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

Appellate 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' BRIEF

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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 as a circuit judge. 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. Kovach then filed a Petition for Writ of Certiorari with this Court, which the Court granted on October 12, 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. As part of the negotiated plea, in exchange for dismissing the three remaining charges, Kovach admitted to the underlying facts of those three remaining 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.

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 Kovach's 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. pp. 45-75. 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 her admission to criminal conduct. On November 3, 2015, Mr. Whitley filed his Answer, Counterclaims, and Third Party Complaint, as well as a Motion for Sanctions against Bloodgood for having filed a frivolous pleading against him. Karen Whitley filed a Motion for Sanctions on November 16, 2015. R. pp. 76-157.

The Complaint also contains various allegations of wrongdoing against non-parties. Specifically, Kovach alleged obstruction of justice, fraud on the court, and ethical breaches against the Attorney General, his lawyers, SLED, and one if its agents. R. p. 60, ¶¶ 104, 106 (perjury and forgery indictments were "retaliatory" and "completely bogus"); R. p. 61, ¶ 110 (SLED agent "drafted a false interview report with witness..."); R. pp. 61-62, ¶ 112 (Attorney General attributed

a doctored document to Kovach knowing that it was not Kovach's and SLED agent obstructed justice); R. p. 62, ¶ 115 (SLED knew that "smurfing" charges were "patently false"); and R. pp. 62-63, ¶ 117 (Attorney Generals' Office "manufactured" smurfing charge to injure Kovach)). Kovach alleged no actual claims against these parties, but she questioned the credibility of the investigation and indictment and implied throughout that she was not actually guilty of the crimes to which she pled guilty or the indicted charges dismissed in her plea deal.[1]

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

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

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

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

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

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

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

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

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

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

In her Statement of Facts, Kovach states that she "believed, and contended, that her criminal prosecution was politically motivated." (Petitioner's Brief, p. 10.) 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 therefore affirm the Court of Appeals' decision.

ARGUMENT

I. 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. *Se. 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.*

II. The Trial Court Properly Awarded Sanctions Against Kovach, And The Court of Appeals Properly Affirmed That Decision, Because There Was No Good Ground To Support Kovach's Civil Conspiracy Claims Against The Whitleys.

A. Rule 11

Rule 11(a), SCRCP, 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, SCRCP. 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 in this case was whether "good ground" existed to support the filing of a civil conspiracy claim against the Whitleys. 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).

B. The Court of Appeals Correctly Affirmed The Trial Court's Ruling That Kovach's Civil Conspiracy Claim Was An Impermissible Attempt to Re-Litigate The Facts That Served As The Predicate To Her Guilty Pleas And Was Therefore Frivolous And Sanctionable.

In her Brief, Kovach wrongly contends, as she did below, that her guilty pleas do not foreclose her claim of civil conspiracy. She asserts that her civil conspiracy claim is consistent with, and did not seek to impermissibly relitigate, her guilty pleas. The Court of Appeals properly rejected her arguments.

The elements of a civil conspiracy in South Carolina are (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff. *Paradis v. Charleston County Sch. Dist.*, 433 S.C. 562, 574, 861 S.E.2d 774, 780 (2021).[2] Kovach relies on authorities holding that a claim of civil conspiracy may be proven even if the defendants' actions are lawful. *See City of Hartsville v. South Carolina Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 546, 677 S.E.2d 574, 578-80 (2009). She argues that her "guilty plea did not preclude her assertion of the civil conspiracy claim, where her Complaint alleged that Respondents engaged in a lawful activity for an unlawful purpose." (Petitioner's Brief, p. 19, citing *Paradis*.) But none of the authorities she cites address the filing of a civil conspiracy claim by a plaintiff who has admitted under oath that she is guilty of the crimes for which defendants allegedly "conspired" to have her prosecuted.

To start with, the conspiracy allegations against the Whitleys in Kovach's fourth cause of action were limited to the following:

- Mr. Whitley 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

[2] At the time Kovach filed the Complaint at issue, a plaintiff asserting a civil conspiracy action under South Carolina law was required to prove special damages. *Pye v. Estate of Fox*, 369 S.C. 555, 566-567, 633 S.E.2d 505, 511 (2006). The Court in *Paradis* removed that element from the tort, replacing it with "damages proximately resulting to the plaintiff." *Id.* at 574, 861 S.E.2d at 780.

Republican Party, LLC encouraging the Attorney General to prosecute Kovach. R. p. 70, ¶ 159.

