>Pee Dee Health Care, P.A. v. Estate of Thompson</i> , 418 S.C. 557, 567, 795 S.E.2d 40, 45-46 (Ct. App. 2016), reh'g denied (Feb. 21, 2017).....	2
<i>Pye v. Estate of Fox</i> , 369 S.C. 555, 566-67, 633 S.E.2d 505, 511 (2006).....	8
<i>Renner v. Hawk</i> , 125 N.C. App. 483, 481 S.E.2d 370, 374 (1997).....	2
<i>Ross v. Life Ins. Co. of Virginia</i> , 273 S.C. 764, 259 S.E.2d 814 (1979).....	5
<i>Sanders v. Belue</i> , 78 S.C. 171, 58 S.E. 762, 763-64 (1907).....	7
<i>State v. Bacote</i> , 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998).....	10
<i>Todd v. S.C. Farm Bureau Mut. Ins. Co.</i> , 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981), <i>rev'd on other grounds</i> , 283 S.C. 155, 321 S.E.2d 602 (1984), <i>quashed in part on other grounds</i> , 287 S.C. 190, 336 S.E.2d 472 (1985).....	8
<i>United States v. Milam</i> , 855 F.2d 739, 743 (11th Cir. 1988).....	2
<i>Zurcher v. Bilton</i> , 379 S.C. 132, 136, 666 S.E.2d 224, 226-27 (2008).....	11

STATUTES

S.C. Code § 4-9-610.....	5
S.C. Code § 4-9-620.....	5
S.C. Code § 15-36-10.....	1
S.C. Code. § 8-13-100(27).....	6
S.C. Code. § 8-13-100(26).....	6

OTHER

S.C. Attorney General Op., 1992 WL 682846, at *1 (S.C.A.G. Sept. 28, 1992).....6
Wright & Miller, 5A Fed. Prac. & Proc. Civ. § 1336.2 (3d ed.)3
South Carolina Rule of Civil Procedure 11 Passim

ARGUMENTS

A. The Trial Court Erred in Imposing Sanctions on Appellant Amy Kovach, Because There Is No Evidence in the Record of Any Culpable Conduct on Her Part and She Relied Upon Counsel in Filing The Complaint

The Court should reverse the imposition of sanctions upon Amy Kovach ("Mrs. Kovach") with regard to her filing of the October 15, 2015 Complaint ("Complaint", R. pp. 0045-0075) in this matter. Mrs. Kovach properly relied upon the advice of her attorney, Nancy Bloodgood, Esq. ("Attorney Bloodgood"), who drafted, signed and filed the Complaint on her behalf. While Mrs. Kovach believes that Attorney Bloodgood conducted ample due diligence and exercised professional judgment in filing the Complaint and thus should not have been sanctioned, Attorney Bloodgood has not appealed the award of sanctions against her. If any sanction is warranted in this case, it must be only against Attorney Bloodgood.

Respondents sought sanctions against Mrs. Kovach under S.C.R.C.P., Rule 11, and the South Carolina Frivolous Civil Proceedings Sanction Act ("SCFCPSA"), S.C. Code § 15-36-10. As an initial matter, it is clear that Respondents were not entitled to sanctions from Mrs. Kovach under the SCFCPSA, as that statute *only* authorizes sanctions against "[a]n attorney or *pro se* litigant participating in a civil or administrative action or defense." *See* S.C. Code § 15-36-10(A)(4). The statute does *not* authorize sanctions against a party represented by an attorney, as Mrs. Kovach was in this case. Therefore, if Respondents seek to impose sanctions on Mrs. Kovach, they must find another legal basis.

South Carolina Rule of Civil Procedure 11 provides in relevant part (emphasis added):

The written or electronic signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. . . . If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, *a represented party*, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

See S.C.R. Civ. P. 11(a). "A court imposing sanctions under Rule 11 should, in its order, describe the conduct determined to constitute a violation of the Rule and explain the basis for the sanction imposed." *Ex parte Gregory*, 378 S.C. 430, 438, 663 S.E.2d 46, 50 (2008).

This Court has discussed some of the policies underlying Rule 11, relying upon case law decided under the similar counterpart under the Federal Rules of Civil Procedure:

Although the current version of Rule 11 of the Federal Rules of Civil Procedure, unlike our state rule, contains a safe harbor provision, we find the U.S. Court of Appeals for the Fourth Circuit's explanation of the purposes behind the rule instructive. *Cf. Renner v. Hawk*, 125 N.C. App. 483, 481 S.E.2d 370, 374 (1997) (stating decisions pertaining to the federal version of Rule 11 are "pertinent to [the] analysis" of the state rule). "Under Rule 11, the primary purpose of sanctions against counsel is not to compensate the prevailing party, but to 'deter future litigation abuse.'" *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 151 (4th Cir. 2002) (quoting *In re Kunstler*, 914 F.2d 505, 522 (4th Cir. 1990)). The expenses opposing counsel incurs in combatting frivolous claims is an appropriate factor for a court to consider when determining whether to issue a monetary sanction. *In re Kunstler*, 914 F.2d at 522. "[O]ther purposes of the rule include compensating the victims of the Rule 11 violation, as well as punishing present litigation abuse, streamlining court dockets[,] and facilitating court management." [Citation omitted.]

See *Pee Dee Health Care, P.A. v. Estate of Thompson*, 418 S.C. 557, 567, 795 S.E.2d 40, 45-46 (Ct. App. 2016), reh'g denied (Feb. 21, 2017).

"[A] court will determine a party's responsibility for a violation by analyzing the facts leading up to the violation, rather than by reference to whose signature appears on the paper." [Citation omitted.] Courts generally allocate sanctions between the client and his or her attorney based on their respective culpability, and *where the client misleads the attorney by providing incorrect information, the client should bear the sanctions.*" See *In re Kilgore*, 253 B.R. 179, 187 (Bankr. D.S.C. 2000) (emphasis added); accord *United States v. Milam*, 855 F.2d 739, 743 (11th Cir. 1988) ("[F]ining a represented party is a very severe sanction that should be imposed with sensitivity to the facts of the case and to the party's financial situation."). Where sanctions are based on the alleged assertion of a claim that is not legally supportable, that is not sufficient grounds for imposing sanctions on the client, who relied upon counsel for legal guidance. See

Kirk Capital Corp. v. Bailey, 16 F.3d 1485, 1492 (8th Cir. 1994) ("The trouble here was: the facts alleged would not have formed a legal basis for the relief sought. This was an issue of law that the law firm, not the lay client, was called upon to make."). Normally, to support the imposition of sanctions on a represented party, there must be a showing of the client's specific culpable conduct:

[W]hen the offending conduct concerns the scope or quality of the counsel's competence—especially when the material is beyond the understanding of the client or when the client is unaware of the attorney's wrongful conduct—counsel alone should be sanctioned. Conversely, sanctions should fall on the client rather than on counsel when the attorney has relied reasonably on the client's misrepresentations or the client failed to disclose relevant facts—but the reliance by the attorney on the client must be reasonable under the circumstances.

See Wright & Miller, 5A Fed. Prac. & Proc. Civ. § 1336.2 (3d ed.).

Mrs. Kovach did not subject herself to Rule 11 by signing the Complaint; rather, Attorney Bloodgood, Mrs. Kovach's able and trusted lawyer, did so. Therefore, the allocation of any Rule 11 sanction to Mrs. Kovach — as opposed to counsel actually signing the pleading — should be based on her actual culpability. Respondents have not presented any evidence showing that Mrs. Kovach herself was culpable in any way with regard to any claimed Rule 11 violation. There is no evidence that Mrs. Kovach lied to her attorney in any way about the facts underlying her Complaint. To the contrary, it is undisputed that Mrs. Kovach relied heavily on her counsel for guidance with regard to the Complaint. Respondents cite no authority supporting the imposition of Rule 11 sanctions on a represented party who relied upon the advice of counsel, in the complete absence of any evidence of that party engaging in culpable conduct relating to the filing.

The record shows that Attorney Bloodgood undertook reasonable efforts to investigate Mrs. Kovach's claims before filing the Complaint. For example, Attorney Bloodgood affirmed that she undertook the following due diligence (in addition to numerous meetings and telephone calls with Amy Kovach and her husband):

- "[T]hroughout my drafting process, I reached out to her criminal attorney Jerry Theos, Joe Griffith (who represented the former Superintendent), and to others involved to ask questions or to request information. The individuals were professional and responsive to my specific requests. My partner and I also spent a great deal of time researching the applicable law." (R. p. 00647 ¶7).
- "After Ms. Kovach's grievance process concluded, a Board member contacted Mr. Kovach and told him the Attorney General's Office had provided a letter to the Board after the criminal hearing and prior to the Interim Superintendent's recommendation for termination. Even though it was apparently provided to the Board before they made their final grievance decision, I was neither told about this letter nor provided a copy, I asked one of the District attorneys for a copy, and I was surprised that they required me to make a formal FOIA request to receive it, which I did. (Ex. 4) I was further shocked to find that this seven (7) page letter (summarizing this particular Assistant Deputy Attorney General's opinion of the events involving Ms. Kovach) stated Ms. Kovach was guilty of a crime of moral turpitude." (R. p. 00648 ¶9).
- "I spoke with others with knowledge of the underlying facts and criminal proceedings." (R. p. 00648 ¶10).
- "Ms. Kovach was eager to file the suit, and I let her know that I was waiting to file to be sure there were no additional suggested changes from the criminal counsel who were reviewing the Complaint for accuracy. Additionally, I understood that the criminal transcript would be transcribed shortly and was waiting for Jerry Theos to forward a copy of it to me so that I could review before filing, which I did." (R. p. 00648 ¶11).
- "On October 13, 2015, Jerry Theos' assistant sent me the transcribed copy of the criminal hearing. (Ex. 6.) I reviewed the transcript in full, again went through the Complaint - piece by piece (my then-associate and now-partner had a long telephone call with Jerry Theos on October 13th (see notes in Ex. 6). Mr. Theos provided my office with those allegations and factual recitations which were inaccurate and recommended that they be deleted. He further reiterated that we should review the criminal transcript before filing, which we did." (R. p. 00648 ¶12).
- "Prior to filing, the Complaint had been revised eight times: September 18th; September 21st; September 22nd; September 23rd; September 28th; September 29th; October 10th; and October 14th." (R. p. 00649 ¶13).

Attorney Bloodgood further stated that she "was careful in seeking out additional information to confirm the pleading was accurate." (R. p. 00649 ¶ 14). In other words, even if the Complaint violated Rule 11, the record does not support that Mrs. Kovach's actions gave rise to that violation. Instead, the evidence shows that Mrs. Kovach relied on her attorney, who herself

conducted a full and complete investigation and obtained additional information from third parties to support the allegations in the Complaint and did not simply rely on what Mrs. Kovach told her. Indeed, much of the information Attorney Bloodgood learned from third parties during her investigation was previously unknown to Mrs. Kovach, including the controversy surrounding her hiring.

The Court's imposition of sanctions against Mrs. Kovach is tantamount to a "loser pays" rule. There was no discovery -- let alone a basis for adjudication -- that Mrs. Kovach's claim was meritless. She is being punished for voluntarily abandoning her lawsuit even though she believed, and her attorney affirmed, that she had a viable claim. For these reasons, this Court should reverse the trial judge's imposition of monetary sanctions on Mrs. Kovach.

B. Respondents Are Incorrect in Their Suggestion That Appellant Amy Kovach Could Not Assert a Conspiracy Claim Because She Was a "Public Official"

Respondents argue in their Brief that Mrs. Kovach's Complaint against them was frivolous because she could not sue them for civil conspiracy as a matter of law. For the reasons that follow, Respondents' contention is wrong.

