

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Carmen Tevis Mullen, Circuit Court Judge

Opinion No. 2012-UP-623
(S.C. Ct. App. filed February 20, 2013)

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L. Paul Trask, Jr., individually, as a citizen, resident,
taxpayer and registered elector of the State of South Carolina,
and on behalf of others similarly situated, Petitioner,

v.

South Carolina Department of Public Safety, Beaufort County,
Beaufort County Management Information Systems,
Beaufort County Coroner Curtis Copeland in his official capacity,
and Beaufort County Sheriff P.J. Tanner in his official capacity, Respondents.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This is a Freedom of Information Act (FOIA) case. Following the death of his son in a single vehicle accident in November 2005, the Petitioner L. Paul Trask, Jr. submitted numerous FOIA requests to the various Respondents in conducting his own investigation into the death. The Respondent South Carolina Department of Public Safety (SCDPS) received four FOIA requests from Trask in 2006. SCDPS responded to the FOIA requests and made available to Trask the documents and records that were available.

Unsatisfied with the responses by SCDPS and the other Respondents (collectively referred to as the "Beaufort County Respondents"), Trask filed this action alleging various violations of the Freedom of Information Act. The Respondents including SCDPS moved for summary judgment, and by order filed March 16, 2009, Circuit Court Judge Carmen Tevis Mullen granted that motion. (R. 5-13). A subsequent Rule 59(e) motion was denied by Judge Mullen by her order filed October 13, 2009. (R. 3-4).

The Petitioner Trask subsequently filed a Notice of Appeal which was served on counsel for the Beaufort County Respondents but was never served on SCDPS's counsel. (R. 1187-1191). The South Carolina Court of Appeals issued an unpublished per curiam opinion on November 21, 2012, dismissing the appeal

against SCDPS. In addition, the Court of Appeals affirmed the summary judgment entered in the Circuit Court for the Beaufort County Respondents. A subsequent petition for rehearing was denied.

ARGUMENTS

I. The decision of the South Carolina Court of Appeals does not warrant the issuance of a writ of certiorari.

Rule 242(b), SCACR, sets forth general factors considered by this Court in determining whether issues require review on certiorari. The Petitioner L. Paul Trask, Jr. makes no mention of these factors in his petition. The Respondent SCDPS submits that, aside from the merits which are addressed below, there are several factors that demonstrate that a writ of certiorari is entirely unwarranted in this case.

First, the decision of the three-judge panel in the Court of Appeals was unanimous; there was no dissenting opinion. Second, the opinion of the Court of Appeals was unpublished and a *per curiam* opinion issued in accordance with Rule 220(b)(1), SCACR, and thus the opinion has no precedential value. Third, the decision of the Court of Appeals does not conflict with any existing decisions of this Court. Finally, this case does not involve any issue of first impression nor any issue of great public interest or importance. The *per curiam* opinion has no precedential value, and as a result, the Court of Appeals' decision will have no application to other cases.

Based upon these considerations, there is simply no need for this Court to review the decision of the Court of Appeals.

II. The Court of Appeals was correct in dismissing Trask's appeal against the South Carolina Department of Public Safety because the Notice of Appeal was never served on counsel for the Department.

As described above, the Petitioner L. Paul Trask, Jr. filed a complaint alleging certain violations of the Freedom of Information Act (FOIA) by the Respondents including SCDPS. After summary judgment was granted in the Respondents' favor and a Rule 59(e) motion was denied, Trask filed a Notice of Appeal on or about November 13, 2009. However, the Notice of Appeal was not served on SCDPS or on its counsel of record. The Notice of Appeal was served only on counsel for the Beaufort County Respondents. (R. 1190-1191).

