THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable Roger L. Couch
Circuit Court Judge

Appellate Case Number: 2017-001898

Anderson County ..... Petitioner-Respondent,

v.

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

and the South Carolina Retirement System is ..... Respondent.

RETURN TO PETITIONER-RESPONDENT'S ANDERSON COUNTY'S MOTION FOR COSTS BY RESPONDENT-PETITIONER, JOEY PRESTON

Respondent-Petitioner, Joey Preston, hereby files this Return to the Petitioner-Respondent's Motion for Costs on Appeal pursuant to SCRAP 222. For the reasons herein, Petitioner-Respondent's Motion for Costs on Appeal should be denied.

I. PROCEDURAL BACKGROUND

Following nearly ten (10) years of litigation between these parties, initiated in November 2009, the Supreme Court issued its decision on August 7, 2019, vacating the Court of Appeals decision by two judges in August of 2017. As recounted in this Court's Opinion, the circuit court's ruling was "that, despite tainted votes, the Severance Agreement was valid and also held:

(1) public policy rendered neither the Severance Agreement nor the vote adopting it void; (2) Preston did not breach a fiduciary duty because he owed no duty to disclose Council members' personal conflicts of interest; (3) the County failed to prove its claims for fraud, constructive fraud, and negligent misrepresentation; (4) the 2008 Council's approval of the Severance Agreement was neither unreasonable or capricious nor a product of fraud and abuse of power; (5) the County's constructive trust claim no longer remained viable; (6) rescission was unavailable as a remedy; (7) the County had unclean hands; (8) adequate remedies at law barred the County from invoking the court's equitable jurisdiction; (9) the County breached the covenant not to sue in the Severance Agreement by bringing this lawsuit; and (10) the issue concerning the award of attorney's fees should be held in abeyance pending the final disposition and filing of a petition." Anderson Cty. v. Preston, No. 2017-001898, 2019 WL 3683575, at *1 (S.C. Aug. 7, 2019).

This Court then vacated the decision of the Court of Appeals, found the Severance Agreement invalid due to the County's lack of a quorum, and remanded the matter to the circuit court for further proceedings. Anderson Cty. v. Preston, No. 2017-001898, 2019 WL 3683575, at *8 (S.C. Aug. 7, 2019). Notably, the lack of quorum issue was a procedural oddity that the County never pled in their original pleadings and only raised after the judgment of the Circuit Court.

This Court then issued its Remittur on August 23, 2019. Petitioner-Respondent thereafter filed this Motion for Costs on Appeal under SCRAP 222 on September 6, 2019.

II. LAW AND ARGUMENT

A. Anderson County was not a "prevailing party" under SCRAP 222 or 242. Rather, the issue in Preston's Writ was actually the holding of the Court. Further, the Circuit Court's judgment was only reversed in part and Anderson County did NOT prevail on the majority of their issues.

Purportedly relying on SCRAP Rules 222 and 242, Anderson County has argued that the decision of this "Court in this matter had 'the effect of reversing the judgment of the lower court . . . which was on appeal'." (**Motion for Costs, p.1**)

The South Carolina Rules of Appellate Procedure, Rule 222(a) provides that "[u]nless otherwise ordered by the appellate court or agreed by the parties, costs shall be taxed against the appellant when the appeal is dismissed or judgment on appeal is affirmed. When a judgment is reversed, costs shall be taxed against the respondent unless the court orders otherwise. ***When an appeal is affirmed or reversed in part or is vacated, costs shall be allowed only as ordered by the appellate court.***" SCRAP 222(a) (Emphasis added).

Similarly, the South Carolina Rules of Appellate Procedure, Rule 242(j)(1) provides "[u]nless otherwise ordered by the Supreme Court or agreed to by the parties, costs shall be assessed against the appellant if the decision of the Supreme Court has the effect of affirming the judgment of the lower court or tribunal which was reviewed by the Court of Appeals. When the decision of the Supreme Court has the effect of reversing the judgment of the lower court or tribunal which was on appeal, costs shall be assessed against the respondent before the Court of Appeals. ***When the decision of the Supreme Court has the effect of affirming or reversing in part or vacating the judgment of the lower court or tribunal which was on appeal, costs shall be allowed only as ordered by the Supreme Court.***" SCRAP 242(j)(1) (Emphasis added)

