

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
MAY 11 2018
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.

FINAL BRIEF OF RESPONDENT-PETITIONER JOEY PRESTON

Lane W. Davis, SC Bar No. 68796
Nelson Mullins Riley & Scarborough, LLP
lane.davis@nelsonmullins.com
104 South Main Street
Poinsett Plaza, Suite 900
PO Box 10084 (29603)
Greenville, SC 29601
(864) 250-2300

*Attorneys for Respondent-Petitioner Joey
Preston*

**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

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.

FINAL BRIEF OF RESPONDENT-PETITIONER JOEY PRESTON

Lane W. Davis, SC Bar No. 68796
Nelson Mullins Riley & Scarborough, LLP
lane.davis@nelsonmullins.com
104 South Main Street
Poinsett Plaza, Suite 900
PO Box 10084 (29603)
Greenville, SC 29601
(864) 250-2300

*Attorneys for Respondent-Petitioner Joey
Preston*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
CERTIFICATION OF COUNSEL.....	1
QUESTIONS PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
ARGUMENT	4
I. THE COURT OF APPEALS LACKED THE QUORUM REQUIRED TO ISSUE THE SUBJECT OPINION.	4
A. The South Carolina Court of Appeals Cannot Constitutionally Adjudicate Cases Without a Quorum of Three Judges.	4
B. Binding Precedent Confirms the Subject Opinion’s Invalidity Due to the Lack of a Judicial Quorum.	5
C. Persuasive Authority Mirrors McMillian’s Holding in Sister Jurisdictions Where Quorum Requirements Substantially Match That of South Carolina.	6
D. Omitting Critical Facts, Anderson County Invokes Inapposite Authority With Zero Success.	9
E. Anderson County’s Urged Position Would Upset Public Policy.	11
II. ERROR INFECTS THE SEVERANCE AGREEMENT’S INVALIDATION BASED UPON UNPLED CLAIMS RAISED ONLY AFTER THE COUNTY LOST.	14
A. The Court of Appeals Granted Relief Nowhere Pled By the County.	14
B. The Court of Appeals Erred By Ignoring the Circuit Court’s Unchallenged Findings Denying the County’s Post-Judgment Motion to Amend.	14
C. If Allowed, the Subject Opinion Would Violate Preston’s Due Process Rights.	18
III. THE COURT OF APPEALS FACTUALLY AND LEGALLY ERRED WHEN IT FOUND THE COUNTY TIMELY RAISED ITS QUORUM THEORY IN A RULE 59 MOTION	19

A.	Anderson County Failed to Preserve Its Quorum Theory of Relief By First Raising the Issue in a Rule 59 Motion.	19
B.	Despite the Court of Appeals’ Finding to the Contrary, the Validity of C. Wilson’s and Waldrep’s Votes Did Arise at Trial.	22
C.	The Subject Opinion Erred By Ignoring Key Findings of the Trial Court.	26
IV.	THE COURT OF APPEALS COMMITTED ERROR WHEN IT REVERSED THE LOWER COURT’S CONSTRUCTIVE TRUST FINDINGS.....	27
A.	The Court of Appeals Erred by Reversing the Circuit Court’s Constructive Trust Findings Without Addressing the Order Disallowing Amendment.	27
B.	Internally Inconsistent and Requiring Correction, the Constructive Trust Findings Contradict the Court of Appeals’ Findings Elsewhere in the Decision.	28
1.	Required to Impose a Constructive Trust, the County Failed to Prove Preston Committed Any Wrongdoing.....	28
2.	No Unjust Enrichment Occurred Allowing Imposition of a Constructive Trust.	31
3.	No Constructive Trust Can Exist Where the County Cannot Return the Benefit Obtained Because: “He Who Seeks Equity Must Do Equity.” .	31
4.	The Subject Opinion’s Constructive Trust Finding Cannot Be Discerned	33
V.	THE SUBJECT OPINION ERRED WHEN IT REVERSED THE LOWER COURT’S FINDINGS CONCERNING ANDERSON COUNTY’S UNCLEAN HANDS.....	33
VI.	DISQUALIFICATION OF WILSON’S AND WALDREP’S VOTES ADJUDICATED THE INSTANT CASE INTO NON-EXISTENCE.	36
VII.	THE DECISION ERRED BY INVALIDATING PRESTON’S SEVERANCE AGREEMENT	41
	CONCLUSION	41

TABLE OF AUTHORITIES

	Page(s)
Cases	
<u>All v. Prillaman</u> , 200 S.C. 279, 20 S.E.2d 741 (1942).....	29
<u>Anderson County v. Joey Preston and the South Carolina Retirement System</u> , Op. No. 5490	1, 2
<u>Anderson Mem’l Hosp., Inc. v. Hagen</u> , 313 S.C. 497, 443 S.E.2d 399 (Ct. App. 1994)	20, 22
<u>Anderson v. Short</u> , 323 S.C. 522, 476 S.E.2d 475 (1996)	18
<u>Banks v. Virginia Elec. & Power Co.</u> , 2000 U.S. App. LEXIS 2400 (4th Cir. 2000)	40
<u>Baptist Found. for Christian Educ. v. Baptist Coll. at Charleston</u> , 282 S.C. 53, 317 S.E.2d 453 (Ct. App. 1984)	30
<u>Beck v. McDonald</u> , 848 F.3d 262 (4th Cir. 2017)	39, 40
<u>Bishop v. Bartlett</u> , 575 F.3d 419 (4th Cir. 2009)	39
<u>Briggs v. Richardson</u> , 288 S.C. 537, 343 S.E.2d 653 (Ct. App. 1986)	28, 29
<u>Burch v. Burch</u> , 395 S.C. 318, 717 S.E.2d 757 (2011)	32
<u>Carolina Park Assocs., LLC v. Marino</u> , 400 S.C. 1 (2012)	29
<u>Citizens’ Bank v. Heyward</u> , 135 S.C. 190, 133 S.E. 709 (1925).....	11
<u>Columbia Pools, Inc. v. Galvin</u> , 288 S.C. 59, 339 S.E.2d 524 (Ct. App. 1986)	5
<u>Comer v. Murphy Oil USA</u> , 607 F.3d 1049 (5th Cir. 2010)	5
<u>Commercial Credit Loans, Inc. v. Riddle</u> , 334 S.C. 176, 512 S.E.2d 123 (Ct. App. 1999)	22
<u>Craig v. Bell</u> , 211 S.C. 473, 46 S.E.2d 52 (1948)	19
<u>Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.</u> , 783 F.3d 976 (4th Cir. 2015)	21
<u>Dickinson State Bank v. Ogden</u> , 624 S.W.2d 214 (Tex. Civ. App. 1981), <u>overruled on other grounds</u> , 662 S.W.2d 330 (Tex. 1983)	9, 10

<u>Donevant v. Town of Surfside Beach</u> , 414 S.C. 396, 778 S.E.2d 320 (Ct. App. 2015), <i>aff'd</i> , No. 2015-002533, 2018 WL 1077237 (Feb. 28, 2018).....	11
<u>E.E.O.C. v. Lockheed Martin Corp., Aero & Naval Sys.</u> , 116 F.3d 110 (4th Cir. 1997)	21
<u>Elam v. S.C. DOT</u> , 361 S.C. 9 (2004)	38, 39
<u>Elview Const. Co. v. N. Scott Cmty. Sch. Dist.</u> , 373 N.W.2d 138 (Iowa 1985)	32
<u>Estate of Gill v. Clemson Univ. Found.</u> , 397 S.C. 419 (Ct. App. 2012)	20
<u>Ex parte Allstate Ins. Co.</u> , 248 S.C. 550 (1966).....	37
<u>Garris v. Governing Bd. of S.C. Reins. Facility</u> . App. 47	26
<u>Glenn v. E. I. Du Pont de Nemours & Co.</u> , 254 S.C. 128, 170 S.E.2d 155 (1970)	37, 40
<u>Grady v. City of Livingston</u> , 115 Mont. 47, 141 P.2d 346 (1943)	32
<u>Greenville County v. Kenwood Enters.</u> , 353 S.C. 157 (2003)	19
<u>Hagelstein v. Swift-Eckrich Div. of ConAgra</u> , 257 Neb. 312, 597 N.W.2d 394 (Neb. 1999)	8, 9
<u>Hemingway v. Small</u> , 284 S.C. 42, 324 S.E.2d 335 (Ct. App. 1984).....	30
<u>Hickman v. Hickman</u> , 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990).....	21
<u>Hippenmeyer, Reilly, Arenz, Molter, Bode, & Gross, S.C. v. Village of Lac La Belle, Wisconsin</u> , 133 Wis. 2d 474, 394 N.W.2d 919 (Ct. App. Aug. 7, 1986)	19
<u>Holland ex rel. Knox v. Morbark, Inc.</u> , 407 S.C. 227, 754 S.E.2d 714 (Ct. App. 2014)	18
<u>Hoyt v. Hoyt</u> , 351 S.W.2d 111 (Tex. Civ. App. 1961), writ dismissed (Feb. 14, 1962)	10
<u>Hughey v. Mooney</u> , 282 S.C. 597 (Ct. App. 1984).....	37, 41
<u>I'On, LLC v. Town of Mt. Pleasant</u> , 338 S.C. 406, 526 S.E.2d 716 (2000)	22
<u>Kan Enters., Inc. v. S.C. Dep't of Revenue</u> , 420 S.C. 596, 803 S.E.2d 882 (Ct. App. 2017), <i>reh'g denied</i> (Sept. 22, 2017).....	20