The Respondents, SCDPS included, were originally represented by the law firm of Howell, Gibson and Hughes, P.A. However, by order filed January 21, 2009, William H. Davidson, II of Davidson and Lindemann, P.A. was substituted as counsel for SCDPS. (R. 1168-1171). Robert W. Achurch, III and Howell, Gibson and Hughes, P.A. were relieved as counsel for SCDPS. The order of substitution specifically directed that "[a]ll future correspondence and all other documents relating to this case are also to be sent to the attention of William H. Davidson, II." (R. 1169). Trask's counsel was provided with a copy of the order of substitution (R. 1498) and on numerous occasions while the case remained pending in the Circuit Court served Davidson with filings and copied him with correspondence in this

litigation. (R. 1173-1174, 1506-1508). Trask's counsel were clearly aware that Davidson represented SCDPS from January 21, 2009 forward.

As indicated, on November 13, 2009, Trask attempted to appeal the summary judgment orders issued by Judge Mullen. On that date, according to the proof of service signed by Trask's counsel, a Notice of Appeal was served only on Jason F. Ward of Howell, Gibson and Hughes, P.A. (R. 1190-1191). That firm no longer represented SCDPS and had not done so for almost ten months. The proof of service does not reflect that the Notice of Appeal was served on SCDPS or its counsel of record. This has also been conceded by Trask who confirms that "Davidson & Lindemann was not sent a copy of the NOA." *See*, Petition for Writ of Certiorari, p. 21.

Rule 203(b)(1), SCACR, provides in mandatory terms as follows: "A notice of appeal *shall be served on all respondents* within thirty (30) days after receipt of written notice of entry of the order or judgment." Rule 203(b)(1), SCACR. (Emphasis added). Moreover, Rule 233(b), SCACR, governs service and provides that "[w]henver under these Rules service is required or permitted to be made upon a party represented by an attorney the service *shall be made upon the attorney ...*" Rule 233(b), SCACR. (Emphasis added).

Without question, Trask failed to comply with the mandatory requirement of service of the Notice of Appeal on SCDPS's counsel. It is well settled that "[t]he

failure to timely serve a notice of appeal divests this court of subject matter jurisdiction and results in dismissal of the appeal." *Holroyd v. Requa*, 361 S.C. 43, 603 S.E.2d 417 (Ct. App. 2004).

In the Court of Appeals, Trask's counsel filed affidavits contending that there was "reasonable confusion" about the identity of the counsel of record for SCDPS and suggesting that there was "constructive service" of the Notice of Appeal when it was served on SCDPS's former counsel. As the Court of Appeals apparently agreed, the applicable facts and law do not support that position.

As an initial point, it is very telling what was *not* included in the lengthy affidavits of Trask's two attorneys. Neither Thomas Tisdale nor Stephen Groves denies having been served with the Consent Order Substituting Counsel for Defendant South Carolina Department of Public Safety filed January 21, 2009.¹ Therefore, there is no question that Trask through his counsel had proper notice of the change in counsel for SCDPS in January 2009. It is absolutely disingenuous for Trask to now argue that he was never advised of the change in counsel for SCDPS.

¹ The record includes a copy of a cover letter dated January 29, 2009, showing that a filed copy of the Consent Order Substituting Counsel for Defendant South Carolina Department of Public Safety was sent to Thomas S. Tisdale, Jr. That cover letter, in fact, reiterated that William Davidson had been substituted as counsel of record for SCDPS. *See*, Davidson Affidavit, para. 6, Ex. D. (R. 1486, 1498). The record further includes a copy of a letter dated January 15, 2009, whereby Davidson forwarded the Consent Order Substituting Counsel for Defendant South Carolina Department of Public Safety to Judge Carmen Mullen for her signature. Tisdale was copied on that January 15, 2009 letter. *See*, Davidson Affidavit, para. 5, Ex. C. (R. 1585A, 1495-1496).

