THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2017-002429

Desa Ballard ..... Appellant/Respondent,

v.

Newberry County ..... Respondent/Appellant,

INITIAL BRIEF OF APPELLANT/RESPONDENT

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STATEMENT OF THE CASE

Appellant/Respondent Desa Ballard (hereafter "Ballard"), a licensed South Carolina attorney, made a request to Newberry County (hereafter "the County") for numerous documents in accordance with the Freedom of Information Act, S.C. Code Ann. Section 30-4-10 *et. seq.* (hereafter "FOIA"). At the heart of the FOIA requests were emails and texts from the County Administrator with the pre-March 2014 period of time the most relevant to Ballard, a fact she made known to the County. (Second Amended Order, p. 3, ¶10).

The County produced some documents in response to the request but claimed it did not have or had not maintained a number of the documents Ballard requested. Specifically, the County informed Ballard that the County Administrator's computer had crashed in March 2014 and those emails had not been archived. (Id., ¶9). As Attorney Ballard testified, "The actual emails that were produced for Mr. Adams were obviously on his newer computer after the crash, March 2014 forward, and they were half-an-inch thick," (T. p. 40, lines 11-19). Although Mr. Adams testified that he may have conducted county business via text message, none were provided in response to Ballard's FOIA request. (Second Amended Order, p. 4, ¶12).

As of the trial date, the County had no system in place for backing up or archiving county emails, no connected email servers, no cloud storage, and no end user back-ups. (Id., p. 4, ¶13; T, p. 160, line 16 – p. 161, line 25; p. 163, lines 10-21). The County admits it has no policies concerning the preservation of emails or archiving of emails. (Id., p. 3, ¶8). The County has no written policy concerning the purging of electronic data. (T. p. 161, lines 8-16). The County's former Information Technology Director

sought and was granted funds for emails archiving prior to the 2014 crash of the County Administrator's computer. (T. p. 99, line 25 – p. 101, line 3; p. 116, line 11 – p. 117, line 12; p. 175, lines 16-19; Trial Exhibits 7-9). However, while approved for the 2013-2014 budget year, the system was never implemented. (T. p. 177, line 21 – p. 178, line 17; p. 179, line 22 – p. 181, line 16).

Ballard filed this action seeking declaratory and equitable relief under FOIA for the production of the public records; she also alleged a violation by the County of the South Carolina Public Records Retention Act, S.C. Code Ann. Section 30-1-10 *et seq.* (hereafter the "PRA") in its handling of executive sessions during county council meetings. Pursuant to statute, she also requested an award of attorney fees necessarily incurred by her in pursuit of these actions. S.C. Code Ann. §30-4-100.

The Honorable Thomas Russo heard the matter non-jury and issued an order finding the County had violated FOIA and ordered equitable relief for the County's failure to comply with FOIA. Judge Russo awarded attorney's fees to Ballard for that portion of her action which sought relief under FOIA but concluded that the PRA did not provide a private right of action, and therefore denied fees requested for that matter. Ballard made a motion for reconsideration on that issue, which was denied. (Motion for Reconsideration and to Amend Judgment; Order Denying Plaintiff's Motion for Reconsideration).

Included among the equitable relief ordered with respect to the County's FOIA violation, Judge Russo ordered that the County produce to Ballard a document which had been redacted prior to production and which had been admitted into evidence in its redacted form. After Judge Russo's order, the County moved that, even though it had

violated FOIA with reference to going into executive session, that the redacted material was exempt from disclosure pursuant to the attorney-client privilege. Ballard asserted that the attorney-client privilege issue had not been raised at trial and opposed the motion. Judge Russo ruled that attorney-client privilege had been raised at trial, and after an in-camera review of the document provided by the County, Judge Russo agreed that the redacted materials were, in fact, exempt from disclosure by attorney-client privilege.

Judge Russo issued an amended order in connection with his finding that the document was protected by the attorney-client privilege. (Amended Order) In doing so, he inadvertently omitted language that had been contained in the original order. Upon motion by Ballard, Judge Russo corrected his omission, and the Second Amended Order dated November 17, 2017 became the final order in the case. (Second Amended Order). Both parties appealed.

