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Dec 13 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Chief Justice (Ret.) Jean H. Toal, Circuit Court Judge

Appellate Case No. 2023-001789

J. Bradford McIlvain,Appellant,

v.

The Town of Kiawah Island,Respondent.

**MOTION TO DISMISS APPEAL
FOR LACK OF JURISDICTION**

Respondent Town of Kiawah Island hereby moves to dismiss this appeal for lack of subject matter jurisdiction due to Appellant J. Bradford McIlvain’s failure to timely serve or file the Notice of Appeal. Notice of Appeal (served by U.S. Mail), Exhibit No. 1.

As stated in the Notice of Appeal, Appellant received written notice of The Honorable Jean H. Toal’s order on October 13, 2023. Appellant initially attempted to serve the Notice of Appeal by email to Respondent’s counsel on November 10, 2023. Notice of Appeal (served by email), Exhibit No. 2.

This initial service by email was not in compliance with Rule 262(c) of the South Carolina Appellate Court Rules governing service. Rule 262(c) requires service by personal delivery, U.S. Mail, or “Serving a copy on the person by electronic means in a manner provided by order of the Supreme Court of South Carolina.” The Supreme Court’s Administrative Order dated May 6,

2022 sets out the methods for electronic service. Administrative Order, Exhibit No. 3. It only permits attorneys admitted to practice law in South Carolina to utilize electronic service. Appellant is neither a South Carolina licensed attorney nor is he represented by one. He is proceeding *pro se*. Thus, Appellant's attempt to serve Respondent's attorneys by email was not effective under the South Carolina Appellate Court Rules.

On November 17, 2023, the Court of Appeals sent a Deficiency Letter to Appellant informing him that he could not serve his Notice of Appeal by email. Deficiency Letter, Exhibit No. 4. In response, Appellant served the Notice of Appeal by U.S. Mail. Notice of Appeal (served by U.S. Mail), Exhibit No. 1. Although Appellant's new Certificate of Service claimed to have served the Notice on November 27, 2023, the envelope that contained the Notice was postmarked November 28, 2023, one day after the ten-day deadline set out in the Deficiency Letter. Notice of Appeal (served by U.S. Mail), Exhibit No. 1 (envelope included at end of Exhibit). In addition, the Notice only included Judge Toal's October 13, 2023 Order on a Motion to Reconsider. It did not include Judge Toal's original August 21, 2023 Order dismissing Appellant's lawsuit. August 17, 2023 Order, Exhibit No. 5.

A notice of appeal must be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. Rule 203(b)(1). Appellant's Notice of Appeal acknowledges that he received written notice of Judge Toal's Order on October 13, 2023. Notice of Appeal (served by U.S. Mail), Exhibit No. 1. Counsel for Respondent sent the Order to Appellant by email. Email providing notice of Order, Exhibit No. 6. This constituted notice under Rule 203, SCACR, and started the 30-day clock for service of the Notice of Appeal:

Unlike the notice of appeal, there is no requirement that the written notice of entry of an order or judgment be served upon the parties. All that is required to trigger the time to appeal is that the parties receive such notice. Moreover, there is nothing in our appellate court rules suggesting that the manner in which a party

may receive notice is limited to the methods used to effectuate service, that is, by mail or hand delivery.

Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC, 422 S.C. 211, 215–16, 810 S.E.2d 856, 858 (2018).

Since Appellant received notice of the Order on October 13, 2023, the Notice of Appeal had to be served by November 13, 2023.¹ Appellant did not properly serve the Notice of Appeal until, at the earliest, November 27, 2023. Since Appellant did not properly serve the Notice of Appeal on Respondent until 45 days after receiving notice of the underlying Order, the Notice of Appeal was not timely served.

“Rule 203(b), SCACR, requires a party to serve his notice of appeal within thirty days after receiving written notice of the entry of a final order or judgment, and failure to do so divests this court of subject matter jurisdiction and results in dismissal of the appeal.” *Canal Ins. Co. v. Caldwell*, 338 S.C. 1, 4, 524 S.E.2d 416, 418 (Ct.App.1999). “The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of the notice.” *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004). *See also USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008).

