

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Appellate Case No. 2017-001898

RECEIVED

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S.C. SUPREME COURT

Anderson County.....Petitioner-Respondent,

v.

Joey Preston and the South Carolina Retirement System.....Defendants,
Of whom Joey Preston is Respondent-Petitioner,
And the South Carolina Retirement System is Respondent.

ANDERSON COUNTY'S RETURN TO PRESTON'S PETITION FOR WRIT OF CERTIORARI

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The Court of Appeals correctly held that Preston's Severance Agreement is invalid, and that equitable relief is available to Anderson County. Preston's arguments for revisiting these core conclusions do not justify a writ of *certiorari*. Any grant of *certiorari* by this Court should be limited to the grounds set forth in Anderson County's petition.

ARGUMENT

I. The Decision of the Court of Appeals Was Validly Issued

This appeal was argued on June 11, 2015, to a three-judge panel of the Court of Appeals that included then-Judge John Few. On February 9, 2016, Judge Few was confirmed as a Justice of this Court. The Court of Appeals' decision in this matter was issued on August 16, 2017. Judge Williams authored the decision and Judge Huff concurred in the decision. After the notation of Judge Huff's concurrence, the opinion includes a notation that Justice Few was "not participating." Preston argues that the Court of Appeals' decision is invalid as a result of this sequence of events. That argument should be rejected.

Preston bases his argument in S.C. Code § 14-8-80(d), 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." A quorum was present at the time of argument of this case, and a majority (two judges) concurred in the decision. Anderson County submits that Justice Few's elevation to the Supreme Court nearly eight months after oral argument of this case did not destroy the quorum and that the Court of Appeals' decision satisfies Section 14-8-80(d).

The only South Carolina authority cited by Preston is this Court's decision in *State v. McMillian*, 349 S.C. 17, 561 S.E.2d 602 (2002). *McMillian* does not address the circumstance presented here. Instead, *McMillian* holds that three judges must be present during oral argument to the Court of Appeals. That occurred here, and therefore *McMillian* is not dispositive.

Section 14-8-80(d) provides expressly that the “concurrence of a majority of the judges is necessary for the reversal of the judgment below.” This language allows the vote of only two judges to issue an effective opinion. Because that occurred here, the decision of the Court of Appeals complies with the statute.

This outcome is consistent with general principles, which recognize that, once a body is duly convened with a quorum, the subsequent departure of members for reasons other than disqualification for cause will not destroy a quorum. *Cf.* Delaware L. of Corp. & Bus. Org. § 7.22 (“a stockholder who is counted in reaching a quorum, cannot defeat the quorum, once established, by not voting or by walking out”).

The few decisions from other jurisdictions cited by Preston construe different statutory language, and so are not relevant. In *Ayrshire Collieries Corp. v. United States*, 331 U.S. 131 (1947), the Supreme Court construed a provision of the Urgent Deficiencies Act of 1913, which required that a “specially constituted court of three judges” hear motions seeking to enjoin orders of the Interstate Commerce Commission. 331 U.S. at 133. The provision in question provided that any challenge should be “heard *and determined*” by three judges, and the Supreme Court reversed a decision rendered by only two judges in which it was noted that a third judge had become ill and was “unable to participate *in the determination.*” 331 U.S. at 134. Neither the statutory language under review in *Ayrshire*, nor the scenario presented there, confronts this Court.

Similarly, in *Hagelstein v. Swift-Eckrich Div. of ConAgra*, 597 N.W.2d 394 (Neb. 1999), the Nebraska Supreme Court considered a decision from a panel of that state’s Workers’ Compensation Court. The decision included “only two signatures” of judges, despite a specific requirement in the applicable Nebraska statute that a quorum of three judges was necessary “to

transact business.” 597 N.W.2d at 400. The very same statutory language referencing the power of a given court “to transact business” was at issue in *State v. Lloyd A. Fry Roofing Co.*, 502 P.2d 253 (Ore. 1972), and was key to the Oregon Supreme Court’s decision. *See* 502 P.2d at 254 (“we construe the phrase ‘to transact business’ as including the participation of the judge in the decision-making process”). But that language is notably *absent* from the South Carolina statute. *See* S.C. Code § 14-8-80(d).