As recounted in the Court's decision, "The Court of Appeals affirmed in part and reversed in part. This Court granted the parties' cross-petitions for writs of certiorari. Preston

argues this Court should vacate the decision rendered by the Court of Appeals because the panel lacked a quorum of three judges and, instead, issued an opinion authored by only two judges. In response, the County maintains that section 14-8-80(d) of the South Carolina Code (2017) allows the vote of only two judges to issue an effective opinion. According to the County, *State v. McMillian* simply requires that three judges be present during oral argument, which occurred here." Anderson Cty. v. Preston, No. 2017-001898, 2019 WL 3683575, at *4–5 (S.C. Aug. 7, 2019).

This Court then found, "section 14-8-80(d), read in conjunction with *McMillian*, provides that, in the absence of a quorum, the Court of Appeals cannot issue a valid opinion. *See McMillian,* 349 S.C. at 17, 561 S.E.2d at 602 (finding a quorum constitutes three judges, and no valid act can be done in the absence of a quorum). We take this opportunity to clarify that a quorum is required throughout the proceedings, including the issuance of the opinion. Thus, because the panel did not have the quorum needed to reverse the circuit court, the Court of Appeals did not have the authority to reverse the judgment below. As a result, we vacate the opinion of the Court of Appeals." Anderson Cty. v. Preston, No. 2017-001898, 2019 WL 3683575, at *5 (S.C. Aug. 7, 2019) So, strictly reading SCRAP 222 and 242, Preston's writ was the prevailing opinion of this Court. However, the Court went on to determine "in the interest of judicial economy, we proceed to the merits of the dispute." *Id.* at *5. This Court further emphasized that "[w]e note neither party sought relief specifically based on the absence or existence of a quorum. Furthermore, the trial record is absent of either party mentioning the lack of a quorum, advancing an argument for or against a quorum, or presenting arguments explaining how any disqualification might affect a quorum. Anderson Cty. v. Preston, No. 2017-001898, 2019 WL 3683575, at *6 (S.C. Aug. 7, 2019).

Notably, the County, in its final brief, argued the following issues to this Court:

- The Court of Appeals should have fashioned an equitable remedy (**Petitioner-Respondent's Brief, pp. 16-19**)
- Rescission is available (**Petitioner-Respondent's Brief, pp. 19-22)**
- The tainted votes in favor of the severance agreement require that is be voided **(Petitioner-Respondent's Brief, pp. 22-31)**
    - Numerous Courts have recognized that, in the particular circumstances presented here, a single tainted vote is fatal
    - This Court did not reject the one-tainted vote rule in *Baird v. Charleston County*
    - The series of votes leading to enactment of the severance agreement included a 4-3 vote
- The severance agreement was unreasonable and capricious, a product of fraud and abuse of power, and violated public policy (**Petitioner-Respondent's Brief, pp. 31-43)**
- Preston had a duty to disclose the facts that required disqualification of Thompson and Wilson; Preston breached his fiduciary duty, and engaged in fraud, constructive fraud, and negligent misrepresentation when he did not do so. (**Petitioner-Respondent's Brief, pp. 44-45)**
- To the extent this Court does not render complete relief, Anderson County should be allowed to amend its complaint to seek invalidation of the severance agreement of the basis of the invalidation of four votes. (**Petitioner-Respondent's Brief, pp. 45-46)**
- Anderson County's suit seeking to invalidate the severance agreement did not itself violate the severance agreement, whether or not the severance agreement is voided. **(Petitioner-Respondent's Brief, pp. 46-48)**

- No fee award is available to Preston, whether or not the severance agreement is voided.

(Petitioner-Respondent's Brief, pp. 48-49)

Of the eight issues (including sub-issues) Anderson County argued in its brief, this Court found separately that "a majority of the seven-member Council requires four members to constitute a quorum. After removing the disqualified votes, however, only three of the Council members could count towards the quorum. *Id.* As such, a quorum did not exist. Accordingly, the circuit court erred in considering the four disqualified votes in its quorum calculation. Therefore, because the Council acted without the quorum necessary for taking valid action, the Severance Agreement is null and void. Anderson Cty. v. Preston, No. 2017-001898, 2019 WL 3683575, at *7 (S.C. Aug. 7, 2019).

