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

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.

FINAL BRIEF OF APPELLANT

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4. THE TRIAL COURT ERRED IN FAILING TO FIND THAT DEFENDANT WAIVED ANY CONFIDENTIALITY THAT MIGHT HAVE BEEN AVAILABLE TO HER UNDER RULE OR STATUTE. THE COURT ERRED IN RULING THAT THE DOCUMENTS SOUGHT WERE "BEYOND THE SCOPE OF FOIA;" WERE "EXPRESSLY NON-PUBLIC UNDER THE APPELLATE COURT RULES," AND WERE "PERSONAL DOCUMENTS" OF THE RESPONDENT.

STATEMENT OF THE CASE

On or about July 10, 2015, Appellant made request to Respondent to inspect and copy any records relating to any disciplinary complaints made against her or action taken with respect to her as a member of the South Carolina Bar. The request was made pursuant to S. C. Code Ann. Section 30-4-10 *et seq.,* hereafter "the Act." Respondent answered the request on her official letterhead, acknowledging that her office was subject to the Act, but declining to produce the records on four (4) bases:

1. Respondent asserted she was not a public body and she is not a public official.
2. The documents were confidential pursuant to Rule 12 of the Rules on Lawyer Disciplinary Enforcement (RDLE) and the documents were personal in nature.
3. The documents were exempt from disclosure under the Act.
4. Production would violate the attorney-client privilege.

Respondent made a motion to dismiss the action, citing the above grounds. The matter was heard by the Honorable J. Markley Dennis Jr., who granted the motion. A motion for reconsideration was filed, and was also denied. This appeal follows.

ARGUMENTS

Issue One

THE TRIAL COURT ERRED IN FAILING TO FIND THAT DEFENDANT IS A PUBLIC OFFICER AND HER OFFICE IS A PUBLIC BODY AND THEREFORE SUBJECT TO THE FREEDOM OF INFORMATION ACT.

Respondent Scarlet Wilson is an elected official of the State of South Carolina, serving as Solicitor of the Ninth Judicial Circuit, elected by the electorate of the Ninth Judicial Circuit. She is a full-time employee of the State of South Carolina and has such duties as are assigned to her by law in the State of South Carolina, including the duty to receive and administer county funds within her circuit. (R. p. 12 ¶ 2).

In order to hold her elected office, Respondent is required to be a member of the South Carolina Bar, licensed to practice law in South Carolina. (R. p. 12 ¶ 3). Respondent does not maintain a private practice of law and has no private clients. Any legal services she provides are provided as a public officer of the State. (R. p. 13 ¶ 4). Respondent is a public official and her office constitutes a "public body" as defined by the Act. S.C. Code Ann. Section 30-4-10 *et seq.* (Rev. 2007).

In the hearing in this matter, the trial judge specifically noted that Respondent "is an officer representative of the Solicitor's Office and is the solicitor." (R. p. 51, lines 6-8). The court also noted that Respondent "can't practice law in any capacity... other than the solicitor." (R. p. 52, lines 4-6). The trial judge also observed that "it is the officer and that may well be proper" under the Act. (R. p. 52, line 25 – 53, line 4).

Respondent also acknowledged in her response to Appellant's request, that the Act "requires that this office, as a public body, make available to the public... any 'public record' kept during the normal course of our business." (R. p. 21). The trial judge specifically said if

"the only issue was whether or not she is a public body, there is no question what I would do. I mean, I think she is." (R. p. 57, lines 2 – 4).

Nonetheless, the trial judge's written order declined to address this issue, concluding that the order "need not reach this issue" and went on to deny the relief requested on other grounds. (R. p. 7).

It is respectfully asserted that a ruling that the Respondent is a public official, and therefore generally subject to the Act, is a determination that is accurate as a matter of law. The Supreme Court has noted that the provisions of the Act "must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials..." Stephen George Brock v. Town of Mount Pleasant, Opinion No. 27621 (filed April 13, 2016), quoting Wallace v. City of York, 276 S.C. 694, 281 S.E.2d 487, 488 (1981).

While the trial court's order assumed that Respondent was a public official for purposes of the Act, Respondent urges that an express finding of the character of the Respondent's role is necessary for a full discussion of the issues presented here.

The trial court erred in failing to find, as a matter of law, that Respondent was a public official and her office is a public office.

Issue Two

THE COURT TRIAL COURT ERRED IN ITS INTERPRETATION OF AND RELIANCE ON RULE 12 OF THE RULES OF LAWYER DISCIPLINARY ENFORCEMENT (RLDE), RULE 413, SCACR, WHICH HAS NO BEARING ON THE DETERMINATION OF WHETHER A DOCUMENT IS, OR IS NOT, A PUBLIC DOCUMENT UNDER FOIA.