The entirety of the record before this Court shows only that then-Judge Few was present for oral argument of the case, that a quorum as defined in the statute was present for oral argument, that Judge Few remained on the panel that heard oral argument for over eight months after oral argument, and that a decision was issued by a majority of the panel after Judge Few was elevated to the Supreme Court. That is sufficient for a valid decision. *See Dickinson State Bank v. Ogden*, 624 S.W.2d 214, 222 (Tex. Civ. App. 1981), *overruled on other grounds*, 662 S.W.2d 330 (Tex. 1983) (decision issued by two judges of three-judge panel was valid after all three judges heard oral argument but one was subsequently elected to the Texas Supreme Court and confirmed prior to issuance of the decision).

The policy implications of overturning a decision of the Court of Appeals because one judge on a panel that heard oral argument is subsequently elevated to the Supreme Court are compelling and further counsel against invalidation here. As judicial dockets become more crowded, the standard procedure for each of three judges to either concur or dissent in a panel decision must be balanced against a need for judicial efficiency, particularly in the absence of any statutory requirement otherwise. *See Murray v. National Broadcasting Co.*, 35 F.3d 45, 48 (2d Cir. 1994) (affirming decision of two judges in which a third member of the panel recused himself just prior to oral argument and recognizing that although “consideration by three judges

is preferable,” the “quest for efficiency must be balanced against the need for judicial pluralism”).

The Court of Appeals panel was properly constituted, and a majority joined its opinion. Now-Justice Few’s vote, regardless of how it was cast, would not have changed the outcome. The decision below complied with Section 14-8-80(d).

II. The Court of Appeals Properly Decided That No Quorum Was Present to Approve the Severance Agreement

In its Complaint and presentation of evidence, Anderson County challenged only three votes cast for the Severance Package. No other votes were challenged in the pleadings. Despite this, the Circuit Court found that a total of four Council members should not have voted on Preston’s Severance Agreement. In addition to two of the three votes challenged by Anderson County (those of Michael Thompson and Ron Wilson), the Circuit Court also held that the votes of Bob Waldrep and Cindy Wilson (both of whom opposed the Package) were improper because the Severance Agreement contained a general release in favor of *all* members of Council.

The Court of Appeals agreed with this conclusion, but also agreed with Anderson County that, if four Council members were precluded from participating in the vote, it is inescapable that the Severance Agreement is void. This decision of the Court of Appeals is plainly correct, and does not warrant a grant of *certiorari*. The County Council was powerless to act with only three members able to vote.

The Anderson County Code requires that four members be present to constitute a quorum. Anderson County Code of Ordinances § 2-37(d).¹ Moreover, South Carolina law is

¹ The provision provides in full:

Quorums. A quorum shall consist of a majority of the council. In the absence of a quorum, the meeting cannot be convened. Should sufficient members leave during a meeting, the chairperson shall immediately declare a recess and attempt to

clear that a member of the body who cannot participate because of a conflict of interest *is not counted toward the quorum*. *Fidelity Fire Ins. Co. v. Harby*, 156 S.C. 238, 153 S.E. 141 (1930), is on point here. In *Harby*, the South Carolina Supreme Court voided an action of the Sumter Cemetery Association, a state-created entity, upon determining that the authorizing vote of the committee was taken without the necessary quorum because committee members later determined to be disqualified could not be counted toward the quorum. The Court held: “A quorum is not present in passing upon a matter in which one of the directors is personally interested, where only a bare quorum is present when he is counted. And likewise an interested director or committeeman cannot be counted in order to make up a quorum to pass upon any matter in which such director or committeeman is interested.” 156 S.C. at 247, 153 S.E. at 144 (internal quotation marks omitted); *see also Talbot v. James*, 259 S.C. 73, 82, 190 S.E.2d 759, 764 (1972) (corporate director disqualified for interest “may not even be counted to make a quorum at a meeting where the matter is acted upon”); *Garris v. Governing Bd. of South Carolina Reinsurance Facility*, 333 S.C. 432, 453, 511 S.E.2d 48, 59 (1998) (“member who recuses himself or is disqualified to participate in a matter due to a conflict of interest, bias, or other good cause may not be counted for purposes of a quorum at the meeting where the board acts upon the matter”); *see also* 56 AM. JUR. 2D *Municipal Corporations, Etc.* § 143 (“While a law on conflict of interest may leave quorum requirements undisturbed, recused members are not counted in determining the presence of a quorum, and action taken when, as a result, a quorum is

obtain a quorum. If, after a reasonable time, a quorum has not been obtained, the meeting shall be adjourned. Members of county council may excuse themselves briefly during a meeting without loss of a quorum; however, no vote may be taken during the temporary absence of quorum.

