

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

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Unpublished Opinion No. 2012-UP-623

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.

**PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC***

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SC Court of Appeals

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I. STATEMENT OF ISSUE ON REHEARING

- A. Did The Court Of Appeals Properly Affirm The County Respondents' Summary Judgment Given Mr. Trask's Substantial Evidence The Respondents Had Violated The South Carolina Freedom Of Information Act?
- B. Did The Court Of Appeals Properly Affirm The County Respondents' Summary Judgment Given Mr. Trask's Substantial Evidence The Respondents Had Violated The South Carolina Public Records Act?
- C. Did The Court Of Appeals Properly Dismiss Mr. Trask's Appeal Against The SCDPS Respondent?

II. STATEMENT OF THE CASE

On April 11, 2007, 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 ("Mr. Trask"), brought this action against the Respondents, South Carolina Department of Public Safety ("SCDPS"); Beaufort County; Beaufort County Management Information Systems ("BCMIS"); Beaufort County Coroner Curtis Copeland in his official capacity ("Coroner Copeland"); and Beaufort County Sheriff P.J. Tanner in his official capacity ("Sheriff Tanner" or "BCSO"). (R.p.5; R.pp.19-31). Mr. Trask asserted claims against all of the Respondents for FOIA¹ violations (R.pp.5-6; R.pp.20-30, paras. 10-12, 14-24, 26-39, 41-46, 48-56, 58-65) seeking to compel them to produce various public documents which had been previously requested, but not supplied. (R.p.30). Mr. Trask also sought statutory attorneys' fees and costs, together with a recalculation and reimbursement of incorrectly charged copying costs. (R.p.30).

¹ See South Carolina Freedom of Information Act codified in S. C. Code Ann. §§ 30-4-10, *et seq.* (Thomson West 2005).

The Respondents unsuccessfully moved to dismiss the action. (R.p.18; R.pp.41-42). They then answered (R.pp.43-52), denying the material allegations (R.pp.43-51, paras. 1, 12-12, 17, 20-24, 27, 30, 32-39, 42-46, 50-56, 61-66) and asserting various affirmative defenses. (R.pp.51-52).² Both the Respondents and Mr. Trask moved for summary judgment. (R.pp.53-54; R.pp.90-91).³ The Trial Court granted the Respondents summary judgment. (R.pp.5-13). (R.pp.5-13). Mr. Trask then unsuccessfully moved for reconsideration, *etc.* (R.pp.3-4; R.pp.727-750). This appeal followed.

This Court of Appeals, by *per curiam* unpublished opinion, dismissed in part and affirmed in part. Mr. Trask now files his Petition for Rehearing.

III. STATEMENT OF THE FACTS⁴

1. SCDPS' Actions/Inactions

After the Accident, Mr. Trask wrote to the South Carolina Highway Patrol requesting the SCDPS "preserve all records related to the [A]ccident and the subsequent investigation". (R.p.21, para. 15; R.p.45, para. 15; R.p.114; R.p.93; R.p.107, para. 3; R.p.718, para. 12(a)). Mr. Trask then sent

² Mr. Trask served various discovery requests (R.pp.58-70) which the Respondents answered/responded. (R.pp.71-83). Mr. Trask also sought to depose various individuals, including Beaufort County Staff Attorney Kelly Golden, Esquire. (R.pp.84-89). Due to the Respondents' deficient discovery answers/responses and attempt to prevent the Kelly Golden deposition, Mr. Trask filed a Motion to Compel (R.pp.55-89) and the Circuit Court ordered the Respondents to provide certain discovery responses. (R.pp.15-17). Mr. Trask later served supplemental interrogatories and supplemental requests for production. (R.pp.301-310).

³ Mr. Trask submitted two supporting affidavits. (R.pp.107-254; R.pp.293-298). The Respondents later filed an amended motion (R.pp.314-315) with two supporting affidavits. (R.pp.316-317; R.pp.318-319).

⁴ This case arises out of the 22 November 2005, fatal single vehicle accident (the "Accident") involving Mr. Trask's son, Paul Trask, Jr. ("Paul Trask"). See Trask v. Beaufort County, 392 S.C. 560, 709 S.E.2d 536 (Ct.App. 2011), *rehearing denied* (3 June 2011), *certiorari granted* (3 October 2012).

a FOIA request to the SCHP seeking copies of “all records, excluding photo[graph]s, pertaining to the [A]ccident”. (R.p.21, para. 16; R.p.45, para. 16; R.p.107, para. 4; R.p.117; R.p.119, lines 10-18; R.p.718, para. 12(a)). This included copies of the audio radio transmissions related to the Accident. (R.p.117; R.p.119, line 19 – R.p.120, line 11). The SCDPS partially responded, but failed to include any handwritten notes or copies of recorded radio transmissions. (R.pp.21-22, para. 17; R.p.107, para. 4; R.p.718, para. 12(a)).⁵

Mr. Trask later requested SCDPS to provide him with copies of the investigatory field notes and the coroner’s toxicology report. (R.p.22, para. 18; R.p.45, para. 18; R.pp.661-662; R.p.718, para. 12(a)). The SCDPS provided illegible copies of the field notes (R.p.22, para. 18; R.p.45, para. 18; R.p.718, para. 12(a)), but Mr. Trask was not allowed to see the original file until mid-July 2006. (R.p.22, para. 18; R.p.45, para. 18). Mr. Trask then sought “e[-]mail communications between several of the investigating SCHP troopers BCSO Captain Robert Bromage[,] and Coroner Copeland.” (R.p.22, para. 19; R.p.45, para. 19; R.p.718, para. 12(a)).⁶ The SCDPS advised Mr. Trask the “SCDPS could not supply the requested records because the SCHP troopers had ‘double deleted’ the records from their e-mail accounts.”

⁵ “[M]any of the documents provided were illegible and of poor quality and impossible to read” (R.pp.21-22, para. 17; R.p.107, para. 4; R.p.718, para. 12(a)). SCDPS’ Leigh Watkins (“Ms. Watkins”) testified the transmission should have been available, but she did not recall sending them to Mr. Trask. (R.p.120, line 12 – R.p.123, line 9). The records no longer exist. (R.p.123, line 10 – R.p.124, line 22).

⁶ Captain Robert Bromage of the Beaufort County Sheriff’s Office was assigned to the Beaufort County Coroner’s Office as its death investigator.

(R.p.22, para. 20; R.p.718, para. 12(a)). Mr. Trask made several subsequent requests to the SCDPS seeking restoration of the deleted e-mails, as well as a copy of the SCDPS' written policy governing its e-mail system. (R.p.22, para. 20; R.p.718, para. 12(a)). SCDPS never provided either (R.p.22, para. 20; R.p.718, para. 12(a)).