The trial court agreed with Respondent's argument that Rule 12 of the Rules on Lawyer Disciplinary Enforcement (RLDE) operate to make the documents requested "confidential."

Specifically, the trial judge said that "Rule 12 closes the documents at issue to the public." (R. p. 2) (emphasis added).

Rule 12 of the RLDE, contained in Rule 413, SCACR, has no application in requests under the Freedom of Information Act. Specifically, the Rule reads:

> ... [T]he members of the Commission, the staff of the Commission, disciplinary counsel, the staff of disciplinary counsel, the members of the Supreme Court and the staff of the Supreme Court shall not in any way reveal the existence of the complaint, while the matter remains confidential...

Rule 12, RLDE.

By definition, the RLDE apply only to "the procedure for resolving allegations that a lawyer has committed ethical misconduct... ." Rule 1, RLDE. Noticeably absent from Rule 12 is any prohibition that the complainant, the responding lawyer, any witness, or any other person with knowledge of proceedings before the Commission other than the specific persons mentioned in Rule 12 are subject to any obligation of confidentiality. Any person involved in or who has knowledge of a grievance proceeding other than the persons specified in the rule are not prohibited in any way from divulging the existence of a matter under the RLDE. Indeed, any attempt to silence the complainant, the responding lawyer, or witnesses, would certainly fall under a First Amendment challenge. *See* City of Beaufort v. Baker, 315 S.C. 146, 432 S.D.2d 470 (1993), *c.f.,* Disabato v. SC Ass'n. of School Adm'rs., 404 S.C. 433, 746 S.E.2d 329 (2013).

Moreover, Rule 12 does not say that any document is confidential; instead it placed a prohibition on certain categories of persons from divulging the existence of proceedings which are occurring or have occurred under the RLDE. Section 12(b) of the Rule specifically provides when the files maintained by the persons named in Section (a) become public. But in the hands of anyone other than the persons to whom the prohibition of Section (a) applies, the documents always are, and always have been, public documents. Stated differently, there is no rule which prohibits the

complainant, the responding lawyer, or any person other than those specifically identified in Section (a) from disclosing the documents or widely disseminating them.

Court rules, such as the RLDE, are enacted by the South Carolina Supreme Court pursuant to Article V, Section 4[1] of the South Carolina Constitution. The Court's powers are limited to enacting rules "governing the practice and procedure in all [state] courts." That article also provides that the "Supreme court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted." Id.

The Supreme Court's rule-making authority does not empower it to enact rules which change the meaning of statutes. The separation of powers doctrine simply would not permit a court rule to modify the meaning of a statutory scheme. See SC Public Interest Forum v. SC Transp. Infrastructure Bank, 403 S.C. 640, 744 S.E.2d 521 (2013). As Appellant argued below, "Rule 12 by its very definition only addresses restrictions that are on the Supreme Court, the Commission on Lawyer Conduct, and the Office of Disciplinary Counsel." (R. p. 57, lines 19-22). "By definition any lawyer against whom a complaint is filed at any state of the proceedings can buy a billboard on 26 and public the fact that a grievance has been filed against them." (R. p. 57, line 23 – p. 58, line 1).

The trial judge erred in concluding that Rule 12 of the RLDE changes the nature of documents held by a public official and "makes the documents... non-public because formal charges have not been filed." (R. p. 3). The Act is a self-contained Act, not amended or restricted by procedural rules which govern the operation of the state courts and the discipline of lawyers.

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[1] The 1973 amendments to Article V, Section 4 were accompanied by substantive changes to the structure and operation of the judicial system which "eliminated the balkanization of our [judicial system]." Cort Indus. Corp. v. Swirl, 264 S.C. 142, 146, 213 S.E.2d 445 (1975). The Supreme Court subsequently noted that the amendments had created a prohibition on the General Assembly making changes to the unified court system. State *ex rel.* McLeod v. Knight, 264 S.C. 532, 216 S.E.2d 190 (1975). In 1985, the Supreme Court and the General Assembly reached a historic agreement which led to the repeal of statutes enacted by the General Assembly which governed procedure in the unified court system, leaving procedural matters governing the state courts to the Supreme Court's exclusive authority. *See* Stokes v. Denmark Emergency Med. Servs., 315 S.C. 263, 433 S.E.2d 850 (1993).

Having concluded that Rule 12 made the documents sought here "non-public," the trial court cited Rule 12(d) in support of his conclusion that a lawyer (who is subject to a complaint before the Commission) "may reveal" the filing of complaint. Having said that, however, the trial judge again permitted Rule 12 to modify the obligations of a public official under the Act. "Accordingly, under the Rule, the Complaint and related documents are not public during the period of confidentiality" and "the lawyer may not be compelled to disclose them." (R. p. 3) (emphasis added). Again, the trial judge erroneously concluded that the procedural rules governing complaints filed with the Commission can alter a public officials obligations under FOIA[2]. Such a construction is legal error, and is actually prohibited by the separation of powers doctrine.

