

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

S.C. SUPREME COURT

Jean Toal, Circuit Court Judge

Appellate Case No. 2021-000174

Amy Kovach Plaintiff

v.

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

And

Joshua S. Whitley Defendant/Counterclaimant,

v.

Amy Kovach Plaintiff/Counterclaim Defendant,

And

Joshua S. Whitley Defendant/Third-Party Plaintiff,

v.

Rodney Thompson Third-Party Defendant,

Of Whom Amy Kovach is the Petitioner.

PETITIONER AMY KOVACH'S REPLY BRIEF

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ARGUMENTS

A. Respondents' Brief Does Not Support Justice Toal's Imposition of Sanctions, Because Ms. Kovach's Guilty Plea Did Not Make a Conspiracy Claim Frivolous or Baseless.

The crux of Respondents' Brief is their contention that the trial court properly sanctioned Ms. Kovach because her civil conspiracy claims were contrary to and inconsistent with her guilty plea and because those claims asked asking the trial court to find that she had not committed the acts to which she pled guilty. (*See* Resps.' Br., at 13 ("In her Brief, Kovach wrongly contends, as she did below, that her guilty pleas do not foreclose her claim of civil conspiracy.^[1] She asserts that her civil conspiracy claim is consistent with, and did not seek to impermissibly relitigate, her guilty pleas.")). However, Respondents mischaracterize Ms. Kovach's argument and misconstrues her civil conspiracy claim. Ms. Kovach's claim against Respondents does not factually undermine her guilty plea.

"Assuming [Respondents'] acts were lawful, that fact *does not prevent* the finding of a civil conspiracy." *See Gynecology Clinic, Inc. v. Cloer*, 334 S.C. 555, 556, 514 S.E.2d 592, 592 (1999) (emphasis added). "Ordinarily a conspiracy is where two or more persons combine or agree to do something to the detriment or hurt of another." *See Charles v. Texas Co.*, 199 S.C. 156, 176, 18 S.E.2d 719, 727 (1942). "Under South Carolina law, 'lawful acts may become actionable as a civil conspiracy when the 'object is to ruin or damage the business of another.'" *See Gynecology Clinic*,

¹ Respondents' Brief states that Ms. Kovach "admit[t]ed" 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*." (*See* Resps.' Br., at 19 (emphasis in original)). Ms. Kovach notes that this was an unfortunate typographical error in her Brief. Of course, Ms. Kovach intended to state that "facts relating to forgery, perjury or dishonesty *were not necessary to her guilty plea*." This is apparent from the context of the sentence and that paragraph, which conveys that — because the perjury and forgery counts were dismissed — the only facts "necessary" to Ms. Kovach's guilty plea were those concerning the use of public resources to support the "Yes4Schools" campaign. More specifically, the only facts truly necessary to Ms. Kovach's guilty plea were those surrounding the expenditure of \$5,300 for a campaign video. The prosecution plainly stated that "[t]he main points that really crystalize this case are payment for a campaign video, as well as payment for campaign signs for kids to hold." (*See* R. p. 1096:20-24 (confirming that other actions allegedly taken in furtherance of referendum campaign "are not really the main points.")).

Inc., 334 S.C. at 556, 514 S.E.2d at 592 (*quoting LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988)). "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.'" *Pye v. Estate of Fox*, 369 S.C. 555, 567, 633 S.E.2d 505, 511 (2006) (*quoting Lee v. Chesterfield Gen. Hosp., Inc.*, 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986)).

Ms. Kovach has consistently alleged and argued that her civil conspiracy claim was not premised upon her innocence of the crimes to which she pled guilty. Rather, she alleges that, even if she was guilty of the crimes to which she pled guilty, Respondents engaged in conduct for the sole and unlawful purpose of injuring her. In other words, they committed "a lawful act by unlawful means." See *Paradis v. Charleston County Sch. Dist.*, 433 S.C. 562, 574, 861 S.E.2d 774, 781 (2021). Irrespective of whether Ms. Kovach would have ultimately succeeded on that claim, she alleged civil conspiracy claims that were plausible and that she *might have* won. Of course, we will never know the answer to that question, in part because the trial judge prohibited Ms. Kovach from presenting or developing testimony or evidence supporting her claim.

