THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

Appeal from Charleston County
Court of Common Pleas

Jean Toal, Specially Appointed Judge

Appellate Case No. 2023-001789

J. Bradford McIlvain, Appellant,

v.

The Town of Kiawah Island, Respondent.

INITIAL BRIEF OF APPELLANT

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Pro se

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STATEMENT OF ISSUES ON APPEAL

1. Did the Lower Court err in granting Respondent's Motion for Judgment on the Pleadings when the face of the pleadings required a different result?

    a. Did the Lower Court err in concluding that the Wilson Memo was protected from production under South Carolina's Freedom of Information Act even though there is no basis to conclude the Respondent's Town Council exempted the Wilson Memo?

    b. Did the Lower Court err in concluding the work product privilege protected the document sought under the South Carolina Freedom of Information Act?

    c. Did the Lower Court err in concluding the Wilson Memo was protected from production when the well pleaded allegations demonstrate any privilege was waived?

2. Did the Lower Court err in granting Respondent's Motion for Judgment on the Pleadings by improperly considering matters outside the pleadings?

3. Did the Lower Court err by failing to (a) review and analyze the document sought under the South Carolina Freedom of Information

Act for non-exempt material and (b) order production of any such non-exempt information?

4. Did the Lower Court err in conducting an *ex parte* hearing on Respondent's Motion for Judgment on the Pleadings?

5. Because the Lower Court's *ex parte* hearing on the merits was prejudicial to Appellant, must this matter be remanded to a different Judge?

STATEMENT OF THE CASE

This appeal involves a South Carolina Freedom of Information Act ("FOIA") request denied by Respondent Town of Kiawah Island ("Respondent" or "TOKI").

On June 6, 2023, TOKI citizen J. Bradford McIlvain ("Appellant" or "Mr. McIlvain") submitted a FOIA request to Respondent seeking production of a 25-page memorandum addressing material publicly disclosed at a TOKI Town Council meeting on May 2, 2023 ("the Wilson Memo"). Complaint, ¶21. The next day, June 7, 2023, TOKI's Town Clerk denied Appellant's FOIA request. *Id.*, ¶24.

On July 21, 2023, Appellant filed an action for injunctive and declaratory relief in the Court of Common Pleas for the County of Charleston (the "Lower Court") seeking, *inter alia*, production of the Wilson Memo. In his Complaint, Appellant affirmatively avers that Respondent's Town Council specifically waived any attorney-client privilege applicable to the Wilson Memo at its May 2, 2023 public meeting. Complaint, ¶¶7-9, 30. Appellant also avers that the Wilson Memo was not prepared in anticipation of litigation and, therefore, is not protected by the attorney work product doctrine. *Id.*, ¶31. Service of the Summons and Complaint was effected on July 24, 2023 and the Affidavit of Service was filed the next day on July 25, 2023.

Although the pleadings were not closed, on August 2, 2023 Respondent filed a Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment ("Respondent's Motion"). On August 10, 2023, Respondent filed its Answer to the Complaint. In the Answer, Respondent summarily denied that the Town Council waived "any privilege" attached to the Wilson Memo. Answer, ¶¶5-6, 8.

On August 14, 2023, the Lower Court conducted an *ex parte* hearing on Respondent's Motion. 8/14/23 Transcript. At the conclusion of this hearing, the Lower Court granted the relief sought by Respondent. *Id.*, at p. 20, lines 8-10. In its subsequent Order dated August 17, 2023, the Lower Court found that the Wilson Memo was protected by both the attorney-client privilege and the work product doctrine. 8/17/23 Order, p. 5. As a result of the *ex parte* proceeding, the Lower Court further determined that the Respondent Town Council's explicit waiver of privilege on May 2, 2023 did not effect a waiver for any portion of the Wilson Memo itself. *Id.*

On August 28, 2023, Appellant filed his Motion for Reconsideration of Judgment Order dated August 17, 2023 ("Motion for Reconsideration"). Motion for Reconsideration. By Order dated August 29, 2023, the Lower Court granted the Motion for Reconsideration and scheduled a "rehearing" for September 13, 2023. 8/29/23 Order. On September 7, 2023, Appellant filed his Opposition to

Respondent's Motion. Appellant's Opposition. On September 8, 2023, Respondent filed a Reply Memorandum in Support of Respondent's Motion. Reply Memorandum.

On September 13, 2023, the Lower Court conducted a hearing on Respondent's Motion. At the conclusion of that hearing, the Lower Court requested additional briefing on whether FOIA and applicable case law required the Lower Court to review and analyze the Wilson Memo to determine whether it contains any non-exempt material which should be produced to Appellant. Appellant's additional brief was submitted on September 25, 2023. *See* Appellant's Supplemental Memorandum. Respondent's additional brief was submitted on September 29, 2023. *See* Respondent's Supplemental Memorandum.

By Order dated October 13, 2023, the Lower Court granted Respondent's Motion "for the reasons set forth in the Order dated August 17, 2023"-*viz.* the *ex parte* hearing Order. Appellant received notice of the Order on that same day. Appellant filed the Notice of Appeal to this Honorable Court on November 10, 2023.

STANDARD OF REVIEW

"Any party may move for a judgment on the pleadings under Rule 12(c), SCRCP. When considering such motion, the court must regard all properly pleaded factual allegations as admitted." *Falk v. Sadler*, 341 S.C. 281, 286, 533 S.E.2d 350, 353 (Ct. App. 2000). "On review of the motion, the court may not consider matters outside the pleadings." *Id.*

In evaluating a Rule 12(c) motion, the court must consider that "a complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever. Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties." *Id.*, 341 S.C. at 287, 533 S.E.2d at 353 (quoting *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). Moreover, "a judgment on the pleadings is considered to be a drastic procedure by our courts." *Id.* (quoting *Russell*, 305 S.C. at 89, 406 S.E.2d at 339). This court applies the same standard of review implemented by the circuit court. *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001).

It is equally well recognized that "[s]tatutory interpretation is a question of law." *Hopper v. Terry Hunt Constr.*, 373 S.C. 475, 479, 646 S.E.2d 162, 165 (Ct. App. 2007). On appeal, this court may decide matters of law with no particular

deference to the circuit court. *Pressley v. REA Constr. Co.*, 374 S.C. 283, 287-88, 648 S.E.2d 301, 303 (Ct. App. 2007).

ARGUMENT

Statement of Facts Relevant to the Issues Presented

The Dispute

Appellant is a full-time resident of TOKI. Complaint, ¶2. On May 2, 2023, Respondent conducted its monthly Town Council meeting. *Id.*, ¶4. Included on the agenda for that meeting was a presentation by TOKI legal counsel, Joe Wilson (hereinafter "Mr. Wilson"). *Id.*, ¶5. When the time came for Mr. Wilson's presentation, Mr. Wilson affirmatively stated that he could not discuss questions that had been posed about the TOKI 2013 Amended and Restated Development Agreement (hereinafter the "ARDA") before first securing permission from Town Council to discuss his legal advice and analysis.[1] *Id.*, ¶7. Specifically, Mr. Wilson stated that "a Town attorney cannot generally provide its, his legal advice to the public because that's a waiver of the attorney-client privilege" which "only the client can waive." *See* Motion for Reconsideration, Ex. 1, p. 1, lines 14-16.[2] *See also*, Complaint, ¶7. Mr. Wilson noted that despite this limitation "after some discussions" he wanted to present Council "the opportunity" for him to publicly discuss his legal analysis but, before that could happen, he wanted "clarity and a

[1] Although Mr. Wilson asked for a waiver of any applicable privileges, there is no evidence that Respondent, through its Town Council, ever actually invoked the attorney-client privilege with respect to the advice and analysis Mr. Wilson intended to publicly disclosed.