not present, is invalid.”). If four members of Council had disqualifying interests, there was no quorum present and the matter could not have been acted upon.

Because this conclusion is inescapable as a matter of law, Preston was not prejudiced by having the conclusion reached on appeal, and his claim that there is some reason to take further testimony on this topic is baseless. He cannot identify any fact that would make a difference in the conclusion that three members of County Council may not act.

Preston devotes considerable energy to the contention that the quorum issue was not properly before the Court of Appeals because the County did not address it, or every aspect of the Circuit Court’s underlying reasoning, in its Motion to Alter or Amend the Judgment of the Circuit Court or its appeal. This is plainly wrong. First, a motion to reconsider is required to preserve a matter for appeal only where the matter has *not* been addressed. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (“Post-trial motions are not necessary to preserve issues that have been ruled upon at trial.”). Because the Circuit Court obviously ruled on this point, there was no need for a motion for reconsideration. Second, findings of fact that fall within the scope of issues raised on appeal are preserved for review. *Cf. Green v. City of Columbia*, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct. App. 1993) (noting that findings of fact and law in an administrative hearing are law of the case “unless within the scope of the appellant’s exception . . . and its notice to the respondent”). The County plainly stated the quorum issue as one of the questions presented on appeal to the Court of Appeals, and argued this proposition in detail in its briefing to the Court of Appeals; this preserved that issue and all underlying facts. There is no requirement that every factual finding be the subject of a separate question; this would result in statements of questions presented running for pages. In addition, even where an issue is not “specifically set out” in the statement of issues on appeal (and this issue is in the

statement of issues on appeal), an appellate court may nevertheless consider the issue if it is “reasonably clear” from the appellant’s arguments. J. TOAL, ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 208 (3d ed. 2016). Especially in an equitable action like this one, where appellate review is *de novo*, Preston’s contention that the County did not preserve for review any unchallenged sentence in the Circuit Court’s opinion is plainly incorrect.

The law is clear, and the Court of Appeals applied it correctly. Four improper votes render the Severance Package void. Preston’s contention that *certiorari* is appropriate to review this decision is not well founded.

III. The Lack of a Quorum at the County Council Meeting Was Not Part of the Case Prior to the Trial Court’s Decision, and So It Was Timely Raised by Anderson County

The Court of Appeals also correctly ruled that the foregoing quorum issue was raised in a timely manner. This is so because the issue did not *exist* until the Circuit Court issued its Order invalidating four votes. Anderson County argued for the invalidation of only three votes (R. pp. 129-133), and Preston’s pleadings cannot reasonably be construed to have sought invalidation of *any* votes. Despite this, the Circuit Court reached out on its own to invalidate two other votes – those of Bob Waldrep and Cindy Wilson, who opposed the Severance Package. This extraordinary action by the Circuit Court created an extraordinary situation in this case – when the Circuit Court issued its opinion, for the first time in the case there was a prospect of disqualification of four votes, with the effect of destroying the County Council’s quorum and thus voiding approval of the Severance Agreement. Accordingly, the conclusion in the Circuit Court Order that four votes should not have been cast constituted new matter in this case, an internal inconsistency, and relief that was not sought in the pleadings. (In addition, the Circuit Court’s resulting conclusion that a matter could be validly enacted by a 3-0 vote was a clear error of law.)