ISSUE ONE

THE LOWER COURT ERRED IN DETERMINING THAT APPELLANT BALLARD LACKED STANDING TO SEEK DECLARATORY RELIEF FOR A VIOLATION OF THE PUBLIC RECORDS ACT.

A key issue on appeal is whether a public body can fail to preserve public records as required by the PRA and still comply with the spirit and letter of FOIA. Here, if the lower court decision stands, a public body can affirmatively or passively fail to preserve records as a means of avoiding FOIA. Put another way, without the roots of the PRA, FOIA – a protection at the center of our democracy – may wither on the vine.

Indeed, FOIA governs the public disclosure of a public body's activities. Lambries v. Saluda Cnty. Council, 409 S.C. 1, 760 S.E.2d 785 (2014). "The essential purpose of FOIA is to protect the public from secret government activity." Id., 760 S.E.2d at 789. "The FOIA serves the important governmental interests of providing transparency in governmental decision-making, preventing fraud and corruption, and fostering trust in government." Disabato v. S.C. Ass'n of Sch. Adm'rs, 404 S.C. 433, 450, 746 S.E.2d 329, 338 (2013). If public bodies are allowed to say "don't have them, can't give them" as to public records, then the essential purpose of FOIA is thwarted.

In its Second Amended Order, the lower court states: "Plaintiff seeks a declaratory judgment that Defendant violated FOIA and the Public Records Act by: (1) failing to preserve documents as required by state law, failure to provide those documents as required by FOIA, and failing to provide other documents subject to FOIA in a timely manner; and (2) failing to properly announce the 'specific purpose' of executive meetings as required by law." (Second Amended Order, p. 1). While finding Ballard was entitled to relief under FOIA, the lower court erred in finding Ballard lacked standing under the PRA.

In this regard, the lower court erred in three ways. First, the relief sought by Ballard was pursuant to FOIA. Second, whether it relates to the failure to produce documents or failing to announce the "specific purpose" of executive meetings, a public body's compliance with the PRA is a necessary predicate to any statutory right of the public under FOIA and comports with at least two of this State's standing doctrines – statutory standing and the "public importance" exception. Third, standing was not before the lower court. As such, this Court should hold that the lower court erred in finding Ballard did not have standing to pursue claims under the PRA.

A. BALLARD SOUGHT RELIEF UNDER *FOIA*

As evidenced by the pleadings, Plaintiff sought relief *under FOIA* – not the PRA - for the County's failure to provide emails and texts (Complaint, pp. 1-5, ¶18, 20-22). As to the County's failure to properly announce the "specific purpose" of executive session, while citing the County's failure to comply with the PRA, the relief sought is similarly under FOIA. (Id., pp. 6-7, ¶31-32). FOIA sets out the right and procedure for seeking public records and specifically addresses what must be done by public bodies before going into executive session. S.C. Code Ann. §30-4-70; 30-4-100. FOIA confers upon citizens the right to injunctive relief, costs and attorney's fees for violations. Id.

B. BALLARD HAS STATUTORY STANDING UNDER FOIA

Even if this Court concludes the relief sought was not under FOIA, Ballard has statutory standing for the County's failure to comply with the PRA under FOIA. In ATC South, Inc. v. Charleston County, the South Carolina Supreme Court explained that standing can arise in a number of ways: (1) by statute; (2) through the rubric of

constitutional standing; or (3) under the "public importance" exception. Id., 380 S.C. 191, 669 S.E.2d 337 (2008).

It is undisputed that the County is a public body subject to both FOIA and the PRA. (Second Amended Order, p.2, ¶2).

During the course of the litigation, it became evident that the root cause of the County's inability to produce public records was the County's failure to preserve public records. As the lower court found, "[the County] concedes that as it relates to electronic data, it had no archiving policy, no document retention policy, and no FOIA compliance policy in place prior to receipt of the FOIA request." (Id., p. 3, ¶8). Further, "as of the date of trial, [the County] had no system in place for backing up or archiving county emails, no connected email servers, no cloud storage, and no end user back-ups." (Id. p. 4, ¶13). Although the County, including the County Administrator, conducts public business using text messages, "[the County] does not archive or save text messages in any way." (Id. p. 4, ¶12).