[2] The video of the May 2, 2023 TOKI Town Council meeting is referenced multiple times in the Complaint. *See* Complaint ¶7, 11-13.

vote from Council to OK this discussion." Motion for Reconsideration, Ex. 1, p. 1, lines 18-20; Complaint, ¶7. Following queries from two Town Council members, Mr. Wilson confirmed that he wanted Town Council to enact a formal resolution or motion permitting public disclosure of his legal analysis and opinions regarding the ARDA. Complaint, ¶8. In response to Mr. Wilson's request, Councilman Bradley Belt asked whether a motion "to waive any attorney-client privilege with regard to the discussion pertaining to the ARDA" would suffice and Mr. Wilson responded "that would suffice." Motion for Reconsideration, Ex. 1, p. 1, lines 26-29. Mr. Belt made that motion and Councilman Michael Heidingsfelder seconded the motion. *Id.*, p. 1, lines 31-35; Complaint, Ex. B., p. 3. The motion to waive the attorney-client privilege passed 4-0.[3] Complaint, ¶8.

Following the vote, Mr. Wilson revealed that he had been asked by Respondent to perform an "audit" of the ARDA which work had been undertaken over the last year. Motion for Reconsideration, Ex. 1, p. 2, lines 13-18. As part of this "audit," Mr. Wilson created the Wilson Memo memorializing his analysis and conclusions. *Id.*, p. 7, lines 38-41. Mr. Wilson represented that his public presentation would include counsels' "opinions" (both his and co-counsel Ross

[3] The Lower Court was under the impression that Respondent's Town Council has seven members. 9/13/23 Transcript, p. 29, lines 1-6. In fact, there are only five members - 4 At-large Councilmen and the Mayor. One member of Respondent's Town Council was absent on May 2, 2023.

Appel's opinions) and then proceeded to discuss, for over 25 minutes, his and Mr. Appel's interpretation of the ARDA (including its ambiguities), the interplay of the ARDA with the Respondent's zoning code, the authority of the Town Planning Director under the ARDA and Respondent's zoning code, and the effect of the US Constitution, state law, state judicial decisions and contract interpretation principles on the legal analysis of the ARDA.[4] *See e.g., id.*, p. 2, lines 6-7, referring to counsel's opinions; *id.*, p. 3, lines 2-6, 10-13, 24-28 and 30-32, discussing Respondent's zoning code; *id.*, p. 3, lines 21-22, discussing Respondent's Ordinances; *id.*, p. 6, lines 19-22, discussing the Contracts Clause of the United States Constitution; *id.*, p. 3, lines 32-33, explaining the cardinal rule applicable to contract interpretation; *id.*, p. 6, lines 17-19, discussing the Supreme Court case in *Lucas*.

During the Citizen Comment period following Mr. Wilson's extensive presentation, Appellant asked that a copy of the Wilson Memo be produced to the

[4] At the end of his presentation, Mr. Wilson offered to create a short summary of the legal analysis and opinions for public release, which public release was immediately authorized by Respondent's Mayor. Motion for Reconsideration, Ex. 1, p. 7, lines 15-17, 28-36. Mr. Wilson then fielded questions from Council members about the legal analysis for another 12 minutes until the Mayor stepped in and said there was not sufficient time for Council members to pose their remaining questions. *Id.*, p. 10, lines 10-14. The Mayor asked for a motion to cut-off further discussion including Councilman Belt's questions. Councilman Heindingsfelder specifically conditioned his vote to forestall further comment on May 2, 2023 on the representation that Mr. Wilson's answers to the remaining Council members' comments would take place shortly thereafter, in public, with "community in the room." *Id*, p. 11, lines 27-31. See also Complaint, ¶17.

public insofar as Respondent's Town Council had expressly waived any attorney-client privilege that could apply to the Wilson Memo. Complaint, ¶12. After additional colloquy, Appellant stated:

> "I think it would be helpful for those who would find it of interest, **the memo that Mr. Wilson has generated I think should be provided to the community**." Motion for Reconsideration, Ex. 1, p. 12, lines 27-29 (emphasis added).

In response, Councilman Heidingsfelder stated, "**I thought that was the first decision we took.**" *Id.*, p. 12, line 31 (emphasis added). *See also* Complaint, ¶13. Councilman Moffitt concurred with Councilman Heidingsfelder and stated "**I don't disagree with that**." Motion for Reconsideration, Ex. 1, p. 12, line 33 (emphasis added). *See also* Complaint, ¶3. Thereafter, Mr. Heidingsfelder reconfirmed, "**I think that was the first decision we took.**" Motion for Reconsideration, Ex. 1, p. 12, line 35 (emphasis added).[5] Neither Mr. Wilson, nor any other representative of Respondent, corrected the Councilmen, or otherwise expressed a different view as to the intent or effect of Council's waiver vote on May 2, 2023. Complaint, ¶16. A third Councilman, Mr. Belt, also expressed his

[5] Curiously, Appellant's comment, and Messrs. Heidingsfelder and Moffitt's responses, were not included in the minutes of the May 2, 2023 Town Council meeting. Complaint, Ex. B. However, they do appear on the recorded video referenced throughout the Complaint and subsequently transcribed. *See* Motion for Reconsideration, Ex. 1.

belief that any attorney-client privilege associated with the Wilson Memo was waived by Town Council's May 2, 2023 vote. *Id.*, ¶14. Accordingly, a majority of TOKI Town Council members contemporaneously expressed the opinion that the Wilson Memo should be produced and that any attorney-client privilege applicable to that document had been waived by them. *Id.*, ¶15.

When the Wilson Memo was not thereafter produced, on June 6, 2023, Appellant submitted a FOIA Request for a "copy of the entire legal memorandum referenced by Joe Wilson during the May 2, 2023 Town Council Meeting [the Wilson Memo]. The memorandum should be as it existed on that date without any subsequent modifications." Complaint, Ex. E. Appellant forwarded a copy of his FOIA Request to Town Council and the Mayor. Complaint, Ex. F. In response, TOKI Councilman Heidingsfelder responded that he had "wanted to ask staff why this was not done" and viewed the FOIA request as "an appropriate move." Complaint, Ex. G.

The next morning, Respondent's Town Clerk responded to the FOIA request stating, "the document you are requesting is covered by attorney-client privilege and attorney work product and, therefore is exempt from FOIA requests. South Carolina Code Section 30-4-40(a)(4) and (7)." Complaint, Ex. H. This response issued even though there is (1) no evidence Respondent's Town Council ever invoked a FOIA exemption or

any privilege with respect to the Wilson Memo and (2) clear evidence that Town Council intended their May 2, 2023 waiver vote to cover production of the Wilson Memo.