This ruling was therefore appropriately addressed in Anderson County's motion to alter or amend the Order. (R. pp. 3165-3168) *See* J. TOAL, ET AL., APPELLATE PROCEDURE, *supra* at 189 (post-trial motion is appropriate vehicle to address a grant of "relief not requested," a ruling "on an issue that was never raised at trial," or "errors or inconsistencies" in final order). Where a court rules on a matter not previously before it and which the parties had not been given an adequate opportunity to address, any error in the ruling may be corrected on a Rule 59(e) motion. *See Moreau v. Allied Van Lines, Inc.*, Civil Action No. 1:07-3257-RBH, 2010 WL 2044663 (D.S.C. May 20, 2010) (vacating the court's *sua sponte* granting of summary judgment in favor of the plaintiff, where the only motion pending before the court concerned the defendant's request for summary judgment).²

Preston's contention that this challenge was already part of the case is unsound. Preston's petition devotes considerable energy to pointing out that the validity of the Waldrep and Cindy Wilson votes was *mentioned* during the trial. This, however, misses the point. Neither Anderson County nor the Court of Appeals' opinion suggests to the contrary. The point is that only three votes are challenged in the pleadings. At no time did Preston allege the invalidity of those votes in his pleadings, nor move to amend his pleadings for that purpose.

As the Court of Appeals noted in its decision, the Circuit Court confirmed with counsel during argument that the theory that the Waldrep and Cindy Wilson votes were invalid was never pled. (R. pp. 1377-1379, 1382-1383). When pressed on this point, Preston's counsel could not point to any pleadings to support it, but simply stuck to the argument, effectively urging the

² Alternatively, as Anderson County has argued in its petition for *certiorari*, the Circuit Court erred in denying Anderson County's motion to amend its Complaint post-trial to address the quorum issue. (R. pp. 44-49; pp. 3245-3270). That motion was timely because the issue did not exist until the Court itself disqualified four votes.

Court to reach beyond the pleadings to make this ruling. (R. pp. 1390-1394). Thus, when the theory was adopted in the Circuit Court's Order, new matter was injected into the case, and Preston cannot now complain that Anderson County has been allowed to address that new matter.

Only Anderson County sought the invalidation of votes, and Anderson County sought the invalidation of only three votes. Preston's argument that, despite this clear fact, Anderson County should also have argued about the potential impact of the invalidation of four votes, *before* this was part of the case, seeks to impose an unfair – indeed, impossible to meet – burden. It says a litigant must anticipate any unpled issue the trial court may decide to rule on, and address that ruling in advance – even if the trial court has correctly indicated on the record that the matter was not pled – or risk being prevented from ever addressing the issue. This is incorrect, and a motion to alter or amend is the proper vehicle for addressing such new matters.

Anderson County's response to the insertion into the case of an unpled theory was proper, and the Court of Appeals was correct in so holding. Once the issue was injected for the first time, Anderson County noted in a motion to alter or amend the judgment that if four votes were improper, then no quorum was present and the Severance Package was void. This was the earliest point at which Anderson County could be expected to make this argument, and the motion to alter or amend was the proper vehicle for doing so.

IV. The Court of Appeals Correctly Recognized that a Constructive Trust Is an Available Remedy

The Severance Package included a lump-sum payment of over \$350,000 to the South Carolina Retirement System ("SCRS"). This money was used to purchase additional service credit for Preston, allowing him to retire on a full pension – \$7,600 per month at the time of trial

– at age 45. (R. pp. 1985-1989; p. 252 at ¶ 10). This was the clearest extra-contractual payment to Preston; on no theory could he claim any right to such a subsidy.

At trial, Anderson County presented un rebutted expert testimony that, along with the un rebutted testimony from SCRS, demonstrates how the excess payments that Preston stands to receive from January 1, 2009 through the day he turns 60 (the amount of which will total approximately \$1,333,000 and had a present value as of the time of trial of roughly \$804,000) could be redirected from Preston to the County as part of a remedy upon rescission of the Severance Package. (R. pp. 251-252 at ¶¶ 5-11; pp.253-255 at ¶¶ 5-7, 11-14; pp. 2671-2681; p. 1290) This can be accomplished without harming SCRS. As the affidavits submitted by SCRS demonstrate (R. pp. 249-263), the lump sum payment from the Severance Package allowed Preston to receive payments he would not have received otherwise before age 60, and also increased his prospective benefits after that time.