2. Coroner Copeland's Actions/Inactions

Mr. Trask requested Coroner Copeland to provide him with a copy of any statement obtained from Mr. James Irby – the Fripp Island Security Gate guard – but never received a response. (R.p.108, para. 1; R.p.125; R.p.719, para. 13(a)). Mr. Trask then requested “the Coroner’s office preserve all records, including audio recordings and e-mail correspondence related to the [A]ccident.” (R.p.24, para. 28; R.p.46, para. 28; R.pp.93-94; R.p.108, para. 3; R.p.143). Mr. Trask sought “a copy of the Coroner’s report and also [Captain] Bromage’s inquest investigation field notes and reports, as well as the reports from the MAIT investigation. (R.p.24; R.p.46, para. 29; R.p.108, para. 2; R.p.109, para. 1; R.p.126; R.p.721, para. 15(a)). Coroner Copeland partially responded, but failed to provide a “copy of his own handwritten field notes[,] any reports pertaining to the MAIT investigation, or any . . . field notes and reports prepared by [Captain] Bromage” (R.p.24, para. 30; R.p.46, para. 30; R.p.108, para. 2; R.pp.109-110, paras. 1-2; R.pp.153-171). Mr. Trask then asked Coroner Copeland for Captain Bromage’s and the other investigator’s handwritten notes, as well as Coroner Copeland’s handwritten notes. (R.p.24, para. 31; R.p.47, para. 31; R.p.108, para. 2; R.pp.109-110, p.3, para. 1; R.pp.127-128; R.p.132, line 17 – R.p.133, line 12; R.p.721, para.

15(b)). Coroner Copeland then advised “all of the handwritten notes and reports from the interviews . . . had been ‘destroyed’.” (R.p.24, para. 32; R.p.47, para. 32; R.p.109, paras. 1-2; R.pp.172-173; R.p.130, line 1 – R.p.131, line 21; R.p.132, line 17 – R.p.133, line 25).⁷

Mr. Trask then sought cell phone records and e-mail communications. (R.pp.24-25, para. 33; R.p.47, para. 33; R.p.108, para. 3; R.p.144; R.pp.718-719, para. 12(b)).⁸ Coroner Copeland refused to produce the cell phone/e-mail records asserting they were not covered by FOIA. (R.pp.24-25, para. 33; R.p.108, para. 3; R.p.137, lines 2-8; R.p.145). Mr. Trask then asked Coroner Copeland for a list of the Deputy Coroners, their certificates of appointment, and the identity of the person or persons administering the oath to them. (R.p.25, para. 34; R.p.108; para. 5; R.p.148; R.p.137, lines 8-15; R.p.720, para. 13(c)). Coroner Copeland did not respond: (R.p.25, para. 34; R.p.108, para. 5; R.p.137, lines 8-23; R.p.720, para. 13(c)). Coroner Copeland

⁷ Captain Bromage confirmed he routinely destroyed all his handwritten interview notes made during his investigations as he usually reduced the notes to an incident report or the like. (R.p.183, line 1 – R.p.184, line 3). He repeatedly refused Mr. Trask’s requests for a copy of the Fripp Island Security Gate logs. On 1 September 2006, Captain Bromage advised Mr. Trask the handwritten logs were maintained but not disseminated to other than law enforcement personnel on privacy grounds. (R.p.175, lines 1-20).

⁸ Coroner Copeland used his personal e-mail address and personal e-mail account for official county business even though he believed he had an official Beaufort County e-mail address. (R.p.137, lines 2-17). Coroner Copeland erased all of those e-mails even though for official county coroner business. (R.p.135, line 22 – R.p.136, line 5). Similarly, Captain Bromage accessed his personal e-mail address and account from his county-owned computer for official county business and routinely deleted the e-mails claiming “a volume issue.” (R.p.176, line 2 – R.p.178, line 11). Captain Bromage did this even though he was assigned an official Beaufort County e-mail address. (R.p.196, p.43, lines 9-25). Moreover, Captain Bromage’s county-issued computer’s hard drive “fried sometime [in the] [S]ummer [of 2007]” and BCMIS “replaced the hard drive in the laptop [he] used”, thereby completely eliminating any ability to re-create the e-mails. (R.p.180, lines 11-16; R.p.181, lines 8-17). None of Captain Bromage’s information on the conveniently “fried” hard drive had been backed up. (R.p.180, lines 17-20; R.p.181, lines 8-17; R.p.197, lines 7-19).

conceded he routinely “double deleted” his e-mails. (R.p.134, line 1 – R.p.135, line 7).⁹ He also admitted the e-mails he deleted were probably covered by Beaufort County’s records retention policy – Section 12-518-3. (R.p.135, lines 8–16).¹⁰

Mr. Trask made several additional written FOIA requests to Coroner Copeland and/or his Deputy Coroner, Connie Herman, seeking, among other things, (a) e-mail correspondence on the Coroner’s Office’s computer hard drives,¹¹ (b) various toxicology examinations conducted by the Coroner’s Office, and (c) the radio call log for the night of the accident. (R.p.25, paras. 35-37; R.pp.47-48, paras. 35-37; R.p.104, para. 4; R.p.111, para. 3; R.p.146; R.p.148; R.p.149; R.p.151; R.p.138, line 24 – R.p.142, line 6; R.pp.719-720, paras. 12(c). 13(b)). Coroner Copeland never responded, even after Mr. Trask made follow-up requests. (R.p.25, paras. 35-37; R.p.108, para. 4; R.p.111, para. 3; R.p.138, line 24 – R.p.142, line 6; R.pp.719-720, paras. 12(c), 13(b)).

⁹ Coroner Copeland stated he deleted the coroner’s office correspondence “[b]ecause it beca[me] cumbersome” and did so as a mater of course. (R.p.135, line 22 – p.91, line 5). Coroner Copeland admitted he wished he had not deleted the e-mails. (R.p.136, lines 3-5).

¹⁰ Coroner Copeland conceded he should not have double deleted any of the “official business” e-mails from his e-mail account, especially if they involved anything to do with a coroner’s inquest since the Beaufort County record retention policy (Section 12-518.3) required him to maintain those records. (R.p.135, line 8 – R.p.136, line 12).

¹¹ Coroner Copeland operated the Beaufort County Coroner’s Office (same employees, same official vehicle, same cell phones, same computers, *etc.*) out of his funeral home business – Copeland Company of Beaufort, LLC (the “Copeland Funeral Home”). He refused, despite a court order, to produce the computer hard drive from his “office” computer as he has sold the Copeland Funeral Home and the computers, admittedly containing official Coroner’s Office records, to third-parties and had erased the hard drive prior to the sale. (R.p.136, line 6 – R.p.137, line 1).

3. BCMIS' Actions/Inactions

Mr. Trask requested BCMIS¹² provide, among other things, “a copy of the Beaufort County records retention schedule for all e-mail correspondence.” (R.p.26, para. 42; R.p.48, para. 42; R.p.112, para. 1; R.p.192, line 25 – R.p.194, line 13).¹³ BCMIS provided some information and documentation, but omitted the e-mail correspondence retention schedule. (R.p.26, para. 43; R.p.112, para. 1). His later requests for clarification were ignored. (R.p.194, line 14 – R.p.196, line 2; R.pp.253-254).