Proceedings Before the Lower Court

On July 21, 2023, Appellant initiated this action in the Lower Court. Service of the Summons and Complaint was effected on July 24, 2023 and the Affidavit of Service was filed the next day on July 25, 2023. South Carolina's FOIA provisions require that an *initial* hearing be conducted within ten (10) days of service or, in this instance, **on or before August 3, 2023**. S.C. Code Ann. §30-4-100. The South Carolina Code fully contemplates that the initial hearing may not result in resolution and, therefore, provides further, that the Court has six months from the initial filing to conclude the matter, unless good cause is shown to extend that time period. *Id.*

Even though it had not responded to the Complaint, on August 2, 2023, TOKI filed Respondent's Motion. By email accompanying that filing, Mr. Wilson reminded the Lower Court of the ten-day initial hearing requirement and confirmed that the Complaint was served on July 24, 2023. *See* Motion for Reconsideration, Exhibit 2, Attachment A at pp. 3-4. Despite this reminder, the initial hearing was not convened, or even scheduled, on or before August 3, 2023.

Four days later on August 6, 2023, after the statutory deadline for the initial hearing had passed, Appellant advised Judge Young in the Lower Court and Respondent's Counsel, that Respondent's Motion seemed premature insofar as Respondent had not yet answered the Complaint and, therefore, the pleadings were not yet closed. *See Id.*, at pp. 2-3. In that same communication, Appellant noted Respondent's Answer date of August 23, 2023 and he proposed to respond to Respondent's Motion shortly thereafter. *Id.* Appellant also advised the Lower Court and Respondent's counsel that he was then scheduled to depart for a trip on August 9 and would be gone until August 18, 2023. *Id.*

In response, on August 7, 2023 Mr. Wilson promptly advised Judge Young that Respondent had "no objection to working around" Appellant's travel plans and he asked "that a hearing be set after August 18, 2023." *Id.*, pp. 1-2. By return email, Judge Young's clerk promptly acknowledged Mr. Wilson's email and stated he would "inform the parties" once Judge Young had determined how he wished to proceed. *Id.*, p. 1. Two days later, having heard nothing further from the Lower Court, and in light of Respondent's counsel's agreement to a hearing after August 18, Appellant departed for Europe.

On Thursday, August 10, 2023, after Appellant had already arrived in Europe, and <u>a week after the statutory period for the initial hearing had expired,</u> the parties were informed that some undefined type of hearing would be convened on

Monday, August 14, 2023. Motion for Reconsideration, Exhibit 2, Attachment B, pp. 4-6. In a subsequent communication, the Lower Court acknowledged that Appellant was *pro* se, and was then out of the country. *See Id.*, pp. 3-4. Nonetheless, the Lower Court stated, twice, that it had to "at least" convene a hearing so as not to be in violation of the FOIA statute. *Id.* In this same email, the Lower Court solicited from Appellant "any requests [he had] for further scheduling." *Id.*

Upon review of the Lower Court's communication, Appellant promptly responded by, among other things, (1) noting that the ten-day statutory deadline had already passed, (2) asking to remotely participate in the August 14 proceeding and (3) advising of his availability for a hearing on various dates in August and September. *Id.*, pp. 1-2. Late in the day on Friday, August 11, the Lower Court simply advised that it was not "able to arrange [Appellant's] participation by phone." *Id.*, p. 1. The Lower Court did not address the untimeliness of the scheduled hearing or the "further scheduling" information provided by Appellant earlier that day. *Id.*

Despite Appellant's absence, and inability to participate, the Lower Court convened an *ex parte* hearing on the merits on August 14, 2023. At that hearing, Mr. Wilson conceded that the waiver motion passed unanimously by Respondent's Town Council on May 2, 2023 was a waiver as to "**<u>all</u>** discussion of the [ARDA]."

8/14/23 Transcript, p. 9, lines 10-11 (emphasis added). At the conclusion of that proceeding, the Lower Court ruled against Appellant. *Id.*, p. 20, lines 8-10. On August 17, 2023, the Lower Court issued its Order and written notice of that Judgment Order issued on August 18, 2023.[6] 8/17/23 Order.

On August 28, 2023, Appellant timely filed a Motion for Reconsideration raising the impropriety of the *ex parte* hearing on the merits and citing to applicable case law demonstrating that the Wilson Memo was neither protected by the attorney-client privilege nor subject to the attorney work product exemption. On August 29, 2023, the Lower Court granted the Motion for Reconsideration and scheduled a "rehearing" for September 13, 2023. 8/29/23 Order.

During the "rehearing" on September 13, 2023, the Lower Court summarily dismissed Appellant's argument that Respondent's Town Council had never invoked a FOIA exemption with respect to the Wilson Memo. 9/13/23 Transcript, p. 15, lines 10-14. During this same proceeding, the Lower Court agreed that the FOIA exemption under S.C. Code Ann. §30-4-40(a)(7) should be coextensive with

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[6] The Lower Court's *ex parte* Order dated August 17, 2023 states, *inter alia*, that "[a]ll parties were notified of the hearing … only counsel for the Town of Kiawah Island appeared, and Plaintiff, proceeding *pro se*, notified the Court of his inability to appear." 8/17/23 Order, p. 1. This formulation fails to reveal that (1) the Lower Court knew Appellant was out of the country when it scheduled the hearing, (2) the Lower Court denied Appellant's request to participate in the hearing by phone and (3) the Lower Court decided to proceed, nonetheless, despite the absence of any statutory obligation to do so.

the attorney-client privilege and work product doctrines in civil discovery.[7] Despite this acknowledgement, the Lower Court then espoused the view that SC FOIA requires a document by document waiver of the attorney-client privilege. *Id.*, p. 13, line 24 - p. 14, line 1; p. 14, line 25 - p. 15, line 1. As a result, the Lower Court ruled that the waiver of the attorney-client privilege in this case -- which waiver covered "all discussion" of the ARDA and authorized a fulsome, public explication of legal analysis and advice contained in the Wilson Memo -- did not effect a waiver for any part of the writing itself. Indeed, the Lower Court went so far as to say that had Mr. Wilson read, verbatim, the Wilson Memo out loud at the May 2, 2023 TOKI Town Council meeting, that <u>would not</u> have resulted in a waiver of any privilege over the document itself.[8] The Lower Court also rejected the idea that applicable case law required it to (1) review the Wilson Memo and (2) segregate and order produced all non-exempt information in the Wilson Memo, but

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[7] As you [Appellant] say, general law and the FOIA should speak in parallel on the subject of attorney-client privilege, and I agree with you." 9/13/23 Transcript p. 15, lines 16-19.

[8] "[APPELLANT]: If Mr. Wilson got up and read from his memo, would that be a waiver?
THE COURT: No, sir, not in my opinion…." 9/13/23 Transcript p. 13, lines 22-24.

permitted additional briefing on this issue.[9] Appellant filed his Supplemental Memorandum on September 25, 2023 and Respondent filed its on September 29, 2023.

The Lower Court filed its Order on October 13, 2023 granting Respondent's Motion "for the reasons set forth" in the *ex parte* Order dated August 17, 2023. 10/13/23 Order, p. 2. The Order granting judgment on the pleadings does not cite to the pleadings or mention, much less address, any of the arguments raised by Appellant except to state that the Court did not have to review the Wilson Memo to determine whether or not it contained non-exempt material. *Id.*

ISSUE 1: Did the Lower Court err in granting Respondent's Motion for Judgment on the Pleadings when the face of the pleadings required a different result?

