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,.....Respondent,

v.

Joey Preston.....Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

The undersigned hereby certifies that Preston filed a petition for rehearing with the Court of Appeals and the Court of Appeals ruled on the petition with finality on August 16, 2017. (App. 3669.)

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err when a panel consisting of only two judges issued a written an opinion with precedential value, even though S.C. Code § 14-8-80 and a binding decision of this Court mandates three judges had to participate to constitute valid judicial action?

II. Did the Court of Appeals err by invalidating Preston's severance agreement due to unpled claims—never raised until after Anderson County lost on a divergent theory?

III. Did the Court of Appeals err when it found the County timely raised the lack of a quorum as a basis for relief for the first time in its Rule 59(e) Motion?

IV. Did the Court of Appeals err when it reversed the trial court's ruling concerning the County's constructive trust claim with no supporting findings and virtually no legal analysis as to why?

V. Did the Court of Appeals' affirmance of the disqualification of Cindy Wilson's and Robert Waldrep's votes adjudicate this case into non-existence?

VI. Did the Court of Appeals err when it invalidated Preston's Severance Agreement?

STATEMENT OF THE CASE

Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioner Joey Preston ("Preston") hereby petitions this Court to grant a writ of certiorari to review the Court of Appeals' opinion in *Anderson County v. Joey Preston and the South Carolina Retirement System*, Op. No. 5490 (S.C. Ct. App. Filed May 31, 2017 Withdrawn, Substituted, Refiled August 16, 2017). (App. 3671-3696.) For the reasons set forth below, this petition should be granted, the decision of the Court of Appeals reversed or vacated, and the trial court's verdict in favor of Preston reinstated.

STATEMENT OF FACTS

Long on rhetoric but short on facts, even today, Anderson County ("the County") still bandies about such terms as "fraud" and "corruption" so frequently, one might get the misimpression the County actually proved its case. It did not. This emperor has no clothes.

This case involves a Severance Agreement executed between the County and Joey Preston ("Preston"), the former Anderson County Administrator. To date, Anderson County has spent eight years and nearly $2.4 Million Dollars seeking rescission of a $1.1 Million Dollar Severance Agreement. (Appx. 22.) As the Court may have already surmised, this case has virtually nothing to do with a *bona fide* claim for rescission. As sitting Anderson County Council member, Gracie Floyd, describes this case: "It's a vendetta. It's a vendetta." (Appx. 1620, line 16.) And, while the County pays lip-service to serving the public and vindicating the public interest, it is just that—lip-service. Political payback fuels this case.

The County enjoys portraying Preston's Severance Agreement as exorbitant, rich, a golden parachute, an enormous sum only paid due to an abuse of power. See e.g., County Petit. for Cert. But, what the County almost never discloses is the toxic political environment existing in Anderson County in 2008, when the Severance Agreement was executed. (See e.g. Appx. 3.) It was on this backdrop that a pattern of conduct intended to harass and interfere with Preston's ability to execute his duties as County Administrator unfolded. The trial court described such conduct as: "at the least…ethically questionable, if not illegal." (Appx. 34.) Certain sitting members of the then Anderson County Council participated as well as a number of council-members elect.

The harassment escalated to such an extent that Preston, still employed by the County, hired a lawyer, who put County Council on notice. In turn, Anderson County hired its own lawyer, an employment specialist. After investigating the claims and consulting with all Council members, the employment specialist informed Anderson County Council that its downside risk to Preston could exceed two million dollars ($2,000,000.00). (Appx. 461, line 8-p. 462, line 5; 623, line 22-p. 624, line 3; 1254, lines 17-25.) When discussing the severance amount, the County uniformly omits this fact.

After arm's length negotiations between counsel, the then sitting Anderson County Council agreed to settle the dispute with the $1.1 Million Severance Agreement. They did so because they thought it was in the best interest of the County. They were correct. But, what ensued when the new Council took office in 2009 was this lawsuit, a never-ending continuation of the toxic political environment in Anderson and an attempt, by Preston's political foes, to grind a man, who no longer even works in Anderson County. This Court should grant Preston's petition for a writ of certiorari. And, for the reasons set forth below, this Court should vacate the Court of Appeals' decision ("Subject Opinion" or "Decision"), reinstate the trial court's judgment in favor of Preston, and put an end to this case once and for all.

ARGUMENT

I. THE PANEL AUTHORING THE DECISION LACKED THE QUORUM REQUIRED TO ISSUE THE SUBJECT OPINION.

This Court should reverse the Subject Opinion because the Court of Appeals issued the Decision without the mandatory quorum of three judges. Instead, only two judges authored the Subject Opinion. See e.g., Appx. 3696 (Noting, third panel judge: "[N]ot participating.") The Subject Opinion, therefore, invalidly issued and proves void.

