

**RECEIVED**

**Dec 27 2023**

**SC Court of Appeals**

Exhibit 1

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

J. BRADFORD MCILVAIN,	)	
	)	
Appellant,	)	Appellate Case No. 2023-001789
	)	
-versus-	)	
	)	AFFIDAVIT OF J. BRADFORD MCILVAIN
THE TOWN OF KIAWAH ISLAND,	)	
	)	
Respondent.	)	

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COMES NOW, J. Bradford McIlvain, and swears or affirms under the penalty of perjury:

1. I am older than eighteen years of age and competent to make this Affidavit.
2. The statements in this Affidavit are based on my own personal knowledge.
3. I am the Appellant in this action.
4. I initiated this action in the Lower Court by filing a Summons and Complaint on July 21, 2023.
5. The Summons and Complaint were served pursuant to the South Carolina Rules of Civil Procedure on July 24, 2023.
6. Prior to the monthly Town Council Meeting on August 1, 2023, I observed that the docket reflected that the Town of Kiawah Island's Town Attorney, Joseph Wilson ("Mr. Wilson") had entered his appearance.
7. At the August 1 Meeting, I spoke with Mr. Wilson and noted that I had not been served with his Entry of Appearance. During that discussion, Mr. Wilson claimed he did not have to serve the Entry of Appearance.
8. Later that day, Mr. Wilson sent me an email stating, "Please accept this email as a notice of my appearance in your case. As mentioned, our filing system does not require or

generate a hard copy notice.” A true and correct copy of the August 1, 2023 email is attached as Exhibit A.

9. The next day, August 2, 2023, Mr. Wilson sent an email with an entry of appearance for Ross A. Appel and him with “/s/” signatures. A true and correct copy of the August 2, 2023 email with attachment is attached as Exhibit B.

10. Mr. Wilson sent me a second email that same date, on August 2, 2023, attaching a link to a Motion for Judgment on the Pleadings. A true and correct copy of the second August 2, 2023 email is attached as Exhibit C.

11. Also on August 2, 2023, Mr. Wilson sent an email, with an email copy me, to the Chief Administrative Judge for the Court of Common Pleas, Charleston County, Judge Young, attaching the link for the Motion for Judgment on the Pleadings and noting the Town had been served with the Complaint on July 24, 2023 and that the South Carolina Freedom of Information Act requires the Chief Administrative Judge to schedule an initial hearing within ten days of service of the Complaint.

12. After the ten-day period had passed with no initial hearing being scheduled, I replied on August 6, 2023, via email to all recipients stating that, among other things, I would be leaving for Europe on August 8 and returning August 18, 2023 and requested that any hearing be scheduled after my return.

13. The next day, on August 7, 2023, Mr. Wilson wrote Judge Young via email, “The Defendant Town has no objection to working around Mr. McIlvain’s vacation plans. We would ask that a hearing be set after August 18, 2023. We will also file an Answer in the meantime if that will satisfy Mr. McIlvain’s concerns.”

14. Judge Young's clerk responded by email shortly thereafter, "Thank you for letting us know. Judge Young is currently reviewing the materials sent in by the parties. I will inform the parties once the Judge has made a determination on how he wishes to proceed." A true and correct copy of the August 2, 6 and 7, 2023 email string is attached as Exhibit D.

15. On August 10, 2023 (a Thursday), after I had arrived in Europe, I received an email from Judge Young's law clerk stating that a hearing in this matter would be held on August 14, 2023 (the following Monday). No notice of the hearing was sent by US Mail.

16. About an hour later, I received an email from former Chief Justice Toal which said,

"I have been aware that [@Brad McIlvain](#) you are the *pro se* Plaintiff in the FOIA matter entitled *McIlvain v. Town of Kiawah Island*, C/A No. 2023-CP-10-03550. There is a very limited time frame for scheduling these types of hearings in Court when FOIA Act claims have been denied. I have been assigned by Judge Roger Young to hear this matter pursuant to the 10-day scheduling rule in the FOIA statute. I have scheduled the hearing for August 14, 2023 at the Charleston County Judicial Center, at 12:00 noon. Given I was appointed today, I intend to at least convene a hearing because of the statutory deadline involved. I will keep you informed what transpires at the hearing. I'm sorry you cannot attend due to your European vacation, but I do not wish violate the statute by not at least convening a hearing. If you have any communication regarding this matter, I'll be happy to receive any response prior to my hearing, including any requests you have for further scheduling."

