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.

REPLY BRIEF OF RESPONDENT-PETITIONER JOEY PRESTON

Lane W. Davis
Nelson Mullins Riley & Scarborough, LLP
lane.davis@nelsonmullins.com
PO Box 10084 (29603)
Greenville, SC 29601
(864) 250-2300

Candy M. Kern-Fuller
Upstate Law Group, LLC
200 East Main Street
Easley, SC 29640

ATTORNEYS FOR RESPONDENT-PETITIONER JOEY R. PRESTON

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

ARGUMENT

Preston offers the following in reply to Anderson County's response to his brief supporting appeal:

I. Offering No Meaningful Arguments to the Contrary, Anderson County Effectively Admits the Lower Court Invalidly Issued its Opinion.

The Court of Appeal's panel, consisting of only two judges ("Lower Court"), could not, and did not, validly issue the opinion presently under review by this Court ("Subject Opinion"). According to Anderson County ("the County"), so long as three judges from the Lower Court heard oral argument, it matters not how many judges participated in the deliberation and authoring of the Subject Opinion despite the prospect of its establishing binding precedent in this state. (Anderson County Response ("AC Response"), pp. 2-5) This analysis is incorrect and must be rejected.

The County's incorrect position begs the question: what function would oral argument serve, if not to inform the views of the *three* jurists statutorily charged with deciding this or any Court of Appeal's case? See S.C. §14-8-80(d). If, as State v. McMillian, 349 S.C. 17, 561 S.E.2d 602 (2002) teaches, "valid action" requires participation of three judges at oral argument, then the reasoning of Ayshire Collieries Corp v. United States necessarily follows: three judges must also participate in: "the very essence of the judicial function...the actual adjudication of the issues of law and fact." 331 U.S. 131, 137 (1947). Otherwise, McMillian would secure the statutorily required and constitutionally derived panel of three judges to hear oral argument on appeal but then allow only two judges, whose opinions were informed by oral argument, to adjudge the parties' rights. Backwards and unsound, the Court should reject the County's reasoning in this regard.

The County only raises two arguments contrary to Preston's analysis. First, attempting to distinguish South Carolina law and McMillian from the authority cited by Preston, the County cites minor differences in the statutory language involved from those respective jurisdictions. Simultaneously, Anderson County purportedly supports its analysis by citing Dickinson State Bank v. Ogden, 624 S.W.2d 214, 222 (Tex. Civ. App. 1981) reversed on other grounds, 662 S.W.2d 330 (Tex. 1983). The County misstates both the holdings cited by Preston and Ogden. Like South Carolina, every case cited by Preston involved statutes requiring three judges to establish a judicial quorum. By contrast, Ogden required two judges to constitute a quorum (i.e., a majority of a panel of three constitutes a quorum in Texas courts). (See Preston Brief in Support of Appeal ("Preston Supp. Brief"), pp. 9-10 (Citing Tex. Gov't Code Ann. §22.222)) The County's reasoning is flawed and should be rejected.

Anderson County also cites a restatement of Delaware law contending the departure of a member for "reasons other than disqualification" does not "destroy a quorum." (AC Response, p. 3) The County ignores the fact that upon elevation to the Supreme Court, Judge Few became constitutionally disqualified from further participation on matters before the Court of Appeals pursuant to Article V, §16 of the South Carolina Constitution. (See Preston Supp. Brief, p. 13, FN 10) Aware the authority it cites fails to support its position and further aware its "enduring" quorum argument likewise fails, the County then resorts to a "who cares" approach to argumentation. (See AC Response, p. 2, FN1)

Apart from invalidating the entire decision and all findings of the Lower Court, however, the analytical crux of the decision below, a judicial declaration invalidating Preston's severance agreement, has not been affirmatively sought from this Court (as confirmed by the County's *certiorari* petition) and, further, nowhere appears in any operative pleading. Thus, the lack of a

quorum by the Lower Court invalidates its opinion and warrants reinstatement of the final judgment of the Circuit Court. To rule otherwise would ignore the South Carolina Constitution, applicable statutory law, and binding precedent.

II. The Lower Court Improperly Ignored Precedent Under Rule 59(e), SCRCP When It Found the 2008 Council Lacked a Quorum on November 18, 2008.