Respondents' Brief admits that Ms. Kovach's Complaint alleges multiple acts of Respondents' misconduct, including using their influence to ensure that the state prosecuted Ms. Kovach, for their own personal reasons and with the intention of harming Ms. Kovach:

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 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. . . .

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.

(See Resps.' Br., at 13-14). These allegations (and others) are not contingent upon a finding that Ms. Kovach factually did not violate the law or that she did not legitimately plead guilty. Instead, these allegations state (at least) a plausible claim that Respondents acted in a lawful manner, *but with the unlawful purpose* of harming Ms. Kovach. Ms. Kovach might have succeeded on those claims had she been given the right to fully develop and present her case.

Respondents argue that "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." (See Resps.' Br., at 27). If that is true, then Ms. Kovach also had the "right to be wrong" about her civil conspiracy claims against Respondents. The issue in this appeal is not whether Ms. Kovach's claims would have actually succeeded. The issue is not whether Ms. Kovach's claims were particularly strong. The issue is not whether Ms. Kovach's claims would have been difficult to prove at trial. The issue is not whether Justice Toal felt that Ms. Kovach's claims were without merit. The only issue is whether her claims were *so* meritless that she should be punished for even exercising her right to access the courts. The issue is whether the facts here are so egregious that the trial court should have denied Ms. Kovach the "right to be wrong" and punished her for simply being (in the trial court's view) incorrect. Respectfully, despite Respondents' rhetoric and attacks upon Ms. Kovach's character, the evidence does not support the trial court's stripping Ms. Kovach of the "right to be wrong."

The trial court's imposition of sanctions is inconsistent with the purpose of Rule 11. Instead of punishing absolutely clear and indisputably frivolous conduct, the trial court harshly sanctioned

a *lay party* for not understanding the nuances² of South Carolina civil conspiracy law. It punished a mother for engaging in conduct that brought *no* direct personal gain to herself. Respectfully, the Court should not apply Rule 11 so as to chill parties and attorneys in the exercise of their right to access to the courts just because they were wrong or assert challenging claims:

While the Court firmly believes that Rule 11 serves a vital purpose, it should not be applied so as to inhibit lawyers from representing their clients zealously. Vigorous representation must include the ability to take risk on legal theories. Our system is not the English system: lawyers, acting in good faith, have the right to be wrong. Imposition of Rule 11 would not be appropriate in this case.

Plaintiffs' arguments were well crafted and well presented. Although they may not have had the strongest precedent available as a foundation for their position, plaintiffs' counsel are competent lawyers who had a good faith basis for bringing their case. Plaintiffs had been frustrated in their attempt to gain relief through the administrative process. The litigation theory they adopted may have been an unorthodox choice, but it did not fall within the proscription of Rule 11. The fact that this Court had to write an opinion of nineteen pages and the Court of Appeals one of twenty-three pages in order to address the issues in the case is a strong indication that the case was not frivolous.

See Daniels v. Burnside-Ott Aviation Training Ctr., Inc., Civil Action No. 89-3142, 1992 U.S. Dist. LEXIS 2308, at *1-2 (Mar. 3, 1992). The Court should not apply Rule 11 in a manner that would chill litigants in their exercise of their right of access to the Court. Ms. Kovach's civil conspiracy claims, at a minimum, asserted plausible claims against Respondents, for which the trial court should not have sanctioned Ms. Kovach.

For the foregoing reasons, the Court should vacate and reverse the trial court's imposition on sanctions on Ms. Kovach.

² It should be noted that civil conspiracy is an area in flux in South Carolina. As this Court is well aware, for example, it was only recently that this Court did away with the long-time requirement of allegations of special damages as an element of such a claim. *See Paradis v. Charleston Cty. Sch. Dist.*, 433 S.C. 562, 564, 861 S.E.2d 774, 775 (2021) ("We overrule precedent that requires the pleading of special damages and return to the traditional definition of civil conspiracy in this state.").

B. The Additional Grounds That Respondents Argue Are Without Merit.

Respondents further argue that "[a]lthough not addressed in the Court of Appeals' opinion or Petitioner's Brief, there are additional bases supporting Chief Justice Toal's decision." (*See Resps.' Br.*, at 26). For the following reasons, the Court should reject these argued additional grounds.

