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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Court Of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

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Appellate Case No. 2018-001164

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South Carolina Lawyer's Weekly, by and through its principal,  
Dolan Publishing Company. . . . . Petitioner,

v.

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

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**RETURN OF RESPONDENT  
TO PETITION FOR WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED FOR REVIEW**

1. Whether the Court of Appeals properly determined that Respondent did not waive confidentiality?
2. Whether Rule 242(d)(2), SCACR, bars Petitioner from questioning whether the case should have been remanded to circuit court for fact findings on waiver, when Petitioner did not raise that issue until its Petition for Rehearing?
3. Whether the Court of Appeals properly determined that RLDE Rule 12 controls as to the confidentiality of the documents at issue and does not violate separation of powers?
4. Whether Rule 242(d)(2), SCACR, bars Petitioner from questioning the circuit court's reference to Rule 12(d) when she did not raise that issue in the Court of Appeals?

## **STATEMENT OF THE CASE**

Petitioner's Complaint contended that the Solicitor violated the Freedom of Information Act by declining to comply with its request for documents. Record (R. p. 8). Appellant's FOIA request emailed to "Solicitor Wilson" was for "any records relating to any disciplinary complaints made against you or action taken with respect to you as a member of the bar." R. p. 20 (Ex. A. to Complaint). The response to the FOIA request stated that the Solicitor's Office is a "public body" under FOIA §30-4-20(a), but that Ms. Wilson is not personally a public body. R. p. 21 (Ex. B. to Complaint). It said that her personal records regarding the matters requested are not public records under §30-4-20(c). The response further contended that even if otherwise covered by FOIA, the documents were exempt under §§30-4-40(a)(2) (information of a personal nature), (4) (matters exempt from disclosure by law and (7) (matters violative of attorney client privilege). The response also noted that the Office of Disciplinary Counsel had

recommended dismissal of the charges against her and that she had never been found to have engaged in ethical misconduct.

Ms. Wilson moved to dismiss the Complaint on the same grounds noted above in the response to the FOIA request and also adding that the documents sought belonged to her in her personal capacity and were not records of the Office of the Solicitor. (R. p. 22). At the oral argument concerning the Motion on January 7, 2016, in Charleston, the Court granted the Motion. R. pp. 60, l. 25 - p. 62, l. 25).

In his written order, the Honorable Markley Dennis found that the documents that Lawyer's Weekly seeks are not "public records" under §30-4-20(c). (R. p. 2, *et seq.*). He concluded that the documents were not public during the period of confidentiality under Rule 12 and that, even if they were "public," they are exempt from disclosure under §§30-4-40(a)(2) and (4). Judge Dennis ruled that Ms. Wilson did not waive confidentiality. By Order dated February 29, 2016, and filed March 8 (R. p. 7), Judge Dennis denied Petitioner's Motion for Reconsideration (R. p. 44).

The Court of Appeals affirmed on appeal. *S.C. Lawyers Weekly By & through Dolan Publ'g Co. v. Wilson*, 423 S.C. 144, 153, 813 S.E.2d 527, 531 (Ct. App. 2018), reh'g denied (May 24, 2018). That Court concluded that Respondent Wilson did not waive the confidentiality of the disciplinary complaints. As stated by the Court of Appeals:

We do not agree with Appellant that Solicitor Wilson "picked and chose" what content to disclose in her FOIA response. Solicitor Wilson revealed the existence of disciplinary complaints and revealed the source of certain of those complaints. She did not reveal anything further about the content of those complaints; therefore she did not waive any objection to disclosing that content.

S.C. Lawyers Weekly, 813 S.E.2d at 530.

The Court also found Rule 12, RLDE, Rule 413, SCACR to be controlling and that Respondent Solicitor Wilson would not be required to disclose complaints filed against her under FOIA:

Based on the plain language of Rule 12(b), complaints filed with the Office of Disciplinary Counsel do not become public documents until formal charges are filed and 30 days have passed after the filing of an answer, or in the absence of an answer, 30 days after the time to file an answer has expired. Because Rule 12(b) indicates lawyer disciplinary complaints do not become public until after formal charges are filed, and no formal charges were filed against Solicitor Wilson, any complaints would not be public documents, and Solicitor Wilson would not be required to be disclose them pursuant to FOIA.

