THE STATE OF SOUTH CAROLINA
IN THE SUPREME

APPEAL FROM CHARLESTON COUNTY
COMMON PLEAS COURT
Appellate Case No.: 2012-208787

J. C. Nicholson, Jr., Circuit Court Judge
Trial Court Case No.: 2008CP1003308
Ct. of Appeals Appellate Case No.: 2012-208787

Stephen George Brock, ...
Appellant,

v.

Town of Mount Pleasant, ...
Respondent.

PETITION FOR CERTIORARI

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CERTIFICATE OF SERVICE

I certify that I have on the 23rd of February, 2015, served the Appellant's Petition for Certiorari and Appendix on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, and by facsimile, addressed to counsel of record as follows:

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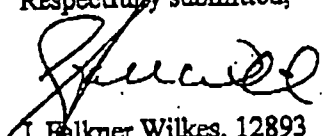
Respectfully submitted,



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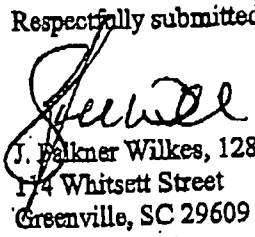
CERTIFICATE OF COUNSEL

I further certify that the Record on Appeal has been redacted in compliance with the Supreme Court's Order 2007-08-13-02.

Respectfully submitted,



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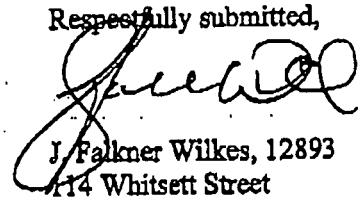
CERTIFICATE

I certify that a petition for rehearing was timely filed in this case and has been ruled on by the Court of Appeals.

Respectfully submitted,



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STATEMENT OF THE CASE

This matter came to Court by way of a Complaint filed by Stephen Brock seeking remedies pursuant to FOIA and the PRRA. The Defendant timely filed an Answer. The matter subsequently went before the Circuit Court as a non-jury matter. A trial was held on January 24, 2011. From that trial an Order was entered was entered on August 22, 2011, by the Honorable J.C. Nicholson, Jr. A Second Supplemental Order for Reasonableness of Attorney's Fees was also filed on August 22, 2011. The Appellant filed timely post trial motions seeking to alter or amend the judgment. A hearing was held on the post trial motions on January 17, 2012. A Supplemental Order was entered February 8, 2012. The Appellant timely filed notice of appeal. A portion of the transcript was inaudible and a Motion to Settle the Record was filed by Appellant and an Order settling the record was entered on February 1, 2013.

At trial, the Appellant was represented by Thomas S. Tisdale . On appeal the Appellant is represented by Robert C. Childs, III, and J. Falkner Wilkes. The Respondent, was represented at trial by Francis Cantwell and was represented on appeal by David Guy Pagliarini. The Court of Appeals affirmed in part, reversed in part, and remanded to the circuit court for further proceedings. A timely motion for rehearing was filed by the Appellant, Brock. The Court of Appeals denied the Appellant's motion and this Petition follows.

QUESTIONS PRESENTED FOR REVIEW

I. DID THE COURT OF APPEALS FAIL TO PROPERLY APPLY THIS COURT'S HOLDING IN LAMBRIES, II AND DISTINGUISH BETWEEN REGULAR AND SPECIAL MEETINGS WHEN CONSIDERING AGENDA NOTICE REQUIREMENTS?

II. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE ANNOUNCEMENT OF SPECIFIC PURPOSE PROVISION OF FOIA HAD BEEN MET FOR NOVEMBER 16 AND DECEMBER 5 MEETINGS?

III. DID THE COURT OF APPEALS FAIL TO ADDRESS ISSUES RAISED REGARDING PUBLIC RECORDS INCLUDING THE DESTRUCTION OF EMAILS.