BCMIS did not make any effort to restore any of the deleted e-mail correspondence and/or records related to the accident. (R.p.26, paras. 44-45; R.p.112, para. 1). Furthermore, Frank Guth confirmed Beaufort County did not have any type of policy and/or procedure and/or standard governing the retention of official Beaufort County business e-mail correspondence. (R.p.196, p.43, lines 3-8).

4. Sheriff Tanner's Actions/Inactions

Mr. Trask requested Sheriff Tanner to provide copies of “e-mail records [from Captain] Bromage pertaining to the investigation of the accident.” (R.p.27, para. 49; R.p.49, para. 49; R.pp.109-110, para. 3; R.p.181, line 2 –

¹² The BCMIS “is responsible for comprehensive data management and support and service to other [Beaufort] [C]ounty departments for records management. (R.p.26, para. 41; R.p.48, para. 41).

¹³ Frank Guth, a BCMIS employee, confirmed that after the BCMIS' 30-day e-mail back-up period has ended any electronic document would be forever lost. (R.p.192, lines 7-24). Mr. Guth noted that certain software made it possible to retrieve “double-deleted” e-mails from a computer hard drive. (R.p.192, lines 1-22; R.p.197, lines 1-6). Clearly, had Sheriff Tanner's office needed to recover and/or re-create any e-mails which would have assisted in a criminal prosecution purpose, then Beaufort Court would have used such software without hesitation. (R.p.197, p.54, lines 1-6).

R.p.182, line 3; R.p.184, lines 10-24; R.pp.185-186; R.p.722, para. 15(c)).¹⁴ Mr. Trask made a follow-up request. (R.p.27, para. 49; R.p.49, para. 49; R.p.110, para. 3; R.p.147). Sheriff Tanner stated Beaufort County's legal counsel, Kelly Golden, Esquire, would respond. (R.p.27, para. 49; R.p.49, para. 49; R.p.110, para. 3; R.p.147). Attorney Golden advised Mr. Trask "some of the requested information [and/or documentation] did not exist in written form and could not be provided." (R.p.27, para. 50; R.p.110, para. 3; R.p.187). Even though Mr. Trask requested a written listing of the "records which could be produced", no listing was ever produced. (R.p.27, para. 51; R.p.110, para. 3; R.p.190).

Mr. Trask requested Sheriff Tanner to provide a copy of the investigating deputies' "audio and video recordings generated by the equipment from the accident scene . . . and policies concerning the retention and management of [such] equipment". (R.p.110; R.p.205, line 1 – R.p.207,

¹⁴ BCSO's Chief Deputy Michael Hatfield advised Captain Bromage of Mr. Trask's request for the BCSO to preserve all e-mail correspondence associated with the Trask Accident investigation, but Captain Bromage was never directed to actually preserve any of the information and/or documentation. (R.p.181, line 2 – R.p.182, line 3). Captain Bromage double deleted his e-mails from his county-owned computer even though some of the e-mails admittedly involved his investigations for the Coroner's Office – including specifically the investigation of Paul Trask's death. (R.p.176, line 2 – R.p.178, line 23; R.p.179, line 7 – R.p.182, line 20). Captain Bromage said no one in Beaufort County government told him to retain his e-mail correspondence. (R.p. 176, line 2 – R.p.178, line 23; R.p.181, line 18 – R.p.182, line 3). Nevertheless, Captain Bromage knew or should have known about Mr. Trask's request to Chief Deputy Hatfield. (R.pp.185-186). Moreover, Captain Bromage's superiors, both Chief Deputy Hatfield and Coroner Copeland, had Mr. Trask's written requests for document preservation, including e-mails. (R.p.143; R.pp.185-186). Captain Bromage never received any "guidance" from the Sheriff's Department since Chief Deputy Hatfield also double-deletes his e-mails. (R.p.203, line 16 – R.p.204, line 23). Beaufort County did not have any policy regarding a Beaufort County employee's use of his or her personal e-mail address and personal e-mail account for official county business. (R.p.196, p.43, lines 9-25).

line 10; R.p.722). Sheriff Tanner never responded. (R.p.110).¹⁵ Chief Deputy Hatfield indicated none of the responding BCSO deputies made either audio or video recordings of the Accident, but refused to answer Mr. Trask's other questions regarding destruction of public records, recordings of radio traffic, *etc.* (R.p.207, line 11 – R.p.212, line 16; R.pp.213-219).¹⁶

5. Beaufort County's Actions/Inactions

Mr. Trask requested Beaufort County's Communications Supervisor, Gwen Duhon ("Ms. Duhon"), to provide "copies of all of the Beaufort County E911 audio and computer records, reports, photo[graph]s[,] and investigation records pertaining to [the] accident". (R.p.29, para. 59; R.p.50, para. 59). Mr. Trask's request included all of the "records for all personnel who [had] responded from the [Beaufort County] Sheriff's Office, EMS, Fire Department, Coroner's Office[,] and [SCHP]". (R.p.29, para. 59; R.p.50, para. 59). Ms. Duhon advised Mr. Trask she needed to obtain permission from each individual responding agency in order to release the information. (R.p.29, para. 60; R.p.50, para. 60). Ms. Duhon produced three compact discs with the information/documentation (R.p.29, para. 60; R.p.50, para. 60), including computer voice time stamps for the Fire Department's audio calls. (R.p.29,

¹⁵ The BCSO did have a "computer usage policy." (R.pp.199-201). SOP 214 did not address e-mail retention or mandatory back-up procedures. (R.pp.199-201).

¹⁶ Sherriff Tanner never responded to Mr. Trask's request for a copy of the written authorization which permitted Captain Bromage to use his personal e-mail account for official county business, as well as the BCSO's written e-mail retention/destruction policy. (R.p.27, para. 52; R.p.110, para. 4; R.p.198, p.1).

para. 60).¹⁷ Mr. Trask requested Ms. Duhon to have computer voice time stamps included for the Sheriff's Office's and EMS' recordings (R.p.29, para. 62), Ms. Duhon could not do because of "the . . . [master recording] disc had been 'recycled'." (R.p.29, para. 62).

Mr. Trask requested Beaufort County to produce copies of the 911 system's intergovernmental agreements, as well as "the written operational procedures for the Beaufort County 911 system, the records inventory forms[,] and all other documents used to prepare records retention schedules for every type of record created by the operation and use of the Beaufort County 911 system. (R.p.30, para. 64; R.pp.110-111, p.4, para. 1; R.p.111, para. 2; R.p.151; R.p.220; R.p.319, para. 8; R.p.720, para. 13(d)). Although Attorney Golden submitted a very limited response (R.pp.110-111, para. 1; R.p.151), Beaufort County never produced the 911 system documents. (R.p.30, para. 64; R.pp.110-111, para. 1; R.p.111, para. 2; R.pp.221-223; R.p.720, para. 13(e)).¹⁸

¹⁷ Since the original three CDs did not contain all of the recordings either to or from Coroner Copeland, Mr. Trask again submitted a written request to Ms. Duhon asking Beaufort County to produce any such recordings. (R.pp.29-30, para. 63). Beaufort County failed to produce the records because, as Ms. Duhon advised, the "master tape" had been recycled after 60 days, the original audio records had been destroyed, there was no backup of the recordings, and she had failed to make a copy of the three CDs which she had originally provided to Mr. Trask. (R.pp.29-30, para. 63).

