

STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT

Appeal from the Court of Common Pleas
For Beaufort County
Honorable Carmen T. Mullen, Circuit Judge
Civil Action No.: 2007-CP-07-0995
South Carolina Court of Appeals
Unpublished Opinion No. 2012-UP-623

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S.C. Supreme Court

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; Beaufort County Sheriff P.J. Tanner
In His Official Capacity,

Respondents.

REPLY IN SUPPORT OF WRIT OF CERTIORARI

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I. SUMMARY OF REPLY

The Respondents cannot and do not try to refute the extensive record of late and/or unanswered FOIA requests and wrongfully destroyed documents and information that will forever prevent Mr. Trask from knowing what happened to his son. Instead, the Respondents argue that this case is simply not important enough for this Court's consideration. And the South Carolina Department of Public Safety Respondent ("SCDPS") relies on confusion it created by switching law firms to argue that it was not timely served with the Notice of Appeal, when its now former firm was indeed served within the 30-day deadline and there is no evidence that its new counsel was unaware of the Notice of Appeal. As detailed further below, the Respondents' arguments are without merit.

II. ARGUMENT AND CITATION OF AUTHORITY

1. Granting Certiorari In This Case Is Supported By Special And Important Reasons Under Rule 242, SCACR

The Respondents argue that this case is not important and does not satisfy any of the enumerated criteria under Rule 242, SCACR, which notably by its own terms is "neither controlling nor fully measuring the Supreme Court's discretion or power to grant review."

a. Novel Questions Of Law

With respect to the first enumerated criteria of Rule 242, SCACR, this case raises the novel questions of law whether South Carolina FOIA claims are mooted by self-serving destruction of documents and information, as well as whether the South Carolina FOIA can be avoided by violating the South

Carolina Public Records Act's requirements to retain information.¹ No prior case in South Carolina has addressed these issues.

Notably, the case relied on by Respondents to argue that the South Carolina Public Records Act cannot be considered in conjunction with the South Carolina FOIA, Kissinger v. Reporters' Committee for Freedom of the Press, 405 U.S. 136 (1980), is a federal case that deals with federal statutes that are very different from the South Carolina statutes at issue here, and involves facts that are very different from the facts at issue here, and has been distinguished by other state courts in applying their own state statutes. See e.g., Office of Governor v. Washington Post Co., 360 Md. 520, 759 A.2d 249 (2000).

b. Conflict With South Carolina Supreme Court Case

As to the third enumerated criteria of Rule 242, SCACR, the Court of Appeals answered the above novel questions of law by effectively extending this Court's holding in Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474 (2006). In Sloan, this Court found the alleged FOIA violations at issue were moot because the documents had been provided.² Id. The Respondents here intentionally destroyed public documents and information

¹ The South Carolina FOIA does not require a public body to preserve, retain, and/or maintain public documents and/or records, simply only to preserve, retain, and maintain those public documents/records which the public body has decided to keep. The South Carolina Public Records Act is the means to compel a public body to retain its public records.

² In Sloan, unlike here, there was no issue regarding the public body's admitted destruction of documents, which ultimately prevented the production of those very same documents in compliance with FOIA. Moreover, the real issue in the case was not the documents themselves, but the dispute over whether the Friends of the Hunley was a public body. Sloan, 369 S.C. at 24-5, 630 S.E.2d at 477-8.

with no ability to recover or regenerate those documents and information. After doing so, the Respondents asserted they had given Mr. Trask all of the documents and information in their possession. Indeed, the very reason the Respondents could not produce any more documents or electronic information was that they destroyed the documents. Accordingly, it is important for this Court to distinguish or limit the Sloan case as to not reward illegal destruction of documents and information.

