THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM ANDERSON COUNTY

Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Case No. 2013-002499

Anderson County,.....Appellant,

v.

Joey Preston and the South Carolina Retirement System.....Respondents.

PETITION FOR HEARING *EN BANC*, OR ALTERNATIVELY, FOR REHEARING OF RESPONDENT JOEY PRESTON

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RECEIVED
JUN 15 2017
SC Court of Appeals

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Pursuant to SCACR 219 and 221(a), Respondent Joey Preston ("Respondent" or "Preston") respectfully submits this Memorandum Supporting his Petition, pursuant to SCACR 221(a), for rehearing of certain aspects of the Opinion Number 5490 ("Decision"). Arguments in support of this petition are set forth in a memorandum in support hereof. Such arguments include:

I. THE PANEL ISSUING THE DECISION LACKED THE QUORUM REQUIRED TO ISSUE THE INSTANT DECISION.

II. DISQUALIFICATION OF WILSON'S AND WALDREP'S VOTES ADJUDICATED THE INSTANT CASE AND THIS COURT'S SUBJECT MATTER JURISDICTION INTO NON-EXISTENCE.

A. Without Wilson's and Waldrep's Votes, the Entire Case Before the Court Proves *Ultra Vires.*

B. This Court Otherwise Lacks Subject Matter Jurisdiction.

III. THE COURT'S DECISION ERRED BY INVALIDATING THE SEVERANCE AGREEMENT DUE TO QUORUM ISSUES.

A. The Court Erred By Granting Appellant Relief Nowhere Found in Its Last Operative Pleading.

B. The Decision Erred By Ignoring the Law of the Case Resulting From Unappealed Findings.

C. The Decision Erred When Finding No Arguments Arose at Trial or Before Regarding the Disqualification of Waldrep's and Wilson's Votes.

D. The Decision Erred When Concluding Appellant Could Raise Its Quorum Arguments in a Rule 59(e) Motion.

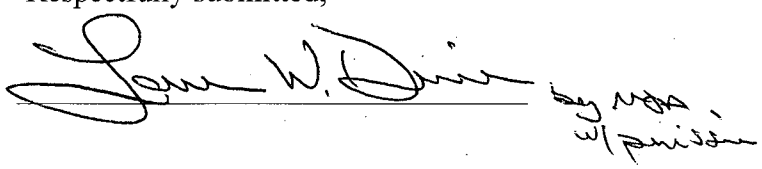
E. The Decision Erred By Failing to Address the Lower Court's Findings.

IV. THE DECISION ERRED WHEN IT REVERSED THE LOWER COURT'S FINDINGS CONCERNING CONSTRUCTIVE TRUST.

V. THE DECISION ERRED WHEN IT REVERSED THE LOWER COURT'S FINDINGS CONCERNING APPELLANT'S UNCLEAN HANDS.

VI. THE DECISION ERRED BY INVALIDATING PRESTON'S SEVERANCE AGREEMENT.

Respectfully submitted,



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June 15, 2017

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Anderson County,.....Appellant,

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MEMORANDUM SUPPORTING PETITION FOR HEARING *EN BANC*, OR ALTERNATIVELY, FOR REHEARING OF RESPONDENT JOEY PRESTON

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Pursuant to SCACR 219 and 221(a), Respondent Joey Preston ("Respondent" or "Preston") respectfully submits this Memorandum Supporting his Petition, pursuant to SCACR 221(a), for rehearing of certain aspects of the Opinion Number 5490 ("Decision").

I. THE PANEL ISSUING THE DECISION LACKED THE QUORUM REQUIRED TO ISSUE THE INSTANT DECISION.

The Court's Decision violates the South Carolina Constitution and controlling statutory provisions. Participation of only two members of the South Carolina Court of Appeals in reaching its Decision mandates vacatur, rehearing, and re-adjudication. It is axiomatic: "The provisions of the Constitution shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or permissory by its own terms." S.C. Const. Ann. Art. I, § 23.

Article V, § 7 of the South Carolina Constitution expressly grants the General Assembly the power to determine the Court of Appeals' structure and organization. In material part, Article V, § 7 mandates: "The structure and organization of the Court of Appeals shall be determined by the General Assembly. The Court of Appeals shall sit in panels." S.C. Const. Ann. Art. V, § 7. Pursuant to this constitutional grant of authority, the General Assembly enacted South Carolina Code § 14-8-80, which expressly provides: "On a panel, three judges shall constitute a quorum, and the concurrence of a majority of the judges is necessary for the reversal of the judgment below." S.C. Code Ann. § 14-8-80. A Court of Appeals panel, such as the two judge panel authoring the Court's instant Decision, lacks the mandatory quorum to adjudicate a matter absent participation by a third judge. As reflected by the Decision, however, Associate Justice Few (then Chief Judge

Few) did not participate in the outcome; nor could he. (Decision at 28 (Noting, "FEW, A.J., not participating.")

At the time of oral argument (*i.e.*, June 11, 2015), Justice Few served as one of the three judges on the panel designated to hear this appeal. The General Assembly thereafter elected Justice Few to the South Carolina Supreme Court on February 3, 2016; he undertook the oath of office as Associate Justice on February 9, 2016. On May 25, 2016, the General Assembly elected Judge James Lockemy as the Court of Appeal's Chief Judge filling the Justice Few's prior position; Judge Lockemy's investiture as Chief Judge followed within only a few weeks. Over a year later, this Court issued its opinion on May 31, 2017. [1]

Upon assuming the office of Associate Justice of the Supreme Court (*i.e.*, on February 9, 2016), Justice Few could not simultaneously serve on both the Court of Appeals and the Supreme Court. This is true because his prior office had been filled by Judge Lockemy and because Article V, § 16 of the South Carolina Constitution mandates: "The Justices of the Supreme Court and the judges of the Court of Appeals...shall not, while in office...hold any other office or position of profit under the United States, the State, or its political subdivisions...nor shall they be allowed any...perquisites of office." S.C. Const. Ann. Art. V, § 16. As of February 9, 2016, then, absent a duly appointed replacement, the presiding panel lost the required quorum needed to decide this matter. It was never regained.