Rule 12(c) permits any party to move for judgment on the pleadings after the pleadings are closed. Rule 12(c), SCRCP. When considering such a motion "the court must regard all properly pleaded factual allegations as admitted" and may not consider "matters outside the pleadings." *Pope v. Wilson*, 427 S.C. 377, 384, 831

[9] THE COURT: "We are talking about a document of 25 pages and whether that document should be released. I'm not aware of any authority I would have under this statute to parse that document and decide some things are releasable and some things are not releasable...

[APPELLANT]: I think, at the very least, you have to do that. The case law requires that, Your Honor.

THE COURT: I don't think so." 9/13/23 Transcript p. 18, lines 2-12.

S.E.2d 442, 445 (Ct. App. 2019) *citing Falk v. Sadler*, 341 S.C. 281, 286, 533 S.E. 350, 353 (Ct. App. 2000). When evaluating a Rule 12(c) motion, the Court must view a complaint as sufficient "if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever." *Pope*, 831 S.E. 2d at 446 (citations omitted). Indeed, judgment on the pleadings is "considered to be a drastic procedure" given the Court's mandate to view pleadings liberally to ensure that "substantial justice" is done between the parties. *Id.* (citations omitted).

It is equally well established that "[b]ecause the attorney-client privilege exists for the benefit of the client, the client holds the privilege." *In re Grand Jury Proceedings #5 Empaneled January 28, 2004*, 401 F.3d 247, 250 (4th Cir. 2005). In the FOIA context, Courts make clear that the public body "has the burden of proving that an exemption applies." *See Evening Post Publ'g. Co. v. City of N. Charleston*, 363 S.C. 452, 457, 611 S.E.2d 496, 499 (2005) (citations omitted) (*quoting Fowler v. Beasley*, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996).

a. Did the Lower Court err in concluding that the Wilson Memo was protected from production under South Carolina's Freedom of Information Act even though there is no basis to conclude the Respondent's Town Council exempted the Wilson Memo?

Here, the Court found that the Wilson Memo was an exempt attorney-client communication. 8/17/23 Order, p. 3; *id.*, p. 5, #2; 10/13/23 Order, pp. 1-2. However, there is simply no allegation from which the Lower Court could have

concluded that Respondent's Town Council ever asserted an exemption or privilege with respect to the Wilson Memo. To the contrary, the allegations support the conclusion that a majority of Respondent's Town Council intended the Wilson Memo to be public-*i.e.* not exempt. Complaint, ¶¶13-14. *See also* Motion for Reconsideration, Ex. 1, p. 12, lines 27-31, 33, 35.

That Respondent's Town Council had to invoke the exemption with respect to the Wilson Memo is also clear.[10] Specifically, §30-4-40(a)(7) of South Carolina's Freedom of Information Act ("FOIA") provides, in relevant part, that "A public body ***may*** but is not required to exempt from disclosure" "[c]orrespondence or work product of legal counsel ... and any other material that would violate attorney-client relationships." S.C. Code Ann. §30-4-40(a)(7) (emphasis added). Because the Legislature chose not to (1) classify attorney-client communications as automatically exempt, or (2) create a duty of confidentiality as to this type of information, by its terms §30-4-40(a)(7) requires the public body to affirmatively act to exempt such information.[11] Insofar as nothing in the pleadings

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[10] In general, a public body may act only after the action has been approved by a majority vote of a quorum of its members. *See Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432, 453, 511 S.E.2d 48, 59 (1998). At all times relevant to this dispute, the members of the Town Council were John Labriola, John Moffitt, Bradley Belt, Russell Berner and Michael Heidingsfelder.

[11] The Legislature's decision to make the listed FOIA exemptions discretionary was clearly deliberate. Indeed, prior to 1998, S.C. Code Ann. §30-4-40(a) provided that the listed matters "**are** exempt from disclosure under the provisions of this chapter." (Emphasis added).

demonstrates that Respondent's Town Council declared the Wilson Memo exempt, the Lower Court's entry of judgment on the pleadings based on the FOIA exemption for attorney communications was improper.[12]

b. Did the Lower Court err in concluding the work product privilege protected the document sought under the South Carolina Freedom of Information Act?

In this instance, the Lower Court also determined that judgment on the pleadings should issue in Respondent's favor because the Wilson Memo is exempt as work product. 8/17/23 Order, p. 3; *id.*, p. 5, #2; 10/13/23 Order, p. 2. In South Carolina, the attorney work product doctrine protects "from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 537, 787 S.E.2d 485, 495 (2016) (quoting *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010); *see* Rule 26(b)(3), SCRCP. In determining whether a document was prepared in "anticipation of litigation," "most courts look to whether or not the document was prepared because of the prospect of litigation." *Stokes-Craven,* 416 S.C. at 537, 787 S.E.2d at 495 (quoting

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[12] The Lower Court treated Respondent's Motion as a Motion for Judgment on the Pleadings and, therefore, the Court was limited to consideration of the pleadings. *See* 10/13/23 Order: "the Court grants the Motion for Judgment on the Pleadings." Of course, had the Court considered evidence on this issue, that evidence confirms that Respondent's Town Council never voted to invoke the attorney-client privilege with respect to the Wilson Memo. Motion for Reconsideration, Ex. 3, Belt Affidavit, ¶19.

Tobaccoville, 387 S.C. at 294, 692 S.E.2d at 530). Courts have held that materials prepared in the ordinary course of business, pursuant to regulatory requirements, or for other, non-litigation purposes are not documents prepared in anticipation of litigation within the meaning of the doctrine. *Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992). The party claiming work product immunity has the burden to establish the claimed protection. *United States v. Herrera*, 324 F.R.D. 258, 262 (S.D. Fla. 2017) (citation omitted).

The Complaint clearly alleges that the Wilson Memo does not constitute attorney work product because it was not prepared in anticipation, or because of, the prospect of litigation. Complaint, ¶31. In fact, at the May 2, 2023 Council Meeting, Mr. Wilson stated that the Wilson Memo was prepared in conjunction with a year-long "audit" of the ARDA requested by his client, *i.e.* for a clearly "non-litigation" purpose. Motion for Reconsideration, Ex. 1, p. 2, lines 13-18. And at the September 13, 2023 argument, Mr. Wilson affirmatively stated: "No one is trying to sue anyone." 9/13/23 Transcript p. 30, lines 18-19.

Respondent's pleading does not require a different conclusion. Specifically, while summarily denying that Respondent's Town Council waived "any privilege" attaching to the Wilson Memo, Respondent never alleged that the work product doctrine exempted the Wilson Memo. Respondent's Answer, ¶¶5-6, 8.

Absent an allegation of possible litigation, or an averment that the Wilson Memo constitutes exempt work product, the pleadings do not support the Lower Court's conclusion that the Wilson Memo "is protected" by the work product privilege and, therefore, judgment on the pleadings should not have issued on this basis as well. 10/13/23 Order, p. 2.

c. Did the Lower Court err in concluding the Wilson Memo was protected from production when the well pleaded allegations demonstrate any privilege was waived?

As set forth in the Complaint, the Respondent's Town Council voted to waive any attorney-client protection applicable to counsel's discussion and analysis of the ARDA.[13] Complaint, ¶¶7-9. It is further alleged that when undertaking that vote, a majority of Town Council understood that their vote encompassed the Wilson Memo itself. *Id.*, ¶¶3-14. Thereafter, Mr. Wilson's undertook an almost 30-minute public explication of his opinions and analyses as set forth in various legal memoranda, including the Wilson Memo. *Id.*, ¶9.