<u>Kerr v. Marshall Univ. Bd. of Governors</u> , No. 2:14-CV-12333, 2018 WL 934614 (S.D.W. Va. Feb. 16, 2018)	17
<u>Lake v. Reeder Constr. Co.</u> , 330 S.C. 242 (Ct. App. 1998)	39
<u>Lollis v. Lollis</u> , 291 S.C. 525 (1987)	29
<u>Lovern v. Edwards</u> , 190 F.3d 648 (4th Cir. 1999)	40
<u>MailSource, LLC v. M.A. Bailey & Assocs., Inc.</u> , 356 S.C. 370, 588 S.E.2d 639 (Ct. App. 2003)	22
<u>Massey v. Glenn</u> , 106 S.C. 53, 90 S.E. 321 (1916)	4
<u>Maybank v. BB&T Corp.</u> , 416 S.C. 541, 787 S.E.2d 498 (2016)	21
<u>Mayfield v. Nat’l Ass’n for Stock Car Auto Racing, Inc.</u> , 674 F.3d 369 (4th Cir. 2012)	15
<u>McClurg v. Deaton</u> , 380 S.C. 563 (Ct. App. 2008)	20
<u>Mears v. Mears</u> , 287 S.C. 168 (1985)	38, 39
<u>Melendez v. Sebelius</u> , 611 Fed. Appx. 762 (4th Cir. 2015)	39, 40
<u>Mills v. Atl. Coast Line Ry. Co.</u> , 87 S.C. 158, 69 S.E. 91 (1910)	6
<u>Montgomery v. Keziah</u> , 277 S.C. 84, 282 S.E.2d 853 (1981)	5
<u>Murray v. National Broad. Co.</u> , 35 F.3d 45 (2nd Cir. 1994)	10
<u>Nalle v. City of Austin</u> , 85 Tex. 520, 22 S.W. 668 (1893)	10
<u>Pac. Emp’rs Ins. Co. v. Mathison</u> , No. 10-04-00314-CV, 2005 WL 2665454 (Tex. App. Oct. 19, 2005) (Unpublished)	10
<u>Pac. Ins. Co. v. Am. Nat. Fire Ins. Co.</u> , 148 F.3d 396 (4th Cir. 1998)	20
<u>Patterson v. Reid</u> , 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) (Party cannot raise new issue by filing Rule 59 Motion)	21
<u>Patton Boggs LLP v. Chevron Corp.</u> , 683 F.3d 397 (D.C. Cir. 2012)	22
<u>Plum Creek Dev. Co. v. City of Conway</u> , 334 S.C. 30 (1999)	19, 20
<u>Proctor v. Whitlark & Whitlark, Inc.</u> , 414 S.C. 318 (2015)	15, 16
<u>Richmond, Fredricksburg & Potomac R. Co. v. United States</u> , 945 F.2d 765 (4th Cir. 1991)	40

<u>Smith v. Barr</u> , 375 S.C. 157 (Ct. App. 2007).....	19
<u>Smith v. Strickland</u> , 314 S.C. 192 (Ct. App. 1994).....	21
<u>Smith v. Tiffany</u> , 419 S.C. 548, 799 S.E.2d 479 (2017).....	13
<u>State v. Achziger</u> , 11 Or. App. 574, 502 P.2d 1162 (1972).....	9
<u>State v. Lloyd A. Fry Roofing Co.</u> , 263 Ore. 300, 301-302 (Or. 1972)	5, 9
<u>State v. McMillian</u> , 349 S.C. 17, 561 S.E.2d 602 (2002)	6, 8, 9, 11
<u>Steel Co. v. Citizens for a Better Env't</u> , 523 U.S. 83 (1998)	39
<u>Sykes v. Reeves</u> , 195 Ga. 587, 24 S.E.2d 688 (1943).....	32
<u>Taghivand v. Rite Aid Corp.</u> , 411 S.C. 240, 768 S.E.2d 385 (2015)	11
<u>Tatnall v. Gardner</u> , 350 S.C. 135, 564 S.E.2d 377 (Ct. App. 2002)	39
<u>Thompson v. State</u> , 415 S.C. 560 (2016)	19
<u>United States Rubber Products, Inc. v. Batesburg</u> , 183 S.C. 49 (1937).....	19
<u>Wigfall v. Tideland Utils., Inc.</u> , 354 S.C. 100, 580 S.E.2d 100 (2003)	5
<u>Wilder Corp. v. Wilke</u> , 330 S.C. 71, 497 S.E.2d 731 (1998)	22
<u>Williams v. Benet</u> , 35 S.C. 150, 14 S.E. 311 (1892).....	5

Rules

S.C. App. Ct. R. 8	21
S.C. App. Ct. R. 8(a).....	19, 21
S.C. App. Ct. R. 15	14, 21
S.C. App. Ct. R. 15(a)	21
S.C. App. Ct. R. 15(b).....	17, 21, 24, 25
S.C. App. Ct. R. 20	21
S.C. App. Ct. R. 20(a)	21
S.C. App. Ct. R. 52(b).....	25
S.C. App. Ct. R. 59	15, 19, 20, 21, 22, 28

S.C. App. Ct. R. 59(e)	1, 21, 22, 26
S.C. App. Ct. R. 203(b)(1)	38
S.C. App. Ct. R. 242	1, 2
S.C. App. Ct. R. 242(b)(2)	12

Statutes

28 U.S.C.A. § 46.....	10
28 U.S.C.A. § 46(c)	10
28 U.S.C. § 46(d)	10
S.C. Code § 14-8-80	1, 5, 6, 8, 10, 11, 13
S.C. Code § 14-8-80(d)	6, 11, 12
Tex. Gov't Code Ann. § 22.222	9
Texas Gov't Code Ann. § 22.222(c)	9

Other Authorities

20 Am. Jur. 2d § 32.....	6
76 Am. Jur. 2d § 221	29
S.C. Const. Art. I, § 8	12, 13
S.C. Const. Art. I, § 23	4, 11
S.C. Const. Art. V, § 7	4, 5, 11, 13
S.C. Const. Art. V., § 16.....	13

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 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

This is an appeal from a decision issued by the South Carolina Court of Appeals on August 15, 2017, affirming and reversing in part a judgment from the Court of Common Pleas in Anderson County. (App. 3671, 1-3) The underlying appeal arose from a suit filed by Anderson County ("County") on November 12, 2009 against its former County Administrator, Joey Preston ("Preston"). (App. 84-96) The County's lawsuit sought rescission of a Severance Agreement approved by Anderson County on November 18, 2008. (App. 84-96) Preston's lawyer and the law firm of Ogletree Deakins, the County's counsel, negotiated the Severance Agreement. (App.

1914-1915) Preston filed an Answer on August 10, 2010 alleging a breach of contract counterclaim arising out of his Severance Agreement. (App. 109-122)

Assigned to the Honorable Roger L. Couch on February 28, 2012 as a complex case, App. 81, a non-jury trial was held between October 29, 2012 and November 5, 2012. (App. 264-1890) The trial court issued a final order and judgment on May 3, 2013. (App. 1-43) Anderson County filed a motion to reconsider on May 13, 2013 and then a post-judgment motion to amend its Complaint on July 15, 2013, both of which Preston opposed and were denied. (App. 3163-3176, 3245-3270, 3177-3244, 3304-3324, 44-79) Anderson County filed a notice of appeal on November 22, 2013.

The Court of Appeals conducted oral argument on June 11, 2015 and issued its opinion on May 31, 2017. (App. 3501-3528) Both parties filed Petitions for Rehearing on June 14 & 15, 2017, respectively, which were denied on August 17, 2017. (App. 3529-3539, 3540-3688, 3669-36670) Both parties then filed Petitions for Writ of Certiorari with this Court on September 15, 2017, which were granted on March 29, 2018.

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. Instead, Anderson County resorts to half-facts and innuendo. Despite what the County might say, at this point in the litigation, three separate judges have combed the evidentiary record. None have concluded Joey Preston engaged in wrongful conduct. These Anderson County emperors have 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 well over \$2.5 Million Dollars seeking rescission of a \$1.1 Million Dollar Severance Agreement. (App. 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 still fuels this case, even after eight years and counting.

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., App. 3) It was an environment where Preston and his family alike encountered unending harassment at the hand of political foes. 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." (App. 34.) Certain sitting members of the then Anderson County Council participated in the harassment 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). (App. 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 *via* 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. 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 COURT OF APPEALS LACKED THE QUORUM REQUIRED TO ISSUE THE SUBJECT OPINION.

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

A. The South Carolina Court of Appeals Cannot Constitutionally Adjudicate Cases Without a Quorum of Three Judges.

Issuance of the Subject Opinion by a panel consisting of only two judges of the Court of Appeals ("Two Judge Panel") violated Article V, § 7 of the South Carolina Constitution ("Art. V, § 7"). Article V, § 7 mandates: "The structure and organization of the Court of Appeals shall be determined by the General Assembly. The Court of Appeals shall sit in panels." Id. In turn, the provision's use of the term "shall" requires Article V, § 7 to be construed as compulsory and not merely "directory." S.C. CONST. art. I, § 23 ("The provisions of the Constitution shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or permissive by its own terms."); see also Massey v.