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[1] Of note, the Court's analysis concerning abstentions (which in itself errs) cannot apply. *Id.* (Discussing how an abstaining member could still count toward quorum requirements). Only a member of the body can abstain. Here, Justice Few could not serve on both Courts thereby foreclosing his "abstention" as counting toward the panel's quorum requirement.

Accepting the Court's own analysis, for the instant purposes only (*see infra*), "[N]o valid act can be done in the absence of a quorum" and the Decision proves "null and void" ab initio. (Decision at pp. 17-19) Thus, consistent with the Decision's reasoning, this Court must now vacate its opinion, reconstitute a quorum *via* the statutorily mandated three judge panel, re-open oral arguments if need-be, and decide this case anew. To hold otherwise belies the analytical crux of this Court's entire Decision.

II. DISQUALIFICATION OF WILSON'S AND WALDREP'S VOTES ADJUDICATED THE INSTANT CASE AND THIS COURT'S SUBJECT MATTER JURISDICTION INTO NON-EXISTENCE.

Disqualification of both the votes of Council Members Cindy Wilson ("Wilson") and Bob Waldrep ("Waldrep") adjudged both this case and the Court's subject matter jurisdiction into non-existence. According to the Decision, the lower court correctly applied the decision of *Baird v. Charleston County* finding South Carolina courts invalidate local government action if tainted votes prove outcome determinative. (*See Id.* at p. 19) The Decision likewise agreed with the lower court about disqualifying Wilson's and Waldrep's votes finding both had "clear conflicts" of interest prohibiting their participation in County Council votes concerning Respondent's severance agreement ("Severance Agreement"). (*See Id.* at 27 ("[D]espite having clear conflicts of interest...")) Based upon this reasoning, this Court must vacate its Decision and dismiss the County's appeal as *ultra vires*.

A. Without Wilson's and Waldrep's Votes, the Entire Case Before the Court Proves *Ultra Vires*.

Affirmance of the disqualification of Wilson's and Waldrep's votes garners irreversible impacts on both the case and this appeal. County Council authorized the filing

of the instant lawsuit on November 12, 2009 at called meeting starting at 2:00 PM. *(See* Ex. 2 (11/12/09 Meeting Minutes)) Following an executive session commencing at 2:05 PM and lasting until 3:40 PM, County Council considered whether: "[T]o hire the Wyche Burgess Law Firm for the purpose of reviewing and pursuing [the instant case] in regards to the contract with Mr. Preston." (*Id.* at pp. 1-2) "The vote on the motion...resulted in four in favor (Waldrep, Moore, Ms. Wilson, Dunn), two opposed (Floyd, Allen)." (*Id.* at p. 2) The meeting adjourned at 3:50 PM. (*Id.*)

But, as the Court's Decision confirms, both Waldrep and Wilson had "clear conflicts of interest" voting on measures impacting Respondent's Severance Agreement. (*See Id.* at 27) Despite the same, within the next hour and ten minutes (*i.e.,* before the courthouse closed), the Appellant filed its original thirteen page Complaint initiating the instant, unauthorized lawsuit. (*See* R. pp. 000084-000096)

By operation of the Supreme Court's holding in *Baird*, and this Court's Decision, neither Waldrep's nor Wilson's votes--authorizing a public body to file this lawsuit (*i.e.*, Anderson County)—count, due to their respective disqualifications. As this Court correctly found, a "majority vote of those members present and voting shall decide all questions, motions, and other votes" considered by Anderson County Council. (Decision at p. 17) (Citing ACC § 2-37(d)) The public vote authorizing the filing of this case, then, failed by a vote of 2 (Moore and Dunn) to 2 (Floyd and Allen). (Ex. 2 at p. 2)

Appellant's unauthorized filing of this lawsuit on November 12, 2009 lawsuit proved unauthorized, *ultra vires*, and a nullity from inception. "A civil action may be maintained only in the name of a person [or entity]...capable of possessing and asserting a right of action." *Glenn v. E. I. Du Pont de Nemours & Co.*, 254 S.C. 128, 133, 170 S.E.2d 155

(1970). "[I]f there is a lack of legal entity [before the Court], the whole action fails ...it is as if there was no plaintiff in the record and therefore no action before the court; which presents an instance of want of jurisdiction." *Id.* at 134.[2]

A condition precedent to Anderson County possessing lawful authority and this constituting a legal entity actually before the Court below and this one was requisite authorization, which did and does not exist. (*See* ACC Ord. § 2-2 ("The ultimate and final source of authority in county government affairs is the county council...subject to the approval, execution, and control of the council...All centralized county functions, such as ...legal... are reserved to the county council, acting through the administrator and administrative staff."); ACC § 2-178 (c) (Public votes of Council prescribe authority of County Attorney); Ex. 1, p. 39, § XXVII (2012-13 Anderson County Budget Ordinance) (Requiring Council approval to fund legal services.)[3]

Without proper authorization, a slew of jurisdictional and jurisprudential defects ensue: Appellant lacked and lacks the capability, standing, capacity, real party in interest status, and lawful ability to press the causes of action it now urges. Without proper authorization, no actual case or controversy exists, nor could it—as no public entity with due authorization to sue—exists before this Court. The case fails. *Hughey v. Mooney*, 282

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[2] Nor can an individual member or members constituting less than required act on behalf of a public body initiate suit for a body politic. *See, e.g., Newman v. Richland County Historic Preservation Comm'n*, 325 S.C. 79, 83 (1997).