The Lower Court ignored these well-pled averments and determined, instead, that no waiver of the attorney-client privilege occurred because Respondent's Town Council's waiver vote did not itemize the Wilson Memo by name. Specifically, the Lower Court determined that a waiver of the attorney-

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[13] At the *ex parte* hearing Mr. Wilson conceded that TOKI Town Council's waiver vote covered **all** discussion of the ARDA. 8/14/23 Transcript, p. 9, lines 10-11.

client privilege must be "distinct and unequivocal" (8/17/23 Order, p. 4), and then interpreted this requirement to mean that, in the FOIA context, all attorney documents are exempt absent an explicit and particular waiver as to each individual document. In other words, the waiver is not to the advice, or subject of the advice but, rather, must be as to each form of the advice, i.e. oral versus written. Thus, even though Mr. Wilson verbally described, in great detail, the analysis and opinions he memorialized in the Wilson Memo, according to the Lower Court the waiver motion did not cover that same advice and analysis in written form. The Lower Court's interpretation is not supported by the relevant case law or the FOIA statute.

1. The Waiver Need Not Be Explicit to Be Effective.

As an initial matter, the Lower's Court determination that a waiver must be explicit and particularized derives from civil litigation cases requiring waivers to be "distinct and unequivocal." *In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 168, 829 S.E.2d 707, 712 (2019); *State v. Thompson*, 329 S.C. 72, 76-77, 495 S.E.2d 437, 439 (1998). Relying on cases arising in the civil litigation context is appropriate since the FOIA exemptions and civil litigation privileges are co-extensive.[14] *See, e.g., United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799-800, 104 S. Ct.

[14] At the hearing on September 13, 2023, the Lower Court agreed that the privileges were co-extensive. 9/13/23 Transcript, p. 15, lines 16-19: "As you say general law and the FOIA should speak in parallel on the subject of attorney-client privilege, and I agree with you."

1488, 1492-94, 79 L.Ed.2d 814 (1984); *FTC v. Grolier Inc.*, 462 U.S. 19, 26-28, 103 S. Ct. 2209, 2214, 76 L. Ed. 2d (1983); *Town of Winthrop v. F.A.A.*, 328 Fed. App'x 1 (1st Cir. 2009); *Stonehill v. I.R.S.*, 534 F. Supp. 2d 1 (D.D.C. 2008). *See also Pope v. Wilson,* 427 S.C. at 388-89, 831 S.E.2d at 448 (discussing interplay between FOIA and discovery rules). The reason for this is obvious: if the privileges are not the same, a party could simply end run FOIA and file civil litigation where the material would be produced because of, among other things, subject matter waiver principles.

However, the "distinct and unequivocal" requirement cited by the Lower Court does not require a waiver of the attorney-client privilege to be explicit or particularized. Indeed, both *Mt. Hawley* and *Thompson* cited by the Lower Court stand for the proposition that waiver of the attorney-client privilege **need not be** explicit.[15] *Mt. Hawley*, 427 S.C. at 168, 829 S.E.2d at 712; *State v. Thompson,* 329 S.C. at 77, 495 S.E.2d at 439. *See also Duplan v. Deering Milliken,* 397 F. Supp. 1146, 1162 (D.S.C. 1975) ("Plaintiff's argument that waiver requires an intentional relinquishment or abandonment of a known right has a familiar ring with regard to general contract law, but waiver, as applied to the particular subject of attorney-

[15] The Lower Court failed to consider South Carolina cases interpreting the "distinct and unequivocal" requirement as requiring an intentional action rather than an explicit one. *Lamberson v. Reardon*, 2017 WL 2210238 at **2-3 (S.C. Comm. Pl. Jan. 6, 2017) (J., Young, J.). *See also, Carolina Park Associates, LLC v. Marino*, 2011 WL 9369845 (S.C. Comm. Pl. June 28, 2011) (J., Young, R.) (disclosure of document did not rise to a distinct and unequivocal waiver of the attorney-client privilege because it was accidental and inadvertent.).

client privilege, may be made by implication.") Moreover, nothing in these cases can be fairly read to require the waiver to identify, by name, the particular materials or information subject to waiver.

That this case arises under FOIA does not support a stricter view. In fact, there is nothing in the text of FOIA to support the idea that every document is exempt unless explicitly waived, by name. Indeed, such a reading is directly contradicted by the text of FOIA which classifies all attorney-client information as non-exempt absent an affirmative act by the public body to exempt that material. SC Code Ann. §30-4-40(a)(7). *See also*, discussion pp. 20-21, *supra*. Reading extra requirements into FOIA also undermines FOIA's espoused purpose to ensure "that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy." S.C. Code Ann. §30-4-15. In fact, there is no public interest served by giving public bodies a greater ability to hide information, or selectively disclose information, when a case arises under a statute whose purpose is "to make it possible for citizens ... to learn and report fully on the activities of their public officials...." *Id.* The Lower Court's grafting additional restrictions onto the FOIA statute is also inconsistent with the liberal construction of FOIA afforded by the Courts and the fact that

FOIA's exemptions are to be narrowly construed. *Evening Post Publ'g. Co*, 363 S.C. at 457, 611 S.E.2d at 499.

Litchfield Plantation Co. v. Georgetown Cnty. Water & Sewer Dist., 317 S.C. 30, 443 S.E.2d 574 (1994) cited by the Lower Court does not change these conclusions. In fact, the *Litchfield* holding was limited to "under §30-4-30(c) failure to respond within fifteen days means the disclosure of non-exempt material at the time and place of access which the party requested is deemed approved." *Litchfield*, 314 S.C. at 32, 443 S.E.2d at 575. See *also* Op. S.C. Atty. Gen. July 9, 2010, p. 2. There is not only no broad pronouncement on implied waiver in *Litchfield,* in fact the *Litchfield* Court found that the time and place for the production of all non-exempt material had been approved by default, *i.e.* impliedly. In any event, because the waiver was not implied here, *Litchfield* is inapposite. *See* discussion, pp. 29-33, *infra.*

Additionally, while *Litchfield* has been cited less than a dozen times by SC Courts since 1994, those Courts never cited *Litchfield* for the broad propositions adopted by the Lower Court. *See, e.g., S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, No. 2022-UP-406 (Ct. App. 2022) (attorney's fees); *Pope v. Wilson,* 427 S.C. 377, 831 S.E.2d 442 (2019) (attorneys' fees); *Sloan v. S.C. Dep't of Revenue*, 409 S.C. 551, 762 S.E.2d 687 (2014) (citing Toal dissent); *Sloan v. Friends of the Hunley,* 393 S.C. 152, 711 S.E.2d 895 (2011) (citing Toal dissent); *Burton v. York*

County Sheriff's Dept., 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004) (attorney's fees); *Campbell v. Marion County Hospital Dist.*, 354 S.C. 274, 580 S.E.2d 163 (Ct. App. 2003) (attorney's fees). *See also* Op. S.C. Atty. Gen. April 29, 2011 (no waiver for failure to timely respond); Op. S.C. Atty. Gen. July 9, 2010 ("failure to respond to a request within 15 days equates to the public body's approval of the request" for non-exempt information); and Op. S.C. Atty. Gen. February 1, 2006 (intent of the Legislature may be gleaned from the plain meaning of the statute.)

