

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
J. C. Nicholson, Circuit Court Judge

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S.C. Supreme Court

Opinion No. 5279 (S.C. Ct. App. filed Nov. 5, 2014)
Appellate Case No.: 2015-000406

Stephen George Brock,.....Petitioner,

v.

Town of Mount Pleasant, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Does the Court of Appeals' correct analysis of *Lambries II* present sufficient "special and important reasons" for this Court to exercise its discretion and grant the Petition?
2. Does the Court of Appeals' correct holding that the Town met the specific purpose announcement provision of FOIA during its November 16 and December 5 meetings presents sufficient "special and important reasons" for this Court to exercise its discretion and grant the Petition?
3. Does the Court of Appeals' appropriate evaluation of the issues raised regarding the destruction of emails and consideration of the Records Retention Act presents sufficient "special and important reasons" for the Court to exercise its discretion and grant the Petition?
4. Does the Court of Appeals' correct consideration of the Records Retention Act issues presents sufficient "special and important reasons" for the Court to exercise its discretion and grant the Petition?
5. Does the Court of Appeals' correct determination that Brock failed to preserve certain matters for appeal presents sufficient "special and important reasons" for the Court to exercise its discretion and grant the Petition?

COUNTER-STATEMENT OF THE CASE

At issue in this case are actions of the Town Council of Mount Pleasant in amending agendas at special meetings pertaining to executive sessions. Petitioner contests the amendments, the announced purposes and the actions authorized. The Court of Appeals affirmed (1) the lower court's finding that the Town did not violate Section 30-4-80 of Freedom of Information Act ("FOIA") by acting on items added to special meeting agendas upon reconvening to open session; (2) the lower court's finding that the Town did not violate FOIA's specific purpose provision at the November 16 and December 5 meetings; and (3) its decision not to declare the Town violated the Records Retention Act ("RRA") by deleting e-mails. The Court of Appeals reversed the lower court's finding that the Town did not violate the specific purpose provision by failing to announce a specific purpose of its executive session at its November 13 meeting and remanded the issue of attorney's fee for further consideration consistent with this opinion. *Brock v. Town of Mount Pleasant*, Op. No. 5279 (S.C. Ct. App. Nov. 5, 2014). Contrary to Petitioner's representation to this Court, the Court of Appeals did not hold the Town violated the RRA with respect to email destruction.

On November 20, 2014, Petitioners filed a Petition for Rehearing in the Court of Appeals. The Court of Appeals denied the Petition for Rehearing on January 26, 2015. Petitioners then filed the Petition for Writ of Certiorari now before this Court. For the reasons stated below, Respondent requests this Court deny the Petition and remit this case to the Court of Appeals for a remand to the circuit court for further proceedings consistent with its ruling.

REASONS TO DENY CERTIORARI

Under Rule 242(b), SCACR, a "writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are "special and important reasons." Petitioner makes no argument about or mention of any "special and important reasons" why this Court should exercise its discretion to grant the Petition.¹

Petitioner's certiorari petition seeks review solely on the ground that the Court of Appeals misapplied the law to the facts presented. The Court's review on petition for certiorari depends on factors other than the perceived correctness of the underlying decision. See, e.g., *Ross v. Moffitt*, 417 U.S. 600, 617 (1974). The United States Supreme Court in *N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) concluded that a Writ of Certiorari "is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way."

Rule 242(d)(4), SCACR, requires Petitioners to submit "A direct and concise argument in support of the petition. " Petitioners' argument addresses the merits of the questions presented rather than addressing if and why this case is appropriate for the Court to exercise its discretion to grant certiorari. There is no special or important reason for granting the Petition and no danger of the Court of Appeals' opinion upsetting the current FOIA law in South Carolina. The Court should deny the Petition because this case is not cert-worthy.

I. The Court of Appeals' correct analysis of *Lambries II* and its decision present insufficient "special and important reasons" for this Court to exercise its discretion and grant the Petition for Certiorari.