Pursuant to an express grant of constitutional authority, see e.g., S.C. Const. Ann. Art. V, § 7, the General Assembly enacted South Carolina Code § 14-8-80 ("Section 14-8-80"), which 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. Thus, for the Court of Appeals to take any valid action, a minimum of three judges must participate and two of the three participating judges must concur to reverse a trial court.

Preston's analysis in this regard accords with binding precedent of this Court. In the decision of State v. McMillian, 349 S.C. 17 (2002), this Court analyzed the Court of Appeals' mandatory quorum requirement as imposed by Section 14-8-80. The McMillian Court held: "Under S.C. Code § 14-8-80(d), three judges are necessary to constitute a quorum of the Court of Appeals, and a concurrence of the majority is necessary for reversal of the judgment below. **This Court has recognized that no valid act can be done in the absence of a quorum**." State v. McMillian, 349 S.C. at 20 (citations omitted) (emphasis added). Accepting the Court of Appeals' analysis, for the instant purposes only (see infra), the Subject Opinion proves "null and void" due to the absence of "the quorum necessary for taking valid action." (Appx. 3688.) To hold otherwise belies the analytical crux of the Subject Opinion.

Absence of the statutorily required quorum prejudices Preston in no less than two ways. First, it eliminates the possibility of one of the reasons this Court grants certiorari, namely, the existence of a "dissent in the decision of the Court of Appeals," which can never exist if only two Court of Appeals' judges can validly issue an opinion. SCACR

242(b)(2). Accordingly, such result deprives Preston of the due process afforded by this Court's own rules.

Second, allowing only two judges to issue an opinion (notably, later operating as binding precedent upon the public at large) deprived Preston of the decision-making crucible mandated by the General Assembly, a process where three experienced jurists argue, counter-argue, and only *then* issue a decision following deliberation. Absence of one-third of the number of judges statutorily mandated by South Carolina's legislature proved especially significant here, where the Court of Appeals struggled for over two years to author an opinion. (See Appx. 3671.)

Preston's analysis follows that of the United States Supreme Court and other persuasive authority examining substantially similar or identical facts as those *sub judice*. In Ayrshire Collieries Corp. v. United States, 331 U.S. 132, 137 (1947), the United States Supreme Court addressed a strikingly similar fact pattern involving an application to enjoin an order of the Interstate Commerce Commission. The Ayrshire Court held:

> [W]e cannot say that the failure of the third judge to participate in the determination of a case, where the other two are in agreement as to the result, is without significance. **The decision reached by two judges is not necessarily the one which might have been reached had they had the benefit of the views and conclusions of the third judge**. And should the latter have publicly indicated an opinion differing from that of his colleagues, his position might be helpful to the litigants and to this Court if the case were appealed…It is readily apparent that this statutory requirement has not been met in this case. While all three judges of the specially constituted court heard the oral argument, only two of them participated in the determination of the case. **The findings of fact, the conclusions of law and the judgment were all entered without the approval, concurrence or dissent of the third judge. He thus missed the very essence of the judicial function in this case -- the actual adjudication of the issues of law and fact**. All that we have here is an adjudication by two judges. But under the statute it is not enough that there be an adjudication by two judges. They lack any statutory authority to hear

> and determine an application to enjoin the enforcement of a Commission order. Any action of theirs in granting or denying such an application is as void as similar action by a single judge.

Id. at 137 (emphasis added). The same analysis applies here.

While three judges heard oral argument, when it came to "the very essence of judicial function" (i.e., "findings of fact, the conclusions of law and the judgment"), all such findings issued without the approval, concurrence or dissent of the statutorily required third judge. Such error infects and voids the Court of Appeals' Decision in *toto*.

South Carolina's sister jurisdictions have reached the same conclusion. For example, when, after oral argument, one member of a three judge panel died and the two remaining judges concurred in an opinion, the Nebraska Supreme Court reversed and held: "The very purpose of multi-judge panels is to seek the input and opinion of experienced jurists during the critical juncture of an appellate case—the actual adjudication of issues of law and fact. It does not suffice to have the adjudication of two judges under § 48-156." Hagelstein v. Swift-Eckrich Div. of ConAgra, 257 Neb. 312, 322 (Neb. 1999). And, when analyzing a statute containing language akin to Section 14-8-80, the Oregon Supreme Court held:

> We interpret the statute to mean that the presence of three judges is necessary, not only in hearing the oral argument but also in deliberating upon and in deciding the issues involved in the case. In other words, we construe the phrase "to transact business" as including the participation of the judge in the decision-making process. That part of the statute which provides that "the concurrence of two judges is necessary to pronounce judgment" was intended only to permit the court, sitting in a department of three, to dispose of a case with two judges concurring and one judge dissenting.

State v. Lloyd A. Fry Roofing Co., 263 Ore. 300, 301-302 (Or. 1972).