[3] South Carolina Code § 19-3-10 requires South Carolina Courts to take judicial notice of local government enactments. Such facts also constitute adjudicative facts directly relating to whether this Court possesses subject matter to hear this case, an inquiry for which the Court has a duty to resolve once raised. As adjudicative facts, they prove subject to South Carolina Rule of Evidence 201's judicial notice provisions, including the mandatory provision prescribed by SCRE 201(d), under which Respondent presently moves.

S.C. 597, 602 (Ct. App. 1984) ("Unless a real party in interest... institutes suit, the court is without jurisdiction."); *see also Ex parte Allstate Ins. Co.*, 248 S.C. 550, 562 (1966) (Court is "without jurisdiction" unless the real party in interest initiates suit and is properly before the Court.)

B. This Court Otherwise Lacks Subject Matter Jurisdiction.

The jurisdictional defects thereafter cascade in relation to this Court. On November 19, 2013, four (4) members of Anderson County Council, including Wilson, voted in favor of Anderson County Resolution No. 2013-067 ("Invalid Resolution"), while three (3) members voted against it. (*See* Ex. 2.) The Invalid Resolution purported to authorize Appellant's attorneys "to take all necessary action to notice and fully pursue [the instant] appeal..." (*See* Ex. 3.)

Notwithstanding her "clear conflict of interest" as pertaining to Respondent's Severance Agreement, Wilson: placed the Invalid Resolution on Council's agenda (*see* Ex. 2 (11/19/13 Agenda, p. 2, ¶10(d); *Id.* (11/19/13 Meeting Minutes, p. 10, lines 31-36)); moved to have the Disputed Resolution approved (*Id.* at p. 46, lines 25-26); cast an outcome determinative vote against extending the time for discussion (so her fellow Council members could not be fully heard) (*Id.* at p. 51, lines 29-33); and then cast an outcome determinative vote in favor of the Invalid Resolution authorizing Appellant's attorneys to file the County's notice of appeal. (*Id.* at p. 51, line 33- p. 52, line 5) On November 19, 2013, Wilson pursued such actions, notwithstanding fellow Council member Gracie Floyd's: openly objecting to Wilson's placing the Disputed Resolution on the County's agenda, expressly noting her conflict of interest in doing so, participating in any such deliberations, and notifying the full Council of an existing request by her to the State Ethics

Commission requesting an investigation into Wilson's conduct. (*Id.* at p. 10, line 31-p. 11, line 38)

Pursuant to Rule 203(b)(1), SCACR, the County was required, but did not, file a valid notice of appeal no later than December 8, 2013. A validly authorized notice of appeal constitutes a prerequisite to this Court's exercise of subject matter jurisdiction. *Elam v. S.C. DOT*, 361 S.C. 9, 14-15 (2004); *Mears v. Mears*, 287 S.C. 168 (1985) Counsel for the County (unwittingly) filed an *ultra vires* notice of appeal on Appellant's behalf, as no valid authority existed to do so due to County Council's failed vote on the Disputed Resolution. As a consequence, the notice of appeal filed by the County constitutes an unauthorized, *ultra vires* action and void *ab initio.*[4]

Moreover, Appellant cannot remedy either of the above defects at this point. As noted *supra*, the lack of a *bona fide* Appellant immediately deprives the Court of jurisdiction. *Glenn v. E. I. Du Pont de Nemours & Co.*, 254 S.C. at 133 ("[I]f there is a lack of legal entity [before the Court]...presents an instance of want of jurisdiction.") And, pursuant to Rule 203(b)(1), SCACR, Appellant was required, but did not, file a valid notice of appeal no later than December 8, 2013. "[I]f a party misses the deadline [to file a notice of appeal], the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." *Elam v. S.C. DOT*, 361 S.C. 9, 14-15 (2004); *see also Mears v.*

[4] Respondent raised subject matter jurisdiction to this Court at the appeal's inception. Respondent acknowledges the issues may have been prematurely raised at that time, since the jurisdictional predicate (*i.e.*, Wilson's and Waldrep's tainted votes) remained in contention. However, now that the Court has definitively decided the issue, the legal impact on this Court's subject matter jurisdiction is inescapable.

Mears, 287 S.C. 168, 169 (1985) (Because it is a "jurisdictional requirement," Court lacks "authority to extend or expand the time in which the notice of intent to appeal must be served.")[5] Because Appellant failed to file a timely notice of appeal, the Court of Appeals lacks jurisdiction to hear this case and it must be immediately dismissed.

Nor can this Court simply ignore the issue. Once this Court learns of potential jurisdictional infirmities, it has a duty to confirm the existence of its subject matter jurisdiction.[6] *Tatnall v. Gardner*, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002) ("Furthermore, this Court must, on its own motion, raise the issue of subject matter jurisdiction to ensure the 'orderly administration of justice.")[7] Once it confirmed the