Petitioner complains that the Court of Appeals incorrectly applied *Lambries v. Saluda*

¹ Further, none of the "character of reasons" listed in Rule 242(b)(1)-(5), SCACR, which this Court may consider in deciding a petition for writ of certiorari, apply in this case.

Cnty. Council, 409 S.C. 1, 760 S.E.2d 785 (2014)(“*Lambries II*”) to the unique and complicated facts presented. Petitioner does not allege that any “special and important reasons” exist to compel the grant of his petition. Petitioner appears to advocate that the Court of Appeals create a judicially imposed restriction unsupported by the plain language of South Carolina Code Section 30-4-80. Petitioner argues that a special meeting agenda must include a notice that agenda items, which are appropriately identified and discussed in an executive session, might also be voted on in open session after the executive session. Petitioner conceded he is not appealing the trial court’s finding that Town Council did not violate FOIA by amending its executive session agendas during the special meetings.²

The Court of Appeals correctly points out that FOIA does not mandate an agenda for executive sessions. In its consideration of *Lambries II*, the Court of Appeals agreed with this Court’s finding that Section 30-4-80 requires an agenda for special meetings. It also correctly points out that Petitioner cannot reference any statutory provision that requires the public body to include the exact action it plans to take after an executive session on a meeting agenda. The Court of Appeals refusal to rewrite Section 30-4-80 does not contradict the holding in *Lambries II*, where this Court refused to impose restrictions on the amendment of an agenda to a regular meeting in the absence of a legislative directive. “We find this is also the better public policy in light of the fact a violation of FOIA can carry a criminal penalty, and we note this Court has previously declined to impose restrictions that are not expressly provided by the General Assembly in FOIA. See *Lambries II*, 409 S.C. at 12, 760 S.E.2d at 790.

Petitioner has not even attempted to satisfy its burden of demonstrating that “special and important reasons” exist to warrant the issuance of the extraordinary writ of certiorari. Petitioner

² At the motion for reconsideration hearing, Petitioner stated: “Let me be clear that I agree absolutely you can add an item [to the agenda] in the executive session...Again, it is about the open meeting following the executive session is the issue.” (R. p. 13, fn. 11).

simply complains he does not perceive the Court of Appeals decision as correct under the facts presented. This position does not demonstrate sufficient worthiness of certiorari. The decision was, in the first instance correct; the importance of the decision is limited to the unusual, complicated facts presented by the unique case; the decision creates no dispute with this Court's *Lambries II* decision; and the actual purpose of this petition is to request the Court to review conflicting evidence and reverse the Court of appeals decision. Therefore, the Petitioner fails to demonstrate sufficient "special and important reasons" for the Court to grant certiorari to this unworthy petition.

II. The Court of Appeals correct holding that the Town met the specific purpose announcement provision of FOIA during it November 16 and December 5 meetings presents insufficient "special and important reasons" for this Court to exercise its discretion and grant the Petition.

Petitioner dislikes the Court of Appeals' analysis of the announced specific purpose of the November 16, 2007 and December 5, 2007 executive sessions of town council. Petitioner does not dispute that a specific purpose was announced but desires this Court to parse the unique announcement language and rewrite the clear requirements of Section 30-4-70(b) into a complex, impossibly specific and impractical standard which would certainly invite endless litigation over semantics and pragmatic word usage. The Court of Appeals correctly held that the Statute does not require such specificity and the purposes announced by Town Administrator Burdette, as clarified by the town's counsel, disclosed exactly what was going to be discussed. As a result, the unique circumstance were distinguishable from *Quality Towing v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001). The Petitioner fails to demonstrate sufficient "special and important reasons" for the Court to grant certiorari to this unworthy petition.

III. The Court of Appeals' appropriate evaluation of the issues raised regarding the destruction of emails and the RRA presents insufficient "special and important reasons" for the Court to exercise its discretion and grant the Petition.