While there is previous little case law interpreting SCRAP 222 and 242, this Court has in other cases defined that "A prevailing party is a party who successfully prosecutes the action by prevailing on the main issue and "in whose favor the decision or verdict is rendered and judgment entered." *Heath v. County of Aiken,* 302 S.C. 178, 394 S.E.2d 709 (1990) (citing *Buza v. Columbia Lumber Co.,* 395 P.2d 511 (Alaska 1964)). The key factor in determining whether a party is a prevailing party is the degree of success obtained by the party seeking attorney's fees. *Id."* Douan v. Charleston Cty. Council, 373 S.C. 384, 386, 645 S.E.2d 241, 243 (2007).

First, the Court did not find on any of the eight issues initially pressed by the County in its Brief. Rather, the Court failed to rule positively on *any* of the issues briefed by Anderson County. Ultimately, when the Court decided there was not a quorum present and voided the severance on that issue, this Court did not even require a refund of the full amount of the Severance. Instead, the Court found "we are cognizant of the fact that Preston cannot be returned to his position of County Administrator. Furthermore, Preston concedes that he can no

longer revive his prior legal claims against the County nor claims against certain Council members from the 2008 Council because they are time-barred and the evidence (text messages and emails) he could have unearthed no longer exist. The value of the severance package was $1,139,833.00 (less withholdings). After consideration of all the variables, we hold that the $355,848.95 payment to SCRS is not recoverable. Further, we find the County shall not be entitled to a refund or reimbursement from SCRS for the difference. However, the County shall recover the total amount the County paid in cash to Preston pursuant to the Severance Agreement, plus the value of the 2006 County vehicle. Therefore, we remand to the circuit court to determine the amount the County is entitled to recover from Preston in the form of a civil judgment." Anderson Cty. v. Preston, No. 2017-001898, 2019 WL 3683575, at *7–8 (S.C. Aug. 7, 2019).

B. Besides not being the prevailing party, Anderson County is not able to recover the entire costs for printing when Preston's Counsel paid part of them nor is the County allowed to recover for the printing of irrelevant matter

SCRAP 242(j)(2) provides that a "party entitled to recover costs may recover all those costs specified in Rule 222(b), to include the attorney's fee provided by that rule. Additionally, the party may, to the extent the party actually incurred these costs. ..." In this case, Preston's counsel actually shared the costs of obtaining transcripts and the costs of printing the Appendix. For those reasons, Anderson County did not actually incur the entire costs of that printing and, in addition to Anderson County not be the prevailing party, they should not recover for costs they didn't actually incur.

SCRAP 242(j)(3) provides that "[a] party who has unjustifiably designated irrelevant matter to be included in the Record on Appeal shall not be entitled to tax the cost of printing this matter in the Record on Appeal or in the Appendix. Further, a party not otherwise entitled to

costs under this Rule shall be entitled to collect the cost the party incurred for printing irrelevant matter in the Record on Appeal and/or the Appendix which another party unjustifiably designated to be included in the Record on Appeal." In this case, Anderson County included the *entire* transcript in the Record on Appeal and the Appendix. The County's doing so was almost the equivalent of a criminal *Anders* brief. Additionally, despite losing at the trial level and the facts utterly failing to support any torts on Preston's behalf, the County continued to argue those frivolous issues all the way through the Supreme Court and the Court making absolutely ***no*** findings to support those claims.

As such, even if the Court finds that the County would otherwise be entitled to costs under SCRAP 242(j)(1) or 222(a), Preston argues that they should be prohibited from recovering the entire costs for printing when Preston's Counsel paid part of them nor is the County allowed to recover for the printing of irrelevant matter.

III. CONCLUSION

For the reason set forth herein, Anderson County's Motion for Costs should be DENIED.

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September 16, 2019

ATTORNEY FOR APPELLANT

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PROOF OF SERVICE

On September 16, 2019, I served a copy of the Respondent-Petitioner's Return to Motion for Costs as detailed below by United States Priority Mail.

An original and six copies to:

The Honorable Daniel E. Shearhouse, Clerk
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

With copies to:

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