Here, Ballard specifically sought the County's Administrator's emails and text messages related to the magistrate's court. As the lower court concluded, "[Ballard] testified that the pre-March 2014 time period was the most relevant in terms of her FOIA request, and it appears from the various exhibits and her testimony that she made this fact known to [the County]." (Id. p. 3, ¶10). However, in answer to her FOIA requests, the County responded that the county administrator's computer had crashed in March 2014 and none of those emails had been archived. (Id. p. 3, ¶9). At trial, the County's Administrator – whose emails were sought - was questioned extensively about his knowledge of the PRA because he is the one charged with carrying out its document

retention responsibilities. S.C. Code Ann. §30-1-20, 30-1-70, 4-9-610 *et. seq.*; T. p. 123, lines 7-15).

During trial, the County's former Information Technology Director testified he sought and was granted funds from the County's Council for email archiving prior to the 2014 crash of the County administrator's computer. However, while the funds were approved for the 2013-2014 budget year, the system was never implemented. (T. p. 99, line 25 – p. 101, line 3; p. 116, line 11 – p. 117, line 12; p. 175, lines 16-19; p. 177, line 21 – p. 181, line 16).

Thus, in order to understand the County's failure under FOIA, it is important to understand what public records are *required* to be maintained. In order to know what the County *should have produced*, it was necessary to know what it *should have retained.* Id. As such, statutory standing is created by way of the FOIA statute which explicitly grants a private right of action. S.C. Code Ann. §30-4-100; Freemantle v. Preston, 398 S.C. 186, 728 S.E.2d 40 (2012).

FOIA presumes that there are public records for the public to inspect. Title 30 presumes the right to enforce record retention laws *under FOIA* because the right to access cannot exist without the definitional and retention mandates of the PRA.

The legislature's intent to tie record retention mandates to FOIA's enforcement right is evidenced by the interdependent language contained in the two chapters. For example, FOIA guarantees access to "public records" which it defines. When the PRA defines a public record, it does so by adopting the definition in FOIA. *See* S.C. Code Ann. 30-1-10(A)("For the purposes of Sections 30-1-10 to 30-1-140 'public record' has the meaning as provided in Section 30-4-20(c))." In short, these Chapters must be read

together to accomplish a shared purpose: public access to public records. This reading is in harmony with the General Assembly's unambiguous intent that public records be made accessible:

> The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the person seeking access to public documents or meetings.

S.C. Code Ann. §30-4-15.

For FOIA to have significance, in order for citizens to be able "to learn and report fully the activities of their public officials," governmental bodies must *retain* public records. As the County readily admitted at trial, "I suppose you have to have the record to provide it." (T. p. 150, lines 15-21). The lower court provides the case in point:

> The Court finds that Plaintiff is entitled to a declaratory judgment that Defendant has violated the act and is entitled to relief. See S.C. Code Ann. §30-4-100(a). While Plaintiff in her Complaint requested Defendant employ, at its expense, any necessary technology consultants to retrieve the records at issue, it appears from the evidence that such records were inadvertently destroyed. ***As such, this relief does not appear to be available.***

(Second Amended Order, p. 4, ¶14)(emphasis added, footnote omitted). The lower court's holding, if left in place, creates an unintended incentive for government entities to fail to retain or purge records as a means to avoid disclosure under FOIA while the beneficiaries of retention – South Carolina citizens – are left with no recourse to challenge that decision. Surely, this Court does not intend such a result and should hold accordingly.

This conclusion also comports with the rules of statutory construction by harmonizing the statutory scheme consistent with legislative intent while avoiding an absurd result. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). When the statute's language is plain and unambiguous, no construction is needed, but when the statute is silent or unclear, the rules of construction are tools to discern and give effect to legislative intent. *See* Id. "The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Jones v. State Farm Mut. Auto Ins. Co., 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct. App. 2005).