Petitioner incorrectly asserts that the Court of Appeals failed to address issues raised regarding public records under the RRA. The Court of Appeals determined the lower court did not abuse its discretion in declining to issue a declaratory judgment as to this particular issue due to the ever developing law in this area and the Town's remedial efforts in adopting a record retention policy in compliance with the South Carolina Code Section 30-1-10, et seq. The Town's policy, contrary to Petitioner's suggestion but as noted by both the Court of Appeals and Trial Court, is compliant and adequately addresses computer use, email, and retention. The statement that Respondent admitted that it failed to adopt a policy that appropriately addresses this issue is simply untrue and contrary to the record presented to the Court of Appeals. The Petitioner further complains that the Court of Appeals failed to specifically consider the additional beneficial results Petitioner obtained from the injunctive relief granted by the trial court in the remand. Initially, the injunctive relief, if it had been granted, would have been pursuant to the provisions of the RRA. Attorney fees in this case are recoverable only under South Carolina Code Section 30-4-100(b) for FOIA violations. The only additional relief granted by the Court of Appeals under the FOIA related to the specific purpose for the November 13 meeting and the Court of Appeals specifically referenced that relief in the remand. Petitioner's inaccurate challenge to the decision of the Court of Appeals' review of the trial court's discretionary denial of a request for declaratory judgment presents no "special and important reasons" for this Court to grant the Petition for Certiorari.

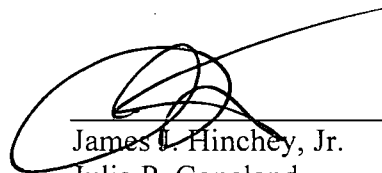
IV. The Court of Appeals' correct determination that Brock failed to preserve certain matters for appeal present insufficient "special and important reasons" for the Court to exercise its discretion and grant the Petition.

Petitioner complains that the Court of Appeals incorrectly determined that he failed to preserve certain unspecified issues for appeal. The Petition addresses this issue in eight lines that fails to address let alone demonstrate any "special and important reasons" for the Court to exercise its discretion and grant certiorari.

Petitioner also now complains that the Court of Appeals should have determined Petitioner to be the prevailing party and not a party that prevails in part. Such a request bizarrely ignores several issues raised by Petitioner where both the trial court and the Court of Appeals found against the Petitioner. (R. pp. 16-17; pp. 119-121; pp. 128-129). Under no circumstances, as a result, could the Petitioner be considered a prevailing party but simply a person who prevails in part. In such a circumstance, absent a legislative amendment to the statute, the award of reasonable fees or an appropriate portion thereof is subject to the reasonable discretion of the trial court.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and permit the Court of Appeals to remand this case to the circuit court for further proceedings consistent with its ruling.



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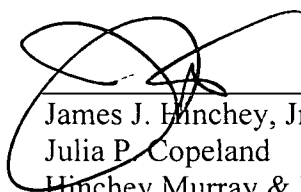
Town of Mount Pleasant, Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below, a copy of the foregoing *Return to Petition for Writ of Certiorari* was served on all counsel of record via U.S. Mail with first class postage prepaid to the following addresses:

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March 25, 2015

Hon. Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
P.O. Box 11330
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APR 01 2015

S.C. Supreme Court

Re: Stephen George Brock, Appellant v. Town of Mt. Pleasant, Respondent
Case No: 2008-CP-10-3308; Appellate Tracking No.: 2015-000406

Dear Mr. Shearouse:

Enclosed please find for filing an original and seven copies of Respondent's Return to Petition for Writ of Certiorari in the above referenced case. Per your request, we have added the correct Appellate Case Number reference and reversed the parties in the caption. Please let us know if you need any additional changes. Please also return a clocked-in copy of same to me for our records.

Thank you in advance for your attention to this matter.

Respectfully,

A handwritten signature in black ink, appearing to be 'James J. Hinchey, Jr.', written over a horizontal line.

James J. Hinchey, Jr.

Enclosure

cc: Robert C. Childs, III
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