¹⁸ Mr. Trask made several other FOIA requests to Beaufort County (either original requests or follow-ups) (R.pp.111-112, paras. 2-6, 9-10; R.pp.221-223; R.p.225, lines 22-25; R.p.231, line 6 - R.p.232, line 23; R.p.233, line 2 - R.p.234, line 15; R.p.235, lines 14-23; R.p.240, line 11 - R.243, line 4; R.p.244, line 3 - R.246, line 23; R.p.247; R.p.252; R.p.319, paras. 7-8; R.p.720, para. 13(f)), seeking, among other things, the "911 printout of telephone and cell phone numbers [which] called the Beaufort County dispatch system [on the night of the Accident]", a "complete print-out of all Beaufort County computer aided dispatch . . . entries made [on the night of the Accident]", a copy of the "records including the operational manual and written operating procedures pertaining to the ComLog digital recording device

Beaufort County's handling of Mr. Trask's request for the 911 written operational procedures mirrored the Respondents' overall handling of Mr. Trask's FOIA requests. Mr. Trask had sent William Winn a request asking him to "[p]lease supply . . . a copy of the written operational procedures for the Beaufort County 911 system". (R.p.30, para. 64; R.pp.110-111, p.4, para. 1; R.p.111, p.5, para. 2; R.p.220; R.pp.221-223; R.p.301, para. 8; R.p.720, para. 13(d)). Attorney Golden submitted a very limited response. (R.pp.110-111, para. 1; R.p.687). Mr. Trask sent a second FOIA request. (R.pp.221-223). Attorney Golden then provided the "Table of Contents" which showed "Section P - Dispatch Operational Procedures" (Written operational procedures required under [S.C. Code Ann. §] 23-47-20(C)(9)) (R.p.687), but never produced the 911 system documents, including the individual referenced procedures. (R.p.30, para. 64; R.pp.110-111, para. 1; R.p.111, para. 2; R.pp.221-223; R.p.236, line 14 – R.238, line 7; R.p.687; R.p.720, para. 13(e)).**19**

in service at the Beaufort County 911 center", a copy of the "records including the operation manual and written operating procedures pertaining to the Beaufort County 800mhz radio system", and a copy of the "handbook entitled 'Freedom of Information Act Handbook for County Government' authored by [Attorney] Golden while she [was employed elsewhere]." (R.pp.111-112, paras. 2-6, 9-10; R.p.240, line 11 – R.243, line 4; R.p.244, line 3 – R.246, line 23). In response, Beaufort County either (a) failed to produce the documents, citing privacy or homeland security concerns, or (b) directed Mr. Trask elsewhere, or (c) asserted the information was unavailable, or (d) simply ignored the request. (R.pp.111-112, paras. 2-6, 9-10; R.pp.221-223; R.p.226, line 2 – R.p.228, line 25; R.p.229, line 9 – R.p.230, line 16; R.p.240, line 11 – R.243, line 4; R.p.244, line 3 – R.246, line 23; R.pp.248-249; R.pp.250-251; R.pp.719-721, paras. 12(c), 13(f), 14(a)-(c)).

19 Mr. Winn knew Mr. Trask requested a copy of the 911 procedures, but did not know if the documents were ever provided to Mr. Trask. (R.p.233, line 21 – R.p.234, line 10). Mr. Winn noted he had privacy concerns about turning over the documents. (R.p.235, lines 10-23). Nevertheless, about six months later, Mr. Winn submitted his affidavit affirming "[t]o the best of [his] knowledge, all responsive public records were or ha[d] now been produced for inspection and copying [to Mr. Trask] in accordance with [S.C. Code Ann. §§]

On **18 December 2008**,²⁰ the Respondents provided Mr. Trask a file folder consisting of documents responsive to several of Mr. Trask's prior FOIA requests (the "Gwen Duhon File").²¹ (R.p.719, para. 12(c); R.pp.761-767; R.pp.419-588). Furthermore, on **19 December 2008**,²² Beaufort County and Coroner Copeland finally produced the previously requested toxicology reports to Mr. Trask. (R.p.719, para. 12(d); R.p.1160).

IV. ARGUMENT AND CITATION OF AUTHORITY

This Court Of Appeals Improperly Affirmed The Respondents' Summary Judgment As Mr. Trask Presented Sufficient Evidence The Respondents Violated Both FOIA And The South Carolina Public Records Act

Early on November 22, 2005, Mr. Trask believed his son, Paul Trask, died in a single-car accident on the Sea Island Parkway. (R.pp.20-21, para. 11; R.p.93; R.pp.717-718, paras. 3, 8). Mr. Trask only "believes" this

30-4-10 *et seq.* (R.p.319, para. 6). Furthermore, Mr. Winn acknowledged the even though he had "received Mr. Trask's . . . FOIA request regarding the operational procedures for the 911 system . . . there [were] none to give him because there is no consolidated or written procedures for 911 because the 911 system is owned by a multitude of companies." (R.p.319, para. 8). Notwithstanding these "truths", when the Respondents finally parted with the Duhon File at the 11th hour it contained several different draft letters from Mr. Winn in response to Mr. Trask's initial FOIA request - none of which were sent. (R.pp.435-441; R.pp.447-452) Each draft letter references the requested 911 operating procedures which were never delivered, although the referenced production copying cost was noted to be approximately \$400.00. (R.p.435; R.p.438; R.p.439; R.p.447; R.p.450).

20 This was the day prior to the Trial Court's hearing on the Respondents' summary judgment motion. (R.p.5; R.p.1067). Prior to **18 December 2008**, both Marshall Waldron, Esquire (previously representing the Respondents herein) (R.p.258, paras. 1, 3) and Mr. Winn, Director of Beaufort County's Emergency Management Department ("BCEM") (R.p.318, para. 3) *affirmed* that Beaufort County had turned over all relevant documents to Mr. Trask and complied with FOIA. (R.p.259, paras. 5-6; R.pp.318-319, paras. 4-6).

21 The Respondents' production of the Gwen Duhon File, albeit belatedly, begs the question as to why the documentation was not produced to Mr. Trask pursuant to his FOIA.

22 This was the day of the Trial Court's summary judgment hearing. (R.p.1067).

because he really doesn't know. Not only does Mr. Trask not know if Paul Trask actually died that early November morning, but, even if he did, Mr. Trask does not really know the "how" or the "why". (R.pp.20-21, para. 11; R.p.93; R.pp.717-718, paras. 3, 8). Mr. Trask was entitled to have this knowledge as any parent would when having to bury a child. Mr. Trask was entitled to know if it was Paul Trask and, if so, how he died. (R.pp.20-21, para. 11; R.p.93; R.pp.717-718, paras. 3, 8). Tragically, the Respondents, heaping uncertainty, confusion, and deception upon Mr. Trask's unbearable grief, prevented Mr. Trask from having answers to these critically important questions.