The instant case mirrors Ayrshire, Hagelstein, and Lloyd. The same analysis applies. Accordingly, the same result obtains; this Court should, therefore, grant Preston's petition for certiorari. And, just like the McMillian Court, this Court should vacate the Subject Opinion, issue a new, valid opinion, and correct the errors below by affirming the trial court or, as discussed below, dismiss the case altogether.

II. BY INVALIDATING PRESTON'S SEVERANCE AGREEMENT DUE TO UNPLED CLAIMS--NEVER RAISED UNTIL AFTER THE COUNTY LOST ON A DIVERGENT THEORY--THE COURT OF APPEALS ERRED.

Even if not otherwise void, the Subject Opinion errantly invalidated Preston's Severance Agreement warranting certiorari to correct the following manifest errors:

A. The Court of Appeals Granted Relief Nowhere Pled By the County.

The Court of Appeals' Decision grants unpled relief to the County. Nowhere in the County's pleading does the County seek relief—of any species--based upon Anderson County Council's lack of a quorum. (See Appx. 127-141.) Yet, the Subject Opinion, by judicial declaration, errantly grants such relief by issuing a 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 Appx. 3689.) Thus, the Court of Appeals erred, in this regard, by granting unpled declaratory relief.[1]

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[1] Of course, such finding begets yet another infirmity of the Decision. In Section 7 of the of the Decision, the Court of Appeals reverses the trial court's ruling that a declaratory action would fail to provide adequate relief. (See Appx. 3694-369.) However, critical analysis of the Decision yields an inescapable conclusion: what the Subject Opinion holds as an inadequate remedy (i.e., declaratory relief) proves identical to what the Court of Appeals actually does. (Id.) For yet another reason, this Court should grant Preston's petition for a writ of certiorari to correct the errors infecting the Court of Appeals' ruling.

B. The Court of Appeals Erred By Ignoring the Law of the Case Resulting From Findings Unchallenged By the County.

Granting relief bottomed upon the absence of a quorum, as the Subject Opinion purports to do, has the impermissible effect of uprooting established law of the case. Recognizing it failed both to allege and preserve quorum-related issues as a basis to support relief, on July 15, 2013, the County invoked Rule 15, SCRCP to file a post-judgment, Motion to Amend its Complaint ("Untimely Motion") seeking to add a claim for the exact relief the Decision presently (albeit errantly) grants and purports to allow. (See Appx. 3245-3250.)

At the time the County filed its Untimely Motion: *eight and a half months had lapsed* since the trial court concluded hearing evidence; *eight months had lapsed* since the parties submitted written closings, *two and half months had lapsed* since the trial court issued its final order and judgment, and *sixty days had lapsed* since Anderson County had filed its Motion to Amend or Alter the Judgment. (Compare filing dates on: Appx. 264 with 3052 with 3099 with 3163 with 3245.)

Predictably, the trial court denied the Untimely Motion on November 8, 2013 ("November 8th Order"). (Appx. 44 to 49.) The County could have, but did not, file a Motion to Alter or Amend the findings denying the Untimely Motion. However, apparently for perceived tactical reasons (i.e., hoping to avoid highlighting the deficiency and belatedness of its Untimely Motion), the County instead elected to pursue filing its Notice of Appeal on November 22, 2013. (Appx. 3337.) While Anderson County enjoyed the right to do so, such election does not operate to confer upon the County a legal mulligan to re-try its case on mutually exclusive factual bases and discrepant legal theories.

An overwhelming number of factual and legal findings underpinned the trial court's denial of the County's Untimely Motion. Such findings remained, at all times, wholly untouched by the issues for which the County did seek reconsideration and upon which its appeal bottomed. An inescapable conclusion ensues: all such un-appealed findings ripened to finality and became law of the case. Proctor v. Whitlark & Whitlark, Inc., 414 S.C. 318, 333 (2015) (Having "[N]ot appealed this ruling…it is now the law of the case.")

Anderson County neither moved to reconsider, nor appealed, nor preserved any challenge to any of the following findings of the trial court:

(1) "The County failed to preserve the proposed Quorum Claim, as the issue was never presented to the Court." (Appx. 44.);

(2) "At trial, [the County] actually argued the exact opposite position…instead contending [Waldrep's and C. Wilson's] votes were properly cast." (Id.);

(3) Granting the Untimely Motion, would unfairly allow the County to "try the... 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." (Appx. 45.);

(4) "[T]he County unduly delayed in seeking the" amendment as it had more than adequate opportunity to permit the amendment: during the three years prior to trial; following Waldrep's and C. Wilson's depositions; when it previously amended the Complaint, to which Preston consented; before trial; during trial; when it submitted its written closing; or any time during the "six month window between trial and issuance of judgment." (Id.)

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

To date, ignored by the County and again ignored by the Court of Appeals, all such findings belie the Subject Opinion's holding that the absence of a quorum forms a valid basis for the County to obtain relief. (See, e.g., Appx. 3685.)