Thus, even though the Court’s November 17, 2023 Deficiency Letter gave Appellant ten days to properly serve the Notice of Appeal, that Letter could not extend the November 13, 2023 deadline. See, Rule 263(b), SCACR (“The time prescribed by these Rules for performing any act *except the time for **serv**ing the notice of appeal* under Rules 203 and 243 may be extended” (emphasis added)); *Ex Parte Sadisco of Greenville, Inc. v. Greenville Cnty. Bd. of Zoning Appeals*,

¹ November 12, 2023 was a Sunday.

340 S.C. 57, 530 S.E.2d 383 (2000) (“This Court has consistently stated that service of the notice of appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the notice of appeal must be served.”). In the absence of timely service, the Court has no jurisdiction to hear this matter, and it should be dismissed. *State v. Devore*, 416 S.C. 115, 784 S.E.2d 690 (Ct. App. 2016).

In addition, Appellant failed to properly include the orders he is appealing with the Notice of Appeal. Rule 203(d)(1)(B)(ii), SCACR, requires the Appellant to include a copy of the orders to be challenged on appeal. Rule 203(d)(B) requires that the Notice of Appeal be filed within ten days of service. Thus, Appellant had, at most, until December 7, 2023 to timely file his Notice of Appeal.

Appellant’s filed Notice of Appeal only includes the lower court’s Order on Appellant’s Motion for Reconsideration. Notice of Appeal (served by U.S. Mail), Exhibit No. 1. The Notice of Appeal did not include Justice Toal’s original August 17, 2023 Order dismissing the lawsuit. August 17, 2023 Order, Exhibit No. 5. Thus, Appellant’s filed Notice of Appeal is incomplete as of the date of this filing. Thus, Appellant has neither timely served nor timely filed a Notice of Appeal that complies with Rule 203, SCACR. Appellant has not only failed to timely serve his Notice of Appeal, but he has also failed to timely file his Notice of Appeal.

Based on the foregoing, Respondent would ask that the Court dismiss this appeal for lack of jurisdiction with prejudice.

Respectfully submitted,

/s/ Joseph C. Wilson, IV
Joseph C. Wilson, IV, Esquire
Town Attorney, Town of Kiawah Island
Post Office Box 178
Folly Beach, South Carolina 29439
(843) 834-2390
joe@follybeachlaw.com

/s/ Ross A. Appel
Ross A. Appel
McCULLOUGH ▪ KHAN ▪ APPEL
2036 eWall Street, Suite 200
Mt. Pleasant, SC 29464
(843) 937-0400
ross@mklawsc.com

Attorneys for Respondent Town of Kiawah Island

December 13, 2023

EXHIBIT NO. 1

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jean Toal, Judge

Case No. 2023-CP-10-03550

J. Bradford McIlvain,

Appellant,

v.

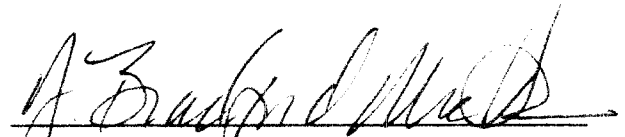
Town of Kiawah Island,

Respondent.

NOTICE OF APPEAL

J. Bradford McIlvain appeals the order of the Honorable Jean Toal dated October 13, 2023 attached hereto as Exhibit "A." Appellant received written notice of the order on October 13, 2023.

November 10, 2023



J. Bradford McIlvain, *pro se*
146 Blue Heron Pond Road
Kiawah Island, South Carolina 29455
(215) 789-8600

Counsel of Record for Respondent:

Joseph C. Wilson, Esquire
PO Box 178
Folly Beach, SC 29439
(843) 834-2390
joew@kiawahisland.org

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McCullough Kahn Appel
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EXHIBIT A

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON)	NINTH JUDICIAL CIRCUIT
J. BRADFORD MCILVAIN,)	Civil Action No. 2023-CP-10-03550
)	
Plaintiff,)	
)	
vs.)	ORDER
)	
THE TOWN OF KIAWAH ISLAND,)	
)	
Defendant.)	
)	
)	
)	

This matter is before the Court upon J. Bradford McIlvain's ("Plaintiff") Motion for Reconsideration of Judgment Order dated August 17, 2023 ("Motion for Reconsideration"), filed on August 28, 2023. The Court granted Plaintiff's Motion for Reconsideration on August 29, 2023, and filed a Notice of Rehearing regarding the issues previously presented to this Court regarding Plaintiff's action for declaratory and injunctive relief pursuant to the South Carolina Freedom of Information Act and Defendant's Motion for Summary Judgment on the Pleadings or, in the alternative for Summary Judgment.