The analysis under Rule 59(e), SCRCP as to why the Lower Court erred when finding the Anderson County Council ("2008 Council") lacked a quorum on November 18, 2008 interlocks with the analysis as to why it also erred under Rule 15, SCRCP. Accordingly, to avoid unnecessary duplication, Preston addresses both in his reply under the next section and incorporates such analysis herein by reference.

III. The Lower Court Improperly Ignored Precedent Under Rule 15, SCRCP When It Found the 2008 Council Lacked a Quorum on November 18, 2008.

The County's efforts to salvage the Lower Court's ruling invalidating Preston's severance agreement due to a purported lack of quorum ("Quorum Theory") fail both legally and factually.[1] As an initial matter, Preston fully explains the underlying errors infecting the Subject Opinion's findings in his Response to the County's Brief Supporting its Appeal. (See Preston Response Brief ("Preston Response"), pp. 13-21, §I) Such analysis constitutes substantive error this Court should not repeat. Preston incorporates herein by reference his prior analysis in that regard.

As explained, the Circuit Court's ruling takes into account various provisions of the County Code, gives effect to all such provisions, accords with the County's own prior usage, and follows the State Ethics Commission's interpretation (as required). Both the Circuit Court's ruling and Preston's reasoning, see Preston Response, pp. 13-21, §I, rebuts the County's naked assertion that

[1] As to a large number of Preston's arguments, the County provides no response. As such, in lieu of re-plowing arguments for which the County offers no response, Preston incorporates herein his arguments from his Supporting Brief as related to both Rule 59(e) and Rule 15 issues.

the Circuit Court's findings "inescapably" result in the severance agreement's invalidation. They do not. In fact, giving effect to all of its terms, the reasoning of both the Circuit Court and Preston provide a much more reasoned approach to construing the County's Code.

Secondly, as it does in many respects on appeal, the County distorts the record below by claiming the pleadings fail to raise the validity of four disqualified votes.[2] Such argument is incorrect. The County's operative pleading (i.e., its First Amended Complaint) does not attempt to invalidate or even challenge any "specific votes." The County's instant portrayal of the same as doing so is unsupported by its pleading.

Just like it does in this Court, Anderson County sought to invalidate Preston's severance agreement based upon the existence of any one of the factual nuclei it pled (i.e., Thompson allegations, R. Wilson allegations, McAbee allegations, or Heather Jones allegations). Indeed, the County proceeded under a "one bad apple" spoiled the "barrel" theory arguing the participation of any disqualified member invalidated action of the whole legislative body. This is how the County presented the issue in its initial Complaint, its response to Preston's motion to dismiss, its Amended Complaint, throughout the litigation, and continues to date.

In response, *Preston* argued the decision of Baird v. Charleston County required application of a different standard. Although probably unnecessary, Preston actually pled Baird v. Charleston County controlled the present analysis in his Answer as his Ninth Affirmative

[2] Preston does not mean to suggest counsel for Anderson County has intentionally sought to distort the record or misstate prior legal arguments. The two primary attorneys who handled the instant case for the County no longer remain involved and the primary brief writing has fallen to counsel who was not present during any of the proceedings below. (See e.g., Order Dated Feb. 5, 2018; Correspondence Dated Feb. 5, 2018 Regarding Prior Counsel of Record.) This would seem to be the probable source of most of the errant recitation of facts particularly in light of the size of the record on appeal.

Defense, which the Circuit Court noted.[3] (See R. p. 6 & FN4; p. 59, FN33 & 34) Specifically, Preston contended, under Baird, allegations of disqualification only operated as to individual votes and required the County to prove, as part of its *prima facie* case, the matter under consideration would not have garnered sufficient supporting votes after discounting any votes improperly cast. (See R. pp. 1393, line 22-1394, line 1) Contrary to what the County claims, Preston also made this exact argument at trial. (R. p. 1393, line 22-1394, line 1) As a consequence, the County sought to invalidate action of the 2008 Council as a whole, see e.g., R. p. 133, ¶35, and thereby put at issue the entire vote count, including those of C. Wilson and Waldrep.

The County claims no pleading raised the prospect of the disqualification of four votes only as an attempt to justify why it untimely raised its Quorum Theory for the first time in its Rule 59(e) motion. According to the County, the supposed lack of any pleading that could result in four votes being disqualified rendered it incapable of raising the disqualification of C. Wilson's and Waldrep's votes. In turn, the County asserts it could not have raised its Quorum Theory before final judgment and, thus, timely raised the same in its Rule 59(e) motion. In this regard, the County's argument amounts to illogical, double-talk.