The trial judge erroneously concluded that he lacked the "power" to release documents which were requested of the respondent in this proceeding. Again, his error is in believing that Rule 12 has any effect on the statutory obligations set forth in the Act. His decision should be reversed, and remanded to order production of the documents in question.

Issue Three

THE COURT ERRED IN CONCLUDING THAT S.C. CODE ANN. § 30–4–40(A)(2) PROVIDED THE DEFENDANT WITH AN EXCLUSION FROM A REQUEST UNDER THE FREEDOM OF INFORMATION ACT. IT WAS UNDISPUTED THAT THE SUBJECT MATTER OF THE DOCUMENTS REQUESTED DID NOT RELATE TO DEFENDANT'S PERSONAL CONDUCT, BUT INSTEAD ADDRESSED HER CONDUCT IN HER CAPACITY OF A PUBLIC OFFICIAL. THEREFORE, THE CITED EXCLUSION DID NOT APPLY.

The trial judge also erred in concluding that the requested documents were exempt from disclosure under Section 30-4-40(a). That provision exempts from disclosure under the Act

[2] The Court also cited to a 1981 opinion of the Attorney General which has become moot by virtue of the entire restructuring both of the unified judicial system in 1973 and the exclusive allocation to the Supreme Court in 1985 of the right to establish procedure for the courts and for the practice of law.

"information of a personal nature where the public disclosure thereof would constitute an unreasonable invasion of personal privacy."

As pleaded in the complaint, any records received by the [Respondent] from the Office of Disciplinary Counsel or the Commission on Lawyer conduct which relate to her conduct as a public official are required to be maintained in accordance with the Public Records Act... ." (R. p. 13 ¶ 8) (emphasis added). It is respectfully asserted that any complaints which relate to the fitness of the Respondent to carry out the duties of her public office are legitimate matters of public inquiry under the Act and are not exempt from disclosure pursuant to 30-4-40(a) as an invasion of personal privacy.

Because the matter was decided on a motion to dismiss, the well-pleaded allegations of the complaint are construed liberally, and the court assumes the matters alleged to be true. United Educ. Distribs. LLC v. Educ. Testing Servs., 350 S.C. 7, 564 S.E.2d 324 (Ct.App. 2002). Moreover, based on the complaint itself, Respondent admitted that the documents sought related to her conduct as a public official.

> In the last year a number of grievances have been filed against [Respondent] by or at the behest of disgruntled criminal defense lawyers who disagree with her management of the Solicitor's Office and in some cases with her handling of cases.

(R. p. 21).

This is not a situation in which the conduct forming the factual basis for the claim under the Act relates to Respondent's personal conduct. Had the complaint related to her conduct as a private citizen, a different result may be required. Here, however, it is undisputed that the complaints which are sought specifically relate to the Respondent's job as a public official.

The act is "remedial in nature" and should be "liberally construed" to carry out the purpose mandated by the legislature. Quality Towing Inc. v. City of Myrtle Beach, 345 S.C. 163, 547 S.E.2d 862 (2001). "Consistent with the [Act's] goal of broad disclosure, the exemptions from its

mandates are to be narrowly construed." Burton v. York County Sheriff's Dep't, 358 S.C. 339, 348, 594 S.E.2d 888 (Ct.App. 2004). The Act "creates an affirmative duty on the part of public bodies to disclose information." Id. citing Bellamy v. Brown, 305 S.C. 291, 295 408 S.E.2d 219, 221 (1991).

The Act governs the public disclosure of the activities of public bodies. Lambries v. Saluda Cnty. Council, 409 S.C. 1, 760 S.E.2d 785 (2014). "The essential purpose of FOIA is to protect the public from secret government activity." Id. at 789. Where, as here, it is undisputed that the Respondent's actions as a public official are the subject of the inquiry, the purposes of the Act are especially urgent.

The trial court's ruling seems to take the mandate that a solicitor be a lawyer in order to carry out her public duties, and use it as a sword to prevent inquiry into the ethical operations of her office, somehow making them private and not a subject of public inquiry. Such a conclusion turns the very purpose of the Act on its head.

It is because Respondent is a public official that public inquiry into the operation of her public office, using public funds, is subject to disclosure under the act. Just because the Respondent personally may be subject to discipline as a result of her public activities, she should not have the benefit of the shield of "private" information provided by the exemption.

This is not a case in which the Respondent's private conduct is at issue. It is undisputed that the complaints which are the subject of Appellant's request all related to Respondent's conduct in her elected capacity. She admits that.

Construing the exemption of "personal" information broadly, as the Court must, it is clear that the trial court erred in agreeing, as a matter of law, that the documents sought were protected by the exemption.