In Brock v. Town of Mt. Pleasant, 411 S.C. 106, 767 S.E.2d 203 (Ct. App. 2015)(aff'd as modified), 415 S.C. 625, 785 S.E.2d 198 (2016), this Court entertained review of private causes of action under *both* FOIA and the PRA. This Court determined the trial court did not abuse its discretion in refusing to issue an injunction under the PRA for the Town's past destruction of emails. In that case, unlike here, the Town had later adopted a computer policy. As this Court stated, "The trial court did not issue a judgment with regard to Town Council's past actions of deleting emails, properly finding the law in this area is ever developing and the Town [unlike the present case] has since adopted the Computer Policy." Id., 411 S.C. 106, 767 S.E.2d at 212.

This is consistent with case precedent in recognizing the symbiotic relationship between FOIA and the PRA. In Glassmeyer v. City of Columbia, this Court held, "the FOIA is remedial in nature and shall be liberally construed to carry out the purpose mandated by the General Assembly." Id., 414 S.C. 213, 777 S.E.2d 835, 839 (Ct. App. 2015). As our case law has held, "statutes dealing with the same subject matter are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result. Because we must presume that the General Assembly is familiar with existing legislation, statutes dealing with the same subject must be reconciled, if possible, so as to render both operative." Amisub of S.C., Inc. v. S.C. Dept. of Health & Envtl. Control, 407 S.C. 583, 757 S.E.2d 408, 416 (2014)(internal citations omitted).

Therefore, this Court should find that Ballard has standing by way of FOIA to enforce the public records retention requirements as it relates to FOIA. FOIA presumes the existence of records for the public to inspect, a conclusion bolstered by both construction and the legislature's unambiguous intent.

C. BALLARD HAS STANDING UNDER THE PUBLIC IMPORTANCE EXCEPTION

Even if this Court finds Ballard does not have standing to enforce the public records retention requirements as part and parcel of FOIA, Ballard has standing to enforce record retention mandates pursuant to South Carolina's "public importance" exception. The South Carolina Supreme Court has "long recognized the public importance exception to the general standing requirements." ATC, 380 S.C. at 198, 669 S.E.2d at 341. "Standing is not inflexible and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." Id. (internal citations omitted). As Justice Kittredge explained:

> An appropriate balance between the competing policy concerns underlying the issue of standing must be realized. Citizens must be afforded access to the judicial process to address alleged injustices. On the other hand, standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits. The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of "future guidance" that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance. Yet the very nature of the public importance exception to general standing requirements resists a formulaic approach, as each case must turn on "the competing policy concerns" as we expressed in *Sloan v. Sanford.*

Id.

Here, the public importance and need for future guidance are paramount. The County failed to retain not "its" records, but the public's records. It is undisputed that as it relates to electronic data, the County had no archiving policy, no document retention policy, and no FOIA compliance policy. Cost is not an excuse. The County should have implemented its own approved budget item for e-mail backup to accomplish compliance with the PRA (and FOIA). This would have prevented the admitted loss of e-mails from the County Administrator's computer – who ironically was the very person charged with preserving documents under the PRA here. This is especially important since the County's former IT employee acknowledged computer crashes aren't unusual. (T. p. 75, line 21 - p. 76, line 4). Importantly, since this litigation, the County has still not changed its procedure regarding archiving of emails or text messages. (Ballard's Trial Exhibit 27; Second Amended Order, p. 4, ¶13). In other words, even after this matter drew its attention, the County continues to thwart the ability of citizens now and in the future to avail themselves of the protections afforded by FOIA. Beyond the County, other public

bodies are no doubt looking to this Court's decision as precedent that might inform their own retention practices. Truly, future guidance here is necessary.