IV. DID THE COURT OF APPEALS ERR IN FAILING TO INCLUDE FOR CONSIDERATION ON REMAND THE ADDITIONAL BENEFICIAL RESULTS BROCK OBTAINED IN THE CASE RELATING TO THE DESTRUCTION OF EMAILS.

V. DID THE COURT OF APPEALS ERR IN FINDING THAT CERTAIN MATTERS WERE NOT PRESERVED FOR APPEAL.

ARGUMENT

I. THE COURT OF APPEALS FAILED TO PROPERLY APPLY THIS COURT'S HOLDING IN LAMBRIES, II AND DISTINGUISH BETWEEN REGULAR AND SPECIAL MEETINGS WHEN CONSIDERING AGENDA NOTICE REQUIREMENTS.

The Court of Appeals opinion fails to properly apply this Court's holding in Lambries v. Saluda Cnty. Council, 409 S.C. 1, 760 S.E.2d 785 (2014) (Lambries II) which finds "... a "special" meeting is a meeting called for a special purpose and at which nothing can be done beyond the objects specified for the call." In contrast, the Court of Appeals stated in its opinion that FOIA allows a public body to add items to a special meeting agenda. In the instant case, there was no indication on the special meeting agenda that the matters scheduled for discussion in executive session would subsequently be acted upon in open session. The Court of Appeals creates a new rule that the public must guess whether matters on an executive session agenda, not on the following special meeting agenda, might be voted on after the executive session. This finding conflicts with Lambries, II.

The Court of Appeals' error lies, in part, in its finding that the Town gave the public sufficient notice of pending issues by way of its executive session announcements, allowed the public to present its comments on the topics, and never took action during executive session. The record fails to support these conclusions. Here, the public was not given notice, nor did the special meeting agendas of November 13 and November 16 (PL 16 & 22) allow public comments. While the December 5 meeting agenda allowed for public comment, it served little purpose since the vote to spend $6 million was unnoticed on the meeting agenda. (PL 3).

In this case the posted agenda for the special meetings of November 13 and November 16 indicated that Council would only hold executive sessions. There was no notice that Council might take formal action during the open session of the special meetings. Agendas for these meetings noticed executive session as the only object of the call, however, in violation of 30-4-80, unnoticed votes were taken at these special meetings. Allowing unnoticed action violates to the 24-hour notice provision of FOIA applicable to special meetings under 30-4-80 and is contrary to the reasoning in Lambries II which unambiguously distinguished the notice requirements for regular meeting agendas from those for special meetings:

> "Moreover, although the specific types of meetings are not defined in FOIA itself, in light of the General Assembly's references to these different meetings in Section 30-4-80(a) and its general references in section 4-9-110 to meeting requirements, we believe the General Assembly made an intentional delineation because the terms do have commonly understood distinctions in the common parlance for procedures governing public bodies." Lambries v. Saluda Cnty. Council, 409 S.C. 1, 760 S.E.2d 785 (2014) (Lambries II),

Lambries II, decided after the briefing of this case in the Court of Appeals, recognized that the permissible topics of a special meeting are limited to the "objects of the call" on the noticed agenda. Because all of the meetings at issue in this case were special meetings, a properly noticed agenda is required under Lambries II. To be proper: "Such notice must be posted as early as is practicable *but not later than twenty-four hours before the meeting*. The notice *must include the agenda*, date, time, and place of the meeting." S.C. Code Section 30-4-

80. (Emphasis added)

Finding no definition of "agenda" in state law, the Court of Appeals failed to give any weight to the agenda requirement under 30-4-80 or to consider the applicability of the *Robert's Rules of Order, the* Town's adopted rules of order, as a guide to the definition of agenda provided therein:. . . "the terms order of business, orders of the day, agenda, and program refer to the closely related concepts having to do with the order in which business is taken up in a session and the prescheduling of particular business". (§41(15) *Robert's Rules of Order, Newly Revised, 10th Edition*).