Both the County and the Court of Appeals also ignored the findings of prejudice to Preston if the County could pursue the relief sought by the Untimely Motion. The trial

court specifically found that granting the Untimely Motion (i.e., allowing the County to pursue relief based upon the lack of a quorum) would:

(1) Deprive Preston of the opportunity to develop facts of prior usage and assert the same as an affirmative defense. (Appx. 45.);

(2) Deprive Preston of the opportunity to introduce evidence of new affirmative defenses corresponding to the new claim. (Appx. 45.);

(3) Deprive Preston of the opportunity to develop facts and "introduce evidence refuting the non-existence of a quorum." (Appx. 45.);[2]

(4) Deprive Preston of "the opportunity to introduce expert testimony" concerning the previously unpled claim. (Appx. 45.);

(5) Deprive Preston of "The opportunity to pursue different litigation and trial strategies, based upon claims actually asserted." (Appx. 46.);

(6) Deprive Preston of "The opportunity to develop and introduce evidence pertaining to counter-theories that the entirety of the lawsuit constituted an unauthorized act." (Appx. 46.);

(7) Cause Preston to "Re-incur duplicative discovery and trial expense after trial. (Appx. 46.);

(8) Cause Preston to "Incur an unfair disadvantage" by allowing "the County to try the case under one theory, absent certain risks" and then re-try the case "under a new theory," after it lost. (Appx. 46.);

(9) Cause Preston to "[i]ncur an unfair disadvantage" by choosing a litigation strategy based upon the then-framed issues, "which [could not] be undone." (Appx. 46.);

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[2] Lest this Court conclude no prejudice resulted in actuality, Preston would direct the Court to the Court of Appeals' finding concerning the impact of abstaining members. The Subject Opinion held: "[M]embers with conflicts could have abstained from voting, and their abstentions would have allowed them to be counted toward the quorum without tainting the entire vote." (Appx. 3688.) If this analysis proved correct, the Subject Opinion proves internally inconsistent. On the Motion to Reconsider the Transfer of Funds, C. Wilson abstained. On the Motion to Reconsider Approval of the Severance Agreement, both C. Wilson and Waldrep abstained. (See Appx. 17.) Thus, by virtue of the Court of Appeals' abstention analysis, a valid quorum existed for both votes meaning that valid action resulted.

(10) Cause Preston to lose: "the procedural right under Rule 15(b), SCRCP…to seek a continuance during trial, had the County timely pursued the instant amendment." (Appx. 46.)

To date, neither the County nor the Court of Appeals has ever addressed the prejudice incurred by Preston by allowing the County to claim relief based upon an unpled claim, which constitutes the ultimate holding of the Subject Opinion.[3]

To make matters worse, the County actually argued (in the Untimely Motion) that the Parties "tried the Quorum Claim by consent during trial." (Id. at 48.) The argument directly contradicts the Subject Opinion where it found: "[T]he question of whether a quorum existed first arose when the circuit court invalidated [four votes]…in the Final Order issue never arose at trial." (Appx. 3685.) Because the County failed to challenge any of the above findings, and because the County otherwise preserve any challenges to the same, they ripened into law of the case and the Court of Appeals committed plain error when granting affirmative relief contrary the established law of the case. See Anderson v. Short, 323 S.C. 522, 476 S.E.2d 475 (1996). Without ever addressing any of the foregoing findings of the trial court, the Subject Opinion erred by collaterally reversing such findings, all of which fall beyond the ambit of the County's Appeal. For this reason and those set-out below, this Court should grant a writ of certiorari to correct such errors.

III. THE COURT OF APPEALS BOTH FACTUALLY AND LEGALLY ERRED WHEN IT FOUND THE COUNTY TIMELY RAISED THE QUORUM ISSES FOR THE FIRST TIME IN ITS RULE 59 MOTION.

According to the Court of Appeals' reasoning, Anderson County timely sought relief based upon its quorum arguments, *for the first time*, in its post-judgment Motion under

[3] Yet another unchallenged finding includes the trial court's finding that: "the County's proposed amendment prove[d] futile." (Id.)

Rule 59, SCRCP. This holding is a crucial error on the part of the Court of Appeals since, without the same, the trial court's judgment would necessarily have been affirmed. Plain error infects such holding for no less than three reasons.

First, the findings of fact supporting the holding prove inescapably wrong. The Court of Appeals held: "Neither the County nor Preston presented an argument prior to or during trial that would have resulted in four votes being invalidated." (Appx. 3684.) Not so.

