

**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.

REPLY OF ANDERSON COUNTY IN SUPPORT OF ITS PETITION FOR *CERTIORARI*

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ANDERSON COUNTY**

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The core rulings by the Court of Appeals were correct, and need not be revisited or disturbed. The million-dollar Severance Agreement bestowed on Joey Preston by his friends in the outgoing County Council was improper and void, and the courts acting in equity are not powerless to fashion a remedy. The Court of Appeals did fall short, though, in failing to fashion that remedy or give clear direction on how it should be fashioned. The record in the case is adequate to allow creation of a remedy, and there is no reason to leave that undone.

Anderson County has petitioned for *certiorari* on other grounds as well. These grounds, though, are advanced for purposes of issue preservation, in the event this Court elects a broad review of the case. Anderson County's primary contention in petitioning is that this Court can proceed simply and economically by leaving the Court of Appeals' core holdings undisturbed and taking the step omitted by the Court of Appeals of fashioning an appropriate equitable remedy.

ARGUMENT

I. This Court Can and Should Fashion an Equitable Remedy

The Court of Appeals agreed with Anderson County that the Severance Agreement is void, and that equitable relief is available. Moreover, the record contains the information required to fashion a remedy. The record indicates how much Preston was paid under the void Severance Agreement, and in particular how much he will receive in pension payments that he would not have received but for those payments that should not have occurred. (Preston's contention that the amounts paid to SCRS are depleted is a distortion of the record; it is undisputed that Preston has received and continues to receive amounts that he would not receive but for the payments made under the Severance Agreement.) To the extent the passage of time has altered the precise amounts, such as Preston's current monthly payments, these are

mechanical calculations that can be done easily, after a ruling that amounts attributable to the void payment to SCRS should be returned to Anderson County.

Preston's contention that Anderson County did not seek this relief is groundless. Each cause of action in Anderson County's First Amended Complaint asked the court to "invalidate and rescind" the Severance Agreement and to "direct defendants to return all monies received" thereunder. (R. pp. 133-140) In addition, the prayer for relief sought "such other relief as [is] just and appropriate." (R. p. 140) Anderson County also included an additional prayer for relief in its proposed Second Amended Complaint, which was drafted when the Circuit Court injected the quorum issue into the case; that amendment, which should be allowed to the extent there is any concern over the scope of relief sought, further requests the Court "rescind and invalidate as null and void the Severance Agreement," "direct and order Preston to return to Anderson County all funds paid to him or paid on his behalf in connection with the Severance Agreement," and "grant . . . such other relief as the Court considers just and appropriate." (R. p. 3269)

Even laying aside the specific relief requested in each count and the prayer for relief, the general prayer alone is sufficient to encompass the equitable remedy the County seeks. Black letter law recognizes that

a court of equity may grant proper relief under the general prayer that is consistent with the case stated in the bill of complaint. Accordingly, under the prayer for general relief, a decree which accords with the equities of the cause may be shaped and rendered; the court may grant any appropriate relief that conforms to the case made by the pleadings although it is not exactly the relief which has been asked for by the special prayer. The trial court is authorized in equity proceedings to mold its judgment so as to adjust the equities of all the parties and meet the obvious necessities of each situation.

27A AMERICAN JURISPRUDENCE 2d *Equity* § 206; *accord Makozy v. Makozy*, 874 A.2d 1160, 1172 (Pa. Super. Ct. 2005) ("Under the prayer for general relief, the plaintiffs are entitled to such relief as is agreeable to the case made in the bill, though different from the specific relief prayed

for.” (quotation marks omitted)); *D’Ambrosio v. D’Ambrosio*, 610 S.E.2d 876, 883 (Va. Ct. App. 2005 (“a court of equity may grant proper relief under the general prayer that is consistent with the case stated in the bill of complaint”)); *Sherrod v. Bailey*, 580 S.W.2d 24, 28 (Tex. Civ. App. 1979) (“It is well settled that a prayer for general relief will support any relief raised by the evidence and consistent with the allegations in the petition.”).