Glenn, 106 S.C. 53, 90 S.E. 321, 324 (1916) (Noting provision’s use of term “[s]hall” is mandatory by its “own terms.”); Montgomery v. Keziah, 277 S.C. 84, 85, 282 S.E.2d 853, 854 (1981) (rejecting construction of statute as “merely directory” due to the use of the term “shall” indicating “mandatory language.”).

In turn, pursuant to Article V, §7, the General Assembly enacted South Carolina Code § 14-8-80 (“Section 14-8-80”). Section 14-8-80 mandates: “On a panel [of the Court of Appeals], three judges shall constitute a quorum, and the concurrence of a majority of the judges is necessary for the reversal of the judgment below.”¹ S.C. Code Ann. § 14-8-80 (Supp. 2017).² Like Article V, § 7, Section 14-8-80 also denotes mandatory action through use of the term “shall.” Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003) (“The term ‘shall’ in a statute means that the action is mandatory.”) 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 before reversing a trial court. See also JEAN H. TOAL, ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 23 (3d ed. 2016).

B. Binding Precedent Confirms the Subject Opinion’s Invalidity Due to the Lack of a Judicial Quorum.

¹ Because Anderson County does not claim Section 14-8-80 contains ambiguous terms, the Court must construe the statute pursuant to its clear and unambiguous language. See Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1986) (“[I]f the language of a statute is clear, we must hold it to mean what it plainly says.”)

² In the context of a judicial panel, the term “quorum” denotes the number of judges required to support the competent transaction of court business. See Williams v. Benet, 35 S.C. 150, 14 S.E. 311, 311 (1892) (“[P]rescribing that a portion less than the whole number shall constitute a quorum, which unquestionably means such a proportion as will be competent to transact the business committed to the body or tribunal to which the term is applied...”); see also Comer v. Murphy Oil USA, 607 F.3d 1049, 1054 (5th Cir. 2010) (“Absent a quorum, no court is authorized to transact judicial business.”); State v. Lloyd A. Fry Roofing Co., 263 Ore. 300, 301-302 (Or. 1972) (Quorum constitutes number of judges “necessary to transact business.”)

Binding precedent confirms the foregoing analysis. In the decision of State v. McMillian, 349 S.C. 17, 561 S.E.2d 602 (2002), this Court analyzed Section 14-8-80's mandatory quorum requirement. 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.**

McMillian, 349 S.C. at 20 (citations omitted) (emphasis added). Accordingly, the Subject Opinion proves "null and void" due to the absence of "the quorum necessary for taking valid action." (App. 3688)³

C. Persuasive Authority Mirrors McMillian's Holding in Sister Jurisdictions Where Quorum Requirements Substantially Match That of South Carolina.

Preston's analysis is in lockstep with the United States Supreme Court's holding in Ayrshire Collieries Corp. v. United States. Ayshire involved the review of a lawsuit brought in the Southern District of Indiana to enjoin an Order of the Interstate Commerce Commission under the Urgent Deficiencies Act ("UDA"). A panel of two judges heard the case but UDA required three judges to hear and determine cases involving the relief requested. Id. at 135. Like Section 14-8-80, UDA made no provision allowing a quorum of less than three judges.

Reversing the District Court, the Ayshire Court drew the exact distinction Preston has noted but the County persistently has ignored. The Ayshire Court found: "It is significant that

³ To hold otherwise belies the analytical crux of the Subject Opinion itself and fails to square with the holding of McMillian. Id. at 20 (citing Mills v. Atl. Coast Line Ry. Co., 87 S.C. 158, 69 S.E. 91 (1910): "It is obvious that the provision of the Constitution above quoted (which . . . must be construed to be mandatory) absolutely requires that there shall be a hearing by a quorum of the Supreme Court, and this quorum cannot consist of less than three members."); see also 20 AM. JUR. 2d *Courts* § 32 ("A quorum requirement must be satisfied as of the date on which the opinion is filed finally . . . [w]hen a quorum is required but not present, the court should not act.").

this Act makes no provision for a quorum of less than three judges. Two judges of a three-judge circuit court of appeals, on the other hand, ordinarily constitute a statutory quorum for the hearing and determination of cases.” Id. at 138. The Ayrshire Court rejected the position the County urges this Court to adopt: “The Act provides, it is true, that a decision may be reached by a three-judge court if a majority of said three judges concur. But that means only that the decision of the three judges need not be unanimous; it does not imply that two judges alone may hear and determine the case.” Id. at 139.⁴

Perhaps the most striking aspect of Ayrshire concerns its discussion as to why adhering to UDA’s mandatory quorum of three judges mattered. The Supreme 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). This analysis also applies to the case at bar.

⁴ In dismissive fashion, the County purports to distinguish the cases Preston cites by calling attention to the variety of panels involved and type of relief sought. Such issues are distinctions without differences. The material inquiry concerns the constitutional or statutory formulation of quorum requirements relative to whether the body or panel can act. The County zooms its lens on the wrong inquiry and draws incorrect conclusions from its faulty premises as a result.

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

Where a constitutional provision or statute mandates participation of three appellate judges to establish a quorum, South Carolina’s sister jurisdictions have reached the same conclusion as the McMillian Court.⁵ 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, 597 N.W.2d 394 (Neb. 1999).

Similarly, 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.

⁵ It is this distinction that betrays Anderson County’s position as untrue. The authority cited by the County (to date) uniformly involves constitutional or statutory provisions establishing *panels* of three judges but prescribing *quorums* of two judges. In such instances, the judicial panel retains the power to act when one of the three judges cannot participate due to disqualification, death, illness, or the like. See infra at § D.

State v. Lloyd A. Fry Roofing Co., 263 Ore. 300, 301-302 (Or. 1972); see also State v. Achziger, 11 Or. App. 574, 502 P.2d 1162 (1972).

The instant case mirrors Ayrshire, Hagelstein, and Lloyd. The same analysis applies. The same result should, therefore, obtain. And, just like the McMillian Court, this Court should vacate the Subject Opinion and reinstate the trial court's final judgment so as to correct the errors permeating throughout the Subject Opinion. See infra.

D. Omitting Critical Facts, Anderson County Invokes Inapposite Authority With Zero Success.

To date, Anderson County has cited inapposite opinions to justify its constitutionally infirm position. See, e.g., County Return to Preston Petit., pp. 3-4. Indeed, all of the decisions cited by the County involve appellate panels where, even after disqualifying events, the number of remaining judges satisfy governing constitutional provisions and statutes.

For example, the County cites 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). Decided under Texas law, Dickinson does not depart from the legal reasoning found in McMillian, Ayrshire, Hagelstein, and Lloyd, as discussed *supra*. The outcome in Dickinson solely differs because the controlling jurisdiction (Texas) enacted different statutory requirements for establishing a judicial quorum, not, as the County suggests, because the overall analytical framework somehow changed.

Pursuant to state statute, appellate panels in Texas must consist "of not fewer than three justices." Tex. Gov't Code Ann. § 22.222. However, unlike in South Carolina, only: "A majority of a [Texas appellate] panel constitutes a quorum for the transaction of business." Texas Id. § 22.222(c). Two judges, therefore, constitute a quorum on a three judge appellate panel in Texas thereby explaining Dickinson's holding. Contrary to Anderson County's assertions,

following the unavailability of one judge, a quorum persisted with only two judges in Dickinson allowing transaction of judicial business to continue. See also Pac. Emp'rs Ins. Co. v. Mathison, No. 10-04-00314-CV, 2005 WL 2665454, at *3 (Tex. App. Oct. 19, 2005) (Unpublished). By contrast, South Carolina Code § 14-8-80 requires three judges to maintain a quorum explaining the difference in McMillian's outcome.⁶

Similarly, Anderson County relies upon Murray v. National Broad. Co., 35 F.3d 45, 48 (2nd Cir. 1994). Specifically contrasted in Ayrshire, Murray involved federal appellate panel and quorum requirements under 28 U.S.C.A. § 46 (“Section 46”). Like Texas law, three judges preside on federal appellate panels, see Section 46 (c), “a majority” of which “constitute[s] a quorum.” Section 46(d). As such, just like Dickinson, the Murray Court found federal appellate panels could proceed after losing a single judge since a quorum of two judges remained so as to allow the transaction of judicial business.⁷

To date, every opinion analyzed by Preston, including those invoked by Anderson County, trod the same legal path: determining whether the number of remaining judges satisfy the controlling quorum requirements following the unavailability of a judge assigned to an appellate panel. When yes, the panel can validly transact judicial business. When no, it cannot.

⁶ Despite constitutional amendments and statutory reformulations, this has remained unchanged under Texas law since at least 1893. See e.g., Nalle v. City of Austin, 85 Tex. 520, 549, 22 S.W. 668, 677 (1893); Hoyt v. Hoyt, 351 S.W.2d 111, 114 (Tex. Civ. App. 1961), writ dismissed (Feb. 14, 1962). Anderson County’s prior filings either misapprehended or omitted such facts. But, either way, the County’s reasoning fails.