1. Mr. Whitley Is Not Protected From Potential Conspiracy Liability Because He Is a Private Person.

Respondents argue that sanctions were appropriate because "Mr. Whitley, as a private citizen, cannot be held liable for civil conspiracy under the facts of this case." (*See Resps.' Br.*, at 26 (*citing Angus v. Burroughs & Chapin Co. (Angus II)*, 368 S.C. 167, 628 S.E.2d 261, 262 (2006))). For the following reasons, Respondents' reliance on *Angus II* is misplaced.

In *Angus II*, the plaintiff was employed *at-will* as a county administrator. County Council terminated her employment. She then sued for civil conspiracy against County Council, a newspaper, and a developer. She alleged that, because she objected to several projects the developer had proposed, these parties conspired to have her terminated. The alleged conspiracy included incentives to council members and the publication of articles discrediting her. "The trial judge granted summary judgment on the ground that the termination of at-will employment cannot support a cause of action for civil conspiracy." *See id.*, 368 S.C. at 169, 628 S.E.2d at 262. With little discussion or analysis, the Court affirmed the grant of summary judgment:

A civil conspiracy is a combination of two or more parties joined for the purpose of injuring the plaintiff, thereby causing her special damages. . . . [A]n at-will employee may not maintain a civil conspiracy action against her employer. Where the employment is at-will, the employee may be terminated "at any time for any reason or for no reason at all." . . . [T]he Court of Appeals affirmed the grant of summary judgment to County Council as Angus's employer but concluded Ross was not applicable to Newspaper and Developer because they were third parties to the employment agreement. It held Angus could therefore maintain a civil conspiracy action against them.

We disagree with the Court of Appeals' analysis and find Ross controlling. *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.

See id., 368 S.C. at 170-71, 628 S.E.2d at 262 (emphasis added). In other words, the *Angus II* rule is simply that an at-will government official may not sue a private individual for actions causing the employer to terminate that at-will employment.

Importantly, Respondents can direct the Court to nothing in *Angus II* (or any other cited authority) creating a blanket rule that a public official may never sue a private individual. While *Angus II* correctly noted the importance of the First Amendment — which, of course, is also an important right accruing to Ms. Kovach — its holding was a product of its very specific facts. The Court only held that a private person cannot be liable for causing the termination of an at-will public official by criticizing that official. However, nothing in *Angus II* suggests that the Court intended to insulate private people from *all conspiracy liability* for their conduct directed toward public officials. Ms. Kovach's conspiracy claim was proper notwithstanding *Angus II*, because she focused on Respondents' wrongful acts to cause the Attorney General to aggressively seek to impose criminal liability on Ms. Kovach. Ms. Kovach alleged that Respondents more than merely say mean or untrue things to get Ms. Kovach fired; she alleged that they used their influence to subject her to criminal liability for ulterior purposes. *Angus II* does not preclude such a claim.

At least one court has construed *Angus II* as Ms. Kovach proposes. Specifically, the United States District Court for the District of South Carolina has stated: "The court does not read *Angus II* as precluding at-will public officials from maintaining civil conspiracy actions against their employers under any circumstances. Rather, *Angus II* stands for the proposition that members of the public possess the right *to call for the termination of* an at-will public official." *See Reed v. Aiken Cty.*, No. 1:09-1744-MBS, 2010 U.S. Dist. LEXIS 75059, at *8 (D.S.C. July 26, 2010) (emphasis added). This interpretation is consistent with this Court's language in *Angus II* and accurately states the law. *Angus II* is not a blanket prohibition of all claims by public officials; rather, it only precludes a very specific type of claim: *i.e.*, claims against private individuals who speak to bring about the firing of an at-will public official.