Preston’s related argument that none of the cases cited by Anderson County looks exactly like the instant case does not mean that equity is stymied. The beauty of equity is its flexibility to fashion remedies to fit particular facts. The facts of this case are certainly unusual; this does not mean that equity is straitjacketed. *See generally* 12 SOUTH CAROLINA JURISPRUDENCE *Equity* § 8 (1992) (“[E]quity will always seek to provide a remedy where a right has been violated.”). In addition, Preston’s own knowledge of and participation in the improprieties inherent in the Severance Agreement and its passage satisfy any requirements for imposition of a constructive trust.

Finally, Preston’s suggestion that requiring him to return funds he received under a void contract would violate his due process rights rings hollow. First, it was Preston himself who injected (without pleading) the challenge to the Cindy Wilson and Bob Waldrep votes into this litigation before the Circuit Court. Anderson County argued that this contention did not belong in the lawsuit. Preston prevailed on this point, though, and he cannot now complain that *he* is prejudiced by the logical fallout from his own insistence on injecting unpled matter into the litigation. In this regard, it is also worth noting that Preston has now had the opportunity to brief and argue the quorum issue to the Court of Appeals, and to raise it to this Court; he has had an ample opportunity to be heard.

The Court of Appeals left judicial business unfinished. It held that the Severance Agreement is invalid and that Anderson County may obtain equitable relief, but it did not provide that relief or adequate guidance as to how to fashion it. This Court should grant *certiorari* for the limited purpose of providing a remedy.

II. Rescission Is Available

While equity is available generally to provide relief, this Court should overturn the holding of the Court of Appeals that rescission is unavailable. The Court of Appeals took too narrow a view of equity in general, and rescission in particular, in holding rescission always requires a full return to the *status quo ante*. It does not, and this is a prime case where rescission is available despite the foreclosing of some avenues by the passage of time.

It is important to step back and consider the alternative. If rescission, or some other equitable remedy, is not available, this means that Preston is allowed to retain a million-dollar severance payment provided to him under a void contract. This cannot be the proper outcome. The correct response, as the Fourth Circuit recognized in *Griggs v. E.I. DuPont de Nemours & Co.*, 385 F.3d 440, 452 (4th Cir. 2004)¹, is that rescission is available, even where restoration to the *status quo* is impossible, where the court can fashion an appropriate remedy. And such a remedy is plainly within the Court's power here.

Preston's attempt to dismiss *Griggs* as an ERISA case with no persuasive power here fails. The *Griggs* court was plainly addressing bedrock equitable principles that are not limited

¹ Contrary to Preston's misguided assertion, Anderson County's reliance on *Griggs* in its petition for *certiorari* does not constitute "abandonment" of other authorities that also support Anderson County's position. As the County has argued before, *see* R. pp. 3384-3385 & 3497, numerous authorities recognize that a change-of-circumstances defense is not available when a party asserting the defense is itself at fault. *See generally* 17B C.J.S. *Contracts* § 652 ("Complete restoration is not necessary if the party that is not fully restored is actually at fault."); *Thompson v. Atlantic City*, 921 A.2d 427, 442 (N.J. 2007) ("We are not persuaded . . . that equity demands that [wrongdoers] should keep their settlement monies because they have already spent them.").

to the ERISA context. Moreover, ERISA is itself a codification of the equitable law of trusts. The principle enunciated by *Griggs* is universal, and it allows rescission here. Preston is also flatly wrong that *Griggs* supports the proposition that “a plaintiff must make restoration of what he got under the contract in order to get rescission.” *Griggs* indeed acknowledges that there is some “support for such a proposition” but concludes that “[a] closer review of relevant authorities . . . reveals that the complete restoration requirement is a general one that is subject to certain exceptions” and that “courts of equity did not automatically deny rescission . . . where complete restoration of benefits could not be accomplished.” 385 F.3d at 447-49.