⁷ Just as the Ayrshire Court concluded, the Court in Murray found: “This understanding of subsection 46(b) is explicitly borne out by subsection 46(d), which provides that “[a] majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c) [authorizing panels of not more than three judges], shall constitute a quorum.” 28 U.S.C. § 46(d) (1988). Murray, 35 F.3d at 47.

Here, South Carolina law requires participation of three judges to constitute a judicial forum. Only two judges issued the Subject Opinion. As a byproduct of an appellate panel lacking capacity to act, the Court of Appeals invalidly issued the Decision rendering it void. This Court should vacate the Subject Opinion and reinstate the trial court's final judgment.

E. Anderson County's Urged Position Would Upset Public Policy.

According to Anderson County, the Supreme Court will upset public policy if it follows: Article V, § 7 and Article I, § 23 of the South Carolina Constitution; South Carolina Code § 14-8-80(d); State v. McMillian, 349 S.C. 17, 561 S.E.2d 602 (2002); and persuasive authority from other jurisdictions. To the contrary, failing to abide by such authority would upset public policy, not *vice versa*. This is true for several reasons.

First, “[t]he primary source of the declaration of the public policy” in South Carolina “is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration.” Taghivand v. Rite Aid Corp., 411 S.C. 240, 244, 768 S.E.2d 385, 387 (2015).⁸ Here, pursuant to constitutional mandate, the General Assembly—through enactment of Section 14-8-80—has mandated as public policy in this state: “On a panel [of the Court of Appeals], three judges shall constitute a quorum.” S.C. Code § 14-8-80 (Supp. 2017).

Second, according to Anderson County, abiding by Section 14-8-80's mandatory quorum requirements will upend “judicial efficiency” in South Carolina's courts. See County Return to Preston Cert. Petit., p. 3. Not so. The General Assembly enacted Section 14-8-80 several decades ago. To date, one reported opinion has issued (McMillian) relating to Section 14-8-80's

⁸ See also Donevant v. Town of Surfside Beach, 414 S.C. 396, 414, 778 S.E.2d 320, 330 (Ct. App. 2015), *aff'd*, No. 2015-002533, 2018 WL 1077237 (Feb. 28, 2018); Citizens' Bank v. Heyward, 135 S.C. 190, 133 S.E. 709, 713 (1925).

mandatory quorum requirement of three judges. Moreover, Anderson County's expressed concern over "judicial efficiency" smacks of more than just a little irony and disingenuity.⁹

Third, adopting Anderson County's position upsets the proper operation of South Carolina's appellate court rules. Specifically, when determining whether to grant *certiorari*, this Court considers whether a dissent issued in the Court of Appeals. Rule 242(b)(2), SCACR. But, if a panel consists of only two judges and two judges must concur to reverse the trial court, see Section 14-8-80(d), no dissent could ever exist.

Fourth, allowing only two judges to issue an opinion (notably, later operating as binding precedent upon the public at large) would deprive Preston (and litigants similarly situated) of the decision-making crucible mandated by the General Assembly. The legislature contemplated and statutorily prescribed a process where three experienced jurists argue, counter-argue, and only *then* issue a decision following deliberation. In cases such as the one at bar, where the Court of Appeals struggled for over two years to author an opinion, the legal views of a third jurist could easily change the outcome of a case. (See App. 3671)

Last, adopting Anderson County's position would violate the Separation of Powers Doctrine. Article I, § 8 of the South Carolina Constitution states: "In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate

⁹ Contrary to its public policy concern about judicial efficiency: Anderson County has: spent over eight years and nearly \$3.0 million dollars purporting to recoup severance benefits totaling \$1.1 million dollars; Preston is now virtually broke; he no longer works in or for Anderson County; the County has voted several times to perpetuate the lawsuit; the County has voted several times to foreclose any negotiated resolution; and the County has failed to take any remedial action to ensure one of its members will no longer participate and votes upon Preston-related matters, even though she was found by both lower courts as clearly having financially disqualifying interests, and has on repeated occasions cast outcome determinative votes at critical junctures. In light of the same, it is difficult to perceive such arguments as sincere.

and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.” S.C. CONST. art. I, § 8.

Here, Article V, § 7 expressly grants the General Assembly sole authority to determine “the Court of Appeals’ structure and organization.” By enacting Section 14-8-80, the General Assembly has fulfilled its constitutional charge in this regard and has done so in mandatory terms. Yet, Anderson County asks this Court to usurp the constitutional power expressly granted to the legislative branch pursuant to Article V, § 7.

Had the General Assembly wished Section 14-8-80 to contain exceptions to its three judge mandate, the legislature could have, but did not, include such language. To alter Section 14-8-80’s operation in contravention of its plain language would impermissibly violate the constitutional mandate of Separation of Powers. S.C. CONST. art. I, § 8; Smith v. Tiffany, 419 S.C. 548, 559, 799 S.E.2d 479, 485 (2017) (“The point remains—absent a constitutional prohibition, where the General Assembly has spoken and established policy, separation of powers demands that courts honor the legislative policy determination.”)¹⁰ For these reasons and those set forth herein, this Court should vacate the Subject Opinion and reinstate the trial court’s final judgment.

¹⁰ Anderson County also contends a quorum somehow persisted even after only two judges remained on the Appellate Court’s panel. (Cty. Return, p. 2) Not so. Well over a year before the Decision first issued (May 31, 2017), Justice Few accepted the position of Supreme Court Associate Justice on February 9, 2016.¹⁰ As of that date, Justice Few could not constitutionally serve on both the Supreme Court and Court of Appeals. Article V, § 16 of the South Carolina Constitution forecloses such result: “The Justices of the Supreme Court and the judges of the Court of Appeals . . . shall not, while in office . . . hold any other office . . . [of] . . . the State . . . nor shall they be allowed any . . . perquisites of [another] office.” S.C. CONST. art. V, § 16. As of February 9, 2016, then, the presiding panel lost both its third judge and the quorum required to decide this matter.

II. ERROR INFECTS THE SEVERANCE AGREEMENT'S INVALIDATION BASED UPON UNPLED CLAIMS RAISED ONLY AFTER THE COUNTY LOST.

In addition to being void, the Subject Opinion improperly invalidated Preston's Severance Agreement resulting in 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 its pleading does Anderson County seek relief—of any kind—due to the lack of a quorum. (See App. 127-141) Yet, the Subject Opinion, by judicial declaration, errantly granted such relief by 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 App. 3689) As a result, the Court of Appeals erred by granting unpled declaratory relief.¹¹

B. The Court of Appeals Erred By Ignoring the Circuit Court's Unchallenged Findings Denying the County's Post-Judgment Motion to Amend.

Granting relief bottomed upon the absence of a quorum, as the Subject Opinion purports to do, impermissibly overruled the Circuit Court's findings specifically disallowing such claim. Recognizing it failed both to allege and preserve quorum-related issues as a basis to support relief, on July 15, 2013, Anderson County invoked Rule 15, SCRCF to file a post-judgment, Motion to Amend its Complaint ("Untimely Motion") wherein it sought to add a claim for the exact relief the Decision presently (albeit errantly) purports to grant. (See App. 3245-3250)

¹¹ Of course, such finding begets yet another infirmity of the Decision. In Section 7 of the of the Decision, the Court of Appeals reversed the trial court's ruling that a declaratory action would fail to provide adequate relief. (See App. 3694-369) However, a close 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.)

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 under Rule 59, SCRCF. (Compare filing dates on: App. 264 with 3052 with 3099 with 3163 with 3245; see also Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 674 F.3d 369, 379 (4th Cir. 2012) (“We find compelling the argument that the amendment—coming so belatedly—would change the nature of the litigation and, would therefore, prejudice the Appellees.”))

Predictably, the trial court denied the Untimely Motion on November 8, 2013 (“November 8th Order”). (App. 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 tactical reasons, the County instead elected to pursue filing its Notice of Appeal on November 22, 2013. (App. 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 theory.

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 later 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, and thus never preserved any challenge to the following findings of the trial court:

- (1) “At trial, [the County] actually argued the exact opposite position...instead contending [Waldrep’s and C. Wilson’s] votes were properly cast.” (*Id.*);
- (2) 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.” (App. 45);
- (3) “[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.*)
- (4) “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 Two Judge Panel could: invalidate Preston’s Severance Agreement based upon unpled relief; issue such relief without affording Preston an opportunity to present evidence in his defense; and find the absence of a quorum, under such circumstances, adequately supported a constructive trust claim. (*See, e.g.*, App. 3685; *see also infra*)

Both the County and the Court of Appeals likewise 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 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. (App. 45);
- (2) Deprive Preston of the opportunity to introduce evidence of new affirmative defenses corresponding to the new claim. (App. 45);
- (3) Deprive Preston of the opportunity to develop facts and “introduce evidence refuting the non-existence of a quorum.” (App. 45);¹²

¹² 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

- (4) Deprive Preston of “the opportunity to introduce expert testimony” concerning the previously unpled claim. (App. 45);
- (5) Deprive Preston of “the opportunity to pursue different litigation and trial strategies, based upon claims actually asserted.” (App. 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.” (App. 46);
- (7) Cause Preston to “re-incur duplicative discovery and trial expense after trial. (App. 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. (App. 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.” (App. 46);
- (10) Cause Preston to lose: “the procedural right under Rule 15(b), SCRCF...to seek a continuance during trial, had the County timely pursued the instant amendment.” (App. 46)

See also Kerr v. Marshall Univ. Bd. of Governors, No. 2:14-CV-12333, 2018 WL 934614, at *4 (S.D.W. Va. Feb. 16, 2018) (“A common example of a prejudicial amendment is one that ‘raises a new legal theory that would require the gathering and analysis of facts not already considered...’”)