Lambries II establishes that special meetings must be noticed with agenda 24 hours before the meeting, and importantly, the meeting action is limited to the object of the call. The Court of Appeals erred in holding that FOIA accepts unnoticed action at a special meeting when the action follows an executive session, and such a ruling is contrary to the plain language of the statute and this Court's ruling in Lambries II. The Court of Appeals' opinion states:

> From the posted and amended agendas, the public and the press had notice Town Council desired to confer with its attorney in closed session regarding certain matters and may take some action upon reconvening to open session...and once those agenda were amended, it seems Town Council could certainly act on the agenda items upon reconvening to public session.

Contrary to the Court of Appeals' opinion, the public and press had no such notice of action at the Town Council special meetings. An executive session is a closed-door meeting within an

open meeting. The agenda for executive session cannot become the *de facto* agenda for an open special meeting. The special meeting must have an agenda posted 24 hours in advance, and any action is limited to that which is posted on the agenda. FOIA does not allow for an executive session to serve as notice or to give permission for the public body to act when returning to open session in a special meeting. A special meeting agenda that notices only an executive session cannot allow unnoticed action in open session and still comply with the provisions of 30-4-80.

The Court of Appeals further erred in holding that Brock did not appeal from the trial court's finding that Town Council could amend its special meeting agendas in violation of the 24 hour notice requirement, and then take formal action. Brock clearly argued that issue before the trial court. **(Motion for Reconsideration)** The trial court found that any agenda could be so amended. **(Second Supplemental Order - Feb. 6, 2012)** The Court of Appeals' finding focuses on amendment of executive session agendas, while overlooking the fact that this is an argument on the improper amendment of special meeting agendas. Brock has argued that Council violated FOIA by amending its special meeting agendas during special meetings. Brock agrees the Town may discuss any topic in a properly announced executive session, subject to provisions of 30-4-70. (TT Second Supplemental Order 2/8/12 p28L22-p29L3) Notice requirements in FOIA (30-4-80) do not allow for executive sessions agendas to satisfy agenda notice for special meetings.

The Court of Appeals decision fails to distinguish agenda notice between special and regular meetings. The reasoning of Lambries II shows this to be error: "By mandating an agenda for regularly scheduled meetings and forbidding County Council from amending its agenda, the Court of Appeals is, effectively, treating a regularly scheduled meeting as a called, special, or rescheduled meeting." Contrary to Lambries II the Court of Appeals has held: "To the extent

Brock's notice issue is preserved, Section 30-4-80 does not support his position. That section requires public bodies to post agendas for special meeting twenty-four hours before the meetings; however, it does not specifically require the agenda to include what action the public bodies plan to take." This simply eviscerates Section 30-4-80 and is contrary to the entire analysis in Lambries II.

The Court of Appeals misperceived important aspects of Brock's argument. Brock's argument is that Town Council must notice any matter to be taken up at a special meeting. The Court of Appeals, found that unforeseen matters may arise during the course of any meeting which could require an executive session. This is not in dispute for regular meetings where a matter for executive session arises and leads to an action. However, the executive sessions in this case did not arise during a meeting. They were scheduled events. Contrary to the decision of the Court of Appeals, Brock argues that formal action *following an executive session at a special meeting* must meet the notice requirements of FOIA.

The Court of Appeals mistakenly perceived that Town Council voted to amend the special meeting agendas at issue. Even if Lambries II made no distinction between regular and special meetings, the Court of Appeals' decision would still be in error as there was never an formal amendment to any meeting agenda, except executive sessions for which no agenda is required. Instead, at every meeting in this lawsuit, Council adjourned from executive session to open session and voted without any notice to the public. Even had there been a formal amendment of the special meeting agenda, the actions, without 24 hour notice, would be violations of FOIA and in conflict with the reasoning of Lambries II.