The primary obstacle to a full return to the *status quo* cited by the Court of Appeals is the fact that Preston cannot now be restored to the position of County Administrator. (R. p. 3691) This, though, is not a reason to allow him to keep his million-dollar severance. *See Griggs*, 385 F.3d at 452 (finding rescission appropriate and observing that the district court’s determination that the appellant could not be restored to his prior position had not been appealed); *East Derry Fire Precinct v. Nadeau*, 924 A.2d 390, 393-94 (N.H. 2007) (where severance agreement was obtained by misrepresentation, rescission was appropriate even though fire chief argued he was not returned to the status quo because he lost benefits while out of office). It must furthermore be recalled that we now know that Preston’s employment contract was invalid under *Cunningham v. Anderson County*, 402 S.C. 434, 741 S.E.2d 545 (Ct. App. 2013), because it extended beyond the term of the County Council that conferred it. Preston has no claim to be returned to a job to which he had no legitimate claim; the fact that he cannot be made County Administrator is not a bar to relief.

In arguing against equitable relief, Preston tries to resurrect his argument that Anderson County has unclean hands. In support, Preston points to the “eight bullet points” of the Circuit

Court's order, which the Court of Appeals correctly rejected. As the Court of Appeals noted, none of those eight bullet points refers to conduct *of the County*, and so they do not support a finding the County had unclean hands. Indeed, the Circuit Court's own description of those actions undermines this argument. The Circuit Court stated that "[e]ach bullet point outlines conduct involving either *sitting County Council members acting alone* or in *concert with Council-elect*." (R. p. 57; emphases added) Actions of Council members "acting alone" and actions of the "Council-elect" are not actions of Anderson County. Nothing in the record supports a finding of any action constituting unclean hands on the part of the County itself.²

Equity is not constrained in providing a remedy to undo the void Severance Agreement, and rescission is one available element of equity. In granting *certiorari* to provide an appropriate remedy, this Court may invoke rescission.

III. Anderson County's Motion to Amend Its Complaint Was Timely and Appropriate

Anderson County submits that the lack of a quorum to approve the Severance Package was properly raised by Anderson County's post-trial motion to alter or amend the judgment, and that complete relief can be provided on the current state of the record. However, to the extent that this Court directs further proceedings or concludes that the issue needs to be presented other than through the motion to alter or amend, Anderson County should be allowed to amend its Complaint to assert a claim that the Severance Agreement is invalid for lack of a quorum.

² As discussed in Anderson County's Reply to Preston's petition, Preston's argument that a post-Preston resolution approving payment of legal expenses for Bob Waldrep constituted ratification of particular conduct avails nothing. 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, the point of the ordinance was to ratify payment of Waldrep's legal fees. It made no finding regarding his conduct.

The Court of Appeals' explanation of how the quorum issue was injected into this litigation for the first time by the Circuit Court's decision is thorough and cogent, and we will not revisit that point in detail here.

There is nothing unfair to Preston about the way this issue came into the case. Again, it was Preston who pushed the unpled theory that the Waldrep and Cindy Wilson votes should be disallowed. Only Anderson County filed a *pleading* that sought to invalidate votes, and Anderson County attacked only three votes. The destroyed quorum thus entered the case only at the point that the Circuit Court – at Preston's instigation – decided to go beyond the pleadings and invalidate additional votes.

Preston's claim that he was not able to address this issue is hollow. He had – and availed himself of – the opportunity to brief it to the Circuit Court in responding to Anderson County's motion to alter or amend the judgment, as well as its motion to amend the Complaint. (R. pp. 3185-3200; pp. 3304-3324) While Preston suggests that he has been deprived of the opportunity to assert counterclaims or defenses, he cannot identify any substantial argument that he has been prevented from making. The quorum issue is a purely legal issue. If, as the Circuit Court and Court of Appeals have held, four Council Members were disqualified from voting, there was no quorum to act on the Severance Package. This is straightforward and unavoidable.