c. Important Public Interest

Related to the fourth enumerated criteria of Rule 242, SCACR, the South Carolina FOIA is a fundamentally important public protection from secret government activity – as the cases cited by Respondents expressly so hold. Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 580 S.E.2d 163 (Ct. App. 2003) (“[t]he essential purpose of the FOIA is to protect the public from secret government activity.”) (internal citations omitted); Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 274, 580 S.E.2d 163 (Ct. App. 2003) (FOIA was enacted to prevent the government from acting in secret); Fowler v. Beasley, 322 S.C. 463, 468, 472 S.E.2d 630 (1996) (“South Carolina’s FOIA was designed to guarantee the public reasonable access to certain activities of the government.”); Bellamy v. Brown, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991) (The FOIA meets, “the demand for open government while preserving workable confidentiality in governmental decision making.”) (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 292, 99 S. Ct. 1705, 60 L.Ed 2d 208 (1979)).

Of particular concern, the Court of Appeals decision in the instant case

invites government agencies to destroy documents to avoid South Carolina FOIA obligations, which undoubtedly will have a significant detrimental impact on the South Carolina public at large.

2. **The Notice Of Appeal Was Timely Served On SCDPS's Counsel In This Case**

SCDPS argues that it was not timely served with the Notice of Appeal under Rules 203 and 233, SCACR, and seeks to invoke a jurisdictional bar on extending the time to serve. Mr. Trask's initial brief fully details the confusion caused by SCDPS when SCDPS switched law firms; how SCDPS's now former law firm continued to represent to Mr. Trask that they represented all Respondents; how SCDPS's now former law firm was indeed timely served with the Notice of Appeal; how following the service of the Notice of Appeal, no one advised Mr. Trask that there had been a change in representation and that the service of the Notice of Appeal was improper; and how there is no evidence that SCDPS's new counsel was unaware that the Notice of Appeal had been served. Petition at 21-24. Under these circumstances, SCDPS should be estopped from arguing that the Notice of Appeal was not served timely. Indeed, the Notice of Appeal was served timely within the 30-day deadline, albeit on now former counsel under confusing circumstances created by SCDPS. The case law cited by SCDPS reciting the jurisdictional nature of the 30-day deadline is therefore inapposite. Mr. Trask does not need an extension. This Court has jurisdiction to recognize the timely service on SCDPS's counsel as proper. See O'Connell, Goyak & Ball v. Silbernagel, 297 Or. 207, 212, 681 P.2d 1159, 1162

(1984) (suggesting that if there had been confusion as to the identity of the proper legal counsel the appeal would not have been dismissed).

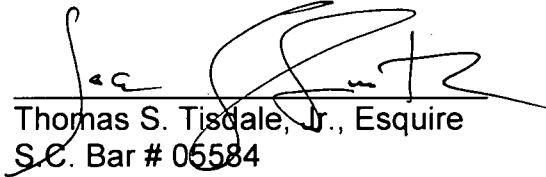
III. CONCLUSION

Based upon the foregoing arguments and citation of authority, the Petitioner, 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, respectfully requests that this Court grant this Petition for Writ of Certiorari and remand this matter back to the Circuit Court for a jury trial on the merits.

Respectfully submitted:

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By:



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18 July 2013

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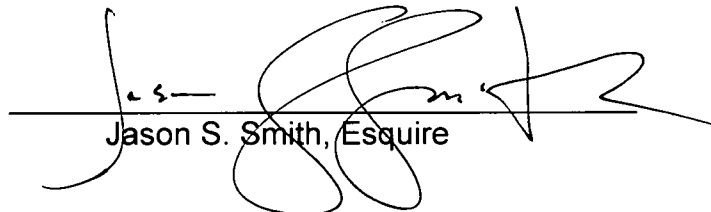
I, Jason S. Smith, Esquire, hereby certify that on 18 July 2013, I served a copy of the ***Reply in Support of Writ of Certiorari***, submitted by the Petitioner, L. Paul Trask, Jr., Individually, as a Citizen, Resident, Taxpayer, and Registered Elector of the State of South Carolina, and on behalf of others similarly situated, on the respective counsel for the Respondents via United States Mail, postage pre-paid, and addressed as follows:

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