In support of their contention, Respondents cite *Angus v. Burroughs & Chapin Co.*, 368 S.C. 167, 628 S.E.2d 261 (2006). In *Angus*, the plaintiff was hired as the county administrator for Horry County. Horry County operated under the council-administrator form of government, pursuant to S.C. Code § 4-9-610. Under § 4-9-620, the plaintiff, as county administrator, was the administrative head of county government. Horry County Council terminated plaintiff, and plaintiff filed suit against newspaper publishers and developers, alleging that they conspired to have her fired because of her opposition to several projects in Horry County. The trial judge granted summary judgment, holding that termination of at-will employment cannot support a civil conspiracy claim, citing *Ross v. Life Ins. Co. of Virginia*, 273 S.C. 764, 259 S.E.2d 814 (1979). The South Carolina Supreme Court upheld the grant of summary judgment, stating:

The critical factor here is Angus's status as an at-will public official. 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.

See id., 368 S.C. at 170-71, 628 S.E.2d at 262. Importantly, the plaintiff in *Angus* was not just an employee of a large government organization; she was the administrative *head* of the county and occupied the highest non-elected position in the county and whose position was defined by statute. As a result, her work would clearly be of great public interest.

In the instant case, Mrs. Kovach is arguably not a "public official" for purposes of the *Angus* decision. "The definitions of public official and state employee are many and may vary depending upon the purpose for which the terms are used. . . . As is provided in a legal treatise, the terms 'office,' 'officer,' 'public office,' and 'public officer' are terms of vague and variant import, the meaning of which necessarily varies with the connection in which they are used." *See S.C. Attorney General Op.*, 1992 WL 682846, at *1 (S.C.A.G. Sept. 28, 1992). Indeed, under South Carolina law, a "'Public official' means an elected or appointed official of the State, a county, a municipality, or a political subdivision thereof, including candidates for office." *See* S.C. Code. § 8-13-100(27). At the same time, a "'Public employee' means a person employed by the State, a county, a municipality, or a political subdivision thereof." *See* S.C. Code § 8-13-100(26). The trial judge did not hear any evidence or conduct any legal analysis to determine whether Mrs. Kovach was a "public official." No discovery was conducted on that subject. Simply put, Respondents have not set any factual predicate to determine this question. As discussed above, there is no "one-size-fits-all" definition of who is a "public official" for purposes of *Angus*. The South Carolina Supreme Court has stated, at least in one context, that:

One who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent, is a public officer. Conversely, one who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about a public work or business, is a mere employé. The position of superintendent of the poorhouse and farm is created by statute law, and not by the county board of commissioners. The person to be appointed to the position is designated by statute a "superintendent," and that term itself connotes the assumption of

responsibility and the exercise of discretion in the details of the management of the poorhouse and farm, though subject to the general supervision of the county board of commissioners. The care for the indigent is universally recognized as falling within the sovereign power of the state, and hence the superintendent, in managing the details of the institution provided by the state for the indigent and helpless, exercises a part of the sovereign power.

See Sanders v. Belue, 78 S.C. 171, 58 S.E. 762, 763–64 (1907). In the context of a defamation claim, the Supreme Court has stated:

Neither the Supreme Court nor this Court has provided a precise or all-encompassing definition of “public official,” although it is clear the category does not include all public employees. [Citation omitted.] In general, a public official is a person who, among the hierarchy of government employees, has or appears to the public to have “substantial responsibility for or control over the conduct of governmental affairs.” [Citation omitted.] “In considering the question of whether one is a public official, the employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.”

See Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 469, 629 S.E.2d 653, 666 (2006).

Unlike the county administrator in *Angus*, Mrs. Kovach was not the head executive of the school district. She did not have overall policymaking authority. She had no ability to exercise sovereign power and she took her employment instructions from the superintendent of education and the county school board, which held the authority to exercise such sovereign power. There is at least a genuine issue of fact as to whether she performed such a role that she was answerable to the public in such a way that she could not assert a conspiracy claim. She was not acting in a special capacity created by statute or other laws. To the contrary, Mrs. Kovach's position could be viewed — for purposes of her conspiracy claim — of being more akin to an employee. As a result, there is at least a reasonable, colorable chance that a court could conclude that she could succeed on a conspiracy claim, notwithstanding *Angus*.

In any event, even if Mrs. Kovach's claim was not cognizable under the law, Respondents can make no showing that she actually was aware of the state of South Carolina employment and civil conspiracy law. To the contrary, Mrs. Kovach had no expertise on that topic and relied entirely on Attorney Bloodgood to advise her on whether the claims were legally supportable.

There is no evidence that Mrs. Kovach deceived Attorney Bloodgood about her potential status as a "public official" or that Mrs. Kovach even knew this could impact her claims.

For these reasons, this Court should reverse the trial court's award of sanctions to Respondents from Mrs. Kovach.

C. Respondents Are Incorrect in Their Suggestion That Appellant Amy Kovach Could Not Assert a Claim Because of Judicial Privilege

Respondents assert that the doctrine of judicial privilege bars Mrs. Kovach's conspiracy claims against Respondents. This contention is without merit.

"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" *Pye v. Estate of Fox*, 369 S.C. 555, 566-67, 633 S.E.2d 505, 511 (2006). "A claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint." *See Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009) (citing *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981), *rev'd on other grounds*, 283 S.C. 155, 321 S.E.2d 602 (1984), *quashed in part on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985)). Also, a civil conspiracy claim, must allege special damages that are *different* from those sought in other claims:

[C]ivil conspiracy requires that the plaintiff claim special damages. In this case, the Gordons' amended complaint fails to allege any special damages incurred as a result of any conspiracy. They allege the same damages as they do under the other causes of action. This is insufficient to establish special damages. *See Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 117, 682 S.E.2d 871, 875 (Ct. App. 2009) ("If a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed.").

See Gordon v. Busbee, 397 S.C. 119, 136, 723 S.E.2d 822, 831-32 (Ct. App. 2011).

Respondents and the trial judge take the position that Mrs. Kovach could not assert a civil conspiracy claim on the grounds stated above because judicial privilege insulated Respondents from liability for their conduct. In support of this contention, Respondents cite *Crowell v. Herring*,

301 S.C. 424, 430, 392 S.E.2d 464, 467 (Ct. App. 1990). However, *Crowell* only recognized that privilege in connection with defamation claims based on allegedly privileged statements. *See id.*, 301 S.C. at 429, 392 S.E.2d at 466 ("All defendants moved for summary judgment on a theory any statements alleged by Crowell *to be defamatory* took place within a judicial proceeding and consequently were absolutely privileged.") (emphasis added). Notably, *Crowell* did *not* involve a claim for conspiracy, such as that at issue in the instant case.

Under South Carolina law, *even if Respondents' acts could have been privileged vis-a-vis a defamation claim*, they were not immune from potential liability for civil conspiracy. "A plaintiff *need not allege an unlawful act* to state a cause of action; *lawful acts may become actionable* as a civil conspiracy if the objective is to ruin or damage the business of another. [Citation omitted.] Therefore, the primary inquiry in civil conspiracy is whether the principal purpose of the combination is to injure the plaintiff." *See Allegro, Inc. v. Scully*, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016), reh'g denied (Oct. 26, 2016) (emphasis added). Even if Respondents' actions were completely lawful, they could nevertheless be held liable for civil conspiracy if they acted with an intention to harm Mrs. Kovach. Mrs. Kovach plainly alleged precisely that Respondents did act with the purpose of harming her. While her claims might have ultimately failed, they were clearly not frivolous.

Additionally, even if Respondents' actions were lawful, they could have formed the basis for an abuse of process claim. "To cause process to issue without justification is an essential element of malicious prosecution, but not of abuse of process. In the latter, the issuance of the process may be justified in itself; it is the malicious misuse or perversion of the process for an end not lawfully warranted by it that constitutes the tort known as abuse of process." *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 209, 153 S.E.2d 693, 695 (1967). "[L]iability for an abuse of process extends to all who knowingly participate, aid, or abet in the abuse." *Broadmoor Apartments of Charleston v. Horwitz*, 306 S.C. 482, 486, 413 S.E.2d 9, 11 (1991). Although Attorney Bloodgood did not use the words "abuse of process" in the Complaint, "it is well settled that a plaintiff need not label his cause of action, and these deficiencies do not make the

complaint vulnerable." See *Lawson v. Citizens & S. Nat. Bank of S.C.*, 255 S.C. 517, 520, 180 S.E.2d 206, 208 (1971). The facts alleged in the Complaint are plainly sufficient to state a possible claim for abuse of process. Moreover, it demands too much of Mrs. Kovach to require her to make such fine legal distinctions herself. She had a potentially viable claim against the Respondents, irrespective of how her attorney captioned her causes of action. The trial judge erred in imposing monetary sanctions on Mrs. Kovach.

D. Respondents Are Incorrect in Their Suggestion That Appellant Amy Kovach's Guilty Plea Estopped Her From Asserting Claims

Respondents also argue in their Brief that "No actionable claim for civil conspiracy could exist against the Whitleys because of Kovach's admissions under oath at the sentencing hearing." (See Resp.'s Br., at 19). In this regard, Respondents argue that either collateral estoppel or judicial estoppel barred Mrs. Kovach's claims. For the reasons that follow, Respondents' arguments must fail.

1. Collateral Estoppel

Respondents argue that Mrs. Kovach's statements in her guilty plea precluded her Complaint under the doctrine of collateral estoppel. The elements of collateral estoppel are well-known:

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). Mrs. Kovach does not dispute that a guilty plea can have

preclusive effect in certain circumstances under collateral estoppel. *See Zurcher v. Bilton*, 379 S.C. 132, 136, 666 S.E.2d 224, 226-27 (2008) ("[S]o long as a defendant has entered a guilty plea freely and voluntarily, an admission of guilt fully and fairly litigates the matter in the same manner as a contested trial in which a defendant is adjudicated guilty. Accordingly, we hold that a defendant who enters a guilty plea may be collaterally estopped from litigating the same issue in a subsequent civil suit."). However, as discussed below, Respondents' collateral estoppel argument fails, as the issues raised in the Complaint are entirely different from those resolved in Mrs. Kovach's guilty plea.

In her guilty plea, Mrs. Kovach admitted to charges set forth in 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 omissions 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 line 9 – 1090, line 24). Mrs. Kovach further stated during her guilty plea that she had violated the law "[b]y using resources to promote school district and its agenda of passing the referendum." (R. p. 1112 lines 23-25).

In this regard, Mrs. Kovach's guilty plea centered on two issues: (a) a video allegedly produced for the campaign and (b) \$239 in signs purchased for the campaign:

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, lines 2-8). Mrs. Kovach's guilty plea was limited to these two items, which were allegedly purchased with the school's public funds in violation of South Carolina law. By contrast, Mrs. Kovach's Complaint in this matter addressed Respondents' (and others') attempts to use these two relatively minor items to carry out a personal or political vendetta. Mrs. Kovach's Complaint asserts that a conspiracy existed, irrespective of whether Mrs. Kovach had actually engaged in the conduct to which she pled guilty. For example, Mrs. Kovach alleged that Respondents engaged in the following conspiratorial acts, *inter alia*:

- "[A]fter 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." (R. p. 0070 ¶159).
- Provided false statements to SLED. (R. p. 0070 ¶160).
- Provided false information to the press. (R. p. 0070 ¶161).
- Turned school board members against Mrs. Kovach. (R. p. 0070 ¶162).
- Acting in violation of Rule of Professional Conduct 3.6 by commenting on a pending SLED investigation in order to influence its outcome. (R. p. 0071 ¶170).
- Threatening to sue Campaign Coordinator Co-Chair June Pulling if she continued to support Mrs. Kovach. (R. p. 0072 ¶171).

Even if Mrs. Kovach had engaged in all of the criminal acts of which she was accused, she could certainly consistently make these allegations regarding Respondents and others who used those circumstances to exact personal or political vendettas against her. Mrs. Kovach acknowledged in her Complaint that she "had no choice but to plead guilty to two minor charges." (R. p. 0067 ¶140(d)).

Collateral estoppel would not apply in this case, because the facts to which Mrs. Kovach pled guilty are not in any way inconsistent with the allegations in her Complaint. The Complaint states the viable claim that, even if the criminal allegations against her were true, Respondents and others acted with the intention of harming her. Mrs. Kovach's guilty plea did not foreclose the allegations of her Complaint. Therefore, the trial judge erred in imposing monetary sanctions on Mrs. Kovach.

