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S.C. SUPREME COURT

**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
Lower Court Case No. 2009-CP-04-04482

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 the.....Respondent.

RESPONSE BRIEF OF PETITIONER-RESPONDENT ANDERSON COUNTY

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STATEMENT OF THE CASE

In response to Preston's Statement of the Case, Anderson County adopts the Statement of the Case set forth in its brief filed in this appeal on May 7, 2018.

INTRODUCTION

The Court of Appeals correctly held that Preston's Severance Agreement is invalid, and that equitable relief is available to Anderson County. As the County argued extensively in its own initial brief addressing the issues on which the County sought and has been granted *certiorari* ("County Br."), the Severance Package was an arbitrary and unjustifiable abuse of public power, rushed through County Council by political allies and friends of Preston who were tainted by conflicts of interest. The decision to give Preston a \$1.1 million golden parachute in exchange for the release of his logically and legally impossible claim of "anticipatory breach" was indefensible. The decision of the Court of Appeals that the votes needed for a quorum of Council were lacking, rendering the Severance Package void, was sound as far as it went and should be upheld. The flaws in the Court of Appeals' decision were that Court's failure to complete fashioning a remedy, and its rejection of alternative grounds for invalidating the Severance Package.

Preston's appeal to this Court fails to offer any compelling reason – either as a matter of doctrine or as a matter of public integrity – to reverse the decision below voiding the Severance Agreement. Instead, Preston focuses on a grab-bag of supposed procedural irregularities in the proceedings that led to that invalidation. None of Preston's arguments has any merit, and none of them offers any justification for the use of public funds to pay him an unmerited and unconscionable severance. We address Preston's arguments in the order they are presented in Preston's brief ("Preston Br.").

ARGUMENT

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

This appeal was argued on June 11, 2015, to a three-judge panel of the Court of Appeals that included then-Judge John Few. On February 9, 2016, Judge Few was confirmed as a Justice of this Court. The Court of Appeals' decision in this matter was issued on August 16, 2017. Judge Williams authored the decision and Judge Huff concurred in the decision. After the notation of Judge Huff's concurrence, the opinion includes a notation that Justice Few was "not participating." Preston argues that the Court of Appeals' decision is invalid as a result of this sequence of events. That argument should be rejected.¹

Preston bases his argument on S.C. Code Ann. § 14-8-80(d), which provides, "On a panel, three judges shall constitute a quorum, and the concurrence of a majority of the judges is necessary for the reversal of the judgment below." A quorum was present at the time of argument of this case, and a majority (two judges) concurred in the decision. Anderson County submits that Justice Few's elevation to the Supreme Court nearly eight months after oral argument of this case did not destroy the quorum and that the Court of Appeals' decision satisfies Section 14-8-80(d).

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

¹ In the alternative, Anderson County respectfully submits that the issue of the validity *vel non* of the Court of Appeals' decision has effectively been mooted by this Court's grant of *certiorari*. In *State v. McMillian*, discussed *infra*, this Court concluded that the Court of Appeals' opinion was not validly issued, but proceeded to resolve the appeal. While this Court may want to address the quorum issue presented by Preston to provide guidance in future cases, the issue has little practical impact in this case, as this Court has agreed to review the case on its merits.

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

Confirming the validity of the Court of Appeals’ opinion is consistent with general principles surrounding determination of a quorum, which recognize that, once a body is duly convened with a quorum, the subsequent departure of members for reasons other than disqualification for cause will not destroy a quorum. *Cf.* DELAWARE L. OF CORP. & BUS. ORG. § 7.22 (3d ed. Supp. 2018) (“a stockholder who is counted in reaching a quorum, cannot defeat the quorum, once established, by not voting or by walking out”).

The few decisions from other jurisdictions cited by Preston construe different statutory language, and so are not relevant. In *Ayrshire Collieries Corp. v. United States*, 331 U.S. 131 (1947), the Supreme Court construed a provision of the Urgent Deficiencies Act of 1913, which required that a “specially constituted court of three judges” hear motions seeking to enjoin orders of the Interstate Commerce Commission. 331 U.S. at 133. The provision in question provided that any challenge should be “heard *and determined*” by three judges, and the Supreme Court reversed a decision rendered by only two judges in which it was noted that a third judge had become ill and was “unable to participate *in the determination.*” 331 U.S. at 134-35 (emphasis added). Neither the statutory language under review in *Ayrshire*, nor the scenario presented there, confronts this Court.

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

requirement in the applicable Nebraska statute that a quorum of three judges was necessary “to transact business.” 597 N.W.2d at 399-400. The very same statutory language referencing the power of a given court “to transact business” was at issue in *State v. Lloyd A. Fry Roofing Co.*, 502 P.2d 253 (Ore. 1972), and was key to the Oregon Supreme Court’s decision. *See* 502 P.2d at 254 (“we construe the phrase ‘to transact business’ as including the participation of the judge in the decision-making process”). But that language is notably *absent* from the South Carolina statute. *See* S.C. Code Ann. § 14-8-80(d).