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[6] It is anticipated Appellant will suggest this Court possesses jurisdiction so long as the notice of appeal is not irregular on its face. This is plainly wrong for two reasons. First, Courts routinely inquire beyond a party's court filings and examine the facts underlying their jurisdiction. *See, e.g.,*
Beck v. McDonald, 848 F.3d 262, 270 (4th Cir. 2017) ("A defendant may challenge subject-matter jurisdiction in one of two ways: facially or factually."); *see also Lovern v. Edwards*, 190 F.3d 648, 654 (4th Cir. 1999) (Court allowed to consider evidence beyond filings); *see also Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991) (same). Second, Appellant's anticipated argument, if true, would fail to address the underlying jurisdictional defect, such as here, a public body filing an appeal that is an unauthorized and *ultra vires* act of a public body, which can *only* act as prescribed by law. To hold otherwise, as Appellant might suggest, would enable the creation of *faux* subject matter jurisdiction—based upon artfully pled yet untrue facts—without regard to the Court's obligation to the Constitution and veracity. Indeed, as the party invoking jurisdiction, once questioned, Appellant has the obligation to prove the same. *Melendez v. Sebelius*, 611 Fed. Appx. 762, 763 (4th Cir. 2015) (Once challenge "is raised to...subject matter jurisdiction, the burden of proving the asserted basis for jurisdiction falls on the plaintiff."); *Banks v. Virginia Elec. & Power Co.*, 2000 U.S. App. LEXIS 2400, *6 (4th Cir. 2000) ("The plaintiff has the burden of proving that subject matter jurisdiction exists."); *see also Bishop v. Bartlett*, 575 F.3d 419, 424 (4th Cir. 2009) ("In determining whether a party has standing to bring suit, the party invoking the jurisdiction of the court bears the burden of establishing standing.")

[7] The Decision would otherwise err since this Court has no way of knowing the full extent of the potential jurisdictional impact disqualifying Wilson's and Waldrep's votes has. Of course, "[l]ack of subject matter jurisdiction can be raised at any time" and "can be raised

propriety of the disqualification of Waldrep's and Wilson's votes, this Court also confirmed it had no subject matter jurisdiction. Accordingly, the Court must "ensure the orderly administration of justice" by vacating its decision, and dismissing this appeal. *Tatnall v. Gardner*, 350 S.C. at 137. To hold otherwise is tantamount to exercising hypothetical jurisdiction—where none actually exists—so as to adjudicate an issue nonetheless. Such is not the province of South Carolina courts. Alternatively, this Court should vacate its decision, except as to the findings related to Waldrep and Wilson and remand this case to the lower court to conduct further evidentiary proceedings concerning what extent such disqualification impacts the Court's organic ability to hear this matter.

III. THE COURT'S DECISION ERRED BY INVALIDATING THE SEVERANCE AGREEMENT DUE TO QUORUM ISSUES.

Citing a lack of quorum, the Decision errantly invalidates Respondent's Severance Agreement and remands the case back to the trial court to determine if a remedy

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for the first time on appeal." *Lake v. Reeder Constr. Co.*, 330 S.C. 242, 248 (Ct. App. 1998). Here, however, even non-subject matter jurisdiction issues warrant remand. If, as the Decision holds--the disqualification of Wilson's and Waldrep's votes were nowhere raised at trial (a holding to which Respondent assigns manifest error (*see infra*)), *but see* Decision at p. 15 ("Neither the County nor Preston presented an argument prior to or during trial that would have resulted in four votes being invalidate")—further proceedings now prove necessary to ascertain what impacts such disqualification has on the Court proceedings. This proves necessarily true by virtue of the Decision's logic, since id unfair prejudicing Respondent—since (by such logic) the instant filing proves as the first time Respondent, as prevailing party, would have had to raise such issues. Of course, Respondent disputes certain aspects of this analysis (*see infra*). But, if this Court continues to hold the disqualification of Wilson's and Waldrep's votes--then, at a minimum, Preston should be treated on equal procedural footing with Appellant. Such errant analysis cannot be solely deployed to benefit Appellant but ignored as to Respondent and his detriment.

exists. The Court should grant rehearing on this issue, or alternatively, vacate its findings and issue a new opinion for several reasons.

A. The Court Erred By Granting Appellant Relief Nowhere Found in Its Last Operative Pleading.

By granting relief bottomed upon the absence of a quorum, the Decision grants relief to the County that nowhere appears in its Complaint. Nowhere in Appellant's pleading do they seek rescission (or any other relief) based upon the County Council lacking a quorum. (*See* R. pp. 000127 to 000141) Yet, the Decision, by judicial declaration, enters exactly that legal finding: "Based upon the foregoing, we hold all votes relating to the adoption and funding of the Severance Agreement are null and void because the 2008 Council passed these motions in the absence of a quorum." (*See* Decision at p. 20) Thus, the decision first errs, in this regard, by granting unpled declaratory relief.[8]

B. The Decision Erred By Ignoring the Law of the Case Resulting From Unappealed Findings.

Granting relief bottomed upon the absence of a quorum, as the Decision purports to do, has the impermissible effect of uprooting established law of the case. Recognizing that it failed both to allege and preserve quorum-related issues as a basis to seek the Severance Agreement's rescission, on July 15, 2013, Appellant filed a post-

[8] Of course, such finding begets yet another infirmity of the Decision. On page 27 of the Decision, the Court reverses the lower court's ruling that a declaratory action would fail to provide adequate relief. (*See* Decision at p. 27) However, critically analyzing the Decision prompts the inescapable conclusion: what the Decision holds as an inadequate remedy (*i.e.*, declaratory relief) proves identical in substance to what its holding does. (*Id.*) For yet another reason, the Court should vacate its Decision, conduct rehearing either *en banc* or on a reconstituted panel, and ameliorate the deficiencies set forth herein, as the Court's ruling in this case will guide local government bodies statewide with respect to an array of issues potentially in perpetuity.

judgment, Motion to Amend ("Untimely Motion") its Complaint seeking to amend its pleading by adding a claim for the exact relief the Decision presently (albeit errantly) grants and apparently allows. (*See* R. p. 00001 to R. p. 00043) At the time Appellant filed its Motion to Amend: *eight and a half months had lapsed* since the lower court concluded hearing evidence; *eight months had lapsed* since the parties submitted written closings, *two and half months had lapsed* since the lower court issued its final order and judgment, and *sixty days had lapsed* since Appellant had filed its Motion to Amend or Alter the Judgment. (*Compare* filing dates on: R. p. 264 *with Id.* p. 3052 *with Id.* p. 3099 *with Id.* p. 3163 *with Id.* p. 3245)