2. Judicial Estoppel

Respondents also argue that Mrs. Kovach's Complaint was sanctionable because her claims were precluded under the doctrine of judicial estoppel. For the reasons that follow, Respondents' argument must fail.

"Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding. [Citation omitted.] The purpose of the doctrine is to ensure the integrity of the judicial process, *not to protect the parties from allegedly dishonest conduct by their adversary.*" *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004) (emphasis added). The elements of judicial estoppel are well-settled:

For the doctrine of judicial estoppel to apply, the following elements must be satisfied: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

Equivest Fin., LLC v. Ravenel, 422 S.C. 499, 507, 812 S.E.2d 438, 442 (Ct. App. 2018), *reh'g denied* (Apr. 26, 2018). Judicial estoppel does not apply to the facts at bar.

First, as discussed in the preceding section, there is nothing inconsistent between Mrs. Kovach's guilty plea and her Complaint. Even assuming that she violated the law with regard to the video and signs, this would not foreclose her complaints against Respondents. Again, a civil conspiracy claim can survive, even where the defendants' acts are lawful, if there is an intent to harm the plaintiff. Therefore, Mrs. Kovach could state a claim against Respondents for civil conspiracy based not on the lack of merit of the criminal charges against her, but on their intention to use those charges to carry out personal or political vendettas against her.

Moreover, Mrs. Kovach did not successfully obtain any benefit with the allegedly inconsistent position. She pled guilty to a crime, the equivalent of a conviction. She received a punishment as a result of her guilty plea. She did not successfully take an inconsistent position to obtain dismissal of the criminal charges against her. As a result, judicial estoppel would not apply to the facts of this case.

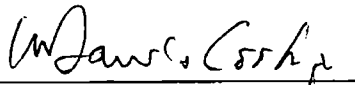
Therefore, for the foregoing reasons, the trial court erred in awarding sanctions to Respondents against Mrs. Kovach.

CONCLUSION

Appellant Amy Kovach should not have been sanctioned in this case. Her claims were legally viable; in fact, the Respondents do not even dispute the essential facts that she alleged. She was guided by able counsel. She voluntarily abandoned her claims without there ever having been any discovery in the case, let alone an adjudication of the merits of her claims. Imposition of sanctions in cases like this would force litigants to pursue all litigation to the bitter end, whether they want to or not, solely to prove that their claims were not frivolous. This is the opposite of the purpose served by Rule 11 and the Frivolous Civil Proceedings Act. The Respondents' insistence on keeping this case alive solely so that they could run up legal fees in seeking sanctions is a further perversion of the policies that these rules serve. Appellant Amy Kovach respectfully requests that this Court reverse and vacate the lower court's order granting sanctions against her.

Respectfully Submitted,

BARNWELL WHALEY
PATTERSON & HELMS, LLC

By: 

M. Dawes Cooke, Jr., Esq.
288 Meeting Street, Suite 200
Charleston, SC 29401
(843) 577-7700
mdc@barnwell-whaley.com
Attorney for Plaintiff/Appellant Amy Kovach

Dated: August 10, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Jean H. Toal, Circuit Court Judge

Appellate Case No.: 2018-000467

Amy Kovach Plaintiff

v.

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

And

Joshua S. Whitley Defendant/Counterclaimant,

v.

Amy Kovach Plaintiff/Counterclaim Defendant,

And

Joshua S. Whitley Defendant/Third-Party Plaintiff,

v.

Rodney Thompson Third-Party Defendant,

Of Whom Amy Kovach is the Appellant.

CERTIFICATE OF COUNSEL

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

BARNWELL WHALEY
PATTERSON & HELMS, LLC

By: M. Dawes Cooke, Jr.

M. Dawes Cooke, Jr., Esq.
288 Meeting Street, Suite 200
Charleston, SC 29401

(843) 577-7700

Attorney for Plaintiff/Appellant Amy Kovach

RECEIVED

Feb 22 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Jean Toal, Circuit Court Judge

Appellate Case No. 2018-000467

Amy Kovach Plaintiff

v.

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

And

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

v.

Amy Kovach Plaintiff/Counterclaim Defendant,

And

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

v.

Rodney Thompson..... Third-Party Defendant,

Of Whom Amy Kovach is the Appellant.

..... Respondent

APPELLANT AMY KOVACH'S
PETITION WRIT OF *CERTIORARI*

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

CERTIFICATE PURSUANT TO RULE 242(d)(1) 1

QUESTIONS PRESENTED 1

STATEMENT OF JURISDICTION..... 2

STATEMENT OF THE CASE..... 2

A. Background Facts 2

B. Procedural History in the Trial Court..... 3

C. The Court of Appeals' Opinion..... 4

ARGUMENT 4

A. Standard of Review..... 4

B. The Court of Appeals Erred in its Decision..... 5

1. As a Matter of Law, a Criminal Conviction Does
Not Foreclose a Subsequent Civil Action 5

2. There is No Evidence In the Record that the Civil Conspiracy Claims Were
Untrue 5

3. Even if Appellant’s Complaint Was Sanctionable, The Court of Appeals
Should Have Concluded That the Trial Court Imposed Sanctions That Were
Excessive and Disproportionate to the Actual Expense Incurred.11

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Anderson County v. Preston, 2013 WL 1015480615

Borough v. Duryea, Pa., v. Guanieri,
564 U.S. 379, 387 (2011).....8

Carolina Renewal v. S.C. Dept. of Transp.,
385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009).....10

Fox v. Vice, 563 U. S. 826, 836 (2011).....14

Goodyear Tire & Rubber Co. v. Haeger,
137 S. Ct. 1178, 1186 (2017).....14

Haring v. Prosis,
462 U.S. 306, 310 (1983).....8,9,10

Hunter v. Earthgrains Co. Bakery,
281 F.3d 144, 151 (4th Cir. 2002)16

Jackson v. Speed,
326 S.C. 289, 486 S.E.2d 750 (1997)16

Lee v. Chesterfield General Hosp., Inc.,
289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986).....11

Paroline v. United States,
572 U. S. ___, ___, 134 S.Ct. 1710, 1722, 188 L.Ed.2d 714 (2014).....14

State v. Fletcher, 322 S.C. 256, 259, 471 S.E.2d 702, 704 (1996)8

STATUTES

S.C. Code § 15-36-10.....6

Article V, § 5 of the South Carolina Constitution2

Article I, § 2 of the South Carolina Constitution.....5

Amendment I, United States Constitution7

Amendment XIV, United States Constitution7

RULES

Rule 242, S.C.R.A.P1,7

S.C. Civ. R. 112,5,6

S.C.R. Prof. Cond. 1.516

CERTIFICATE PURSUANT TO RULE 242(d)(1)

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

QUESTIONS PRESENTED

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

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

Suggested Answer: Yes.

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

Suggested Answer: Yes.

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

Suggested Answer: Yes.

STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

A. Background Facts

The Appellant Amy Kovach ("Kovach") is a former Berkeley County School District communications director, who was tasked by her superiors with serving as a campaign liaison between the school district and a volunteer "Yes4Schools" Campaign Committee during the 2012 Yes4Schools Improvement Bond Referendum. In this role, she provided information support to district employees and leadership as well as members of the public seeking information regarding the referendum. Defendant Josh Whitley led an organized group opposition to the bond referendum. After not receiving an apology from the school district leadership for Kovach's actions, he "took his concerns to the Attorney General, and the South Carolina Law Enforcement Division ("SLED") conducted a thorough investigation." (R. p. 00293). Kovach cooperated with this investigation and requested reimbursement from the school district for legal expenses under South Carolina Code §59-17-110. As a result of this investigation Kovach was indicted on February 11, 2014 for violating South Carolina Code §8-13-1346 by using public funds to promote the school bond referendum. Kovach retained criminal counsel who provided a vigorous defense and the matter ended with a guilty plea to two charges, use of government funds to influence the outcome of an election and misconduct in office.

Subsequent to her guilty plea on August 24, 2015, Kovach retained Attorney Nancy Bloodgood to represent her in an employment grievance against the Berkeley County School District ("BCSD") arising from her termination for actions taken during the bond referendum

campaign in good faith at the school district's instruction and direction. When the school board rejected the grievance application without a hearing, Kovach filed suit against the BCSD and other parties. (R. pp. 0045-75). Specifically, Kovach filed this suit on October 15, 2015 against the BCSD, Joshua Whitley, Karen Whitley and other parties who have subsequently been dismissed and are not involved in these motions. On November 3, 2015, approximately two weeks after the complaint was filed, Defendant Joshua Whitley filed an Answer, Counterclaims and a Third-Party Complaint; a motion to Dismiss the Complaint and a Motion for Sanctions against Ms. Bloodgood only. (R. pp. 00168-86). No motion for sanctions against Kovach was filed at that time. Shortly thereafter, following an exchange of letters between Ms. Bloodgood and the South Carolina Attorney General's Office as well as contact between Joshua Whitley and the Attorney General's Office, the Attorney General moved for an order to show cause against Kovach in her criminal case. The motion for order to show cause was regarding information contained in an employment grievance affidavit that was allegedly contrary to information contained in her guilty plea. The rule to show cause did not address the specific allegations of civil conspiracy raised in the complaint. (R. pp. 00159-67). After consultation with additional counsel, Kovach instructed Ms. Bloodgood to dismiss the actions as to all parties based upon the threat of new criminal charges being levied against her. By November 23, 2015 all parties had consented to a stipulation of dismissal except the Respondents who demanded attorneys' fees from Ms. Bloodgood. By letter dated November 25, 2015, counsel for Respondent, Joshua Whitley, demanded payment from Ms. Bloodgood stating, "The dismissal of this action is clearly in your client's best interest, and we are willing to stipulate, with prejudice, to the same, accompanied by the payment of attorney fees. It is apparent that there is a significant potential conflict of interest between you and your client which you will

need to discuss with her.” (R. pp. 001367-68). Ms. Bloodgood never discussed the payment of Defendants’ attorney fees with Kovach and no other party to this action has moved for sanctions.

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

B. Procedural History in the Trial Court

On December 2, 2015, Respondent Joshua Whitley filed an Amended Answer, Affirmative Defenses, Amended Counterclaims and an Amended Third-Party Complaint. On December 1, 2015 Respondent Karen Whitley filed a general denial answer followed by a December 4, 2015 Motion to Strike Plaintiff’s Stipulation of Dismissal to Karen Whitley. On December 4, 2015, Ms. Bloodgood filed an answer to Respondent Joshua Whitley’s

Counterclaims, a Motion to Dismiss the Counterclaims and a Motion to Dismiss Kovach's Complaint as to Respondent Joshua Whitley. Then on February 11, 2016 Ms. Bloodgood filed Memo in Opposition to the Motion for Sanctions. (R. pp. 00270-90). On February 12, 2016, Respondent Joshua Whitley filed an Amended Motion for Sanctions against Ms. Bloodgood and Kovach personally. (R. pp. 00292-310). On February 23, 2016 Respondent Karen Whitley filed an Amended Motion for Sanctions against Ms. Bloodgood and Appellant. (R. pp. 00311-13) More than three months prior, Kovach had instructed Ms. Bloodgood to dismiss the action as to both Respondents.

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

On September 16, 2016, the matters came for hearing before The Honorable Jean Toal, who stated that "what we are dealing with is whether or not a complaint was filed that was known to be without factual foundation and therefore violated Rule 11." (R. p. 001181, lines 3-5). No testimony or any other evidence was taken from any party, as Judge Toal instead focused only on Kovach's criminal guilty plea and the attorney general's defense of its investigation stating, "I think the parties pretty well got the drift from me I was not going to take any testimony today but, rather, try to deal with these things as motions on the law and on the record as it's been submitted." (R. p. 001218, lines 14-20). Judge Toal further stated, "I don't feel discontented that we're not having a factual hearing. I think these matters can very directly be addressed by the very fulsome record we do have on all sides." (R. p. 001219, lines 8-11).