On September 13, 2023, the Court held a hearing to reconsider Defendant's Motion for Judgment on the Pleadings, or in the alternative, Defendant's Motion for Summary Judgment. Mr. Brad McIlvain appeared *pro se* and Mr. Joe Wilson appeared on behalf of the Town of Kiawah Island. Following the hearing, the Court requested additional briefing on whether the Court is required to go through the Attorney Memorandum at issue, line by line, to determine whether the attorney-client privilege or work product doctrine applies.

First, the Court declines to amend its previous Order entered on August 17, 2023, in which

this Court found: (1) the Attorney Memorandum at issue is protected by the work product and attorney-client privileges, (2) the Town of Kiawah Island ("Defendant") never waived the attorney-client privileges as to the Attorney Memorandum, and (3) the Attorney Memorandum was exempt from public disclosure under the South Carolina Freedom of Information Act ("FOIA") pursuant to S.C. Code Ann. § 30-4-40(a)(7).

Last, the Court disagrees with Plaintiff's argument this Court is required to review the Attorney Memorandum for the reason that the entire Attorney Memorandum is exempt under § 30-4-40(a)(7) of the FOIA. Thus, the Court is not required to separate the exempt from nonexempt material, as the entire Attorney Memorandum is exempt. As stated in the hearing, this Court has reviewed the Attorney Memorandum *in camera* and confirmed it is exempt under § 30-4-40(a)(7) of the FOIA.

Therefore, for the reasons set forth in the Order dated August 17, 2023 and entered by this Court, the Court grants the Motion for Judgment on the Pleadings in favor of Defendant and denies the relief asked by the Plaintiff.

AND IT IS SO ORDERED.

[JUDGE'S SIGNATURE PAGE FOLLOWS]



Charleston Common Pleas

Case Caption: J Bradford Mcilvain VS Kiawah Island Town Of
Case Number: 2023CP1003550
Type: Order/Other

So Ordered

Jean H. Toal

Electronically signed on 2023-10-12 18:39:59 page 3 of 3

ELECTRONICALLY FILED - 2023 Oct 13 8:46 AM - CHARLESTON - COMMON PLEAS - CASE#2023CP1003550

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jean Toal, Judge

Case No. 2023-CP-10-03550

J. Bradford McIlvain,

Appellant,

v.

Town of Kiawah Island,

Respondent.

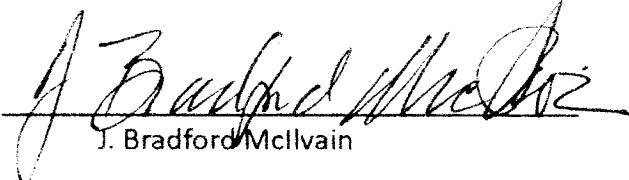
CERTIFICATE OF SERVICE

I certify that on this date I served a copy of the Notice of Appeal dated November 10, 2023 on Defendant Town of Kiawah Island by US Mail it to its counsel as noted below:

Joseph C. Wilson, IV, Esquire
Wilson Law Firm
PO Box 178
Folly Beach, SC 29439

Ross A. Appel, Esquire
McCullough-Kahn-Appel
2036 eWall Street, Suite 200
Mt. Pleasant, SC 29464

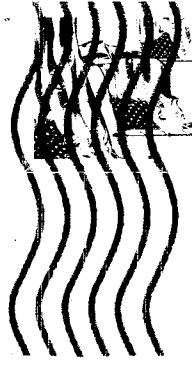
NOVEMBER 27, 2023
Date


J. Bradford McIlvain

MCILVAIN
146 BLUE HERON POND ROAD
KIAWAH ISLAND, SC 29455

CHARLESTON SC 294

28 NOV 2023 PM 3 L



JOSEPH C. WILSON, ESQUIRE
P.O. Box 178
FOLLY BEACH, SC 29439

29439-017878

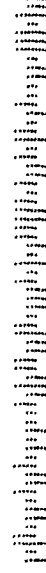


EXHIBIT NO. 2

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jean Toal, Judge

Case No. 2023-CP-10-03550

J. Bradford McIlvain,

Appellant,

v.