Without question, Anderson County could have, but did not, raise its Quorum Theory at trial. It did not do so because the Quorum Theory, if raised by the County, ran directly contrary to its "one bad apple theory." By contrast, the Quorum Theory, at bottom, acknowledges Baird applies and requires an analysis tallying the votes of the entire body.

---

[3] It is also untrue that such issues did not arise before trial. As noted in Preston's Response Brief, C. Wilson was questioned about the same during her pre-trial deposition, which was read into the record at trial.

Lacking confidence that any of its challenges would result in disqualification, Anderson County chose a different, mutually exclusive trial theory (i.e., the one bad apple theory). Such tactical decision was fine but it does not entitle the County to wait until after final judgment and then assert an entirely divergent theory of relief *via* a Rule 59(e) motion. Indeed, South Carolina precedent clearly establishes that using Rule 59(e) motions to raise issues a party could have previously raised is improper. See e.g., Anderson Mem'l Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994); see also Preston Supp. Brief, pp. 14-23.

While an exception to the rule does exist in instances where a party could not have raised an issue earlier, where, as here, a party elects not to pursue an alternative theory for tactical reasons, such exception plainly does not apply.[4] A party instead has an obligation to assert all theories of relief, including those in the alternative, or lose the ability to assert the same later. See e.g., Cunningham v. Anderson Cty, 414 S.C. 298, 304, 778 S.E.2d 884, 887 (2015). A ruling to the contrary would allow a party to litigate twice on divergent theories and would result in unending litigation.

Anderson County also, intentionally it seems, appears to conflate the various deficiencies associated with its failure to preserve the Quorum Theory while still at the Circuit Court. The County first filed a Rule 59(e) motion raising the issue six months after evidence closed and then two and a half months later but before the Circuit Court had ruled on the pending motion, the

[4] The County's arguments about unaddressed factual findings of prejudice to Preston misses the mark in two regards. First, the fact that disqualification of C. Wilson's and Waldrep's votes arose at trial, a point the County now concedes, means necessarily that the County could have raised its Quorum Theory at trial but elected not to do so. Second, the Circuit Court's findings that Preston would sustain prejudice if the County were allowed to pursue such claims after evidence closed--were never challenged by the County by way of counter evidence or argument, nor did they form the subject of a Rule 59(e) motion.

County filed another motion, a motion to amend its Complaint. (Compare R. p. 264 with p. 3052 with p. p. 3099 with p. 3163 with p. 3245)

The Circuit Court then issued a single order denying both motions (and a third motion--a motion to intervene by a third-party). In relation to the order denying the County's motion to amend its Complaint, the Circuit Court issued numerous factual findings based upon Preston's opposition filing, including the supportive affidavit filed by Preston and uncontested by the County. Neither counter argument nor counter-evidence supports the County's efforts to justify the Lower Court's ruling, which, in effect, overrules such findings without ever addressing the same. The oversight end-runs a fatal defect in the Court of Appeal's ruling, namely, it granted relief (effectively a *sua sponte* judicial declaration) nowhere appearing in any operative pleading, while simply overruling the findings of prejudice to Preston explicating why such amendment was disallowed and despite such findings (of prejudice) being subject to an abuse of discretion standard of review. (See Preston Supp. Brief, pp. 16-17) And, in relation to the precedent cited by Preston, the County simply claims its ability to pursue unpled relief does not fall beneath such holdings without further explanation. (See AC Response, p. 12)

Without basis, Anderson County then impugns the Circuit Court's ruling claiming, "[I]t is noteworthy the Circuit Court's decision to invalidate four votes was not a matter of mere happenstance." (AC Response, p. 6) According to the County, the Circuit Court only invalidated C. Wilson's and Waldrep's votes—two votes which it has never meaningfully disputed were conflicted--because in the chain of votes approving the severance agreement, the "vote to end debate on the motion to reconsider...the Severance Package...passed by only a single vote..." (AC Response, p. 6) In a strained effort to cast a shadow, Anderson County greatly overstates the significance of what essentially constituted a tangential, throw-away argument. In reality, the

parliamentary "vote to end debate"—now portrayed by the County as the linchpin motivating the Circuit Court's findings, played an entirely inconsequential role at the Circuit Court.