The court issued an order granting sanctions against Ms. Bloodgood and Appellant making extensive findings of fact regarding Kovach's guilty plea and finding, "the facts admitted under

oath at the guilty plea, and the plea itself, foreclosed the claim against Defendants for civil conspiracy, because the allegations against them directly contradict Ms. Kovach's material admissions under oath." (R. p. 0017).

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

C. The Court of Appeals Opinion

On December 9, 2020, the Court of Appeals filed its Opinion affirming the trial judge's order sanctioning Appellant. The Court held that Appellant's claim of civil conspiracy was an attempt to re-litigate the facts that served as a predicate of her guilty plea. (December 9, 2020 App. Order, Pg. 4). The Court then agreed with the trial court's conclusion that Appellant's civil conspiracy claims were predicated on false facts and barred by her guilty plea to a separate criminal matter. (December 9, 2020 App. Order Pg. 5). Appellant timely filed a Petition for Rehearing on December 10, 2020 and an Amended Petition for Rehearing on January 6, 2021. The Court of Appeals denied the Petitions for Rehearing on January 21, 2021.

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

ARGUMENT

A. Standard of Review

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

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

- (1) *Where there are novel questions of law.*
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

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

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

1. This Case Presents a Novel Question of Law

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

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

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

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

The Court should further exercise its discretion to grant a writ of *certiorari* because this case involves an open and novel constitutional question impacting the fundamental right of any person to exercise her right to freedom of speech through access to the court system. “It is a due process violation to punish a person for exercising a protected statutory or constitutional right.” *State v. Fletcher*, 322 S.C. 256, 259, 471 S.E.2d 702, 704 (1996) citing *United States v. Goodwin*, 457 U.S. 368, 372, 102 S.Ct. 2485, 2488, 73 L.Ed.2d 74 (1982) and *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 667, 54 L.Ed.2d 604 (1978). Furthermore, “the right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government.” *Borough of Duryea, Pa., v. Guanieri*, 564 U.S. 379, 387 (2011). This right of redress includes the right of a convicted person to pursue a collateral civil action based upon on facts related to the conviction. Kovach’s Constitutional right to petition was addressed by her counsel in the lower court through *Haring v. Prosser*, 462 U.S. 306 (1983).

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

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

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

B. The Court of Appeals Erred in Its Opinion

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

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

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

As a matter of law, “criminal judgments, whether by guilty plea or adjudicated guilt, have no preclusive effect on subsequent civil litigation” and do not amount to collateral estoppel barring a subsequent civil suit. *Haring v. Prosise*, 462 U.S. 306, 310 (1983). Therefore, even if the subsequent civil litigation touches upon information contained in the prior criminal complaint, there is no basis under the law which prohibits this from occurring. Under South Carolina law, in order to successfully assert a collateral estoppel claim, a party “must demonstrate that the issue in

the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.” *Carolina Renewal, Inc. v. S.C. Dept of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). But where collateral estoppel results in injustice or unfairness, the courts may refuse to apply it. *Id.*

Appellant’s guilty plea was to distinct charges that share no common elements with her claims of civil conspiracy. The government argued in *Haring* that the convicted person had no right to contest how evidence was obtained through a civil action as he had waived his Fourth Amendment rights by virtue of his guilty plea. 462 U.S. 306 (1983). The United States Supreme Court disagreed since a waiver of his Fourth Amendment rights was never decided by the plea; therefore, collateral estoppel did not prohibit his subsequent civil suit.

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

Nowhere in the trial court’s order or this Court of Appeals opinion affirming it is the holding of *Haring v. Prosis* addressed. Nor it is explained how the prior criminal matter in any

way actually litigated the specific allegations against Respondents contained in the civil conspiracy complaint. Nor is it explained how the court arrived at a conclusion that sanctions are appropriate for actions permitted under United States Supreme Court precedent and in an apparent case of first impression.

2. There is No Evidence In the Record that the Civil Conspiracy Claims Were Untrue

The trial judge erred in imposing sanctions because Respondents did not present a scintilla of evidence that the Civil Conspiracy Complaint was, in fact, frivolous or without any merit. Respondents, as the parties moving for sanctions, bore the burden of showing that the claims against them were frivolous. In ordinary circumstance, motion for sanctions is made following an adjudication of the merits of the underlying claim or at least where the Movants bring forth evidence that the claims against them lack factual basis. There were no such adjudications here. In its Opinion, Court of Appeals held that "This is a unique case where *further* [emphasis added] development of the record would not illuminate the relevant issues." (*See Opin.*, at 5). This represents a misapprehension of the record as there been no factual record development of any kind regarding the civil conspiracy allegations.

In this case, there is nothing in either the trial court's order or this Court's opinion which specifies how the allegations supporting the civil conspiracy claim are untrue. The elements of a civil conspiracy are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages. Therefore, the essential consideration in civil conspiracy "is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the primary purpose of object of the combination is to injure the plaintiff." *Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986). The gravamen of a civil conspiracy action is the damage created and not whether the actions taken to create those damages were lawful or unlawful. The trial court focused its attention entirely on Appellant's guilty plea without ever considering the factual considerations necessary to support a

claim for civil conspiracy. Indeed, there is nothing in the record refuting the allegations contained in the complaint regarding the existence of a civil conspiracy against Appellant.

Appellant's guilty plea was limited to two discrete elements. First whether she made a video regarding the bond referendum campaign and, and second, whether she purchased campaign signs with a value of \$259.20. (R. p 1097, lines 2-8). The gravamen of Appellant's civil conspiracy complaint was not that she was attempting to disavow those two admissions. It was instead to assert a cause of action addressing Respondents' attempts to use these relatively minor items done by Appellant at the behest of her employer to carry out a personal or political vendetta against Appellant. These civil conspiracy allegations were specific, did not disavow Appellant's guilty plea, and *have never been disproven*. The allegations regarding the existence of a civil conspiracy included:

Organizing and leading a bond referendum opposition group which engaged in vitriolic commentary regarding Respondent and actively engaging in efforts to undermine Appellant's statutory right to reimbursement of Appellant's attorney's fees as a district employee. (R. p. 0045 ¶3, p. 0050 ¶41, p. 0052 ¶52, ¶, p. 0064 ¶124, p. 0070 ¶¶161, 162).

Making defamatory statements directly addressing Appellant and inciting fear and gathering to injure her including "she does not know whether to defecate or go blind", and "isn't it grand when a plan comes together." (R. p. 0063 ¶121).

With respect to Karen Whitely, Joshua Whitley's mother and a school district employee who worked directly with Kovach during the 2012 bond referendum, the complaint alleges that the then-associate superintendent was laterally transferred into a position with less authority upon the hiring of Dr. Thompson (the Berkeley County School District Superintendent). (R. p. 0051 ¶¶ 43-44).

That, upon information and belief, Karen Whitley had an objective to cause harm and embarrassment to her supervisors so that she would rise in leadership within the school district. (R. p. 0051 ¶45)

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

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

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

In this case, Appellant's complaint complied with the requirements of the civil rules and stated a plausible action for civil conspiracy. Nothing in the civil conspiracy complaint allegations seek to undue or refute the statements made during Appellant's guilty plea as none of these allegations were every addressed during the guilty plea. (R. p. 00159-67). Indeed, even after removing all reference to the criminal case, the complaint still states a plausible claim for civil conspiracy because none of the allegations are in any way predicated upon Appellant's innocence of the charges contained in that matter.

The trial judge never analyzed the substance of the civil conspiracy claims and did not permit a hearing or discovery on the issue. Instead, the trial court ruled that, "the facts admitted under oath at the guilty plea, and the plea itself, foreclose the claim against Defendants for civil conspiracy, because the allegations against *them (i.e. Respondents)* directly contradict Mrs. Kovach's material admissions under oath." (R. p. 0017). This statement is untrue and is without any factual support in the record. There is absolutely nothing in the record in this motion for sanctions or at the guilty plea hearing where any factual allegation regarding the existence of a civil conspiracy involving Respondents was ever discussed let alone refuted or disproven.

3. **Even if Appellant's Complaint Was Sanctionable, The Court of Appeals Should Have Concluded That the Trial Court Imposed Sanctions That Were Excessive and Disproportionate to the Actual Expense Incurred**

The trial judge sanctioned Appellant and awarded Respondents \$48,000.00 in legal fees related to a civil action addressing matters of first impression which she directed her attorney to dismiss within one month of filing. The Court of Appeals affirmed the amount of sanctions, stating:

The circuit court's award was well below the amount the Whitleys claimed they accrued in legal fees for the time period before Kovach attempted to dismiss the

case. Further the record indicates the Whitleys attempted to negotiate a dismissal of the civil conspiracy claim and sanctions motions, but they could not reach an agreement with Kovach about the payment of attorneys' fees.

(See Opin., at 6). For the reasons that follow, this Court should have reversed the trial judge's amount of sanctions as being excessive and disproportionate.

Contrary to this Court's holding, the record does not include any evidence that Respondents ever attempted to negotiate with *Appellant* regarding payment of fees. Respondent instead pursued *Appellant's counsel*, Nancy Bloodgood for payment of fees. In doing so, Respondents even chastised Bloodgood for putting her own interest ahead of her client's by failing to acquiesce to their demand for fees. (R. pp. 001368-69) Appellant agreed to dismiss her complaint against all parties (including those who did not pursue sanctions against Bloodgood) within one month of filing the complaint. Appellant has no knowledge of any negotiations between Respondents and Attorney Bloodgood regarding Bloodgood's payment of their attorney fees and was never consulted on the subject. Furthermore, Respondents never notified Appellant of any intent to pursue sanctions against her or negotiate for payment of attorney fees prior to filing their motion for sanctions against her in February 2016.

The United States Supreme Court has held a sanctions award is only compensatory where it compensates the moving party for fees that would not have been incurred but for the sanctioned conduct:

[A]s we have previously noted, a sanction count is compensatory only if it is 'calibrate[d] to [the] damages caused by' the bad-faith acts on which it is based. . . . A fee award is so calibrated if it covers the legal bills that the litigation abuse occasioned. . . . That kind of causal connection, as this Court explained in another attorney's fees case, is appropriately framed as a but-for test: The complaining party (here, the Haegers) may recover 'only the portion of his fees that he would not have paid but for' the misconduct. *Fox v. Vice*, 563 U. S. 826, 836 (2011); see *Paroline v. United States*, 572 U. S. ___, ___, 134 S.Ct. 1710, 1722, 188 L.Ed.2d 714 (2014).

Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178, 1186 (2017). .

Furthermore, Rule 11 requires that, "all motions filed shall contain an affirmation that the movant's counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion, unless

movant's counsel certifies that consultation would serve no useful purpose or could not be timely held... If a motion... does not comply with this rule, it shall be stricken." *Anderson County v. Preston*, 2013 WL 10154806.

In this case, there was never any consultation between Appellant and Respondents regarding a sanctions motion against Appellant. Instead, Respondents resisted Appellant's efforts to dismiss her case only to the extent that they wished to seek attorney fees from Attorney Bloodgood. Substantially all of Respondent's counsel's efforts, as evidenced by their Motion arguments, argued that Appellant could not pursue an action against them as a matter of law by virtue of her alleged status as a public official. The facts of the allegations against them were never refuted by affidavit, testimony, or otherwise. But it is important to note that substantially all of these expenses occurred after Appellant had already instructed her attorney to dismiss the action and there has been no ruling either way from the trial court of the Court of Appeals on the legal merits of the civil conspiracy complaint.

A party should not be penalized for reassessing its position or seeking to dismiss a matter because doing so effectively forces a party to continue litigating and developing a factual record in order to stave off a motion for sanctions. In this case, the circuit court has done exactly that by sanctioning Appellant without giving her the opportunity to develop a factual record supporting the allegations of civil conspiracy in the complaint.

In examining the reasonableness of attorney fees, "the injured party has a duty to mitigate costs by not overstaffing, overresearching or overdiscovering clearly meritless claims." *In re Kunstler*, 914 F.2d 505, 523 (4th Cir. 1990). While Appellant's claims were not clearly meritless, as evidenced by the trial court's request for briefing on the issues, spending undue time researching a matter of first impression after the threat of litigation had ended is completely contrary to mitigating costs. If such extensive legal research was indeed necessary, then this alone is evidence that the legal claim clearly not meritless and it is inequitable to require Appellant to pay for it.