As such, this Court should recognize and find that Ballard's pleadings, arguments, and trial questioning concerning violations of the PRA were *necessary components of her FOIA causes of action.* As such, the FOIA statute confers standing on Ballard. Moreover, even if such arguments were not a necessary part of her FOIA action, which they are, this court should find that Ballard has statutory standing under the PRA, also by way of the FOIA statute. In order to effectuate the intent of FOIA, the County must retain documents and have a system in place for complying with FOIA – neither of which was done here. Further, this Court should find that there is no greater "public importance" than the preservation of public records and as such, should find standing for Ballard both as to the public importance exception and statutory standing by reading the FOIA and Public Records Act as conjoined in *pari materia.*

D. THE ISSUE OF STANDING WAS NOT BEFORE THE LOWER COURT

In its answer to Ballard's lawsuit, the County did not argue that Ballard lacked standing to assert a claim; it filed a general denial and argued that Ballard had failed to state a cause of action. (Answer).

Additionally, the matter of standing was not raised at trial. (T. pp. 4-15).

In her motion for reconsideration, Ballard raised the issue of the failure of the County to argue the issue of standing as precluding the trial judge's ruling on that issue. (Motion for Reconsideration p. 2, ftn. 2). In his order denying Ballard's motion for reconsideration, the trial judge appeared to acknowledged the issue of standing was not raised by the County and that his ruling on that issue had been *sua sponte*, determining

the issue of standing was one of subject matter jurisdiction. (Order Denying Plaintiff's Motion for Reconsideration). However, in footnote 3 of the Bardoon opinion, the Supreme Court of South Carolina compared "standing" with the concept of "real party in interest" and concluded that neither affected a court's subject matter jurisdiction. Bardoon Properties v. Eidolon Corporation, 326 S.C. 166, 485 S.E.2d 371 (1997)(ftn. 3). The failure of the County to raise this issue to the trial judge precluded him from ruling on the issue *sua sponte*.

This Court has recognized that the failure to raise standing at the trial court precludes an appellate court from considering the issue on appeal. *See generally* A Fast Photo Express Inc. v. First National Bank of Chicago, 369 S.C. 80, 630 S.E.2d 285 (Ct. App. 2006). Similarly, the trial judge lacked authority to raise the issue *sua sponte*.

If the issue of standing did, in fact, determine the court's subject matter jurisdiction, the trial judge could properly raise it despite the absence of a party doing so. Lake v. Reeder Construction Co., 330 S.C. 242,498 S.E.2d 650 (Ct. App. 1998). Since Judge Russo raised the issue of standing *sua sponte* in his order, Ballard correctly raised the issue by motion pursuant to Rule 59(e), SCRCP in order to preserve it for appeal. *Id.*

That portion of the trial judge's ruling that determined Ballard lacked standing to raise the issues which he decided in her favor should be reversed.

ISSUE TWO

THE LOWER COURT ERRED IN FAILING TO AWARD BALLARD'S FULL ATTORNEY FEES.

The trial judge found that the County had, in fact, violated FOIA with respect to the emails and text messages, but failed to order the equitable relief sought because "it appears from the evidence that such records were inadvertently destroyed. As such, this relief does not appear to be available." (Second Amended Order, p. 4, ¶ 14).

The lower court similarly granted the relief Ballard sought for the County's failure to properly announce the "specific purpose" of executive sessions. (Second Amended Order, p. 8, ¶7-8). Specifically, the lower court ordered the County to:

- submit to [Ballard] any documentation which reflects the discussions during the executive session at issue[1], notwithstanding any material that the Court has determined to be attorney-client privileged.

(Second Amended Order p. 8).

After finding a violation of FOIA as to producing documents and granting the precise relief Ballard sought with reference to the improper holding of Executive session by County Council, the lower court concluded that Ballard had not prevailed on all of the issues she brought to the Court's attention:

> Of three overreaching legal issues, [Ballard] prevailed on two, and one of those produced no benefit to [Ballard]. Based on the time devoted at trial to the issue of the Public Records Retention Act and a review of counsels' affidavits, it appears that a large bulk of time was spent on what was ultimately an unsuccessful legal argument, and no beneficial result was obtained for [Ballard] on that cause of action.

(Second Amended Order, p. 10).

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[1] As trial progressed, the focus of the executive sessions became a single meeting of County Council. Trial Exhibit 16.