Furthermore, the record demonstrates that Trask's counsel immediately acted upon that change in counsel for SCDPS. A series of correspondence and filings in January and February 2009 show that Tisdale was aware that William Davidson had become counsel for SCDPS. There are a number of letters generated by Tisdale and received by Tisdale which copy Davidson. *See, Davidson Affidavit, para. 7, Ex. E. (R. 1486, 1500-1510).* Interestingly, there are no letters *prior to January 2009* to Davidson or copying Davidson. That refutes any suggestion that Davidson was copied on certain correspondence only because he was believed to have been involved in other Trask litigation. The fact that Davidson began receiving and sending correspondence in January 2009 demonstrates Trask's counsel's recognition and understanding that he had become counsel of record for SCDPS *in this litigation.*²

Further, it is submitted that Trask's counsel's professed confusion is simply immaterial. South Carolina law does not recognize the concept of "constructive

² In their affidavits, Trask's counsel suggest that confusion was caused by another lawsuit filed by L. Paul Trask, Jr. which bears Civil Action Number 2007-CP-07-0993. Trask correctly points out that Andrew F. Lindemann, who practices with William Davidson, was and remains counsel of record in that case. Lindemann represents only non-governmental defendants in that litigation, namely Copeland Company of Beaufort, LLC and Curtis Copeland in his individual capacity. SCDPS is not a party to that litigation. Lindemann did not make an appearance in the present litigation (Civil Action Number 2007-CP-07-0993) until after the appeal was filed. *See, Davidson Affidavit, paras. 8, 10. (R. 1486-1487).* Moreover, there is no evidence that Davidson was ever involved in Civil Action Number 2007-CP-07-0993. *See, Davidson Affidavit, para. 11. (R. 1487).* Hence, Trask's suggestion that there was any bonafide confusion when in January 2009, Davidson was legally and properly substituted as counsel for SCDPS in Civil Action Number 2007-CP-07-0995 is unavailing.

service." To the contrary, prevailing case law clearly explains that actual service of the Notice of Appeal is a jurisdictional requirement. The applicable Appellate Court Rules state in mandatory terms that the Notice of Appeal "*shall* be served on all respondents" and that the service "*shall* be made upon the attorney." Rules 203(b)(1) and 233(b), SCACR. (Emphasis added). South Carolina law does not provide for any exceptions or any discretion for the appellate courts to excuse a failure to properly serve a Notice of Appeal. This Court has clearly held that "if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." *Elam v. South Carolina Dept. of Transportation*, 361 S.C. 9, 602 S.E.2d 772, 775 (2004). *See also, USAA Property & Casualty Ins. Co. v. Clegg*, 377 S.C. 643, 661 S.E.2d 791 (2008) (same). Trask has conceded that he did not serve the Notice of Appeal on SCDPS or its counsel of record. His error is not subject to "rescue" by the appellate courts.

In sum, Trask's failure to serve the Notice on Appeal on SCDPS or its counsel of record is a jurisdictional defect. Because there was not timely service of the Notice of Appeal on SCDPS, the Court of Appeals was correct in ruling that it lacked appellate jurisdiction over the appeal against SCDPS. The appeal against

SCDPS for alleged FOIA violations was properly dismissed on this basis, and there is no valid basis for the issuance of a writ of certiorari.³


³ The Court of Appeals did not address the merits of the summary judgment entered by Judge Mullen in favor of SCDPS on the FOIA claims in its opinion given the lack of appellate jurisdiction. However, if this Court is inclined to consider the merits of those FOIA claims, SCDPS would refer the Court to its brief filed in the Court of Appeals which sets forth an analysis of SCDPS's defenses, including the preservation, mootness, and statute of limitations/statute of creation defenses. In his petition, Trask has not shown that the rulings with respect to the FOIA claims against SCDPS were in error.

CONCLUSION

Based on the foregoing discussion, the Respondent South Carolina Department of Public Safety respectfully requests that this Court deny the Petitioner's petition for writ of certiorari.

Respectfully submitted,

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June 28, 2013

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In The Supreme Court

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent South Carolina Department of Public Safety, does hereby certify that service of the **Return to Petition for Writ of Certiorari** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 28th day of June 2013:

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