Neither the trial court nor the Court of Appeals engaged in a sufficient detailed evidentiary analysis to determine whether the attorneys' fees awarded in the sanctions were reasonable. The

primary purpose of sanctions under Rule 11 is not to compensate the prevailing party, but to deter future litigation abuse, *See Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 151 (4th Cir. 2002). In keeping with the rule's purpose, a court should impose the least severe sanction adequate to serve the deterrence function of the rule. *In re Kunstler*, 914 F.2d 505 (4th Cir., 1990). Assessment should be based on four factors: 1) the reasonableness of opposing party's attorney fees; 2) the minimum to deter; 3) the ability to pay; and 4) factors related to the severity of the Rule 11 violation. *Id.* In determining the reasonableness of legal fees, South Carolina courts typically focus on six factors from the case of *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997): (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. The factors for determining the reasonableness of fees set forth in Rule 1.5 of the Rules of Professional Conduct, Rule 407, SCACR, include the same factors as those in *Jackson*. Neither the trial judge nor the Court of Appeals analyzed any of these factors contained *In re Kunstler* or *Jackson v. Speed*, which would have supported a \$48,000.00 sanction award.

Further, even if supported by any evidence, the amount of \$48,000.00 allegedly spent to defend a lawsuit with a total duration of one month is facially excessive and grossly disproportionate and runs contrary to the efficient administration of civil matters to construe the civil rules to "secure the just, speedy, and inexpensive determination of every action". Civ. R. 1.

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

CONCLUSION

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

February 22, 2021

BARNWELL WHALEY PATTERSON &
HELMS, LLC

By: M. Dawes Cooke, Jr.
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
Attorneys for Appellant Amy S. Kovach

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Feb 22 2021

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

SC Court of Appeals

Jean Toal, Circuit Court Judge

Appellate Case No. 2018-000467

Amy Kovach..... Plaintiff

v.

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

And

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

v.

Amy Kovach..... Plaintiff/Counterclaim Defendant,

And

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

v.

Rodney Thompson..... Third-Party Defendant,

Of Whom Amy Kovach is the Appellant.

Respondent

PROOF OF SERVICE


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

Jeffrey A. Breit, Esquire
Breit Drescher Imprevento, P.C.
Town Pavilion Center II
600 22nd Street, Suite 402
Virginia Beach, VA 23451
Attorney for Respondent Joshua Whitley

Joshua S. Whitley, Esquire
Smyth Whitley, LLC
126 Seven Farms Drive, Suite 150
Charleston, SC 29492
Attorney for Respondent Joshua Whitley

Wm. Howell Morrison, Esquire
Haynsworth Sinkler Boyd, P.A.
134 Meeting Street, 3rd Floor
Charleston, SC 29401
Attorney for Respondent Karen Whitley

BARNWELL WHALEY PATTERSON &
HELMS, LLC

By: 
M. Dawes Cooke, Jr., Esq. (SC Bar #1376)
211 King Street, Suite 400 (29401)
P. O. Drawer H
Charleston, SC 29402
(843) 577-7700 Fax: (843) 577-7708

Attorneys for Appellant Amy Kovach

THE STATE OF SOUTH CAROLINA
In The 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.

RESPONDENTS' JOINT RETURN

Joshua S. Whitley, Esquire
SC Bar No.: 77824
Smyth Whitley, LLC
126 Seven Farms Drive, Suite 260
Charleston, South Carolina 29492

Jeffrey A. Breit, Esquire
VSB No. 18876
Breit Cantor Grana Buckner, PLLC
Town Pavilion Center II
600 22nd Street, Suite 402
Virginia Beach, Virginia 23451

Attorneys for Respondent Joshua S. Whitley

Wm. Howell Morrison, Esquire
SC Bar No.: 4106
Haynsworth Sinkler Boyd, P.A.
134 Meeting Street, 3rd Floor
Charleston, South Carolina 29401

Attorney for Respondent Karen Whitley

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iv

COUNTER-STATEMENT OF QUESTIONS PRESENTED.....v

COUNTER-STATEMENT OF THE CASE.....1

ARGUMENT10

**I. Kovach Has Failed To Identify Any Special And Important Reason For This Court
 To Grant Her Petitions for Writ of Certiorari.10**

**II. The Court of Appeals Correctly Affirmed Chief Justice Toal's Decision That Kovach's
 Guilty Plea Foreclosed Her Claims Against the Whitleys.14**

**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.).....16**

**IV. The Court of Appeals Properly Concluded That The Sanctions Were Reasonable And
 Not Excessive.....22**

CONCLUSION.....25

TABLE OF AUTHORITIES

CASES

<i>Angus v. Burroughs & Chapin Co. (Angus I)</i> , 358 S.C. 498, 596 S.E.2d 67 (Ct. App. 2005)	21, 22
<i>Angus v. Burroughs & Chapin Co. (Angus II)</i> , 368 S.C. 167, 628 S.E.2d 261 (2006)	21, 22
<i>Borough of Duryea, Pa. v. Guanieri</i> , 564 U.S. 379 (2011)	13
<i>Crowell v. Herring</i> , 301 S.C. 424, 392 S.E.2d 464 (Ct. App. 1990)	20
<i>Doe v. Doe</i> , 346 S.C. 145, 551 S.E.2d 257 (2001)	13, 15
<i>Ex parte Bon Secours St. Francis Xavier Hosp., Inc.</i> , 393 S.C. 590, 713 S.E.2d 624 (2011)	16
<i>Ex parte Gregory</i> , 378 S.C. 430, 663 S.E.2d 46 (2008)	11, 12, 16
<i>Goodyear Tire & Rubber Co. v Haeger</i> , 137 S. Ct. 1178 (2017)	25
<i>Grochowski v. Dewitt-Rickards</i> , No. 90-2159, 1991 U.S. App. LEXIS 4017 (4th Cir. 1991)	15
<i>Haring v. Prosis</i> , 462 U.S. 306 (1983)	13-15
<i>Holmes v. Haynsworth Sinkler Boyd, P.A.</i> , 408 S.C. 620, 760 S.E.2d 399 (2014)	16
<i>Johnson v. Dailey</i> , 318 S.C. 318, 457 S.E.2d 613 (1995)	16
<i>LaMotte v. Punch Line of Columbia, Inc.</i> , 296 S.C. 66, 370 S.E.2d 711 (1988)	17
<i>Link v. School District of Pickens County</i> , 302 S.C. 1, 393 S.E.2d 176 (1990)	16
<i>Lyon v. Sinclair Refining Co.</i> , 189 S.C. 136, 200 S.E. 78 (1938)	18
<i>Peoples Federal Savings & Loan Ass'n of S. Carolina v. Resources Planning Corp.</i> , 358 S.C. 460, 596 S.E.2d 51 (2004)	17
<i>Pye v. Estate of Fox</i> , 369 S.C. 555, 633 S.E.2d 505 (2006)	17
<i>Sanders v. Leeke</i> , 254 S.C. 444, 175 S.E.2d 796 (1970)	14-15
<i>State v. Fletcher</i> , 322 S.C. 256, 259, 471 S.E.2d 702, 704 (1996)	13
<i>Zurcher v. Bilton</i> , 379 S.C. 132, 666 S.E.2d 224 (2008)	11, 14-15, 20

STATUTES

S.C. Code Ann. § 30-4-30 3, 19
Rule 242(b), SCACR 10

OTHER AUTHORITIES

Rule 11, SCRCF 11-13, 16, 24

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. 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 of 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 General's 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), SCRCF 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), SCRCF, 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. Guarnieri*, 564 U.S. 379, 387 (2011) is equally infirm. She quotes the *Guarnieri* 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 *Guarnieri* 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 Prosis'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

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.

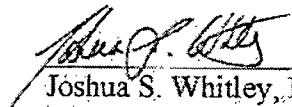
In her argument that the sanctions were excessive, Kovach relies on *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997), where the Court held that the following six factors are generally considered when determining a reasonable attorney's fee: "(1) the nature, extent, and difficulty of 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,


Joshua S. Whitley, Esquire
SC Bar No.: 77824
Smyth Whitley, LLC
126 Seven Farms Drive, Suite 260
Charleston, South Carolina 29492

Jeffrey A. Breit, Esquire
VSB No. 18876
Breit Cantor Grana Buckner, PLLC
Town Pavilion Center II
600 22nd Street, Suite 402
Virginia Beach, Virginia 23451

Attorneys for Respondent Joshua S. Whitley

Wm. Howell Morrison, Esquire
SC Bar No.: 4106
Haynsworth Sinkler Boyd, P.A.
134 Meeting Street, 3rd Floor
Charleston, South Carolina 29401

Attorney for Respondent Karen Whitley

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.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Jean Hofer 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,

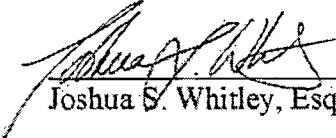
Of whom Amy Kovach is the Appellant.

PROOF OF SERVICE

I certify that I have served Respondents' Joint Brief on the above-referenced Appellant by depositing a copy of it in the United States Mail, postage prepaid, on April 12, 2021, addressed to the following parties and their attorneys of record:

M. Dawes Cooke, Jr., Esquire
Barnwell Whaley Patterson & Helms, LLC
211 King Street, Suite 300
Charleston, South Carolina 29401

Attorneys for Petitioner, Amy Kovach



Joshua S. Whitley, Esquire

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. 2021-000174

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*

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. This Case Presents a Novel Question of Law 1

II. This Case Does Present Important Issues Involving
the Fundamental Right of Access to the Courts. 3

III. The Record in this Case Contains No Evidence
that the Civil Conspiracy Claims are Untrue 3

CONCLUSION 4

TABLE OF AUTHORITIES

CASES

Angus v. Burroughs & Chapin Co. (Angus I),
358 S.C. 498, 596 S.E.2d 67 (S.C. Ct. App. 2005)2

Borough v. Duryea, Pa., v. Guanieri,
564 U.S. 379, 387 (2011).....3

Haring v. Prorise,
462 U.S. 306, 310 (1983).....2

Hogan v. Wellstar Health Network, Inc., Civil Action No. 1:12-CV-1418-RWS,
2013 WL 1136980 (N.D. Ga. March 14, 2013)2

Milwaukee Concrete Studios. Ltd., v. Field Mfg. Co., Inc, 8 F.3d 441 (7th Cir. 1993)2

Murdock v. Stout, 54 F.3d 1437 (9th Cir. 1985)2

Stern v. Thompson & Coates, Ltd., 185 Wis. 2d 220, 235, 517 N.W.2d 658, 663 (1994) ..3

Zurcher v. Bilton, 379 S.C. 132, 666 S.E.2d 224 (2008)1

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

BARNWELL WHALEY
PATTERSON & HELMS, LLC

By: M Dawes Cooke Jr
M. Dawes Cooke, Jr., Esq. (SC Bar #1376)
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
Attorneys for Appellant Amy S. Kovach

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. 2021-000174

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

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.

Town Pavilion Center II
600 22nd Street, Suite 402
Virginia Beach, VA 23451
Attorney for Respondent Joshua Whitley

Joshua S. Whitley, Esquire
Smyth Whitley, LLC
126 Seven Farms Drive, Suite 150
Charleston, SC 29492
Attorney for Respondent Joshua Whitley

Wm. Howell Morrison, Esquire
Haynsworth Sinkler Boyd, P.A.
134 Meeting Street, 3rd Floor
Charleston, SC 29401
Attorney for Respondent Karen Whitley

BARNWELL WHALEY PATTERSON &
HELMS, LLC

By: M. Dawes Cooke, Jr. Esq.
M. Dawes Cooke, Jr., Esq. (SC Bar #1376)
211 King Street, Suite 400 (29401)
P. O. Drawer H
Charleston, SC 29402
(843) 577-7700 Fax: (843) 577-7708

Attorneys for Appellant Amy Kovach

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Amy Kovach, Plaintiff,

v.

