

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Robert E. Watson, Master-in-Equity

Opinion No. 5488 (S.C. Ct. App. filed May 24, 2017)

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

v.

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

PETITION FOR WRIT OF CERTIORARI

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Petitioner, South Carolina Lawyers Weekly, through its principal Dolan Publishing Company (hereafter “Petitioner”) moves, pursuant to Rule 242, SCACR, for a writ of certiorari to review the decision of the South Carolina Court of Appeals in the instant case which was published as Opinion No. 5542 on March 14, 2018 and amended on March 19, 2018)¹.

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing on the merits issue was made and finally ruled on by the Court of Appeals on May 24, 2018.

QUESTIONS PRESENTED

- I. The Court of Appeals erred in its conclusions regarding Solicitor Wilson’s waiver of exemptions available under FOIA:
 - a. The Court erred in concluding 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 request.
 - b. The Court of Appeals erred in ruling, as a matter of law, that Solicitor Wilson’s waiver could be decided as a matter of law.
- II. The Court of Appeals erred in applying Rule 12 of the Rules of Lawyer Disciplinary Enforcement (Rule 413, SCACR, RLDE) to determine that

¹ The Court of Appeals published its opinion in this case on March 14, 2018 (App. p. 107), but less than one (1) hour after publication, the opinion was pulled from the Court’s website. A revised opinion (App. p. 115) bearing the same decision number (which did not indicate it was revised) was issued on March 19, 2018, without explanation. Neither published opinion appears to have any formal citation to S.E.2d or the South Carolina reporter at this time. But are reproduced in the Appendix because of the unusual disappearance of the original version of the decision. The revised decision appears online at <https://apps.fastcase.com/Research/Pages/Document.aspx?LTID=ukz64BVnH7P7TQXmkWqnTSRTx4d%2fBgr6VgA9MAHWyYbHE6cSfHIZiUG7fto8eLQgqqunRb%2fPvvHYOdvlcqK9YnRYvNTMO3%2frkeukyyTwROsI3bOt9T0aPXXBvTG2r4gswMj9fdECpQ%2bRUDapPBwoGKLEhqa510VNqvLCow9%2fQNo%3d>

documents in the possession of an elected public official were confidential under FOIA.

- III. The Court of Appeals erred in allowing Rule 12 of the RLDE to modify FOIA, thereby violating the separation of powers doctrine.

STATEMENT OF THE CASE

Petitioner, the publisher of the newspaper South Carolina Lawyer's Weekly, served a Freedom of Information request on Solicitor Scarlet Wilson for documents related to disciplinary complaints that had been filed against her. (App. p.22). Wilson or someone in her publicly-funded office answered the request, confirming that the documents existed and were in her possession; the response further summarized the content of at least some of the responsive documents, but then refused to produce the documents in her FOIA response. (App. p.23).

This action was filed seeking relief under the Freedom of Information Act, S.C. Code Ann. Section 30-4-10 *et seq* (App. pp. 10-23). Wilson's motion to dismiss was granted. (App. pp. 3-8). The Court of Appeals affirmed. (App. p. 115). Petitioner's petition for rehearing was denied. (App. p.134).

SUMMARY OF FACTS²

Wilson is a public official, having been elected by the electorate of the Ninth Judicial Circuit to serve as Solicitor. She is prohibited by law from representing private clients, all of her professional duties are performed in her position as a full time Solicitor. Her duties are prescribed by law, and she receives and administers county funds within the

² Because this case was decided on Motion to Dismiss, the allegations of the complaint are deemed to be true for purposes of this proceeding. *Charleston County School District v. Harrell*, 393 S.C. 552, 713 S.E.2d 604 (2011). The facts set forth here are from the complaint. (App. pp. 10-23).

Ninth Circuit. In response to Petitioner's FOIA request, Wilson or someone in her office³ answered the request on her official letterhead, confirming the existence of several responsive documents, as well as the contents of at least some of them. (App. p.23). The documents requested (documents from the Office of Disciplinary Counsel or the Commission on Lawyer Conduct are public records that Wilson is required to maintain.

Wilson's response to the FOIA request stated, *inter alia*,

... a number of grievances have been filed against Ms. Wilson 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. The South Carolina Office of Disciplinary Counsel thoroughly investigated these matters and recommended dismissal of all of these charges. Further, 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.