The entirety of the record before this Court shows only that then-Judge Few was present for oral argument of the case, that a quorum as defined in the statute was present for oral argument, that Judge Few remained on the panel that heard oral argument for over eight months after oral argument, and that a decision was issued by a majority of the panel after Judge Few was elevated to the Supreme Court. That is sufficient for a valid decision. *See Dickinson State Bank v. Ogden*, 624 S.W.2d 214, 222 (Tex. Civ. App. 1981), *reversed on other grounds*, 662 S.W.2d 330 (Tex. 1983) (decision issued by two judges of three-judge panel was valid after all three judges heard oral argument but one was subsequently elected to the Texas Supreme Court and confirmed prior to issuance of the decision). S.C. Code Ann. § 14-8-80(d), after providing that “three judges shall constitute a quorum,” states only that “the concurrence of a majority of the judges” is required to reverse a trial court judgment. The argument before the Court of Appeals was made to the required quorum, and the decision was joined by a majority. That satisfied the statute.

The policy implications of overturning a decision of the Court of Appeals because one judge on a panel that heard oral argument is subsequently elevated to the Supreme Court are compelling and further counsel against invalidation here. As judicial dockets become more

crowded, the standard procedure for each of three judges to either concur or dissent in a panel decision must be balanced against a need for judicial efficiency, particularly in the absence of any statutory requirement otherwise. *See Murray v. Nat'l Broad. Co.*, 35 F.3d 45, 48 (2d Cir. 1994) (affirming decision of two judges in which a third member of the panel recused himself just prior to oral argument and recognizing that although “consideration by three judges is preferable,” the “quest for efficiency must be balanced against the need for judicial pluralism”).

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

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

Anderson County was the plaintiff in this action. As part of its challenge to the validity of the Severance Package, Anderson County alleged and sought to prove that three of Preston’s allies had conflicts of interest that disqualified them from voting for the Package. While Preston asserted counterclaims, none of them involved a challenge to the validity of any of the votes on the Package. Accordingly, nothing in the pleadings raised the possibility of invalidation of more than three votes. Because the invalidation of three votes or fewer would not affect the quorum for consideration of the Severance Package, this means that nothing in the pleadings raised the possibility of destruction of that quorum. That was the state of the case at the close of evidence.

Despite this – and despite having observed during argument that Preston never pled the invalidity of any votes (R. pp. 1377-79, 1382-83, 1391-92) – the Circuit Court found that a total of four Council members should not have voted on Preston’s Severance Agreement. (R. pp. 8-12) In addition to two of the three votes challenged by Anderson County (those of Michael Thompson, who was actively seeking employment from Preston while acting on Preston’s

severance request, and Ron Wilson, whose daughter received a sweetheart contract from the County, through Preston, in the days leading up to that vote), the Circuit Court also held that the votes of Bob Waldrep and Cindy Wilson (both of whom opposed the Package) were improper because the Severance Agreement contained a general release in favor of *all* members of Council.

This invalidation of four votes on the basis of conflict of interest necessarily and unavoidably entailed that, as a matter of law, there was no quorum present to act on the Severance Package. As the Court of Appeals correctly concluded, this renders the Severance Package void. Moreover, because this quorum issue was not injected into the case until the Circuit Court took it upon itself to go outside the pleadings and invalidate additional votes, this quorum issue became a part of the case only when the opinion issued. In this section and the next, we address in turn the reasons that the invalidation of four votes destroys the County Council's quorum and thus invalidates the Severance Agreement, and then the reasons that Anderson County raised this issue in a timely fashion.

A. With Four Invalid Votes, County Council Lacked a Quorum and Could Not Act

As a preliminary matter, it is noteworthy that the Circuit Court's decision to invalidate four votes was not a matter of mere happenstance. The invalidation of four votes was part of the Circuit Court's response to Anderson County's argument that one of the votes cast during the series of votes approving the Severance Package – the vote to end debate on the motion to reconsider approval of the Severance Package – passed by only a single vote, meaning that invalidation of one vote would invalidate the package. As the Circuit Court itself explained, its invalidation of the Waldrep and Cindy Wilson votes changed the math on that crucial one-vote margin. (R. p. 17)

The Court of Appeals agreed with the Circuit Court's conclusion that four votes were invalid, but also agreed with Anderson County that, if four Council members were precluded from participating in the vote, it is inescapable that the Severance Agreement is void. (R. pp. 3683-89) This decision of the Court of Appeals is plainly correct. The County Council was powerless to act with only three members able to vote.

The Anderson County Code requires that four members be present to constitute a quorum. Anderson County Code of Ordinances § 2-37(d).² Moreover, South Carolina law is clear that a member of the body who cannot participate because of a conflict of interest *is not counted toward the quorum*. *Fidelity Fire Ins. Co. v. Harby*, 156 S.C. 238, 153 S.E. 141 (1930), is on point here. In *Harby*, the South Carolina Supreme Court voided an action of the Sumter Cemetery Association, a state-created entity, upon determining that the authorizing vote of the committee was taken without the necessary quorum because committee members later determined to be disqualified could not be counted toward the quorum. The Court held:

A quorum is not present in passing upon a matter in which one of the directors is personally interested, where only a bare quorum is present when he is counted. And likewise an interested director or committeeman cannot be counted in order to make up a quorum to pass upon any matter in which such director or committeeman is interested.