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

And

Joshua S. Whitley, Defendant/Counterclaimant,

v.

Amy Kovach, Plaintiff/Counterclaim Defendant,

And

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

v.

Rodney Thompson, Third-Party Defendant,

Of whom Amy Kovach is the Appellant.

Appellate Case No. 2018-000467

Appeal From Berkeley County
Jean Hoefler Toal, Circuit Court Judge

AFFIRMED

M. Dawes Cooke, Jr., and Christopher Mark Kovach,
both of Barnwell Whaley Patterson & Helms, LLC, of
Charleston, for Appellant.

William Howell Morrison, of Haynsworth Sinkler Boyd,
PA, of Charleston, for Respondent Karen Whitley.

Joshua Steven Whitley, of Smyth Whitley, LLC, of
Charleston, and Jeffrey A. Breit, of Virginia Beach, VA,
both for Respondent Joshua S. Whitley.

PER CURIAM: Amy Kovach sued Joshua Whitley, Dr. Karen Whitley, and others alleging civil conspiracy. The Whitleys moved for sanctions for the filing of a frivolous complaint; the motion was granted, and Kovach was ordered to pay \$48,000.00 in attorneys' fees to the Whitleys. Kovach appeals the sanctions. Because the circuit court's factual findings are well supported by the record and the imposition of sanctions was not an abuse of discretion, we affirm.

I.

After a \$198 million bond for the Berkeley County School District (BCSD) was approved by voters in November 2012, a South Carolina State Law Enforcement Division (SLED) investigation concluded BCSD resources had been illegally used to campaign for the bond. Amy Kovach, BCSD's Director of Communications, was charged in an indictment with five crimes: common law misconduct in office, use of public funds to influence an election in violation of § 8-13-1346 of the South Carolina Code (2019),¹ two counts of forgery, and one count of perjury. Kovach

¹ S.C. Code Ann. § 8-13-1346 provides: "A person may not use or authorize the use of public funds, property, or time to influence the outcome of an election."

accepted a plea deal offered by the Attorney General's office where she would plead guilty to misconduct in office and the misuse of public funds in exchange for dismissal of the forgery and perjury charges.

At her plea hearing, the Attorney General explained that, in pleading guilty to the misconduct in office charge, Kovach would also be admitting to facts that would have sustained convictions for forgery and perjury. The Attorney General placed an extensive factual basis for the convictions and Kovach's other misconduct alleged in the indictment on the record, and when the plea judge asked Kovach whether she agreed with the facts "as stated by the [Attorney General]," Kovach stated, "Yes, sir." The plea judge accepted Kovach's guilty pleas and sentenced her to five years' imprisonment, suspended upon service of two years' probation and the payment of a \$25,000.00 fine.

Kovach then hired counsel and sued the BCSD board for claims relating to her employment and termination. In the same lawsuit, she also sued several members of the community who had campaigned against the bond, including Joshua Whitley and Dr. Karen Whitley, for civil conspiracy.

The complaint wove a narrative quite different from the one Kovach stipulated to at the plea hearing. Some of the allegations echoed the Attorney General's timeline and story, while others directly contradicted facts Kovach had agreed under oath were true. For example, Kovach disavowed all facts that would sustain a forgery or perjury conviction, claiming instead the charges were retaliatory and meritless. Kovach alleged the investigation, her prosecution, her public denunciation, and her termination from BCSD employment were orchestrated by the Whitleys.

Joshua Whitley answered the complaint, denying the civil conspiracy allegation and alleging several counterclaims. Additionally, the Whitleys each moved for sanctions against Kovach's counsel under Rule 11, SCRPC, and South Carolina's Frivolous Proceedings Sanctions Act (FPSA), S.C. Code Ann. § 15-36-10 (2005 and Supp. 2018). A few weeks after the complaint was filed, the Attorney General filed a Rule to Show Cause with the plea judge as to why Kovach should not be held in contempt of court for filing a complaint alleging facts directly contrary to the facts she agreed to under oath at her plea hearing. Within six weeks of filing the complaint, Kovach filed dismissals against all the parties who had not yet answered and attempted to negotiate a dismissal with the Whitleys;² however, the Whitleys and Kovach could

² The claims against these other parties were originally dismissed "without prejudice" but were later amended to be dismissals "with prejudice." Dr. Whitley (who had not answered) moved to strike the dismissal of the claims against her, and

not come to agreement about the payment of attorneys' fees. After Kovach's Rule to Show Cause hearing,³ the Whitleys amended their motions for sanctions to include Kovach personally.

After a sanctions hearing, the Whitleys' motions were granted. In the order granting sanctions, the court found that in her guilty plea, Kovach admitted to "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." The order concluded:

At the end of the day, a complaint that materially contradicts a plaintiff's previous sworn testimony from a criminal proceeding lacks 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.

After the order was filed, the Whitleys' attorneys submitted affidavits of their costs and fees. Kovach filed a Rule 59(e), SCRPC motion. The court denied the Rule 59(e), SCRPC motion, and taking into account "the legal fees occurring at various stages after the filing of the frivolous lawsuit, efforts on the part of [Kovach and her counsel] to dismiss the matter, and the efforts of counsel to pursue sanctions," the court ordered Kovach to pay Dr. Whitley \$13,000.00 and Whitley \$35,000.00 in attorney's fees, totaling \$48,000.00. This appeal follows.

II.

The Sanctions Were Not Levied Prematurely

Kovach argues that, under the FPSA, the court may only consider sanctions against a represented party after a dispositive motion or trial has been resolved in the moving party's favor. *See* S.C. Code Ann. § 15-36-10(C)(1)(c) (2005 and Supp. 2018)

the circuit court granted the motion—allowing Dr. Whitley to stay a party to the lawsuit, so her motion for sanctions could be decided.

³ Kovach was not held in contempt as a result of the Rule to Show Cause petition; instead, the plea judge accepted Kovach's apology for filing a complaint with facts in direct contradiction to facts she had agreed were true at her at her guilty plea, as well as Kovach's assurance she would not further aggrieve the court by filing another lawsuit based on the same factual predicate as her convictions.

(providing a represented party may be sanctioned "[a]t the conclusion of a trial" if it is found "the case or defense was frivolous as not reasonably founded in fact"). Kovach contends that, because the court awarded sanctions before discovery or resolution of the merits of her allegations, sanctions were inappropriate and premature.

Kovach was sanctioned under both the FPSA and Rule 11, SCRCF. Even if the FPSA precludes a finding of sanctions against a represented party until after adjudication of the merits, Rule 11, SCRCF, has no such procedural prerequisite. *See* Rule 11(a), SCRCF ("If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, *a represented party*, or both, an appropriate sanction" (emphasis added)). Kovach was sanctioned for alleging facts in a lawsuit that contradicted the factual predicate of her sworn guilty pleas. This is a unique case where further development of the record would not illuminate the relevant issues. Accordingly, we find the imposition of Rule 11, SCRCF sanctions was not premature. *See Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008) ("[W]here the appellate court agrees with the trial court's findings of fact, it reviews the decision to award sanctions, as well as the terms of those sanctions, under an abuse of discretion standard."). We therefore need not reach the issue of whether FPSA sanctions were premature.

Represented Party

Kovach next asserts that, under Rule 11, SCRCF, a represented party may not be sanctioned for an attorney's failure to verify the legal sufficiency of a filing. Kovach contends it is the attorney's obligation to ensure the legal theories presented in a complaint contain merit, not the party's.

Kovach was not sanctioned for the legal theories advanced in her complaint. Rather, the court sanctioned her for disavowing and attempting to re-litigate the facts underlying her two criminal convictions, which she had earlier, in open court, sworn were true. Because Rule 11, SCRCF, provides a represented party may be sanctioned if a lawsuit is filed without "good ground" to support it, the court did not abuse its discretion in sanctioning Kovach. Rule 11(a), SCRCF (providing sanctions may be appropriate against a represented party if a signed pleading does not contain "good ground to support it"); *Ex parte Gregory*, 378 S.C. at 438–39, 663 S.E.2d at 51 (upholding imposition of Rule 11, SCRCF sanctions for the filing of a lawsuit predicated upon false facts).

Effect of Guilty Plea

Kovach asserts her criminal convictions do not foreclose her claim of civil conspiracy; the tort of civil conspiracy does not require proof of innocence; and the facts supporting her guilty plea were separate and distinct from the facts she alleged in her civil conspiracy claim against the Whitleys. According to Kovach, these distinct facts include the following: Joshua Whitley opposed the bond referendum; Joshua Whitley made several negative public comments about Kovach; Dr. Whitley was dissatisfied with the BCSD administration during the referendum because she had been laterally transferred to a less desirable position within BCSD; and Dr. Whitley wanted to harm Kovach, so Dr. Whitley could rise in leadership at BCSD.

After our review of the record, we agree with the circuit court that Kovach's claim of civil conspiracy was an attempt to re-litigate the facts that served as the predicate to her guilty pleas. *See Ex parte Gregory*, 378 S.C. at 436–37, 663 S.E.2d at 50 (providing that, on review of an imposition of sanctions, an appellate court takes its own view of the evidence, but if it agrees with the lower court's findings, "the imposition of sanctions will not be disturbed on appeal absent a clear abuse of discretion"). Because 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, we affirm the imposition of sanctions. *See id.* ("An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions.").

Amount of the Attorneys' Fees Award

Kovach contends the \$48,000.00 attorneys' fees award was not reasonable, as demonstrated by: 1) the Whitleys' failure to confer with Kovach as required by Rule 11, SCRPC, and 2) Kovach's attempts to dismiss the lawsuit within six weeks of its filing. Kovach also asks us to find the award was not equitable, as \$48,000.00 is an amount well above the minimum necessary to deter further lawsuits and constitutes a financial hardship.

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. Finally, because the circuit court demonstrated discretion by considering "the legal fees occurring at various stages after the filing of the frivolous lawsuit, efforts on the part of [Kovach and her counsel] to dismiss the matter, and the efforts of counsel to pursue sanctions" when it awarded the \$48,000.00 amount to the Whitleys, we affirm. *See Ex parte Gregory*, 378 S.C. at 437, 663 S.E.2d at 50 ("[W]here the appellate court agrees with

the trial court's findings of fact, it reviews the decision to award sanctions, *as well as the terms of those sanctions*, under an abuse of discretion standard." (emphasis added)); *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996) ("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 . . ."); Rule 11(a), SCRPC.

AFFIRMED.⁴

THOMAS, HILL, and HEWITT, JJ., concur.

⁴ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

The Honorable Jean Hoefer Toal

Appellate Case No. 2018-000467

Amy Kovach Plaintiff

v.

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

And

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

v.

Amy Kovach Plaintiff/Counterclaim Defendant,

And

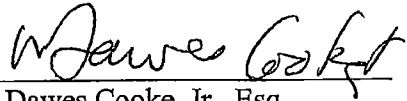
Joshua S. Whitley..... Defendant/Third-Party Plaintiff,

v.

Rodney Thompson..... Third-Party Defendant,

Of Whom Amy Kovach is the Appellant.