(emphasis in original) (App. p. 23)

Issue One

The Court of Appeals erred in its conclusions regarding Solicitor Wilson's waiver of exemptions available under FOIA

In responding to Solicitor Wilson's Motion to Dismiss, Petitioner argued that Wilson had waived any right she might otherwise have to claim exemptions that would have been available to her pursuant to the statutory exemptions of FOIA, because she revealed (1) the existence of the documents being requested; and (2) the nature and content of at least some of the responsive documents. (App. 30; 52, line 23 – p. 54, line 1; 58, lines 17-22). The trial judge did not address waiver during the hearing on the motion, but concluded in his order:

³ The FOIA response was on Wilson's official letterhead, but it spoke of her in the third person, so it is unclear whether Wilson herself or some member of her staff, obviously a public employee, assisted in the response.

Certainly, Ms. Wilson's letter had no intent whatsoever to waive confidentiality when he invoked the Rule on Lawyer Disciplinary Enforcement in her response and made quite clear that she believed, and correctly so, that the documents sought are not public.

(App. p. 7).

In overruling Petitioner's argument on appeal and affirming the circuit court's dismissal of the FOIA action, the Court of Appeals concluded, as to waiver, that Wilson "did not reveal anything about the content of those complaints." (App. p. 120). Quite the opposite is true. Wilson revealed that the grievances took issue with her "management" of her office and the handling of "cases." (App. p. 23).

The Court of Appeals ruled correctly that issues of waiver are issues of fact for the finder of fact. (App. p. 120). The Court of Appeals then went on to analyze its view of the evidence (which was, again, only the complaint with attachments) to determine the conclude that Wilson's actions did not constitute a waiver. It reasoned that because "she did not reveal anything further [beyond the existence and source] of those complaints, therefore she did not waive any objection to disclosing the content." *Id.*

It cannot be both. Either waiver can be decided as an issue of law (as both the trial court and the Court of Appeals did), or it is an issue of fact for the trier of fact.

If the Court of Appeals was correct (and it was), that waiver is an issue to be determined by the trier of fact, then the Court of Appeals erred in weighing the evidence and drawing its own conclusions about what Wilson did, or did not, intend when she selectively revealed what she wanted to reveal about the "number of grievances" and then claimed confidentiality as to the rest.

The Court of Appeals' decision regarding waiver directly conflicts with previous decisions of this Court, and a writ of certiorari is therefore warranted. Rule 242(b)(3),

SCACR. This Court has long held stated that decisions regarding waiver must be decided by the trier of fact. *Harvey v. Jefferson Standard Life Ins. Co.*, 165 S.C. 427, 164 SE. 6 (1932); *Bookhart v. Langford*, 128 S.C. 350, 122 S.E. 866 (1924).

Issues Two and Three

The Court of Appeals erred in applying Rule 12 of the Rules of Lawyer Disciplinary Enforcement (Rule 413, SCACR, RLDE) to determine that documents in the possession of an elected public official were confidential under FOIA.

The Court of Appeals erred in allowing Rule 12 of the RLDE to modify FOIA, thereby violating the separation of powers doctrine.

Both the trial judge and the Court of Appeals misapprehended and misapplied the provisions of Rule 12 of the RLDE, which govern the conduct of certain public officials who are involved in the disciplinary process, including this Court and its staff. That rule, however, has no effect on and cannot be applied to modify the terms of FOIA or distort a judicial construction of the FOIA statutes. Allowing a Court procedural rule to be used as a tool for purposes of statutory construction would violate the separation of powers doctrine.