The lower court denied Appellant's Untimely Motion on November 8, 2013 ("November 8th Order"). (R. pp. 44 to 49) Appellant could have, but did not, file a Motion to Alter or Amend the findings denying the Untimely Motion. For tactical reasons (*i.e.,* not wanting to highlight its deficient and belatedness of the Untimely Motion, nor its recognition that such basis relief nowhere appears in its operative pleading), Appellant instead made a tactical decision to pursue filing its Notice of Appeal on November 22, 2013. Moreover, the overwhelming number of findings supporting the Untimely Motion's denial remain wholly untouched by the issues for which Appellant did seek reconsideration and upon which it bottoms its appeal. This yields the inescapable conclusion that all such un-appealed findings—including the County lacked the right to amend--ripened to finality and became law of the case. *Proctor v. Whitlark & Whitlark, Inc.*, 414 S.C. 318, 333 (2015) ("Petitioners have not appealed this ruling. Thus, it is now the law of the case.")[9]

[9] Appellant likewise appears to recognize the Decision's error as set forth above. For this reason, Appellant asks the Court to modify its Decision to find the County had the right to

Appellant neither moved to reconsider nor appealed any of the following findings:

- "The County failed to preserve the proposed Quorum Claim, as the issue was never presented to the Court." (R. p. 44)

- "At trial, [Appellant] actually argued the exact opposite position concerning the votes of Waldrep and C. Wilson instead contending such votes were properly cast." (*Id.*)

- "Allowing [Appellant] to amend its pleading, at this stage, would impermissibly allow the County to try the instant case twice using discrepant legal and factual theories of relief, the latter of which the County only raised after the Court issued judgment on May 3, 2013." (*Id.* at p. 45)

- "Even if the Quorum Claim had merit, which the Court rejects...the County unduly delayed in seeking the Quorum Claim amendment." (*Id.*)

- "The County had more than adequate opportunity to pursue the amendment: from the case's inception; during the three (3) years leading up to trial; following Waldrep's and C. Wilson's depositions; in connection with the previous amendment of Plaintiff's Complaint (which was by consent on March 29, 2012)." (*Id.*)

- "The County could also have pursued the amendment: on or before the first day of trial; during the trial; contemporaneous with the submittal of its November 16, 2012 written summation following trial; or during the six (6) month window between trial and issuance of judgment." (*Id.*)

- "The County failed to identify any legitimate basis, legally or factually, for its delay in pursuing the Quorum Claim." (*Id.*)

- "Permitting the County's proposed amendment—following a lengthy trial and after judgment issued—would require the Court to re-open proof in this case. Such result would highly prejudice Preston." (*Id.*)

- "Absent re-opening proof, Preston would lose:

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amend its Complaint to seek "invalidation of the Severance Agreement on the basis of absence of a quorum." (App. Petit. for Reh., p. 3, § III) For the reasons explained herein, however, such modification would only enhance the Decision's error.

-"The opportunity to develop facts and introduce evidence of prior usage and to assert the same as an affirmative defense." (*Id.*)

-"The opportunity to develop facts and introduce evidence regarding other affirmative defenses such as (*inter alia*) the rule of necessity doctrine, ratification, waiver, and estoppel." (*Id.*)

-"The opportunity to develop facts and introduce evidence refuting the non-existence of a quorum." (*Id.*)

-"The opportunity to introduce expert testimony concerning the Quorum Claim."

-"The opportunity to pursue different litigation and trial strategies, based upon claims actually asserted." (*Id.* at p. 46)

-"The opportunity to develop and introduce evidence pertaining to counter-theories that the entirety of the lawsuit constituted an unauthorized act." (*Id.*)

-"Re-incur duplicative discovery and trial expense after trial. (*Id.*)

- "By contrast, if the [lower court] allowed the County to re-litigate the case by re-opening proof, Preston would:

-"Incur an unfair disadvantage inasmuch as it would allow the County to try the case under one theory, absent certain risks, and upon losing, re-open the record to re-try the case under a new theory" (*Id.*)

-"Incur an unfair disadvantage as to litigation decisions, trial strategies, and the presentation of evidence which Preston showed were made based upon the framing of the issues (as then framed), which cannot now be undone" (*Id.*)
-"The loss of the procedural right under Rule 15(b), SCRCP, which would have permitted Preston to seek a continuance during trial, had the County timely pursued the instant amendment" (*Id.*)

-"[D]ue to the County's undue delay and the resulting prejudice to Preston, the Court denies Plaintiff's Motion to Amend." (*Id.*)

-"The Court also finds the County's proposed amendment proves futile." (*Id.*)

- "The County alternatively seeks to amend pursuant to Rule 15(b), SCRCP contending the Parties tried the Quorum Claim by consent during trial." (*Id.* at p. 48)

- "As noted above, the Court rejects the County's contention that the Quorum Claim was raised during trial or even before judgment issued." (*Id.*)
- "The County's arguments fail under Rule 15(b)…" (*Id.*)
- "[A]mendment of Plaintiff's Complaint to add the Quorum Claim would highly prejudice Preston if allowed." (*Id.*)
- "[E]ven if amendment under Rule 15(b) otherwise proved proper, such amendment was clearly not express and "implied consent will not be found if all the parties did not recognize [the issue] as an issue at trial, even if evidence in the record exists to support the amendment." (*Id.*)

For these reasons, the lower court found the Appellant could not amend its Complaint to assert the quorum issues as a basis for relief. Because the County did not appeal any of the above findings, they have become law of the case and Appellant cannot seek affirmative relief based upon quorum issues. *See Anderson v. Short*, 323 S.C. 522, 476 S.E.2d 475 (1996) (stating that where a trial judge's decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case).