Cunningham v. Anderson County, 414 S.C. 298, 778 S.E.2d 884 (2015), is not to the contrary. There, this Court reversed a decision by the Court of Appeals affirming a trial court's determination that an employer had not breached an employment contract, but remanding the case so that the plaintiff could argue "he was wrongfully discharged as an at-will employee." This Court rejected the Court of Appeals' conclusion that the employee had preserved an argument about his "at-will" status on the mere basis of a "supplemental filing" likening his case

to another construing whether an employee under an at-will contract may assert wrongful discharge. This Court pointed out the trial court's finding that "at no point" in the litigation had the employee ever alleged he was at-will, that "nothing" had precluded the employee "from making alternative arguments based on whether he was deemed a contractual or at-will employee," and that any such argument had accordingly not been preserved. *Id.* at 303-04, 778 S.E. 2d at 886-87. Despite Preston's evidence-free insistence to the contrary, this case is markedly different. The assertion that the Waldrep and Cindy Wilson votes should be invalidated was not pled. Anderson County had no duty, or ability, to foresee and assert provisional pleadings regarding all unpled theories that the Circuit Court might adopt in its Order. Only when the Circuit Court reached out to decide an unpled matter was the absence of a quorum a part of the case. Anderson County addressed it in a timely fashion at that point.

The quorum issue was appropriately raised by Anderson County's motion to alter or amend the judgment. As noted above, though, if this Court concludes further proceedings are in order, granting Anderson County's motion to amend its Complaint to add allegations concerning the quorum issue would be appropriate.

IV. In This Case of First Impression, the Authorities Cited by Anderson County Provide a Persuasive Framework

Anderson County's argument that even one tainted vote should invalidate the Severance Agreement – because of the particular and egregious circumstances of this case – presents a question of first impression in South Carolina.

Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999), did not involve or address such an argument. *Baird* does not shed any light on Anderson County's argument, and it certainly is not dispositive. *Baird* held that invalidation of a number of votes equal to or greater than the margin of passage of a measure is *sufficient* to invalidate the measure; *Baird* did not

hold that invalidation of that number of votes is always *necessary* to invalidate a measure. That question remains open under South Carolina jurisprudence.

In addition, *Baird* involved a very different set of circumstances. *Baird* was a challenge to a measure of general application that was in the public eye, and that was subjected to multiple readings over a period of time before passage. Even if *Baird* could be read to require invalidation of a number of votes equal to the margin of passage in that particular context, it would not dictate the outcome in this vastly different case, involving a single unannounced vote on a sweetheart deal for one individual.

Anderson County relies on a number of persuasive cases from other jurisdictions that hold that – under particular and extraordinary circumstances like those present here – a single tainted vote is enough to invalidate a measure. Anderson County does not advocate for a rule that one bad vote is always enough. Instead, Anderson County believes that South Carolina should join other jurisdictions that recognize that one bad vote can be enough in an exceptional case like this one. Here, a lame duck County Council rammed through an unjustifiable payment to a single individual, with no public notice and no opportunity for debate. The mode of passage was calculated and choreographed, as can be seen from a viewing of the videotape. (R. p. 1983) The tainted voters were instrumental in presenting the Severance Package – with Ron Wilson asserting he was the only person other than the County’s lawyer who had even seen the Severance Agreement. This was the opposite of reasoned and deliberate public legislative action. The lame duck Council’s passage of the Severance Agreement was extraordinary and improper, and the analysis of other courts reviewing similar sorts of extraordinary conduct provides helpful guidance to this Court in fashioning a response.

If this Court grants *certiorari* to do more than simply fashion an appropriate remedy, it should confirm that the Severance Agreement is invalidated by the presence of one tainted vote in favor of the Agreement, on the particular facts presented here.

V. The Severance Agreement Was an Unjustifiable Sham, and Is Therefore Subject to Judicial Invalidation

The Severance Agreement was a sham. The premise for the Severance Agreement was that Preston had a valid claim for “anticipatory breach” of his Employment Agreement that justified settlement. He did not. The demand letter written on Preston’s behalf admitted as much when it acknowledged that his claim was based on what “newly elected Council Members intend, after January 2009.” (R. p. 1914) There is no record evidence of any action by Anderson County that could constitute anticipatory breach. It may be that Preston faced – and might have continued to face – political opposition. However, it was arbitrary and capricious to give Preston a golden parachute to allow him to avoid the forecast unpleasantness. Preston was free to resign if he did not want to face further political scrutiny and opposition. But he was not entitled to a million-dollar payout that included a lifetime pension, on the basis of an impossible legal theory. The Severance Package was a political exit strategy, not a settlement of a valid legal claim.