Issue Four

THE TRIAL COURT ERRED IN FAILING TO FIND THAT DEFENDANT WAIVED ANY CONFIDENTIALITY THAT MIGHT HAVE BEEN AVAILABLE TO HER UNDER RULE OR STATUTE.

Appellant argued that, even if Respondent might be entitled to protection from production under the Act, she waived her right to do so by virtue of her decision to disclose some information about the documents sought. Specifically, respondent admitted that there had been "a number of grievances" filed against her and discussed the subject matter of those grievances. (R. p. 21). She went on to disclose that

> The South Carolina Office of Disciplinary Counsel thoroughly investigated these matters and recommended dismissal of all these charges. Furthermore, Independent Investigative Panels of the commission on Lawyer Conduct considered these matters and have *never* found that she engaged in any ethical misconduct. Moreover, she has never been sanctioned or disciplined.

(R. p. 21).

Respondent disclosed some of the content of the requested documents, but she picked and chose exactly what portions of information she wanted to publicize. She withheld the documents from which the public could form its own conclusions about the nature of the complaints and the action which was taken. Furthermore, she used public resources, *i.e.,* her letterhead and presumably her staff, to prepare and transmit her response to the FOIA request.

Again, erroneously relying upon Rule 12, RLDE, the trial judge concluded that Respondent's "general reference" to the content of the requested documents did not "alter the non-public nature of the documents... ." (R. p. 5). Inexplicably, the trial judge also concluded that Respondent "had no intent whatsoever to waive confidentiality" in her written response. Id.

As argued above, Rule 12 has no application in proceedings under the Act, and it specifically limits it application to particular persons who are employees of officers of the Supreme

Court. It does not alter the nature of the documents which otherwise are "public documents" within the meaning of the Act.

The trial judge correctly stated that "waiver" is a voluntary relinquishment of a known right. However, in deciding upon the Respondent's "intent", the trial judge permitted himself to decide an issue of fact, which could not be decided as a matter. "The determination of whether one's actions constitute waiver is a question of fact." Sanford v. SC State Ethics Comm'n, 385 S.C. 483, 685 S.E.2d 600, 607 (2009). In Sanford, the Supreme Court made a determination regarding waiver because the action was brought within its original jurisdiction, and it was within the Court's province to "make findings of fact" on matters before it. Id.

Appellant asserted that the undisputed facts permitted the trial judge to conclude that a waiver had occurred as a matter of law, because there was no evidence to the contrary. Appellant pointed out:

1. The response to the FOIA request was on official letterhead;
2. The response was prepared using resources of a public office, *i.e.,* letterhead and perhaps staff; and computer equipment; and
3. Disclosed the contents of the very documents she refused to produce.

As in Sanford, "the only reasonable interpretation... was that it was an intentional relinquishment of the right to confidentiality, and therefore a valid – and complete – waiver." Id. at 608. Here, the Respondent described the fact that the documents existed, and the content of the documents, but then attempted to claim the documents were exempt from disclosure.

Respondent's own actions indicate she understood the legal significance of the Act. Her response specifically cited it. (R. p. 21). Having opened the door and let out only what she wanted to let out, Respondent cannot now close the door and claim "privacy" or "confidentiality" of the

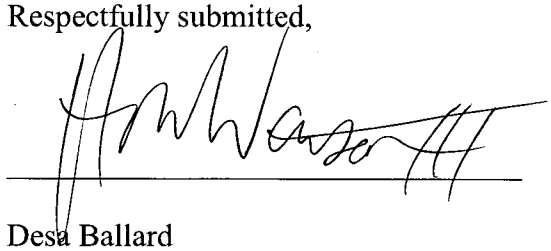
documents.

The trial judge erred in failing to conclude that Respondent has waived her right to withhold the requested documents from disclosure.

CONCLUSION

For the reasons set forth above, the trial judge erred in granting the Respondent's Motion to Dismiss. Appellant seeks an order of this Court reversing the trial judge and remanding the matter for further proceedings. In the alternative, Appellant seeks an order reversing the trial judge and remanding for entry of an order mandating the Respondent to produce the documents requested under the Act.

Respectfully submitted,



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August 9, 2016

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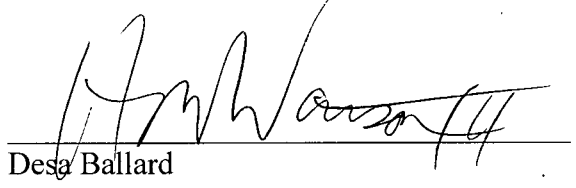
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Beth Cogan, an employee with Ballard & Watson, Attorneys at Law, do hereby certify that on August 10, 2016, I served a copy of the **Final Reply Brief and Final Brief of Appellant** in the above-captioned case on the following individuals by electronic mail and by standard US Mail:

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