17. Also on August 10, 2023, Mr. Wilson sent an email attaching the Town's Answer to the Complaint.

18. The next morning, on August 11, 2023, I wrote the Lower Court via email noting that the required ten days had expired and setting forth my availability for August and September, 2023. I also asked to be able to participate in the hearing via telephone.

19. The Lower Court responded later that day via email, "Dear Mr McIlvain: I am not able to arrange your participation by phone. I will apprise you of the results of Monday's

proceeding. Sincerely yours, Jean Toal.” A true and correct copy of the August 10-11, 2023 email string as well as the separate email August 10, 2023 email enclosing Respondent’s Answer to the Complaint is attached hereto as Exhibit E. For unknown reasons, this email string does not include the emails documenting the Parties’ agreement to have any hearing after my return from Europe.

20. The Lower Court held an *ex parte* hearing on the merits on August 14, 2023.

21. All communications with the Lower Court about the hearing were via email.

22. Three days later, on August 17, 2023, former Chief Justice Toal’s law clerk sent an email enclosing an Order which stated, “All parties were notified of the hearing, ... and Plaintiff, proceeding *pro se*, notified the Court of his inability to appear.” The Order documented the ruling on the merits at the *ex parte* hearing. A true and correct copy of the August 17, 2023 email from the Lower Court is attached hereto as Exhibit F.

23. On August 28, 2023, I filed a Motion for Reconsideration and served counsel via email as noted in the Certificate of Service. A true and correct copy of my August 28, 2023 email serving the Motion for Reconsideration is attached hereto as Exhibit G.

24. Later, that same day, Mr. Wilson sent via email the transcript of the *ex parte* hearing and asked that I confirm receipt, which I did. A true and correct copy of the August 28, 2023 email exchange with Mr. Wilson is attached hereto as Exhibit H.

25. On August 29, 2023, Mr. Wilson sent me via email a copy of the Order granting my Motion for Reconsideration. A true and correct copy of the August 29, 2023 email from Mr. Wilson is attached hereto as Exhibit I.

26. On September 7, 2023, I served counsel and the Lower Court via email with a copy of my Opposition to the Town’s Motion for Judgment on the Pleadings which had been

filed that day. A true and correct copy of my September 7, 2023 email serving the Opposition to the Town's Motion for Judgment on the Pleadings is attached hereto as Exhibit J.

27. On September 8, 2023, Mr. Wilson sent me via email a copy of the Town's Reply Memorandum in Support of Motion for Judgment on the Pleadings. A true and correct copy of Mr. Wilson's September 8, 2023 email is attached hereto as Exhibit K.

28. On September 13, 2023, the Lower Court held a second hearing and requested supplemental briefing.

29. On September 25, 2023, I served counsel and the Lower Court via email with a link to my Supplemental Brief in Opposition to the Town's Motion for Judgment on the Pleadings. A true and correct copy of my September 25, 2023 email serving the Supplemental Brief in Opposition to the Town's Motion for Judgment on the Pleadings is attached hereto as Exhibit L.

30. On September 26, 2023, Mr. Wilson sent me a copy of the transcript of the second hearing via email. A true and correct copy of Mr. Wilson's September 26, 2023 email is attached hereto as Exhibit M.

31. On September 29, 2023, Mr. Appel's paralegal served the Lower Court and me via email with a copy of the Town's Supplemental Memorandum in Support of Motion for Judgment on the Pleadings. A true and correct copy of Ms. Lademan's September 29, 2023 email is attached hereto as Exhibit N.

32. On October 13, 2023, Mr. Wilson sent me an email enclosing a copy of the Order entered by the Lower Court and which is the subject of this appeal. A true and correct copy of Mr. Wilson's October 13, 2023 email is attached hereto as Exhibit O.