To date, neither the County nor the Court of Appeals has rebutted that prejudice would result (and now does result) by allowing the County to assert relief based upon an unpled claim, which constitutes the ultimate holding of the Subject Opinion. Accordingly, the Circuit Court

have allowed them to be counted toward the quorum without tainting the entire vote.” (App. 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 App. 17) Thus, by virtue of the Court of Appeals’ abstention analysis, a valid quorum existed for both votes meaning that valid action resulted. Had the County timely raised the issue, Preston could have introduced record evidence establishing the same, as well as a number of other defenses negating the County’s quorum theory.

properly denied the Untimely Motion and the Two Judge Panel erred by issuing findings relating to the unpled claim.

To make matters worse, the County actually argued (in the Untimely Motion) that the Parties “tried the Quorum Claim by consent during trial.” (App. 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]...never arose at trial.” (Appx. 3685) Because the County failed to challenge any of the above findings, and because the County otherwise failed to preserve any challenges to the same, they ripened into law of the case and the Court of Appeals committed error when granting relief contrary to such findings. 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. Holland ex rel. Knox v. Morbark, Inc., 407 S.C. 227, 235, 754 S.E.2d 714, 719 (Ct. App. 2014) (Amendment issues are “Addressed to...sound discretion” of trial judge and noting: “Prejudice occurs when the amendment states a new claim... that would require the opposing party to introduce additional or different evidence...”)

Thus, when the Appellate Court errantly invalidated Preston’s Severance Agreement on grounds of a purportedly deficient quorum, it impermissibly interjected into this lawsuit: a disallowed claim for relief never asserted until long after trial, a disallowed claim for relief rejected by the Trial Court upon grounds never challenged, and a legal theory that Preston never had an opportunity to refute.

C. If Allowed, the Subject Opinion Would Violate Preston’s Due Process Rights.

Allowing such an unpled remedy is plainly improper and would violate Preston’s state and federal due process rights. It is axiomatic: a Defendant, like Preston, is entitled to know

the relief sought against him, the factual basis alleged to support such relief, and an opportunity to be heard in his defense.¹³ Thompson v. State, 415 S.C. 560, 566 (2016) (“Fundamentally, due process requires notice, a meaningful opportunity to be heard, and judicial review.”)¹⁴ Accordingly, the Supreme Court should vacate the Subject Opinion and correct the Court of Appeals’ errors by reinstating the final judgment of the Circuit Court.

III. THE COURT OF APPEALS FACTUALLY AND LEGALLY ERRED WHEN IT FOUND THE COUNTY TIMELY RAISED ITS QUORUM THEORY IN A RULE 59 MOTION.

According to the Subject Opinion, Anderson County timely sought relief based upon its quorum theory, for *the first time*, in its post-judgment Motion under Rule 59, SCRPC (“Rule 59 Motion”). App. 3515. Infected with serial errors, the Court of Appeals’ holding, in this regard, changed the outcome in the case and substantially prejudiced Preston.

A. Anderson County Failed to Preserve Its Quorum Theory of Relief By First Raising the Issue in a Rule 59 Motion.

¹³ The South Carolina Rules of Civil Procedure require litigants to plead the facts under which they claim relief. Rule 8(a), SCRPC. It is also the reason why the substantive law of South Carolina disallows claim splitting. See e.g., Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34 (1999). The Court should reverse the Appellate Court’s Decision because it offends due process and, “[i]t is well known that equity follows the law.” Smith v. Barr, 375 S.C. 157, 164 (Ct. App. 2007).

¹⁴ Anderson County’s claim that Preston was not prejudiced by the Appellate Court’s granting of relief on unpled grounds simply lacks credibility. See e.g., Cty. Response, p. 6. It is easy to declare oneself the “winner” when the opposing party had no opportunity to defend against the claim under which victory is self-declared. A non-exhaustive list of alternative counterclaims and defenses lost by Preston includes: quasi-contract claims; set-off; and indemnification under his original employment agreement’s indemnity clause, which incidentally survived termination, and is revived if the Severance Agreement is invalidated. See e.g., Craig v. Bell, 211 S.C. 473, 484, 46 S.E.2d 52, 57 (1948); United States Rubber Products, Inc. v. Batesburg, 183 S.C. 49, 56 (1937); (R. p. 001898.) Preston would also have asserted estoppel as a defense, which may lie against government bodies in factual circumstances such as these. See Greenville County v. Kenwood Enters., 353 S.C. 157, 171 (2003); Hippenmeyer, Reilly, Arenz, Molter, Bode, & Gross, S.C. v. Village of Lac La Belle, Wisconsin, 133 Wis. 2d 474, 394 N.W.2d 919 (Ct. App. Aug. 7, 1986).

It is well-settled: parties cannot use a Rule 59 Motion to assert new recovery theories: “they had the ability” to raise before or during trial. Anderson Mem’l Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994) (“A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not.”); Pac. Ins. Co. v. Am. Nat. Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998).¹⁵ Inapplicable here, an exception does exist where the new issue: “could not have been raised at trial.” JEAN H. TOAL, ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 189 (3d ed. 2016). While the Subject Opinion does not clearly state the rationale of its holding, the Two Judge Panel appears to have relied upon such exception when it found: “the prospect of a quorum being destructed did not exist until the court invalidated four Council members’ votes.” App. 3515. If correct, the Decision erred by misapprehending and misapplying what it meant for a litigant to be unable to raise the issue at trial.

Apart from its own strategy decisions, nothing impaired Anderson County’s ability to challenge the validity of Waldrep’s and C. Wilson’s votes. Similarly, nothing impaired the County’s ability to raise its quorum theory before or during trial. Nothing prevented the County from raising the theory in its written closing or—at any time—during the six months between the trial’s conclusion and issuance of the final judgment. The Subject Opinion identifies none. Nor has Anderson County.

Indeed, the exact opposite is true. Not only did Plaintiff have the ability to raise the issue, Anderson County had an obligation to pursue all legal theories it wished to preserve against Preston or they would thereafter be foreclosed. Plum Creek Dev. Co. v. City of Conway, 334 S.C.

¹⁵ See also App. 58, n. 32; Kan Enters., Inc. v. S.C. Dep’t of Revenue, 420 S.C. 596, 608, 803 S.E.2d 882, 888 (Ct. App. 2017), *reh’g denied* (Sept. 22, 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).

30, 34, 512 S.E.2d 106, 109 (1999) (*Res judicata* extends to claims which also “might have been raised in the former suit.”). For this reason, the South Carolina Rules of Civil Procedure afford litigants such as the County with broad flexibility to assert all available claims.

For example, Rule 20 specifically allows Plaintiffs to assert as many legal theories as the facts support against an adversary. See Rule 20(a), SCRCF. Similarly, Rule 8 permits assertion of alternative, even mutually exclusive, claims for relief. Rule 8(a), SCRCF; 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.”). And, Rule 15 liberally grants parties the ability to amend and conform pleadings before and during trial. Rule 15(a) & (b), SCRCF. Relatively few instances exist where a party cannot raise an issue before or during trial.¹⁶

By allowing Anderson County to assert a theory of relief *via* a Rule 59 Motion, the Subject Opinion disregarded well-established precedent interpreting the Rule. See e.g., Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) (Party cannot raise new issue by filing Rule 59 Motion); Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) (“A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.”); Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc., 783 F.3d

¹⁶ Examples of instances where a party could not address an issue at trial include circumstances such as: newly found and previously unavailable evidence, an intervening change of law, or rulings raised *sua sponte*. See, e.g., E.E.O.C. v. Lockheed Martin Corp., Aero & Naval Sys., 116 F.3d 110, 112 (4th Cir. 1997) (discussing traditional grounds supporting Rule 59 Motion including [1] accommodating an intervening change in controlling law; [2] accounting for new evidence not available at trial; or [3] correcting a clear error of law or prevent manifest injustice.); see also Maybank v. BB&T Corp., 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016) (“In construing the South Carolina Rules of Civil Procedure, our Court looks for guidance to cases interpreting the federal rules.”).

976, 984 (4th Cir. 2015) (affirming dismissal of unpled contractual claims); Patton Boggs LLP v. Chevron Corp., 683 F.3d 397, 403 (D.C. Cir. 2012).

While not entirely clear, the Subject Opinion appears to have erred 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 precedent¹⁷ since the trial court will (almost) always *not* have ruled upon previously unraised issues. As a consequence, the Court of Appeals erred in finding the issue was preserved by the County’s Rule 59(e) motion. Following *vacatur* of the Subject Opinion, this Court should correct the Court of Appeals’ error by reinstating the trial court’s final judgment.

B. Despite the Court of Appeals’ Finding to the Contrary, the Validity of C. Wilson’s and Waldrep’s Votes Did Arise at Trial.