Town of Kiawah Island,

Respondent.

NOTICE OF APPEAL

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November 10, 2023



J. Bradford McIlvain, *pro se*
146 Blue Heron Pond Road
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(215) 789-8600

Counsel of Record for Respondent:

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EXHIBIT A

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

J. BRADFORD MCILVAIN,) Civil Action No. 2023-CP-10-03550
)
Plaintiff,)

vs.) **ORDER**

THE TOWN OF KIAWAH ISLAND,)
)
Defendant.)

This matter is before the Court upon J. Bradford McIlvain’s (“Plaintiff”) Motion for Reconsideration of Judgment Order dated August 17, 2023 (“Motion for Reconsideration”), filed on August 28, 2023. The Court granted Plaintiff’s Motion for Reconsideration on August 29, 2023, and filed a Notice of Rehearing regarding the issues previously presented to this Court regarding Plaintiff’s action for declaratory and injunctive relief pursuant to the South Carolina Freedom of Information Act and Defendant’s Motion for Summary Judgment on the Pleadings or, in the alternative for Summary Judgment.

On September 13, 2023, the Court held a hearing to reconsider Defendant’s Motion for Judgment on the Pleadings, or in the alternative, Defendant’s Motion for Summary Judgment. Mr. Brad McIlvain appeared *pro se* and Mr. Joe Wilson appeared on behalf of the Town of Kiawah Island. Following the hearing, the Court requested additional briefing on whether the Court is required to go through the Attorney Memorandum at issue, line by line, to determine whether the attorney-client privilege or work product doctrine applies.

First, the Court declines to amend its previous Order entered on August 17, 2023, in which

this Court found: (1) the Attorney Memorandum at issue is protected by the work product and attorney-client privileges, (2) the Town of Kiawah Island (“Defendant”) never waived the attorney-client privileges as to the Attorney Memorandum, and (3) the Attorney Memorandum was exempt from public disclosure under the South Carolina Freedom of Information Act (“FOIA”) pursuant to S.C. Code Ann. § 30-4-40(a)(7).

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AND IT IS SO ORDERED.

[JUDGE’S SIGNATURE PAGE FOLLOWS]



Charleston Common Pleas

Case Caption: J Bradford Mcilvain VS Kiawah Island Town Of
Case Number: 2023CP1003550
Type: Order/Other

So Ordered

Jean H. Toal

Electronically signed on 2023-10-12 16:39:59 page 3 of 3

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jean Toal, Judge

Case No. 2023-CP-10-03550

J. Bradford McIlvain,

Appellant,

v.

Town of Kiawah Island,

Respondent.

CERTIFICATE OF SERVICE

I certify that on this date I served a copy of the Notice of Appeal dated November 10, 2023 on Defendant Town of Kiawah Island by emailing it to its counsel as noted below:

Joseph C. Wilson, IV, Esquire
Wilson Law Firm
joew@kiawahisland.org

Ross A. Appel, Esquire
McCullough-Kahn-Appel
ross@mklawsc.com

November 10, 2023
Date


J. Bradford McIlvain

2022-05-06-03 **EXHIBIT NO. 3**
The Supreme Court of South Carolina

RE: Methods of Electronic Filing and Service Under Rule 262 of
the South Carolina Appellate Court Rules (As Amended May 6, 2022)

Appellate Case No. 2020-000447

ORDER

(a) Purpose. Pursuant to Rule 262(a)(3) and (c)(3) of the South Carolina Appellate Court Rules (SCACR), this Court may by order establish methods for the electronic filing and service of documents. For the purpose of this order, "Appellate Court" means the Supreme Court of South Carolina or the South Carolina Court of Appeals.

(b) Electronic Methods of Filing. Filings with an appellate court may be made electronically using the methods listed below.