**The Public Entities Failed To Comply With FOIA
Or The South Carolina Public Records Act**

Mr. Trask asserted various claims against the Respondents for their numerous FOIA violations. The evidence Mr. Trask presented to the Circuit Court far exceeded the "mere scintilla" requirement needed to defeat the Respondents' request for summary judgment. Material issues of fact clearly existed regarding the Respondents' FOIA violations. This Court of Appeals should have reversed the Circuit Court's decision in all respects and remanded this case for a trial on the merits.

(a) FOIA Requests to Which the Public Bodies Did Not Respond

Mr. Trask made numerous FOIA requests to one or more of the Respondents. Unfortunately, the Respondents, clearly contrary to FOIA's mandatory nature and directives, unilaterally chose **not to respond** to many of those requests in any manner whatsoever. For example:

- The 12/11/2006, FOIA request to Coroner Copeland for all official records, including e-mail records and the hard drive from Deputy Coroner Herman's personal and business computers along with all backup files. (R.p.25, para. 35; R.p.47, para. 35; R.p.108, para. 4; R.p.138, line 24 – R.p.142, line 6; R.p.146; R.p.719, para. 12(c));
- The 12/13/2006, and 1/7/2007, FOIA requests to Sheriff Tanner for Captain Bromage's e-mail records generated during the course of Captain Bromage's investigation on behalf of Coroner Copeland's office. (R.p.27, para. 49; R.p.49, para. 49; R.pp.109-110, para. 3; R.p.147; R.p.181, line 2 – R.p.182, line 3, R.p.184, lines 10-24; R.pp.185-186; R.p.722, para. 15(c));
- The 1/23/2006, FOIA request to Coroner Copeland requesting a copy of any statement concerning Coroner Copeland's conversation with Mr. Irby of Fripp Island Security. (R.p.108, para. 1; R.p.125; R.p.719, para. 13(a));
- The 2/2/2007, FOIA request to BCEM for a copy of the inter-governmental agreements required under S. C. Code Ann. § 23-47-20(A) pertaining to the use of the Beaufort County 911 system. (R.p.30, para. 64; R.pp.110-111, para. 1; R.p.111, para. 2; R.p.220; R.p.p.221-223; R.p.319, para. 8; R.p.720, para. 13(d));
- The 2/2/2007, and 2/25/2007, requests to BCEM for the written operational procedures for the Beaufort County 911 system required under S. C. Code Ann. § 23-47-20(C)(9) and copies of all inter-governmental agreements pertaining to the use of the Beaufort County 911 system. (R.p.30, para. 64; R.pp.110-111, para. 1; R.p.111, para. 2; R.p.220; R.p.p.221-223; R.p.319, para. 8; R.p.720, para. 13(d));
- The 2/3/2007, FOIA request to Sheriff Tanner for a copy of written e-mail policy for BCSO. (R.p.27, para. 52; R.p.110, para. 4; R.p.198);
- The 2/5/2007, and 2/25/2007, requests to BCEM and to Coroner Copeland for Coroner Copeland's complete radio log (Call Sign 601) for 11/22/2005. (R.pp.111-112, paras. 2-6, 9-10; R.pp.221-223; R.p.225, lines 22–25; R.p.231, line 6 – R.p.232, line 23; R.p.233, line 2 – R.p.234, line 15; R.p.235, lines 14–23; R.p.240, line 11 – R.243, line 4; R.p.244, line 3 – R.246, line 23; R.p.247; R.p.252; R.p.319, paras. 7-8; R.p.720, para. 13(f));
- The 2/5/2007, request to Coroner Copeland and Deputy Coroner Herman for toxicology reports and related documentation from Coroner Copeland's office for the time period of 6/1/2005, through 12/31/2005. (R.p.25, para. 36; R.pp.47-48, para. 36; R.p.108, para. 4; R.p.111, para. 3; R.p.138, line 24 – R.p.142, line 6; R.p.149; R.pp.719-720, paras. 12(c); 13(b));

- The 2/27/2006, request to the SCDPS for audio recordings of the radio transmissions of SSHP Troopers Perry and Harrison. (R.p.21, para. 16; R.p.45, para. 16; R.p.117; R.p.107, para. 4; R.p.119, lines 10-18; R.p.718, para. 12(a)); and
- The 5/16/2007, request to Attorney Golden for a copy of the handbook entitled "*Freedom of Information Act Handbook for County Government*" she authored in 1999, while a registered lobbyist for the South Carolina Association of Counties. (R.pp.111-112, paras. 2-6, 9-10; R.p.240, line 11 – R.243, line 4; R.p.244, line 3 – R.p.246, line 23).

Mr. Trask asked Coroner Copeland on 20 July 2006, for a list of all Beaufort County Deputy Coroners serving from 1 January 2000, forward, including certificate of appointments and the names of individuals who administered the statutorily required oaths of office.²³ (R.p.25, para. 34; R.p.108, para. 5; R.p.148; R.p.137, lines 8-15; R.p.720, para. 13(c)). Coroner Copeland never responded. (R.p.25, para. 34; R.p.108, para. 5; R.p.148; R.p.137, lines 8-15; R.p.720, para. 13(c)). Mr. Trask had to sue in order to obtain the requested records through discovery in this lawsuit. Coroner Copeland's failure to provide the records prior to Mr. Trask having to sue directly violated FOIA and precluded summary judgment.²⁴

The Respondents failed to uphold their statutorily mandated duty to produce the requested public documents upon Mr. Trask's proper FOIA requests. This Court of Appeals should have reversed summary judgment.

²³ S.C. Code Ann. § 17-5-70 (Thomson West 2007).

²⁴ S.C. Code Ann. § 30-4-30 required the Respondents to respond to Mr. Trask's FOIA requests and to provide the requested information or notify him within 15 days as to why they decided not to disclose the requested information. *See S.C. Code Ann.* § 30-4-30(b). Moreover, the Respondents' failure to respond to Mr. Trask's FOIA requests within the 15-day limit meant the disclosure of non-exempt materials had been approved as a matter of law. *See S.C. Code Ann.* § 30-4-30(c). *See also Litchfield Plantation Co., Inc. v. Georgetown County Water & Sewer Dist.*, 314 S.C. 30, 443 S.E.2d 574.