*S.C. Lawyers Weekly*, 813 S.E.2d at 531.

The Court of Appeals rejected Petitioner's separation of powers challenge, as follows:

Appellant asserts this reading of Rule 12 violates the separation of powers doctrine because it allows a Supreme Court rule to modify a statutory scheme. We disagree. Instead, Rule 12 provides privacy protection for attorney disciplinary complaints, and their disclosure cannot be compelled until formal charges are filed. [footnote omitted] The General Assembly, through section 40-5-50, provided court rules, including rules regarding lawyer discipline, carry the force of law. S.C. Code Ann. § 40-5-50 ("Upon such rules and regulations becoming effective, they shall supersede all laws or parts of laws in conflict therewith to the extent of the conflict."). We find the General Assembly's decision to allow court rules to carry the force of law satisfies any potential separation of powers issues.

*S.C. Lawyers Weekly*, 813 S.E.2d at 531.

Petitioner petitioned for rehearing. The Court of Appeals denied rehearing by Order filed May 24, 2018, finding that the Court was unable to discover that any material fact or principle of law had been overlooked or disregarded and that no basis existed for granting a rehearing. This appeal then followed.

## ARGUMENT

### I

#### **THIS COURT PROPERLY DETERMINED THAT RESPONDENT DID NOT WAIVE CONFIDENTIALITY (Questions 1 and 2)**

Petitioner contends the Court of appeals erred in finding that Respondent “did not reveal anything about the content of [the] complaints.” What the Court said was correct: “Solicitor Wilson revealed the existence of disciplinary complaints and revealed the source of certain of those complaints. She did not reveal anything further about the content of those complaints; therefore she did not waive any objection to disclosing that content.” *S.C. Lawyers Weekly*, 813 S.E.2d at 530. The response to the FOIA request stated generally that “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.” R. p. 21. This statement in the response was about the source of the complaints: defense lawyers who disagree with her. It did not reveal the substance of the complaints themselves. Moreover, the FOIA response quite clearly asserted Rule 12 confidentiality.

In its Petition for Rehearing, *Lawyers Weekly* argued for the first time that the Court of Appeals should have remanded to allow the fact finder to make its own findings on waiver. Essentially, *Lawyers Weekly* makes the same argument in the instant Petition. (Petition for Rehearing at page 2). This argument comes too late as it was not made in briefing at the Court of Appeals. Rule 242(d)(2), SCACR (“Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.”)(emphasis added).

Contrary to the argument that Petitioner now makes, Lawyers Weekly asserted in its brief on appeal that the lower court erred in failing to decide that waiver had occurred as a matter of law. Brief of Appellant at p. 11. Petitioner argued in its brief that “the undisputed facts permitted the trial judge to conclude that a waiver had occurred as a matter of law. . . .” and that he “erred in failing to conclude that Respondent has waived her right to withhold the requested documents from disclosure.” (Brief at pp. 11 & 12 – emphasis as written).

Petitioner’s conflicting arguments are difficult to follow in that the lower court did address waiver and properly determined that no waiver had occurred based upon Rule 12, RLDE, and the response to the FOIA. R., p. 5. The circuit court found as follows:

Nothing in Rule 12 creates a waiver of confidentiality except when the lawyer signs a waiver for the Commission . . . Certainly, Ms. Wilson’s response had no intent whatsoever to waive confidentiality when she invoked the Rules on Lawyer Disciplinary Enforcement in her response letter and made quite clear that she believed, and correctly so, that the documents sought were not public.

Petitioner simply disagreed with that decision, but the Court of Appeals properly affirmed it. No factual basis exists for further consideration by the circuit court or the Supreme Court.