156 S.C. at 247, 153 S.E. at 144 (internal quotation marks omitted); *see Talbot v. James*, 259 S.C. 73, 82, 190 S.E.2d 759, 764 (1972) (corporate director disqualified for interest “may not

² The provision provides in full:

Quorums. A quorum shall consist of a majority of the council. In the absence of a quorum, the meeting cannot be convened. Should sufficient members leave during a meeting, the chairperson shall immediately declare a recess and attempt to obtain a quorum. If, after a reasonable time, a quorum has not been obtained, the meeting shall be adjourned. Members of county council may excuse themselves briefly during a meeting without loss of a quorum; however, no vote may be taken during the temporary absence of quorum.

even be counted to make a quorum at a meeting where the matter is acted upon”); *Garris v. Governing Bd. of South Carolina Reinsurance Facility*, 333 S.C. 432, 453, 511 S.E.2d 48, 59 (1998) (“member who recuses himself or is disqualified to participate in a matter due to a conflict of interest, bias, or other good cause may not be counted for purposes of a quorum at the meeting where the board acts upon the matter”); *see also* 56 AM. JUR. 2D *Municipal Corporations, Etc.* § 143 (“While a law on conflict of interest may leave quorum requirements undisturbed, recused members are not counted in determining the presence of a quorum, and action taken when, as a result, a quorum is not present, is invalid.”). If four members of Council had disqualifying interests, there was no quorum present and the matter could not have been acted upon.

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

B. The Quorum Issue Was Preserved for Appellate Review

Preston devotes considerable energy to the contention that the quorum issue was not properly before the Court of Appeals because the County did not file a subsequent motion to alter or amend addressing certain factual findings in the Circuit Court’s order denying the County’s initial motion to alter or amend, nor did the County enumerate each of those findings in its appeal. (Preston Br. 15-18) This is plainly wrong. First, a motion to reconsider is required to preserve a matter for appeal only where the matter has *not* been addressed. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (“Post-trial motions are not necessary to preserve issues that have been ruled upon at trial.”). Because the Circuit Court obviously ruled on the quorum issue in its order denying the County’s motion to alter or amend, there was no

need for the County to file a subsequent motion for reconsideration to preserve the matter for appeal. Moreover, this Court has made it clear that a second or successive post-trial motion is inappropriate where – as is the case here – “the trial judge’s ruling on the first Rule 59(e) motion does not result in a substantial alteration of the original judgment.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 20, 602 S.E.2d 772, 778 (2004). The Circuit Court denied Anderson County’s motion to alter or amend in its entirety, and so a second motion to alter or amend was not appropriate.

It is equally obvious that the quorum issue was placed before the Court of Appeals. The County plainly stated the quorum issue as one of the questions presented on appeal to the Court of Appeals, and argued this proposition in detail in its briefing to the Court of Appeals; this preserved that issue and all underlying facts. (R. pp. 3335, 3378-81, 3491-95) Findings of fact that fall within the scope of issues raised on appeal are preserved for review. *Cf. Green v. City of Columbia*, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct. App. 1993) (noting that findings of fact and law in an administrative hearing are law of the case “unless within the scope of the appellant’s exception . . . and its notice to the respondent”). There is no requirement that every factual finding be the subject of a separate question; this would result in statements of questions presented running for pages. In addition, even where an issue is not “specifically set out” in the statement of issues on appeal (and this issue is in the statement of issues on appeal), an appellate court may nevertheless consider the issue if it is “reasonably clear” from the appellant’s arguments. J. TOAL, ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 208 (3d ed. 2016). Especially in an equitable action like this one, where appellate review is *de novo*, Preston’s contention that the County did not preserve for review any sentence in the Circuit Court’s opinion that was not expressly and separately challenged is plainly incorrect.

Finally, Preston's argument that the Court of Appeals' determination of the quorum issue somehow violated Preston's state and federal due process rights rings hollow. (*See* Preston Br. 18-19) First, it was Preston himself who injected (without pleading) the challenge to the Cindy Wilson and Bob Waldrep votes into this litigation before the Circuit Court. (R. pp. 1377-79, 1382-83; 1391-94) Anderson County argued that this contention did not belong in the lawsuit. (R. pp. 1377-79) Preston prevailed on this point, though, and he cannot now complain that *he* is prejudiced by the logical fallout from his own insistence on injecting unpled matter into the litigation. Second, Preston has had ample opportunity to brief and argue the quorum issue. That issue has been argued to the Circuit Court (*see, e.g.*, R. pp. 3185-94); to the Court of Appeals (R. pp. 3439-43); and now to this Court. Preston has had ample opportunity to be heard.

The law is clear, and the Court of Appeals applied it correctly. Four improper votes render the Severance Package void.

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

The Court of Appeals also correctly ruled that the quorum issue was raised in a timely manner. (*See* Preston Br. 19-27) This is so because the issue did not *exist* until the Circuit Court issued its Order invalidating four votes. Anderson County argued for the invalidation of only three votes (R. pp. 129-33), and Preston's pleadings cannot reasonably be construed to have sought invalidation of *any* votes. Despite this, the Circuit Court reached out on its own to invalidate two other votes – those of Bob Waldrep and Cindy Wilson, who opposed the Severance Package.

This extraordinary action by the Circuit Court created an extraordinary situation in this case – when the Circuit Court issued its opinion, for the first time in the case there was a prospect of disqualification of four votes, with the effect of destroying the County Council's

quorum and thus voiding approval of the Severance Agreement. Accordingly, the conclusion in the Circuit Court's Order that four votes should not have been cast constituted new matter in this case, an internal inconsistency, and relief that was not sought in the pleadings. In addition, the Circuit Court's resulting conclusion that a matter could be validly enacted by a 3-0 vote was a clear error of law.