As the County has argued in other litigation, as Preston argued below, and as the Circuit Court agreed, South Carolina Courts do not review the parliamentary processes of legislative bodies. Instead, they leave such matters to the internal review process within those bodies to the extent their procedures allow for appeal of the same. Here, the Anderson County Code did allow for appeal of parliamentary matters but none ever ensued. (See R. p. 17, FN15 citing ACC §2-37(g); State v. Lewis, 181 S.C. 10, 186 S.E. 625, 631 (1936); Smith v. Jennings, 67 S.C. 324, 328, 45 S.E. 821, 822-23 (1903). Moreover, under the County Code and Robert's Rules of Order (Article 1, §7), debate on an existing matter eventually closes regardless and the evidence of record confirmed additional debate would not have changed the severance agreement vote. (R. p. 17; see also R. p. 450, line 21-p. 451, line 8; p. 632, line 25-633, line 8; p. 1243, lines 16-20; p. 1268, lines 20-23; p. 1351, line 16-p. 1622, line 25). Once again, the County does not dispute such findings and, once again, Preston is the only party providing citations to actual evidence in the record.

The County resorts to citing cases at the common law about quorums and explaining why the Circuit Court's holding does not conform to the same. As Preston has argued from inception and as the Circuit Court found, however, the Anderson County Code's treatment of quorum issues departs from the common law formulation relied upon by the County. Indeed, changes in quorum formulations are fairly common with local government units, which otherwise face quorum issues with regularity due to their smaller size. Here, the County knows this to be the case, since Anderson County itself interpreted its Code in exactly the same manner as Preston articulates until its litigation position required its current interpretation.

IV. The Subject Opinion Erred in Finding a Constructive Trust Could Be Imposed.

Anderson County does not dispute that a constructive trust "results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty" giving "rise to an obligation in equity to make restitution." Carolina Park Assocs., LLC v. Marino, 400 S.C. 1, 6, (2012). Nor does the County dispute it had an obligation of proving such *prima facie* elements by "clear, definite, and unequivocal evidence." Whitmire v. Adams, 273 S.C. 453, 257 S.E.2d 160 (2012).

By a like token, the County also fails to articulate any *bona fide* reasons, if any at all, why the Circuit Court and Lower Court erred when they both found no evidence supported a finding that Preston committed wrongdoing. (R. pp. 1-40, p. 3961, pp. 3676-77, p. 3678, pp. 3679-81) Indeed, in both his brief in support of his appeal and in response to the County's supporting brief, Preston explains why such findings should not be disturbed by this Court. (See Preston Supp. Brief, pp. 27-33; Preston Response, pp. 21-31) Preston incorporates all such arguments herein by reference.

As explained in earlier findings, the County's bid to impose such unpled relief fails for numerous reasons. They include: (1) the County bases its constructive trust claim on errant analysis (Preston Response, pp. 13-21); (2) the County failed to prove Preston engaged in any wrongdoing (see Preston Supp. Brief, pp. 28-31; Preston Response, pp. 21-24); (3) the County failed to prove any unjust enrichment occurred (see Preston Supp. Brief, p. 31; Preston Response, pp. 24-27); (4) the County's sought-after relief runs afoul of fundamental equitable maxims (see Preston Supp. Brief, pp. 31-33; Preston Response, pp. 24-27); (5) the County seeks imposition of a constructive trust in a form never before sought and in a manner violative of state statute (see Preston Response, p. 27); (6) allowing such unpled relief violates Preston's Due Process rights (Preston Supp. Brief, pp. 15-19; Preston Response, pp. 29-30); (7) allowing such unpled relief deprives Preston of the ability to introduce evidence establishing various equitable defenses

(Preston Supp. Brief, pp. 15-19; Preston Response, pp. 29-30); and (8) the County cites no authority allowing such an extreme position as it advocates (Preston Response, pp. 30-31). No matter how the County responds or attempts to justify the same, the evidence fails to support imposing a constructive trust and such relief suffers from an array of fatal defects.

The Circuit Court properly disallowed the County's claim for constructive trust and the Lower Court erred in ruling such relief proved available. Nowhere pled and disallowed by South Carolina law, this Court should vacate the Lower Court's decisions and reinstate the final order and judgment issued by the Circuit Court. Such an outcome accords with both South Carolina law and equity.