- Mr. Whitley 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." R. p. 70, ¶ 160.
- Mr. Whitley and others "suggested stories and provided false information to the press...." and "communicated directly with Defendant BCSD Board members to turn them against Plaintiff." R. p. 70, ¶¶ 161-162.
- 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.'" R. p. 70, ¶ 163.
- Mr. Whitley exchanged emails with his mother, Karen Whitley, regarding the lease of Karen Whitley's private property while Karen Whitley was at work. R. p. 71, ¶ 168.
- Mr. Whitley violated Rule 3.6 of the Professional Rules of Conduct for Lawyers by repeatedly commenting on a pending matter that SLED was conducting an investigation in order to influence the outcome of the SLED investigation. R. p. 71, ¶ 170.
- Mr. Whitley "threatened to sue volunteer Campaign Coordinator Co-Chair Jane Pulling if she continued to support Plaintiff." R. p. 72, ¶ 171.
- Mr. Whitley "bragged publically [sic] that he hoped to harm the School District." R. p. 72, ¶ 172.
- Mr. Whitley "issued multiple FOIA requests for emails of other BCSD employees who publically [sic] expressed support for Plaintiff." R. p. 72, ¶ 173.

- Mr. Whitley "knew and encouraged his mother to use public resources while she was working to lease her personal property which personally benefited her." R. p. 72, ¶ 174.

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 their 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.

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.E2d 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 v. Bilton*, 379 S.C. 132, 136, 666 S.E.2d 224, 226 (2008) ("[t]his Court recently extended the doctrine of collateral estoppel by adopting the rule 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'") (quoting *Doe,* 346 S.C. at 148, 551 S.E.2d at 258). *See U.S. CFTC v. Leben*, 3:14-cv-866-TLW, 2016 U.S. Dist. LEXIS 192662, *5 (D.S.C. 2016) (holding that a civil defendant was precluded from "relitigating the facts

and issues he admitted when he pled guilty" under the doctrine of collateral estoppel). In *Zurcher*, two men were involved in an altercation. One of the men, Zurcher, filed a civil suit against the other, Bilton and Bilton's company, alleging assault and battery, false imprisonment, abuse of process, malicious prosecution, and intentional infliction of emotional distress. Zurcher then entered an *Alford* plea to assault and battery in the criminal proceeding against him arising out of the incident. The Court held that Zurcher's *Alford* plea at the criminal proceeding collaterally estopped him from litigating the claims and counterclaim (against Bilton) asserted at the subsequent civil proceeding, all of which hinged on whether Zurcher physically assaulted Bilton. *Id.* at 134-135, 666 S.E.2d at 226. Likewise, here, Kovach's civil conspiracy claims hinge on whether she engaged in the conduct to which she admitted during the sentencing hearing. Under these authorities, no actionable claim for civil conspiracy could exist against Mr. Whitley because of Kovach's admissions under oath at the sentencing hearing. As is clear that a party pleading to an *Alford* plea is subsequently precluded from filing a civil claim, there is no question that Kovach is *bound by her guilty plea* under South Carolina law and she cannot take a position contrary to her previous admissions under oath at the guilty plea hearing.

Kovach asserts that she "does not allege that she did not violate any laws..." (Petitioner's Brief, p. 20.) This is false. In her Complaint, Kovach specifically contradicts the facts to which she confessed during the sentencing hearing and which established the factual predicate for the crimes she committed. *See* e.g., R. p. 50, ¶ 38 ("The video plaintiff was working on was not prepared in anticipation of the Referendum"); ¶ 40 ("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, ¶ 57 ("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, ¶ 83: ("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, ¶ 111 ("The indictment was false and unfounded, as was the first indictment, and was ultimately dismissed"); R. p. 60, ¶ 106 ("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. p. 63, ¶ 123 ("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 allegations in her Complaint (as also similarly alleged in her grievance Affidavit) that conflicted with her admissions during sentencing prompted the Attorney General to issue a motion to show cause. At the show cause hearing, 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 trial court and 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 asserts in her Brief that "the Respondents (and others) conspired to ensure - for the improper purpose of harming Ms. Kovach - that the State's prosecutorial discretion would be exercised in favor of full prosecution...even though the amount at issue was relatively small...she did not directly and personally benefit from her actions....there existed a difficult legal question of