Each of these circumstances justifies the consideration of the quorum issue on the basis of Anderson County's motion to alter or amend the Order. (R. pp. 3165-68) *See J. TOAL, ET AL., APPELLATE PROCEDURE, supra* at 189 (post-trial motion is appropriate vehicle to address a grant of "relief not requested," a ruling "on an issue that was never raised at trial," or "errors or inconsistencies" in final order). Where a court rules on a matter not previously before it and which the parties had not been given an adequate opportunity to address, any error in the ruling may be corrected on a Rule 59(e) motion. *See Moreau v. Allied Van Lines, Inc.*, Civil Action No. 1:07-3257-RBH, 2010 WL 2044663 (D.S.C. May 20, 2010) (vacating the court's *sua sponte* granting of summary judgment in favor of the plaintiff, where the only motion pending before the court concerned the defendant's request for summary judgment).³

The case law cited by Preston is not to the contrary, and Preston is wrong to suggest the Court of Appeals "disregarded well-established precedent" in interpreting Rule 59(e). (Preston Br. 21-22) None of the cases he cites addresses a situation remotely like the one before this Court, and the holdings of those cases are consistent with the decision of the Court of Appeals.⁴

³ Alternatively, as Anderson County has argued in its initial brief, the Circuit Court erred in denying Anderson County's motion to amend its Complaint post-trial to address the quorum issue. (R. pp. 44-49, 3245-70) That motion was timely because the issue did not exist until the Court itself disqualified four votes.

⁴ Preston also cites much of this case law for the first time in this matter, and he has not used it as the basis for prior argument.

In *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995), for example, the plaintiff's attorney stated to the jury during closing argument that he "would not argue" with the verdict, although he subsequently moved for a new trial *nisi additur*, which was granted. Defense counsel subsequently argued that the statement constituted a waiver, but this waiver argument came only in a Rule 59(e) motion. This Court observed that the record contained "no contemporaneous or post-trial motion to limit [plaintiff's] recovery based upon closing argument," nor even did the waiver argument appear in the opposition brief to the motion for a new trial. For these reasons this Court questioned whether the waiver argument had been properly preserved, observing that Rule 59(e) cannot be used to raise an issue "which could have been raised at trial." *Id.* at 185, 456 S.E.2d at 437. The other South Carolina case Preston cites, *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990), concerned a wife's appeal of a family court order equitably dividing marital property in a divorce. Following issuance of that order, and after the wife changed counsel, she filed a Rule 59(e) motion, claiming for the first time an interest in her ex-husband's civil service retirement fund and requesting that the court apportion that fund. This Court affirmed the trial court's rejection of the request, noting that "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." *Id.* at 456, 392 S.E.2d at 482. Plainly this case is neither *Patterson* nor *Hickman*. The County raised the quorum issue as soon as the issue itself materialized as a result of the Circuit Court's order, and the quorum issue was not one that the County could have raised "prior to judgment but did not," in that the quorum issue was not presented in the pleadings of *either* party.

Preston's suggestion that the Fourth Circuit standard for a Rule 59(e) motion, which provides the motion may be used only "(1) to accommodate an intervening change in controlling

law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice,” *E.E.O.C. v. Lockheed Martin Corp.*, 116 F.3d 110, 112 (4th Cir. 1997), is also unavailing. (Preston Br. 21 n.16) Even assuming a South Carolina court would adopt this standard, the extraordinary circumstances here fall squarely under the third permissible basis. The Circuit Court’s order created a “clear error of law” by invalidating four votes and eliminating the legally required quorum. This chain of events then rendered the Severance Agreement a nullity, and the County properly raised the issue through a Rule 59(e) motion.

Preston’s contention that the quorum challenge was already part of the case (Preston Br. 22-25) is also unsound. Preston’s brief devotes considerable energy to pointing out that the validity of the Waldrep and Cindy Wilson votes was *mentioned* during the trial. (*See* Preston Br. 23-24) This, however, misses the point. Neither Anderson County nor the Court of Appeals’ opinion suggests to the contrary. The point is that only three votes are challenged in the pleadings. At no time did Preston allege the invalidity of those votes in his pleadings, nor move to amend his pleadings for that purpose.

As the Court of Appeals noted in its decision, the Circuit Court confirmed with counsel during argument that the theory that the Waldrep and Cindy Wilson votes were invalid was never pled. (R. pp. 1377-79, 1382-83) When pressed on this point, Preston’s counsel could not point to any pleadings to support it, but simply stuck to the argument, effectively urging the Court to reach beyond the pleadings to make this ruling. (R. pp. 1391-94) Thus, when the theory was adopted in the Circuit Court’s Order, new matter was injected into the case, and Preston cannot now complain that Anderson County has been allowed to address that new matter.