(1) Electronic Filing by Lawyers. Lawyers who are licensed to practice law in South Carolina may utilize OneDrive for Business to electronically submit documents for filing with the Supreme Court and the Court of Appeals, and *lawyers are strongly encouraged to use this method of filing*. More information about this method, including registration and filing instructions, is available in the Attorney Information System (<https://ais.sccourts.org/AIS>) under the tab "Appellate Filings."

(2) Filing by E-mail. Filings may be made by e-mail. For the Supreme Court, the e-mail shall be sent to suptfilings@sccourts.org; for the Court of Appeals, the e-mail shall be sent to ctappfilings@sccourts.org. This method may not be suitable for large documents, and if it becomes necessary to split a document into multiple parts, the e-mail shall identify the part being sent (i.e., Record on Appeal, Part 1 of 4). A document filed by this method must be in Adobe Acrobat portable document format (.pdf). Filers shall not utilize any other file format or a file-sharing service when e-mailing documents for filing. The clerk of the appellate court may reject any document submitted by e-mail in a format other than .pdf or using a file-sharing service.

(3) Faxing Documents. A document may be filed by an electronically transmitted facsimile copy. The fax number for the Supreme Court is 803-734-1499. The fax number of the Court of Appeals is 803-734-1839. While this method is well suited for relatively small documents, depending primarily upon the limitations of the sending fax machine, it may not be possible to send large documents, such as a record on appeal, in a single transmission. If it becomes necessary to split a document into multiple parts to make the fax transmission, a separate cover sheet should be used on each part to identify the document (i.e., Brief of Appellant, Part 1 of 4). In the event the facsimile copy is not sufficiently legible, the clerk of the appellate court may require the party to provide a copy by mail.

(c) Filing Date and Payment of Fees for Documents Filed Electronically. When filed using one of the methods specified in (b) above, a document transmitted and received by 11:59:59 p.m., Eastern Standard Time, shall be considered filed on that day. If a filing fee is required for the document, a check or money order for the fee must be mailed or delivered to the appellate court within five (5) days of the filing; the case name and the Appellate Case Number, if known, should be listed on the check or money order.

(d) Electronic Service Using AIS E-mail Address.

(1) Service on Another Lawyer. A lawyer admitted to practice law in South Carolina may serve a document on another lawyer admitted to practice law in South Carolina using the lawyer's primary e-mail address listed in the Attorney Information System (AIS). Documents must be e-mailed as an attachment in .pdf. In the absence of consent, a lawyer serving a document by e-mail may not utilize another file format or a file-sharing service. For documents that are served by e-mail, a copy of the sent e-mail shall be enclosed with the proof of service, affidavit of service, or certificate of service for that document. Lawyers are reminded of their obligation under Rule 410(g), SCACR, to ensure that their AIS information is current and accurate at all times.¹

(2) Service by an Appellate Court. An appellate court may send an order, opinion or other correspondence to a lawyer admitted to practice law in South Carolina using that lawyer's primary e-mail address in AIS. A self-represented litigant may request the appellate court serve the litigant by e-mail under this provision. Any request must be in writing and must include the e-mail address for service. It is the responsibility of the self-represented litigant to immediately inform the appellate court of any change in e-mail address.

(3) Service on Persons Admitted Pro Hac Vice. For attorneys admitted pro hac vice under Rule 404, SCACR, service on the associated South Carolina lawyer using an electronic method permitted by this order shall be construed as service on the pro hac vice attorney; if appropriate, it is the responsibility of the associated lawyer to provide a copy to the pro hac vice attorney.

s/Donald W.
Beatty _____ C.J.

s/John W. Kittredge
_____ J.

s/Kaye G. Hearn
_____ J.

s/John Cannon
Few _____ J.

s/George C. James,
Jr. _____ J.

Columbia, South Carolina
May 6, 2022

¹ The primary AIS e-mail address for lawyers admitted to practice in South Carolina may be obtained using the search function at <https://www.sccourts.org/attorneys/dspSearchAttorneys.cfm>. Lawyers may update their AIS information at <https://ais.sccourts.org/AIS>.