The record proves replete with examples of where the Parties argued at length concerning the validity of the votes of C. Wilson and Waldrep along with challenges to the votes of McAbee, Michael Thompson, and R. Wilson. Contrary to the Subject Opinion's holding, the total number of votes disputed by the Parties totaled five, *not* less than four. An illustrative but non-exhaustive list of examples when the Parties argued such issues includes: **(1)** Preston's Motion for Directed Verdict;[4] **(2)** the County's Response to Preston's Motion for Directed Verdict;[5] **(3)** the trial court's discussion of Preston's directed

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[4] See Appx. 1351, line 13 to 1353, line 9; Appx. 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."; Appx. 1352, lines 23-25 ("The consequence of this is that…both of their votes are discounted."); Appx. 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."); Appx. 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.)

[5] See Appx. 1378, line 19) ("I thought it was inventive, but wrong…"); Appx. 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."); Appx. 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); Appx. 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]…")

verdict motion;[6] (4) the pre-trial deposition of C. Wilson (published at trial);[7] **(5)** the County's written closing argument;[8] **(6)** Preston's written closing argument;[9] **(7)** the trial court's May 3, 2013 Final Judgment;[10] **(8)** the trial court's November 25, 2013 Reconsideration Order;[11] **(9)** the County's Untimely Motion to Amend Complaint;[12] **(10)**

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[6] See Appx. 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.")

[7] See Appx. 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); Appx. 1693, line 24-1694, line 1-3) (Admitting existing tort claims threatened against Waldrep and Wilson on night of Severance Agreement vote); Appx. 1685, line 10-22)(Questioning Wilson about scope of release as embracing "council members.")

[8] See Appx. 3068-3069 ("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.)

[9] See Appx. 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.)

[10]See Appx. 10-12 & FN5 & 7 (Lower court outlining evidence supporting Waldrep's and Wilson's conflicts of interest) (FN6 discussing the County's arguments against disqualifying Waldrep's and Wilson's votes.)

[11]See Appx. 78, Issue 15 (Again citing evidence presented at trial supporting disqualification of Waldrep's and Wilson's votes.)

[12]See Appx. 3245-3250 (Lower court should permit the amendment because: "Preston, did, however, suggest at trial that the votes of two other Council members…were tainted." (Appx. 3246); the new claim would "assert[] no 'new' factual issue in the Second Amended Complaint that has not already been tried" (Appx. 3248); the facts supporting the disqualification of Waldrep's and Wilson's votes "have been fully developed," (Appx. 3248), and later arguing amendment should be allowed to conform to evidence because parties tried disqualification of votes by consent under Rule 15(b), SCRCP. (Appx. 3248-3249.)

Preston's Appellate Brief;[13] **(11)** the Subject Opinion itself.[14] Based upon the above and serial other citations, the Court of Appeals committed plain error when it found, as a finding of fact, that the County had properly preserved its claim for relief based upon quorum issues because neither the County nor Preston presented an argument "prior to or during trial that would have resulted in four votes being invalidated." (Appx. 15.)[15]

Second, the Court of Appeals' issue preservation analysis likewise suffers from clear legal error. As the trial court found, it is axiomatic: "A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." See Appx. 58, FN 32 (Quoting inter alia Anderson Mem'l Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994).)[16] As noted supra, the prospect of the disqualification of four or more votes clearly arose at trial.

Simply nothing prevented the County from arguing that a lack of a quorum would invalidate Preston's Severance Agreement during trial. Nothing prevented the County from raising the issue in its written closing. Nothing prevented the County from raising

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

[14]The Court of Appeals Decision itself actually cites a passage where the disqualification of Waldrep's and Wilson's votes arose at trial. (Appx. 3684.)

[15] Preston notes for the Court the untenable nature of the Court of Appeals' Decision. If, as the Court of Appeals held, neither party raised an argument implicating the prospect of the invalidation of four votes, then the correct outcome should have been to remand for further proceedings on such issues, since Preston never had an opportunity to introduce his arguments and evidence (outlined above) against the quorum issues. As the prevailing party, Preston had no obligation to raise such issues until he lost the issue.

[16] See also Kan Enters. v. S.C. Dep't of Revenue, 2017 S.C. App. LEXIS 54 (Ct. App. 2017); Estate of Gill v. Clemson Univ. Found., 397 S.C. 419, 427 (Ct. App. 2012); McClurg v. Deaton, 380 S.C. 563, 579-580 (Ct. App. 2008).

the issue--at any time--during the six months before the trial court issued a final judgment. Indeed, the South Carolina Rules of Civil Procedure expressly authorize pursuing "relief in the alternative." Rule 8(a), SCRCP; see also Smith v. Strickland, 314 S.C. 192, 197 (Ct. App. 1994) (A South Carolina Plaintiff can "assert all viable causes of action, whether they are consistent or not.")

As the trial court found in an unappealed finding: "At trial, the County actually argued the exact opposite position concerning the votes of Waldrep and C. Wilson instead contending such votes were properly cast." (Appx. 58.) Thus, the trial court correctly found: "Allowing the County 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." (Appx. 45.)