Moreover, even if *Angus II* could apply, it would not preclude the particular claims that Ms. Kovach asserted against Respondents. Numerous courts have held that, notwithstanding *Angus II*, "an at-will employee may maintain an action for civil conspiracy where the alleged conspiracy is based on harm other than termination." *Smith v. Palmetto Denture Care, P.A.*, No. 7:17-cv-1043-AMQ-KFM, 2018 U.S. Dist. LEXIS 125715, at *15-16 (D.S.C. July 27, 2018) (citing *Reed v. Aiken*, No. 1:09-CV-1744-MBS, 2010 U.S. Dist. LEXIS 75059, 2010 WL 2985805, at *1 (D.S.C. July 26, 2010) ("[T]he at-will employment doctrine articulated in *Angus* and *Ross* does not govern actions by employees based on harm other than termination such as isolation and ostracization")); accord *Lewis v. Richland Cty. Rec. Comm'n*, Civil Action No. 3:16-cv-2884-MGL-TER, 2016 U.S. Dist. LEXIS 162739, at *17 (D.S.C. Oct. 31, 2016) ("Although Plaintiff does allege that the individual Defendants conspired to strip him of responsibilities and set him up with a suspension in an effort to terminate his employment, he also alleges that they conspired to cause him ostracization, isolation, humiliation, and embarrassment. These allegations are sufficient to allege a conspiracy beyond termination, and, therefore, dismissal of this cause of action at this stage of the litigation against is premature."). Ms. Kovach's claims are not limited to wrongful termination. To the contrary, even though Ms. Kovach's termination was one of the negative consequences of Respondents' actions, Ms. Kovach's claims focus on Respondents' wrongful actions to encourage and coerce the Attorney General to aggressively prosecute her. *Angus II* does not prohibit such claims.

Finally, as a layperson represented by an attorney, Ms. Kovach should not be penalized for not being aware of *Angus II* or in improperly applying it, even if she is wrong about being able to sue a private person for civil conspiracy. Again, the trial court's sanctions punish Ms. Kovach for not knowing the nuances of South Carolina law. This is not an appropriate circumstance for the Court to sanction a layperson.

For the foregoing reasons, the Court should vacate and reverse the Court of Appeals' affirmation of the trial court's imposition of harsh sanctions on Ms. Kovach for merely exercising her right of access to the courts.

2. Judicial Privilege Does Not Insulate Respondents From Liability.

Respondents additionally argue — in only a single sentence citing one case without any analysis or discussion — that "Whitley's actions are protected by the doctrine of judicial privilege."³ (See Resps.' Br., at 28 (*citing and quoting, Crowell v. Herring*, 301 S.C. 424, 430, 392 S.E.2d 464, 467 (Ct. App. 1990))). For the following reasons, this is not an additional basis to support the Court of Appeals' decision.

Respondents cite *Crowell* for a blanket rule that "judicial" actions are immune from suit under any legal theory. However, as *Crowell* (upon which Respondents rely) makes clear, South Carolina courts only apply judicial privilege as a defense to *defamation* claims. *See id.*, 301 S.C. at 429, 392 S.E.2d at 466 ("The common law rule protecting statements of judges, parties and witnesses offered in the course of judicial proceedings *from a cause of action in defamation* is well recognized in this jurisdiction.") (emphasis added). Ms. Kovach's claims against Respondents do *not* sound in defamation, but in civil conspiracy. She has not pled a defamation claim against any of the Defendants. Respondents cite no authority extending judicial privilege to civil conspiracy claims or to any claims outside of defamation. Therefore, judicial privilege could not conceivably bar Ms. Kovach's conspiracy claims against Respondents.

Moreover, even assuming that judicial privilege *could* apply to Ms. Kovach's conspiracy claims, there is at least a reasonable question as to whether Respondents' actions even qualify for the privilege. As a result, Respondents cannot show that Ms. Kovach's civil conspiracy claim was *so* meritless as to warrant the extreme remedy of sanctions against her. "The [absolute judicial] privilege covers anything that may be said in relation to the matter at issue, whether it be in the pleadings, in affidavits, or in open court." *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 22, 567 S.E.2d 881, 892 (Ct. App. 2002) (citation and quotation marks omitted). The "common law rule protecting statements of judges, parties and witnesses offered in the course of judicial proceedings

³ Ironically, Respondents seek to invoke judicial privilege, but do not extend the same privilege to Ms. Kovach, whose challenged conduct was directly in the course of asserting claims in South Carolina state court. If judicial privilege would apply to protect Respondents, it would seem that it should also apply to Ms. Kovach.

from a cause of action in defamation is well recognized in this jurisdiction." *See Crowell v. Herring*, 301 S.C. 424, 429, 392 S.E.2d 464, 467 (Ct. App. 1990). An "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 provided those steps bear reasonable relationship to it." *Id.* 301 S.C. at 430, 392 S.E.2d at 467 (*citing* Restatement (Second) of Torts § 587, cmt e). When triggered, the judicial privilege protects not only statements in filings, statements in open court, and letters between counsel, but also to "any utterance arising out of the judicial proceeding and having any relation to it," including statements made prior to the judicial proceeding. *See id.*, 301 S.C. at 430, 392 S.E.2d at 467.