(b) **Public Records The Public Bodies Either Improperly Destroyed And/Or Wrongfully Withheld As Exempt**

In addition to the referenced instances where the Respondents ignored their statutory responsibilities under FOIA by failing to respond whatsoever to Mr. Trask's FOIA requests, there were numerous other instances where the Respondents violated FOIA by either (1) wrongfully claiming records were exempt from disclosure or (2) by destroying public records and failing to preserve records subject to public disclosure.²⁵

FOIA is to be interpreted as being broadly pro-disclosure and any exemptions are narrowly construed.²⁶ A public body has the burden of demonstrating that the claimed FOIA exception applies.²⁷ Here, the

²⁵ For example, on 2/2/2007, Mr. Trask submitted FOIA requests to BCEM for copies of the 911 computer printout of telephone and cell phone numbers which called the Beaufort County dispatch system from 12:00 am to 6:00 am on 11/22/2005, and the complete print-out report of all Beaufort County computer aided dispatch (CAD) entries made during that same time period. (R.p.30, para. 64; R.pp.110-111, para. 1; R.pp.111-112, paras. 2-6, 9-10; R.p.220; R.pp.221-223; R.p.319, para. 8; R.p.720, para. 13(d)). While Attorney Golden submitted a very limited response on 23 February 2007 (R.pp.110-111, para. 1; R.p.687), she ultimately stated the requested records could not be provided due to privacy concerns. (R.pp.111-112, paras. 2-6, 9-10; R.pp.221-223; R.p.226, line 2 - R.p.228, line 25; R.p.229, line 9 - R.p.230, line 16; R.p.240, line 11 - R.p.243, line 4; R.244, line 3 - R.p.246, line 23; R.pp.248-249; R.pp.250-251; R.pp.719-721, paras. 12(c), 13(f), 14(a)-(c)).

Then on 5/20/2007, Mr. Trask requested BCEM to provide records including the operation manual and written operating procedures pertaining to the Beaufort County 800mhz radio system and the ComLog digital recording device in service at the Beaufort County 911 center. (R.pp.111-112, paras. 2-6, 9-10; R.pp.221-223; R.p.225, lines 22-25; R.p.231, line 6 - R.p.232, line 23; R.p.233, line 2 - R.p.234, line 15; R.p.235, lines 14-23; R.p.240, line 11 - R.p.243, line 4; R.p.244, line 3 - R.p.246, line 23; R.p.247; R.p.252; R.p.319, paras. 7-8; R.p.720, para. 13(f)). Beaufort County advised Mr. Trask the requested records were exempt from inspection/copying pursuant to state and federal law and nothing was produced. (R.pp.111-112, paras. 2-6, 9-10; R.pp.221-223; R.p.226, line 2 - R.p.228, line 25; R.p.229, line 9 - R.p.230, line 16; R.p.240, line 11 - R.p.243, line 4; R.244, line 3 - R.p.246, line 23; R.pp.248-249; R.pp.250-251; R.pp.719-721, paras. 12(c), 13(f), 14(a)-(c)).

²⁶ See S. C. Tax Com'n v. Gaston Copper Recycling Corp., 316 S.C. 163, 166, 447 S.E.2d 843, 844.

²⁷ Post Publishing Co. v. City of N. Chas., 363 S.C. 452, 457, 611 S.E.2d 496, 499.

Respondents failed to provide any evidence concerning the legitimacy of the various alleged FOIA exemptions they asserted to thwart Mr. Trask's legitimate FOIA requests. At a minimum, there were significant questions of fact regarding whether the Respondents would be able to satisfy the heavy burden of demonstrating that any of the statutory FOIA exemptions actually applied to justify their withholding relevant public documents from Mr. Trask. Summary judgment was inappropriate and should never have been granted.

In response to Mr. Trask's FOIA requests for records such as (a) handwritten investigative notes and reports, (b) field notes taken at the accident scene, (c) e-mails, (d) computer data and backup files, (e) hard drives containing electronically stored records, (f) video recordings, and (g) assorted other forms of electronic media, the Respondents simply did not respond or notified Mr. Trask such documentary and/or electronic records could not be produced because they had been deleted and/or otherwise destroyed with no possibility of regeneration or restoration. (R.pp.107-113; R.pp.293-298; R.pp.717-732).**28**

Under FOIA and the Public Records Act, the legal custodian of public records for every public body is held responsible for protecting and restoring

28 On 24 March 2007, 6 April 2007, and 16 April 2007, Mr. Trask made FOIA requests to Chief Deputy Hatfield for copies of all audio and video recordings generated by Deputies Eckard, Garst, or Arbello's equipment at the Accident scene, as well as policies concerning the retention and management of this audio/video equipment. (R.p.110, para. 5; R.p.205, line 1 - R.p.207, line 10; R.p.722, para. 15(d)). No video recordings were produced and Chief Hatfield stated there was no policy for preservation of video recordings on 22 November 2005. (R.p.207, line 11 - R.212, line 16; R.pp.213-219). Moreover, the BCSO, Attorney Golden, and Frank Guth all advised Mr. Trask any e-mails and/or other forms of electronic media pertaining to and/or related to the Accident had previously been deleted and, in particular, the deleted e-mail records could not be regenerated and/or restored. (R.pp.107-113; R.pp.717-732).

records against loss, destruction, deletion, etc.²⁹ Clearly, the public body responsible for maintaining public records (i.e.; the Respondents) should and must be held accountable for the destruction of electronic records, such as e-mails and other forms of electronically-stored media, which are expressly covered by either the FOIA, the Public Records Act, or their implementing administrative regulations. The Respondents' practice of deleting public records at an arbitrarily-established time period or their failure to adopt record retention schedules for such records clearly deprived Mr. Trask and the public of access to information about public officials' activities in violation of FOIA.

Where a public body has intentionally destroyed beyond recognition or restoration e-mails and other electronic and/or documentary public records which are subject to disclosure, Mr. Trask, as the requestor, is entitled to compensation pursuant to FOIA. Here, Mr. Trask specifically requested each Respondent public body to restore the electronic records which the respective entity had either "lost" or unlawfully deleted. Given the technology then-existing, the e-mail data should still have existed on the relevant computer hard-drives and the Respondents should have taken steps to have the computed hard-drives examined and the records repaired in accordance with FOIA and the Public Records Act.

Numerous disputed issues of material fact existed as to whether the Respondents complied with (a) FOIA's and the Public Records Act's statutory requirements to retain, protect, and maintain such documentary and/or

²⁹ See e.g., S.C. Code Ann. § 30-1-70.

electronic information, as well as, (b) FOIA's statutory requirements to restore and/or produce such information when a legitimate FOIA request has been made such as those made by Mr. Trask.

This Court of Appeals' reliance on Sloan v. Friends of Hunley, Inc.,³⁰ is particularly misplaced as it completely misses the point of FOIA and effectively rewards the Respondents' illegal behavior. In Sloan v. Friends of Hunley, Inc., our Supreme Court found the alleged FOIA violations were moot because the documents had been provided.³¹ The Respondents herein intentionally destroyed public documents and information, whether in paper or electronic format, with no ability to recover or regenerate that documentation/information. Thereafter, having done so, the Respondents asserted they have given Mr. Trask all of the documents/information the Respondents had in their possession. While that statement may be "true" to a certain extent, the very reason the Respondents cannot produce any more documents or electronic information was that they destroyed the documents.³²

³⁰ Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474 (2006).

³¹ Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 26, 630 S.E.2d 474, 477-478. In that case, 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.