The County's decision not to pursue the quorum issue was a strategic one. If Anderson County argued the disqualification of Waldrep's and Wilson's votes invalidated the Severance Agreement due to absence of a quorum, such argument tacitly acknowledged the Baird standard would apply, a position the County eschewed in favor of the "single tainted vote rule" sometimes deployed in handful of other jurisdictions. (See Appx. 3683.) If such concession were made and the trial court then refused to invalidate enough votes to undo the Severance Agreement vote, the County recognized it would necessarily lose. As a result, Anderson County made a tactical decision not to pursue relief based upon quorum issues. This was a legitimate strategy but not a basis to license the County to deploy a Rule

59 Motion as a procedural do-over to assert *post facto* claims. Nor does such strategy suddenly reinvigorate unpreserved claims.[17]

As to the preservation issue, the Subject Opinion also suffers from flawed reasoning by conflating distinct concepts. If a party raises an issue *and* the trial court does not rule upon the same, the litigant may pursue a motion under Rule 59, SCRCP to preserve the issue. I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). But, as noted supra, "A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." Anderson Mem'l Hosp. v. Hagen, 313 S.C. 497, 498 (Ct. App. 1994). To rule the issue is preserved because the trial court did not rule upon the same when a party could have, but did not, raise an issue eviscerates well-established precedent,[18] since the trial court will (almost) always *not* have ruled upon previously unraised issues. The Court of Appeals erred in finding the issue was preserved by the County's Rule 59(e) Motion; this Court should grant certiorari as a result.

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[17] Of note, the instant case proceeded as a bench trial. If the County wished to pursue the quorum issue and truly felt it was new material, the County's very capable counsel could have moved for a continuance under Rule 15(b), SCRCP. This did not occur. Similarly, 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. Anderson County did not request the same, since it 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 relief based upon the same.

[18] See Appx. 58, FN32 (Trial court decision citing: MailSource, LLC v. M.A. Bailey & Assocs., Inc., 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003); Commercial Credit Loans, Inc. v. Riddle, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App. 1999); Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998); see also Jean Hoefer Toal et al., Appellate Practice in South Carolina, 57 (2d ed. 2002).

Third, as to the preservation issue, Preston's petition for writ of certiorari should be granted because the Subject Opinion ignores numerous, key findings made by the trial court. The findings impermissibly overlooked by the Court of Appeals include:

(1) The lower court's finding as to why both the County's and Preston's pleadings embrace the disqualification of Waldrep's and Wilson's votes. (Appx. 59.)

(2) The lower court's analysis under Rule 59(e), SCRCP. (Appx. 58, FN32.)

(3) The Anderson County Code provisions indicating physical presence at the meeting site dictates whether a quorum exists under the Anderson County Code. (Appx. 47 (citing ACC §2-37(d).)

(4) The lower court's analysis about why the disqualification of Wilson's and Waldrep's votes formed part of the County's *prima facie* case. (Appx. 59 & FN33.)

(5) The lower court's analysis of the County's belated Motion under SCRCP 15(b). (Appx. 59.)

(6) The lower court's analysis of the Anderson County Code's varying voting formulations as compared to quorum requirements. (Appx. 47, FN4 & 59.)

(7) The County'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. (Appx. 47, FN5.)

(8) The definition of quorum under FOIA, which the County'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 the Court of Appeals' decision. (Appx. 47-48, FN6.)

(9) The lower court's analysis of Garris v. Governing Bd. Of S.C. Reins. Facility. (Appx. 47, FN2.)

The Court of Appeals' Decision fails to rule upon any of the trial court's findings in this regard, let alone offer reasoning why the trial court erred. The Subject Opinion simply ignores the same. Such omission constitutes error and this Court should grant certiorari to review the same.

IV. THE COURT OF APPEALS COMMITTED ERROR WHEN IT REVERSED THE LOWER COURT'S FINDINGS CONCERNING CONSTRUCTIVE TRUST.

The Decision erred in relation to its findings concerning the County's claim for constructive trust. This is true for several reasons. First, the Subject Opinion's treatment of the constructive trust claim proves impossible to discern.

As the Decision notes, the trial court made no substantive findings about the claim other than to note the constructive trust claim "no longer remained viable" in light of its other holdings. (Appx. 3689.) A constructive trust plainly does not apply to this case but without specific findings Preston cannot articulate how the Court of Appeals erred other than to say it identified no basis nor issued any findings *whatsoever* in support of its holding.