Ms. Kovach's complaint and allegations against Respondents in civil conspiracy do not focus on statements Respondents made in pleadings or in open court. They do not involve testimony in a court proceeding. To the contrary, Ms. Kovach alleges solely that Respondents used their influence and power to ensure that the Attorney General vigorously prosecuted her, irrespective of the actual severity of her crime. While a hypothetical court might ultimately have determined that Respondents' alleged use of back channels and influence within the Attorney General's office was judicially privileged, Ms. Kovach had — at the very least — a good faith reason to believe that Respondents' actions are too far removed from any actual judicial proceeding to receive the benefit of the privilege. Again, the question is not whether Ms. Kovach would have actually won at trial of her civil conspiracy claims. The only issue before this Court is whether judicial privilege was *so clearly applicable* that Ms. Kovach's claims were sanctionable against her personally.

Finally — as in the analysis above — Ms. Kovach, as a layperson, should not be penalized for not understanding the nuances of the defense judicial privilege, even if it in fact applied here.

For the foregoing reasons, the Court should reject Respondents' reliance on judicial privilege. Ms. Kovach respectfully asks the Court to vacate and reverse the sanctions that the trial court imposed upon her personally.

C. **The Court Should Vacate and Reverse the Imposition of Sanctions, Because They Were Excessive.**

1. **Ms. Kovach Did Not Fail to Preserve the Issue of Whether Sanctions Were Excessive.**

Respondents first argue that "[t]he 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." (*See Resps.' Br.*, at 28). For the reasons that follow, Ms. Kovach has properly preserved for this Court's review the question of the reasonableness (and the inherent excessiveness) of the sanctions that the trial court imposed on her.

Under the South Carolina Rules of Appellate Procedure, a petition for writ of *certiorari* should include a statement of questions for review:

The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. Only those questions raised in the Court of Appeals and in the petition for rehearing⁴ shall be included in the petition for writ of *certiorari* as a question presented to the Supreme Court. A question presented will be deemed to include every subsidiary question fairly comprised therein

See S.C.R.A.P., Rule 242(d)(2). A petition for writ of *certiorari* "may be granted . . . on any question presented. If the petition is granted, the Clerk shall notify each party or his attorney, specifying the question or questions to be considered." *See S.C.R.A.P.*, Rule 242(i).

Ms. Kovach's Petition for Writ of *Certiorari* includes several stated questions presented⁵ in this appeal:

⁴ Ms. Kovach's Petition for Rehearing includes a several page argument that the sanctions were excessive. (*See Ms. Kovach's Pet. for Rehearing*, at 8-11).

⁵ In her Final Brief of Appellant in the South Carolina Court of Appeals (at page 1), Ms. Kovach defined the questions presented as follows:

I. Did the trial judge err in imposing sanctions under Rule 11 and under the South Carolina Frivolous Proceedings Sanctions Act ("FCPSA") S.C. Code §§ 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?

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.

(See Ms. Kovach's Pet. for Writ of *Cert.*, at 1). However, in the body of her Petition for Writ of *Certiorari*, Ms. Kovach set forth a nearly three-page argument (*see id.*, at 13-16) that the trial court's sanctions were unreasonable and excessive, under the heading:

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**

This extended argument was similar in substance to the argument that Ms. Kovach made in her substantive Brief to this Court (and in her filings before the South Carolina Court of Appeals).

Throughout this case — and at all stages of the appeal — Ms. Kovach has consistently argued that (even if sanctions were proper) the amount of sanctions that the trial court imposed was excessive. She has made this argument repeatedly and has never expressed an intention to waive it. She has made that argument at every available opportunity. She has done nothing to suggest an intention to waive this argument or to abandon appellate review of that issue. Additionally, Respondents cannot reasonably suggest that they have been prejudiced by anything that Ms. Kovach has done with regard to this argument. At every stage and in every filing,

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?

Respondents were fully apprised that Ms. Kovach was arguing that the sanctions were excessive. At every stage, Respondents have had the opportunity to fully respond to that argument.