The Decision errs by collaterally reversing issues nowhere embraced by the County's Appeal. The Decision further errs by failing to take into account (or even addressing) the findings set-out above, which have cemented as law of the case. Last, the Decision errs by failing to take into account the prejudice incurred by Preston as a result of the Decision allowing the County to amend its Complaint eight months after trial. For this reason and those set-out below, this Court should vacate its decision, or slate a rehearing *en banc*, or, alternatively, rehearing by a reconstituted panel.

C. The Decision Erred When Finding No Arguments Arose at Trial or Before Regarding the Disqualification of Waldrep's and Wilson's Votes.

Plain error infects the Decision in yet another way. According to the Court's reasoning, Appellant permissibly raised its quorum arguments, for the first time, in its post-trial Rule 59 Motion, because: "Neither the County nor Preston presented an argument prior to or during trial that would have resulted in four votes being invalidated." (Decision at p. 15) The Court should grant the instant Petition because such finding proves demonstrably and manifestly incorrect.

In light of the frequency with which the disqualification of Wilson's and Waldrep's votes appears in pre-trial discovery, the trial transcript, the Parties' Closings, the lower court's orders, and the parties' appellate briefs, the Court's finding in this regard appears to be a scrivener's error, albeit a material one. An illustrative but non-exhaustive list of examples includes:

- **Pre-trial Deposition of C. Wilson (published at trial).** (*See* R. p. 1680, line 10-22)(Preston's personal attorney threatened tort claims against Wilson and Waldrep); (*Id.* at 1689, lines 3-23) (Admitting Court found Wilson was interfering with Preston's ability to do job); *Id.* at 1693, line 24-1694, line 1-3) (Admitting existing tort claims threatened against Waldrep and Wilson on night of Severance Agreement vote); *Id.* at 1685, line 10-22)(Questioning Wilson about scope of release as embracing "council members.")

- **Respondent's motion for directed verdict.** (*See* R. p. 1351, line 13 to 1353, line 9) (*Id.* at p. 1351, lines 13-16: "Your Honor, you have heard evidence over the past...four days that would allow you, and the Court should discount both the votes of Cindy Wilson and Bob Waldrep."; *Id.* at p. 1352, lines 23-25 ("The consequence of this is that...both of their votes are discounted."); *Id.* at 1392, line 19 to 1394, line 9 (p. 1394, lines 2-9: "[A]nd you discount Cindy Wilson and Bob Waldrep's vote...[i]t still passes three nothing...[n]o matter which way you frame this... the vote still goes through."); *Id.* at 1394, line 22 to 1394, line 1 ("[I]t's framed by my pleadings...one of my affirmative defenses is specifically under...the *Baird* doctrine, and that is what I'm saying with respect" to the Severance Agreement vote.)

- **Appellant arguing against Respondent's motion for directed verdict.** (*See* R. p. 1378, line 19) ("I thought it was inventive, but wrong..."); *Id.* at 1379, lines 12-13 (*Baird* analysis should not apply to Waldrep and Wilson because the purpose of the ethics prohibition: "is to keep you from voting in favor of your own interest."); *Id.* at 1380, lines 12-16 ("The other thing that **we pointed out in the...course of our case** is that the benefit was not—it was not a release of Cindy Wilson and Bob Waldrep...")(emphasis added); *Id.* at 1381, line 19-21 ("The other problem with that argument, Your Honor...was that Ms. Wilson and Mr. Waldrep did not have time to read [the Severance Agreement]...")

- **Court discussing Respondent's directed verdict motion.** (R. p. 1397, line 21-22) ("[A]s to what votes should be or shouldn't be invalidated is also a question that's up for interpretation.")

- **Appellant's Closing.** (*See* R. pp. 3068 to 3069) ("The final point to make with respect to invalid votes relates to Preston's argument at trial that the votes of Cindy Wilson and Bob Waldrep should be invalidated because they were voting in favor of a release for themselves" and then outlining three arguments why the Court should not invalidate Waldrep's and Wilson's votes.)

- **Respondent's Closing.** (*See* R. p. 3125, § 2(b) & FN 21 ("[A]pplying *Baird* to the instant case (which was pled as the Ninth Affirmative Defense), the two negative votes (those of Bob Waldrep and Cindy Wilson) against Preston's Severance Agreement must be discounted..." and then reciting the evidence introduced at trial)

- **May 3, 2013 Final Judgment.** (*See* R. pp. 10-12 & FN5 & 7) (Lower court outlining evidence supporting Waldrep's and Wilson's conflicts of interest) (FN6 discussing Appellant's arguments against disqualifying Waldrep's and Wilson's votes.)

- **November 25, 2013 Reconsideration Order.** (*See* R p. 78, Issue 15 (Again citing evidence presented at trial supporting disqualification of Waldrep's and Wilson's votes.)

- **Respondent's Brief.** (*See* Resp. Brief, pp. 21-23 & FN29-32 (Providing pinpoint cites of evidence supporting disqualification of Waldrep's and Wilson's votes.)