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

Anderson County's response to the insertion into the case of an unpled theory was proper, and the Court of Appeals was correct in so holding. Once the issue was injected for the first time, Anderson County noted in a motion to alter or amend the judgment that if four votes were improper, then no quorum was present and the Severance Package was void. This was the earliest point at which Anderson County could be expected to make this argument, and the motion to alter or amend was the proper vehicle for doing so.⁵

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

Preston is likewise wrong to argue that the Court of Appeals erred in recognizing that a constructive trust is an available remedy for the invalidated Severance Agreement. (Preston Br. 27-33)

⁵ At the same time it filed its motion to alter or amend the Circuit Court's Order, the County also moved to amend its Complaint to seek a remedy on the theory that the invalidation of four votes destroyed a quorum and rendered the Severance Agreement void. (R. pp. 3245-70) The Circuit Court denied the County's motion to amend, however (R. pp. 44-49), and as the County argues in its initial brief, the Circuit Court's decision on that motion was wrong, (County Br. 45-46).

The Severance Package included a lump-sum payment of over \$350,000 to the South Carolina Retirement System (“SCRS”). This money was used to purchase additional service credit for Preston, allowing him to retire on a full pension – \$7,600 per month at the time of trial – at age 45. (R. pp. 1985-89; p. 252 at ¶ 10) This was a clear extra-contractual payment to Preston; on no theory could he claim any right to such a subsidy.

At trial, Anderson County presented unrebutted expert testimony that, along with the unrebutted testimony from SCRS, demonstrates how the excess payments that Preston stands to receive from January 2009⁶ through the day he turns 60 (payments which will total approximately \$1,333,000 and had a present value as of the time of trial of roughly \$804,000) could be redirected from Preston to the County as part of a remedy upon rescission of the Severance Package. (R. pp. 251-52 at ¶¶ 5-11; pp. 253-55 at ¶¶ 5-7, 11-14; pp. 2671-81; p. 1290) This can be accomplished without harming SCRS. As the affidavits submitted by SCRS demonstrate (R. pp. 249-63), the lump sum payment from the Severance Package allowed Preston to receive payments he would not have received otherwise before age 60, and also increased his prospective benefits after that time.

The Court of Appeals correctly ruled that a constructive trust on this flow of funds would provide an appropriate remedy to Anderson County for the improper payments to Preston. The relevant statute provides for precisely this relief. S.C. Code Ann. § 9-1-1680 provides in pertinent part, “[S]ubject to the doctrine of constructive trust *ex maleficio* . . . , the right of a person to an annuity or a retirement allowance . . . are exempted from . . . levy and sale, garnishment, attachment, or any other process” (emphasis added). Thus, the statute allows

⁶ As set out in affidavits from SCRS administrators, Preston retired on a service retirement allowance effective January 3, 2009. (R. pp. 251 ¶ 3; 253 ¶ 3)

a constructive trust on retirement fund proceeds. This makes sense, as it would be remarkable if a court of equity were powerless to undo an inappropriate purchase of service credit like the one at issue here. *See Matter of Loomer*, 198 B.R. 755, 762 (Bankr. D. Neb. 1996) (“[v]oid [ERISA] contributions are not protected by the alienation restraint and may be disgorged from the Plan”; “funds in the account may be recovered under the federal common law theory that fraud in the inducement allows rescission of the contract”).

In seeking to impose a constructive trust on these funds in its Tenth Cause of Action (R. p. 139 at ¶¶ 81-84), the County is not seeking any relief in this case that would harm SCRS. None of the relief requested by Anderson County will change any amounts that SCRS is otherwise obligated to pay. Instead, the unrebutted testimony of SCRS itself makes it clear that the retirement benefits currently paid to Preston through the day he turns 60 are all amounts to which Preston would not have been entitled but for the Severance Agreement. (R. pp. 251-52 at ¶¶ 5-11; pp. 253-55 at ¶¶ 5-7, 11-14) In addition, because of the purchase of retirement service credit on his behalf, Preston will receive benefit amounts after the age of 60 that will exceed what he would have received without such a purchase. (*Id.*) These excess payments provide a readily available source of revenue from which to fashion an equitable remedy.

Preston’s argument that a constructive trust is inappropriate because the County “failed to prove Preston committed any wrongdoing” (Preston Br. 28-30), is misguided. As the County argues in detail in its own initial brief, there is abundant evidence upon which this Court, conducting its own *de novo* review, can conclude that Preston breached his fiduciary obligations and committed fraud, constructive fraud, and negligent misrepresentation. (*See* County Br. 13 & 44-45) Moreover, alongside Preston’s own wrongdoing is the additional wrongdoing of those on the Council who voted in Preston’s presence and with Preston’s knowledge to pay him for a

claim that could not exist, all while they had financial ties to him. (*See generally* County Br. 12-13, 25-26, 29) Preston has not been receiving pension payments because of some innocent ministerial oversight or accounting error. He and those beholden to him knowingly engineered these payments to insulate Preston from any future actions the democratically elected County Council might consider in the future. Under such circumstances, a constructive trust is warranted to make the County whole.