Similarly, the \$1.1 million paid to Preston far exceeded the severance amount in his Employment Agreement. Preston served at the pleasure of County Council, and at most could make a claim for that severance amount if he were terminated. (In fact, under *Cunningham*, it is now clear that Preston has no claim to the severance amount, because his Employment Agreement is void.) The Severance Agreement paid him far more than this. In particular, it provided for a lump sum payment to the Retirement System of over \$350,000 – an amount calculated to purchase a State pension for Preston at the age of 45. This payment was thus unjustifiable, arbitrary, and capricious.

The authority of the courts to invalidate such an agreement – one with no rational basis and that pays a demonstrably excessive amount – is clear. *See Moody v. City of Orangeburg*, 319 S.C. 184, 186, 460 S.E.2d 374, 375 (1995) (courts have authority to invalidate decisions of municipal governments “in cases of fraud or clear of abuse of power, or where [the decision was] unreasonable or capricious”). The lame duck Council used public money to feather a friend’s nest. That is impermissible.

Preston wrongly argues for a “fairly debatable” standard that he attributes to *Bear Enterprises v. County of Greenville*, 319 S.C. 137, 459 S.E.2d 883 (Ct. App. 1995). *Bear Enterprises* involved a challenge to a zoning decision. Observing that zoning was inherently a “legislative matter” and that courts have “no power” to zone property, the *Bear Enterprises* court looked only to other zoning cases for the “fairly debatable” standard. *See id.* at 140-41, 459 S.E.2d at 885-86. Accordingly, Anderson County believes that *Bear* is limited to zoning cases and that *Moody* provides the applicable standard. However, use of the “fairly debatable” standard would not yield a different result. Whether or not Anderson County could justifiably pay \$1.1 million for a nonexistent claim, and one that would in any event be capped at a considerably lower figure, is not “fairly debatable.” And, as a purely factual matter, the videotape of the orchestrated approval of the Severance Agreement reveals that there was no “fair debate.” (R. p. 1983)

As with the issue of invalidation by reason of a single tainted vote, this issue should be revisited only if the Court goes beyond fashioning of an appropriate remedy.

VI. Preston’s Assertion of a Claim Against the County Did Not Excuse Him from All Duties to the County

As County Administrator, Preston was the County’s chief executive officer. He owed the County a high duty of loyalty, and he retained that duty at the time that he sat silently by and

watched Council Members who were personally beholden to him vote in favor of his million dollar severance package. Preston's contention that his duties were all excused by the fact that he had asserted a claim against the County is meritless. He was certainly free to negotiate with the County in his own interest. But he retained the duty not to collude for his own benefit by sitting silent in the face of obvious and egregious impropriety.

Preston first seeks to excuse his silence by observing that the Council Members who voted for his Agreement while receiving favors from him should have policed themselves. This may be true, but it is immaterial. Any breach by them of their duties does not relieve Preston of his obligations as County Administrator.

Preston next suggests that his silence was not fraudulent because it involved a legal opinion. This argument, too, obscures the point. Preston had a duty to disclose the very material facts that Michael Thompson was actively courting Preston for employment and that Ron Wilson's daughter had just received a sweetheart deal from Preston. Legal conclusions might flow from those facts – and indeed surely would have – but Preston's breach of duty involves his silence on the facts.

Preston is also wrong – on the facts and the law – in arguing that disclosure of these two plain improprieties would not have mattered. As for the facts, Ron Wilson had the only copy of the Agreement and announced he was the only Council member to have seen it. Thompson was the Chair. Without their crucial participation, the Agreement could not even have been introduced. By allowing Thompson and Wilson to participate, Preston's silence caused passage of the Severance Agreement.

More fundamentally, however, Preston misconstrues the appropriate legal analysis and burden of proof in a case of fraudulent concealment. Black letter law provides that “when there

is nondisclosure of a material fact, the courts permit inferences of inducement and reliance.” 37 AM. JUR. 2D *Fraud and Deceit* § 238. That only makes sense, given the difficulty of providing proof about “what might have been” had a fraudulent concealment not occurred. *See Vasquez v. Superior Court*, 4 Cal. 3d 800, 814 (1971) (“The fact of reliance upon alleged false representations may be inferred from the circumstances attending the transaction . . .”).