The Court of Appeals erred in holding Brock's argument as to "ratification" not being

raised or preserved. The issue of ratification was raised and ruled on by the trial court in its order denying Brock's Motion for Reconsideration. (Second Supplemental Order Feb.8, 2012), p.2). The trial court ruled that any violation at the December 5 Special Meeting was cured or ratified by the December 17 Special Meeting. The FOIA violation of the December 5 meeting could not be cured by the subsequent meeting. Although a subsequent, properly noticed meeting might cure any contractual deficiencies between Mason and the Town as to the purchase of the property, it could not erase the FOIA violation existing on December 5, nor Brock's right to have a declaration as to the violation of FOIA. Ratification was eliminated from FOIA and the term removed with 1987 amendments to FOIA that followed Multimedia from 1986.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE SPECIFIC PURPOSE PROVISION OF FOIA HAD BEEN MET FOR NOVEMBER 16 AND DECEMBER 5 MEETINGS.

The Court of Appeals decision is in conflict with this Court's holding in Quality Towing. **(Quality Towing v City of Myrtle Beach, 345 S.C. 156 (2001) 547 S.E.2d 862)S.E. 2d)** Below the court found that the specific purpose announcements of November 16, 2007 and December 5, 2007 disclosed "exactly" what was going to be discussed, and therefore met the requirements of 30-4-70. This is inconsistent with the record and the reasoning in Quality Towing. At the November 16 Special Meeting, the announcement of the specific purpose of the executive session included amending the executive session agenda "to include personnel matters pertaining to the Clerk of Council" and "personnel matters relating to the Boards and Commissions." The actions by Town Council following the executive session of the November 16 were: ..."adjust the position requirements and compensation of the Clerk of Council" (and) "to prepare a letter as

discussed in executive session".

Although compensation is a defined purpose for an executive session, "personnel matters" is not, and is insufficient to inform the public as to specific purpose of the session. Regarding the second matter, in light of the existence of several boards and commissions in Mt. Pleasant, the Town failed to name even which board or commission was the subject of "personnel matters". The following motion to prepare a letter fails to reveal any identifiable purpose to the session. Similarly, at the December 5 special meeting the stated "specific purpose" of the executive session was for "legal advice" on settlement of a lawsuit and purchase of property. The motion that immediately followed the executive session was to accept a settlement offer, including the purchase and financing of the property that was the subject of the lawsuit for $6 million. The Court's finding that the public might have known of settlement discussions and the amount of that settlement is inconsistent with the holding of Quality Towing:

> "FOIA is clear in its mandate that the specific purpose of an executive session shall be announced." (emphasis added). Therefore, FOIA is not satisfied merely because citizens have some idea of what a public body might discuss in private. Therefore, FOIA is not satisfied merely because citizens may have some idea of what a public body might discuss in private". (Quality Towing)

FOIA's requirement of the specific purpose of an executive session relieves the the public of the need to guess the actual topic of executive sessions. The specific purpose announcement requirement was not met at the special meetings at issue.

III. THE COURT OF APPEALS FAILED TO ADDRESS ISSUES RAISED REGARDING PUBLIC RECORDS INCLUDING THE DESTRUCTION OF EMAILS.

The decision of the Court of Appeals fails to address numerous issues raised by Brock in regards to the issue of public records. The Court's decision interprets Brock's argument in regard to the destruction of e-mails among Town Council members as solely involving e-mails concerning discussion of public business. (See Amended Complaint. Page 6- Illegal Communication Concerning Pending Legislation). The Amended Complaint sets out the broader claim of destruction of e-mail due to the absence of a defined e-mail management and retention policy as required by law (Count IV mismumbered Count VI).