Preston also incorrectly contends – without citation to any authority – that the “sole purpose” of a constructive trust is to provide a remedy for unjust enrichment, and that no evidence of unjust enrichment exists in this case.⁷ (Preston Br. 31) First, the remedy of constructive trust is applicable here because it is specifically provided by statute, *see* S.C. Code Ann. § 9-1-1680, whatever the common law restrictions on this remedy may be. Second, the County’s Complaint specifically included a claim for unjust enrichment (R. pp. 139-40), all the elements of which have been satisfied, *see Swanson v. Stratos*, 350 S.C. 116, 121, 564 S.E.2d 117, 119 (Ct. App. 2002) (to prevail on a claim for unjust enrichment, plaintiff must establish (1) he conferred a benefit upon the defendant; (2) the defendant realized that benefit; and (3) retention of the benefit by the defendant under the circumstances make it inequitable for the defendant to retain it without paying its value). In this case, the Severance Agreement unquestionably conferred a benefit upon Preston that he realized, and it would be inequitable for him to retain that benefit in that the Severance Agreement (i) is void because the vote to pass it occurred without the required quorum; (ii) is arbitrary and capricious in the amounts given and the circumstances under which it was entered; and (iii) was secured with tainted votes. In order

⁷ As with certain other arguments Preston makes with respect to the constructive trust issue, his argument regarding unjust enrichment is new to the appellate proceedings in this matter.

to fashion an appropriate equitable remedy under these circumstances, it is natural for the Court to look first to the retirement payments currently flowing to Preston – a discrete and readily identifiable benefit he is receiving due to the inequitable circumstances he orchestrated. The value of that stream of payments approximates the amounts paid to and on behalf of Preston by the County under the Severance Package, and is a sensible place to begin in fashioning a remedy.

Preston is further wrong that equity creates some bar to application of a constructive trust under these facts. (See Preston Br. 31-33) His suggestion that he must be restored to the *status quo ante* confuses the doctrines of constructive trust and rescission. While rescission generally requires consideration of return to the *status quo ante*, this is not a feature of constructive trust jurisprudence. Preston’s argument otherwise appears to hinge upon a dated decision from Georgia, *Sykes v. Reeves*, 24 S.E.2d 688, 691 (Ga. 1943), concerning an oral contract for the sale of real property in which the court observed the plaintiff “sought to be placed in *statu quo*” in seeking to have the court “impress a trust on the property,” and a decision from Iowa, *Elview Construction Co., Inc. v. North Scott Community School Dist.*, 373 N.W.2d 138 (Iowa 1985), which does not specifically address constructive trust at all. We are aware of no South Carolina authority that makes “return to the *status quo ante*” part of the doctrine of constructive trust.

Moreover, even if this concern were part of the constructive trust analysis, it is not a barrier to relief in this case. As the County explains in its own initial brief in addressing why rescission is not barred, a return to the *status quo ante* is not required where the court can nonetheless fashion appropriate equitable relief. (County Br. 19-21) This is especially true where, as here, the party seeking to prevent court intervention is himself at fault for inducing the initial wrongful payment. Cf. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 65 (2011) (“The defense [of change of position] is therefore unavailable to a conscious

wrongdoer or to a recipient who is primarily responsible for his own unjust enrichment.”). That is precisely the case here. It is Preston who provided benefits to those voting on his Severance Package, and Preston who sought far more than even his generous Employment Agreement provided. He cannot invoke changed circumstances. Particularly given the fact that it is now clear as a matter of law that Preston’s Employment Agreement was invalid, *see Cunningham v. Anderson County*, 402 S.C. 434, 741 S.E.2d 545 (Ct. App. 2013)⁸, it makes little sense to say that the inability to return Preston to that post should be a barrier to relief.

The decision of the Supreme Court of New Jersey in *Thompson v. City of Atlantic City*, 921 A.2d 427 (N.J. 2007), addressed the remedy of constructive trust in similar circumstances and lends further weight to this conclusion. That case, like this one, addressed public corruption and a public contract declared invalid. In *Atlantic City* a mayor and his political ally who received a tainted settlement secured by their political friends with conflicts of interest argued – as does Preston – that their ill-gotten settlement money was gone. The defendants further asserted that imposition of a constructive trust would be “an oppressive rather than an equitable device, requiring them to make restitution after they have already paid attorneys’ fees and taxes on the settlement proceeds.” 921 A.2d at 435. The *Atlantic City* court gave this argument short shrift:

We are not persuaded by Langford’s or Marsh’s argument that equity demands that they should keep their settlement monies because they have already spent them on, among other things, attorney fees and taxes. A basic equitable maxim is that “he who seeks equity must do equity.” . . . [W]e conclude that the only appropriate remedy to *vindicate the public trust* is the immediate restoration of the funds to the City.

⁸ In *Cunningham* the Court of Appeals held that a governmental body cannot execute an employment contract with a public officer for a definite term that extends beyond the terms of the members of the governing body, as doing so impairs the ability of future members to exercise their own governmental duties in a manner they deem appropriate. 402 S.C. at 441-50, 741 S.E.2d at 549-554.

Id. at 442 (emphasis added).

Last, while Preston contends the rationale of the decision of the Court of Appeals on the constructive trust issue “proves unclear” (Preston Br. 33), it is nothing of the sort. Preston has been receiving, and will continue to receive, pension benefits to which he would not have been entitled but for the payment by Anderson County to SCRS of about \$350,000 pursuant to the void Severance Agreement. Anderson County demonstrated at trial that the excess payments to Preston attributable to that lump sum contribution could be calculated and subjected to a constructive trust, with no harm to SCRS and no invasion of pension benefits to which Preston was legitimately entitled given his actual years of service and contributions. The Court of Appeals clearly and correctly ruled that redirection of these excess payments is an available remedy for Anderson County’s outlay under the void Severance Agreement.