Significant factual error also infects the Subject Opinion. Specifically, the factual findings undergirding the Court of Appeals’ treatment of the quorum issue cannot be reconciled with the record evidence. When concluding the County had timely raised its quorum theory *via* a Rule 59 Motion, the Court of Appeals found: “Neither the County nor Preston presented an argument prior

¹⁷See App. 58, n. 32 (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 H. TOAL, ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 189 (3d ed. 2016)57 (2d ed. 2002).

to or during trial that would have resulted in four votes being invalidated.” App. 3684. Such finding proves demonstrably incorrect and constitutes manifest error.

The record proves replete with instances where the Parties argued at length about 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;¹⁸ (2) the County’s Response to Preston’s Motion for Directed Verdict;¹⁹ (3) the trial court’s discussion of Preston’s directed verdict motion;²⁰ (4) the pre-trial deposition of C. Wilson

¹⁸ See App. 1351, l. 13 -1353, l. 9; *id.* 1351, ll. 13-16 (“Your Honor, you have heard evidence over the past . . . four days that would allow you, and the Court should, discount both the votes of Cindy Wilson and Bob Waldrep.”); *id.* 1352, ll. 23-25 (“The consequence of this is that . . . both of their votes are discounted.”); *id.* 1392, l. 19 - 1394, l. 9; *id.* 1394, ll. 2-9 (“[A]nd you discount Cindy Wilson and Bob Waldrep’s vote...[i]t still passes three nothing . . . [n]o matter which way you frame this . . . the vote still goes through.”); *id.* 1393, l. 22 - 1394, l. 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.)

¹⁹ See App. 1378, l. 19 (“I thought it was inventive, but wrong”); *id.* 1379, ll. 12-13 (Baird analysis should not apply to Waldrep and Wilson because the purpose of the ethics prohibition: “is to keep you from voting in favor of your own interest.”); *id.* 1380, ll. 12-16 (“The other thing that **we pointed out in the . . . course of our case** is that the benefit was not—it was not a release of Cindy Wilson and Bob Waldrep”) (emphasis added); *id.* 1381, ll. 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]”)

²⁰ See App. 1397, ll. 21-22) (“[A]s to what votes should be or shouldn’t be invalidated is also a question that’s up for interpretation.”)

(published at trial);²¹ (5) the County's written closing argument;²² (6) Preston's written closing argument;²³ and (7) the trial court's May 3, 2013 Final Judgment.²⁴

Several other record citations further confirm the holding as contrary to the record evidence. They include: the trial court's November 25, 2013 Reconsideration Order;²⁵ the County's Untimely Motion to Amend Complaint;²⁶ Preston's Appellate Brief;²⁷ and the Subject

²¹ See App. 1680, ll. 10-22 (Preston's personal attorney threatened tort claims against Wilson and Waldrep); *id.* at 1689, ll. 3-23 (admitting Court found Wilson was interfering with Preston's ability to do job); *id.* 1693, l. 24 - 1694, ll. 1-3 (admitting existing tort claims threatened against Waldrep and Wilson on night of Severance Agreement vote); *id.* 1685, ll. 10-22 (questioning Wilson about scope of release as embracing "council members.").

²² See App. 3068-69 ("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).

²³ See App. 3125, § 2(b) & n. 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).

²⁴ See App. 10-12 nn. 5 & 7 (Lower court outlining evidence supporting Waldrep's and Wilson's conflicts of interest); *id.* n. 6 (discussing the County's arguments against disqualifying Waldrep's and Wilson's votes).

²⁵ See App. 78, Issue 15 (Trial judge: specifically outlining evidence presented at trial supporting disqualification of Waldrep's and Wilson's votes.)

²⁶ See App. 3245-50 (Anderson County: arguing lower court should permit the amendment because: "Preston, did, however, suggest at trial that the votes of two other Council members . . . were tainted." (*id.* 3246), the new claim would "assert[] no 'new' factual issue in the Second Amended Complaint that has not already been tried" (*id.* 3248), the facts supporting the disqualification of Waldrep's and Wilson's votes "have been fully developed" (*id.* 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 (*id.* 3248-49)).

²⁷ See Resp. Brief, pp. 21-23 & nn. 29-32 (providing pinpoint cites of evidence supporting disqualification of Waldrep's and Wilson's votes).

Opinion itself.²⁸ Indeed, as the trial court found, the issue clearly arose during trial but contrary to the position it now urges, the County elected to “argue[] . . . the exact opposite position concerning the votes of Waldrep and C. Wilson instead contending such votes were properly cast.” App. 58.

Due to the foregoing, the trial court correctly found that allowing the County to pursue relief based upon its quorum theory: “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.” App. 45. Based upon the above and serial other citations, the two judge panel committed plain error when it found, as a finding of fact, that the County had properly preserved its quorum theory because neither the County nor Preston presented an argument “prior to or during trial that would have resulted in four votes being invalidated.” App. 15.²⁹ Such holding is simply untrue and this Court should correct the same following the Subject Opinion’s *vacatur*.³⁰

²⁸ The Court of Appeals Decision itself actually cites a passage where the disqualification of Waldrep’s and Wilson’s votes arose at trial. App. 3684.

²⁹ 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 (discussed above) against the County’s quorum theory. As the prevailing party, Preston had no obligation to raise such issues until he lost the issue.

³⁰ 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 used in handful of other jurisdictions. See App. 3683. Significantly, the instant case proceeded as a bench trial. If Plaintiff wished to pursue the quorum theory and truly viewed it as new material, Anderson County could have moved, but did not, for a continuance under Rule 15(b), SCRCp. Under Rule 52(b), SCRCp, the County also could have, but did not, request the trial court to re-open the proceedings and make additional findings. Instead, Anderson County aimed to keep the issue in

C. The Subject Opinion Erred By Ignoring Key Findings of the Trial Court.

The Two Judge Panel also ignored numerous, key findings 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, in fact, embrace the disqualification of Waldrep's and Wilson's votes. App. 59.
- (2) The lower court's analysis under Rule 59(e), SCRCF. App. 58, n. 32.
- (3) The Anderson County Code provisions indicating physical presence at the meeting site dictates whether a quorum exists under the Anderson County Code. App. 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. App. 59, n. 33.
- (5) The lower court's analysis of the County's belated Motion under SCRCF 15(b). App. 59.
- (6) The lower court's analysis of the Anderson County Code's varying voting formulations as compared to quorum requirements. App. 47, nn. 4 & 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. App. 47, n. 5.
- (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. App. 47-48, n. 6.
- (9) The lower court's analysis of Garris v. Governing Bd. of S.C. Reins. Facility. App. 47, n. 2.

The Court of Appeals' Decision fails to address any of the trial court's findings in this regard, let alone explain how the trial court erred. The Decision simply ignores the trial court's findings, while providing scant or no explanation of its own reasoning. Such omissions constitute error and implicate Preston's Due Process rights. Out of fairness, Preston should be allowed to

its hip pocket. By doing so, the County waived the right to pursue relief predicated upon the same.

understand what the Court of Appeals held, why it did so, and how it impacts his retirement funds. Otherwise, he has been deprived adequate due process. Accordingly, following *vacatur* of the Subject Opinion, this Court should correct the Court of Appeals' errors by reinstating the final judgment of the trial court.

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

Legally incorrect and fundamentally flawed, the Supreme Court should correct the Court of Appeals' treatment of the constructive trust ("Constructive Trust Finding") pursued by Anderson County. Error infects the Two Judge Panel's Constructive Trust Finding for several reasons. They include:

A. The Court of Appeals Erred by Reversing the Circuit Court's Constructive Trust Findings Without Addressing the Order Disallowing Amendment.

As referenced above, without providing any specific findings or rationale, the Two Judge Panel reversed the trial court and found:

The County contends the circuit court erred in declining to have Preston's monthly retirement benefit from SCRS placed in a constructive trust and redirected to the County. The circuit court did not reach the merits of this issue in the Final Order. Instead, the court held that, given previous findings, the County's cause of action for constructive trust no longer remain[ed] viable. In light of our holding in Part III, *supra*, we reverse.

(App. 3689) Error fundamentally infects the Constructive Trust Finding in a variety of ways.

Initially, the Court of Appeals claims to have reversed the trial court's constructive trust reasoning: "In light of our holding in Part III, *supra*..." (i.e., quorum issues). (App. 3689) However, the operative pleading in this case--Anderson County's Amended Complaint--contains no allegations about quorum issues, let alone as supporting relief. (App. 127-129) As a consequence the Decision supports the Constructive Trust Finding solely with a judicial finding that ought not have been made.

The claims relied upon by the Court of Appeals were exactly the same as what Anderson County unsuccessfully attempted to interject into the case *via* its Untimely Motion, which it pursued for the first time on July 13, 2013, eight months after the trial had ended. (App. 3245-3270) As noted *supra*, the trial court denied the Untimely Motion based upon a number of supporting findings. (Compare 49-56 *with* App. 3689) South Carolina law confers such issues to the “sound discretion” of the trial judge.³¹ And, the County never challenged such findings by way of a Rule 59 Motion or later on appeal.³² *See supra*. Without ever addressing the Circuit Court’s Order denying the Untimely Motion and ignoring the battery of findings set forth therein, *see* App. 49-56, the Court of Appeals summarily reversed the Circuit Court’s Constructive Trust Findings. But, when it did so, the Two Judge Panel committed error. Absent the unpled quorum issue, the Subject Opinion’s Constructive Trust Finding necessarily fails, as it solely supports the same. (App. 3689)

B. Internally Inconsistent and Requiring Correction, the Constructive Trust Findings Contradict the Court of Appeals’ Findings Elsewhere in the Decision.