The Court of Appeals correctly ruled that a constructive trust on this flow of funds would provide an appropriate remedy to Anderson County for the improper payments to Preston. The relevant statute provides for precisely this relief. S.C. Code Ann. § 9-1-1680 provides in pertinent part, “[S]ubject to the doctrine of constructive trust *ex maleficio* . . . , the right of a person to an annuity or a retirement allowance . . . are exempted from . . . levy and sale, garnishment, attachment, or any other process” (Emphasis added.) Thus, the statute allows a constructive trust on retirement fund proceeds. This makes sense, as it would be remarkable if a court of equity were powerless to undo an inappropriate purchase of service credit like the one at issue here. See *Matter of Loomer*, 198 B.R. 755, 762 (Bankr. D. Neb. 1996) (“[v]oid [ERISA] contributions are not protected by the alienation restraint and may be disgorged from the Plan”;

“funds in the account may be recovered under the federal common law theory that fraud in the inducement allows rescission of the contract”).

In seeking to impose a constructive trust on these funds in its Tenth Cause of Action (R. p. 139 at ¶¶ 81-84), the County is not seeking any relief in this case that would harm SCRS. None of the requested relief by Anderson County will change any amounts that SCRS is otherwise obligated to pay. Instead, the unrebutted testimony of SCRS itself makes it clear that the retirement benefits currently paid to Preston through the day he turns 60 are all amounts to which Preston would not have been entitled but for the Severance Agreement. (R. pp. 251-252 at ¶¶ 5-11; pp. 253-255 at ¶¶ 5-7, 11-14) In addition, because of the purchase of retirement service credit on his behalf, Preston will receive benefit amounts after the age of 60 that will exceed what he would have received without such a purchase. (*Id.*) These excess payments provide a readily available source of revenue from which to fashion an equitable remedy.

Preston’s petition fails to specify any error in the Court of Appeals’ decision on this point. While Preston characterizes the decision as “impossible to discern,” it is nothing of the sort. Preston has been receiving, and will continue to receive, pension benefits to which he would not have been entitled but for the payment by Anderson County to SCRS of about \$350,000 pursuant to the void Severance Agreement. Anderson County demonstrated at trial that the excess payments to Preston attributable to that lump sum contribution could be calculated and subjected to a constructive trust, with no harm to SCRS and no invasion of pension benefits to which Preston was legitimately entitled given his years of service and contributions. The Court of Appeals clearly and correctly ruled that this is an available remedy for Anderson County’s outlay under the void Severance Agreement.

The statute and equitable principles allow a court to fashion a remedy that includes the redirection of these funds to the County, and the Court of Appeals appropriately recognized this. Upon invalidation of the Severance Package – and to the extent that the improper payments are not made up in some other way – the only sensible outcome is to redirect the incremental benefit generated by that deposit back to Anderson County, which made the deposit.

V. Anderson County Did Not Have Unclean Hands

The Court of Appeals correctly reversed the Circuit Court’s holding that Anderson County has unclean hands in this matter. The Circuit Court’s holding, like Preston’s argument, is based entirely on conflating the conduct of individuals with conduct of Anderson County. The law in South Carolina is that “a party will have unclean hands where *the party* behaves unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. *Anderson v. Buonfonte*, 365 S.C. 482, 492, 617 S.E.2d 750, 756 (Ct. App. 2005) (emphasis added); *see also Food Lion, Inc. v. S.L. Nusbaum Ins. Agency, Inc.*, 202 F.3d 223, 228 (4th Cir. 2000) (“Unclean hands bars a party from receiving equitable relief *because of that party's own inequitable conduct.*” (emphasis added)). The County took no action at all concerning Preston’s employment. Instead, Preston voluntarily resigned his employment, and the only action of Anderson County directed toward Preston at the time was approval of the Severance Package he had maneuvered to obtain. Far from acting inequitably toward Preston, the County gave him exactly what he requested.