EXHIBIT NO. 4



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

CATHERINE S. HARRISON
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
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November 17, 2023

J. Bradford McIlvain
146 Blue Heron Pond Road
Kiawah Island SC 29455

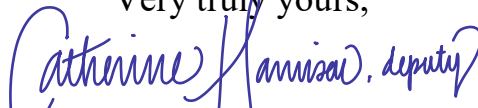
Re: J. Bradford McIlvain v. Town of Kiawah Island
Appellate Case No. 2023-001789

Dear Mr. McIlvain:

Upon reviewing your notice of appeal, the following deficiency has been noted under the South Carolina Appellate Court Rules (SCACR), and any deficiency must be corrected within ten (10) days of the date of this letter or this matter will be dismissed:

- The accompanying proof of service is not in compliance with the SCACR. Pursuant to Rule 262(c)(3), SCACR, and Re: Methods of Electronic Filing & Service Under Rule 262 of the South Carolina Appellate Court Rules, S.C. Sup. Ct. Order dated May 6, 2022, only lawyers admitted to practice in South Carolina may serve other lawyers using the lawyer's primary email address in AIS. Service by pro se parties may be accomplished by hand delivery or U.S. mail.

Very truly yours,


CLERK

cc: Ross A. Appel, Esquire
Joseph C. Wilson, IV, Esquire

EXHIBIT NO. 5

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON)	NINTH JUDICIAL CIRCUIT
)	
J. BRADFORD MCILVAIN,)	Civil Action No. 2023-CP-10-03550
)	
Plaintiff,)	
)	
vs.)	ORDER
)	
THE TOWN OF KIAWAH ISLAND,)	
)	
Defendant.)	
)	
)	
)	

This matter is before the Court on J. Bradford McIlvain’s (“Plaintiff”) Complaint pursuant to the South Carolina Freedom of Information Act (“FOIA”) for Declaratory Judgment and Injunctive Relief filed on July 21, 2023. Defendant, the Town of Kiawah Island (“Defendant” or “TOKI”), filed an Answer to Complaint and a Motion for Judgment on the Pleadings or, in the Alternative for Summary Judgment on August 2, 2023. This Court was assigned to this matter on August 10, 2023, and pursuant to S.C. Code Ann. § 30-4-100, a hearing was held on August 14, 2023. All parties were notified of the hearing, and only counsel for the Town of Kiawah Island appeared, and Plaintiff, proceeding *pro se*, notified the Court of his inability to appear. After careful consideration of the pleadings, submissions by the parties, the *in camera* review of the attorney-client legal memorandum at issue, applicable legal authority, oral argument of counsel at the hearing, the Court finds for the Defendant, as set forth herein.

HISTORY OF THE CASE

Plaintiff is a resident of the TOKI, a public body located in the County of Charleston, South Carolina. The TOKI is governed by a Mayor and five-member Town Council of which the Mayor is also a member.

On May 2, 2023 the Town Council for the TOKI held its monthly meeting (the “May Meeting”). Relevant to this matter is the TOKI’s dispute concerning the Kiawah Island Community Association and Architectural Review Board regarding a 2013 Amended and Restated Development Agreement (“Development Agreement”). During the May Meeting, the Town Council of TOKI agreed to have its Town Attorney, Joe Wilson, address some of the concerns regarding the Development Agreement. This is reflected in the Council Meeting Agenda which included “Council Approval of Public Statement from Town Attorney Regarding [the Development Agreement]” and “Town Attorney- Discussion of [the Development Agreement], Architectural Review Board, and Kiawah Island Community Association.” *See* Def.’s Mot. for J. on the Pleadings or, in the Alternative for Summ. J., Ex. 1.

During the May Meeting, the Town Council of TOKI approved the discussion and waived attorney-client privilege as to the discussion of the Development Agreement only. On June 6, 2023, Plaintiff McIlvain submitted a FOIA request seeking a “copy of [the] entire legal memorandum referenced by [Town Attorney] Joe Wilson during the May 2, 2023 Town Council Meeting,” (“Attorney Memorandum”). Def.’s Mot., Ex. 7. The Defendant denied the FOIA request on the grounds that any legal memorandum prepared by the Town Attorney is exempt from production under the South Carolina FOIA. *Id.*, Ex. 8. Following the denial of Plaintiff’s FOIA request, Plaintiff filed this lawsuit requesting the Court 1) determine the Attorney Memorandum as it existed on May 2, 2023 be produced under the South Carolina FOIA; 2) order the Defendant to produce a copy of the requested Attorney Memorandum; 3) award Plaintiff all fees, costs, damages, and fines; and 4) any other appropriate equitable relief as allowed under the South Carolina FOIA. *See* Pl.’s Compl. 9.