The Constructive Trust Findings internally contradict the Court of Appeals’ findings elsewhere in the Subject Opinion. Such contradictions include:

1. Required to Impose a Constructive Trust, the County Failed to Prove Preston Committed Any Wrongdoing.

The Court of Appeals erred by confirming Preston failed to commit any wrongdoing while simultaneously reversing the Circuit Court. The decision of Briggs v. Richardson articulates how South Carolina courts define constructive trusts *ex maleficio*:

³¹ The full list of supporting findings are set forth above in Section 2.

³² Of note, throughout the filings in this case, both Anderson County and the Two Judge Panel conflate the disqualification of votes with the lapse of a quorum. Such analysis is also error, as the two concepts prove distinct.

A constructive trust, otherwise known as a trust *ex maleficio*, a trust *ex delicto*, a trust *do son tort*, an involuntary trust or an implied trust is a trust by operation of law which arises against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of a wrong or by any form of unconscionable conduct, artifice, concealment, or questionable means and against good conscience, either has obtained or holds the right to property which he ought not in equity and good conscience to hold and enjoy. 76 Am.Jur.2d Section 221 page 446. The burden of proof to establish a constructive trust requires clear and convincing evidence.

288 S.C. 537, 539, 343 S.E.2d 653, 654 (Ct. App. 1986).³³ This analysis applies here.

Despite a towering legal spend, despite conducting discovery for over three years,³⁴ and despite repeatedly slinging spurious accusations bereft of support, Anderson County failed to prove Preston committed any wrongdoing. The trial judge, a jurist with forty years of courtroom experience, heard the record evidence for over a week and found no evidence Preston committed wrongdoing. (App. 1-40) Then, after oral argument, the Court of Appeals sifted the record and

³³ See also Carolina Park Assocs., LLC v. Marino, 400 S.C. 1, 6 (2012) (A constructive trust “results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution.”); Lollis v. Lollis, 291 S.C. 525, 529 (1987); All v. Prillaman, 200 S.C. 279, 20 S.E.2d 741, 750 (1942) (“One is not chargeable as a trustee...unless he has been guilty of some wrong...no trust arises...where there is no fraud or abuse of confidence or influence.”)

³⁴ Of note, before the lawsuit ever commenced, Anderson County had already spent nearly a million dollars investigating Preston and such number continued to soar reaching nearly two million dollars ten months before trial began, and now approximates the three million dollar mark. (Appx. 1410, lines 4-8) Through the course of discovery, the County combed through and produced nearly 10,000 pages of documents and noticed over a dozen depositions. To date, three judges—two Court of Appeals judges and the trial judge—all of whom studied the evidence of record in detail have all found Preston did not commit any wrongdoing. Indeed, after spending three million dollars of tax payer funds, Anderson County, in its bloodthirsty grinding of Preston, has solely managed to prove improprieties on behalf of itself, as committed by its own members. Not one case, anywhere in the Country and certainly not cited by the County, stands for the proposition that a party can sustain claims for relief against another bottomed upon its own wrongful acts. However, that is precisely what the County argues in this case.

agreed the evidence showed Preston was not a fault. (App. 3691 (“Record...does not support a finding that Preston...was at fault.”))³⁵

Indeed, the Court of Appeals panel flatly rejected the County’s accusations of wrongdoing against Preston. For example, Anderson County accused Preston of breaching his fiduciary obligations. (App. 135-136) But, just like the trial court, see App. 27-28, the Court of Appeals rejected the claim as contrary to the evidence. (App. 3676-3677) The County accused Preston of ethics violations under state law and the Anderson County Code. (App. 133-134) But, just like the trial court, see Appx. 23-24, the Court of Appeals rejected such claims as unfounded. (App. 3678) The County accused Preston of fraud, constructive fraud, and negligent misrepresentation. (App. 135-138) But, just like the trial court see App. 24-27, the Court of Appeals concluded the record evidence established otherwise. (App. 3679-3681)

When the record evidence fails to establish “fraud, wrongdoing, or abuse of a confidential relationship,” South Carolina’s appellate courts will not, and do not, impose constructive trusts. See, e.g., Id. (“In our view of the evidence, Loretta failed to show fraud, wrongdoing, or abuse of a confidential relationship.”); see also FN4.³⁶ Despite finding the record evidence established Preston evidence of record established Preston was not at fault in way, the Court of Appeals nonetheless reversed the trial court when it found Anderson County’s constructive trust claim “no longer remain[ed] viable.” (App. 3689)

³⁵ Unfortunately, the Court of Appeals panel consisted of only two judges for approximately half of this period.

³⁶ Baptist Found. for Christian Educ. v. Baptist Coll. at Charleston, 282 S.C. 53, 60, 317 S.E.2d 453, 458 (Ct. App. 1984) (“There is no evidence that the College induced the transfer of the funds by actual or constructive fraud or wrongdoing of any kind.”); Hemingway v. Small, 284 S.C. 42, 47, 324 S.E.2d 335, 338 (Ct. App. 1984) (Holding Livingston failed to establish claim’s elements by “clear and convincing” evidence.)

2. No Unjust Enrichment Occurred Allowing Imposition of a Constructive Trust.

Providing a remedy for unjust enrichment forms the sole purpose of a constructive trust. However, no evidence of unjust enrichment exists in this case, let alone clear and convincing evidence. Anderson County and Preston executed a Severance Agreement. The County agreed to pay a severance. In return, Preston agreed to relinquish his position and execute a release. And, Preston did so. Moreover, the County has received the negotiated benefit of the bargain and it is irreversible. Of course, the County always omits the reciprocal benefit it received when claiming unjust enrichment. But, such benefit is had and received and even in the absence of a contract, which Preston denies, Anderson County remains responsible for the value of the benefit. No unjust enrichment exists in this case.

Moreover, the Court of Appeals impermissibly purports to have invalidated Preston's Severance Agreement. But, the issue was not properly before the Court. Nor was the issue presented on a perfected record. The Court of Appeals likewise lacked a quorum invalidating the Subject Opinion. Until adjudicated otherwise, the Severance Agreement remains a valid contract. No claim for unjust enrichment exists where the parties have executed a contract. In short, clear and convincing evidence of unjust enrichment did not exist before the Court of Appeals. And, the Subject Opinion cites none, nor makes any supportive findings.

3. No Constructive Trust Can Exist Where the County Cannot Return the Benefit Obtained Because: "He Who Seeks Equity Must Do Equity."

Even assuming the Court of Appeals could allow a constructive trust in the absence of wrongful conduct attributable to Preston, and even assuming unjust enrichment existed, the Court of Appeals still erred by reversing the trial court's findings. This is true because Anderson County cannot restore Preston to the *status quo ante*. (App. 3689) The Court of Appeals correctly found: "[T]he County failed to demonstrate why the facts and circumstances of this

case justify this court employing an exception to fashion a remedy that does not return the parties to their *status quo ante*.” (App. 3692) Yet, by reversing the trial court’s refusal to impose a constructive trust, the Court of Appeals appears to do just that. does just that. The Court of Appeals committed error, because the same equitable considerations applicable to rescission also constrain the imposition of constructive trusts.

“A plaintiff seeking the establishment of a constructive trust is subject to the ordinary rule of equity.” Mary F. Radford, George Gleason Bogert, & George Taylor Bogert, § 472. Theory of creation, The Law of Trusts & Trustees. And, “Equity makes no distinction between public bodies and private persons as to obligations arising out of contract.” Grady v. City of Livingston, 115 Mont. 47, 141 P.2d 346, 353 (1943). It is axiomatic: “[one] who seeks equity must do equity.” Burch v. Burch, 395 S.C. 318, 331, 717 S.E.2d 757, 764 (2011). Such fundamental legal tenets apply here.

When “seeking to have the court impress a [constructive] trust,” a plaintiff, in essence, seeks restoration of the “status quo.” Sykes v. Reeves, 195 Ga. 587, 591, 24 S.E.2d 688, 691 (1943). Thus, “[b]efore equity will grant [] such relief,” litigants such as the County “must offer to do equity” by tendering to “the defendant that which [they] admittedly received in the transaction.” Id.; see also Elview Const. Co. v. N. Scott Cmty. Sch. Dist., 373 N.W.2d 138, 143–44 (Iowa 1985).

Here, however, all parties agree: Anderson County cannot restore Preston to his prior position as County Administrator. Nor can the County revive Preston’s prior legal claims against Anderson County. Nor can the County revive Preston’s prior legal claims against certain Council members from the 2008 County Council. Anderson County obtained the benefits from

the Severance Agreement and cannot return such benefits to Preston. As a consequence, just like the remedy of rescission, a constructive trust cannot be imposed.

To hold otherwise would belie equity, not promote it. On one hand, South Carolina courts would disallow the remedy of rescission due to the inequity associated with being incapable of restoring one or both parties to his or their *status quo ante*. Then, on the other hand, a party could still recoup in equity, just pursuant to a constructive trust, even though the same inequity existed (i.e., inability to restore rights). Obviously, this is not and cannot be the law. Indeed, this is the very reason why courts do not impose constructive trusts in the absence of wrongful conduct. Accordingly, this Court should refrain from allowing the imposition of a constructive trust where, as here, one party would retain all benefits to a contract, while stripping the other of all benefits but retaining the burden thereof.