In accusing the County of unclean hands, Preston confuses the political rhetoric of primary winners with actual County conduct. The former will not support a finding of unclean hands. *See Wedgewood Comm. Ass’n, Inc. v. Nash*, 789 N.E.2d 495, 496 (Ind. Ct. App. 2003) (rejecting attempt to impute unclean hands to plaintiff community association on the basis of alleged actions of the association’s directors); 30A C.J.S. *Equity* § 118 (“An innocent party is, of

course, not barred from relief because of the misconduct of others for which he or she is not responsible.”).

In his petition, Preston asserts that the votes of Cindy Wilson and Bob Waldrep cast against approval of his Severance Agreement constitute unclean hands on the part of the County. This is incorrect because these votes were not on the prevailing side. They had no impact on County action, as Preston’s Severance Package was approved. So, again, these votes do not constitute inequitable conduct *by the County*, and the County did exactly what Preston wanted.

Preston also tries to identify inequitable conduct by the County by arguing that a post-Preston resolution that approved of the payment of legal expenses for Bob Waldrep constituted ratification of particular prior conduct. Given that this resolution occurred long after the transactions at issue here, it can have no bearing on the County’s right to equitable relief. Moreover, all the ordinance did was ratify reimbursement of Waldrep’s legal fees. It made no finding regarding his conduct. Preston cannot argue that reimbursing a Council Member’s fees was inequitable conduct directed toward Preston, or that it had any impact on Preston.

VI. This Case Exists

Preston asks this Court to determine that this case does not exist. It does.

Preston argues that the determination that Cindy Wilson had a conflict of interest concerning the severance agreement means that her votes concerning the filing of this lawsuit and the appeal of the Circuit Court’s decision should be disregarded. This in turn means, Preston contends, that the complaint and appeal were not validly authorized and were “*ultra vires*” acts.

As an initial matter, Preston has never before questioned the validity of Anderson County’s vote to bring the lawsuit. This fact distinguishes his argument from Anderson’s County’s own quorum argument, which the County raised via a motion for reconsideration as

soon as the issue of conflicts on the parts of Bob Waldrep and Cindy Wilson was injected into the case by the Circuit Court's decision. Preston did not take any similar action.

The only occasion on which Preston has ever questioned the validity of Anderson County's vote to pursue this appeal was in a much-belated motion in the Court of Appeals to dismiss, filed over six months after the case had been pending on appeal – and three months after Anderson's County own initial brief had been filed. In that motion Preston asked the Court of Appeals to look behind the County's duly filed Notice of Appeal to gauge its authenticity. The Court of Appeals properly rejected that invitation, as should this Court.

Preston seeks to excuse his delay in raising this issue by arguing that the validity of the notice of appeal is jurisdictional and therefore may be raised at any time. He makes no similar argument concerning the decision to file a complaint, and so that portion of his argument plainly falls away. Furthermore, to the extent the filing of a notice of appeal is jurisdictional, the jurisdictional aspect of filing is plainly met here.³ This is so for at least three reasons, all of which Anderson County set forth in greater detail in its Return to Preston's Motion to Dismiss.

First, the only facts relevant to establishing the jurisdiction of the Court of Appeals below, and the resulting jurisdiction of this Court now, show that Anderson County filed and served a timely notice of appeal, signed by its counsel of record in this case, on November 22, 2013. Preston does not argue or allege that Anderson County failed to comply with any rule governing the appellate process.

Second, Preston cites no authority that this Court can or should look behind a duly filed appeal to gauge its authenticity. That is not surprising given that this Court has actually *rejected*

³ If, hypothetically, an unauthorized appeal were filed on behalf of an entity, that entity certainly could act to repudiate the filing. However, it would make no sense to initiate subsidiary litigation in this Court to determine whether the notice was "valid" or not.

a litigant's invitation to do this. In *Hartman v. City of Columbia*, 268 S.C. 44, 232 S.E.2d 15 (1977), a landowner who had prevailed before the circuit court in seeking a variance to a zoning ordinance moved to dismiss the city's appeal of the circuit court's decision. At that time the rules allowed such a motion to be heard by the circuit court, and the circuit court denied the motion to dismiss. The landowner then appealed that decision to this Court. The landowner's counsel alleged that although he had received oral notice within the time allowed for service of the notice of intention to appeal, written notice was received outside the timeframe and had been "predated" by him to the same date he had received oral notice. This acceptance and predating, the landowner's counsel contended, had been "conditional." This Court took little time in rejecting the landowner's argument it should look behind a valid notice of appeal to extraneous facts:

We first discuss the Landowner's appeal. Counsel for the Landowner contends that the acceptance of service of the notice of intention to appeal and its predating was conditional, and would have us look behind this instrument to find an alleged irregularity. ***The instrument, signed and dated by counsel, is valid on its face*** and we refuse to allow him to impeach his own signature under the circumstances of this case.