In support of their "failure to preserve" argument, Respondents cite South Carolina Appellate Court Rule 208(b)(1)(B), which provides that "[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal." *See also Burris v. Propst Lumber & Logging, Inc.*, 396 S.C. 85, 94, 719 S.E.2d 695, 700 (2011) ("[T]his specific issue is not preserved for appellate review because Employer did not specifically raise this point in its Statement of Issues on Appeal."). Ms. Kovach respectfully submits that, irrespective of whether she included a separate entry for this issue in her statement of the Questions Presented, the Court should consider the important questions she has raised concerning the unfair excessiveness of the sanctions imposed on her. Ms. Kovach has consistently identified this as an important issue for this Court's (and the Court of Appeals') review and argued it at length. The Court should not deny her the chance⁶ to argue this point merely because she did not have a separate entry in her statement of questions presented in her petition for writ of *certiorari* — particularly since she argued the substance of that position at length in the text of her petition. Denying Ms. Kovach the chance to make this potentially-meritorious argument would be contrary to the interests of justice.

Therefore, Ms. Kovach has properly preserved and has not waived her right to seek appellate review in this Court of the excessiveness of the sanctions the trial court imposed on her.

2. The Sanctions Imposed on Ms. Kovach Were, in Fact, Excessive.

As to the merits of this issue, Respondents' primary argument is that the sanctions — \$48,000 in a lawsuit that never advanced past the pleading stage — were not excessive because that amount was less than the amount Respondents allegedly actually incurred in legal fees.

However, Respondents have not successfully disputed the key aspects of Ms. Kovach's argument that the sanctions were plainly excessive. First, Respondents did not refute Ms. Kovach's

⁶ This Court has observed that "it may be good practice for us to reach the merits of an issue when error preservation is doubtful." *See Atlantic Coast Bldrs. & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012).

contention that they did not provide her with an opportunity to resolve this issue before seeking sanctions from her (a layperson and litigant without expertise in South Carolina tort law who relied on the advice of counsel). Instead of reasonably seeking an amicable resolution with Ms. Kovach before filing, Respondents took the radical step of aggressively seeking sanctions. It is undisputed that, upon learning of Respondents' claims for attorneys' fees (and in an effort to end these disputes), Ms. Kovach promptly instructed her attorney to dismiss her claims against Respondents.⁷ There is no evidence that Ms. Kovach did anything to extend the proceedings or increase Respondents' attorneys' fees. To the contrary, immediately upon receiving notice that Respondents were seeking sanctions, she promptly did everything in her power to bring these proceedings to an efficient end.

Additionally, Respondents' claimed attorneys' fees are not proportional to the progress of the underlying claims against them. As Ms. Kovach has noted above, all of the sanctions proceedings occurred at the earliest stages of this litigation. Ms. Kovach took immediate action in an effort to dismiss her claims against Respondents at the pleadings stage. The parties did not engage in any expensive discovery. They did not take any depositions. There was no extended motions practice. There was little need for Respondents to incur any legal fees — outside of the fees they themselves chose to incur by aggressively pursuing sanctions. Ms. Kovach's briefly-lived civil conspiracy claims did not themselves cause Respondents significant expense or harm. Respondents could have substantially mitigated the burden on them, had they not chosen to aggressively seek sanctions from a layperson litigant in a complex and politically-charged matter.

⁷ Respondents insinuate that Ms. Kovach's efforts to withdraw her claims after the "show cause" hearing supports their argument that her claims were frivolous. However, Ms. Kovach's decision to dismiss her claims in the face of the State's efforts to impose additional criminal sanctions was reasonably based on her desire protect herself and her family, rather than a recognition that there was anything improper about her claims. Because of the painful lessons learned from Respondents' aggressive pursuit of the criminal charges, Ms. Kovach feared that Respondents would again seek retribution, using their influence to persuade the Attorney General to aggressively prosecute her. Ultimately, although she still believed that she had a potentially valid civil conspiracy claim, Ms. Kovach — a loving wife and mother — sacrificed her claims to protect her family from further suffering.

Respondents could have exercised restraint and still obtained the dismissal of the claims against them with little expense. However, they voluntarily upped the ante and dramatically increased the burden on them (and the trial court) by filing unnecessary and punitive sanctions motions.

Therefore, for the foregoing reasons, the Court should reverse and vacate the trial court's award of sanctions as being excessive and unreasonable.

CONCLUSION

For the foregoing reasons (and those set forth in Ms. Kovach's opening Brief), the Court should reverse and vacate the Court of Appeals' decision affirming the trial court's imposition of sanctions.

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