While the Subject Opinion purports to reverse the trial court, such reversal has no meaning or effect beyond the literal (i.e., the trial court's "other" findings did not foreclose a constructive trust claim). Of course, this still does not mean the County proved a constructive trust claim by clear and convincing evidence, as required. Singleton v. Mullins Lumber Co., 234 S.C. 330, 350-351, 108 S.E.2d 414, 424 (1959); Whitmire v. Adams, 273 S.C. 453, 458, 257 S.E.2d 160, 163 (1979)(Evidence must leave "no reasonable doubt as to the existence of the trust."); McNair v. Rainsford, 330 S.C. 332, 357, 499 S.E.2d 488, 501 (Ct. App. 1998). Nor does it mean one can or should exist. Nor does it actually impose a constructive trust. And, if the Court of Appeals intended for a constructive trust to be imposed, it nowhere explained the mechanics of the trust or the factual and legal basis for those mechanics.

Such omission proves highly prejudicial to Preston due to two crucial facts. First, the vast majority of Preston's retirement benefits have nothing to do with the instant dispute and do not even arguably fall within the exceptions to the anti-alienation statute. (Appx.

251, ¶¶4 & 5.) Second, as the South Carolina Retirement System ("SCRS") has already informed the County and repeatedly indicated in its briefing, the SCRS funds over which the County seeks to impose a constructive trust have already been depleted. As a result, in light of the absence of any supporting findings whatsoever, the Subject Opinion altogether errs. Thus, this Court should grant Preston's petition to remedy such deficiencies and reverse the Court of Appeals.

Third, the Decision erred by mismatching its shoes. On one hand, the Decision makes a legal ruling (i.e., invalidation bottomed upon the purported 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. Nor can they.

Moreover, the Decision makes no attempt to discern or balance the equities between the parties. Nor does the Decision attempt to explain how the balance of its holdings—exonerating Preston—support imposition of a constructive trust. Accordingly, the Court of Appeals erred in its Decision.

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

The Subject Opinion likewise errs as to its refusal to apply the unclean hands doctrine for several reasons. First, the trial court drew careful distinctions as to what actions it attributed to the County and those it did not. (Compare Appx. 31-35 with 42-43.) Attempting to view the facts through the narrowest of lenses instead of considering the totality of the circumstances, the Court of Appeals overlooked a stubborn fact: the misconduct found by the trial court as "ethically questionable, if not illegal" conduct on

the part of the County directly operated to "prejudice[] Preston in the execution of his duties." (Appx. 34.)

It was this misconduct prompting Preston to hire counsel and furnish notice of his intention to sue the County in the first place. And, it was this misconduct that prompted the 2008 Council to settle such claims by authorizing the Severance Agreement. Yet, the Court of Appeals found, contrary to the evidence of record, the listed "conduct had nothing to do with the subject matter of this litigation." (Appx. 3693.)

The trial court also included Waldrep's and C. Wilson's impermissible participation in the Severance Agreement votes as one of the items it enumerated. Such conduct plainly relates to the litigation before the Court and the Court of Appeals offered no explanation to the contrary. In short, the Court of Appeals altogether ignored the distinctions drawn by the trial court, ignored the trial court's reasoning, and provided no reasoned basis to upset the trial court's findings. (See, e.g., Appx. 57.) Moreover, the Subject Opinion failed to address the trial court's analysis about *sitting* Council members acting in concert with in-coming members, pursuant to a common scheme, design, and as joint-tortfeasors aiming to harass and "run-off" Preston. (Compare Appx. with 57-58).

Last, and perhaps most importantly, the Subject Opinion failed to address the County's express ratification of the misconduct of C. Wilson and Waldrep. (Appx. 33.) Overlooked by the Court of Appeals, the County adopted a Resolution wherein it authorized legal fees arising from the misconduct of Waldrep and C. Wilson characterizing such misconduct as "actions…taken as members of council" and approving and "ratify[ing]" payment of the same. (Appx. 3300, ll. 10-50.) The trial court twice referenced

the same in its findings.[19] Despite the County's expressly ratifying such misconduct, the Court of Appeals ignores the same and never explains how a party can simultaneously ratify and eschew the misconduct. Accordingly, the Court of Appeals erred in reversing the trial court's unclean hands finding.

VI. DISQUALIFICATION OF WILSON'S AND WALDREP'S VOTES ADJUDICATED THE INSTANT CASE INTO NON-EXISTENCE.

Affirmance of the disqualification of C. Wilson's and Waldrep's votes garners irreversible impacts on both this case and the instant appeal. County Council authorized the filing of the instant lawsuit on November 12, 2009. (Appx. 3595-3596.) Following an executive session, 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." (Appx. 3595-3596.) "The vote on the motion…resulted in four in favor (Waldrep, Moore, Ms. Wilson, Dunn), two opposed (Floyd, Allen)." (Appx. 3596.)