ANALYSIS & FINDINGS

South Carolina's Freedom of Information Act allows municipalities to withhold any public records that contain "correspondence or work product of legal counsel for a public body and any other material that would violate attorney-client relationships." S.C. Code Ann. § 30-4-40(a)(7) (emphasis added). FOIA's free standing exemption for attorney work product has been recognized by the South Carolina Supreme Court. *See Beattie v. Aiken Cnty. Dep't of Soc. Servs.*, 319 S.C. 449, 453, 462 S.E.2d 276, 279 (1995) ("[T]he FOIA enumerates certain exemptions, including information of a personal nature and work product of legal counsel.).

1. The Attorney Memorandum from the Town Attorney to Town Council is protected by the Attorney-Client Privilege.

The Attorney Memorandum prepared by the Town Attorney contains legal analysis and advice in great detail on the issue of the Development Agreement to TOKI. Upon the Court's *in camera* review, the Attorney Memorandum contains confidential communications of legal concepts that are subject to protection. There is no question this Attorney Memorandum meets the requirements for the attorney-client privilege to apply. *See Tobacoville USA, Inc. v. McMaster*, 387 S.C. 287, 293, 692 S.E.2d 526, 529–30 (2010) (quoting *State v. Doster*, 276 S.C. 647, 651, 284 S.E.2d 218, 219–20 (1981)).

Thus, "[t]he attorney-client privilege protects against disclosure of confidential communications by a client to his attorney." *State v. Owens*, 309 S.C. 402, 407, 424 S.E.2d 473, 476 (1992). "This privilege is based upon a wise policy that considers that the interests of society are best promoted by inviting the utmost confidence on the part of the client in disclosing his secrets to this professional advisor..." *Id.* Absent a waiver, the Attorney Memorandum is not subject to disclosure under a FOIA request.

Further, the Attorney Memorandum is also work product prepared for the TOKI.

2. The TOKI has not explicitly waived privilege regarding the Attorney Memorandum.

The attorney-client privilege belongs solely to the client and can only be waived by the client. *State v. Love*, 275 S.C. 55, 271 S.E.2d 110 (1980). Any waiver of the attorney-client privilege must be “distinct and unequivocal.” *In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 829 S.E.2d 707, 168 (2019); *State v. Thompson*, 329 S.C. 72, 495 S.E.2d 437, 439 (1998).

Based on the review of the Meeting Minutes and video footage of the May Meeting, the TOKI never voted to waive attorney-client privilege of the Attorney Memorandum. In other words, the Town Council of TOKI, did not distinctly or unequivocally waive the FOIA exemption covering the Attorney Memorandum. Rather, the Town Council only voted to waive the attorney-client privilege to discuss some of the issues related to the Development Agreement. In no way did the Town Council address the Attorney Memorandum.

Further, the Court agrees individual council members cannot waive the attorney-client privilege. Rather, the waiver can only be asserted by Town Council of the TOKI as a whole, not by individual members. *See Wilson v. Preston*, 378 S.C. 348, 359, 662 S.E.2d 580, 585 (2008). In order for a matter of this type to be subject to disclosure, the Town Council would have to specifically vote to disclose the Attorney memorandum.