4. The Subject Opinion's Constructive Trust Finding Cannot Be Discerned.

The Subject Opinion also errs because its Constructive Trust Finding cannot be discerned. What, if anything, the Subject Opinion is unclear. The underlying rationale also proves unclear. Such holding will only fuel additional litigation. This Court should correct the same in order to avoid unnecessary future litigation. Moreover, the holding appears to support imposition of a constructive trust with an unpled legal declaration. Such holding, if understood correctly, likewise proves untenable.

V. THE SUBJECT OPINION ERRED WHEN IT REVERSED THE LOWER COURT'S FINDINGS CONCERNING ANDERSON COUNTY'S UNCLEAR HANDS.

The Subject Opinion likewise erred as to its refusal to apply the unclean hands doctrine for several reasons. First, contrary to the Decision's holding, the trial court drew careful distinctions as to what actions it attributed to the County, those it did not, and why. (Compare App. 31-35

(enumerating delicts considered) with 42-43 (enumerating delicts excluded)) Regarding all such acts, however, it is noteworthy that Anderson County in no way disputes the misconduct cited by the trial court actually occurred. But, attempting to view the facts through the narrowest of lenses rather than weighing all related circumstances, the Two Judge Panel overlooked a stubborn fact: the actions found by the trial court as “ethically questionable, if not illegal” misconduct on the part of the County directly operated to “prejudice[] Preston in the execution of his duties.” (App. 34)

It was this series of misconduct and harassment that prompted Preston to hire counsel and furnish notice of his intention to sue the County in the first place. And, it was this misconduct and harassment 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.” (App. 3693)³⁷

Moreover, the trial court specifically included the impermissible participation of disqualified Council members in the Severance Agreement vote as one of the items it enumerated. As discussed above, both the trial court and the Two Judge Panel found the evidence did not support a finding that Preston engaged in wrongful conduct. Instead, the Court of Appeals purported to invalidate Preston’s Severance Agreement due to the disqualified votes of Council members, conduct attributable to the Plaintiff. (App. 3685-3687) As a result, under the Subject

³⁷ Anderson County and the Two Judge Panel both conclude this Court should only consider the events of November 8, 2008 to the exclusion of the chain of misconduct culminating in the Severance Agreement vote. (App. 3692) Equity has never worn such blinders. Neither the Subject Opinion nor Anderson County cites any authority supportive of such equitable tunnel vision. Indeed, equity could not balance the equities, as it must, considering events and conduct in a sanitized vacuum. It also begs the question as to how the Court of Appeals weighed the overall evidence, since several Council members introduced testimony reflecting they voted in favor of the Severance Agreement to end the toxic environment afflicting Anderson County. (App. 03; App. 21-23)

Opinion's reasoning, such conduct plainly relates to the instant litigation. Otherwise, the Court of Appeals could not cite the same as a basis, albeit incorrectly, to invalidate Preston's Severance Agreement.

In short, the Court of Appeals simply ignored the distinctions drawn by the trial court, ignored its reasoning, ignored the interrelationship of the cited bad acts. Simultaneously, however, the Two Judge Panel failed to provide any reasoned basis for reversing the trial judge's findings. (See, e.g., App. 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 App. with 57-58) Such misconduct involved actions such as authoring correspondence, on Anderson County letterhead, that was intended to disrupt Preston's hiring of employees. (App. 33) Council members and Council members-elect instigating investigations against Preston and then leaking the information to the media (App. 34) And, Council members engaging in media stunts designed to embarrass Preston. (App. 4, 33-34)

Last, and perhaps most tellingly, the Subject Opinion failed to address the County's express ratification of the misconduct of C. Wilson and Waldrep. (App. 33) Overlooked by the Court of Appeals, Anderson 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. (App. 3300, ll. 10-50) The trial court twice referenced the same in its findings.³⁸ Despite the County's expressly

³⁸See App. 32 ("Actions of sitting councilmen whose legal fees for actions surrounding the following were later paid by the County...") (App. 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..."); (App. 57, FN 28 ("Notably Bullet Point 5 discusses improper conduct expressly ratified by Anderson County in

ratifying such misconduct, the Court of Appeals ignored the same and never explained how a party can simultaneously ratify and eschew the same misconduct. Accordingly, the Court of Appeals erred in reversing the trial court's unclean hands finding. Following the Subject Opinion's *vacatur*, this Court should correct the errant rulings of the Court of Appeals by reinstating the final judgment of the trial court.

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. (App. 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." (App. 3595-3596) "The vote on the motion...resulted in four in favor (Waldrep, Moore, Ms. Wilson, Dunn), two opposed (Floyd, Allen)." (App. 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. (App. 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 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). (App. 3596)

ACC Resolution 2009-63.")

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 App. 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 App. 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.³⁹ 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. (App. 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 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

³⁹ In addition to her lengthy power point presentation urging the instant appeal, C. Wilson: placed the Invalid Resolution on Council's agenda (App. 3599, ¶10(d); App. 3603, lines 31-36)); moved for a vote on the Invalid Resolution (App. 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) (App. 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. (App. 3644, line 33- 3645, line 5)

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.⁴⁰ 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.")⁴¹ Once it confirmed the 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 vacate the Subject Opinion and dismiss this appeal. To hold otherwise is tantamount to an impermissible exercise of hypothetical jurisdiction.⁴² Alternatively, this Court should vacate the Subject Opinion and remand this case to the trial court for evidentiary proceedings on subject matter jurisdiction issues.

⁴⁰ 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).

⁴¹ 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).

⁴² See e.g., Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998).)

According to the County, the Court cannot look behind the subject matter jurisdiction curtain to assess whether it truly possesses such jurisdiction. The exact opposite is true. In fact, the Court has a duty to do so. “A defendant may challenge subject-matter jurisdiction in one of two ways: facially or factually.” Beck v. McDonald, 848 F.3d 262, 270 (4th Cir. 2017); Lovern v. Edwards, 190 F.3d 648, 654 (4th Cir. 1999); Richmond, Fredricksburg & Potomac R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991).

To hold otherwise, as the County suggests, would sanction *faux* subject matter jurisdiction—based upon artfully pled yet untrue facts—without regard to the Court’s obligation to both the constitution and veracity. Indeed, once questioned, the County—as the party invoking jurisdiction—has the obligation prove subject jurisdiction. Melendez v. Sebelius, 611 Fed. App. 762, 763 (4th Cir. 2015); Banks v. Virginia Elec. & Power Co., 2000 U.S. App. LEXIS 2400, *6 (4th Cir. 2000). It failed to do so here.

If quorum issues are allowed to be interjected in this case, then, Appellant’s filing of this lawsuit on November 12, 2009 lawsuit (and later the notice of appeal) also proved unauthorized, *ultra vires*, a nullity from the get-go. “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 continues to urge. 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 or commenced the lawsuit or appeal. 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.”). Accordingly, either the quorum issues are in, or they are out, but in either event the County loses.

VII. THE DECISION ERRED BY INVALIDATING PRESTON’S SEVERANCE AGREEMENT.

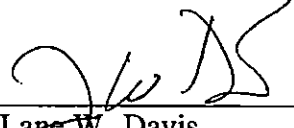
On one hand, the County seeks rescission of Preston’s Severance Agreement, while on the other hand, it disavows any obligation to return the parties to their positions *ante*. On one hand, the County continues to press relief bottomed on Preston’s alleged wrong-doing, which—to date—it never proved, while on the other hand, the County asserts its own misconduct, which it does not dispute, fails to matter. On one hand, the County claims the lack of a quorum, which it never sought to add until months after trial ended, invalidates the Severance Agreement, while on the other hand, the County claims the same defect does not impair any of its other legal actions. And, the contradictions only mount from there. The Appellate Court erred when it invalidated Preston’s Severance Agreement based upon the County’s hopelessly inconsistent and errant positions. This Court should correct those errors.

For the reasons set forth above, the Court of Appeals erred when it invalidated Preston’s Severance Agreement. Accordingly, this Court should vacate the Subject Opinion and reinstate the trial court’s final judgment to correct the Court of Appeals’ errors.

CONCLUSION

For the foregoing reasons, this Court should vacate the Subject Opinion and reinstate the trial court’s final order and judgment.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Lane W. Davis

SC Bar No. 68796

E-Mail: lane.davis@nelsonmullins

104 South Main Street / Ninth Floor

Post Office Box 10084 (29603-0084)

Greenville, SC 29601

(864) 250-2300

Attorneys for Respondent-Petitioner Joey Preston

Greenville, South Carolina

May 7, 2018

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

MAY 11 2018

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.

PROOF OF SERVICE

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

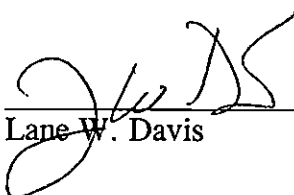
Pleadings: Brief of Joey Preston, Respondent-Petitioner

Counsel Served:

J. Theodore Gentry
Alice W.W. Parham
Wade S. Kolb II
WYCHE, PA
44 East Camperdown Way
Greenville, SC 29601

Justin K. Werner
South Carolina Public Benefit Authority
South Carolina Retirement System
PO Box 11960
Columbia, SC 29211-1960

May 7, 2018



Lane W. Davis