33. Counsel for the Town have never objected to service via email.

34. Thirty days after October 13, 2023 was November 12, 2023. Given that November 12 was a Sunday, the Notice of Appeal was due November 13, 2023.

35. On November 10, 2023, I served Respondent's counsel with the Notice of Appeal via email as I had served them throughout this matter. A true and correct copy of the November 10, 2023 email and Notice of Appeal is attached hereto as Exhibit P.

36. The email address used for Respondent's counsel Mr. Appel is the email address listed in the Attorney Information System ("AIS") - [ross@mklawsc.com](mailto:ross@mklawsc.com). The email address used for Respondent's counsel Mr. Wilson is the email address he used to serve by email through this case - [joew@kiawahisland.org](mailto:joew@kiawahisland.org).

37. Respondent's Counsel has not alleged that they did not receive the Notice of Appeal on November 10, 2023, three days before it was due.

38. Prior to filing its Motion to Dismiss on December 13, 2023, more than a month later and after I filed my initial brief, Respondent's Counsel did not object to service of the Notice of Appeal via email.

39. On November 17, 2023, Catherine Harrison, Deputy Clerk of the South Carolina Court of Appeals sent a letter with copies to counsel for Respondent acknowledging receipt of the Notice of Appeal and noting the appellate case number and that the caption had been changed to "The Town of Kiawah Island."

40. Ms. Harrison sent a separate letter dated November 17, 2023, which was stapled behind the first letter stating, "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 deficiency was that the proof of service was not in compliance with the SCACR, not any statutory requirement. True and

correct copies of the November 17, 2023 letters from Ms. Harrison are attached hereto as Exhibit Q.

41. On November 27, 2023, within ten (10) days of the date of the letter, I placed in the US mail with proper postage to the Clerk, a Notice of Appeal with a corrected Certificate of Service in compliance with the SCACR and placed copies of that document in the US Mail with proper postage addressed to Respondent's counsel. A true and correct copy of the revised Notice of Appeal is attached hereto as Exhibit R.

42. On December 11, 2023, I spoke with the Clerk assigned to this matter in response to a notice that I had not timely ordered the transcript from the Lower Court. I explained that all parties had received copies of the applicable transcripts prior to the filing of the Notice of Appeal being filed. Therefore, no transcript order was required. She requested that I send an electronic filing to [ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org) documenting what I had told her. I asked if I had to send a copy via US Mail to counsel for the Town. She said that was unnecessary if the parties agreed to service by email. I sent the requested notice and received a responsive email noting it was accepted for filing. True and correct copies of the December 11, 2023 emails are attached hereto as Exhibit S.

43. On December 13, 2023, I was copied on an email to clerk filing the Respondent's Motion to Dismiss Appeal which included a copy of the Petition. A true and correct copy of the December 13, 2023 email is attached as Exhibit T. Respondent served the Motion to Dismiss by email on this same date.

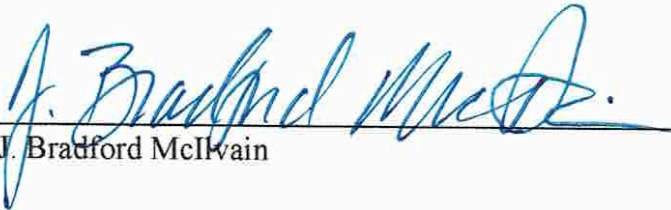
44. On December 14, 2023, I received an email from "Court of Appeals Filings" confirming receipt of the Respondent's Petition for Extension of Time to File Initial Brief. A

true and correct copy of the December 14, 2023 email is attached as Exhibit U. Respondent served the Petition by email on this same date.

45. The Parties, the Lower Court and now the Court of Appeals have established a pattern and practice of serving and communicating via email.

46. Respondent also served a copy of the Motion to Dismiss via US Mail. Appellant did not receive his mail copy until December 21, 2023, eight days after it was “served.” If email service was not allowed, Appellant would have had only two days to respond to the Motion.

FURTHER AFFIANT SAYETH NOT.

  
J. Bradford McIlwain

December 22, 2023

Sworn and subscribed before me  
this 22 day of December, 2023

  
Notary Public for South Carolina

My commission expires 3/18/2024