## II

### **THE COURT OF APPEALS PROPERLY DETERMINED THAT RLDE RULE 12 CONTROLS AS TO THE CONFIDENTIALITY OF THE DOCUMENTS AT ISSUE (Questions 3 and 4)**

Petitioner contends that RLDE Rule 12 constrains people and proceedings in the disciplinary process and that the Rule cannot modify FOIA. Instead, the Rule makes the

documents at issue here non-public because formal charges have not been filed.<sup>1</sup> The Rule prohibits the Commission on Lawyer Conduct, the Office of Disciplinary Counsel and the Supreme Court and their staffs from revealing the existence of a complaint against a lawyer “while the matter remains confidential,” except as provided in that law. During that period of confidentiality, the complaint is expressly non-public. Rule 12(b) (If formal charges are filed against the lawyer, the matter “shall become public 30 days after the filing of the answer” to the charges (emphasis added)). The Rule limits the circumstances under which the Commission on Lawyer Conduct is authorized to release the documents. Rule 12(c)(protection of person or public, violation of criminal law, etc.).

Rather than modify FOIA, Rule 12 documents are exempted by that statute. FOIA expressly exempts “[m]atters specifically exempted from disclosure by statute or law” §30-4-40(a)(4). Rule 12 is such a “law” as this Court recognized. Petitioner hints at but fails to cite §40-5-50 which states that “[u]pon such rules and regulations becoming effective [including rules adopted under §40-5-20 regarding lawyer discipline], they shall supersede all laws or parts of laws in conflict therewith to the extent of the conflict.” These provisions make Rule 12 a law, and therefore, matters controlled by it are exempt from disclosure under FOIA. Although Petitioner notes that the Court of Appeals rejected its separation of powers argument, Petitioner does not explain its contention or cite authority to show that the Opinion was wrong. Instead, the Court of Appeals properly found that “the General Assembly's decision to allow court rules to carry the

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<sup>1</sup> Rule 12 of the Rules for Judicial Disciplinary Enforcement. Rule 502, SCACR, contains similar provisions regarding the confidentiality of complaints against judges.

force of law satisfies any potential separation of powers issues.” *S.C. Lawyers Weekly*, 813 S.E.2d at 531.

Petitioner misunderstands Rule 12 in contending that it was not intended to apply to make particular disciplinary documents confidential. Instead, the Court of Appeals properly found that “[b]ecause Rule 12(b) indicates lawyer disciplinary complaints do not become public until after formal charges are filed, and no formal charges were filed against Solicitor Wilson, any complaints would not be public documents, and Solicitor Wilson would not be required to be disclose them pursuant to FOIA.” *S.C. Lawyers Weekly*, 813 S.E.2d at 527. Petitioner contends that the circuit court should not have referenced Rule 12(d) suggesting that it is a superfluous vestige of an earlier disciplinary rule (Petition at p. 6, footnote 5), but *Lawyers Weekly* failed to make that argument on rehearing or in its brief, and therefore, it is not properly raised in the Petition for Writ of Certiorari. Rule 242(d)(2), *supra*. Rule 12(d) discusses disclosure by the lawyer when necessary for withdrawal as counsel and further demonstrates that whether the lawyer may release the documents during the period of confidentiality is discretionary with him or her.

### CONCLUSION

Petitioner has set forth no special and important for granting its Petition. Rule 242(b). For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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[Signature block continues next page]

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By: 

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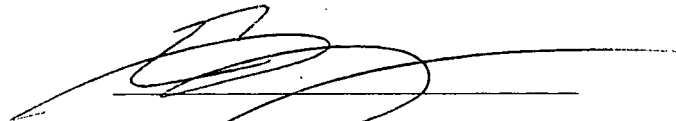
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**CERTIFICATE OF SERVICE**

I hereby certify that I have served the Petitioner with the Respondent's Return to Petition  
for Writ of Certiorari by mailing copies to its attorneys at the address below via the United States

Mail this August 1, 2018.

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