whether the referendum was even an election under the statute....others, including possibly Respondents themselves, had also engaged in conduct in connection with the referendum that might have violated the law....[and she] consistently contended that she was only acting as part of the School District's bond referendum campaign and that the superintendent and school board instructed her to supply informational support to the public concerning the referendum." (Petitioner's Brief, pp. 21-22.) In all of these arguments she seeks to undermine the validity of her guilty pleas and voluntary admissions to the factual allegations underlying all of the State's charges against her. And, as the trial court correctly noted (and counsel for Kovach agreed), during the hearing on the Whitleys' motions for sanctions, Kovach pled guilty to a charge "that carries with it the charge that it was done for personal gain." R. pp. 1209-1210. Respectfully, her brief continues to perpetuate a false narrative reenforcing the need for sanctions against her. After having the benefit of legal counsel that charged the taxpayers of Berkeley County in excess of $300,000.00, Kovach had the opportunity to challenge the State's case in the criminal proceedings and deny any facts which she believed were untrue, but she chose instead to admit to the facts underlying *all* of the State's charges. Under South Carolina law, she is not entitled to raise these issues again in a subsequent civil matter.[3]

Kovach contends that her guilty pleas were limited to the issues of whether she made the video regarding the bond referendum and whether she purchased campaign signs. (Petitioner's Brief, pp. 16-17.) She attempts to minimize her admissions, under oath, to the material facts supporting *all five charges against her*, including the two felony forgery charges and the perjury

[3] Kovach further argues that "the Attorney General - allegedly egged on by Respondents - sought to deprive [her] of her statutory right to reimbursement of criminal attorneys' fees." (Petitioner's Brief, p. 22.) The Whitleys, of course, are not responsible for the actions of the Attorney General, and there are no allegations in the Complaint against them concerning her legal fees.

charge related to her efforts to cover up her misconduct. R. pp. 1102-1104; 1086, 1089-1090; 1093, 1111, 1113, 1116-1118. She does admit that "[t]he Attorney General agreed to dismiss the forgery and perjury charges against [her] so any facts relating to forgery, perjury or dishonesty *were necessary to her guilty plea.*" (Petitioner's Brief, p. 17) (emphasis added). Yet she claims her admission during the sentencing hearing that she "agree[d] with the facts as stated by the attorney general" (R. pp. 1091) was merely a "general statement," despite its having been made under oath and reaffirmed at the rule to show cause hearing where she begged mercy on the Court. First, 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 misconduct in office (i.e., corruption), Kovach was estopped from litigating the same issues in a subsequent civil suit. *Zurcher, supra.*

Second, Kovach is arguing, in essence, that a defendant is free to admit, *under oath*, to criminal conduct for the purpose of having charges dismissed, and then deny those facts in a later civil case. This nonsensical position not only makes a mockery of the justice system, but it is also precluded by principles of judicial estoppel. Under South Carolina law, Kovach is 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.). Kovach's reliance on *Cothran v. Brown*, 357 S.C. 210, 217, 592 S.E.2d 629, 632 (2004), wherein the Court held that a defendant who pleaded guilty to reckless homicide could raise the issue of the decedent's comparative negligence in a subsequent civil action arising out of the same accident, is misplaced. There, the Court reasoned that the defendant could raise that issue in the civil case because the decedent's relative fault was not an issue in the

guilty plea. *Id.* at 217, 592 S.E.2d at 632. Notably, the defendant was not seeking to deny his own fault, and the court held that he could not deny liability in the civil case. Here, by contrast, Kovach sought to hold Respondents liable for conspiring to have her prosecuted for crimes she admits to having committed under oath, but denies having committed in her Complaint. Unlike the scenario presented in *Cothran*, those two positions necessarily conflict. *Cothran* is therefore inapplicable here.

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 and, begging mercy on the Court, represented the Complaint was misplaced and had already been dismissed with prejudice. Setting aside that her civil attorney had refused at that point to dismiss the case with prejudice, Kovach's conduct to the Court was clear – in exchange for not revoking her 5-year suspended sentence, she would forevermore dismiss this falsely filed Complaint. Yet, she continues to this date to litigate and re-litigate her criminal conduct through the civil process. 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.

Sanctions were properly awarded against Kovach 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. The same is unequivocally true here.

Here, Kovach alleges that Whitley 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, ¶ 159. She alleges further that Whitley 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." R. p. 70, ¶ 160. In her Brief, she contends that the "crux of her claim is that she was charged and forced to plead guilty because of the conspiracy." (Petitioner's Brief, p. 23.) Her allegations, if permitted to proceed, would, as in *Tozier*, necessarily undermine the validity of her guilty plea and conviction. She was therefore properly sanctioned for these specious

allegations under Rule 11.