Next, when *Litchfield* was decided, S.C. Code Ann. §30-4-30 provided, *inter alia*, that a FOIA request "must be considered approved" if the public entity did not provide "written notification of the determination of the public body as to the availability of the requested public record" "within the fifteen days allowed ...." And, at that time, S.C. Code Ann. §30-4-40 stated that the items delineated therein "<u>are</u> exempt from disclosure under the provisions of [that] chapter." *Litchfield*, 443 S.E.2d at 575. These two provisions left the Supreme Court to grapple with, and harmonize, dueling interests of transparency and openness with protection of privacy and the effectiveness of law enforcement actions. Specifically, the Supreme Court reasoned that allowing agencies to waive the FOIA exemptions by failing to respond within fifteen days could result in "the disclosure of investigative records of law enforcement agencies and personal information ... through no fault of an interested party which the exemptions were enacted to

protect." 443 S.E.2d at 575, n. 1. Here, there are no such law enforcement or privacy concerns.

Finally, as noted above, (n. 11, *supra*) S.C. Code Ann. §30-4-40 was amended in 1998 to now provide that "A public body ***may*** but is not required to exempt from disclosure" the items listed in §30-4-40. 1998 Act No. 423. (Emphasis added.) Twenty years later, in 2018, S.C. Code Ann. §30-4-30 was amended to provide that a public body's failure to timely respond means that the FOIA request is considered approved as to non-exempt records or information, but not as to the exemptions of §30-4-40 or other state or federal law. 2017 Act No. 67, Section 1. In short, the Legislature addressed, and codified, the Supreme Court's *Litchfield* decision. Most notably, the Legislature never modified FOIA to include the implied waiver or document identification limitations the Lower Court read into *Litchfield* in this case.

2. <u>The Waiver Here was Explicit</u>

Even assuming the waiver had to be explicit, here there was an explicit, distinct and unambiguous waiver of the attorney-client privilege at the May 2, 2023 Town Council Meeting. In fact, the motion introduced and approved by Respondent's Town Council and lawyer (Mr. Wilson) unequivocally waived any attorney-client privilege with regard to "**<u>discussion</u>** pertaining to the ARDA." Motion for Reconsideration, Exhibit 1, p.1, lines 26-27. (Emphasis added). At the

August 14, 2023 *ex parte* hearing, Mr. Wilson confirmed that the waiver Motion meant "all discussion of the [ARDA] is waived." 8/14/23 Transcript, p. 9, lines 10-11. (Emphasis added). By its terms, and as conceded by Mr. Wilson, the waiver motion was (1) explicit and (2) NOT limited to any particular "form" of discussion of the ARDA. As such, the waiver encompassed the Wilson Memo which the Lower Court confirmed is a "discussion pertaining to the ARDA," just in a different form. 8/14/23 Transcript, p. 17, lines 12-17.

The Lower Court's determination that the waiver here was legally insufficient also fails to credit the well established principle that "[a]ny voluntary disclosure by a client to a third party waives the attorney-client privilege not only as to the specific communication disclosed **but also to all communications** between the same attorney and the same client **on the same subject**." *Marshall v Marshall*, 282 S.C. 534, 538, 320 S.E.2d 44, 47 (Ct. App. 1984) *citing Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1975); *United States v. Jones*, 696 F.2d 1069 (4th Cir. 1982). Emphasis added. *See also King v. Travelers Home and Marine Ins. Co.*, 4:20-cv-03806 RMG, 2022 WL 100234 at *5 (D.S.C. Jan. 10, 2022) (finding Plaintiffs explicitly waived the attorney-client privilege as to all communications between themselves and counsel on the topics contained in letters already produced; "[a]ny voluntary disclosure by a client to a third party waives the attorney-client privilege [as to] all communications between the same

attorney and the same client on the same subject."). Voluntary disclosure of documents, in whole or in part, to third parties has also been held to waive FOIA exemptions for those documents. *See, e.g., North Dakota v. Andrus,* 581 F.2d 177, 180-82 (8th Cir. 1978); *Mead Data Central, Inc. v. United States Dep't of the Air Force,* 566 F.2d 242, 253 (D.C. Cir. 1977); *Julian v. United States Dep't of Justice,* 806 F.2d 1411, 1419 n. 7 (9th Cir. 1986) (alternative holding), *aff'd,* 486 U.S. 1, 108 S.Ct. 1606, 100 L.Ed.2d 1(1988).

At the *ex parte* hearing on August 14, 2023, the Lower Court found that the Wilson Memo "includes legal analysis and legal advice in a great deal of detail on the issues of the development standards in the 2013 amended and restated development agreement [ARDA] adopted by the Town as a part of the Town's zoning code." 8/14/23 Transcript p. 17, lines 12-17. Having determined that the Wilson Memo covers the same subject (1) noted in the motion to waive the privilege and (2) which was extensively covered in Mr. Wilson's presentation, the Lower Court should not have granted judgment in Respondent's favor under applicable South Carolina law.

As set forth above, there is also no allegation from which a Court could reasonably conclude that the work product doctrine protects the Wilson Memo absent litigation or the anticipation thereof. However, even if the Wilson Memo was protected by the work product doctrine, any such privilege was also waived by

Mr. Wilson when he stood up at the May 2, 2023 TOKI meeting and spoke, at length, about the contents of the Wilson Memo.[16] This privilege is his to waive and his voluntary exposition effected that waiver. It is likewise clear that the waiver is not limited to the material he addressed but, rather, is as to his entire analysis in the Wilson Memo. *See, e.g.*, *United States v. Herrera*, 324 F.R.D. 258 (S.D. Fla. 2017) (counsel's claim of work product protection for written notes and memos regarding witness testimony was waived after counsel orally described the witnesses' information to federal regulators.) In fact, in *United States v. Coburn*, Civ. 2:19-cr-00120, 2022 WL 357217 at *7 (D.N.J. Feb. 1, 2022) the District Court soundly rejected the invocation of the work product privilege and, instead, found that when oral summaries of witness interviews were provided to the Government, a waiver was effected with respect to: (1) all memoranda, notes, summaries, or other records of witness interviews to the extent that summaries of interviews were conveyed to the government, whether orally or in writing; (2) documents or communications to the extent the summaries of interviews directly conveyed the contents of documents or communications; **and** (3) documents and communications that were reviewed and formed any part of the basis of any presentation, oral or written, to the DOJ in connection with this investigation.

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[16] The 8/17/23 Order does not contain any discussion of waiver in the context of work product issue. 8/17/23 Order, p. 5.

Simply put, the waiver is to the advice, not to the form in which that advice appears. Because waiver clearly occurred as to any arguable attorney-client privilege and work product protection, the Lower Court erred in granting the Motion for Judgment on the Pleadings.

ISSUE 2: Did the Lower Court err in granting Respondent's Motion for Judgment on the Pleadings by improperly considering matters outside the pleadings?