As a result of this erroneous conclusion, the trial declined to award the entire amount of attorney fees that were sought by Ballard. The lower court incorrectly reduced the amount of fees to be awarded by erroneously concluding that Ballard had only partially succeeded in the relief sought. In its order, the lower court relied upon S.C. Code Ann. § 30-4-100 to grant it authority to reduce the amount of attorney's fees sought because, in its view, Ballard had only partially prevailed. (Second Amended Order, pp. 9-10).

As more fully discussed in Issue One, above, Ballard received all of the relief she asked for[2], and she did so based on the County's violation of FOIA.

At trial, Ballard introduced an affidavit of attorney fees reflecting the hours and expenses necessarily devoted by her counsel Joseph M. McCulloch and Kathy Schillaci in representing her in litigating the FOIA action against the County. The total amount of fees and costs sought was $24,667.50. (Affidavits of Attorney Fees dated October 12, 2016). However, since trial, Ballard has incurred additional fees, in connection with multiple motions for reconsideration which resulted in several amendments to the trial judge's final order. (Order dated July 12, 2017; Amended Order dated October 26, 2017; Second Amended Order dated November 17, 2017). A remand would be necessary for the trial court to determine the full amount of attorney's fees to which Ballard is entitled.

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[2] The lower court did not award the relief Ballard sought as to the destroyed emails and texts because it was convinced from the evidence that the materials could not be recovered. (Second Amended Order, p. 4, ¶14). However, it agreed with Ballard that the documents should have been produced under FOIA. This points out the inter-relationship between FOIA and the PRA as argued by Ballard during these proceedings. The PRA determines what has to be kept. FOIA is simply the mechanism for requiring its production to the public.

Ballard prevailed on all issues; she was not awarded relief on the FOIA violation of failure to produce emails because the County acts and omissions had successfully prevented the documents from being recovered. If that is what the lower court meant by Ballard being only partially successful, the effect of denying her full request for attorney's fees and costs acted as a reward to the County for so completely violating the PRA that a forensic analysis of the County's computers would have been futile. Such an analysis, which would encourage public bodies to abandon all efforts at preserving or recovering documents which are subject to public disclosure, rewards incompetence, at best.

The order of the lower court which granted Ballard only partial fees should be reversed and the matter should be remanded to the lower court for a full determination of attorney's fees and costs to which she is entitled.

CONCLUSION

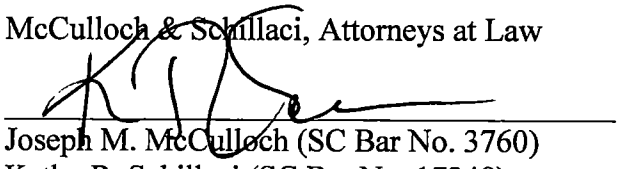
Ballard unmasked a comedy of errors in connection with the public records at the County. The County defended by claiming it was ignorant of its obligations and as such, failed to preserve anything that would be responsive to her requests. As a result of Ballard's efforts, and those of her counsel, a small part of the County's government is operating in accordance with the law, at least insofar as it is now under an order to properly announce the purpose of executive sessions of county council. The County's compliance has not yet been tested. But some progress has been made.

For the reasons set forth above, Ballard requests that this Court vacate that portion of the lower court's order that concluded that Ballard lacked standing to pursue the claims she pursued, and on which she prevailed, in uncovering a small part of secret

government activity. She also requests that she be awarded the full amount of attorney's fees incurred by her in mandating the County's compliance with the law.

Respectfully Submitted,

McCulloch & Schillaci, Attorneys at Law



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PROOF OF SERVICE

I certify that I have served the **APPELLANT/RESPONDENT'S INITIAL BRIEF, DESIGNATION OF MATTERS, AND CERTIFICATION** by depositing one copy of it in the United States Mail, first-class mail, postage prepaid, on February 2, 2018, addressed to Boyd Benjamin Nicholson, Jr., P.O. Box 2048, Greenville, SC 29602 and Mrs. Sarah Patrick Spruill, P.O. Box 2048, Greenville, SC, 29602.

February 2, 2018

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