Kovach's reliance on *Haring v. Prosise*, 462 U.S. 306, 308 (1983) (Petitioner's Brief, p. 24) for her argument that her guilty plea did not preclude her civil conspiracy claim is misplaced. In *Haring*, the plaintiff claimed that Virginia police officers had searched his apartment without probable cause and had seized materials used to manufacture a controlled substance. In disposing of the officers' contention that the accused's (plaintiff's) guilty plea to one count of manufacturing a controlled substance foreclosed his Section 1983 claim, the Court stated

> We begin by reviewing the principles governing our determination whether a Section 1983 claimant will be collaterally estopped from litigating an issue on the basis of a prior state-court judgment. Section 28 U.S.C. § 1738 generally requires 'federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.' In federal actions including § 1983 actions, a state-court judgment will not be given collateral estoppel effect, however, where 'the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court.' Moreover, additional exceptions to collateral estoppel may be warranted in § 1983 actions in light of the 'understanding of § 1983' that 'the federal courts could step in where the state courts were unable or unwilling to protect federal rights.'
>
> The threshold question is whether *under the rules of collateral estoppel applied by the Virginia courts*, the judgment of conviction based upon Prosise's guilty plea would foreclose him in a later civil action from challenging the legality of a search which had produced inculpatory evidence.

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

a state court conviction only if the constitutional issue was actually litigated and necessarily determined in the state proceeding.") (emphasis added). Under South Carolina law, by contrast, guilty pleas are preclusive in subsequent civil litigation. *Doe v. Doe*, 346 S.C. 145, 146, 551 S.E.2d 257, 258 (2001); *Sanders v. Leeke*, 254 S.C. 444, 447, 175 S.E.2d 796, 797 (1970); *Zurcher v. Bilton*, 379 S.C. 132, 136, 666 S.E.2d 224, 226 (2008). Moreover, Kovach had a full and fair opportunity to litigate the claim or issue decided by the first court and admitted to her criminal conduct. Kovach has failed to distinguish any of these controlling South Carolina authorities. 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.

Kovach's reliance on the United States Supreme Court's decision in *Borough of Duryea, Pa. v. Guanieri*, 564 U.S. 379, 387 (2011) (Petitioner's Brief, p. 24) is equally infirm. She quotes the *Guanieri* Court's statement that "the right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government," but fails to note the *Guanieri* Court's recognition that the Petition Clause of the First Amendment does not protect "objectively baseless" litigation, and that sanctions are available under Fed. R. Civ. P. 11 "for claims that are 'presented for [an] improper purpose,' frivolous, or lacking evidentiary support." *Guarnieri*, 564 U.S. at 390 (quoting Fed. R. Civ. P. 11).[4]

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[4]Kovach's reliance on *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337 (2008) for its statement that "[c]itizens must be afforded access to the judicial process to address alleged injustices," *Id.* at 199, 669 S.E.2d at 341, is also misplaced. The quotation relied on is taken out of context. There, the Court balanced the competing policy concerns underlying the issue of standing in claims against public officials - access to the judicial process v. concerns over judicial economy and the freedom from frivolous lawsuits. *ATC South, Inc.* is inapplicable here.

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. But the factual predicate of her Complaint, including the civil conspiracy cause of action, was that charges against her were "completely bogus" and she was innocent, which, as she admitted during the show cause hearing, directly contradicted her previous admissions of guilt.

Kovach attempts to liken her case to a claim of abuse of process where, she asserts, the claim can be proven "even when the underlying process is substantively meritorious." (Petitioner's Brief, p. 24.) First, Kovach did not claim abuse of process. Second, the Court held in *Zurcher*, where the plaintiff sought an abuse of process claim against an alleged assailant after pleading guilty to assault and battery arising out of the same incident, that the abuse of process claim could not stand. Third, the cases she cites - *Broadmoor Apts. of Charleston v. Horwitz*, 306 S.C. 482, 486, 413 S.E.2d 9, 11 (1991); *Food Lion, Inc. v. United Food & Commer. Workers Int'l Union*, 351 S.C. 65, 71, 567 S.E.2d 251, 253 (Ct. App. 2002); and *Huggins v. Winn-Dixie Greenville*, 249 S.C. 206, 209, 153 S.E.2d 693, 695 (1967) - are inapposite. None of these cases involve an abuse of process claim brought by a plaintiff who admitted under oath that she was guilty of the conduct out of which the process arose.