The argument at the trial court hearing on this issue appears at App. pp. 59 – 60. In its order, the trial judge summarized Petitioner’s argument “Rule 12 only limits the disclosure of documents by he Commission on Lawyer Conduct and the Office of Disciplinary Counsel” and concluded that assertion was “wrong⁴.” (App. p.5). As summarized, the trial judge’s reference to Rule 12 is, in fact, erroneous, because Rule 12

⁴ The trial judge noted that the rule regarding confidentiality of disciplinary proceedings used to forbid even the lawyer herself from disclosing the existence of the matter. (App. p. 63, lines 2-3). In acknowledging that the confidentiality rule applicable to disciplinary proceedings had been amended, the trial judge incorrectly stated he thought the current version of the rule simply made confidentiality “discretionary again.” *Id.* lines 7-8.

additionally governs the conduct of “the staff of the Commission [on Lawyer Conduct], . . . the staff of disciplinary counsel, the members of the Supreme Court and the staff of the Supreme Court.” Rule 12(a), RLDE, Rule 413, SCACR. This issue was fully addressed on appeal (App. pp. 7-9) and addressed by the Court of Appeals in its opinion, which held Rule 12 fundamentally addressed the nature of the documents themselves by making the “confidential” within the meaning of FOIA. (App. p. 117).

Rather than properly construing the provisions of Rule 12(a), the trial court and the Court of Appeals essentially equated the provisions of Rule 12 as having the effect of a statute which has to be read within the context of statutory construction of FOIA. The trial judge focused on Attorney General opinions that construed the prior version of Rule 12 (which did, in fact, forbid anyone, including the complainant and the responding lawyer, from revealing the existence of the pending matter. (The prior version of the confidentiality rule appears at App. pp. 63– 65).

Both Courts misconstrued Rule 12 to fundamentally change the nature of documents in the possession of a lawyer who is a respondent in a pending disciplinary matter to make the documents themselves “confidential.” (App. pp. 2-3). In doing so, the trial court referenced Rule 12(d), which a provision of the RLDE that is a leftover from the major revision of the confidentiality rule which lifted any confidentiality requirement for the lawyer, the complainant, or any one other than the persons and entities identified in Rule 12(a)⁵.

⁵ As is evident from a comparison of current Rule 12(d) with former Rule 20(L) which authorized a respondent lawyer to reveal the existence of a pending ODC matter for the limited purpose of moving to be relieved as counsel. That irrelevant provision remained in the current version of Rule 12 when it was adopted. However, it is obvious that the current provisions of Rule 12(d) are unnecessary and superfluous, because the current rule allows a respondent lawyer to reveal the existence of a pending ODC matter to anyone she wants, or even to publicize the existence of the complaint.

The trial judge also erred in reading Rule 12(b) that purportedly governs when disciplinary proceedings become “public.” By its very placement, Rule 12(b) flows from Rule 12(a), and specifically indicates when the confidentiality of Rule 12(a) no longer remains in place. However, nothing in Rule 12 makes any particular document confidential.

Petitioner raised the issue of separation of powers to the Court of Appeals. (App. p. 78). The Court of Appeals, however, rejected the separation of powers argument without citation of authority, inexplicably concluding that Rule 12 of the RLDE solved that issue. (App. p. 121).

It is evident that the Court of Appeals did not understand the origin or application of Rule 12 of the RLDE. In its original opinion, issued on March 14, 2018, the now-withdrawn opinion opined that Rule 12, RLDE had the force of law because it had been “submitted to and not rejected by the General Assembly.” (App. p. 113). The revised opinion deleted this reference, because it is plainly wrong. Article I, Section IV(A) of the South Carolina Constitution provides a unified system whereby this Court promulgates rules of procedure and the General Assembly ostensibly has the ability to reject them before they are formally enacted. However, this Court’s exclusive authority to govern the practice of law and to promulgate rules governing it are established in Article V, Section VI, which contains no provision for the General Assembly to be involved in the adoption, amendment or revocation of rules governing the lawyer disciplinary process⁶.

⁶ The Court of Appeals did not identify which provisions of its March 19, 2018 opinion differed from the original opinion issued on March 14, 2018, but both versions are included here for comparison. (App. pp. 107, 115).

The Court of Appeals' construction of Rule 12, RLDE, and its erroneous use of that rule to designate certain documents as "confidential" under FOIA, compels a grant of certiorari to review this issue and correctly state the application and limitations of Rule 12, RLDE. Rule 242(b)(4).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that grounds exist pursuant to Rule 242, SCACR, to grant a writ of certiorari to review the decision of the Court of Appeals

Respectfully submitted by



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PROOF OF SERVICE

I, Beth Cogan, an employee with Ballard & Watson, Attorneys at Law, do hereby certify that on, June 22, 2018, I served a copy of the **Petition for Writ of Certiorari** 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
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June 22, 2018
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