268 S.C. at 47, 232 S.E.2d at 16 (emphasis added). Anderson County has complied with the South Carolina Rules of Appellate Procedure for noticing and preserving an appeal. This Court should decline Preston's invitation to "look behind" that clear compliance. *See Hartman*, 268 S.C. at 47, 232 S.E.2d at 16.

Third, notwithstanding the vote of Anderson County Council to bring this appeal, each of Anderson County's Interim County Administrator and its County Attorney gave independent authorization for the filing of the notice appeal. *See* Affidavits of Michael S. Pitts and W. Russell Burns, attached as Exhibits A and B to Anderson County's Return to Motion to Dismiss

in the Court of Appeals.⁴ At least in the absence of an express directive by Anderson County Council to the contrary, each of those officials has independent authority to oversee litigation and authorize an appeal on behalf of the County. *See* Anderson County Code § 2-178 (setting forth authority of county attorney); S.C. Code Ann. § 4-9-630 (setting forth powers of county administrator). In other words, even if Preston’s challenge to Cindy Wilson’s vote to authorize the appeal was sound,⁵ the invalidation of that vote would not undo the independent authorizations of the County Administrator and the County Attorney. At most, Preston’s contention that Cindy Wilson should not have voted would mean that Anderson County Council did not affirmatively approve an appeal, but it would not mean that the County Council *prohibited* an appeal. Thus the authority of the County Attorney and the County Administrator to bring this appeal remains, and Preston is flatly incorrect to suggest that filing the instant notice of appeal constituted an “*ultra vires*” act.

Preston’s attack on the subject matter jurisdiction of this Court is without merit. Given a validly filed notice of appeal, which this Court should not look behind, this Court possesses jurisdiction.

⁴ These documents are not currently a part of the Appendix to this petition, since they are outside the scope of Rule 242(e). Anderson County expects to seek to supplement the Appendix to include them.

⁵ As we set forth in considerable detail in opposition to the motion to dismiss in the Court of Appeals, by the time of the vote to appeal, the lawsuit against Cindy Wilson that formed the basis of the conclusion that she should not have voted concerning the Severance Agreement had been dismissed by Preston’s successor as County Administrator. Accordingly, there was no reason to disqualify her at that point.

VII. The Court of Appeals Correctly Ruled That Preston's Severance Agreement Is Invalid


Preston finally asserts, generally, that the Court of Appeals erred in invalidating the severance Agreement. For the reasons set forth herein and in Anderson County's petition, that decision was correct and does not need to be revisited.

CONCLUSION

Preston's petition does not identify any "special and important reasons" that, under SCACR 242, warrant a writ of *certiorari*. The Court of Appeals dealt soundly and correctly with each of the issues raised by Preston in his petition. For the reasons set forth in this return, the Supreme Court should deny *certiorari* on the grounds advanced by Preston, but should grant *certiorari* on the grounds set forth by Anderson County in its petition.

Respectfully submitted,

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**ATTORNEYS FOR APPELLANT
ANDERSON COUNTY**

October 16, 2017

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

RECEIVED
OCT 16 2017

Roger L. Couch, Circuit Court Judge

S.C. SUPREME COURT

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Joey Preston and the South Carolina Retirement
System.....Defendants,
Of whom Joey Preston Respondent-Petitioner,
And, the South Carolina Retirement System is Respondent .

CERTIFICATE OF SERVICE AND FILING

The undersigned counsel for Petitioner-Respondent certifies that a copy of Anderson County's Return to Preston's Petition for Writ of Certiorari has been served upon all counsel of record by depositing copies of same in the U.S. mail, first-class postage prepaid, addressed as follows:

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J. Theodore Gentry

October 16, 2017