Plaintiff asserts the Town Council of TOKI through implied subject matter waived the privilege and its exemption in the FOIA when they voted to waive the attorney-client privilege to discuss the two agenda items and issues pertaining Development Agreement during the May Meeting. Our law on implied subject matter waiver in South Carolina was first discussed in the federal district court case of *Duplan Corp. v. Deering Milliken, Inc.*, which construed South Carolina law on attorney client privilege and found that implied subject matter waiver does not apply to attorney work product privilege. 397 F. Supp. 1146, 1190 (D.S.C.). Further, our South

Carolina Supreme Court found that the attorney client privilege is absolute and there can be no implied waiver in the exemptions section or implied waiver by failure of the public body to timely respond to a record request. *See Litchfield Plantation Co. v. Georgetown Cnty. Water & Sewer Dist.*, 314 S.C. 30, 443 S.E.2d 574, 575 (1994).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the forgoing, the pleadings, submissions by the parties, the in camera review of the attorney-client legal memorandum at issue, applicable legal authority, oral argument of counsel at the hearing, this Court makes the following findings of fact and conclusions of law:

1. I find that the Attorney Memorandum includes legal analysis and advice in a great deal of detail on the issue of the Development Agreement involving the Kiawah Island Community Association and Architectural Review Board.
2. I find the Attorney Memorandum is confidential document protected by the work product and attorney-client privileges.
3. I find the Town Council of TOKI waived the attorney-client privilege only to discuss some issues related to the Development Agreement in open session.
4. I find the Town Council of TOKI never waived the attorney-client privilege as to the Attorney Memorandum.
5. I find the Attorney Memorandum is exempt from public disclosure under FOIA pursuant to S.C. Code Ann. § 30-4-40(a)(7).
6. I find that the Plaintiff's ability to further contest this matter is protected by Plaintiff's ability to file a Motion for Reconsideration of this Order pursuant to South Carolina Rules of Civil Procedure Rule 59(e).

ORDER

Having applied the facts of this case to the law, it is hereby ORDERED that that relief sought by Plaintiff is hereby denied.

AND IT IS SO ORDERED.

[JUDGE'S SIGNATURE PAGE FOLLOWS]



Charleston Common Pleas

Case Caption: J Brandford Mcilvain VS Kiawah Island Town Of

Case Number: 2023CP1003550

Type: Order/Other

So Ordered

Jean H. Toal

Electronically signed on 2023-08-17 12:27:53 page 7 of 7

EXHIBIT NO. 6

From: [Joe Wilson](#)
To: [Brad McIlvain](#)
Cc: [Ross Appel](#)
Subject: McIlvain v TOKI
Date: Friday, October 13, 2023 9:07:00 AM
Attachments: [Final Order.pdf](#)

Mr. McIlvain

Attached please find an order that was filed today in this matter.

Joseph C. Wilson, IV, Esquire
Wilson Law Firm
P.O. Box 178
Folly Beach, South Carolina 29439
Cell Phone: (843) 834-2390

RECEIVED

Dec 13 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Chief Justice (Ret.) Jean H. Toal, Circuit Court Judge

Appellate Case No. 2023-001789

J. Bradford McIlvain,Appellant,


v.

The Town of Kiawah Island,Respondent.

PROOF OF SERVICE

I, Elizabeth M. Lademan, paralegal at McCullough Khan Appel hereby certify that a true and correct copy of Respondent’s Petition to Dismiss was served upon the Appellant in the above-captioned matter, via email and U.S. Mail this 13th day of December, 2023, addressed as follows:

J. Bradford McIlvain
146 Blue Heron Pond Road
Kiawah Island, SC 29455
bradmilvain@comcast.net


Elizabeth M. Lademan,
Paralegal

December 13, 2023
Mount Pleasant, South Carolina



Ross A. Appel
Direct: (843) 937-9798
Fax: (843) 937-0706
ross@mklawsc.com

RECEIVED

Dec 13 2023

SC Court of Appeals

December 13, 2023

VIA E-MAIL AND U.S. MAIL

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201
ctappfilings@sccourts.org

**Re: J. Bradford McIlvain v. Town of Kiawah Island
Appellate Case No. 2023-001789**

Dear Ms. Kitchings:

I hope this finds you well. Enclosed please find the Respondent Town of Kiawah Island's Petition to Dismiss Appeal for Lack of Jurisdiction and Proof of Service. Please find a check in the amount \$50.00 payable to the South Carolina Court of Appeals, for payment of the Respondent's Petition to Dismiss Appeal.

If you have any questions or need anything further from our office, please do not hesitate to contact me. Thank you for your assistance in this matter.

With kind regards,

MCCULLOUGH • KHAN • APPEL

Ross A. Appel

cc: J. Brad McIlvain (via Email)
Enclosures