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

V. Anderson County Did Not Have Unclean Hands

The Court of Appeals correctly reversed the Circuit Court’s holding that Anderson County has unclean hands in this matter. The Circuit Court’s holding, like Preston’s argument, is based entirely on conflating the conduct of individuals with conduct of Anderson County. The law in South Carolina is that “a party will have unclean hands where *the party* behaves unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.” *Anderson v. Buonforte*, 365 S.C. 482, 493, 617 S.E.2d 750, 756 (Ct. App. 2005) (emphasis added) (internal

quotation marks omitted); *see also Food Lion, Inc. v. S.L. Nusbaum Ins. Agency, Inc.*, 202 F.3d 223, 228 (4th Cir. 2000) (“Unclean hands bars a party from receiving equitable relief ***because of that party's own inequitable conduct.***” (emphasis added)). The County took no action at all concerning Preston’s employment. Instead, Preston voluntarily resigned his employment, and the only action of Anderson County directed toward Preston at the time was approval of the Severance Package he had maneuvered to obtain. Far from acting inequitably toward Preston, the County gave him exactly what he requested.

In accusing the County of unclean hands, Preston confuses the political rhetoric of primary winners with actual County conduct. The former will not support a finding of unclean hands. *See Wedgewood Cmty. Ass’n, Inc. v. Nash*, 789 N.E.2d 495, 496 (Ind. Ct. App. 2003) (rejecting attempt to impute unclean hands to plaintiff community association on the basis of alleged actions of the association’s directors acting in their individual capacities); 30A C.J.S. *Equity* § 118 (“An innocent party is, of course, not barred from relief because of the misconduct of others for which he or she is not responsible.”).

In his brief, and struggling desperately to identify an action ***of the County*** that he can characterize as inequitable, Preston asserts that the votes of Cindy Wilson and Bob Waldrep cast against approval of his Severance Agreement constitute unclean hands on the part of the County. (Preston Br. 34-35) This is incorrect because these votes were not on the prevailing side. They had no impact on County action, as Preston’s Severance Package was approved. So, again, these votes do not constitute inequitable conduct ***by the County***, and the County did exactly what Preston wanted.

Preston also tries to identify inequitable conduct by the County by arguing that a post-Preston resolution that approved of the payment of legal expenses for Bob Waldrep constituted

ratification of particular prior conduct. (Preston Br. 35-36) Given that this resolution occurred long after the transactions at issue here, it can have no bearing on the County's right to equitable relief. Moreover, all the ordinance did was ratify reimbursement of Waldrep's legal fees. It made no finding regarding his conduct. Preston cannot argue that reimbursing a Council Member's fees was inequitable conduct directed toward Preston, nor indeed that it had any impact on Preston.

VI. This Case Exists

Preston asks this Court to determine that this case does not exist. (Preston Br. 36-41) It does.

Preston argues that the determination that Cindy Wilson had a conflict of interest concerning the severance agreement means that her votes concerning the filing of this lawsuit and the appeal of the Circuit Court's decision should be disregarded. This in turn means, Preston contends, that the complaint and appeal were not validly authorized and were "*ultra vires*" acts. (Preston Br. 37)

As an initial matter, prior to filing his petition for writ of *certiorari*, Preston had never before questioned the validity of Anderson County's vote to bring the lawsuit. This fact distinguishes his argument from Anderson's County's own quorum argument, which the County raised via a motion for reconsideration as soon as the issue of conflicts on the parts of Bob Waldrep and Cindy Wilson was injected into the case by the Circuit Court's decision. Preston did not take any similar action, and so failed to raise this issue in a timely fashion.

The only occasion on which Preston has ever questioned the validity of Anderson County's vote to pursue this appeal was in a much-belated motion in the Court of Appeals to dismiss, filed over six months after the case had been pending on appeal – and three months after

Anderson's County own initial brief had been filed. (Supp. R. pp. 1-11)⁹ In that motion Preston asked the Court of Appeals to look behind the County's duly filed Notice of Appeal to gauge its authenticity. The Court of Appeals properly rejected that invitation, as should this Court.

Preston seeks to excuse his delay in raising this issue by arguing that the validity of the notice of appeal is jurisdictional and therefore may be raised at any time. (Preston Br. 39) He makes no similar argument concerning the decision to file a complaint, and so that portion of his argument plainly falls away. Furthermore, to the extent the filing of a notice of appeal is jurisdictional, the jurisdictional aspect of filing is plainly met here.¹⁰ This is so for at least four reasons, all of which Anderson County asserted in its Return to Preston's Motion to Dismiss. (Supp. R. pp. 87-101)

First, the only facts relevant to establishing the jurisdiction of the Court of Appeals below, and the resulting jurisdiction of this Court now, show that Anderson County filed and served a timely notice of appeal, signed by its counsel of record in this case, on November 22, 2013. Preston does not argue or allege that Anderson County failed to comply in a timely manner with any rule governing the appellate process. The papers giving rise to the appeal are all in order. Anderson County submits that while the timely *service* of the notice of appeal is jurisdictional, a challenge to the authorization of the filing like the one Preston seeks to make is

⁹ Preston's Motion to Dismiss in the Court of Appeals, the County's Return to the Motion, Preston's Reply, and the Court of Appeals' Order Denying the Motion to Dismiss were not initially part of the Record on Appeal, but this Court, at the same time it granted each party's petition for *certiorari*, also granted Anderson County's motion to supplement the record with these materials, and they are accordingly provided in a supplemental appendix, designated herein as "Supp. R."