According to the Subject Opinion, however, both Waldrep and C. Wilson possessed "clear conflicts of interest" prohibiting their participation in votes relating to Preston's Severance Agreement. (Appx. 3696.) By operation of the Supreme Court's holding in Baird, and the Subject Opinion, both Waldrep's and Wilson's votes--authorizing Anderson County to file and fund the case at bar—must be disqualified due to their respective

[19]See Appx. 32 ("Actions of sitting councilmen whose legal fees for actions surrounding the following were later paid by the County…") (Appx. 33) (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…"); (Appx. 57, FN 28 ("Notably Bullet Point 5 discusses improper conduct expressly ratified by Anderson County in ACC Resolution 2009-63.")

disqualifications. The public vote authorizing the filing and funding of this case, then, failed by a vote of 2 (Moore and Dunn) to 2 (Floyd and Allen). (Appx. 3596.)

In turn, the County'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.

Without proper authorization, a slew of jurisdictional and jurisprudential defects ensue: the County 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 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.)

The jurisdictional defects further cascade. On November 19, 2013, four (4) members of Anderson County Council, including C. Wilson, voted in favor of Anderson County Resolution No. 2013-067 ("Invalid Resolution"), while three (3) members voted against it. (See Appx. 3644, ll. 37-3645, ll.2.) The Invalid Resolution purported to authorize the

County's attorneys "to take all necessary action to notice and fully pursue [the instant] appeal..." (See Appx. 3599, ¶10(d).)

Notwithstanding her "clear conflict of interest" as pertaining to Preston's Severance Agreement, Wilson cast the outcome determinative vote authorizing the filing of the notice of appeal in this case.[20] During the November 19, 2013, C. Wilson pursued such actions, notwithstanding fellow Council member Gracie Floyd's: openly objecting to Wilson's placing the Invalid 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. (Appx. 3603, 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 Anderson County's behalf, as no valid authority existed to do so due to County Council's failed vote on the Invalid

[20] In addition to her lengthy power point presentation urging the instant appeal, C. Wilson: placed the Invalid Resolution on Council's agenda (Appx. 3599, ¶10(d); Appx. 3603, lines 31-36)); moved for a vote on the Invalid Resolution (Appx. 3639, lines 19-26 ("The Supreme Court has basically given us a gift and all we have to do is appeal...So I'll put this resolution in the form of a motion now"); cast an outcome determinative vote against extending the time for discussion (so her fellow Council members could not be fully heard) (Appx. 3644, lines 29-33); and then cast an outcome determinative vote in favor of the Invalid Resolution authorizing the filing of the County's Notice of Appeal. (Appx. 3644, line 33- 3645, line 5.)

Resolution. As a consequence, the notice of appeal filed by the County constitutes an unauthorized, *ultra vires* action and was void *ab initio.*

Moreover, the County cannot remedy such a jurisdictional defect at this point. 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. It is well-established: "[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, 361 S.C. at 14-15; see also Mears, 287 S.C. at 169. Because the County 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 and leap-frog to the merits. Once potential jurisdictional infirmities surface, a jurisprudential duty arises to confirm the Court's subject matter jurisdiction.[21] Tatnall v. Gardner, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002) ("Court must, on its own motion, raise the issue of subject matter jurisdiction to ensure the orderly administration of justice.")[22] Once it confirmed the

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[21] The County may 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.") Second, the County's anticipated argument ignores the underlying jurisdictional defect, namely, the *ultra vires* filing of an appeal by a public body. Indeed, once colorably questioned, as the party invoking jurisdiction, the County has the obligation to prove the same. Melendez v. Sebelius, 611 Fed. Appx. 762, 763 (4th Cir. 2015); Bishop v. Bartlett, 575 F.3d 419, 424 (4th Cir. 2009).

[22]Of course, "[l]ack of subject matter jurisdiction can be raised at any time" and "can be raised for the first time on appeal." Lake v. Reeder Constr. Co., 330 S.C. 242, 248 (Ct. App. 1998).

impropriety of Waldrep's and Wilson's votes, the Court of Appeals simultaneously divested itself of subject matter jurisdiction and should have dismissed this case.

Accordingly, this Court should grant Preston's petition for certiorari, vacate the Subject Opinion, and dismiss this appeal. To hold otherwise is tantamount to an impermissible exercise of hypothetical jurisdiction.[23] Alternatively, this Court should grant certiorari, vacate the Subject Opinion, and remand this case to the trial court for evidentiary proceedings on subject matter jurisdiction issues.

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

For the reasons set forth above, the Court of Appeals erred when it invalidated Preston's Severance Agreement. Accordingly, this Court should grant certiorari to correct the lower court's errors.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari in this case.

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[23] See e.g., Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998).)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Opinion No. 5490 (S.C. Ct. App. Withdrawn, Substituted, and Refiled August 16, 2017)

Anderson County.....Respondent,

v.

Joey Preston.....Petitioner.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough, LLP, attorneys for Petitioner Joey Preston, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

Pleadings: Joey Preston's Petition for Writ of Certiorari
Appendix to Joey Preston's Petition for Writ of Certiorari

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