

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
R. MARKLEY JENNIS JR., CIRCUIT COURT JUDGE
Trial Court Case No.: 2015-CP-10-5757
Appellate Case No. 2016-000555

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SC Court of Appeals

South Carolina Lawyers Weekly,
by and through its principal, Dolan Publishing Company,

Appellant,

vs.

Scarlett Wilson, Solicitor Of the Ninth Judicial Circuit,
An elected public official,

Respondent.

APPELLANT'S INITIAL REPLY BRIEF

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ATTORNEYS FOR APPELLANT

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REPLY TO RESPONDENT'S ISSUE ONE

Respondent's argument that Solicitor Wilson is not a public body because she is an individual is nonsensical, especially where Solicitor Wilson used her public office to respond to the Freedom of Information Act (FOIA) request, and when she admitted that her office was subject to FOIA. (Exhibit B to Complaint).

Solicitor Wilson lists her public office address on the South Carolina Supreme Court's Attorney Information System (AIS). Rule 409(e) of the South Carolina Appellate Court Rules (SCACR) requires that members of the Bar list their contact information with AIS, which is implemented by the South Carolina Judicial Department¹. Solicitor Wilson could certainly have chosen to list her home address as her contact information; however, she did not. She identified herself on AIS as being an agent of a public body and designating her public office as the place at which she could be served with documents. *Id.*

Solicitor Wilson is an agent of a public office, employed in a public office, used public resources to respond to the FOIA request, and thereby admitted her status as a public officer. *See* additional discussion, Issue Three.

Moreover, Solicitor Wilson acknowledges that her office is a "public body" and therefore subject to FOIA. The very definition of "public body" expressly includes "representatives of departments within the executive branch of state government." S.C. Code Ann. Section 30-4-20(a). The act is clear: a "person" includes an "organization." *Id.* at (b). Solicitor Wilson is an

¹ The mandate of the Rule exists "for the purpose of notifying and serving the member." Rule 409(e). By listing her office address in the AIS, Solicitor Wilson acknowledged her status as a public official; any service of a legal document would have to be made to her at the address designated. This case does not present a situation in which a public officer received a document at her office and took it home because it dealt with private and personal matters. To the contrary, Solicitor Wilson used the FOIA response to scold lawyers who had filed complaints against her with disciplinary authorities using the prestige of her official letterhead.

elected official. The records she chooses to receive in her official capacity become public records as defined in Section 30-4-20(c).

Ms. Wilson holds her office only because she is a licensed attorney in South Carolina; she could not otherwise hold the office. S.C. Code Ann. Section 1-7-310 (“A solicitor must be licensed to practice law by the South Carolina Bar at the time of his election and throughout his term”). Indeed, her defense in this action is being provided by the Attorney General’s office pursuant to S.C. Code Ann. Section 1-7-60, which requires an investigation to insure that the subject matter of the lawsuit address an action of a “public officers or employee [who] was acting... in the course of his employment” before the Attorney General can provide a defense in a civil action. *See also* S.C. Code Ann. Section 1-7-50 (“In the event that any officer or employee of the State, or of any political subdivision thereof, be prosecuted in any action, civil or criminal...by reason of any act done or omitted in good faith in the course of employment, it is made the duty of the Attorney General... to appear and defend the action...”). If Solicitor Wilson is a private individual for purposes of this action, she could not be represented by the Attorney General. Her brief does not address this issue.

The South Carolina Code also clearly identifies Solicitor Wilson as a “public officer.” Section 8-1-10 defines a “public officer” as an “officer of the state... whose duties are defined by law.” The duties of a solicitor are clearly defined by law in S.C. Code Ann. Section 1-7-320. Solicitor Wilson is required to be a full-time employee of the state; therefore she may not maintain a private practice of law while she serves as solicitor. Section 1-7-325. All of her duties as a lawyer are therefore activities of a public officer.

Solicitor Wilson’s position is disingenuous. She acknowledges she holds a public office and that she works in a public body, but she somehow thinks that she retains her private, personal

status while she performs her public duties. That argument might be persuasive if the documents sought in this action related to Solicitor Wilson's private affairs. However, it is acknowledged that the documents requested relate exclusively to actions and omissions she performed in her capacity as a public officer, the only capacity in which she has acted or can act.

It is respectfully asserted that the issue presented, *i.e.*, whether an elected public official who is acting within the scope of her official, statutorily-imposed duties, retains her status as a private individual while she is carrying out those duties, is a legal question that begs for an answer.

Because FOIA is remedial in nature, it must be liberally construed to carry out the purposes mandated by the General Assembly. Burton v. York County Sheriff's Department, 358 S.C. 339, 594 S.E.2d 888 (Ct.App. 2004). Any doubts about whether Solicitor Wilson is a public body under the purposes of FOIA must be construed in favor of her being determined to be such a public body for purposes of the FOIA request.

REPLY TO RESPONDENT'S ISSUE TWO

Solicitor Wilson asserts that the documents received by her are not public records. It is possible that Solicitor Wilson could have received documents received from the Commission on Lawyer Conduct and/or Disciplinary Counsel at her personal, private address and could have responded personally. However, she listed her public office for her contact information in AIS, and presumably the documents were mailed to her at her public office address, addressed to her with her public title. She certainly answered this FOIA request on her official letterhead, thereby acknowledging (implicitly at least) that the documents in question were maintained by her at her public office.