³² A public body cannot, on the one hand, intentionally (or otherwise) destroy FOIA documents and information and then, on the other hand, use the non-existence of the documents/information as a complete defense to producing the very same documents and information or of suffering the monetary or other consequences under either FOIA or the Public Records Act for not maintaining the documents and/or information. This proposition neither complies with either the letter or the spirit of FOIA. As already noted, 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 Public Records Act is the means to compel a public body to retain its public records.

A public body cannot, on the one hand, intentionally (or otherwise) destroy FOIA documents and information and then, on the other hand, use the non-existence of the documents/information as a complete defense to producing the very same documents and information or of suffering the monetary or other consequences under either FOIA or the Public Records Act for not maintaining the documents and/or information. This proposition neither complies with either the letter or the spirit of FOIA or the Public Records Act.

The Respondents retained a myriad of documents and/or electronic information associated with the Accident. Mr. Trask vociferously sought to have the Respondents preserve that documentary and electronic information. He clearly placed the Respondents on preservation notice early on after the Accident. Unfortunately, even in the face of the statutory mandates of FOIA and the Public Records Act, many of Mr. Trask's requests were ignored or given short shrift. Consequently, much of the relevant documentary and electronic information was intentionally destroyed and lost forever.³³

(c) **The Respondents' Waived and/or Are Estopped to Assert the Statute of Limitations**

The Respondents either waived and/or were estopped from claiming any application of the statute of limitations as a defense to Mr. Trask's claims. Any delay by Mr. Trask in bringing this action and asserting his claims against the Respondents was clearly induced by the Respondents' conduct.³⁴ The

³³ The issues in this case cannot, by their very nature, be moot as they are clearly capable of repetition, while evading review. Moreover they are of important public interest as they seek to uphold the purposes of FOIA and the S. C. Public Records Act.

³⁴ Wiggins v. Edwards, 314 S.C. 126, 130, 442 S.E.2d 169, 171 (1994).

Respondents repeatedly assured Mr. Trask they would produce any and all available documents responsive to his various FOIA requests. These “assertions”, of course, proved hollow since the Respondents’ individual and collective actions demonstrated otherwise.

Moreover, it is reasonable to assert the Respondents made these assurances/representations to Mr. Trask about their forthcoming document production solely to “lull” Mr. Trask into a false sense of security so that the one-year time period would run prior to him asserting his claims in court.³⁵ To have done so certainly inured to the Respondents’ substantial benefit.

This Court Of Appeals Improperly Dismissed Mr. Trask’s Appeal Against The SCDPS Respondent As His Notice Of Appeal Was Timely Filed Under The Circumstances Herein

This Court of Appeals dismissed Mr. Trask’s appeal against the SCDPS on the basis it was not timely served with a copy of the Notice of Appeal filed in this case. (R.p.1209, para. 7; R.p.1471, para. 17). Howell, Gibson & Hughes originally represented the SCDPS.³⁶ While Davidson & Lindemann³⁷ was not sent a copy of the NOA (R.p.1210, para. 10; R.p.1469, para. 9), a copy was served on Howell, Gibson & Hughes.³⁸ (R.p.1210, para. 9; R.p.1471, paras.

³⁵ See, e.g., Hopkins v. Floyd's Wholesale, 299 S.C. 127, 129, 382 S.E.2d 907, 908 (1989) (statute of limitations is tolled during a reliance period); Hooper v. Ebenezer Sr. Services and Rehab. Ctr., 386 S.C. 108, 117, 687 S.E.2d 29, 33 (2009).

³⁶ On 21 January 2009, the Circuit Court substituted Davidson & Lindemann for Howell, Gibson & Hughes. (R.p.1210, para. 8; R.p.1469, para. 10).

³⁷ The legal counsel for the SCDPS Respondent are William H. Davidson, II, Esquire and Andrew F. Lindemann, Esquire of Davidson & Lindemann (“Davidson & Lindemann”).

³⁸ This substitution was made some 30 days after the parties had argued their positions on the Respondents' Motion for Summary Judgment herein. (R.p.1470, para. 11).

16-17). Given the confusion associated with what law firm represented the SCDPS, service of the NOA was reasonable and appropriate under the circumstances. (R.pp.1211-1234, paras. 12-80; R.p.1472, paras. 20-21).**39**

The confusion as to SCDPS' legal counsel is shown through the correspondence between the parties and/or the Circuit Court (R.pp.1211-1220, paras. 12-19, 21-29, 32-36; R.pp.1223-1225, paras. 43-50; R.pp.1230-1232, paras. 65-68, 71; R.pp.1472, paras. 20-21), as well as, through the parties'/Circuit Court's many documentary filings. (R.pp.1211-1220, paras. 12-19, 21-29, 32-36; R.pp.1223-1225, paras. 43-50; R.pp.1230-1232, paras. 65-68, 71; R.pp.1472, paras. 20-21). These documents reasonably indicated Howell, Gibson & Hughes still represented all of the Respondents, including the SCDPS. (R.pp.1211-1220, paras. 12-19, 21-36; R.pp.1223-1225, paras. 43-50; R.pp.1230-1232, paras. 65-68, 71; R.pp.1472, paras. 20-21).**40**

Furthermore, the Substitution Order was issued some 70 days after the parties had argued their respective positions to the Circuit Court on their cross motions for summary judgment filed in a related civil case. See Trask v. Beaufort County. (R.p.1470, para. 12).

39 Nexsen Pruet represents Mr. Trask and his family herein and in Trask v. Beaufort County. (R.pp.1470-1471, para. 13). Davidson & Lindemann represents Coroner Copeland and the Copeland Funeral Home in Trask v. Beaufort County. (R.pp.1221-1222, paras. 39-40; R.p.1228, paras. 58-59; R.p.1234, paras. 77-78; R.p.1471, para. 14). The County Respondents are represented by other counsel. (R.p.1227, paras. 56-57; R.p.1233, paras. 75-76; R.p.1471, para. 15).

40 In every proceeding in which Thomas S. Tisdale, Jr., Esquire attended and for which an attorney from Davidson & Lindemann appeared, Mr. Tisdale was under the impression and believed Davidson & Lindemann were in attendance in that law firm's capacity as legal counsel only for Coroner Copeland and the Copeland Funeral Home in Trask v. Beaufort County. (R.p.1472, para. 18).

Following the service of pleadings in both the Circuit Court⁴¹ and this Court of Appeals,⁴² no one ever advised Mr. Trask either that Howell, Gibson & Hughes did not represent the SCDPS or that Davidson & Lindemann represented the SCDPS. (R.p.1222, paras. 41-42; R.pp.1228-1229, paras. 60-61; R.p.1234, paras. 79-80; R.p.1472, paras. 20-21).