¹⁰ If, hypothetically, an unauthorized appeal were filed on behalf of an entity, that entity certainly could act to repudiate the filing. However, it would make no sense to initiate subsidiary litigation in this Court to determine whether the notice was "valid" or not. Anderson County does not challenge the validity of its own notice of appeal; the only conceivable question here is thus the jurisdictional one.

not jurisdictional. *Elam*, 361 S.C. at 14, 602 S.E.2d at 775 (“requirement of *service* of the notice of appeal is jurisdictional” (emphasis added)).

Second, Preston cites no authority that this Court can or should look behind a duly filed appeal to gauge its authenticity. That is not surprising given that this Court has actually *rejected* a litigant’s invitation to do this. In *Hartman v. City of Columbia*, 268 S.C. 44, 232 S.E.2d 15 (1977), a landowner who had prevailed before the circuit court in seeking a variance to a zoning ordinance moved to dismiss the city’s appeal of the circuit court’s decision. At that time the rules allowed such a motion to be heard by the circuit court, and the circuit court denied the motion to dismiss. The landowner then appealed that decision to this Court. The landowner’s counsel alleged that although he had received oral notice within the time allowed for service of the notice of intention to appeal, written notice was received outside the timeframe and had been “predated” by him to the same date he had received oral notice. This acceptance and predating, the landowner’s counsel contended, had been “conditional.” This Court took little time in rejecting the landowner’s argument it should look behind a valid notice of appeal to extraneous facts:

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

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

Third, the entire premise of Preston's argument is erroneous. The conclusion that Cindy Wilson had a conflict that prevented her from voting on the Severance Package does not entail the conclusion that she *also* had a conflict of interest when voting to bring or appeal this lawsuit. The primary basis for the Circuit Court's conclusion that Cindy Wilson had a conflict of interest in voting on the Severance Package was the existence of a lawsuit against her, *Preston v. Waldrep*, filed by the County Administrator in his official capacity. (R. pp. 10-12) Long before the time of the votes concerning this lawsuit that Preston now seeks to challenge, *Preston v. Waldrep* had been dismissed by Preston's successor as County Administrator. Accordingly, by that time the basis for disqualifying Cindy Wilson had disappeared.¹¹

Fourth, notwithstanding the vote of Anderson County Council to bring this appeal, each of Anderson County's Interim County Administrator and its County Attorney gave independent authorization for the filing of the notice of appeal. (Supp. R. 104-11) At least in the absence of an express directive by Anderson County Council to the contrary, each of those officials has independent authority to oversee litigation and authorize an appeal on behalf of the County. *See* Anderson County Code § 2-178 (setting forth authority of county attorney); S.C. Code Ann. § 4-9-630 (setting forth powers of county administrator). In other words, even if Preston's challenge to Cindy Wilson's vote to authorize the appeal were sound, the invalidation of that vote would not undo the independent authorizations of the County Administrator and the County Attorney. At most, Preston's contention that Cindy Wilson should not have voted would mean that

¹¹ In finding conflicts of interest on the parts of Bob Waldrep and Cindy Wilson, the Circuit Court also noted the unspecific threat in Preston's demand letter that he might bring "tort claims" if he did not receive a large severance payment. By the time of the vote to appeal the Circuit Court's decision, the statute of limitations had long since run on any tort claims Preston might have had in 2008, when this letter was written. So here again, the conflict was gone by the time of this vote.

Anderson County Council did not affirmatively approve an appeal, but it would not mean that the County Council *prohibited* an appeal. Thus the authority of the County Attorney and the County Administrator to bring this appeal remains, and Preston is flatly incorrect to suggest that filing the instant notice of appeal constituted an “*ultra vires*” act.

Preston’s attack on the subject matter jurisdiction of this Court is without merit. The notice of appeal was validly filed, and this Court possesses jurisdiction.

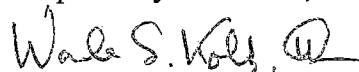
VII. The Court of Appeals Correctly Ruled That Preston’s Severance Agreement Is Invalid

Preston finally asserts, vaguely and generally, that the Court of Appeals erred in invalidating the Severance Agreement. (Preston Br. 41) For all the reasons set forth herein, as well as those in the County’s own initial brief, that decision was correct.

CONCLUSION

While the Court of Appeals could, and should, have gone farther in fashioning a remedy and in invalidating the Severance Agreement on alternative grounds, Preston’s attacks on that decision are unfounded. The Court of Appeals was correct that the Severance Agreement is invalid, correct that the County did not have unclean hands, and correct that a constructive trust on the pension payments arising from the Severance Package is an available remedy. Preston’s challenges to the decision below should be rejected.

Respectfully submitted,



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ANDERSON COUNTY**

June 6, 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

JUN 06 2018

S.C. SUPREME COURT

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 the.....Respondent.

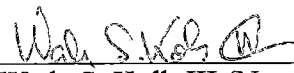
PROOF OF SERVICE

I certify that I have served this 6th day of June 2018, the Response Brief of Petitioner-Respondent on counsel for the Respondent-Petitioner and Respondent by depositing copies of same in the U.S. Mail, first class postage prepaid, addressed as shown below:

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