AMENDED PETITION FOR REHEARING AND SUGGESTION FOR
REHEARING *EN BANC* OF APPELLANT AMY KOVACH



M. Dawes Cooke, Jr., Esq.
Barnwell, Whaley, Patterson & Helms, LLC
211 King Street, Suite 300
Charleston, SC 29401
(843) 577-7700 Fax: (843) 577-7708
mdc@barnwell-whaley.com
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIESiv

INTRODUCTION..... 1

ARGUMENT 3

 A. The Court Should Grant This Petition for Rehearing and Reverse the
 Imposition of Sanctions on Amy Kovach 3

 1. As a Matter of Law and Fact, the Civil Conspiracy Claim
 Was Not Frivolous 4

 a. There Is No Evidence That the Civil Conspiracy
 Claims Were Untrue 4

 b. A Criminal Conviction Does Not, As a Matter of Law
 Foreclose a Civil Suit..... 7

 B. Even if Appellant’s Complaint Was Sanctionable, This Court Should
 Have Concluded That the Trial Court Imposed Sanctions That Were
 Excessive and Disproportionate to the Actual Expense Incurred 8

 C. Appellant Suggests That This Case Would be Appropriate for
 Rehearing en Banc 11

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

Anderson County v. Preston, 2013 WL 101548069

In re Beard,
359 S.C. 351, 597 S.E.2d 835 (Ct. App. 2004).....3

Bell Atl., Corp. v. Twombly,
550 U.S. 544, 570 (2007).....4

Ex parte Bon Secours–St. Francis Xavier Hosp., Inc.,
393 S.C. 590, 597, 713 S.E.2d 624, 628 (2011)4

Borough v. Duryea, Pa., v. Guanieri,
564 U.S. 379, 387 (2011).....7

Carolina Renewal v. S.C. Dept. of Transp.,
385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009).....8

Father v. South Carolina Dep't of Soc. Servs.,
345 S.C. 57, 72, 545 S.E.2d 523, 531 (Ct. App. 2001).....3

Fox v. Vice, 563 U. S. 826, 836 (2011).....9

Ex parte Gregory,
378 S.C. 430, 663 S.E.2d 46 (2008)4

Goodyear Tire & Rubber Co. v. Haeger,
137 S. Ct. 1178, 1186 (2017).....9

Haring v. Prosis,
462 U.S. 306, 310 (1983).....7, 8

Hunter v. Earthgrains Co. Bakery,
281 F.3d 144, 151 (4th Cir. 2002)10

Jackson v. Speed,
326 S.C. 289, 486 S.E.2d 750 (1997)10

Lee v. Chesterfield General Hosp., Inc.,
289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986).....5

Paroline v. United States,
572 U. S. ___, ___, 134 S.Ct. 1710, 1722, 188 L.Ed.2d 714 (2014).....9

State v. Fletcher, 322 S.C. 256, 259, 471 S.E.2d 702, 704 (1996).....7

STATUTES

S.C. Code § 15-36-10.....3

OTHERS

S.C. Civ. R. 111

S.C. Civ. R. 84

S.C. Civ. R. 113,4,9,10

S.C.A.C.R., Rule 219.....11

S.C.R. Prof. Cond. 1.510

**PETITION FOR REHEARING AND
SUGGESTION OF REHEARING *EN BANC***

AND NOW COMES Appellant Amy S. Kovach, by and through her undersigned counsel, and files the following Petition for Rehearing and Suggestion for Rehearing *en Banc* with respect to the Court's affirmance of the imposition of sanctions upon Amy S. Kovach (Court's Unpublished Opinion ("Opinion")).

INTRODUCTION

This matter began as an action styled: *Amy S. Kovach v. Joshua S. Whitley and Karen Whitley, in her individual capacity, 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* No. 2015-ES-21-00778 (In the Common Pleas Court of Berkeley County, South Carolina) This appeal concerns sanctions imposed on Amy S. Kovach regarding a claim she asserted for civil conspiracy against Defendants Joshua S. Whitley and Karen Whitley.

On October 15, 2015, Appellant filed an action against Respondents for Civil Conspiracy arising from Respondent's actions before, during, and after the 2012 Berkeley County School Improvement Bond Referendum. During this referendum, Appellant was tasked by her superiors with providing information to support district employees and leadership as well as member of the public seeking information regarding the referendum. Joshua Whitley led a group actively opposing the referendum and who sought criminal prosecution of Appellant as well as the School District Superintendent and Deputy Superintendent for their efforts during the referendum.

Following receipt of Appellant's complaint, Respondents immediately filed a motion for sanctions against Appellant's counsel, Nancy Bloodgood. Counsel for Respondents then made demands upon Bloodgood for payment of attorney's fees. Appellant was not a party to any communications between Bloodgood and Respondents on the issue of sanctions against

Bloodgood or any payment of attorney fees by Bloodgood. Respondents subsequently amended their motions for sanctions to include Appellant in February 2016. The matter came before the trial court for hearing on September 16, 2016. The trial court issued its order granting sanctions on October 24, 2016 and following Motions for Reconsideration filed by Attorney Bloodgood and Appellant, the trial court held a hearing on January 17, 2017 and entered its final order on February 19, 2018. This final order assessed sanctions against Attorney Bloodgood in the amount of \$15,000.00 and Appellant in the amount of \$48,000.00.

Amy S. Kovach appealed from the imposition of sanctions upon her. On December 9, 2020, this Court filed its Opinion ("Opinion") that affirmed the imposition of sanctions on Amy S. Kovach. Specifically, this Court found that the trial court did not err in imposing sanctions because the trial court's factual findings were well supported by the record. Additionally, this Court held that the trial court did not abuse its discretion by imposing excessive sanctions. For the reasons that follow, Appellant respectfully asserts that this Court's Opinion is in error. This Court should grant rehearing as to its affirmance of the sanctions imposed on Amy S. Kovach and reverse the trial judge's imposition of those sanctions.

ARGUMENT

A. The Court Should Grant This Petition for Rehearing and Reverse the Imposition of Sanctions on Amy S. Kovach

In its Opinion, this Court affirmed the imposition of sanctions upon Amy S. Kovach pursuant to Rule 11 of the South Carolina Rules of Civil Procedure. Rule 11(a) 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.” “[T]he criteria for Rule 11 sanctions are essentially the same as those for sanctions under the [F frivolous Proceedings 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)). Under the Frivolous Proceedings Act, “[a]n attorney or pro se litigant participating in a civil or administrative action or defense may be sanctioned for . . . filing a frivolous pleading, motion, or document.” *See* S.C. Code § 15-36-10(A)(4)(a).

Though the Opinion is unpublished, the Court’s holding runs counter to sound public policy in several important respects. First, it permits imposition of Rule 11 sanctions without any development or determination of the merits of the underlying claim, thus incentivizing parties and attorneys to continue to prosecute cases to conclusion rather than risk creating an inference that the case was frivolous. Parties should be encouraged to reconsider their decisions to pursue litigation, as Amy Kovach did here, rather than feel obliged to build a record to stave off sanctions. Second, the holding effectively requires a represented party take on the role of her counsel in evaluating various legal theories or whether a claim is legally viable. Members of the public rely upon assistance from legal counsel at confusing, critical, and oftentimes traumatic moments. Lawyers in turn provide advice to their clients as fiduciaries and represent them zealously through suits or legal positions that they “believe[s] to be honestly debatable under the law of the land.” As will be shown below, Appellant had reason to believe that she had a viable claim for civil conspiracy against Respondents because such a claim did not appear to be incompatible with her guilty plea.

Third, the holding fails to address case law holding that a criminal conviction does not foreclose a subsequent civil suit. A person convicted of two misdemeanors does not, as a matter of law, forfeit all rights to pursue subsequent legal actions.

For the reasons that follow, this Court should grant a partial rehearing in this matter because the trial court erred in imposing sanctions on Amy S. Kovach.

1. As a Matter of Law and Fact, the Civil Conspiracy Claim Was Not Frivolous

a. There Is No Evidence That the Civil Conspiracy Claims Were Untrue

The trial judge erred in imposing sanctions because Respondents did not present a scintilla of evidence that the Civil Conspiracy Complaint was, in fact, frivolous or without any merit. Respondents, as the parties moving for sanctions, bore the burden of showing that the claims against them were frivolous. In ordinary circumstance, motion for sanctions is made following an adjudication of the merits of the underlying claim or at least where the Movants bring forth evidence that the claims against them lack factual basis. There were no such adjudications here. In its Opinion, this Court held that "This is a unique case where further development of the record would not illuminate the relevant issues." (*See* Opin., at 5). Appellant respectfully states that this is precisely the type of case that requires the development of a factual record regarding the civil conspiracy complaint against Respondents in order to illuminate relevant issues.

Civil Rule 8 (a)(2) requires a plaintiff to set for a short and plain statement of the facts showing that the pleader is entitled to relief. This requires plaintiffs to plead "enough facts to state a claim for relief that is plausible on its face." *Bell Atl., Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A party seeking sanctions under Rule 11 must prove an attorney signed a pleading or motion "to cause delay or when no good grounds exist to support the filing." *See Ex parte Bon Secours–St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 597, 713 S.E.2d 624, 628 (2011). "A court imposing sanctions under Rule 11 should, in its order, describe the conduct determined to constitute a violation of the Rule and explain the basis for the sanction imposed." *Ex parte Gregory*, 378 S.C. 430, 438, 663 S.E.2d 46, 50 (2008).

In this case, there is nothing in either the trial court's order or this Court's opinion which specifies how the allegations supporting the civil conspiracy claim are untrue. The elements of a civil conspiracy are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages. Therefore, the essential consideration in civil conspiracy "is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the primary purpose or object of the combination is to injure the plaintiff." *Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986). The gravamen of a civil conspiracy action is the damage created and not whether the actions taken to create those damages were lawful or unlawful. The trial court focused its attention entirely on Appellant's guilty plea without ever considering the factual considerations necessary to support a claim for civil conspiracy. Indeed, there is nothing in the record refuting the allegations contained in the complaint regarding the existence of a civil conspiracy against Appellant.

Appellant's guilty plea was limited to two discrete elements. First whether she made a video regarding the bond referendum campaign and, and second, whether she purchased campaign signs with a value of \$259.20. (R. p 1097, lines 2-8). The gravamen of Appellant's civil conspiracy complaint was not that she was attempting to disavow those two admissions. It was instead to assert a cause of action addressing Respondents' attempts to use these relatively minor items done by Appellant at the behest of her employer to carry out a personal or political vendetta against Appellant. These civil conspiracy allegations were specific, did not disavow Appellant's guilty plea, and *have been disproven*. The allegations regarding the existence of a civil conspiracy include:

Organizing and leading a bond referendum opposition group which engaged in vitriolic commentary regarding Respondent and actively engaging in efforts to undermine Appellant's statutory right to reimbursement of Appellant's attorney's fees as a district employee. (R. p. 0045 ¶3, p. 0050 ¶41, p. 0052 ¶52, ¶, p. 0064 ¶124, p. 0070 ¶¶161, 162).

Making defamatory statements directly addressing Appellant and inciting fear and gathering to injure her including "she does not know whether to defecate or go blind", and "isn't it grand when a plan comes together." (R. p. 0063 ¶121).

With respect to Karen Whitely, Joshua Whitley's mother and a school district employee who worked directly with Kovach during the 2012 bond referendum, the complaint alleges that the then-associate superintendent was laterally transferred into a position with less authority upon the hiring of Dr. Thompson (the Berkeley County School District Superintendent). (R. p. 0051 ¶¶ 43-44).

That, upon information and belief, Karen Whitley had an objective to cause harm and embarrassment to her supervisors so that she would rise in leadership within the school district. (R. p. 0051 ¶45)

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

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

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

In this case, Appellant's complaint complied with the requirements of the civil rules and stated a plausible action for civil conspiracy. Nothing in the civil conspiracy complaint allegations seek to undue or refute the statements made during Appellant's guilty plea as none of these allegations were every addressed during the guilty plea. (R. p. 00159-67). Indeed, even after removing all reference to the criminal case, the complaint still states a plausible claim for civil conspiracy because none of the allegations are in any way predicated upon Appellant's innocence of the charges contained in that matter.

The trial judge never analyzed the substance of the civil conspiracy claims and did not permit a hearing or discovery on the issue. Instead, the trial court ruled that, "the facts admitted under oath at the guilty plea, and the plea itself, foreclose the claim against Defendants for civil conspiracy, because the allegations against *them* (*i.e. Respondents*) directly contradict Mrs. Kovach's material admissions under oath." (R. p. 0017). This statement is without any factual support in the record. There is absolutely nothing in the record in this motion for sanctions or at

the guilty plea hearing where any factual allegation regarding the existence of a civil conspiracy involving Respondents was ever discussed let alone refuted or disproven.

b. A Criminal Conviction Does Not, As a Matter of Law Foreclose a Civil Suit

In its opinion, this Court agrees with the circuit court that Appellant's claim of civil conspiracy "was an attempt to re-litigate the facts that served as the predicate for her guilty plea." (See Opin., at 6). As stated above, the allegations regarding civil conspiracy were not an attempt to relitigate facts from Appellant's guilty plea as none of the facts supporting the civil conspiracy allegations were ever addressed in the guilty plea. Moreover, as a matter of law, "criminal judgments whether by guilty plea or adjudicated guilt, have no preclusive effect on subsequent civil litigation." *Haring v. Prosser*, 462 U.S. 306, 310 (1983). Therefore, even if the subsequent civil litigation touches upon information contained in the prior criminal complaint, there is no basis under law to prohibit this from occurring.

