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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

RECEIVED
APR 03 2018
SC Court of Appeals

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

vs.

Scarlett Wilson, Solicitor of the Ninth Judicial Circuit,
An elected public official,..... Respondent.

PETITION FOR REHEARING

Appellant/Petitioner South Carolina Lawyer Weekly, asks this Honorable Court to reconsider its ruling in the referenced matter, which was issued as Opinion No. 5542 on March 19, 2018.¹ This petition is filed pursuant to Rule 221(a), SCACR.

It is respectfully asserted that the Court of Appeals erred in its decision in the following respects:

1. The Court of Appeals erred in determining that Solicitor Wilson did not, as a matter of law, waive her right to assert the confidentiality of the documents she disclosed in her response to the FOIA. The Court noted what Solicitor Wilson did reveal (“the

¹ The original opinion was initially issued on March 14, 2018, was withdrawn that same date *sua sponte*, amended and reissued on March 19, 2018.

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existence of the complaints” and “the source of those complaints”), but according to this Court, “did not reveal anything about the content of those complaints.” The Record on Appeal reflects otherwise. In her response to the initial FOIA request, Solicitor Wilson referred to the content of the grievances as dealing with “her management of the Solicitor’s Office and in some case with her handling of cases.” (ROA p. 21). She thus directly revealed that the complaints in question were relating to her professional responsibility as solicitor, and not her conduct as a private person. Important, substantive content of the documents is thus known only because Solicitor Wilson revealed it, and in doing so waived any confidentiality.

2. This Court erred in ruling, as a matter of law, that Solicitor Wilson’s waiver could be decided as a matter of law. This Court correctly rules that the issue of waiver “is a question of fact for the finder of fact,” however, it failed to reverse and remand, which would have allowed the finder of fact to make its own findings on the issue of waiver.
3. The Court of Appeals erred in concluding that a Rule “prescribing the procedure for disciplining, suspending, disbarring and reinstating attorneys at law...” as contained in Rule 12 of the Rules on Lawyer Disciplinary Enforcement (RLDE), Rule 413, SCACR, can be used to define the character of a document that is otherwise not protected by statutory law, *i.e.*, the Freedom of Information Act². The language of Rule 12 constrains the conduct of certain persons, it does not characterize the nature

² To the extent the Court’s opinion intended to state that Rule 12, RLDE, operated to make the requested documents “information of a personal nature where the public disclosure thereof would constitute an unreasonable invasion of privacy” under S.C. Code Ann. Section 30-4-30(A)(1) the Court’s opinion did not do that. Instead, it relied exclusively on Rule 12 to determine that the documents themselves were not “public records” and therefore not subject to FOIA. The Court of Appeals did not decide whether Section 30-4-40(a)(2) applied to the documents in question, nor did it decide that the information of a personal nature where the public disclosure thereof would constitute an unreasonable invasion of privacy. If the Court intended to so rule, that ruling would have been in error; neither the Court of Appeals nor the circuit court examined the contents of the documents in question.

of documents. Rule 12 provides that certain persons (“the Supreme Court, the 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 pendency of a proceeding being investigated by the Office of Disciplinary Counsel and/or pending before the Commission on Lawyer Conduct. Nothing in Rule 12 changes the nature of the documents or information on file with Disciplinary Counsel to make them confidential; it merely identifies who cannot reveal the existence of a proceeding. Notably, any other person, including the lawyer against whom a disciplinary matter is pending, is not prohibited from revealing the existence of the proceeding or the nature thereof. Solicitor Wilson did, in fact, reveal the existence of the proceeding(s), as she was freely permitted to do.

Additionally, a rule enacted by the Supreme Court, *i.e.*, part of the judicial branch of government, cannot be used to determine whether a document is protected from disclosure pursuant to a statute, *i.e.*, FOIA. Allowing the judicial department to enact procedural rules that affect the construction of statutes would violate the separation of powers. The judicial department cannot pass rules that undo what the General Assembly has established via the Freedom of Information Act. In other words, a court rule of procedure cannot affect the substantive law set forth in the Freedom of Information Act.

4. The Court erred in construing Rule 12 of the RLDE as changing the character of a document on file with an entity of the judicial department. Rule 12 relates to a “proceeding” or a “matter” and not to documents (although it does reference the word

“record” and is, to that extent, perhaps ambiguous). Therefore, the Court erred in allowing a procedural rule governing a disciplinary matter at the judicial department to determine whether documents are or are not “public records” under FOIA. *See* Op.No. 5541, footnote 1 (“Having determined the requested documents are not public records...”).

5. The Court of Appeals erred in its construction and application of the separation of powers doctrine to these facts. In its opinion, the Court stated that the General Assembly “provided court rules, including rules regarding lawyer discipline, carry the force of law” (without citation of authority) and therefore speculated that the General Assembly had decided “to allow court rules to carry the force of law.” Such a determination (which is outside the scope of the rules of statutory construction) does not solve the separation of powers issues.
6. The Court of Appeals erred in failing to decide the issue of whether Solicitor Wilson is a public body (Issue One) or Issue Three. In footnote 1, the Court declared that it need not decide Issue One because its ruling on the other issues on appeal “is dispositive,” citing Futch v. McAllister Towing of Georgetown, 356 S.C. 598, 518 S.E.2d 591. (1999). The opposite is true. Since the Court of Appeals affirmed on two of the issues Appellant raised on appeal³, it had to decide the other, unanswered questions (Issue One and Three), either one of which would have required reversal of the trial court’s decision.

³ The Court, respectfully, did not rule on Appellant/Petitioner’s Issue One (is Solicitor Wilson a public official?) nor did it rule on Issue Three (the documents in question are exempt from disclosure pursuant to S.C. Code Ann. Section 30-4-40(a)(2)).

Desa Ballard

Desa Ballard
Harvey M. Watson III

BALLARD & WATSON
Post Office Box 6338
West Columbia, South Carolina 29171
Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com
harvey@desaballard.com

ATTORNEYS FOR PETITIONER

April 3, 2018

STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I, Beth Cogan, an employee with Ballard & Watson, Attorneys at Law, do hereby certify that on, April 3, 2018, I served a copy of the **Petition for Rehearing** in the above-captioned case on the following individual by electronic mail and by United States Mail, with sufficient first-class postage affixed, addressed as follows:

**J. Emory Smith, Jr., Esquire
Assistant Deputy Attorney General
Post Office Box 11549
Columbia, South Carolina 29211**


Beth Cogan, Paralegal

April 3, 2018
West Columbia, South Carolina



Ballard & Watson
Attorneys at Law
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M. Watson III

Post Office Box 6338 | West Columbia, SC 29171
226 State Street | West Columbia, SC 29169
ph 803.796.9299 | fx 803.796.1066 | desaballard.com

April 3, 2018

Via Hand-Delivery

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

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SC Court of Appeals

Re: *South Carolina Lawyers Weekly v. Scarlett Wilson*
Appellate Case No: 2016-000555

Dear Ms. Kitchings:

Please find enclosed for filing an original and seven (7) copies of the **Petition for Rehearing and Certificate of Service** in the above-referenced matter. Also enclosed is our check for the filing fee. After both pleadings have been filed, please return a set of clocked copies to our office by the courier.

By copy of this letter to opposing counsel, I am notifying them of my communication with the Court and serving a copy of the enclosures as evidenced by the Proof of Service. Please do not hesitate to contact our office if you should have any questions. With warm personal regards, I am,

Sincerely yours,

Desa Ballard
desab@desaballard.com

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