V. Anderson County's Unclean Hands Bars Its Resort to Equitable Relief.

The County dismisses, out of turn, the Circuit Court's findings of unclean hands as a bar to equitable recovery because it contends the wrongful conduct does not relate to the "subject of the litigation." (AC Response, p. 20) Preston incorporates all such findings herein by reference. (See R. pp. 31-35; R. pp. 57-58) The County's analysis errs and the Lower Court duplicated such error.

Portraying tortious conduct and acts violative of state law as merely "political rhetoric," see AC Response, p. 21, the County's analysis disregards the fact that the wrongful conduct cited by the Circuit Court prompted Preston's assertion of his claims in the first instance. The County further disregards a concerted effort existed, taken on the part of two sitting Council members, along with the Council-members elect and certain identified members of the public, to interfere with Preston's ability to perform his job, undermine his credibility, and engage in a pattern of harassment, all in a calculated effort to drive Preston from his position as County Administrator and avoid having to fulfill the "without cause" termination provisions of his employment contract.

To the extent doubt existed whether such acts could fairly be attributed to the County, Anderson County made such analysis much easier. Anderson County expressly ratified such conduct as taken in C. Wilson's and Waldrep's official capacities and even used public monies to defray legal fees incurred defending such conduct. Moreover, to the extent the County portrays such conduct as occurring, in part, at the hands of certain unknown individuals, the evidence proves otherwise, as the same handful of individuals appear on the exhibits introduced at trial, over and over again.

As the Circuit Court found, the doctrine of unclean hands forecloses a party's ability to invoke a South Carolina Court's equitable powers when, in the first instance, that party's inequitable conduct created the circumstances for which relief is invoked. This analysis applies here. The Circuit Court, after hearing the trial evidence, correctly concluded, the County could not invoke equity with unclean hands. Anderson County has supplied no basis for this Court to supplant the credibility determinations made by the trial court in this regard. And, the Lower Court erred in doing so. This Court should vacate the Lower Court's decision and reinstate the final order and judgment of the Circuit Court.

VI. Disqualification of C. Wilson's and Waldrep's Votes Adjudicated the Instant Case Into Non-Existence.

As to issue of subject matter jurisdiction, Preston stands on the previous grounds set forth in his original brief. Anderson County's arguments to the contrary make no sense. If C. Wilson and Waldrep could not vote on Preston's severance agreement due to disqualifying grounds, a point the County now concedes, then all matters impacting such subject matter suffer from the same disqualifying grounds. That is to say, if C. Wilson and Waldrep could not vote in relation to whether the severance agreement should be approved, it is axiomatic they also cannot vote to approve a lawsuit seeking its rescission or to perpetuate, by funding to the tune of three million

dollars ($3,000,000.00), such litigation including approval of the lawsuit and green-lighting the instant appeal.

Anderson County suggests matters implicating subject matter jurisdiction can somehow be waived. They cannot. And, if facts exist before this Court causing it to question whether subject matter jurisdiction can be exercised, then this Court must confirm the same as a threshold issue.

Apart from dancing around such issues and citing a case having no application whatsoever, the County has supplied no meaningful response to Preston's arguments concerning the lack of subject matter jurisdiction in this case. Preston would point out that the County's insistence upon the single tainted vote standard, a standard contrived of its own invention, if actually applied, would without question destroy subject matter jurisdiction in this case for the reasons outlined in Preston's original brief in support of his appeal. This is true because every vote to commence, fund, and perpetuate this case would, under the County's analysis, prove invalid.

VII. No Basis Existed to Invalidate Preston's Severance Agreement.

No valid basis existed before the Lower Court to invalidate Preston's Severance Agreement. It did so predicated on relief never pled and refused by the Circuit Court. The Lower Court, without ever addressing the findings supporting the Circuit Court's refusal of the County's motion to pursue such relief, then entered a *sua sponte* judicial declaration, which the County failed to preserve, as part of a tactical decision. Such findings constituted error. This Court should vacate the Lower Court's decision and reinstate the Circuit Court's final order and judgment as a consequence.

CONCLUSION

For the foregoing reasons, this Court should vacate the Court of Appeals' Opinion and reinstate the final order of the Circuit Court.

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
June 18, 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

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: Reply Brief of Respondent-Petitioner Joey Preston

Counsel Served:

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

Justin R. Werner
South Carolina Public Benefit Authority
South Carolina Retirement System
202 Arbor Lake Drive
Columbia, SC 29223

Lane W. Davis

June 18, 2018