Importantly too, in discussing the element of causation in a fraud claim, the Restatement makes clear that a misrepresentation need not be “the sole or even the predominant or decisive factor” in influencing a plaintiff’s conduct, nor is it necessary for a plaintiff to show that he “would not have acted or refrained from acting as he did unless he had relied on the misrepresentation.” RESTATEMENT (SECOND) OF TORTS § 546 cmt. (b). Instead, the inquiry is whether the representation “played a substantial part, and so has been a substantial factor, in influencing [the plaintiff’s] decision.” *Id.*

Without question, the roles that Councilmen Thompson and Wilson played in passing the Severance Package, and their votes, were a “substantial factor” in the Council making the decision it did. That is enough to support the County’s claims of breach of duty, fraud, constructive fraud, and negligent misrepresentation.

VII. This Lawsuit Did Not Breach the Severance Agreement, and There Is No Basis for an Award of Attorney’s Fees Against Anderson County

By voiding the Severance Agreement, the Court of Appeals removed any argument that Anderson County’s lawsuit violated that Agreement. Anderson County does not seek review on that point. Again, though, to the extent that this Court revisits the case more broadly, Anderson County believes the Court should clarify that this lawsuit did not breach the Severance Agreement, and that Preston has no claim for attorney’s fees.

Anderson County has cited substantial authority that, absent a very clear expression of intention to the contrary, a lawsuit challenging the validity of an agreement containing a covenant not to sue is not itself a breach of that covenant. *E.g., Winchester Drive-In Theatre, Inc. v. Warner Bros. Pictures Distrib. Corp.*, 358 F.2d 432, 436 (9th Cir. 1966). Such an “incontestability clause” is extraordinary and must be spelled out. There is no such language in the Severance Agreement. Moreover, Preston’s assertion to this Court that Anderson County’s attorney testified that this was the intent is belied by the record. In fact, Tom Bright testified that he “was not contemplating” including language to prevent a suit like this one when he drafted the covenant not to sue. (R. p. 472 ll. 16-25)

Beyond this, the covenant not to sue does not, by its terms, apply to this lawsuit. The covenant is limited to actions “relating to Mr. Preston’s employment with the County or his actions as an employee on behalf of the County . . . including . . . all actions taken by Mr. Preston within the scope and course of his employment as County Administrator.” (R. p. 1987) This lawsuit challenges the validity of the Severance Agreement itself. Mr. Preston agrees – indeed insists – that he was not acting for the County in obtaining the Severance Agreement. If he is right about this, then he has no claim for fees because the lawsuit does not involve his employment. If he is wrong, then he breached a duty to speak concerning the clear conflicts of interest infecting the voting on his Severance Agreement; in that case, the Severance Agreement should be voided and he would have no claim for breach of that void Agreement.

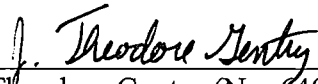
Plainly, the invalidation of the Severance Agreement would undercut any claim by Preston to a right to attorneys’ fees. But even if this Court were to conclude that the Severance Agreement was an appropriate use of public funds and should stand, Anderson County’s decision to challenge the Agreement was reasonable, for the many reasons set forth in Anderson County’s

briefing. Given that the prospect of a fee award has been raised, and in the interest of judicial economy in a matter that has lived a long life already, this Court should clarify that this suit was substantially justified under S.C. Code Ann. § 15-77-300 and that Preston has no right to recover his fees. The record is more than adequate for this resolution, and there is no reason to wait for a second round of appeals to reach that conclusion.

CONCLUSION

The Court of Appeals correctly voided the Severance Agreement, but fell short by failing to provide a remedy. No further record development is necessary to fashion a remedy, and nothing would be gained by sending the parties back to the Circuit Court to obtain an initial ruling on remedy, which would certainly be appealed. This Court should grant *certiorari* for the limited purpose of providing an appropriate remedy in light of the invalidity of the Severance Agreement.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FILING

The undersigned counsel for Petitioner-Respondent certifies that a copy of the Reply of Anderson County in Support of its Petition For *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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