Mr. Trask reasonably believed Howell, Gibson & Hughes still represented all of Respondents herein, including the SCDPS. (R.p.1240, para. 96; R.p.1472, paras. 20-21). Mr. Trask reasonably served Howell, Gibson &

41 This is especially true given the fact the correspondence and/or pleadings from Howell, Gibson & Hughes all occurred after 21 January 2009 -- the date when Davidson & Lindemann was substituted for Howell, Gibson & Hughes. (R.pp.1212-1213, paras. 15, 19; R.pp.1215-1216, paras. 23, 26; R.pp.1218-1219, paras. 32, 36; R.pp.1224-1225, paras. 46, 50; R.p.1232, para. 71; R.p.1472, paras. 20-21). This is similarly true for the Circuit Court's electronic correspondence to the parties. (R.p.1230, paras. 65-66; R.p.1472, paras. 20-21). Howell, Gibson & Hughes' indication of its implied and/or direct representation of the SCDPS comes from Howell, Gibson & Hughes' failure to show copies of pleadings and/or correspondence being sent to Davidson & Lindemann via Davidson & Lindemann's inclusion as a "CC" or "CCE" on letters (R.pp.1211-1217, paras. 12-14, 16-17, 21-22, 24-25, 27-28; R.p.1219, paras. 33-35; R.p.1223-1225, paras. 43-45, 47-49; R.pp.1230-1231, paras. 67-68; R.p.1472, paras. 20-21) or as a designated counsel on various Certificates of Service. (R.p.1213, para. 18; R.p.1218, paras. 30-31; R.pp.1231-1232, paras. 69-70; R.p.1472, paras. 20-21). Furthermore, there were some occasions where Howell, Gibson & Hughes actively stated it represented all of the Defendants below. (R.p.1217-1218, paras. 29, 31; R.p.1223, para. 43; R.p.1232, para. 70; R.p.1472, paras. 20-21). There was a significant level of confusion and/or apparent inadvertent misinformation by both the Circuit Court and Howell, Gibson & Hughes as to the correct identity of the SCDPS' legal counsel. (R.pp.1212-1213, paras. 15, 19; R.pp.1215-1216, paras. 23, 26; R.pp.1218-1219, paras. 32, 36; R.pp.1224-1225, paras. 46, 50; R.p.1232, para. 71; R.p.1472, paras. 20-21). Both the Circuit Court and Howell, Gibson & Hughes, albeit wrongly, consistently identified Howell, Gibson & Hughes as counsel for all of the Defendants below. (R.pp.1211-1235, paras. 12-81; R.p.1272, paras. 20-21).

42 Mr. Trask filed and served his NOA on 13 November 2009. (R.pp.1236-1237, paras. 83-85; R.p.1469, para. 9; R.p.1471, paras. 16-17). The Proof of Service for the NOA as well as the "Other Counsel Of Record" section states Howell, Gibson & Hughes was legal counsel for all of the Respondents, including the SCDPS, and service of the NOA was being made upon Howell, Gibson & Hughes in that capacity. (R.p.1210, paras. 9-10; R.p.1471, paras. 16-17). Furthermore, Mr. Trask has filed several motions and documents with this Court of Appeals and service of those motions and documents all have been made upon Howell, Gibson & Hughes as counsel for all of the Respondents, including the SCDPS. (R.pp.1237-1238, paras. 87-90; R.p.1472, paras. 20-21).

Hughes with the NOA as counsel for *all of the Respondents* herein, including the SCDPS. (R.p.1240, para. 97; R.p.1472, paras. 20-21). Furthermore, service of the NOA on Howell, Gibson & Hughes as counsel for all of the Respondents herein, including the SCDPS, constituted correct and proper service.⁴³

This confusion lead to service of the Notice of Appeal upon Howell, Gibson & Hughes as counsel for all of the Respondents herein, including the SCDPS. (R.pp.1210-1235, paras. 8-81; R.p.1240, paras. 96-97; R.p.1472, paras. 18-21). Howell, Gibson & Hughes made consistent post-21 January 2009, representations, either impliedly or directly, that they represented all of the Defendants – including the SCDPS (R.p.1211-1220, paras. 13-19, 21-36; R.pp.1223-1225, paras. 43-50; R.pp.1230-1232, paras. 67-71; R.p.1472, paras. 20-21). Under the circumstances, service of the NOA on Howell, Gibson & Hughes was proper service sufficient to bring the SCDPS into this appeal as a party-Respondent. (R.p.1240, paras. 96-97; R.pp.1472-1473, paras. 18-22). This is further bolstered by the Circuit Court's own actions effectively "confirming" Howell, Gibson & Hughes represented the SCDPS. (R.p.1230, paras. 65-66; R.p.1472, paras. 20-21).

⁴³ Service of the NOA on Howell, Gibson & Hughes as counsel for SCDPS, constituted proper service (either actual or constructive) of the NOA upon all of the Respondents herein and complied with Rule 203(b)(1), SCACR. See generally O'Connell, Goyak & Ball v. Silbernagel, 297 Or. 207, 681 P.2d 1159 (1984). The Oregon Supreme Court, approving the Oregon Court of Appeals' dismissal of an appeal, did so in part because the "Petitioners ma[d]e no allegation that they were confused about who was representing [one or more parties to the appeal]." O'Connell, Goyak & Ball v. Silbernagel, 297 Or. 207, 212, 681 P.2d 1159, 1162. The Oregon court implied if there had been confusion as to the identity of the proper legal counsel the outcome likely would have been different. O'Connell, Goyak & Ball v. Silbernagel, 297 Or. 207, 212, 681 P.2d 1159, 1162,

V. 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 this Court of Appeals to grant an en banc hearing or, in the alternative, a panel rehearing reverse its per curiam decision in all respects and remand this matter back to the Circuit Court for a jury trial on the merits.

Respectfully submitted:

NEXSEN PRUET, LLC

By: _____

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Charleston, South Carolina
27 November 2012

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

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

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.

PROOF OF SERVICE
for the
PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

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SC Court of Appeals

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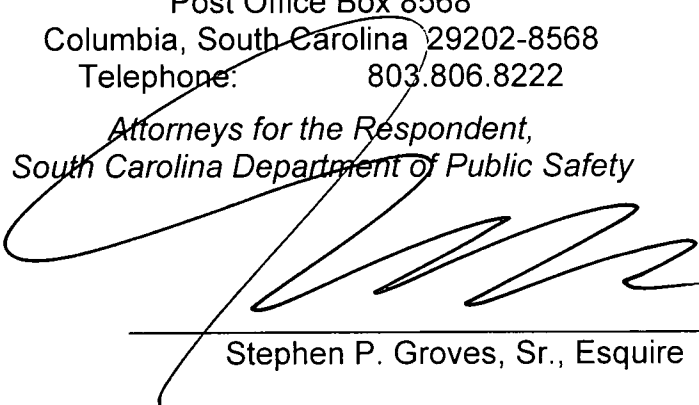
I, Stephen P. Groves, Sr., Esquire, hereby certify that on 28 November 2012, I served a copy of the **Petition for Rehearing**, submitted by the Petitioner, L. Paul Trask, Jr., Individually, as a Citizen, Resident, Taxpayer, and Registered Elector of the State of South Carolina, and on behalf of others similarly situated, on the respective counsel for the Respondents via United States Mail, postage pre-paid, and addressed as follows:

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28 November 2012

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