- **Appellant's Untimely Motion to Amend.** (*See* R. p. (Lower court should permit the amendment because: it would "assert[] no 'new' factual issue in the Second Amended Complaint that has not already been tried;" "Preston himself introduced [the] argument to the proceedings;" and the facts supporting the disqualification of Waldrep's and Wilson's votes "have been

fully developed" and later arguing amendment should be allowed to conform to evidence because parties tried disqualification of votes by consent under Rule 15(b), SCRCP. (R. pp. 3248-3249)

- **This Court's Decision.** Page 16 of the Decision actually cites a passage where the disqualification of Waldrep's and Wilson's votes arose at trial. (Decision at p. 16)

Based upon the above and serial other citations found throughout the Record, the Decision erred when it found: "Neither the County nor Preston presented an argument prior to or during trial that would have resulted in four votes being invalidated." (Decision at p. 15)

D. The Decision Erred When Concluding Appellant Could Raise Its Quorum Arguments in a Rule 59(e) Motion.

The Decision erred when it found the County could raise its quorum arguments, for the first time in its Rule 59(e) Motion. As the authority cited in the Decision notes: "Post-trial motions are…utilized to raise issues that could not have been raised at trial." (Decision p. 15) (Citing J. TOAL, S. VAFAI & R. MUCKENFUSS, APPELLATE PROCEDURE IN SOUTH CAROLINA 189 (3d. ed. 2016). As demonstrated in Section (c) above, the issue of Wilson's disqualification (and derivatively that of Waldrep) arose during Wilson's pre-trial deposition. (*See supra*) Respondent raised the disqualification of Waldrep's and Wilson's votes numerous times at trial. (*Id.*)

As also noted above, Appellant introduced evidence intended to rebut the argument. (*Id.*) Appellant argued against the same during Preston's directed verdict motion. (*Id.*) Appellant thereafter repeated the same exact arguments—despite several additional weeks—in its written closing argument. (*Id.*) Then, in its post-judgment and Untimely Motion to Amend, Appellant argued the facts supporting the disqualification of Waldrep's and Wilson's votes were "fully developed" at trial. (*Id.*) Simply nothing stopped the

County from arguing the lower court should invalidate the Severance Agreement based upon a lack of quorum, except Appellant's tactical decision not to do so.

As the lower court found in an unappealed finding: "At trial, [Appellant] actually argued the exact opposite position concerning the votes of Waldrep and C. Wilson instead contending such votes were properly cast." (*Id.*) The lower court correctly concluded: "Allowing [Appellant] to amend its pleading, at this stage, would impermissibly allow the County to try the instant case twice using discrepant legal and factual theories of relief, the latter of which the County only raised after the Court issued judgment on May 3, 2013." (*Id.* at p. 45)

Of course, if Appellant argued the disqualification of Waldrep's and Wilson's votes invalidated the Severance Agreement due to absence of a quorum, such argument tacitly acknowledges the *Baird* standard would apply. Such position rand directly contrary to Appellant's urged position (for over three years at the point) in favor of the "single tainted vote rule" sometimes deployed in handful of other jurisdictions. (*See* Decision at p. 14) If such concession were made and the lower court did not invalidate enough votes to allow Appellant to argue destruction of a quorum, then the County would necessarily lose. As a result, it made a tactical decision not to pursue relief on that ground, which is perfectly legitimate, but not grounds to assert, for the first time, a new basis for relief following judgment.[10]

[10] Importantly, the instant case proceeded as a bench trial. As such, if the County wished to pursue the quorum issue and felt it was new material, it could have moved for a continuance under Rule 15(b), SCRCP. This did not occur. Moreover, under Rule 52(b), SCRCP, the County could have, but did not, request the trial court to re-open the proceedings and make additional findings. Appellant did not request the same, since it

E. The Decision Erred By Failing to Address the Lower Court's Findings.

Respondent's Petition should be granted because the Decision overlooks several material findings by the lower court. The findings omitted by the Decision and requiring adjudication include:

- The lower court's finding as to why both Appellant's and Respondent's pleadings embrace the disqualification of Waldrep's and Wilson's votes. (*See* R. p. 59)
- The lower court's analysis under Rule 59(e), SCRCP. (*Id.* at 58, FN32)
- The language indicating physical presence at the meeting site dictates whether a quorum exists under the Anderson County Code. (*See Id.* at 47)
- The lower court's analysis about why the disqualification of Wilson's and Waldrep's votes formed part of Appellant's *prima facie* case. (*See Id.* at 59)
- The lower court's discussion of Appellant's attempt to amend under Rule 15(b), SCRP. (*Id.*)
- Consistent with the above, the varying formulations for carrying a measure under the Anderson County Code versus quorum requirements. For example, a measure passes by a majority of those present and voting, not a majority of the quorum. (*Id.*)
- Appellant's own prior interpretation and usage under its Code, which the lower court's analysis mirrors, and the County Code requires to be followed in precedential fashion. (*Id.*)
- The definition of quorum under FOIA, which Appellant's Code, incorporates, along with State Ethics Provisions, all of which mirror the County's own prior usage and the lower court's decision, but not this Court's decision. (*Id.*)

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made the tactical decision not to do so. Instead, it aimed to keep the issue in its hip pocket but by doing so it waived the right to pursue the relief.

- The lower court's discussion distinguishing such case as *Garris v. Governing Bd. Of S.C. Reins. Facility*. (*Id.* at 47, FN2)

While the Decision mentions some, but not all, of these findings, it fails to rule upon any, nor does it offer any analysis why the lower court erred as to the same. For this reason, the Decision erred and Respondent's Petition should be granted.

Rule 59(e) motions are not the equivalent of procedural take-home exams. According to the Decision, the Court agreed with the lower court that the County failed to assert the absence of a quorum as a basis for relief prior to filing its Rule 59(e) motion. Based upon this ruling, the Decision then reaches the exact opposite result mandated by controlling precedent. South Carolina's Courts have ruled over and over that: "A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial." *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436, 437 (Ct. App. 1995). The lower court correctly adhered to controlling precedent in this regard, *see, e.g.,* R. p. 58 & FN32, and the Decision erred by not doing so.