As set forth above, in considering a Motion for Judgment on the Pleadings, a Court is precluded from considering matters outside the record. *See* pp. 18-19, *supra*. Despite this clear limitation, at the *ex parte* hearing, the Lower Court asked Respondent's counsel to provide it with a copy of the Wilson Memo and then spent an undisclosed amount of time reviewing that document.[17] According to the Lower Court, it did not "parse each line" to determine "whether there's some lines that are public and some lines that are not" but, rather, looked at the Wilson Memo "as a

[17] Inexplicably, at the September 13, 2023 hearing, the Lower Court stated "I was **asked** to look at the document as a whole to decide whether it was a public record, exempt or not exempt, and that's what I did." 9/13/23 Transcript, p. 40, lines 3-5 (emphasis added). It is unclear who made this request as it does not appear in the record. Rather, the transcribed record reveals that at the *ex parte* hearing, Mr. Wilson asked the Lower Court if it wanted to review the Wilson Memo *in camera* and the Lower Court responded: "No, I do not need to examine that in camera ... I gave some thought to that before I came to court today but it's the character of the document and not its content that I will be reviewing." 8/14/23 Transcript, p. 7, lines 3-7. Despite saying that it did not need to examine the Wilson Memo, after Mr. Wilson finished his argument at the *ex parte* hearing, the Lower Court asked to see the Wilson Memo. *Id.*, p. 16, lines 8-10.

whole to decide whether it was ... exempt or not exempt." 9/13/23 Transcript, p. 40, lines 1-5. Following its review, the Lower Court determined "It was a 25-page memo...It's labeled as an attorney-client privileged document....and it talks about issues upon which Mr. Wilson is getting advice."[18] *Id.*, p. 39, lines 19-24.

Review of a document clearly outside the pleadings led the Lower Court to summarily conclude that the Wilson Memo "contains confidential communications of legal concepts that are subject to protection." 8/17/23 Order, p. 3. Because the Lower Court's determination derived from its review of material beyond the pleadings, the entry of judgment in Respondent's favor should be vacated.

ISSUE 3: Did the Lower Court err by failing to (a) review and analyze the document sought under the South Carolina Freedom of Information Act for non-exempt material and (b) order production of any such non-exempt information?

Entry of Judgment in Respondent's favor was also improper where, as here, the requirements of FOIA were not followed. In particular, S.C. Code Ann. §30-4-40(b) provides "[i]f any public record contains material which is not exempt under subsection (a) of this section, the public body shall separate the exempt and nonexempt material and make the nonexempt material available in accordance

[18] To the extent determinations outside the pleadings are credited, it is important to note that the Wilson Memo was apparently NOT marked as attorney work product. Respondent's Motion, p. 1; 9/13/23 Transcript p. 39, lines 20-21.

with the requirements of this chapter." There is no allegation that Respondent reviewed the 25-page Wilson Memo as required under FOIA. Indeed, because the FOIA request was transmitted on June 6, and denied <u>the very next morning</u>, it is reasonable to assume Respondent did not comply with its obligations under S.C. Code Ann. §30-4-40(b). Complaint, ¶¶21, 24 and Exhibits E and H thereto.

Absent action by the Respondent, before ruling on this matter, the Lower Court was obligated to undertake the review and dissemination required by S.C. Code Ann. §30-4-40(b). *Evening Post Publ'g Co. v. Berkeley County School Dist.*, 392 S.C. 76, 83, 708 S.E.2d 745, 749 (2011) ("We find it troublesome that the circuit court did not look at the documents ultimately sought by Evening Post before granting School District's summary judgment motion.") *See Newberry Publ. v. Newberry Co. Comm'n A.D.A.* 308 S.C. 352, 417 S.E.2d 870 (1992) (the trial judge erred in failing to segregate the nonexempt and exempt portions of the report and to provide the Observer with the nonexempt material, as is mandated by section 30-4-40(b).) *Accord City of Columbia v. ACLU*, 323 S.C. 384, 388-89, 475 S.E.2d 747, 750 (1996) ("Before Appellant becomes entitled to the report, the trial court must first examine the report in detail in order to determine whether the report's contents or portions thereof qualify for an exemption under §30-4-40."); *Beattie v. Aiken County Dep't of Social Services*, 319 S.C. 449, 462 S.E.2d 276 (1995) ("exemptions for the FOIA do not provide a blanket prohibition of

disclosure of the entire record containing exempt material. Rather, the exempt and nonexempt material shall be separated and the nonexempt material disclosed.").

Despite the unambiguous provisions of FOIA, and clearly applicable case law, the Lower Court never undertook the required review of the document but decided, instead, that its cursory examination of the Wilson Memo as part of the *ex parte* hearing was sufficient. According to the Lower Court, the entire Wilson Memo was subject to blanket protection because it was "an entire record ... labeled as an attorney-client privileged document." 9/13/23 Transcript p. 39, lines 18-21. This approach led the Lower Court to acknowledge:

> "I did not parse each line to determine whether there's some lines that are public and some lines that are not. I was asked to look at the document as a whole to decide whether it was a public record, exempt or not exempt, and that's what I did." *Id.*, p. 40, lines 1-5.

Because FOIA was violated and the required examination of the Wilson Memo never occurred, the entry of Judgment in Respondent's favor was clearly improper.

ISSUE 4: Did the Lower Court err in conducting an *ex parte* hearing on Respondent's Motion for Judgment on the Pleadings?

The South Carolina Judicial Canons provide, among other things, that "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to the law." Canon 3, Section B(7). The Canons also make clear that "A judge shall not initiate, permit, or consider ex

parte communications, or consider other communication made to the judge outside the presence of the parties concerning a pending or impending proceeding" except in certain scheduling, administrative or emergency so long as those matters "do not deal with substantive matters or issues on the merits."[19] *Id.* An *ex parte* communication is defined as "prohibited communication between counsel and the court when opposing counsel is not present." *Fore v. Griffco of Wampee, Inc.*, 409 S.C. 360, 368, 762 S.E.2d 37, 41 (Ct. App. 2014) (quoting *Brown v. Bi–Lo, Inc.*, 354 S.C. 436, 440 n. 3, 581 S.E.2d 836, 838 n. 3 (2003) (quoting BLACK'S LAW DICTIONARY 597 (7th Ed. 1999)). "A judicial proceeding ... is said to be *ex parte* when it is taken for granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested." *Ex Parte Lexington County*, 314 S.C. 220, 226, 442 S.E. 2d 589 (1994) (quoting BLACK'S LAW DICTIONARY 297 (5th Ed. 1983)).

Here, it is beyond dispute that the Lower Court scheduled and then convened a hearing on the merits, on two days' notice, knowing that the Appellant was already out of the country and could not participate. Motion for Reconsideration, Exhibit 2, Attachment B, pp. 3-4: "Given I was appointed today, I intend to at least convene a hearing ... I'm sorry you cannot attend due to your European vacation

[19] The Rules of Professional Conduct also preclude counsel from engaging in *ex parte* communications. Rule 3.5(b) of the South Carolina Rules of Professional Conduct.

..." The Lower Court then conducted the hearing *ex parte* in violation of the applicable Judicial Canons. As Chief Justice, the Lower Court noted "The bottom line for me is that *ex parte* contact about the merits of a matter is never proper." Motion for Reconsideration, Exhibit 4, excerpt from Judicial Merit Selection Commission Open Session transcript, December 2, 2003, p. 20, Answer #4.[20]

ISSUE 5: Because the Lower Court's *ex parte* hearing on the merits was prejudicial to Appellant, must this matter be remanded to a different Judge?

While FOIA seeks to guarantee the public reasonable access to activities of the government in a cost-efficient manner, the instant proceeding has fallen woefully short of these goals.

First, no hearing was held within the 10-day requirement of FOIA in violation of S.C. Code Ann. §30-4-100 and then an untimely hearing was scheduled - on two-days' notice - knowing that the Plaintiff had already left the country and could not attend. *See* discussion pp. 14-15, *supra*.