The record shows that the Town violated the RRA by routinely destroying and deleting emails. (Order p 11; TT 311-312) Here the record shows that the Town failed to have any policy for management and retention of e-mail as defined by the 2005 E-mail Management publication of the South Carolina Department of Archives and History (SCDAH) and as required by the Public Records Act, S.C. Code Section 30-1-10. (TT 310-313) Respondent's Final Brief admits to the absence of the required e-mail management policy stating in part:

> "No evidence was presented to the hierarchy of these (deleted) e-mails as having, as established by the South Carolina Department of Archives and History, permanent value, transitory value or convenient (sic) value which had a bearing on the length of retention of if they have to be retained at all."

The referenced "hierarchy" of e-mails is derived from the SCDAH guidelines. (PL 35, p.1) Respondent's defense for the absence of evidence of the types of the deleted e-mails is an admission that it failed to adopt a policy for e-mail retention which would have identified e-mail for retention. There was no policy; no e-mails had been categorized for retention or deletion, leaving decisions on deletion to individual preference, presenting "legal, operational,and public relations risks" recognized by SCDAH policy. **(E-Mail Management p.1)**

This Court's decision, relying on the trial court's finding that "law in this area is ever-developing" **(Trial Court Order p.11)** is unsupported by anything in the record. The Wisconsin case cited by the Court of Appeals merely provides the observation that e-mail policies developed over decades, ignoring the fact e-mail policy was established by the SCDAH in 2005 when E-mail Management was published by the SCDAH. Further, the policy attributed to the Town as ia records retention policy, enacted during the pendency of the lawsuit, does not meet the requirements of the RRA. **(PL 35; PL 40,)**

IV. THE COURT OF APPEALS FAILED TO INCLUDE FOR CONSIDERATION ON REMAND THE ADDITIONAL BENEFICIAL RESULTS BROCK OBTAINED IN THE CASE RELATING TO THE DESTRUCTION OF EMAILS.

This the Court of Appeals erred in failing to include for consideration on remand the additional beneficial results Brock obtained from injunction (Amended Complaint - Count V) to prevent admitted e-mail deletion. Here, although Brock was successful in having the Town enjoined from further destruction of emails, the Court of Appeals failed to specifically consider this in its consideration or remand of attorney fees and costs. Brock prevailed in the relief he sought, not recognized by the trial court. Therefore, the remand for further consideration of

attorney fees and costs should include consideration of the additional beneficial results obtained from the injunctive relief obtained. On the basis of the injunction issued by the trial court to prevent further destruction of public records, Brock should be further considered the prevailing party for consideration of additional attorney fees and costs on remand. *See* Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474 (2006).

To the extent that Brock obtains further relief as outlined above, the Court should include in the remand for attorney fees consideration of any additional beneficial results. Hudson v. Hudson, App. Case: 2012-212690 (Ct. App. 04162014); Myers v. Myers, 391 S.C. 308, 321 (Ct. App. 2011); *See also* Sexton v. Sexton, 310 S.C. 501, 503-04, 427 S.E.2d 665, 666 (1993).

V. The Court of Appeals erred in dismissing various issues of this appeal as not preserved on that basis that . . . "the trial court's supplemental order did not rules on other issues. Accordingly, because those arguments on appeal were not presented nor ruled upon by the trial court. . .". Brock's Motion for Reconsideration addressed each issue in the appeal to the Court of Appeals. On February 6, 2012, following addition of a missing finding from trial, the trial court added:

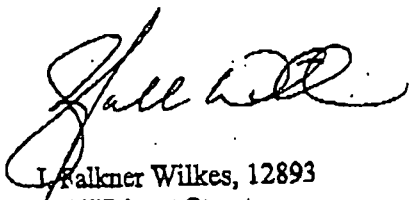
> "Other issues raised by Plaintiff in his motion for reconsideration to alter finding or amend the judgment are denied". (Second Supplemental Order 2/8/15)

CONCLUSION

Based on the foregoing, the Appellant petitions this Court for a Writ of Certiorari to the Court of Appeals and that the opinion of the lower courts be reversed and remanded as more

fully set forth above.

Respectfully submitted,



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