Solicitor Wilson does not dispute that the documents in question relate to inquiries into her conduct as a public official (as opposed to her private actions).

The 1981 opinion of the Attorney General recited by Solicitor Wilson is not persuasive on this issue. It predated the current rules of Lawyer Disciplinary Enforcement (RLDE), Rule 413, SCACR, and was issued at a time when disciplinary proceedings remained confidential at all times unless or until the Supreme Court determined to impose discipline on a licensed lawyer. Rule 12 was first enacted in 1997, well after the referenced Attorney General opinion was issued. The rule in place at the time was far more restrictive than current Rule 12, as prior rules stated that no one, even “witnesses, counsel, counsel’s secretaries... shall mention the existence of any such proceeding.” Rule 20(D) of the “Rules on Disciplinary Procedure” (repealed by adoption of the RLDE). Even those directly involved in any capacity, including witnesses and counsel, could not discuss amongst themselves the issues involved except as necessary. Reminder as to the breadth and nature of such an expansive prior rule was required to be stated to any person attending any proceeding, and violations were deemed contempt of the Supreme Court. Rule 20(E).

Additionally, the dated Attorney General opinion did not address the character of documents that were sent to or received by a public official in her official capacity and which were responded to using public resources and in an official capacity. Certainly, there was nothing in the 1981 opinion which suggested that the documents in question addressed the acts or omission of an elected official while acting within the scope of her public duties.

To the extent that Solicitor Wilson and the trial judge rely upon S.C. Code Ann. Section 30-4-40(a)(2) (which exempts from disclosure of “information of a personal nature where the public disclosure thereof would constitute an unreasonable invasion of personal privacy”) the trial judge could not possibly have had a basis to determine the content of the requested documents related to such private and personal matters without a review of the documents in question. He could not know the content of the documents requested at a motion to dismiss stage.

Certainly, by granting the motion to dismiss, the trial judge erred in concluding as a matter of law that any document embraced by Rule 12 falls within the exemption set forth in Section 30-4-40(a)(2), regardless of its content and without any determination that it would constitute “an unreasonable invasion of personal privacy.” At a minimum, a factual inquiry would be necessary to determine whether the content of the documents did, in fact, constitute information that would “constitute an unreasonable invasion of personal privacy.”

REPLY TO RESPONDENT’S ISSUE THREE

Solicitor Wilson continues to hide behind the language of Rule 12, RLDE, which is wholly inapplicable here, in support of her argument that there cannot be a waiver of confidentiality. For the reasons already addressed, Rule 12 gives Solicitor Wilson no grounds to withhold the requested documents. The Rule expressly governs only the actions of employees of the Office of Disciplinary Counsel and the Commission on Lawyer Conduct. The Rule is a prohibition only upon conduct by certain actors, not a designation of the nature of a document.

Solicitor Wilson acknowledged, on her official letterhead, the existence of the documents requested and the subject matter addressed by the content of those documents, before asserting that the documents were “private” and “personal.” She cannot open the door and then slam it shut without consequences. She cannot disclose what she chooses for her benefit about the documents and then shield the remaining content from public scrutiny. She argues (and the trial judge found) that she had no intent to waive confidentiality. There was no evidence whatsoever of her intent, or lack thereof, to support this conclusion. In fact, the only evidence is the FOIA response itself, which talks about the existence and content of the requested documents; if anything, the language of the FOIA response supports a waiver.

It is impossible to rule on a matter of the Solicitor's intent in the absence of any evidence which supports that finding of intent. Solicitor Wilson used the opportunity to respond to the FOIA request to chastise her critics by describing what she believed to be petty complaints by disgruntled attorneys, and in so doing, acknowledged the existence and content of complaints against her. If she had intended to claim confidentiality, she had no right to speak.

CONCLUSION

For the reasons set forth in the Appellant's Brief, and having addressed Respondent's arguments herein, the order of the trial judge should be reversed and the matter should proceed in its ordinary course.

Respectfully submitted,

A handwritten signature in cursive script that reads "Desa Ballard" followed by a small mark that appears to be "by H.M.W.".

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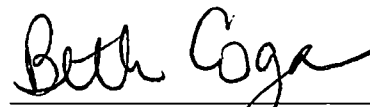
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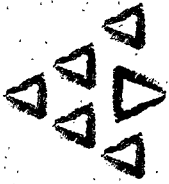
CERTIFICATE OF SERVICE

I, Beth Cogan, an employee with Ballard & Watson, Attorneys at Law, do hereby certify that on July 1, 2016, I served a copy of the **Appellant's Initial Reply Brief and Appellant's Reply Designations** in the above-captioned case on the following individuals by standard US Mail:

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July 1, 2016

Via U.S. Mail

Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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Re: *South Carolina Lawyers Weekly v. Scarlett Wilson*
Appellate Case No: 2016-000555

Dear Ms. Kitchings:

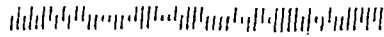
Please find enclosed for filing an original and one (1) copy of the **Appellant's Initial Reply Brief and Appellant's Reply Designations** in the above-referenced matter. After both have been filed, please return the clocked copies to our office in the enclosed, self-addressed, stamped envelope.

Please do not hesitate to contact our office if you should have any questions. With warm personal regards, I am,

Sincerely yours,

Desa Ballard
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cc: Via U.S. Mail
Emory Smith, Jr., Esquire
Phil Bantz (via email)



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