No other votes were challenged in the pleadings." (App. Brief, p. 47.) Not so. Ignored by Appellant, the lower court found both the County's Complaint and Preston's Answer required the trial court to analyze the votes of all Council members. (R. pp. 6 & FN4; 133, ¶35; 59-60 & FN29-35.) As the lower court also found, "The disqualification of Waldrep's and C. Wilson's votes do not even implicate a true affirmative defense, but rather form part of Plaintiff's *prima facie* proof of the claims Appellant alleged in seeking to invalidate Council's action." (R. p. 59.) Finally, Appellant never interposed a challenge to the lower court's finding where it held: "The Parties otherwise tried the issue of

disqualifying Waldrep's and C. Wilson's votes pursuant to Rule 15(b), SCRCP...The court allowed the evidence at trial and addressed the same on page 6 of its Order.") (Id.) Thus, the County errs by suggesting the issue was not adequately raised at trial because it clearly was.

IV. THE DECISION ERRED WHEN IT REVERSED THE LOWER COURT'S FINDINGS CONCERNING CONSTRUCTIVE TRUST.

The Decision erred in relation to its findings concerning Appellant's claim for constructive trust. This is true for several reasons. First, the Decision failed to address the lower court's findings about Appellant's constructive trust claim. (*See, e.g.,* R. p. 74) Specifically, the lower court found Appellant failed to prove the *prima facie* elements of such claim by the required clear and convincing standard. This proves especially true in relation to issues of fraud and constructive fraud, which the Decision agreed, Appellant failed to prove.

Second, the relief Appellant now urges in relation to its constructive trust claim (*i.e.,* partial payments into perpetuity) from Preston's retirement funds nowhere appears in Appellant's last operative pleading. As a result, the Decision erred by reversing the lower court, as both Appellant and the Decision acknowledge the "full amount" of funds Appellant attempts to place into constructive trust no longer exist to grant the relief requested. This was error.

Third, the Decision erred by mismatching its shoes. On one hand, the Decision makes a legal ruling (*i.e.,* invalidation bottomed upon absence of a quorum), but on the other hand, the Decision attempts to bootstrap such legal determination to a constructive

trust claim, which sounds in equity. These shoes do not match and the Decision consequently errs.

Fourth, the Decision proves ambiguous as to what the lower court is being asked to do. The Court should re-open its opinion and vacate the same. But, at a minimum, the Decision proves confusing as to its instructions to the lower court, which will only result in further litigation.

Last, the balance of the Decision (*i.e.,* findings: that the parties operated at arm's length, no confidential relationship existed under the circumstances, mutual representation by counsel, no fraud occurred, no constructive fraud occurred) forecloses constructive trust as a remedy, even if it could bootstrap to a legal finding, which it cannot. For these reasons, the Decision errs and the Court should grant Preston's Petition.

V. THE DECISION ERRED WHEN IT REVERSED THE LOWER COURT'S FINDINGS CONCERNING APPELLANT'S UNCLEAN HANDS.

The Decision errs as to unclean hands for several reasons. First, it fails to address the distinctions carefully drawn by the lower court in relation to the same. (*See, e.g.,* R. p. 57) Second, the Decision failed to address the lower court's analysis about sitting Council members and in-coming members acting in concert, pursuant to a common design, and as joint-tortfeasors. (*Id.* at 57-58). Last, the Decision failed to address Appellant's express ratification of such misconduct by the individual members. (Id. at 33.) Overlooked by the Court is the following resolution adopted by the County:

> Whereas, Mr. Waldrep incurred those legal fees in defending an action brought by the former county administrator of Anderson County who

challenged actions taken by Mr. Waldrep and Ms. Wilson as members of council;

Whereas, the payment of those legal feees was approved by the interim county administrator for Anderson County;

Whereas, in order to reaffirm its legal position in the Jones case Anderson County Council desire to approve and ratify the payment by the county of legal bills incurred by Mr. Waldrep in connection with the Preston—with Preston versus Wilson.

Now, therefore, it is hereby resolved by Anderson County Council that Anderson County Council hereby ratifies and approves the payment of the defense of Preston versus Wilson.

(R. at 3300, ll. 10-50) The lower court twice referenced the same in its findings. (R. at 000032 ("Actions of sitting councilmen whose legal fees for actions surrounding the following were later paid by the County...") (R. at 000033) (Bullet point 3: "According to Waldrep, the County later paid his attorney's fees ratifying his actions as within his official scope of duties...Cindy Wilson confirmed this was consistent with her recollection..."); (R. at 000057, FN 28 ("Notably Bullet Point 5 discusses improper conduct expressly ratified by Anderson County in ACC Resolution 2009-63.") The Decision errs by failing to address the same.

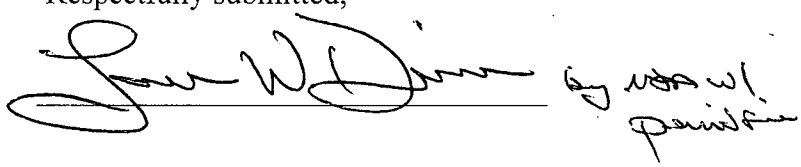
VI. THE DECISION ERRED BY INVALIDATING PRESTON'S SEVERANCE AGREEMENT.

For the reasons set forth above, the Decision erred when it invalidated Preston's Severance Agreement. Accordingly, the Court should grant Preston's Petition.

CONCLUSION

For the reasons set forth above, this Court should grant the instant Petition. The Court should grant rehearing *en banc* because the instant case involves far-ranging matters necessitating uniform treatment and similarly involves matters potentially impacting local government units statewide. Alternatively, the Court should grant rehearing to a reconstituted panel.

Respectfully submitted,



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