Chief Justice Toal properly imposed sanctions under Rule 11(a), SCRCP and this Court's decision in *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008) ("Under Rule 11(a), SCRCP, a party and/or the party's attorney may be sanctioned for filing a frivolous pleading,

motion, or other paper, or for making frivolous arguments."); *id.* ("The party and/or attorney may also be sanctioned for filing a pleading, motion, or other paper in bad faith whether or not there is good ground to support it."); *id.* at 437-38, 663 S.E.2d at 50 ("The sanction may include an order to pay the reasonable costs and attorney fees incurred by the party or parties defending against the frivolous action or action brought in bad faith . . . ."). In her 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.

Finally, the Court of Appeals properly rejected Kovach's argument that the trial court awarded sanctions before discovery or resolution of the merits of her allegations. The Court noted that Rule 11, under which sanctions were imposed, has no such procedural prerequisite. Further development of the record would not have illuminated the relevant issues, and the imposition of sanctions under Rule 11 was not premature. *Kovach v. Whitley*, No. 2020-UP-336, 2020 S.C. App. Unpub. LEXIS 404, *6 (S.C. Ct. App. 2020) (citing *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."). Kovach argues that Chief Justice Toal and the Court of Appeals erred "because Respondents did not present a scintilla of evidence to show that [her] civil conspiracy claims were actually untrue or without merit" (Petitioner's Brief, p. 27.) 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. Of course, her dismissal was to prevent her from going to prison and having her five year suspended sentence revoked. Nevertheless, she cannot have it both ways. Furthermore, her counsel never expressed the need to present evidence during the hearing before Chief Justice Toal. Kovcach should not now be heard to claim that she had a right to a more developed record. Finally, to claim there is no scintilla of evidence is absurd in light of Kovach's under oath testimony which is dispositive. Not only is there a scintilla of evidence, her admissions are dispositive. The law should not permit her to plead guilty under oath and then days later file a civil lawsuit against the victims for complaining of her criminal behavior contradicting the very facts to which she admitted. Respectfully, if Kovach's Complaint is not precisely what Rule 11 was instituted to prevent, then it is difficult to imagine where Rule 11 would apply.

C. The Court of Appeals' Decision Was Proper For Additional Reasons.

Although not addressed in the Court of Appeals' opinion or Petitioner's Brief, there are additional bases supporting Chief Justice Toal's decision that Kovach's Complaint was frivolous. Under this Court's decisions, Mr. Whitley, as a private citizen, cannot be held liable for civil conspiracy under the facts of this case. This Court has held that a citizen's efforts to have a corrupt

public employee prosecuted are not actionable in a civil case alleging conspiracy; 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. *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 he cannot be held liable for conspiracy in doing so under South Carolina law.

Kovach completely ignores the *Angus II* decision in her 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. A decision that, under the circumstances presented here, a group of people could be found to have conspired to prosecute a public official such as Kovach would have a chilling effect on the public's willingness to expose public corruption.

In addition, 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...").

These authorities, not addressed in Kovach's Brief, further support the decisions of Chief Justice Toal and the Court of Appeals. The Court of Appeals' decision should therefore be affirmed.

III. Kovach Has Failed To Preserve The Issue Of Whether The Sanctions Were Unreasonable Or Excessive; Even If The Issue Were Properly Preserved, However, The Court of Appeals Properly Concluded That The Sanctions Levied Against Kovach Were Reasonable And Not Excessive.

The issue of the reasonableness of the sanctions awarded against Kovach was not included among Kovach's Statement of Issues on Appeal and is therefore waived. Under Rule 208(b)(1)(B), SCACR, "[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal." *Id. See Burris v. Propst Lumber & Logging, Inc.*, 396 S.C. 85, 94, 719 S.E.2d 695, 700 (2011) (refusing to consider an issue not set forth in a Petitioner's Statement of the Issues on Appeal).

Even if the issue of the reasonableness of the sanctions awarded were not waived, Kovach's argument fails. As the Court of Appeals correctly noted, Justice Toal's award was well below the amount the Whitleys accrued in legal fees. 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.

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.* In her Brief, Kovach claims that these factors were not considered below (Petitioner's Brief, p. 31), 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.[5] The Court should therefore reject Kovach's argument that the sanctions awarded were unreasonable or excessive.

CONCLUSION

For the foregoing reasons, Respondents, Joshua S. Whitley and Karen Whitley, respectfully request that this Court AFFIRM the decision of the Court of Appeals.

Respectfully submitted,

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[5] 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.

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