Second, although Appellant asked to participate, telephonically, he was advised his participation simply couldn't be arranged. *See* discussion p. 15, *supra*.

[20] The Lower Court's view is consistent with Canon 3(B)(7), Rule 502 SCACR and the professional rules applicable to lawyers barred in South Carolina. Rule 3.5(b) of the South Carolina Rules of Professional Conduct.

Third, based on his communications with the Lower Court, and his review of the Judicial Canons and Rules of Professional Conduct, Plaintiff reasonably believed the hearing would be to determine scheduling going forward. *See* Motion for Reconsideration, p. 11.

Fourth, knowing Plaintiff was precluded from participating, the hearing nonetheless proceeded, *ex parte*. 8/17/23 Order.

Fifth, not surprisingly, since the Lower Court did not hear from both parties, the Lower Court reached a conclusion not supported by the law based on a one-sided argument.

Sixth, after Appellant made the Lower Court aware of the multiple irregularities in the proceedings, and of the resulting prejudice to Appellant, the Lower Court convened a second hearing on September 13, 2023. In that hearing, the Lower Court demonstrated a lack of familiarity with Appellants' arguments, as well as a misapprehension of relevant authorities and principles governing the action.

By way of example only, when Appellant said "South Carolina law in clear ... once the client disclosed confidential attorney-client communications ... all communication between the lawyer and the client on the same subject is waived" the Lower Court dismissed this argument saying "... subject matter waiver is something that must be specifically done... It must be specifically waived."

9/13/23 Transcript p. 11, lines 7-13; p. 11, line 24 - p. 12 line 2. The Lower Court's view is just not the law. *See* discussion pp. 30-31, *supra*.

Similarly, when Appellant noted that the exemptions in FOIA were "not mandatory" "The Town may impose this exemption [S.C. Code Ann. §30-4-40(a)(7)]" and "The Town has never voted to pursue this exemption" the Court summarily rejected this argument saying: "That's an implied waiver-type argument, and attorney-client privilege is an exception to that." 9/13/23 Transcript p. 15, lines 11-16. Appellant was not advancing a waiver argument but, rather, simply addressing the language of FOIA, and the clearly discretionary nature of the only exemption at issue in this matter.

At the September 13, 2023 proceeding, the Lower Court also stated that it was not aware "of any authority" the Court would have under FOIA "to parse that document and decide some things are releasable and some things are not releasable." *Id.*, p. 38, lines 1-6. However, that examination is exactly what is required by S.C. Code Ann. §30-4-40(b) and relevant case law cited to the Lower

Court in Appellant's Motion for Reconsideration.[21] *See also* discussion at pp. 34-36, *supra* and Appellant's Supplemental Memorandum, pp. 10-11. That the Court did not undertake the required review is likewise clear: "I did not parse each line to determine whether there's some lines that are public and some lines that are not." 9/13/23 Transcript p. 40, lines 1-3.

In another instance, the Lower Court mischaracterized the *Duplan v. Deering Milliken* case as standing for the proposition that "with attorney-client privilege, there must be a specific waiver." *Id.*, lines 20-25. The Lower Court also expressed the view that there is no implied waiver of the attorney-client privilege "in South Carolina, in the litigation context." *Id.*, p. 16, lines 10-12. However, in *Duplan*, the Court specifically discussed the circumstances under which it would consider waiver of the attorney-client privilege "by implication." *Duplan*, 397 F.

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[21] "[T]he Court's determination should be directed at whether 'documents **or portions** thereof are exempt from FOIA' which determination is to be made on 'a case-by-case basis.' *Evening Post Publ'g Co. v. Berkeley Cty. Sch. Dist.*, 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011) (reversing and remanding lower's court's order granting summary judgment). Emphasis added. *See also* S.C. Code Ann. §30-4-40(b) (any nonexempt information should be separated from exempt material and be made available to the requesting party.).

In this instance, the Court appears to have briefly looked at the Wilson Memo and then ruled that the entire Wilson Memo was protected from disclosure. There is no evidence from which [Appellant] can conclude that the Court undertook the detailed analysis required under South Carolina law to separate non-exempt information from exempt information, much less that the Court compared the Wilson Memo to Mr. Wilson's extensive oral presentation to determine what, if any, information was still confidential."

Motion for Reconsideration, p. 16.

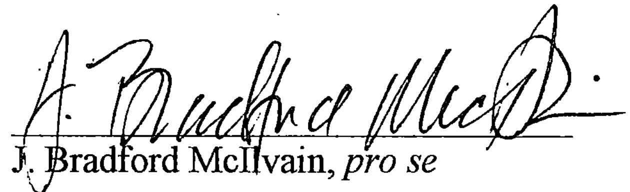
Supp. at 1160-62. *Duplan*, among other authorities cited to the Lower Court, also makes clear that subject matter waiver applies in the attorney-client context and does not require a "specific waiver" at all. *Id.*, 397 F. Supp. at 1161.

Seventh, the Lower Court reaffirmed its decision to grant judgment on the pleadings in Respondent's favor in a 1 ½ page Order which does not even cite to the pleadings and ignores all but one of Appellant's arguments. Indeed, the only bases for the Lower Court's determination were "the reasons set forth in the [*ex parte*] Order dated August 17, 2023." 10/13/23 Order, p. 2. In other words, the tainted *ex parte* proceeding drove the result.

As set forth above, the South Carolina Judicial Canons direct that a judge shall not "consider ex parte communications, or consider other communication made to the judge outside the presence of the parties concerning a pending or impending proceeding." Canon 3, Section B(7). Because the Lower Court's October 13, 2023 Order makes clear that the *ex parte* proceedings, and the communications therein, formed the "reasons" for the Lower Court's entry of judgment here, Appellant submits that (1) judgment in Respondent's favor should be vacated and (2) in order to avoid further prejudice to the Appellant, the matter should be remanded to a different judge in the Lower Court.

CONCLUSION

For the foregoing reasons, Appellant J. Bradford McIlvain respectfully requests that the entry of Judgment in Respondent's favor be vacated and that this matter be remanded to the Court of Common Pleas before a different judge for discovery and further proceedings.



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DATED: December 11, 2023

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jean Toal, Judge

Appellate Case No. 2023-001789

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 Brief of Appellant dated December 11, 2023 on Defendant Town of Kiawah Island by US Mail to its counsel as noted below:

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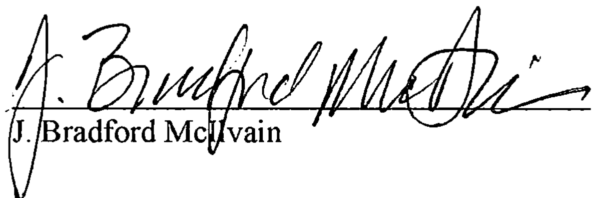
DECEMBER 11, 2023
Date


J. Bradford McIlvain

December 11, 2023

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SC Court of Appeals

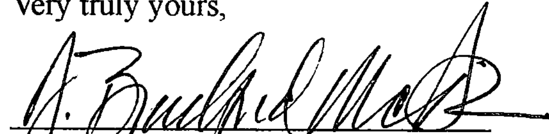
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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

Dear Ms. Kitchings:

Enclosed for filing are the Brief of Appellant and Designation of Record on Appeal along with proof of service for each document.

Very truly yours,



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