Appellant properly sought redress from the court for actions taken against her involving a political fight between Respondents and a school district for which she believed she was made a scapegoat. "The right of access to court for redress of wrongs is an aspect of the First Amendment right to petition the government." *Borough v. Duryea, Pa., v. Guanieri*, 564 U.S. 379, 387 (2011). This right to access should not be restrained utilized as a basis for punishment as, "It is a due process violation to punish a person for exercising a protected statutory or constitutional right." *State v. Fletcher*, 322 S.C. 256, 259, 471 S.E.2d 702, 704 (1996).

In this case, Appellant was not collaterally estopped from asserting her action for civil conspiracy regardless of her guilty plea. Under South Carolina law, in order to assert a collateral estoppel claim, a party, "must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support

the prior judgment.” *Carolina Renewal v. S.C. Dept. of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). Nowhere in the trial court’s order or this Court’s opinion affirming it is the holding of *Haring v. Prosis* addressed. Nor it is explained how the prior criminal matter in any way actually litigated the specific allegations against Respondents contained in the civil conspiracy complaint.

B. Even if Appellant’s Complaint Was Sanctionable, This Court Should Have Concluded That the Trial Court Imposed Sanctions That Were Excessive and Disproportionate to the Actual Expense Incurred

The trial judge sanctioned Appellant and awarded Respondents \$48,000.00 in legal fees related to a civil action addressing matters of first impression which she directed her attorney to dismiss within one month of filing. This Court affirmed the amount of sanctions, stating:

The circuit court’s award was well below the amount the Whitleys claimed they accrued in legal fees for the time period before Kovach attempted to dismiss the case. Further the record indicates the Whitleys attempted to negotiate a dismissal of the civil conspiracy claim and sanctions motions, but they could not reach an agreement with Kovach about the payment of attorneys’ fees.

(See Opin., at 6). For the reasons that follow, this Court should have reversed the trial judge’s amount of sanctions as being excessive and disproportionate.

First and foremost, Contrary to this Court’s holding, the record does not include any evidence that Respondents ever attempted to negotiate with *Appellant* regarding payment of fees. Respondent instead pursued *Appellant’s counsel*, Nancy Bloodgood for payment of fees. In doing so, Respondents even chastised Bloodgood for putting her own interest ahead of her client’s by failing to acquiesce to their demand for fees. (R. pp. 001368-69) Appellant agreed to dismiss her complaint against all parties (including those who did not pursue sanctions against Bloodgood) within one month of filing the complaint. Appellant has no knowledge of any negotiations between Respondents and Attorney Bloodgood regarding Bloodgood’s payment of attorney fees and was certainly never consulted regarding paying Bloodgood’s fees. Furthermore, Respondents never

notified Appellant of any intent to pursue sanctions against her or negotiate for payment of attorney fees prior to filing their motion for sanctions against her in February 2016.

The United States Supreme Court has held a sanctions award is only compensatory where it compensates the moving party for fees that would not have been incurred but for the sanctioned conduct:

[A]s we have previously noted, a sanction count is compensatory only if it is ‘calibrate[d] to [the] damages caused by’ the bad-faith acts on which it is based. . . . A fee award is so calibrated if it covers the legal bills that the litigation abuse occasioned. . . . That kind of causal connection, as this Court explained in another attorney’s fees case, is appropriately framed as a but-for test: The complaining party (here, the Haegers) may recover ‘only the portion of his fees that he would not have paid but for’ the misconduct. *Fox v. Vice*, 563 U. S. 826, 836 (2011); see *Paroline v. United States*, 572 U. S. ___, ___, 134 S.Ct. 1710, 1722, 188 L.Ed.2d 714 (2014).

Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178, 1186 (2017). .

Furthermore, Rule 11 requires that, “all motions filed shall contain an affirmation that the movant’s counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion, unless movant’s counsel certifies that consultation would serve no useful purpose or could not be timely held... If a motion... does not comply with this rule, it shall be stricken.” *Anderson County v. Preston*, 2013 WL 10154806.

In this case, there was never any consultation between Appellant and Respondents regarding a sanctions motion against Appellant. Instead, Respondents resisted Appellant’s efforts to dismiss her case only to the extent that they wished to seek attorney fees from Attorney Bloodgood. Substantially all of Respondent’s counsel’s efforts, as evidenced by their Motion arguments, were spent arguing against the legal ability of Appellant to pursue her action against them. But it is important to note that substantially all of these expenses occurred after Appellant had already instructed her attorney to dismiss the action. A party should not be penalized for reassessing its position or seeking to dismiss a matter because doing so effectively forces a party to continue litigating and developing a factual record in order to stave off a motion for sanctions.

In this case, the circuit court has done exactly that by sanctioning Appellant without giving her the opportunity to develop a factual record supporting the allegations of civil conspiracy in the complaint.

In examining the reasonableness of attorney fees, “the injured party has a duty to mitigate costs by not overstaffing, overresearching or overdiscovering clearly meritless claims.” *In re Kunstler*, 914 F.2d 505, 523 (4th Cir. 1990). While Appellant’s claims were not clearly meritless, as evidenced by the trial court’s request for briefing on the issues, spending undue time researching a matter of first impression after the threat of litigation had ended is completely contrary to mitigating costs. If such extensive legal research was indeed necessary, then this alone is evidence that the legal claim clearly not meritless and it is inequitable to require Appellant to pay for it.

Neither the trial court nor this Court engaged in a sufficient detailed evidentiary analysis to determine whether the attorneys' fees awarded in the sanctions were reasonable. The primary purpose of sanctions under Rule 11 is not to compensate the prevailing party, but to deter future litigation abuse, *See Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 151 (4th Cir. 2002). In keeping with the rule’s purpose, a court should impose the least severe sanction adequate to serve the deterrence function of the rule. *In re Kunstler*, 914 F.2d 505 (4th Cir., 1990). Assessment should be based on four factors: 1) the reasonableness of opposing party’s attorney fees; 2) the minimum to deter; 3) the ability to pay; and 4) factors related to the severity of the Rule 11 violation. *Id.* In determining the reasonableness of legal fees, South Carolina courts typically focus on six factors from the case of *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997): (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. The factors for determining the reasonableness of fees set forth in Rule 1.5 of the Rules of Professional Conduct, Rule 407, SCACR, include the same factors as those in *Jackson*. Neither the trial judge nor this Court analyzed any of these factors contained *In re Kunstler* or *Jackson v. Speed*, which would have supported a \$48,000.00 sanction award.

Further, even if supported by any evidence, the amount of \$48,000.00 allegedly spent to defend a lawsuit with a total duration of one month is facially excessive and grossly disproportionate and runs contrary to the efficient administration of civil matters to construe the civil rules to "secure the just, speedy, and inexpensive determination of every action". Civ. R. 1.

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

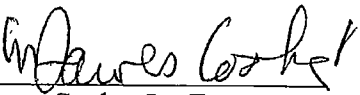
C. Appellant Suggests That This Case Would Be Appropriate for Rehearing *en Banc*

South Carolina Rule of Appellate Procedure 219(a) provides that a rehearing *en banc* may be appropriate where "(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." As discussed above, the issues in Mrs. Kovach's appeal implicate matters of exceptional importance to the South Carolina legal profession and to those who seek legal representation from it. The Court has affirmed the award of sanctions under circumstances that threaten to discourage attorneys from taking on unpopular causes or difficult cases out of fear of sanctions and countenanced separating a represented party from her chosen counsel through the threat of sanctions upon that counsel. Encouraging this tactic will obstruct the ability of laypersons to obtain legal representation in cases of first impression. Furthermore, the injection of threatened criminal sanctions against a civil litigant suppresses that litigant's constitutional right to free speech to seek redress of civil wrongs in the court system and runs contrary to United States Supreme Court precedent. It is therefore appropriate for the Court of Appeals *en banc* to consider these difficult and important legal questions.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Rehearing and Suggestion for Rehearing *en Banc* of Appellant Amy Kovach and should reverse the trial judge's imposition of sanctions of \$48,000.00 upon Appellant.

January 6, 2021

By: 
M. Dawes Cooke, Jr., Esq.
Barnwell, Whaley, Patterson & Helms, LLC
211 King Street, Suite 300
Charleston, SC 29401
(843) 577-7700 Fax: (843) 577-7708
mdc@barnwell-whaley.com
Attorneys for Appellant Amy S. Kovach

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

The Honorable Jean Hoefer Toal

Appellate Case No. 2018-000467

Amy Kovach Plaintiff

v.

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

And

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

v.

Amy KovachPlaintiff/Counterclaim Defendant,

And

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

v.

Rodney Thompson..... Third-Party Defendant,

Of Whom Amy Kovach is theAppellant.

PROOF OF SERVICE

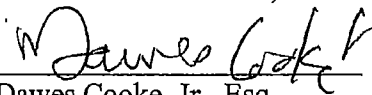
I certify that I have served the Appellant's Amended Petition for Rehearing and Suggestion for Rehearing *en Banc* on the above-referenced Respondents by depositing a copy of it in the United States Mail, postage prepaid, on January 6, 2021, addressed to the following parties and their attorneys of record:

Jeffrey A. Breit, Esquire
Breit Drescher Imprevento, P.C.
Town Pavilion Center II
600 22nd Street, Suite 402
Virginia Beach, VA 23451
Attorney for Respondent Joshua Whitley

Wm. Howell Morrison, Esquire
Haynsworth Sinkler Boyd, P.A.
134 Meeting Street, 3rd Floor
Charleston, SC 29401
Attorney for Respondent Karen Whitley

Joshua S. Whitley, Esquire
Smyth Whitley, LLC
126 Seven Farms Drive, Suite 150
Charleston, SC 29492
Attorney for Respondent Joshua Whitley

BARNWELL WHALEY
PATTERSON & HELMS, LLC

By: 
M. Dawes Cooke, Jr., Esq.

211 King Street, Suite 300
Charleston, SC 29401

(843) 577-7700

Attorney for Plaintiff/Appellant Amy Kovach

The South Carolina Court of Appeals

Amy Kovach, Plaintiff,

v.

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

And

Joshua S. Whitley, Defendant/Counterclaimant,

v.

Amy Kovach, Plaintiff/Counterclaim Defendant,

And

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

v.

Rodney Thompson, Third-Party Defendant,

Of whom Amy Kovach is the Appellant.

Appellate Case No. 2018-000467

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Thomas

J.

D. Manli

J.

3L [Signature]

J.

Columbia, South Carolina

cc:

M. Dawes Cooke, Jr., Esquire
William Howell Morrison, Esquire
Jeffrey A. Breit, Esquire
Christopher Mark Kovach, Esquire
Joshua Steven Whitley, Esquire
The Honorable Jean Hoefler Toal

FILED
Jan 21 2021

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.: 2021-000174

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

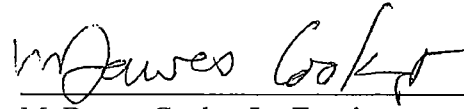
v.

Rodney Thompson..... Third-Party Defendant

Of Whom Amy Kovach is the Petitioner.

CERTIFICATE OF COUNSEL

I hereby certify that the Appendix complies with Rule 242, SCACR.



M. Dawes Cooke, Jr., Esquire

SC Bar No.: 1376

Barnwell Whaley Patterson & Helms, LLC

211 King Street, Suite 300

Charleston, SC 29401

Attorney for Petitioner Amy Kovach